

THE BEGINNINGS OF A MIXED SYSTEM OR, ADVOCATES AT THE CAPE DURING THE EARLY NINETEENTH CENTURY, 1828-1850

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1 Introduction

In his study of the judgments of the Supreme Court of the Colony of the Cape of Good Hope during the second half of the nineteenth century, Reinhard Zimmermann stressed the importance, especially in a common-law procedural environment, of the role of the Bar. He pointed out that “[d]ie ‘dogmatischen’ Grundlagen des Urteilen hängen zu einem grossen Teil von der Quellenpräsentation durch die Advokaten ab”.¹

In this study, the focus shifts to the first half of the nineteenth century. The subject of that focus is the role of advocates during the first two decades (1828-1850) of the existence of the Supreme Court of the Colony of the Cape of Good Hope, which was established by the First Charter of Justice of 1827.

Under the provisions of the Charter, the advocates and judges operated within an environment in which a common-law judicial and procedural framework was

- 1 Reinhard Zimmermann “Die Rechtsprechung des Supreme Court of the Cape of Good Hope am Ende der sechziger Jahre des 19. Jahrhunderts” in J van der Westhuizen (ed) *Huldigungsbandel Paul van Warmelo* (Pretoria, 1984) 286-307 at 306. The role of advocacy in general was the subject of Jeremy Gauntlett SC’s address at the Biennial Lecture of the Faculty of Advocates, Edinburgh, 20 Sep 2014: “Why advocacy matters – What matters in advocacy”.

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imposed upon the Roman-Dutch law that had been brought to the Cape by the Dutch settlers and confirmed by the Charter as part of the law of the Colony. The continued survival (to this day) of the Roman-Dutch law in that environment has on occasion been described as “remarkable”.²

It is customary to pay tribute to the efforts made by the judges (and in particular Menzies J³) during this early period to strengthen and build upon the foundations of Roman-Dutch law. Typical examples of such tributes are the following:

In certain areas it is possible to observe that the court continued to favour Roman-Dutch law strongly, but after Burton J's departure from the Cape real expertise lay with Menzies J and to a lesser extent with Wylde CJ and Kekewich J. Thus in provisional sentence cases the court almost without exception referred to Roman-Dutch sources ...⁴

There was always one judge to keep the lamp of Roman-Dutch learning alight. Shortly after the departure of Menzies came the native sons Cloete (1855-66) who had been a pupil of Van der Keessel, and the brilliant Watermeyer (1857-67), whose life, alas, was cut off in its flower. The future of Roman-Dutch law was assured.⁵

Ian Farlam has pointed out that while such tributes are justified, credit should be given to the advocates, learned and steeped in Roman-Dutch law, who were an important determinant of the character of the newly created Court. During these early years, the advocates gave the judges considerable assistance in their efforts to assure the future of Roman-Dutch law.⁶

A study of the professional activity of the advocates⁷ at the Cape during the early nineteenth century not only reveals their important role in the application

- 2 See Rena van den Bergh “The remarkable survival of Roman-Dutch law in nineteenth-century South Africa” (2012) 18(1) *Fundamina* 71-90.
- 3 Menzies was senior Puisne Judge of the Cape Supreme Court from 1827-1850. See C Graham Botha “The Honourable William Menzies 1795-1850” (1916) 33 *SALJ* 385-404; Stephen D Girvin “William Menzies of Edinburg. Judge at the Cape 1827-1850” (1993) *Juridical Review* 279-293.
- 4 Stephen D Girvin “The establishment of the Supreme Court of the Cape of Good Hope and its history under the Chief Justiceship of Sir John Wylde” (1992) 109 *SALJ* 291-306, 652-665 at 654.
- 5 HR Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Cape Town, 1960) at 208.
- 6 IG Farlam “The origin of the Cape Bar” (1988) 1 *Consultus* 36-39 at 39. Botha (n 3) at 401, in a single sentence gives some acknowledgment to the role of the advocates. P Spiller in his *A History of the District and Supreme Courts of Natal 1846-1910* (Durban, 1986) emphasises (at 21) that an “important determinant of the administration of justice in Natal was the character of the Bar”. The nineteenth century was not the first during which advocates had a vital role in the development of Roman-Dutch law. In his study of early Roman-Dutch law, JE Scholtens points out that as to its essential features, the Roman-Dutch law was in existence before the publication in 1631 of De Groot's *Inleidinge*, and that “it was the product of the labours of the advocates of the courts of Holland” (“Early Roman-Dutch law” (1959) *Acta Juridica* 74-83 at 83).
- 7 Though throughout the nineteenth century, most of the advocates at the Cape played a prominent part in public life, (CJ Brand, for example, was the first Speaker of the Cape Legislative Assembly;

and development of the law. It also compels reconsideration of certain current assumptions.

2 Advocates at the Cape before 1827⁸

There are but few references in the early records of advocates practising at the Cape during the seventeenth and eighteenth centuries.⁹ In 1688, the Governor and *Raad van Justitie* admitted Jacob van Heurn to practise as an advocate and notary in all the courts at Cape Town and in the Court of *Landdrost* and *Heemraden* at Stellenbosch. The civil records of the latter court show that he frequently exercised this right.¹⁰ In 1706, the name of Willem ten Damme appears as practising as an advocate.¹¹ No professional qualification was required for admission as an attorney; it may be that, as in the Netherlands, an advocate had to be a doctor of laws.¹²

During the First British Occupation (1795-1803) changes were made to the administration of justice,¹³ but the position of legal practitioners was left unchanged.

In 1803, on the retrocession of the Cape to the Batavian Republic, Commissioner-General De Mist found that the administration of justice had fallen into a “sorry state” and proceeded to make wholesale reforms.¹⁴ The admission of legal practitioners was regulated: those seeking admission as attorneys had to pass an examination set by the court’s commissioners, while advocates were expressly required to be graduates in law of a Dutch university.¹⁵

many advocates were elected to the Legislative Assembly and through the years their members regularly served as Attorney-General (Minister of Justice) and several as Prime Minister), the focus of this article is on their professional activity as practising lawyers in the first half of the nineteenth century. The advocates also played a vital role in the collection, editing and publication of the early law reports – see JP van Niekerk “An introduction to South African law reports and reporters, 1828 to 1910” (2013) 19(1) *Fundamina* 106-145.

8 On legal practitioners at the Cape during this period, see C Graham Botha “Early legal practitioners of the Cape Colony” (1924) 41 *SALJ* 255-262; PJ van der Merwe *Regsinstellings en Reg aan die Kaap van 1806 tot 1834* (LLD, University of the Western Cape, 1984) at 34-36; GG Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (Cape Town, 1969) at 49ff; L Wildenboer “The origin and division of the legal profession in South Africa: A brief overview” (2010) 16(2) *Fundamina* 199-225 at 214-217.

9 Botha (n 8) at 256.

10 *Ibid.*

11 *Ibid.*; Visagie (n 8) at 49 n 81.

12 See Hahlo & Kahn (n 5) at 202.

13 See Visagie (n 8) at 91-97.

14 For details of the reforms, see Hahlo & Kahn (n 5) at 203-204; Van der Merwe (n 8) at 60-61; Visagie (n 8) at 98-113.

15 Art 130 of the *Provisieonele Instructie van den Raad van Justitie aan de Kaap de Goede Hoop* (1803). See, further, Hahlo & Kahn (n 5) at 203-204; Van der Merwe (n 8) at 60-61; Visagie (n 8) at 106-107.

The Second British Occupation (1806) heralded a period of gradual and intermittent change in the administration of justice at the Cape, which culminated twenty years later in the fundamental changes introduced by the First Charter of Justice in 1827.¹⁶ During the period 1806 to 1827 the position of legal practitioners remained unaffected.

Advocates who practised at Cape Town¹⁷ prior to the promulgation of the First Charter of Justice in 1827 included Johannes Henoch Neethling, who later became a Judge of the old Court of Justice;¹⁸ Hendrik Cloete, who commenced practice at the Cape in 1816;¹⁹ Helperus Ritzema van Rijnveld; J Joubert; Christoffel Joseph Brand, who commenced practice in 1821;²⁰ Johannes de Wet, who commenced practice in 1823;²¹ and JH Hofmeyr. In conformance with the requirements laid down by De Mist, they were all graduates of Dutch universities.²² Hendrik Cloete not only took his LLD at Leiden in 1811 under Van der Keessel, but was also called to the Bar by Lincoln's Inn on 24 April 1812. He later spent nearly ten years as a judge in Natal (1846-1855). In 1855, he returned to Cape Town where he served as third Puisne Judge for ten years (1855-1866).

The advocates had a sound knowledge of Roman-Dutch law and its sources. The records of cases decided before 1827 by the Appeal Court and the Council of Justice reflect extensive reliance on the authoritative writers on Roman-Dutch

16 Van der Merwe (n 8) at 64-237.

17 See Farlam (n 6) at 37; DV Cowen "The history of the Faculty of Law in the University of Cape Town 1859-1959. A chapter in the history of the survival of the Roman-Dutch law in South Africa" (1959) *Acta Juridica* 1-20 at 3 n 15.

18 On JH Neethling (1770-1838), see CR Kotzé *sv* "Neethling JH" *Dictionary of South African Biography* (hereafter *DSAB*) vol 4 (Durban, 1981) at 401.

19 On H Cloete (1792-1870), see JHDeV Cloete "Mr Justice Cloete" (1934) 51 *SALJ* 1-10; see, further, text to nn 57 and 58 below.

20 On CJ Brand see HC Botha *sv* "Brand, Sir Christoffel Joseph" in *DSAB* vol 2 (Cape Town, 1972) at 78.

21 On J de Wet (1794-1875), see RFM Immelman *sv* "De Wet, Johannes" in *DSAB* vol 1 (Cape Town, 1968) at 240. In 1804, he purchased the house in Strand Street, Cape Town, which is today the Koopmans-De Wet Museum; his daughter Maria Margaretha married Koopmans.

22 They were all graduates of Leiden University (Cowen (n 17) at 3 n 13). Eg, JH Neethling obtained his LLD in 1791; Hendrik Cloete took his LLD in 1811; CJ Brand took his LLD in 1820 on a thesis entitled *Dissertatio politico-juridica de jure coloniarum*; and J de Wet took his LLD in 1821 on a thesis *De usucapione et praescriptione secundum principia juris Romani*.

23 This is evident from the research project undertaken jointly by the University of the Western Cape, Potchefstroom University (now the North-West University) and Leiden University of the judgments in civil cases of the Court of Justice at the Cape during the period 1806-1827. The comprehensive final report (314 pages), issued in 1992, was never published. It is available on the internet at <http://dspace.nwu.ac.za/bitstream/handle/1039> under the title *Die Kaapse Regspraak-Projek: Die Siviele Appèlhof en die Raad van Justisie, Hofstukke en Uitsprake wat betrekking het op Siviele Sake 1806-1827: 'n Evaluering van Capita Selecta uit bepaalde Gebiede van die Reg aan die Kaap*. See also the studies of Van der Merwe (n 8) at 208-221, and GG Visagie "The law applied at the Cape from 1652 to 1829" in IMI Koster-Van Dijk & A Wijffels

law.²³ Their books were readily available – in the second half of the eighteenth century there was no shortage of law books at the Cape.²⁴ The list of authorities referred to in the cases is indeed comprehensive: Johannes Voet *Commentarius ad pandectas*; Simon van Leeuwen *Het Roomsche Hollandsch recht, Censura forensis, Manier van procederen in civile en criminele zaken*; Joannes van der Linden *Rechtsgeleerd practicaal, koopman's handboek, Manier van procederen*; Simon van Groenewegen van der Made *Tractatus de legibus abrogatis et inusitatis*; Merula *Manier van procederen*. There is also extensive reference to the works on criminal law of Antonius Matthaeus II,²⁵ Benedictus Carpzovius²⁶ and JM Barels.²⁷ Some of the other authorities relied upon were Damhouder, Peckius, Wassenaar, Gail, Faber, Loenius, Schrasset, Schomaker Pothier, Moorman, Vromans, Zurck and Leyser.

3 Advocates at the Cape 1828 to 1850

In the Charter of Justice of 1827, the Supreme Court was given control over the admission and suspension of legal practitioners.²⁸ The requirement that advocates have been admitted to a United Kingdom Bar or were doctors of law of Oxford, Cambridge or Dublin²⁹ has given rise to a persistent misconception that from the outset the survival of Roman-Dutch law was under threat, if not from a hostile Bar, at least from one with little knowledge of Roman-Dutch Law. Thus “the requirement that barristers be trained in Britain” is listed as one of the factors that strengthened the tendency towards an admixture of English and Roman-Dutch law.³⁰

(eds) *Miscellanea forensia historica: ter gelegenheid van het afscheid van Prof Mr J de Smidt* (Amsterdam, 1988) 325-343 at 334-337.

- 24 See Wouter de Vos *Regsgeskiedenis* (Cape Town, 1992) at 236. See, further, Appendix II and Appendix III in Visagie (n 8); C Graham Botha “An 18th century law library” (1935) 52 *SALJ* 169-182. In 1998, J Th de Smidt published a catalogue of the law books of the *Raad van Justitie* (now in the library of the High Court in Cape Town) and the Van Dessin Collection (now in the South African Library in Cape Town): *Old Law Books from the Libraries of the ‘Raad van Justitie’ (High Court) and JN van Dessin (South African Library)* (Leiden, 1998). Advocate J de Wet had a very extensive library – see RFM Immelman *sv* “De Wet, Johannes” in *DSAB* vol 1 (n 21) at 240.
- 25 *De criminibus*.
- 26 *Practica nova imperialis Saxonica rerum criminalium* and D van Hogendorp’s translation under the title *Verhandeling der lijfstraffelijke misdaden*.
- 27 *Criminele advysen*.
- 28 Sections 17-23 of the Charter of Justice.
- 29 Section 17 of the Charter of Justice provides: “And we do hereby authorise and empower the said Supreme Court of the Colony of Cape of Good Hope to approve, admit, and enrol such persons as shall have been admitted as Barristers in England or Ireland or Advocates in the Court of Sessions of Scotland, or to the Degree of Doctor of Laws at Our Universities of Oxford, Cambridge, or Dublin to act as Barristers or Advocates in our said Supreme Court.”
- 30 Eduard Fagan “Roman-Dutch law in its South African historical context” in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (Oxford, 1996) 33-64 at 57. See, also, Van den Bergh (n 2) at 84-86.

However, the Charter of Justice also made provision for the admission of those who had practised as advocates in the former Court of Justice³¹ – who from 1803 had to have graduated in law in Holland.³²

At the first sitting of the newly established Supreme Court of the Colony of the Cape of Good Hope, nine advocates were admitted under the new regime introduced by the Charter of Justice of 1827.³³ Seven of them had been advocates of the former Court of Justice; namely, JH Neethling, H Cloete, HR van Rijneveld, J Joubert, CJ Brand, J de Wet and JH Hofmeyr. Also admitted were D Denijssen,³⁴ the former Fiscal whose office had been replaced by that of the Attorney-General (the first incumbent being Anthony Oliphant³⁵) and Saxe Bannister, the first English-born advocate to be a member of the Cape Bar. Bannister practised at the Cape Bar for only a brief period, until July 1829. Subsequently, on 28 February 1828 and 27 March 1828 respectively, two other advocates of the old court, OM Bergh and A Faure,³⁶ were also admitted. The next three advocates to be admitted were also colonial born: JG Stadler (admitted 31 Dec 1832), FL Stol (admitted 28 Feb 1833), and W Hidding (admitted 12 Jul 1833).³⁷ This means that with the exception of the Attorney-General and Saxe Bannister, all persons admitted as advocates of the Cape Supreme Court

- 31 Section 18 of the Charter of Justice provides: “And we further authorise and empower the said Supreme Court to admit any persons to practise as barristers or advocates therein, who previously to the promulgation of these presents within the said Colony, have been admitted to practise as advocates in the Supreme Court of Justice heretofore existing within the same.” Neither Fagan (n 30) nor Hahlo & Kahn (n 5) nor Van den Bergh (n 2) nor Cowen (n 17) make mention of the fact that the Charter made provision for the admission of those who had practised in the former Court of Justice.
- 32 See n 15 above. It was only in 1858 that Acts 4 and 12 of 1858 (Cape), which set up a Board of Public Examiners, made provision for the admission of advocates who had qualified in South Africa; see, further, Cowen (n 17) at 7-11.
- 33 Farlam (n 6) at 37-39; and see Botha (n 3) at 391.
- 34 On D Denijssen, see CR Kotzé *sv* “Denijssen, Daniel” in *DSAB* vol 3 (Cape Town, 1977) at 207. He also held an LLD from Leiden University.
- 35 On Anthony Oliphant, see FG Richings *sv* “Oliphant, Sir Anthony” *idem* at 662. He was admitted as an advocate in Edinburgh and called to the Bar at Gray’s Inn on 26 May 1827 and the King’s Inn in Dublin in 1829. Before coming to the Cape, he practised at the Irish Bar.
- 36 The only reference to him I was able to trace is one in the rubric dealing with his cousin, also A Faure (1795-1875) in HB Giliomee *sv* “Faure, Antonij Alexander” in *DSAB* vol 2 (n 20) at 234 in which he is described as a doctor of laws and an advocate.
- 37 Hidding’s father, also W Hidding, was a Judge of the Court of Justice on which he served from 1803 to 1827. Hidding Jnr (1808-1899) obtained an LLD at Groningen University and qualified as an advocate in Edinburgh. He practised regularly on the Circuit Court; see JC Visagie *sv* “Hidding, Willem” in *DSAB* vol 3 (n 34) at 300. He was present and acted as interpreter on 22 Oct 1842 at Allemans Drift when Menzies J took possession, in the name of the Queen, of all territory east of 22 degrees longitude and 25 degrees south latitude not being the possession of the Portuguese Crown or any native tribe or chief. Sir George Napier, Governor at the Cape, did not approve of Menzies’ proclamation, and by a proclamation dated 3 Nov 1842 repudiated the whole proceeding as being unauthorised (see Botha (n 3) at 396-397).

in the first ten years of its existence were colonial born. The advocates whose names appear in the *Menzies' Reports*³⁸ as having been actively involved in litigation in the Cape Supreme Court were all graduates of Dutch universities and former advocates of the old Court of Justice, the one exception being the Attorney-General. The idea that the “fair number of colonists who obtained degrees from distinguished universities in the Netherlands” was a phenomenon of the late nineteenth century only³⁹ is therefore not borne out by the facts.

On 30 December 1836, William Musgrave became the second English-born advocate⁴⁰ to be admitted at the Cape.⁴¹ Musgrave soon acquired a reputation as an able lawyer and established a sound practice. Seven years later, in 1843, he was elevated to the Bench upon the retirement of Kekewich J.⁴²

On 12 July 1837, Petrus Johannes Denijssen was admitted. He was the son of D Denijssen, the former Fiscal who had been one of those admitted in 1827. PJ Denijssen obtained an LLD from Leiden University, subsequently entered the Inner Temple and was called to the Bar in London on 18 November 1836. He was elevated to the Bench in 1868 and remained a Judge of the Cape Supreme Court until 1877.⁴³

On 31 May 1839 followed the admission of JF and JH Dreyer.⁴⁴ On 26 November 1839, JW Ebdon was admitted. He was born at the Cape, was a graduate of Cambridge, and on 28 May 1835 was called to the Bar by the Middle Temple. Oliphant retired as Attorney-General in March 1839, to be succeeded briefly by

38 On the *Menzies' Reports*, see n 48 below.

39 As Van den Bergh (n 2) at 86 seems to suggest when she refers, by way of example, to Judges Juta, Kotzé, the De Villiers brothers, Wessels, Steyn and Hertzog.

40 Saxe Bannister was the first, but he practised at the Cape Bar for but a few months.

41 The admission of Musgrave gave rise to an extraordinary attack on the Cape Bar in an editorial published in the issue of 31 Jan 1837 of *The Moderator*, a local newspaper. Three causes were identified “which justify our predilections in favour of English Barristers. The first is, the character and manner of their education; secondly, the class of person who betake themselves to the profession; and thirdly, the manner in which the legal business is conducted.” *De Zuid-Afrikaan*, with a number of advocates (including CJ Brand, JH Neethling and J de Wet) on its editorial board, sprang to the defence of the Cape Bar in an article reprinted in an English translation in the 28 Feb 1837 issue of *The Moderator*. As Farlam points out (n 6), the writer had no difficulty in demolishing the three “causes” for preferring English barristers: the advocates were all doctors of law from leading universities in Holland; they came from the leading families in the Colony, and the Supreme Court had been functioning for ten years in a vastly superior manner to that of the old Court of Justice.

42 See F St L S “The Hon Mr Justice William Musgrave” (1937) 54 *SALJ* 279-291 at 288.

43 See JC Quinton *sv* “Denyssen, Petrus Johannes” in *DSAB* vol 5 (Pretoria, 1987) at 185; Anon “The late Hon Petrus J Denyssen” (1903) 20 *SALJ* at 221-223.

44 I have been unable to find any information about them except that the name of Dreyer is mentioned as one of the signatories of an address presented by the advocates at the Cape to Bell CJ upon his retirement (see Stephen D Girvin “The architects of the mixed legal system” in Zimmermann & Visser (n 30) 95-139 at 105 n 58). There is no mention in the *Menzies' Reports* of any appearance as advocates before the Cape Supreme Court.

Musgrave, who was in turn, in September 1839, succeeded by William Porter.⁴⁵ The redoubtable Irishman, who remained Attorney-General for twenty-seven years until March 1866, was destined to dominate legal practice and indeed public life at the Cape in a manner that has perhaps not received sufficient recognition.⁴⁶ In 1847 the brilliant EB Watermeyer was admitted; he was South-African born, and educated in Holland where he obtained an LLD at Leiden University. Before his return to the Cape he was in 1847 called to the Bar by the Inner Temple in London.⁴⁷

Perusal of the *Menzies' Reports*,⁴⁸ which cover the years 1828 to 1849, reveals that practice before the Cape Supreme Court was during that time dominated by CJ Brand and H Cloete, both consummate masters of Roman-Dutch law.⁴⁹ There were also regular appearances by the two Denijsens, J de Wet, JH Hofmeyr and J Joubert.⁵⁰ After 1837, the names of William Porter, Musgrave and Ebden appear regularly, and after 1847 that of Watermeyer begins to appear. From all the foregoing it follows that during the period 1827 to 1850, apart from the Attorney-General, only one English-born advocate (Musgrave) practised at the Cape, and that only one of the South African-born advocates (Ebden) was not a graduate of a Dutch university. Several of those who were graduates of a Dutch university had also been called to the Bar in London.

Perusal of the *Menzies' Reports* further reveals the extent to which the advocates relied on Roman-Dutch authority.⁵¹ In every contested civil case Roman and Roman-Dutch authority are cited; sometimes on an extensive scale as in, for example, *In re Insolvent Estate of Loudon, Discount Bank v Dawes*⁵² and *Harris v Trustee of Buisinne*.⁵³ The range of authority cited is comprehensive: from A to Z as it were –

45 On William Porter, see JL McCracken *sv* “Porter, William” in *DSAB* vol 1 (n 21) at 623. He was born in Ireland and called to the Bar by King’s Inn in Dublin. He practised at the Irish Bar before coming to Cape Town.

46 See JL McCracken *New Light at the Cape of Good Hope. William Porter. The Father of Cape Liberalism* (Belfast, 1993).

47 See F St L S “Mr Justice EB Watermeyer” (1935) 52 *SALJ* 135-142 at 137.

48 The *Menzies' Reports* were compiled and edited from the manuscripts of Menzies J by James Buchanan (later Buchanan J) and published in 1870. Some of the notes are so short as to be cryptic; others are comprehensive with a full reproduction of counsels’ arguments and citations of authority. The reports are a reliable indication of the nature and state of practice before the Cape Supreme Court at the time. On the *Menzies' Reports*, see Stephen D Girvin “Law reporting: *Menzies' Reports*, precedent and legal sources at the Cape Colony in the nineteenth century” (1995) 63 *Tijdschrift voor rechtsgeschiedenis* at 103-118; Girvin (n 4) at 654; Van Niekerk (n 7) at 111-113.

49 See, further, the text to nn 57 and 58. Botha (n 3) at 401 gives recognition to the important role that Brand and Cloete played in this regard.

50 The *Menzies' Reports* reflect the odd appearance by Stadler (*Blore v Dreyer* (1833) 1 *Menz* 128) and Hidding (*Boord v De Villiers* (1840) 2 *Menz* 55).

51 See Girvin (n 48) at 110-112.

52 (1829) 1 *Menz* 380.

53 (1840) 2 *Menz* 105.

from Arntzenius to Zutphen!⁵⁴ The links of the advocates with the preceding regime are reflected in the occasional citation as authority, especially in the early years, of decisions of the former Court of Justice.⁵⁵ It should be kept in mind that prior to 1828 these advocates practised within a judicial regime in which Roman-Dutch law was still a living system of law within Holland.

The contention that the advocates who practised at the Cape in the early nineteenth century had limited knowledge of the Roman-Dutch sources cannot be sustained.⁵⁶ They were all law graduates of Dutch universities, and outstanding amongst them were CJ Brand and Hendrik Cloete. Cloete spent ten years in practice before the Court of Justice (1816-1827) and almost twenty years (1828-1846) in practice at the Cape Bar. As a Judge, Cloete was highly regarded for his comprehensive knowledge of the Roman-Dutch authorities,⁵⁷ and his erudite application of Roman-Dutch law played an important role in keeping it alive in Natal.⁵⁸ His sterling work as advocate during the first two decades of the Cape Supreme Court has gone unheralded.

The superimposition of a common-law judicial and procedural framework upon the Roman-Dutch law profoundly influenced the manner of practice at the Cape. On questions of substantive law, the advocates referred extensively to writers on Roman-Dutch law. On questions of practice and procedure, they referred to English works. In *Rogerson v Meyer & Berning*⁵⁹ counsel and the Court referred to texts from Justinian's Code, numerous passages from Voet, Leeuwen's *Censura forensis*, Van der Linden's *Koopman's handboek* and Pothier's *Traité des obligations*. In the same case, on questions of procedure, reference was made to *Harrison's Digest*, *Tidd on Practice*, *Chitty on Pleading*, *Archbold on Pleading*, *Maddox on Chancery Practice*, and *Stephen on Pleading*. All these works deal with common-law practice prior to the abolition of the forms of action. No wonder that traces of the forms of action are found in nineteenth-century South African cases.⁶⁰

54 The range of authorities cited include the *Corpus iuris civilis*, the *Placaat boeken*, the *Hollandsche consultatien*, and the works of Arntzenius, Bort, Brissonius, Brouwer, Brunneman, Bynkershoek, Carpzovius, Cos, Domat, Groenewegen, Grotius, Huber, Leeuwen, Leyser, Loenius, Lybrechts, Lyzenius, Matthaeus, Merula, Neostadius, Pothier, Schulting, Van der Keessel, Van der Linden, Vinnius, Voet, Zangerus, Zurck and Zutphen. On the citation of Roman-Dutch authority as reflected in the *Menzies' Reports*: see Girvin (n 48).

55 Eg, *Witham v Venables* (1828) 3 Menz 291; *Joosten v Grobbelaar* (1832) 1 Menz 149; *Reeves v Reeves* (1832) 1 Menz 244 at 248; *Koemans v Van der Watt* (1838) 1 Menz 36. See Girvin (n 48) at 108.

56 Girvin (n 48) at 113 states that "we may very well admire the attempts by the early Cape lawyers to do justice to the received principles of the Roman-Dutch law when they had limited knowledge of the basic sources".

57 Girvin (n 44) at 101.

58 Spiller (n 6) at 24f.

59 (1837) 2 Menz 38.

60 See HJ Erasmus "The interaction of substantive law and procedure" in Zimmermann & Visser (n 30 above) 141-161 at 152-155. See, also, HJ Erasmus "The interaction of substantive and procedural law: The Southern African experience in historical and comparative perspective" (1990) 1 *Stellenbosch LR* 348-371.

The picture would not be complete without mention of the fact that in certain areas of the law, the advocates did not hesitate to cite English authority.⁶¹ A few examples will suffice. On bills of exchange there is reference to, among others, *Chitty on Bills*, *Bayley on Bills*, *Byles on Bills*, *Story on Bills*; on the law of insolvency there is reference to *Bell's Commentaries on Bankrupt Law*, *Bell on Bankruptcy*, *Cooke's Bankrupt Law* and Judge Burton's treatise on *Insolvent Law*;⁶² on shipping there is reference to *Abbott on Shipping*, *Nott on Shipping* and *Lawes on Charterparties*. There is also reference to general works such as *Blackstone's Commentaries*, *Burge's Commentaries on Colonial and Foreign Laws* and *Smith's Compendium of Mercantile Law*.

The influence of the citation of old authority is apparent from the judgments of the Cape Supreme Court, and is confirmed by express statements such as the following in *Witham v Venables*:⁶³

But the Court, after full argument and a deliberate consideration of all the authorities, held ...

The authorities referred to by the plaintiff and the defendant included works of Van der Linden, Huber, Leeuwen, numerous passages from Voet, Brissonius and Paulus Merula. The defendant also referred to two judgments of "the late Court" which were handed down on 6 April 1822 and 29 April 1824.

4 The case of *Letterstedt v Morgan*

In 1849 at the end of the period under review, in *Letterstedt v Morgan and Others*⁶⁴ Wylde CJ made a statement that on the face of it seems to gainsay the views expressed thus far. The statement has given rise to the view that the "Roman-Dutch authorities held but a tenuous position in the early years of the Supreme Court,"⁶⁵ and that Wylde "was no great defender of Roman-Dutch law"⁶⁶ and had little regard for the authorities cited by counsel. The statement reads as follows:

Quote what Dutch or Roman books you please – musty or otherwise⁶⁷ – and they must be musty if they lay down such doctrines. I belong to a higher Court than they refer to –

61 Girvin (n 4) at 654; Girvin (n 48) at 113.

62 The full title is *Observations on the Insolvent Law of the Colony of the Cape of Good Hope*.

63 (1828) 1 Menz 291. The report is in narrative form and does not give the actual wording of the judgment that was handed down.

64 (1849) 5 Searle 373 at 381.

65 Fagan (n 30) at 56.

66 Girvin (n 44) at 97.

67 The reference to "musty" authority probably derives from Porter who in his address to the Court used the phrase "musty volumes", which elicited the following comment from Musgrave J (at 377): "But the Attorney-General will not deny that these musty volumes, when it suits his purpose, are very often obtruded on the attention of the Court and applied to cases which he brings forward. Then again, by the terms of the Charter,

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a Court not to be broken up or paralysed by their authority, much less by the maxims of philosophers dozing over the midnight lamp in their solitary chambers. My Queen has sent me here to administer Justice under the Royal Charter; and the practice of the Courts of Flanders, Batavia or Trinidad, are no authority to me ... [W]hen you speak of the Institutions of Holland, and of bonding myself down to the practice of Dutch courts – I absolve myself from that bondage, I look to my Charter, to my oath and to my duty.

The case arose from the violent agitation against the establishment of a penal colony at the Cape⁶⁸ during which Wylde CJ and Menzies J had advised the government extra judicially.⁶⁹ When Letterstedt (represented by Porter and Ebden) brought a claim for damages arising from the situation, the defendants (represented by CJ Brand, JH Brand⁷⁰ and EB Watermeyer) raised an *exceptio iudicis suspecti* and called for the recusal of the judges (Wylde, Menzies and Musgrave).

One should not lose sight of the fact that the issue before the Court was a narrow one: The recusal of the judges.⁷¹ Referring to a host of civil-law authority,⁷² counsel for the defendants contended that the judges could not participate in the question of

we are told that we are not bound to decide simply upon the Ordinances, but according to the laws in force, and there is no doubt that the Dutch law is in force in this Colony, except in so far as it has been abrogated by subsequent enactments.”

68 See, in general, AF Hattersley *The Convict Crisis and the Growth of Unity; Resistance to Transportation in South Africa and Australia, 1848-1853* (Pietermaritzburg, 1965).

69 The background to the case is described by Girvin (n 4) at 656. The vitriolic exchanges that characterised the hearing are set out by F St L S (n 42) at 288-291.

70 JH Brand, the son of CJ Brand, was a graduate (LLD) of Leiden University and was called to the Bar in London (see MCE van Schoor *sv* “Brand, Johannes Henricus” in *DSAB* vol 1 (n 21) at 110. He was in 1859 appointed the first professor of law at the South African College (predecessor of the University of Cape Town): Cowen (n 17) at 7-11. He was President of the Orange Free State from 1863 to 1888.

71 The Roman-Dutch law on recusal is considered by “Karoo” in a note entitled “Recusation” in (1924) 51 *SALJ* 33-37.

72 Among the many authorities he cited, CJ Brand referred to the *Dissertatio de recusatione iudicis* of Antonius Schultingius, first published in Franeker in 1708. The full title is *Dissertationes. De recusatione iudicis. Pro rescriptis Imperatorum Romanum: de transactione super controversiis, quae ex ultimis voluntatibus profiscuntur, etiam non inspectis vel cognitis illarum verbis recte ineunda*. Schulting in 1713 succeeded Voet as professor at Leiden. In the Stellenbosch University Library there are two copies of the *Dissertatio*, one of the Franeker edition of 1708 and one of the later (1714) Leiden edition. Brand also referred to the *Tractatus de exceptionibus* (Becker, 1598) of the German jurist Joannes Zangerus who was professor at Wittenberg. AA Roberts *A South African Legal Bibliography* (Pretoria, 1942) was unable to trace a copy of the work in South Africa. As far as I am aware there is a copy in the Merensky Library at Pretoria University of the 1620 edition printed at Frankfurt under the title *Tractatus duo: unus de exceptionibus, alter de questionibus, seu, torturis reorum*. There is also a copy under the same title in the library of the University of South Africa of an edition printed in 1730 (Conrad).

their own recusal – judges when challenged should at once retire.⁷³ The further contention was that if recusal of the whole court and not an individual judge was sought, the issue of recusal must be decided by a superior court or the sovereign.⁷⁴ It was especially this latter contention that aroused the ire of Wylde CJ and led to his extraordinary outburst; for, if the judges were to be recused, the Court would be left *in limbo* without a quorum. Hence his statement that his Court could not be “broken up or paralysed” by such authority, and that he could not be bound by the *practice* (my emphasis) of the Dutch courts. Indeed, he stated that the Dutch *practice* as described by Voet could not be applied to the situation at the Cape:⁷⁵

When we look at Voet, we find that there was a court of seven, of five, and so on. Can we look at their *practice* to regulate our *procedure* in such courts as this?

Menzies J in his judgement considered the civil law authorities and stated his conclusion as follows:⁷⁶

It is a fixed rule of law that an exception cannot be taken to the whole Court or to a *quorum*; and an exception that would have the effect of destroying a legal *quorum* cannot be pleaded. On that ground, and on that ground alone, I stated that, notwithstanding what had been brought to my notice, it was my duty to remain.

This conclusion finds support in Kersteman’s *Hollandsch rechtsgeleerd woordenboek*⁷⁷ in which it is said that the challenging or recusing of a whole court has been abolished, though recusal can still take place against the particular person of a judge.

It can hardly be contended, on the strength of Chief Justice Wylde’s statement, that the Roman-Dutch authorities “held but a tenuous position in the early years of the Supreme Court”.⁷⁸ If the position was indeed tenuous, one would not expect counsel to have referred *in extenso* to civil-law authority (as they had done for the

73 The principle is stated thus by Schultingius in his *Dissertatio de recusatione iudicis* cap XII §8: “Hodie si quis ex collegis iudicum recusetur, moris est, ut ab aliis ejusdem collegii membris recusandi causa examinetur, ac de ea pronuncietur. Ipse recusatus ut de illa hoc est, de propria causa cognoscat, nulla pacto permittetur.”

74 Amongst a host of other authority, Voet 5 1 47 was cited in support of this proposition. Both Wylde CJ and Menzies J refer to this passage in their judgments.

75 At 381.

76 At 388. See, also, at 393 where Menzies J states: “The decision is that with regard to the alleged opinions the exception is wrong in point of fact; secondly, that it has not pleaded the *exceptio iudicis suspecti*; and thirdly, that although it is possible that some fact might exist, yet it is so vaguely and inartificially pleaded that on that ground also the exception is out of Court.”

77 2 ed (Amsterdam, 1777) at 406 *sv* “*recusatio*”.

78 See n 64 above.

preceding twenty years). Moreover, in his judgment, Musgrave J explicitly confirmed that “there is no doubt that the Dutch law is in force in this Colony”.⁷⁹ Menzies J in his judgment considered the civil-law authorities and based his decision not to withdraw on their authority. Even Wylde CJ gave different circumstances as reason for not following Voet.

After all, at the time of the *Letterstedt*-case, Wylde CJ had for twenty-two years presided over a court in which Roman and Roman-Dutch authority had from the outset been extensively quoted and followed. Thus in *In re Insolvent Estate of Buisinne; Van der Byl and Meyer v Sequestrator and Attorney-General*,⁸⁰ a case that came before the Cape Supreme Court in the first year of its existence, it is stated that “the Court is of opinion that these authorities [Codex, Pothier, Leeuwen, Voet, Van der Keessel] prove, that, the law of Rome and Holland, and, consequently, of this colony ...”.⁸¹

In his judgment in a case decided not long after *Letterstedt*, in 1851, Wylde CJ was not averse to accepting Roman-Dutch authority when he said that the “action for slander is given in the Roman-Dutch law in case of words uttered *dolo malo* for the purpose of traducing the character and estimation of another”.⁸² In *Pike v Hamilton, Ross & Co*,⁸³ one of Wylde’s last cases before his final illness, counsel on both sides (Watermeyer and Porter AG for the plaintiff, and CJ Brand for the defendant) referred to the Institutes, Pothier and a number of passages from Voet and Grotius. The three judges agreed that the law as set out in the authorities cited by counsel was applicable to the case before them. Wylde, who had lost his notes and gave judgement from memory, simply stated that the position was as set out by Voet, Leeuwen and “all the authorities”.⁸⁴ In their concurring judgments, Judges Ebdon and Bell explicitly based their judgments on the authorities cited by counsel in argument.

5 Conclusion

The year 1850, when Menzies J died after serving as senior Puisne Judge for twenty-three years from 1828 to 1850, marks the end of an era in the early history of the Cape Supreme Court.

The first two decades of its existence constitutes perhaps the most important formative period in the history of the Cape Supreme Court. Form and content had

79 See the text at n 66 above.

80 (1828) 1 Menz 318.

81 *Idem* at 327.

82 *White v Pilkington* (1851) 1 Searle 107 at 119.

83 (1855) 2 Searle 191.

84 The statement by Girvin (n 4) at 66 that Wylde CJ “delivered an impressive judgment citing a variety of Roman-Dutch authorities” is perhaps a somewhat favourable exaggeration.

to be found for the system created by the Charters of Justice: A system whose main formative element, Roman-Dutch law, had to find application within a judicial and procedural framework of common-law origin. The advocates who practised at the Supreme Court during those years were eminently qualified and experienced to fulfil that task. Most of them were graduates of Dutch universities and, equally importantly, most of them had practised during the previous regime when the Roman-Dutch law was still a living system in Holland, the then governing colonial power. Moreover, they were also familiar with English law and practice, several of them having been called to the Bar in London or Edinburgh. From the outset, it was these advocates who were a most important determinant factor in shaping the character of the newly created Court.

At the Cape during that time there was no confrontation between the proponents of Roman-Dutch law and English law – the *bellum juridicum* is a twentieth-century phenomenon. Roman-Dutch law continued to be accepted as part of the law of the land in the practice of the Cape Supreme Court throughout the nineteenth century. This acceptance was emphatically confirmed during the forty years that Lord De Villiers dominated the scene as Chief Justice. As a member of the Privy Council he wanted all cases in which Roman-Dutch law featured to be allocated to him on the ground that the other members of the Privy Council had an inadequate knowledge of Roman-Dutch law.⁸⁵

This does not mean that Roman-Dutch law was the only actor on the stage. Not only had ties with its country of origin been severed, but the introduction in Holland of a civil code based on the French Civil Code meant that Roman-Dutch law was no longer a living system. Roman-Dutch law at the Cape then found application within an English-colonial political environment, and the courts operated within a procedural regime of English origin. In the circumstances, because the law needed to keep pace with the rapid economic developments of the second half of the nineteenth century, the courts turned to English law to complement Roman-Dutch law (especially in the field of mercantile law) and legislation was based on English precedents.⁸⁶ Whatever tensions there might have been between them at times, these various elements were the building blocks of the new mixed system.⁸⁷ And from the very first years of the life of the Cape Supreme Court, the advocates in a pragmatic way set about fashioning a coherent system from these building blocks. They laid the foundations of the system that during the nineteenth and early twentieth centuries spread to the rest of Southern Africa, the system that underlay the law of the Union

85 See Eric A Walker *Lord De Villiers and his Times. South Africa 1842-1914* (London, 1924) at 287. His request was not granted.

86 Fagan (n 30) at 57.

87 The interplay of civil law and common law is set out by Zimmermann (n 1) and Van den Bergh (n 2).

of South Africa of 1910 and underlies the law of the Republic of South Africa of today.⁸⁸

ABSTRACT

In his study of the judgments of the Supreme Court of the Colony of Good Hope during the late nineteenth century, Reinhard Zimmermann stressed the importance of the role of the Bar. A study of the professional activity of the advocates at the Cape Bar during the early nineteenth century necessitates reconsideration of current assumptions. The Charter of Justice of 1827 required advocates to have been admitted to a United Kingdom Bar or to be doctors of law of Oxford, Cambridge or Dublin. This gave rise to the misconception that from the outset the survival of Roman-Dutch law was under threat, if not from a hostile Bar, at least from one with little knowledge of Roman-Dutch Law. The Charter of Justice also made provision for the admission of persons who had practised as advocates in the former Court of Justice and from 1803, were required to have graduated in law in Holland. For the first ten years of its existence, only former advocates of the old Court of Justice practised before the Cape Supreme Court, the one exception being the Attorney-General. Perusal of the *Menzies' Reports*, which cover the years 1828 to 1849, reveals the extent to which advocates relied on Roman-Dutch authority. In every contested civil case old authority is cited, sometimes on an extensive scale. During the first years of the Cape Supreme Court, the advocates played a vital role in affirming the status of Roman-Dutch law as an integral part of the law of the Colony. This continued throughout the nineteenth century. At the Cape during the nineteenth century there was no *bellum juridicum* between the proponents of Roman-Dutch law and English law. This does not mean that Roman-Dutch law was the only actor on the stage. Ties with Holland had been severed. Roman Dutch-law found application within an English colonial political environment, and the courts operated within a procedural regime of English origin. In the Netherlands, the country of origin of Roman-Dutch law, the introduction of a code based on the French Civil Code meant that Roman-Dutch law was no longer a living system. In the circumstances, developments in the field of mercantile law, in particular, were assimilated with reference to English law and through legislation derived from English precedents. Whatever tensions there might have been at times, these various elements were in fact the building blocks of the new mixed system. From the very first years, the advocates, in a pragmatic way, played their part in fashioning a coherent system from these building blocks.

88 The current system is set out by CG van der Merwe *et al* "The Republic of South Africa" in VV Palmer (ed) *Mixed Jurisdictions Worldwide. The Third Legal Family* (Cambridge, 2012) 95-215.

A HISTORICAL REVIEW OF THE DEVELOPMENT OF THE POST-APARTHEID SOUTH AFRICAN LLB DEGREE – WITH PARTICULAR REFERENCE TO LEGAL ETHICS

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1 Introduction

The purpose of this article is to consider the historical, political and social context of the Bachelor of Laws (LLB) degree – especially insofar as it pertains to teaching legal ethics. It reviews the role of the law, the legal profession and the system higher education not only during the apartheid era, but also during the transition to democracy and in contemporary South Africa. In addition, this article also provides a detailed explication of the efforts to transform legal education since 1994. Aspects which are especially relevant to the question of legal ethics in the LLB degree are highlighted.

In the context of this article, the term “legal ethics” is used to refer to the principles and values which, along with professional rules of conduct and statutory and common law, regulate lawyers’ behaviour. Legal ethics thus references both extrinsic and intrinsic controls on lawyers’ conduct. Extrinsic controls include the

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provisions of the Attorneys Act 53 of 1979, and the codes, rules and regulations of the professional societies. Intrinsic controls include personal values and principles, such as honesty, which are generally regarded by society and the profession itself as representing the best standards of ethical and professional practice.¹

In the last part of this article, the current state of legal education in South Africa is discussed.

2 Historical and political context

2.1 The legal profession

Lawyers have played a paradoxical role in South Africa's history. As the Truth and Reconciliation Commission (TRC) noted, most lawyers played a central role in legitimising the apartheid system.² However, as the TRC also recognised, a small, but significant, number of lawyers chose to pursue justice within the bounds of the law. Insofar as these lawyers were concerned, the TRC accepted that not only did their participation benefit the clients they served, but that these benefits outweighed any harm their participation in the apartheid system might have caused.³ Of course, many lawyers actively fought against the apartheid regime at great personal and professional cost. Nelson Mandela himself was a lawyer, as were many of South Africa's other struggle heroes,⁴ and the TRC found that such lawyers played a significant role in promoting the vision of South Africa as being a constitutional democracy throughout the struggle against apartheid.⁵

Ultimately, it was lawyers who were instrumental in negotiating South Africa's peaceful transition to the new constitutional democracy.⁶ This is not a new or unusual role for lawyers; it is widely recognised that the responsibilities of a lawyer in a state emerging from repression are especially important. These include guiding the nation towards a peaceful transition to democracy and the rule of law.⁷

1 The precise content of the appropriate controls may be contested. See, eg, F Mnyongani "Whose morality? Towards a legal profession with an ethical content that is African" (2009) 24 *SA Public Law* 121-134 at 121.

2 Truth and Reconciliation Commission of South Africa *Final Report* (1998 vol 4) at pars 33 and 38, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (accessed 5 Mar 2011).

3 *Idem* at par 3. See, also, A Craiger *Cause Lawyering in South Africa: Lawyers and the Law in the Struggle Against Apartheid* (Austin USA, 1999).

4 N Mandela *A Long Walk to Freedom: The Autobiography of Nelson Mandela* (Boston, Mass, 1994).

5 Truth and Reconciliation Commission of South Africa (n 2) at par 37.

6 W Esterhuysen *Secret Talks and the End of Apartheid* (Cape Town, 2012).

7 O Oko "Consolidating democracy on a troubled continent: A challenge for lawyers in Africa" (2000) 33 *Vanderbilt J of Transnational Law* 573-645 (hereafter Oko "Consolidating") at 573; O Oko "The problems and challenges of lawyering in developing societies" (2004) 35(2) *Rutgers LJ* 569-573 (hereafter Oko "Problems") at 569.

The fact that South Africa chose a constitutional democracy over any other form of government clearly signified that the law (and thus lawyers, and thus legal education) would play a key role in ensuring justice – and would be responsible for ensuring that the constitutional rights enshrined in the Bill of Rights⁸ were implemented.⁹ As Oko has pointed out, lawyers are responsible for ensuring that democracy works. They hold the power to curb governmental abuse, to promote beneficial societal and economic change, and to maintain political stability.¹⁰ The Constitution requires the use of law to promote social justice and democracy and it is the responsibility of lawyers to see that the Constitution does not become “dead letter” law.¹¹

The “special” responsibility of lawyers in society has been formally recognised by the legal profession itself in the Legal Services Sector Charter.¹² This Charter acknowledges that the legal profession’s special responsibility includes addressing the inequalities which plague South African society.¹³ In addition, the Charter expresses the need to ensure that legal education includes social-context training to achieve this.¹⁴ The legal profession has, however, been criticised for failing to live up to its expectations in this regard.¹⁵

- 8 Chapter 2 of the Constitution of the Republic of South Africa, 1996.
- 9 P Langa “Transformative constitutionalism” (2006) 17 *Stellenbosch LR* 351-360 at 351; K Klare “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146-188 at 147; J Cameron “Our legal system – Precious and precarious” (2000) 117(2) *SALJ* 371-376 at 371. See, also, L Greenbaum “The four-year undergraduate LLB: Progress and pitfalls” (2010) 35(1) *J of Juridical Science* 1-27 at 9; F Mnyongani “Duties of a lawyer in a multicultural society” (2012) 32(2) *Stellenbosch LR* 352-369 at 356; M Mutua “Hope and despair for a new South Africa: The limits of rights discourse” (1997) 10 *Harvard Human Rights J* 63-114.
- 10 Oko “Problems” (n 7) at 569.
- 11 A Sajo “The role of lawyers in social change: Hungary” (1993) 25(2) *Case Western Reserve J of International Law* 137-146 at 137; K Johnson “Lawyering for social change: What’s a lawyer to do?” (1999) 5 *Michigan J of Race and Law* 201-228 at 201; S Bachmann *Lawyers, Law and Social Change* (Bloomington USA, 2001); S Bachmann *Lawyers, Law and Social Change Update* (2010) available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_review_of_law_and_social_change/documents/documents/ecm_pro_068619.pdf (accessed 16 Oct 2012); WW Kilglin “Lawyers: Guardians of democracy” (1986) 38 *Baylor LR* 249-252 at 249; O Agbakoba “The role of lawyers and the observance of human rights” (1995) 5 *J of Human Rights Law and Practice* 115-150 at 120.
- 12 Law Society of South Africa and General Council of the Bar of South Africa “Legal services sector charter” (2008) available at <http://www.lssa.org.za/upload/LSC.pdf> (accessed 1 Mar 2011).
- 13 *Idem* “Foreword”.
- 14 *Idem* at par 2 5 1 iii. However, see H Kruuse “A South African response to legal ethics” in M Robertson, L Corbin, K Tranter & F Bartlett *The Ethics Project in Legal Education* (London, 2011) at 105-107.
- 15 D Mlambo “Carnegie 3: Conference Address” Oct 2012 *Noseweek* 156 available at <http://www.noseweek.co.za/article/2824/Bench-press> (accessed 16 Oct 2012); *Draft Report on LLB Summit: Legal Education in a Crisis?* (29 May 2013) at 2 (document on file with author); J Sarkin “Promoting access to justice in South Africa: Should the legal profession have a voluntary or mandatory role in providing legal services to the poor?” (2002) 18(4) *SAJHR* 630-644 at 630.

Scott cautions that law is an inherently conservative force, and that future lawyers must be properly equipped to play their proper role in the transformation of society.¹⁶ This is in fact the responsibility of legal education. The way lawyers conceive of themselves as legal practitioners, and their role in society, is profoundly affected by their experience of legal education.¹⁷ It is a truism that “the law is what lawyers are, and the law and lawyers are what the law schools are ...”¹⁸

The responsibility of legal education in this regard, and its potential to influence the legal profession and wider society, has been acknowledged by the South African legal academy. In 2009, the South African Law Deans Association (SALDA) and the Society of Law Teachers of Southern Africa (SLTSA) re-affirmed their “commitment to constitutional values and principles” and asserted the “importance of legal education for the proper functioning of the legal system”. In addition, they also re-affirmed “their responsibility to produce lawyers with the necessary analytical skills, critical disposition and independence of thought to play a meaningful role in the development of [South African] society” and called on “all legal educators and stakeholders to exert their energies to achieve this”.¹⁹

The responsibility of lawyers in society was also one of the major themes at the LLB Summit held on 29 May 2013,²⁰ where it was stressed that if the legal profession is not fulfilling its proper role in society, the education of lawyers is a significant part of the problem.²¹ A repeated concern at the Summit was the fact that law faculties are not producing the type of graduates required to further a justice and rights culture.²² Greenbaum argues that a factor contributing to this deficit is the lack of attention given to the ethical dimension of lawyering in law faculties. This omission, she argues, “raises serious questions about the possibility of legal education becoming a transformative experience for law students or for exerting any positive influence on the future of the legal profession”.²³

- 16 S Scott “Knowledge production and transmission in a changing society: Challenges facing law lecturers in a distance education environment in South Africa” (2006) 20(5) *South African J of Higher Education* 731-743 at 732; PM Mtshaulana “In defence of the advocates’ profession” (2009) 22(3) *Advocate* 2-3 at 3.
- 17 F Cownie *Legal Academics: Culture and Identities* (Oxford, 2004); M Paxton “Legal academics: Culture and identities (Review)” (2005) 68(1) *The Modern LR* 156-174 at 166.
- 18 HT Edwards “The growing disjunction between legal education and the legal profession” (1992) 91 *Michigan LR* 34-78 at 34. Indeed, research shows a clear link between the style and content of legal education and the approach of law graduates to legal practice (see E Mertz *The Language of the Law School: Learning to Think Like a Lawyer* (Oxford, 2007)).
- 19 SALDA “SALDA statement” (2009) 22(2) *Advocate* 8-43 at 8.
- 20 *Draft Report on LLB Summit* (n 15) at 2.
- 21 *Ibid.*
- 22 *Idem* at 3.
- 23 L Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose* (PhD thesis, University of KwaZulu-Natal, 2009) at 274.

2.2 Higher education

Education, like law, has a dual identity in the South African context. Historically, apartheid education policies were instrumental in maintaining the ideology of apartheid and thus in excluding black citizens from meaningful participation in all sectors of society, including the system of government.²⁴ Legal education itself was strongly influenced by the government's policy of apartheid and both contributed to and reinforced it.²⁵ Greenbaum explains that legal education was dominated by "white" interests and that it contributed to and reinforced societal inequality and white hegemony.²⁶ Today, however, there is a strong belief that education, in general, and higher education, in particular, is the key to transforming South Africa and unlocking its potential.²⁷

Given the extent to which education, including higher education, contributed towards the maintenance of apartheid, it is not surprising that the system of higher education has undergone a process of transformation over the past twenty years.²⁸ This process may be traced back to 1996 when the National Commission on Higher Education (NCHE) issued a report which was used to develop policy which identified equity, redress of inequalities, reconstruction and development as its central concerns.²⁹

Following the publication of this report the Higher Education Act was promulgated.³⁰ It provided for the establishment of the Council for Higher Education

- 24 The University Education Act 45 of 1959 restricted entry to universities on the basis of race.
- 25 C Dlamini "The law teacher, the law student and legal education in South Africa" (1992) 19 *SALJ* 595-610 at 598; P Iya "The legal system and legal education in Southern Africa: Past influences and current challenges" (2001) 51 *J of Legal Education* 355-362; L Greenbaum "A history of racial disparities in legal education in South Africa" (2009) 3 *John Marshall LJ* 1-18 at 1.
- 26 Greenbaum (n 25) at 13.
- 27 DoHET *Education White Paper 3: A Programme for the Transformation of Higher Education Government Gazette* 18207 of 15 Aug 1997; Council for Higher Education (CHE) *Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21st Century* (2000) at 25-26. See, also, DoHET *Report of the Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions* (30 Nov 2008) available at http://www.vut.ac.za/new/index.php/docman/doc_view/90-ministerialreportontransformationandsocialcohesion?tmpl=component&format=raw (accessed 28 Jan 2013) (hereafter *DoHET Report*) at 6; and *The Response from the Council of Higher Education to the Report of the Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions* available at http://www.che.ac.za/documents/d000202/CHE_response_to_Ministerial_Committee_Report_Dec2009.pdf (accessed 20 Jan 2013).
- 28 In the discussion that follows, some of the key developments in higher education from 1996 onwards are set out. It is important to note, however, that running parallel to these general developments were developments which pertained specifically to legal education. These will be discussed separately.
- 29 DoHET *Education White Paper 3* (n 27).
- 30 Act 101 of 1997.

(CHE). In 1999 the CHE undertook a general review of the institutional landscape of higher education and in response to this review the Department of Education issued the National Plan for Higher Education. This Plan, which prioritised increased efficiency and graduate outputs, argued that the number of higher education institutions in South Africa should be reduced, primarily through a process of institutional mergers.³¹

By 2003 the process of institutional mergers had reduced the total number of universities from twenty to eleven. Shortly thereafter the formula for funding higher education departments changed and law was placed in the lowest band of funding. In 2008, the Ministerial report on the transformation, social cohesion and the elimination of discrimination in public higher education institutions was published.³²

The next significant development took place in May 2009 when a separate Department of Higher Education and Training was formed.³³ According to its website, the mission of the Department is “to develop capable, well-educated and skilled citizens who are able to compete in a sustainable, diversified and knowledge-intensive international economy, which meets South Africa’s development goals.”³⁴

In 2010, the Department of Higher Education and Training (DoHET) invited stakeholders in education to participate in a summit to re-examine the role of higher education in societal development and transformation.³⁵ The participants agreed that the higher-education sector has a duty to produce socially responsible graduates who are conscious of their role in society, and as leaders of economic development and social transformation. They further acknowledged that market pressures in higher education had prioritised the corporate agenda over the transformative agenda, and agreed that university curricula should be oriented to social relevance and should enable and motivate students to become socially engaged citizens and leaders.³⁶

Whether the general efforts to transform higher education to make it more responsive to the needs of society have been successful is questionable.³⁷ There is

31 DoHET *National Plan for Higher Education* (2002) available at <http://www.dhet.gov.za/Reports%20Doc%20Library/New%20Institutional%20landscape%20for%20Higher%20Education%20in%20South%20Africa.pdf> (accessed 11 Feb 2015).

32 DoHET *Report* (n 27) at 6.

33 See <http://www.dhet.gov.za/SitePages/Home.aspx> (accessed 11 Feb 2015).

34 See <http://www.dhet.gov.za/SitePages/AboutUS.aspx> (accessed 11 Feb 2015).

35 Stakeholder Summit on Higher Education *Transformation Concept Document* (Oct 2009) available at <http://www.cepd.org.za/files/pictures/Stakeholder%20Summit%20on%20Higher%20Education%20Transformation.pdf> (accessed 13 Jan 2013) at 2.

36 Stakeholder Summit on Higher Education *Transformation Declaration* (Apr 2010) available at <http://www.cepd.org.za/files/pictures/Stakeholder%20Summit%20on%20Higher%20Education%20Transformation.pdf> (accessed 13 Jan 2013).

37 HR Hay “If walls could speak: Reflections from visiting a South African higher education classroom: Editorial SAJHE Heltasa Conference” (2008) 22(5) *South African J of Higher Education* 935-947 at 936; IM Ntshoe “National Plan for Higher Education in South Africa: A programme for equity and redress or global competition and managerialism?” (2002) 16(2) *South African J of Higher Education* at 7-10.

a real fear that higher education, as it is being managed, may be replicating and perpetuating the cycle of disadvantage for many students. As regards the LLB degree in particular, Greenbaum concludes that the promised “transformation” is superficial and illusory.³⁸

2.3 National Consultative Forum and Justice Vision 2000

One of the urgent priorities South Africa faced following the transition to democracy in 1994 was the need to address issues relating to the legal profession and legal education.³⁹ This was in order to give effect to constitutional values (most notably equity and access to justice) by ensuring that the legal profession became more demographically representative and more transparently aligned to the constitutional ethos.⁴⁰

To this end, in 1994, the Department of Justice and Constitutional Development (DoJCD) convened a National Consultative Forum (NCF) to which the main stakeholders in the legal profession and in legal education were invited.⁴¹ This gave impetus to the national debate about the transformation of the legal profession and legal education,⁴² which had started in the early 1990s.⁴³

The NCF met in November 1994, and this meeting led to the establishment of a special planning unit of the DoJCD in 1995. The unit produced a strategic plan called “Justice Vision 2000”.⁴⁴ The document was a devastating critique of the legal profession. It argued that the legal profession was alienated from the concerns of citizens and lacked a commitment to justice for citizens. It laid out a plan to transform the justice sector. The document raised questions about the focus and purpose of legal education, but did not make any direct recommendations in this regard.⁴⁵

2.4 Task Group on Legal Education

Although Justice Vision 2000 did not make any direct recommendations about the focus and purpose of legal education, various fora were subsequently convened

38 Greenbaum (n 23) at 365; *Draft Report on LLB Summit* (n 15) at 4.

39 For a discussion of the historical development of legal education in South Africa, see Greenbaum (n 25) at 8-10; Iya (n 25) at 355.

40 Greenbaum (n 23) at 213; S Godfrey & R Midgley *Law Professionals: Report on Scarce and Critical Skills* (South Africa, 2008) at 98.

41 Greenbaum (n 23) at 210-211.

42 *Idem* at 210, 212, 214 and 230-231.

43 Godfrey & Midgley (n 40) at 98.

44 Ministry of Justice *Vision 2000: Five year National Strategy for Transforming the Administration of Justice and State Legal Affairs* (1995), available at <http://www.doj.gov.za/policy/misc/justice2000.htm> (accessed 3 Mar 2012).

45 Greenbaum (n 25) at 23; Godfrey & Midgley (n 40) at 21.

to review aspects of legal education and practice. In April 1995, for example, the Legal Forum of Legal Education met.⁴⁶ It emphasised the need for a greater focus on practical skills in the LLB degree.⁴⁷ Later that same year, the DoJCD requested the law deans to establish a task group on legal education to put forward proposals for a new legal education framework.⁴⁸ Underlying this request was the notion that these proposals would be used to draft new legislation aimed at effecting changes to the structure of legal education.⁴⁹ The task group included government representatives, law deans, and representatives from the legal profession itself.

Ironically – given the emphasis on transformation and the importance of the indigenous context – the task group relied extensively on the *First Report on Legal Education and Training* by the Lord Chancellor’s Advisory Committee on Legal Education and Conduct in England (ACLEC), which had been published on 24 April 1996.⁵⁰ In fact, the impression created is that the task group relied almost exclusively on the ACLEC report. No other resources are referred to, and there is no indication of the process that was followed by the task group in dealing with the monumental task it had been entrusted with. The task group made far-reaching proposals regarding the LLB degree with little, if any, input from educational experts – for which it has been heavily criticised.⁵¹ Despite the far-reaching nature of the task group’s proposal there was a lack of “interrogation of the ramifications of the [proposed] changes, even by law academic leaders”.⁵²

The process followed by the South African task group stands in stark contrast to the process followed by ACLEC, which commenced in October 1992 and culminated with the publication of its report in April 1996.⁵³ ACLEC records that it convened consultative panels and commissioned research projects on matters of especial importance.⁵⁴ It also published consultation papers in respect of which it received written comment and took oral evidence. Its members visited relevant institutions both locally and abroad, paying particular attention to countries where

46 Greenbaum (n 23) at 204.

47 Godfrey & Midgley (n 40) at 99.

48 Greenbaum (n 25) at 25; D McQuoid-Mason “Developing the law curriculum to meet the needs of the 21st century practitioner: A South African perspective” (2004) 1 *Obiter* 101-108 at 101.

49 Greenbaum (n 23) at 202.

50 Available at www.ukcle.ac.uk/files/downloads/407/165.c7e69e8a.aclec.pdf (accessed 5 Mar 2012) (hereafter ACLEC Report).

51 Greenbaum (n 9) at 2; S Woolman, P Watson & N Smith “Toto, I’ve a feeling we’re not in Kansas anymore. A reply to Professor Motala and others on the transformation of legal education in South Africa” (1997) 114(1) *SALJ* 30-64 at 55.

52 J Campbell “The role of law faculties and law academics: Academic education or qualification for practice” (2014) 1 *Stellenbosch LR* at 17.

53 ACLEC was established in Apr 1991 under the auspices of the Courts and Legal Services Act, 1990 (c 41).

54 ACLEC Report (n 50) at 23.

legal education had been subject to scrutiny – notably Australia, Canada, Japan and the USA.⁵⁵

The most significant proposal made by the South African task group was that a four year undergraduate LLB degree should be introduced as the minimum qualification needed to practice as an attorney or an advocate.⁵⁶ The task group did not recommend that the content of the LLB degree be prescribed, despite strong calls for the standardisation of the curriculum.⁵⁷ This echoed the recommendations of ACLEC, and followed the approach adopted by the America Bar Association (ABA).⁵⁸

Although the task group emphasised the need for flexibility regarding the content of the curriculum, it did specify the general objectives to be achieved by the LLB. It also specified certain core recommended subjects to be included in the LLB curriculum. They are identical to those contained in the ACLEC report. The core subjects included “legal ethics”, and “legal skills”. There is no explanation of these terms – nor any discussion of what was envisaged by these subjects. This was consistent with the approach taken by ACLEC, which deliberately chose not to articulate a list of skills and values appropriate for legal practice – for fear of creating false dichotomies between the skills, knowledge and attitudinal dimensions of legal practice.⁵⁹ While it is true that an integrated, holistic strategy to integrate the various dimensions of legal education is required, the starting point must be a proper and common understanding of what it is that must be integrated.

The objectives to be achieved by legal education were listed as “intellectual, integrity and independence of mind; core knowledge; contextual knowledge; legal values and professional skills”.⁶⁰ These terms, and the paragraphs describing each of them, are identical to those in the ACLEC report.⁶¹ Legal values were described as including

a commitment to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to promoting

55 *Ibid.*

56 Greenbaum (n 23) at 232-233.

57 *Idem* at 219.

58 The American Bar Association (which determines whether a law degree will be recognised for the purposes of entry into the profession) does not prescribe any courses other than one in ethics. Thus, effectively, ethics is mandatory for those who wish to become lawyers in the USA. See S Gillers “Eat your spinach?” (2007) 51 *St Louis LJ* 1215-1222 at 1219. This is also the case in Australia and New Zealand. See K Economides & J Webb “Teaching ethics and professionalism: A lesson from the Antipodes” (2001) 4 *Legal Ethics* 91-94 at 92.

59 ACLEC Report (n 50) at 43.

60 *Proposals by the Task Group on the Restructuring of Legal Education* (Jul 1996) in Greenbaum (n 23) App 10 at 485 (hereafter *Proposals by the Task Group*). The list is identical to the one contained in the ACLEC Report (n 50), which is said to have greatly influenced the task group. See D McQuoid-Mason (n 48) at 108; Iya (n 25) at 357; Greenbaum (n 25) at 11.

61 ACLEC Report (n 50).

equality of opportunity, and to ensuring that adequate legal services are provided to those who cannot afford to pay for them.⁶²

Greenbaum comments that by merely naming these attributes, the task group was simply paying lip service to the dominant view of the time, as reflected in the influential international reports on legal education, and that it merely strategically mimicked the ACLEC report.⁶³

The proposals were accepted at the conference of the Society of University Teachers of Law in January 1996.⁶⁴ The task group was mandated to continue with their investigations and to report back to the deans of all South African faculties of law as soon as possible.⁶⁵ In April 1997 the task group met and agreed that curriculum design for the LLB degree would be informed by three fundamental principles, and that an integrated approach to the curriculum should be taken.

The first principle adopted was that the historically dominant Eurocentric approach to law was not necessarily suited to South African society and that the *status quo* should be critically evaluated. The second principle was that vocational skills should be taught in the LLB degree; the skills of language, communication, writing and legal reasoning were specifically mentioned. The third principle was that the LLB degree should actively inculcate ethical values in students.⁶⁶

There is no public record of the process leading to the adoption of these three broadly stated principles, nor of the rationale behind their identification and acceptance. There is also no explanation of how they were intended to be interpreted or implemented. This is perhaps why Greenbaum found that the principles had been implemented with only limited success and in isolated pockets at a few law faculties some ten years later.⁶⁷

2.5 South African Qualifications Authority (SAQA)

There had been an expectation that uniform measurable outcomes leading to the LLB degree would be identified in terms of structures set up by the South African Qualifications Authority (SAQA). However, it was soon realised that learning at

62 *Idem* at 34.

63 Greenbaum (n 23) at 255.

64 Greenbaum (n 25) at 25; Greenbaum (n 23) at 25.

65 *Proposals by the Task Group* (n 60) at 481.

66 McQuoid-Mason (n 48) at 102; D McQuoid-Mason "The four year LLB programme and the expectations of law students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some preliminary results" (2006) 27(1) *Obiter* 166-172 at 166; and D McQuoid-Mason *Transforming Legal Education for a Transformed Society: The Case of South Africa* (paper presented at the international conference on the future of legal education, 2008) available at <http://law.gsu.edu/FutureOfLegalEducationConference/ppt/Friday%20220208/McQuoid-Mason220208.ppt> (accessed 10 Jan 2013). See, also, Iya (n 25) at 355.

67 Greenbaum (n 23) at 208.

such a high level was too complex for this approach to be workable.⁶⁸ The higher-education sector thus secured for itself the right to generate its own qualification standards through the establishment of a Sectoral Standards Generating Body (SSGB). It was also given the right to submit the LLB qualification as a single unit – for registration on the National Qualifications Framework (NQF). The currently registered LLB qualification is SAQA Qualification 22993: Bachelor of Laws, registered at NQF level 8.⁶⁹

The LLB qualification is listed as generic – which means that “the essential minimum required outcomes and their assessment criteria have been identified in an abstract way, and are not linked to a preconceived curriculum (content)”.⁷⁰ This means that all LLB degrees are not required to be identical.

The SAQA exit-level outcomes for the LLB degree include four outcomes relevant to the question of ethics, attitudes and values in the LLB degree. Firstly, “the learner will have acquired a coherent understanding of and ability to analyse fundamental legal concepts, principles, theories and their relationships to values critically”. Secondly, “the learner can solve complex and diverse legal problems creatively, critically, ethically and innovatively”. Thirdly, “the learner is able to manage and organize her or his life and professional activities in the legal field responsibly and effectively”. And, finally, “the learner can participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law ...”.⁷¹

The generic approach is supposedly designed to facilitate innovation in curricular design, and to encourage universities to be stakeholder-driven in their approach to legal education. This reflects typical neo-liberal ideology. Thornton explains that neo-liberalism is usually justified on the basis that it is economically rational, since it is assumed that competition fosters excellence. However, she explains further that the neo-liberal approach neglects considerations such as the social value of higher education, and its meaning for the individual’s development.⁷² Greenbaum notes that although this approach protects academic freedom and allows for flexibility and the development of specialist areas of expertise, it has, ironically, also made it easier for law schools to continue a “business as usual” approach – rather than transforming legal education as anticipated.⁷³ It has also resulted in a situation where there are

68 S Gravett & H Geys (eds) *Teaching and Learning in Higher Education* (Pretoria, 2004) at 12.

69 Information available at <http://regqs.sqa.org.za/viewQualification.php?id=22993> (accessed 23 Oct 2013).

70 *Ibid.*

71 The SAQA Exit Level Outcomes are available at <http://regqs.sqa.org.za/viewQualification.php?id=22993> (accessed 23 Nov 2010).

72 M Thornton “Among the ruins: Law in the neo-liberal academy (2001) 20(3) *Windsor Yearbook of Access to Justice* 3-23 at 7.

73 Greenbaum (n 25) at 27-28; Greenbaum (n 23) at 2.

significant disparities in the manner in which even core courses are taught between universities.

There is thus a concern that without defined objectives regarding content, knowledge and skills, there can be no certainty about the levels of competence achieved by LLB graduates across the country.⁷⁴

2 6 The undergraduate LLB and growing concerns about it

The new four-year undergraduate LLB was introduced in 1998 – by way of the Qualification of Legal Practitioner’s Amendment Act.⁷⁵ The main rationale behind the introduction of the undergraduate degree was to provide a more affordable route to qualification as a legal practitioner – thus ultimately transforming the demographics of the legal profession and enhancing access to justice for citizens. However, this objective has not been achieved. The increased diversity of LLB graduates has not translated into a significant change in the demographics of the private sector legal profession,⁷⁶ despite rising numbers of black South Africans being admitted as attorneys. The trend is even more apparent in respect of advocates.⁷⁷ The public sector is in fact representative but, as Godfrey and Midgely correctly note, this is not relevant to the lack of demographic representivity in the private sector.⁷⁸

Increasingly, concerns about the state of legal education have been expressed by the legal profession, the judiciary, the government, the public and the academy itself. In 2009, these concerns were identified by the South African Law Deans Association (SALDA), as relating to:

- a. the quality of graduates⁷⁹ – particularly their lack of skills and deficient writing,⁸⁰
- b. the appropriateness of the four-year undergraduate degree for the different legal careers available to graduates;⁸¹

74 G Pickett *The LLB Curriculum Research Report* (2009) at 134.

75 Act 78 of 1997.

76 I Scott *et al Higher Education Monitor No 6: A Case for Improving Teaching and Learning in South African Higher Education* (2007) available at http://www.che.ac.za/documents/d000155/HE_monitor_6_ITLS_Oct2007.pdf (accessed 25 Jan 2013); Law Society of South Africa *National Survey of the Attorneys Profession* (2008) available at http://www.lssa.org.za/upload/National_Survey_of_the_Attorneys_Profession_2008.pdf (accessed 20 Jan 2013).

77 Godfrey & Midgely (n 40) at 118-119.

78 *Idem* at 120.

79 Greenbaum (n 25) at 29; P van der Merwe “The trouble with LLB graduates ... (editorial)” (2007) 7 *De Rebus* 1-60 at 2; L Dicker “The future of the four year LLB” (2011) 24(1) *Advocate* 1-43 at 22; S Godfrey “The legal professions: Transformation and skills” (2009) 126(1) *SALJ* 91-123 at 121.

80 Van der Merwe (n 79) at 2.

81 Transcript of meeting between CHE and SALDA held on 22 Jul 2009 (document on file with author).

- c. the reduced and condensed curriculum in the four-year undergraduate degree and its impact of teaching;⁸²
- d. the immaturity of students and their apparent lack of a broader world view;⁸³ and
- e. the suitability of graduates for academic careers.⁸⁴

Similar concerns about legal education and law graduates are being expressed globally.⁸⁵ Lawrence explains that “globally, increased access to university education has resulted in an increasingly diverse student body, with inevitably different levels of preparedness for tertiary education ...”.⁸⁶ In South Africa, the problem is especially serious – given the dysfunctional state of primary and secondary education. High levels of poverty, scarcity of resources and related issues exacerbate South Africa’s problems.

In addition, one must not underestimate the pressure placed on law faculties during this period. They had to contend with a shortened degree, a new emphasis on skills development in the light of the SAQA requirements and the need to infuse the entire curriculum with human rights considerations in light of the new constitutional dispensation in South Africa.⁸⁷ In addition, many universities were grappling with the complex and fraught process of merging with other institutions.

Finally decreased funding for law (from 2004) also had to be managed and adjusted to in this period.

In 2013 SALDA noted that “the four year LLB degree was designed to serve an empowering purpose for a transitional period, but the evidence indicates instead that the degree does not enable students to achieve the requisite graduate attributes within the minimum period”.⁸⁸

2.7 National Legal Education Liaison Committee

The National Legal Education Liaison Committee (NLELC) responded to the perceived crisis in legal education by calling on its participants to engage in a review of all facets of the academic phase of legal education.⁸⁹ A summit was convened in

82 SALDA *Review of the LLB Degree* (13 Oct 2005) (document on file with author).

83 SALDA *Position Paper on Legal Education* (25 Aug 2008) (document on file with author).

84 Transcript of meeting between CHE and SALDA (n 81) at 4.

85 Pickett (n 74) at 145.

86 J Lawrence “Addressing diversity in higher education: Two models for facilitating student engagement and mastery, in higher education in a changing world” *Proceedings of the 28th HERDSA Annual Conference* (Sydney, 3-6 Jul 2005) available at <http://www.herdsa.org.au/wp-content/uploads/conference/2005/papers/lawrence.pdf> (accessed 25 Jan 2012); S Mayson “The education and training of solicitors: Time for change” (2011) 45(3) *The Law Teacher* 278-293 at 280.

87 Campbell (n 52) at 17.

88 SALDA *Position paper on Legal Education* (2013) quoted by Campbell (n 52) at 18.

89 Dicker (n 79) at 23.

June 2008 and a task team consisting of representatives of the judiciary, the Law Society of South Africa (LSSA), the General Council of the Bar (GCB), the SLTSA, the universities and the DoJCD was constituted.

2 8 National LLB Curriculum Research Project

The task team – in consultation with the Council for Higher Education (CHE) – commissioned a National LLB Curriculum Research Project.⁹⁰ The project's main objectives were to assess the nature and extent of the perceived crisis in legal education and to make suggestions for improving the situation.⁹¹

The National LLB Curriculum Research Report was prepared by Georgina Pickett for the Advice and Monitoring Directorate of the Council for Higher Education, and was completed in November 2010. The research took the form of both empirical and desk-top research, and contains an excellent review of legal education in various countries.

Unfortunately, the research report was not widely distributed, nor formally published, because of concerns about the reliability and validity of the empirical research. Nevertheless, it did create the impetus for further engagement between the CHE and SALDA on the question of the LLB qualification.

2 9 The 2013 LLB Summit

The engagement between CHE and SALDA led to the convening of a summit in May 2013. The objective of the summit was to consider the LLB crisis, identify its causes, and develop recommendations and solutions to address the problems and to improve the LLB degree.⁹²

Various delegates gave presentations – each followed by a general discussion. The presentations included those made by SALDA, SLTSA, LSSA, an acting Constitutional Court judge, an education expert, the GCB and the CHE. Thereafter, breakaway groups considered the issues and reported back. Finally, the steering committee presented a draft proposal on the way forward, which was discussed and finalised in a plenary session.⁹³ A document entitled *The Road Ahead: Proposals* was duly adopted.

Concerns that were prominent at the summit included the need to develop knowledgeable, skilled, value-driven and ethical law graduates who would be able to contribute meaningfully to society, who would have a highly developed social conscience, and who would strive towards social justice. Modiri criticises the summit

90 Pickett (n 74).

91 *Idem* at 9.

92 *Draft Report on LLB Summit* (n 15) at 1.

93 *Idem* at 19.

for being overly concerned with indexing the value of legal education by how well it serves the needs of the legal profession and the judiciary, arguing that the question is rather how well legal education contributes to “a new jurisprudence suited to the legal, social and political transformation of South Africa”.⁹⁴

The CHE was requested by the summit to conduct a standard setting process for the LLB degree, in accordance with its general mandate to develop standards for higher education qualifications generally.⁹⁵ The CHE was specifically asked to consider a number of issues – including desirable graduate attributes (including an ethical disposition and commitment to social justice), workplace requirements, and resources.⁹⁶

The standard setting exercise will be followed by a national review of the LLB under the auspices of the CHE in its capacity as a quality council for higher education in terms of the National Qualifications Authority.

2 10 Standard setting for LLB

The development of standards for the LLB is intended to clarify the purpose of the qualification and thereafter to identify the appropriate outcomes to be demonstrated by an LLB graduate.⁹⁷ The standard-setting process will be peer-driven. This means that the applicable standards will be “developed by academics in the first instance and then subject to scrutiny in terms of the requirements of the profession”.⁹⁸

In August 2013, the CHE published *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* which recommended, inter alia, that four year professional degrees like the LLB be extended by one year.⁹⁹ However, in May 2014 the National LLB Task Team indicated that

94 J Modiri “The crisis in legal education” (2014) 46(3) *Acta Academica* 1-24 at 1.

95 This is in accordance with its responsibility to implement the Higher Education Qualifications Sub-Framework (HEQSF) published in *Government Gazette* 36721 of 2 Aug 2013) in terms of the Higher Education Act 101 of 1997 and the Higher Education Amendment Act 39 of 2008. In Jan 2013, the CHE published the second draft of *A Framework for Qualification Standards in Higher Education* available at http://www.che.ac.za/sites/default/files/publications/second_draft_framework_for_qualification_standards_in_higher_education_january_2013.pdf (accessed 11 Feb 2015).

96 *Draft Report on LLB Summit* (n 15) at 21.

97 *A Framework for Qualification Standards in Higher Education* available at http://www.che.ac.za/media_and_publications/frameworks-criteria/second-draft-framework-qualification-standards-higher (accessed 23 Oct 2013). See *Draft Report on LLB Summit* (n 15) at 9-10.

98 *A Framework for Qualification Standards* (n 97) at 4. See *Draft Report on LLB Summit* (n 15) at 9.

99 CHE *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* (2013) available at http://www.che.ac.za/media_and_publications/reports/research (accessed 10 Feb 2015) at 20.

until the standards for the LLB were published and finalised, entry to the legal profession degree would remain a four year undergraduate degree.¹⁰⁰

As at February 2015, the standards have not been published and finalised. It is however no secret that SALDA¹⁰¹ and the legal profession are lobbying for an extended LLB, namely a five year programme “that will better be able to produce well equipped graduates for the legal profession and broader society”.¹⁰²

Academics have stressed the importance of a greater focus on legal ethics in the proposed new LLB degree. Campbell explains in this respect that “a good lawyer, particularly in the current constitutional dispensation, is so much more than one who knows well the law and how to apply it ... our law is values-based, and a deep understanding and inculcation of the values of social justice and ethical practice are as important as knowledge of the law”.¹⁰³

This sentiment was also expressed by Justice Yacoob and representatives of the legal profession at a summit on professional ethics held in February 2014. The summit was organised by the LSSA and it was concluded that “a joint partnership between universities, the law society and the legal profession is required to raise the ethical standard and to make a meaningful contribution and difference in South Africa”.¹⁰⁴ Delegates at the summit appeared optimistic that this could be achieved.

2 11 National review

The national review of the LLB degree will follow the standard-setting exercise and will require the re-accreditation of the degree. The national review will also be peer-driven in the sense that academics teaching in the LLB programme will identify the minimum criteria in terms of which the quality of the programme should be assessed. Thereafter, law schools will be required to engage in a process of self-evaluation – followed by peer evaluation. Possible results of the review include: (i) full re-accreditation; (ii) accreditation with conditions where there are shortcomings

100 N Manyathi-Jele “National LLB task team on access and quality legal education” (2014) 7 *De Rebus* 1-60 at 8.

101 In 2013 SALDA specifically recommended a five year degree programme “with the caveat that this should not be regarded as an opportunity to add more law courses, but rather that non-law modules be introduced to broaden the understanding of law students of the context within which the law operates” (SALDA *Position Paper on Legal Education* (2013) quoted by Campbell (n 52) at 23).

102 *Ibid.* See, also, 2014 STLSA conference, the plenary session chaired by Prof V Jaichand, University of the Witwatersrand, 14 Jun 2014. (Document on file with authors.)

103 F Rabkin *Quality Law Graduates Preferred to Large Numbers of Ill Equipped Graduates* (16 Jan 2014) available at <http://www.ru.ac.za/law/facultynews/qualitylawgraduatespreferredtolargenumbersofillequippedgraduates.html> (accessed 10 Feb 2015) at 2.

104 *Report on Ethics Summit. Summit of Professional Legal Ethics* (Durban, 28 Feb 2014) at 5 (document on file with author).

which could be addressed; and (iii) de-accreditation where the qualification does not meet the minimum criteria, and where there is no possibility of improvement.¹⁰⁵

3 Conclusion

Throughout the process of the transformation of the academic phase of legal education, the importance of teaching legal ethics in the LLB degree has been acknowledged. Unfortunately, however, there has been little engagement with what this commitment actually means. Discussion has tended to be general and vague. There is no doubt that the legal ethics will form an important part of the future LLB curriculum. The CHE is specifically tasked with identifying the underlying purpose of the LLB and the associated values and attitudes that the graduate should demonstrate on completion of the degree.¹⁰⁶ The standards set for the LLB will thus include standards relating to ethics, values and attitudes.¹⁰⁷ It is of vital importance that the mistakes made by the task team on legal education in 1996 and 1997 are not repeated. The mistakes made are identified by Campbell as being the failure to “consider very carefully and to engage critically with the educational rationale” behind the changes made to the LLB degree.¹⁰⁸ Decisions around the teaching of legal ethics should be carefully considered and should have a firm pedagogical foundation which is suitably aligned with the fundamental purpose of the LLB degree. Of course, exactly what this is, is also contested terrain.¹⁰⁹

ABSTRACT

This article considers the historical, political and social context of the LLB degree – especially insofar as it pertains to teaching legal ethics. It reviews the role of the law, the legal profession and the system higher education not only during the apartheid era, but also during the transition to democracy and in contemporary South Africa. In addition, this article also provides a detailed explication of the efforts to transform legal education since 1994. Aspects which are especially relevant to the question of legal ethics in the LLB degree are highlighted. Finally, the current state of legal education in South Africa is discussed.

105 *Draft Report on LLB Summit* (n 15) at 9.

106 *Idem* at 19.

107 *Ibid.*

108 Campbell (n 52) at 18.

106 See the special edition of *Acta Academica* on “Law as a humanities discipline: Transformative potential and political limits” (2014) 46(3) *Acta Academica* 1-195 at 1.

THE CAPE AND NATAL SPECIAL PARTNERSHIPS LIMITED LIABILITY ACTS. A STATUTORY HISTORY

JJ Henning*

1 Introduction

Limited partnerships were provided for in the Cape and Natal colonies by the Cape Special Partnerships Limited Liability Act of 1861¹ (hereinafter “the Cape Act”) and the Natal Special Partnerships Limited Liability Act of 1864² (hereinafter “the Natal Act”) respectively. A limited partnership may be described as the statutory equivalent of the common-law partnership *en commandite*.

The partnership *en commandite*, which developed in the European *ius commune*, confers limited liability on the non-managing partners. The partner *en commandite* is not answerable to the creditors of the firm, but solely to his fellow partners, to whom he is only accountable for his share of partnership losses up to the amount of his agreed capital contribution. In this way, a partner *en commandite* is shielded from the partnership creditors, and the limit of his partnership liability is predetermined.³

1 Act 24 of 1861, amended by the Cape Special Partnerships Limited Liability Amendment Act 12 of 1906.

2 Enacted by Law 1 of 1865, of which s 14 provided: “The Law shall be cited for all purposes as ‘The Special Partnerships Limited Liability Act, 1864’.”

3 HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Cape Town, 1960) at 699.

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A limited partnership consists of one or more general partners, who are liable for all the debts and obligations of the firm and entitled to manage the firm's affairs, as well as one or more limited partners, whose liability for the debts and obligations of the firm is limited in amount and who are excluded from management functions. The limited partnership is thus designed to allow passive investors in an enterprise to share profits without becoming responsible for losses and liabilities beyond the amount they invest in the business. The function of the limited partnership differs from that of the recently developed limited liability partnership, which enables partners who are actively involved in the business of their partnership also to limit their liability for the partnership obligations.⁴

Recently, there has been a renewed interest in and several initiatives aimed at the modernisation of limited partnership legislation in several jurisdictions, including the United Kingdom, New Zealand, the United States and Ireland.⁵ In various jurisdictions, the tax-transparent structure of the limited partnership makes it an attractive vehicle for institutional investors such as pension funds or insurance companies, which are partially or wholly tax-exempt. It enables them to invest jointly with tax-paying entities, such as property companies, without losing their tax benefits. The same features have made limited partnerships suitable for use in urban regeneration projects, bringing together public authorities, institutional investors and property developers. In Germany, the hybrid limited partnership, the *GmbH & Co KG*, with a private company as general partner and the limited partners as shareholders in the private company, has for various reasons attained significant popularity as a vehicle for small and medium business enterprises. The recent rise of limited and commanditarian partnerships with corporate partners only, have increased the importance of these partnerships as vehicles for unincorporated joint ventures.⁶

- 4 See, in general, RW Hillman, AW Vestal & DJ Weidner *General and Limited Liability Partnerships under the Revised Uniform Partnership Act* (St Paul Minnesota, 1996) at 299; E Snyman & JJ Henning "Developments in the Anglo-American law of partnership: The limited liability partnership as a new form of business enterprise" (2002) *TSAR* at 129.
- 5 See, eg, United Kingdom Legislative Reform (Limited Partnerships) Order 2009; New Zealand Limited Partnerships Act 1 of 2008; United States Uniform Limited Partnership Act of 2001 available through Westlaw at http://international.westlaw.com/toc/default.wl?rs=WLIN15.07&scdb=ULA&vr=2.0&abbr=ULA&scrlt=CLID_DB56138932638&rp=%2ftoc%2fdefault.wl&sp=intufs-000&fn=_top&tf=2004&mt=314&tc=29&sv=Full; Ireland Investment Limited Partnerships Act 24 of 1994.
- 6 See, in general, C Jaehne & JJ Henning "Recent developments in German and European Union company law affecting the *Gesellschaft mit beschränkter Haftung*" 2007 *International and Comparative Corporate Law J* at 21; W Giesen *Die GmbH & Co als Rechtsform der Kooperation im Sinne der Ausgliederung und Übertragung von Funktionen wirtschaftlich und rechtlich selbständiger Unternehmen auf ein gemeinsames Unternehmen* (Münster, 1986) at 14; JJ Henning *Perspectives on the Law of Partnership in South Africa* (Cape Town, 2014) at 203.

The Cape and Natal Acts were introduced in the two colonies notwithstanding the reception of the partnership *en commandite* and its recognition as a feature of South African law as early as the first half of the nineteenth century.⁷

Although the limited partnership did not prove very popular, and the Cape and Natal enactments were eventually repealed in South Africa, the importance of these colonial statutes in the context of the South African law of partnership should not be underestimated or ignored. It should be kept in mind that these colonial statutes represent the only stand-alone, contiguous partnership legislation ever introduced in a South African context. Also, the Cape legislation found wider application in another four jurisdictions in Southern Africa.

Although the United Kingdom was identified as the statutory origin of this legislation, its Limited Partnerships Act 1907⁸ was introduced more than forty years after the Cape and Natal statutes. In view of some uncertainty surrounding their true origin, this contribution provides an overview of the statutory history of the two colonial limited partnership statutes. The focus is on the relevant statutory provisions in various jurisdictions forming part of this history.⁹

2 Origins and historical background

2 1 France

2 1 1 Introduction

Limited partnership legislation in common-law jurisdictions was initially inspired by the French *société en commandite*.¹⁰ The roots of the partnership *en commandite* can be traced back with certainty to at least the Italian *commenda* contract of the Middle Ages, although it probably dates back to much earlier constructs.¹¹ In essence, the *commenda* was an arrangement by which an investor entrusted capital to a trader for use in mercantile enterprises, provided that the investor, while not in name a party to the enterprise and though entitled to a share of the profits, would not be liable for

7 *Watermeyer v Kerdel's Trustees* 1834 3 Menz 424.

8 Limited Partnerships Act 1907 (7 Edw 7, c 24).

9 I sincerely thank the reference staff of the libraries of the University of the Free State (especially Mrs Hesma van Tonder), the University of Pretoria and PriceWaterhouseCoopers, as well as Mr Michael Ashe QC SC (Recorder of the Crown Court, England and Wales, and Master of the Bench of the Middle Temple), for making available copies of legislation that are not freely accessible on the internet.

10 R I Anson Banks *Lindley and Banks on Partnership* (London, 2010) at 985-986.

11 See W Endemann *Studien in den romanisch-kanonistischen Wirtschafts- und Rechtslehre* (Berlin, 1874) at 361-364; AD Kessler *A Revolution in Commerce* (New Haven & London, 2007) at 141; FJFM Duynstee *Commanditaire vraagstukken* (Zwolle, 1940) at 9; FJ Troubat *The Law of Commendatory and Limited Partnership in the United States* (Philadelphia, 1853) at 34; TM Bergstedt "Partnership in *commendam* – Louisiana's limited partnership" (1960) *Tulane LR* at 816.

losses beyond the amount of his investment.¹² This concept of limiting the liability of non-managing investors spread to French commercial law, emerging as the *société en commandite*, the precursor of both the present-day commanditarian partnership on the European continent¹³ and the limited partnership in Anglo-American law.¹⁴ From France, the *société en commandite* was incorporated into Roman-Dutch law and received in South African law under its French name. Although Van der Linden referred to it as the *sociëteit en commendite*, Van der Keessel correctly described it as the *société en commandite*.¹⁵

2 1 2 Ordinance Pour le Commerce of March 1673

In 1669, the merchants of Paris, feeling the need for an improved body of commercial law, applied to Louis XIV for constructive action. Eventually, this resulted in the promulgation of the Royal Ordinance of March 1673 entitled *Pour le Commerce*.¹⁶ Title IV of the Ordinance devoted fourteen articles to the regulation of commercial partnerships, including partnerships *en commandite*. Article I provided that all partnerships, whether general or *en commandite*, had to be created by a written instrument either before notaries or under “private signature”. Articles II to VI detailed the requirements concerning the public registration and advertisement of instruments of partnership between merchants and tradesmen.¹⁷ Pothier maintains

12 *Ibid.*

13 For example, *Kommanditgesellschaft* (Germany), *Commanditaire vennootschap* (the Netherlands).

14 Endemann (n 11) at 361-364.

15 Van der Linden *Regtsgeleerd, Practicaal, En Koopmans Handboek* (Amsterdam, 1806) at 4 1 12 discusses it as “De Sociëteit, genaamd *en commendite*”, while Van der Keessel *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (Amsterdam/Cape Town, 1967) at 3 21 7 described it as “de societatis ad exemplum earum, que in Gallia vocantur sociétés en commandite, contractis”. See, also, Van Leeuwen *Het Rooms-Hollandsch Recht Op nieuws overgezien en met Aantekeningen uitgebreid door CW Decker* (Amsterdam, 1780) 4 23 1 n (b); JM Barels *Advysen over den Koophandel en Zeevaart* (Amsterdam, 1781) 2 9 and 2 60.

16 Also referred to as the *Code Savary* or Colbert’s *Code Marchand*. See WY Bewes *The Romance of the Law Merchant: An Introduction to the Study of International and Commercial Law, with Some Account of the Commerce and Fairs of the Middle Ages* vol 1 (London, 1923) at 78-79; SE Howard “Business partnerships in France before 1807” (1932) *The Accounting Review* at 242. See, also, CJ Forrester “The codification of commercial laws with special reference to the French Ordinance of 1673 and to accounting” (1999) *An Invitation to Accounting History* available at <http://www.cs.trinity.edu/rjensen/readings/history/forrester/a03codes.htm> (accessed 1 Dec 2014), who points out that the decisions of the Italian *Rote de Genes (Rota Genua)* provided some basis for codification. These decisions were lauded and widely accepted up until the mid-eighteenth century, only to be forgotten in comparison with French commercial legislation.

17 In these cases, a summary had to be registered at the office of a local official and published on a bulletin board in a public place, failing which the acts and contracts performed under such partnership would be nullified. Such notice had to contain the names, surnames, ranks and residences of the members of the partnership, and the duration contemplated for its operations. Extension of the duration of the partnership and changes in membership had to be registered and published. For a detailed discussion of these requirements, see RJ Pothier *A Treatise on the Contract of Partnership* (London, 1854) at 4 2 82-83.

that these formalities of registration and publication fell into disuse and were no longer observed.¹⁸

Articles VII and VIII distinguished between general members (*associés*) and members *en commandite*. All general members were jointly and severally liable for the debts of the partnership. Members *en commandite* were not liable, except up to the amount of their investment.¹⁹ Article VIII stipulated that this limited liability was subject to the condition that the name of the partner *en commandite* may not form part of the firm or partnership name. From this condition, the inference was made²⁰ that the partner *en commandite* may neither contract on behalf of the partnership nor take part in the management of the partnership.²¹ Although the ordinance was silent as to what effect the *en commandite* partner's participation in management would have on his limited liability, a considered body of opinion later existed that such participation would lead to the imposition of full personal liability.²² The remaining articles of Title IV²³ provided for a system of compulsory arbitration of disputes between or among partners²⁴ and, notably, that the foregoing provisions were binding upon the widows, heirs and creditors (legal claimants) of the partners.²⁵

18 *Ibid.*

19 According to Pothier (n 17) at 4 2 82, 2 2 60-63, 4 2 82 and 6 2 102, a partnership *en commandite* was entered into by a trader with a private person (a person not in trade) for a trade that was to be carried on in the name of the trader only, and to which the contracting party (private person) contributed only a certain sum of money, which he brought into the capital of the partnership under an agreement that he was to have a certain share of the profits, if there were any, and in the contrary event, to bear the same share of losses, in which he would nevertheless only be bound to the extent of the capital he had brought into the partnership.

20 Duynstee (n 11) at 41.

21 *Idem* at 40-41.

22 AD Kessler "Limited liability in context: Lessons from the French origins of the American limited partnership" (2003) *J of Legal Studies* at 511.

23 Articles IX-XIV.

24 The Ordinance required that a clause binding members to submit such disputes to arbitrators had to be inserted in every deed or instrument of partnership. In the absence of such a clause, one member could nominate an arbitrator, and in the event of the failure of the other member(s) to take similar action, the court would act in his or their stead. Thus, if appointed arbitrators died or were absent for long, substitutes had to be appointed, and the court would have acted to this end if the members did not themselves initiate action. Arbitrators who were unable to agree could appoint an umpire without the disputants' consent, failing which the court could make such an appointment. The ordinance instructed arbitrators to arrive at decisions on the basis of documents and memoranda submitted by the disputants, without court formality and without the necessity of the interested parties being physically present. Arbitration decisions that were arrived at in this way and involved members of a partnership in trade, commerce and banking had to be confirmed in a court.

25 Articles VII and XIX. See Pothier (n 17) at 4 3 61; Howard (n 16) at 243-244. Note that, at that time, the heirs of a partner were collectively liable for all of the partner's debts, although each was liable only to the extent of the share that he was entitled to as heir of the deceased. See Pothier (n 17) at 6 96.

The Ordinance of 1673 may be thought of as having provided, in Title IV, the first codified partnership law for the French business community.

2 1 3 Code de Commerce of 1807

Title IV of Louis XIV's Ordinance *Pour le Commerce* of 1673 formed the basis of the Book 1 Chapter III of the French *Code de Commerce* of 1807, which dealt with commercial partnerships.²⁶

The *Code de Commerce* also provided for detailed registration and publication requirements of commercial partnerships, including partnerships *en commandite*, along the lines of the Ordinance.²⁷ Partnerships were commercial when their object was to carry on the acts of commerce detailed in articles 632 and 633 of the *Code de Commerce*.²⁸

According to article 23 of the *Code de Commerce*, a partnership *en commandite* was contracted between one or more partners who were jointly and severally liable for partnership obligations (*commandites*), and one or more partners who were mere holders of capital, called *commanditaires* or partners *en commandite*. It was carried on under a firm or partnership name, which necessarily had to be that of one or more of the partners who were jointly and severally liable. Although it appears that at one time, the partnership *en commandite* was carried on in the name of a single manager only, it was later carried on in the name of a firm composed of two or more managing partners, and the capital was often divided into shares.²⁹

In a partnership *en commandite* with several partners jointly and severally liable by name at the same time, whether all managed together or one or more managed on behalf of all, the partnership was simultaneously an ordinary commercial partnership trading under a joint or firm name (*en nom collectif*) with respect to these partners, and a partnership *en commandite* with respect to those who merely provided the capital.³⁰

26 See L Goirand *The French Code of Commerce* (London, 1860) at 4.

27 Articles 41-46. See OD Tudor *A Treatise on the Contract of Partnership by Pothier* (London, 1854) at 58. Articles 42-46 were repealed in 1867. In addition to setting detailed registration requirements, arts 43 and 44 required the extract of the contract to contain the Christian names of all partners, except the partners *en commandite*, and had to be signed by all partners, except the partners *en commandite*.

28 These included all operations of public banks; operations relating to exchange banking and commission; the purchase of produce and merchandise for resale or for letting and hiring; any enterprise of manufacture, commission or carriage by land or water; any undertaking to supply goods; agencies; commission agencies; establishments for sales or auction and public amusements; all obligations between traders, merchants and bankers, and transactions in relation to bills of exchange as well as the remittance of money from one place to another.

29 Tudor (n 27) at 42.

30 *Code de Commerce* art 24.

The partner *en commandite* was only liable for partnership losses to the amount of the funds that he had contributed, or ought to have contributed, to the partnership.³¹ The name of the partner *en commandite* was not allowed to form part of the style of the firm or partnership name.³² The partner *en commandite* was not entitled to perform any act of management nor to be employed in the business of the partnership, not even by virtue of a power of attorney.³³ In the case of a contravention of this prohibition, the partners *en commandite* were liable, jointly and severally with the general partners of the firm, for all the debts and liabilities of the partnership.³⁴ This provision was later modified to provide that the liability of the partner *en commandite* was limited to the debts and obligations arising from the acts of management performed by him, and that, according to the number and importance of the acts, he could be declared jointly and severally liable for all the obligations of the partnership, or for one or some only. In addition, it was stipulated that partners *en commandite* were not rendered liable by acts of mere counsel, advice or guidance. It appears, therefore, that they were able to tender advice, check the operations and generally supervise the transactions of the partnership, without contravening the prohibition.³⁵

It was also possible for the capital of a partnership *en commandite* to be divided into shares, without any derogation of the rules established for this kind of partnership.³⁶ Later, a definite distinction was drawn between the ordinary partnership *en commandite*, referred to as the *société en commandite simple*, and the partnership *en commandite* with freely transferable shares, known as the *société en commandite par actions*.³⁷

It should be noted that the French *Code Civil* provided that if it had been stipulated that, in the event of one of the partners' death, the partnership had to continue with his heir, such arrangement needed to be followed,³⁸ although it seems that this was only feasible in partnerships not established *intuitae personae*.³⁹

31 *Code de Commerce* art 26.

32 *Code de Commerce* art 25.

33 *Code de Commerce* art 27.

34 *Code de Commerce* art 28.

35 Goirand (n 25) at 565.

36 *Code de Commerce* art 38.

37 Goirand (n 26) at 566. See A Santuari "The *société en commandite par actions* in France during the first half of the nineteenth century: Historical developments and comparative outlines" (1997) 3 *Fundamina* at 104.

38 *Code Civil* art 1868: "If it has been stipulated that, in case of the death of one of the partners, the partnership shall continue with his heir, or only between the surviving partners, such arrangements shall be followed: in the second case, the heir of the deceased has a right only to a distribution of the partnership, regard being had to the situation of such partnership at the time of the death, and he has no participation in any ulterior claims, except in so far as they are a necessary consequence of what was done before the death of the partner whom he succeeds." Translation available at http://www.napoleon-series.org/research/government/code/book3/c_title09.html#chapter4 (accessed 6 Nov 2014). See, also, Tudor (n 27) at 106.

39 Goirand (n 26) at 93.

2 2 Irish “Anonymous Partnerships Act” of 1781

English common law does not permit a partner to limit his liability for firm debts to his contribution to its capital, and limited partnerships analogous to partnerships *en commandite* had to be introduced by statute.⁴⁰ Limited partnerships, therefore, are creatures of statute in common-law jurisdictions.

The first limited partnership legislation enacted in a common-law jurisdiction appears to be the Irish “Act to promote Trade and Manufacture, by regulating and encouraging Partnerships” of 1781,⁴¹ often referred to as the Anonymous Partnerships Act. This Irish statute, which took effect on 24 June 1782,⁴² provided for acting partners and anonymous partners under a written partnership contract signed by the parties and witnessed⁴³ and registered at the public registry office.⁴⁴

The acting partners were to manage and conduct the business of the partnership under their collective names, with the addition of “and company”. Every acting partner was fully liable for all partnership obligations.⁴⁵ The statute granted limited liability to anonymous partners, provided that they took no part in the management of the partnership and their names were not mentioned in the firm of the partnership. Such partners’ liability was limited to the “full sums subscribed and paid” by them.⁴⁶ They had to pay a quarter of their subscribed contributions to the acting partners upon the execution of the partnership contract, and the balance no later than at the end of the first year. If not, anonymous partners forfeited their contributions and became liable to the partnership creditors for the unpaid balance.⁴⁷

The partnership could be formed for the purpose of buying and selling by the gross, or wholesale, or for establishing or carrying on any manufacture or business,⁴⁸ although the business of “bankers or discounters of money for shopkeepers selling by retail” was expressly excluded.⁴⁹ There was no limitation on the number of partners.

40 *Walburn v Ingilby* 1 My & K 61; 39 ER 604; Tudor (n 27) at 76; I’Anson Banks (n 10) at 985-986; FM Burdick *The Law of Partnership including Limited Partnerships* (Boston, Mass, 1917) at 383.

41 21 & 22 Geo III, c 46.

42 In 1782, Ireland obtained legislative independence from Great Britain for the first time since 1495. In 1800, the British and Irish parliaments both passed Acts of Union, which merged the Kingdom of Ireland and the Kingdom of Great Britain with effect from 1 January 1801 to create a United Kingdom of Great Britain and Ireland. See, in general, P Higgins & JS Donnelly *A Nation of Politicians: Gender, Patriotism, and Political Culture in Late Eighteenth-century Ireland* (Madison, 2010).

43 Section 1.

44 Section 13. The partnership contract had to contain, *inter alia*, the names of all the parties, specifying who the acting partners and the anonymous partners were, and the sums respectively subscribed for by each.

45 Section 2 of the “Act to promote Trade and Manufacture, by regulating and encouraging Partnerships” 1781 (21 & 22 Geo III, c 46).

46 *Idem* s 7.

47 *Idem* s 4.

48 *Idem* s 1.

49 *Idem* s 18.

Annual financial statements had to be drawn up and signed by all the acting partners and at least two thirds of the anonymous partners.⁵⁰

It has been argued that the Irish statute interfered too much with what should have been left to the discretion of the parties.⁵¹ For example, contributions to the partnership could not be less than £1 000 per partner and not more than £50 000,⁵² certain business activities were expressly excluded, the term of the partnership was limited to fourteen years,⁵³ and the parties could not withdraw more than 50% of the profit annually.⁵⁴

An interesting and progressive feature of this legislation was contained in section 8, which provided that the partnership was not dissolved by death or bankruptcy of all or any of the anonymous partners, unless agreed otherwise. The share of the deceased partners could be inherited, transferred, assigned and even sold at a public auction, and the new owner of the share then had to “stand in the place of the deceased ... partner during the term of the ... partnership”.⁵⁵ Similarly, the legislation stipulated that if there were two or more acting partners, the death or bankruptcy of any of them, while one “survived in full credit”, will not dissolve partnership, unless agreed otherwise.⁵⁶ Provisions such as these disappeared from limited partnership legislation during the nineteenth century and reappeared only in the twentieth century as a modification of the general law of partnership.⁵⁷

The provisions of the Irish statute were so foreign to England that the legislation was included as an appendix to Ker’s *Report on the Law of Partnership*⁵⁸ in 1837,⁵⁹ stating that the effect of the legislation could not be considered beneficial. It appears that after fifty years’ experience, few persons had acquainted themselves with, and made use of, the provisions of the statute. It has been suggested that the risk associated with accidental non-compliance with the strict and minute provisions of this act may have been one of the main causes that deterred capitalists from utilising it.⁶⁰ It was repealed in 1862.⁶¹

50 *Idem* s 5.

51 See Anon “Limited liability in partnerships” (1855) *Law R & Quarterly J of British & Foreign Jurisprudence* at 355.

52 Section 1 of the “Act to promote Trade and Manufacture, by regulating and encouraging Partnerships” 1781 (21 & 22 Geo III, c 46).

53 *Idem* s 1.

54 *Idem* s 6.

55 *Idem* s 8.

56 *Ibid.*

57 See *infra* and *cf* UK Partnership Act, 1907 (7 Edw VII, c 24) sec 6(2).

58 B Ker *Report on the Law of Partnership* vol 44 (London, 1837) at 439.

59 Appendix 22 *idem* at 21.

60 Ker (n 58) at 21. See, also, SJ Strahan & KM Oldham “Book review of *The Law of Partnership*” (1924) *J of the Societies of Public Teachers of Law* at 45.

61 By the Companies Act 1862 (25 & 26 Vict c 89).

The limited partnership was re-introduced in Ireland only with the enactment of the Limited Partnerships Act of 1907⁶² in the United Kingdom, with effect from 1 January 1908.

2.3 Revised New York Limited Partnerships Act of 1829

The earliest legislation inspired by the provisions of the 1807 French *Code de Commerce* and introduced in a common-law jurisdiction, appears to be the New York “Act relative to Partnerships” of 1822.⁶³ It also serves as the first instance in the history of New York legislation when the statute law of any country other than England was closely imitated and adopted.⁶⁴ It was passed on 17 April 1822, after which Connecticut soon followed with a similar statute.⁶⁵ The New York statute was revised in 1829. This statute “[o]f limited partnerships”, as it is termed in the New York Revised Statutes of 1829, was soon re-enacted in almost all of the existing states,⁶⁶ so that at the turn of the nineteenth century, legislative authority for limited partnerships existed in nearly every political jurisdiction in the United States.⁶⁷ These were followed by Uniform Limited Partnership Acts in the twentieth and twenty-first centuries.⁶⁸

For the purposes of this discussion, the influential New York Revised Limited Partnership Act of 1829⁶⁹ will serve as basis.⁷⁰

62 Limited Partnerships Act 1907 (7 Edw VII c 24).

63 Burdick (n 40) at 383.

64 Troubat (n 11) at 26.

65 Both of these states passed statutes in the year 1822 – New York on 17 Apr and Connecticut on 29 May. The two statutes were very similar, although Connecticut courts strenuously denied that its statute was in any way copied from New York’s, insisting that both were derived from the French law. See EA Gilmore *Handbook on the Law of Partnership including Limited Partnerships* (St Paul, Minn, 1911) at 594.

66 Among the earliest were Massachusetts on 10 Mar 1835; Pennsylvania on 21 Mar 1836; New Jersey on 9 Feb 1837; Michigan on 18 Mar 1837; Virginia on 29 Mar 1837; Mississippi on 15 Feb 1838; Vermont on 19 Nov 1839; Ohio on 24 Jan 1846; Illinois on 23 Feb 1847; Kentucky on 26 Feb 1850; New Hampshire on 13 Jul 1855; and Indiana on 5 Mar 1859.

67 FH O’Neal “Comments on recent developments in limited partnership law” (1978) *Washington University Law Quarterly* at 670.

68 The full texts of all Uniform Limited Partnership Acts are available through Westlaw at http://international.westlaw.com/toc/default.wl?rs=WLIN15.07&scdb=ULA&vr=2.0&abbr=ULA&scrlt=CLID_DB56138932638&rp=%2ftoc%2fddefault.wl&sp=intufs-000&fn=_top&tf=2004&mt=314&tc=29&sv=Full). According to the National Conference of Commissioners on Uniform State Laws, the new Limited Partnerships Act of 2001 is a stand-alone act. As a result, it is far more comprehensive and complex than its immediate predecessor.

69 Termed “Of limited partnerships” in the New York Revised Statutes of 1829 (New York Code Article 8A) (hereafter the New York Revised Limited Partnership Act of 1829).

70 See C Crary *The Law in Respect to Limited Partnerships and Compromises by Partners and Joint Debtors in the State of New York* (Albany, 1866) at 5.

A New York limited partnership consisted of one or more general partners and one or more special partners.⁷¹ The general partners were liable jointly and severally for partnership debts, and were the only partners authorised to transact business on behalf of, sign for and bind the partnership.⁷² A special partner contributed a specific sum in cash as capital, and was not liable for the debts of the partnership beyond the specific sum contributed.⁷³

A limited partnership could be formed for the transaction of any mercantile, mechanical or manufacturing business. Interestingly, banking was excluded, similar to the Irish legislation, and as a further limitation, insurance as well.⁷⁴ Persons who sought to form a limited partnership had to draw up a certificate, containing the prescribed detailed information required, signed by each partner.⁷⁵ Detailed requirements were also set for the acknowledgement by witnesses, certification and filing of the certificate,⁷⁶ which had to be filed at the office of the clerk of the county in which the principal place of business of the partnership was to be situated. It had to be recorded in a register open for public inspection.⁷⁷ At the same time, the general partners had to file an affidavit stating that the special partners had paid the sums specified in the certificate into the common stock in cash.⁷⁸ Thereafter, the terms of the partnership had to be published in two newspapers in the county where the registration had taken place.⁷⁹ Every renewal or continuation of the partnership, and any alteration made to any other matter specified in the certificate, had to be similarly certified, acknowledged and recorded.⁸⁰

The business of the partnership had to be conducted under a firm in which only the names of the general partners had to be inserted, without the words “and company”. If the name of any special partner was used in the firm with such partner’s consent, he was deemed a general partner.⁸¹ The general partners were accountable to each other and to the special partners for the management of the concern.⁸²

71 Section 2 of the New York Revised Limited Partnership Act of 1829.

72 Section 3 of the New York Revised Limited Partnership Act of 1829.

73 Section 2 of the New York Revised Limited Partnership Act of 1829.

74 Section 1 of the New York Revised Limited Partnership Act of 1829.

75 *Inter alia* containing the name of the partnership; the general nature of the business; the names of the general as well as the special partners, specifying which is which; their respective places of residence; the amount of capital contributed by each special partner; and the dates of commencement and termination of the partnership.

76 In essence, the same formalities for acknowledgement and certification as required for conveyances of land had to be complied with.

77 Section 6 of the New York Revised Limited Partnership Act of 1829.

78 Section 7 of the New York Revised Limited Partnership Act of 1829.

79 Section 9 of the New York Revised Limited Partnership Act of 1829.

80 Sections 11 & 12 of the New York Revised Limited Partnership Act of 1829.

81 Section 13 of the New York Revised Limited Partnership Act of 1829.

82 Section 18 of the New York Revised Limited Partnership Act of 1829.

A special partner could not transact any business on account of the partnership nor be employed as an agent, attorney or otherwise for that purpose. However, he could from time to time examine the state and progress of the partnership's concerns and advise as to their management. If he acted contrary to these provisions and interfered in the management, he was deemed to be a general partner.⁸³

If it appeared that, by the payment of interest or profits to a special partner, the original capital had been reduced, that partner was bound to restore the amount necessary to make good his share of the capital.⁸⁴ In the event of insolvency or bankruptcy of the partnership, a special partner could under no circumstance claim as a creditor until the claims of all the external creditors of the partnership were satisfied.⁸⁵

Several provisions were devoted to fraud and misconduct in insolvency, and the concomitant liabilities of and consequences for the partners.⁸⁶

Compared to the original legislation of 1822, the revised New York statute of 1829 created a much more modern impression and reflected more considered drafting. The 1822 statute did not limit the scope of the activities of limited partnerships in general, while the revised Act did.⁸⁷ As already stated, the original and the revised statute prohibited the partnership from engaging in banking or insurance. Neither contained the strict limitations on the minimum and maximum amounts that could be contributed by special partners, on the duration of the partnership and the percentage of the profits that could be withdrawn annually, found in the Irish statute of 1781.⁸⁸ On the other hand, neither the original nor the revised New York statute contained provisions similar to those of the Irish statute that stipulated the non-dissolution of the partnership and the succession of a special partner in the event of his death or bankruptcy, or the non-dissolution of the partnership in the event of the death of one of the several general partners. In fact, provisions stipulating that the limited partnership would not be dissolved upon the death or bankruptcy of a limited partner were only introduced by the Limited Partnerships Act of 1907⁸⁹ in the United Kingdom and the Uniform Limited Partnership Act of 1916⁹⁰ in the United States.

Nevertheless, in the same way that the Irish statute of 1781 was included in Ker's *Report on the Law of Partnership* in 1837 as an example of what was regarded ill-considered partnership legislation, the New York Revised Limited Partnership Act of

83 Section 17 of the New York Revised Limited Partnership Act of 1829.

84 Section 16 of the New York Revised Limited Partnership Act of 1829.

85 Section 23 of the New York Revised Limited Partnership Act of 1829.

86 Sections 19-22 of the New York Revised Limited Partnership Act of 1829.

87 Section 1 of the New York Limited Partnership Act of 1822.

88 "Act to promote Trade and Manufacture, by regulating and encouraging Partnerships" of 1781 (21 & 22 Geo III, c 46).

89 Limited Partnerships Act 1907 (7 Edw 7, c 24) s 6(2).

90 Limited Uniform Partnership Act of 1916 ss 19-21.

1829 was included as an appendix to Ker's report⁹¹ as an example worth following in framing similar legislation in the United Kingdom.⁹² The working of the statute was hailed as beneficial, as it created the means to direct capital to commercial enterprise that would otherwise have been employed elsewhere.⁹³ It also enabled a retiring trader to leave a portion of his gains in the business and thereby pass on the business to his successors, which he might not have been inclined to do if his entire fortune were liable to the partnership engagements.⁹⁴

Previously, little was known about the effects of the New York Revised Limited Partnership Act of 1829, but, fortunately, a very comprehensive analysis of the use of the limited partnership in nineteenth-century New York City was recently completed. It appears that the limited partnership was adopted by a surprisingly large number of firms, and that these partnerships had more capital, boasted lower rates of failure and had fewer members with kinship ties than ordinary partnerships. The results suggest that the introduction of the limited partnership facilitated investments that would not have occurred in the absence of this legislation.⁹⁵

2 4 Colonial statutes in Australia and New Zealand

Twomey⁹⁶ maintains that the Irish Anonymous Partnerships Act was adopted as the Anonymous Partnerships Act of 1853 in New South Wales,⁹⁷ in South Australia,⁹⁸ and in Victoria.⁹⁹ However, Fletcher¹⁰⁰ believes that only the concept of limiting liability was adopted in limited partnerships statutes in New South Wales, Victoria and South Australia in the 1850s.¹⁰¹

Upon closer inspection, it appears that the statutes of New South Wales, South Australia and Victoria were not designated "Anonymous Partnerships Act", but rather "An Act to Legalise Partnerships with Limited Liability" in New South Wales and Victoria, and "An Act to Legalize Partnerships with Limited Liabilities" in South Australia. These statutes were almost identical for all intents and purposes, and all three were enacted in the course of 1853. All three provided for limited partnerships consisting of general and special partners, and not for anonymous partnerships

91 Ker (n 58) at 439.

92 *Idem* at 22.

93 *Idem* at 21.

94 *Ibid.*

95 E Hilt & K O'Banion "The limited partnership in New York 1822–1858: Partnerships without kinship" (2009) *The J of Economic History* at 615.

96 See M Twomey *Partnership Law* (Dublin, 2000) at 9.

97 17 Vict c 9.

98 17 Vict c 20.

99 17 Vict c 5.

100 KL Fletcher *Higgins and Fletcher The Law of Partnership in Australia and New Zealand* (Sydney, 1996) at 267.

101 *Ibid.*

consisting of active and anonymous partners, as in the Irish statute. Queensland, which inherited this Act upon separation from New South Wales, retained it in its original form until 1989, when the Partnerships (Limited Liability) Act of 1988 took effect.¹⁰²

New Zealand adopted its Special Partnerships Act in 1858, which provided for special partnerships consisting of general and special partners.¹⁰³ This was preceded by similar legislation in the provinces of Auckland and Wellington.¹⁰⁴ Except for the difference in terminology, referring to “special” instead of “limited” partnerships, the New Zealand statute was almost identical to the three Australian statutes. According to Fletcher, New Zealand remained the sole user of this “first wave” legislation.¹⁰⁵ The 1858 Special Partnerships Act was later consolidated into the Mercantile Laws Act of 1880¹⁰⁶ and substantially re-enacted in part 2 of the Partnerships Act of 1908.¹⁰⁷ The latter was recently repealed by the Limited Partnerships Act of 2008.¹⁰⁸

The three Australian statutes and the New Zealand Act authorised limited or special partnerships consisting of any number of members to transact agricultural, mining, mercantile, mechanical, manufacturing or other business, except banking and insurance. The members of these partnerships could be either general or special partners.¹⁰⁹ General partners were liable jointly and severally for partnership debts and obligations. Special partners contributed specific sums of money as capital to the common stock, beyond which they were not liable for any of the partnership debts.¹¹⁰

102 Partnerships (Limited Liability) Act 78 of 1988. KL Fletcher *International Encyclopedia of Laws: Corporations and Partnerships* (The Hague, 2010) at 23; KL Fletcher “Limited partnerships and the future” (1977) *Queensland Law Society J* at 55.

103 Special Partnerships Act 13 of 1858, dated 26 Jun 1858 and titled “An Act to authorise the Formation of Special Partnerships”.

104 Respectively “An Act to legalise Partnership with limited liability” Session 2 No 2, and “An Act to authorise the formation of Partnerships consisting of members some having general and others special liability” Session 1 no 10, which were both repealed by s 7 of the Special Partnerships Act of 1858.

105 Fletcher (n 100) at 267.

106 Mercantile Laws Act 12 of 1880.

107 Partnerships Act 139 of 1907. Fletcher (n 100) at 267. The Partnerships Act 139 of 1908 did not affect the provisions of the Mercantile Laws Act of 1880 relating to special partnerships.

108 Limited Partnerships Act 1 of 2008 According to s 4, the purpose of this Act is to establish a modern regulatory regime for limited partnerships that gives the business community in New Zealand the option of a flexible and internationally recognised business structure similar to limited partnerships in use in overseas jurisdictions, and facilitates the development of the venture capital industry in New Zealand.

109 Section 1 of “An Act to Legalise Partnerships with Limited Liability” of 1853 (New South Wales); “An Act to Legalise Partnerships with Limited Liability” of 1853 (Victoria); “An Act to Legalize Partnerships with Limited Liabilities” of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand).

110 Section 2 of “An Act to Legalise Partnerships with Limited Liability” of 1853 (New South Wales); “An Act to Legalise Partnerships with Limited Liability” of 1853 (Victoria); “An Act to Legalize Partnerships with Limited Liabilities” of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand).

Before commencing business, all the prospective members had to sign a certificate containing the detailed information required.¹¹¹ In Victoria, South Australia and New South Wales, this certificate had to be registered at the office of the Registry of Deeds, and in New Zealand, in the office of the Supreme Court in a book open for public inspection.¹¹² A copy of the certificate had to be published in the *Government Gazette* and in a newspaper printed nearest to the partnership's principal place of business. If not, the partnership was deemed to be a general partnership.¹¹³

The firm name had to contain the names of the general partners only, or the name of one such partner with the addition of "and Company" in New Zealand,¹¹⁴ or "and another" or "and others" in the three Australian jurisdictions.¹¹⁵ Only the general partners were entitled to transact the business of the partnership. If the name of any special partner was used with his consent or privity in the carrying on of such business or any contract connected therewith, or if he personally entered into any contract in respect of the concerns of the partnership, he was deemed to be a general partner in that particular matter or contract.¹¹⁶

In New South Wales, Victoria and New Zealand, the partnership could not be entered into for more than seven years, but could be renewed at the end of that period or upon the termination of any shorter period for which it was formed.¹¹⁷ The South Australian statute¹¹⁸ did not contain such a limitation.

111 Section 3 of all four statutes ("An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand)) required the style or firm under which the partnership was to be conducted; details of all the partners, distinguishing the general from the special partners; the amount of capital contributed by each special partner as well as details of other contributions; the general nature of the business of the partnership; its principal place of business; and its commencement and termination dates.

112 Section 5 of all four statutes ("An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand)).

113 Section 6 of all four statutes ("An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand)).

114 New Zealand s 4.

115 New South Wales, s 4; Victoria s 4; and South Australia s 4.

116 Section 4 of all four statutes ("An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); and the Special Partnerships Act 13 of 1858 (New Zealand)).

117 Section 7 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

118 "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia).

If renewed or continued beyond the time originally agreed upon for the partnership's duration, a certificate of this renewal or continuation had to be signed, acknowledged, registered and published in the same manner as the original certificate. If not, the partnership was deemed to be general.¹¹⁹ In any event, no dissolution of the partnership could take place, except by operation of law, before the time specified in the certificate, unless a notice of such dissolution was signed, acknowledged, registered and published in the same way as the original certificate.¹²⁰

In the course of the partnership, no part of the certified capital could be withdrawn nor could a division of interest or profit be made so as to reduce the capital below the aggregate amount stated in the certificate. If this prohibition was not observed, and it rendered the assets insufficient to pay the partnership debts, the special partners became severally liable to refund every sum so received.¹²¹

General partners were liable to account to each other and to the special partners for their management of the partnership concerns. The ordinary principles of the law of partnership applied.¹²² General partners were obligated to see to regular bookkeeping in respect of the partnership concerns, and to make available such books for inspection by the special partners at all reasonable times. If not, the special partners were entitled to have the partnership dissolved, and to have its accounts taken by the Supreme Court.¹²³ In South Australia, such default by the general partners resulted in their forfeiture to the special partners of their profits or share of the profits, as the Supreme Court deemed fit in the circumstances.¹²⁴

119 Section 8 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand). See, also, s 8 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia).

120 Section 10 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); Section 11 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand). Interestingly, ss 11 and 12 of the Special Partnerships Act 13 of 1858 (New Zealand) referred to a limited partnership, and not a special partnership as in its other sections.

121 Section 8 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); s 9 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

122 Section 12 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); s 13 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

123 Section 15 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

124 Section 14 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia).

THE CAPE AND NATAL SPECIAL PARTNERSHIPS LIMITED LIABILITY ACTS

In Victoria and New South Wales, however, it was expressly provided that the special partners were also obligated to ensure that regular books of account were kept. This provision did not appear in the statutes of New Zealand or South Australia. The statutes of Victoria, New South Wales and New Zealand further provided that if the partnership's books were kept incorrectly, or contained false or deceptive entries whereby the determination of the maintenance of capital¹²⁵ was or may have been affected, and this occurred with the knowledge or privity of all or any of the special partners, the certified capital of the relevant special partners was deemed to have been withdrawn, and they incurred liability accordingly.¹²⁶ The South Australian statute did not contain a similar provision.

In South Australia, a partner who used the money of the partnership on his own private account or for any separate purpose of his own without the written consent of his partners was deemed to have committed a misdemeanour, and was liable on conviction to a pecuniary fine.¹²⁷

In all cases where these statutes did not provide otherwise, all the members of the partnership were subject to the liabilities and entitled to the rights of general partners.¹²⁸

All lawsuits regarding the business of the partnership had to be prosecuted by and against the general partners only, except where the statute provided that the special partners had to or could be deemed as general partners. In such a case, every special partner liable as a general partner could be joined as a defendant at the discretion of the party suing.¹²⁹

A partner guilty of any fraud in the affairs of the partnership was civilly liable to the party injured to the extent of his damage, and was also liable for a misdemeanour, punishable by fine, imprisonment or both.¹³⁰

125 As provided for in s 9.

126 Section 16 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

127 Section 14 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia).

128 Section 11 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); s 12 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

129 Section 9 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); s 10 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858.

130 Section 13 of "An Act to Legalize Partnerships with Limited Liabilities" of 1853 (South Australia); s 14 of "An Act to Legalise Partnerships with Limited Liability" of 1853 (New South Wales); "An Act to Legalise Partnerships with Limited Liability" of 1853 (Victoria); and the Special Partnerships Act 13 of 1858 (New Zealand).

Although it has been said that the New Zealand Special Partnerships Act of 1858 is based on the Irish Anonymous Partnerships Act of 1781,¹³¹ the comparison shows a markedly closer affinity between the New Zealand statute, the three Australian statutes of 1853 and the New York Limited Partnerships Act as revised in 1829, than between the New Zealand and Irish legislation.

3 Cape and Natal Acts

3.1 Overview

The limited partnership was provided for in the Cape and Natal respectively by the Cape Special Partnerships Limited Liability Act of 1861¹³² (hereinafter “the Cape Act”), as amended by the Cape Special Partnerships Limited Liability Amendment Act of 1906¹³³ (hereinafter “the Cape Amendment Act”), and the Natal Special Partnerships Limited Liability Act of 1864 (hereinafter “the Natal Act”).¹³⁴

Notably, in the Cape, the option of limited liability for all, and not only some, members of a joint stock company was also introduced in 1861 by the Joint-stock Companies Limited Liability Act of 1861,¹³⁵ which also limited the number of partners in an unincorporated partnership to twenty five.¹³⁶ The latter was based on the British Joint Stock Companies Act of 1844¹³⁷ and the Limited Liability Act of 1855,¹³⁸ which, by the time of their introduction to the Cape, had already been consolidated and repealed by the British Joint Stock Companies Act of 1856,¹³⁹ the first modern British companies act.¹⁴⁰ Natal followed suit with the Law to Limit the Liability of Members of Certain Joint-stock Companies of 1864.¹⁴¹

Both the Cape and Natal Acts provided for limited partnerships¹⁴² consisting of one or more general partners and one or more special partners. In the Cape, these partnerships could be formed for the transaction of any mercantile, mechanical or manufacturing business, and in Natal, for agricultural or pastoral farming as well.¹⁴³

131 See par II(b) *supra*.

132 Special Partnerships Limited Liability Act 24 of 1861 (Cape).

133 Special Partnerships Limited Liability Amendment Act 12 of 1906 (Cape).

134 Special Partnerships Limited Liability Act of 1864 enacted by Law 1 of 1865 (Natal), of which s 14 provided: “The Law shall be cited for all purposes as ‘The Special Partnerships Limited Liability Act, 1864.

135 Joint-stock Companies Limited Liability Act of 23 1861 (Cape).

136 Section 1 of the Joint Stock Companies Limited Liability Act of 1861 (Cape).

137 Joint Stock Companies Act 1844 (7 & 8 Vict c 110).

138 Joint Stock Companies Act 1856 (18 & 19 Vict c 133).

139 See, esp, *In re Paarl Bank* (1891) 8 SC 131 at 136; *E Carstens ca C W Neebe* 1883 OFS 10 at 13.

140 PL Davies *Gower and Davies’ Principles of Modern Company Law* (London, 2003) at 4.

141 Law to Limit the Liability of Members of Certain Joint-stock Companies 10 of 1864 (Natal).

142 The headings referred to a “limited liability partnership”.

143 Section 2 of both laws. Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

These partnerships could not be formed for the purpose of banking in either the Cape or Natal.¹⁴⁴ The partnership had to be registered in the office of the Registrar of Deeds. Section 1 of the Cape Amendment Act¹⁴⁵ required the names of limited partnerships in the Cape to bear the word “Registered”.

The general partners were jointly and severally liable for partnership debts and obligations. They were the only ones authorised to transact business on behalf of, sign for and bind the partnership. The special partners contributed a specific sum in cash to the common stock. They were not personally liable for any debts of the partnership beyond the amount that they paid, except where the law provided otherwise. Even then, nothing in the legislation rendered a special partner liable for any debts contracted by the general partners prior to the formation and registration of the limited partnership.¹⁴⁶

Business had to be conducted under a name or firm that did not include the name of any special partner, the word “company” or any other general term. If the name of a special partner was used in the firm with his consent or knowledge, the special partner was deemed and treated as a general partner.¹⁴⁷

A special partner was prohibited from transacting any business on account of the partnership, or being employed as agent, attorney or otherwise for that purpose, and risked forfeiting his privileges for violation of this prohibition. However, he could from time to time enquire into the state and progress of the partnership concerns and advise as to their management.¹⁴⁸ If the special partner personally entered into any transaction or concluded any contract regarding the concerns of the partnership with any person except the general partners, he was deemed and treated as a general partner in relation to such transaction or contract, unless it appeared that in entering into such transaction or concluding such contract, he acted as a special partner only.¹⁴⁹

At no stage in the course of the partnership could a special partner withdraw any part of the sum that he paid into the capital stock and that had been stated in the certificates required for registration, or pay and transfer to himself such funds in the form of dividends, profits or otherwise. However, any partner could annually receive interest on the sum he contributed if the payment of such interest did not reduce the amount of the capital to below the amount originally paid in. If, after the payment

144 Section 1 of both laws: Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

145 Act 12 of 1906.

146 Section 3 of both laws: Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

147 Section 7 of both Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal). Provision was made for a partner retiring from the management and conduct of the business to continue as a special partner.

148 Section 12 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

149 *Ibid.*

of the interest, any profits remained to be divided, the partner could also receive his portion of such profits. However, if it appeared that by the payment of interest or profits to any special partner, the original capital had been reduced, the receiving partner was bound to restore the amount necessary to make good his share of capital, with interest, from the date of the withdrawal.¹⁵⁰

Persons forming a limited partnership had to make and severally sign a certificate that contained the name or firm under which the partnership was to be conducted; the names and residences of all the general and special partners, distinguishing who were general and who were special partners; the amount of capital that each special partner paid into the common stock; the general nature of the business to be transacted, and the time when the partnership was to commence as well as terminate.¹⁵¹

No limited partnership was deemed to have been formed until the certificate containing the required particulars was acknowledged by all the partners before a justice of the peace, and registered in the office of the Registrar of Deeds in a book to be kept for that purpose, which had to be open to public inspection.¹⁵² Where the certificate contained a false statement, all the stakeholders in the partnership were regarded as general partners for all partnership engagements.¹⁵³

Upon a renewal or continuation of a limited partnership beyond the time originally agreed upon for its duration, a certificate had to be made, acknowledged and registered in the same manner as provided for the original formation of the limited partnerships. Where a partnership was renewed and continued, but not in conformity with these requirements, all the partners were deemed and taken to be general partners and, as such, were liable for all the engagements of the partnership.¹⁵⁴

All lawsuits regarding the business of a limited partnership had to be brought and prosecuted by and against the general partners as if there were no special partners. Where the special partners were deemed general partners, and special partnerships were deemed general partnerships, all the partners deemed general partners could join or be joined in the litigation.¹⁵⁵

The general partners had to account to each other and to the special partners for their management of the business.¹⁵⁶ Where a limited partnership became insolvent,

150 Section 11 of both Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

151 Section 4 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864. (Law 1 of 1865) (Natal).

152 Section 5 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

153 *Ibid.*

154 Section 6 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

155 Section 8 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

156 Section 13 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

no special partner could under any circumstances claim as a creditor until all the claims of all the other creditors of the partnership were satisfied.¹⁵⁷

Any alteration made to the names of the partners, the nature of the business, the amount of capital thereof or any other matter stated in the original certificate was regarded as the dissolution of the partnership. A partnership that was carried on after an alteration had been made was deemed a general partnership, except if it was renewed as a special partnership as prescribed.¹⁵⁸

Except by operation of another law, no dissolution of a limited partnership could take place before the time specified in the registered certificate, unless a notice of the dissolution was registered in the Deeds Registry Office and in every civil commissioner's office in which the original certificate of renewal or continuation of the partnership had been registered, and unless the notice was also published for no less than three successive weeks in the *Government Gazette* as well as in a newspaper published in the division(s) where the registration certificate or the certificate of the renewal or continuation of the partnership had been registered. If no newspaper was published in the division at the time of the dissolution, the notice of dissolution had to be published for no less than three successive weeks in any newspaper published in the town or village nearest to the division(s) where the certificate had been registered.¹⁵⁹

Although neither the Cape nor the Natal Act placed any limitation on the number of partners, the Companies Act of 1926 reduced the maximum number of partners in an unincorporated partnership to twenty.¹⁶⁰ This limitation was maintained by the Companies Act of 1973, although provision was made for the exemption of certain professional partnerships.¹⁶¹ It was repealed by the Companies Act of 2008.¹⁶²

3.2 Origin

Some authors described the introduction of the limited partnership in the Cape and Natal as unnecessary and yet another example of the slavish imitation of legislation of the United Kingdom.¹⁶³ However, upon closer inspection, it appears that the Cape and Natal Acts were in fact not modelled after any legislation of the United Kingdom.

157 Section 14 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

158 Section 10 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

159 Section 9 of both the Special Partnerships Limited Liability Act 24 of 1861 (Cape) and the Special Partnerships Limited Liability Act, 1864 (Law 1 of 1865) (Natal).

160 Companies Act 46 of 1926, 4. This provision was based on 4 of the Transvaal Companies Act 31 of 1909. As such, it was taken over directly from UK company legislation.

161 Companies Act 61 of 1973, s 30.

162 Companies Act 71 of 2008.

163 JC de Wet & AH Van Wyk *Kontraktereg en Handelsreg* (Durban, 1978) at 417.

The United Kingdom was much slower than many other countries to introduce a form of partnership in which non-managing partners could have limited liability. In 1882, Sir Frederick Pollock went so far as to observe that “the institution of partnership *en commandite*, or limited partnership ... is unknown in the United Kingdom, and in these kingdoms alone ... among all the civilised countries of the world”.¹⁶⁴ Ker’s comprehensive *Report on Partnership Law*¹⁶⁵ in 1837 referred particularly to the expedience of introducing the concept of the partnership *en commandite* based on the French model in the United Kingdom. Later developments reveal some confusion between the introduction of this kind of limited liability for non-managing partners, and attempts to mitigate the implications of the usury doctrine-inspired construct that rendered any person who shared in the profits of the partnership liable for the debts of the partnership, even creditors.¹⁶⁶ Relief for profit-sharing lenders was finally effected by the House of Lords in *Cox v Hickman*¹⁶⁷ and by the 1865 Act to Amend the Law of Partnership, also known as “Bovill’s Act”,¹⁶⁸ although this did not imply limited liability for non-managing partners in the sense of the partnership *en commandite*. The limitation of liability for partners excluded from management functions was attained in Britain only with the introduction of the Limited Partnerships Act 1907,¹⁶⁹ which took effect on 1 January 1908, more than forty years after the Cape and Natal Acts .

On the face of it, the introduction of the Cape and Natal Acts was rather motivated by the concerted effort in colonial and other common-law jurisdictions to introduce limited partnership legislation inspired by the provisions on the *société en*

164 F Pollock *Essays in Jurisprudence and Ethics* (London, 1882) at 100.

165 Ker (n 58) at 439.

166 *Grace v Smith* (1775) 2 Wm Bl 997, 96 ER 587. See, also, *Canada Deposit Insurance Corporation v Canadian Commercial Bank* [1992] 3 SCR 558. Thus, the Select Committee on the Law of Partnership of 1851 considered the issue of limited liability in a partnership context, but recommended that this question be referred to a royal commission of adequate legal and commercial knowledge. As a result, the Commission on the Mercantile Laws and on the Law of Partnership of 1854 was appointed. The commission failed to reach unanimity. A bare majority opposed the 1851 proposal that a person should be able to lend money to a partnership at an interest rate related to its profits, without incurring partnership liability. This was followed by a unanimous resolution of the House of Commons that the law of partnership should be amended by the introduction of limited liability for profit-sharing contributors of capital. In the next session of Parliament, the Partnerships Amendment Bill reaffirmed the proposal of the 1851 committee to allow profit-sharing loans to partnerships, without the lender incurring the liability of a partner. It progressed to a second reading, but did not go any further, despite the earlier resolution of the House. In 1856, a similar Partnerships Amendment Bill was tabled. The Bill had a third reading in the House of Commons, but was not implemented. For a detailed discussion, see JJ Henning & MS Wandrag “Limited companies and limited partnerships in English law – a historical watershed” (1997) *J for Juridical Science* at 150.

167 *Cox v Hickman* (1860) 8 HLC 268, 11 ER 431.

168 28 & 29 Vict c 86.

169 Limited Partnerships Act 1907 (7 Edw 7, c 24).

commandite found in Louis XIV's Ordinance of 1673 and/or the *Code de Commerce* of 1807.¹⁷⁰ It appears that, in this regard, the New York Revised Limited Partnership Act of 1829,¹⁷¹ played a more significant and influential part than the Irish limited partnership statute of 1783.¹⁷²

3 3 Fortunes

3 3 1 South Africa

Because of the prior reception in South Africa of the partnership *en commandite* via Roman-Dutch law, as well as the availability of limited liability for all members under the various companies statutes instead of only for some members in a limited partnership, the Natal and Cape statutes did not prove popular. In South Africa, the Natal and Cape statutes were eventually repealed by the Pre-Union Statute Law Revision Act of 1976,¹⁷³ but not with retroactive effect.

The repeal of the Natal and Cape Act as well as the Cape Amendment Act¹⁷⁴ by the South African Pre-Union Statute Law Revision Act of 1976¹⁷⁵ did not result *ipso jure* in the repeal of the Cape statutes as they applied in the Southern African jurisdictions referred to below.

3 3 2 Southern Africa

Both Roman-Dutch common law and the statutory law then in force in the Cape Colony was introduced in the then Basutoland (present-day Lesotho) in 1884, in Southern Rhodesia (present-day Zimbabwe) in 1898 as well as the then Bechuanaland (present-day Botswana) in 1909, and in the law existing in the province of the Cape of Good Hope in South West Africa (now Namibia) in 1920.¹⁷⁶ Thus the Cape Act was introduced in all four jurisdictions, and the Cape Amendment Act only in Namibia.

The Cape Act was repealed and substantially re-enacted by Part II of the Partnerships Proclamation of 1957¹⁷⁷ in Lesotho and by the Special Partners Limited Liability Act of 1963¹⁷⁸ in Zimbabwe.

170 See JJ Henning "Felicjus-Boxelius *Tractatus de Societate* – 'n Miskende vennootskapsregtelike kenbron uit die *ius commune*" (1992) *THRHR* at 446.

171 New York Revised Limited Partnership Act of 1829 (New York Code Article 8A).

172 Irish "Act to promote Trade and Manufacture, by regulating and encouraging Partnerships" 1781 (21 & 22 Geo III, c 46).

173 Act 36 of 1976.

174 Special Partnerships Limited Liability Act 24 of 1861 (Cape); Special Partnerships Limited Liability Amendment Act 12 of 1906 (Cape); and the Special Partnerships Limited Liability Act of 1864 (Law 1 of 1865 (Natal)).

175 Act 36 of 1976.

176 See Hahlo & Kahn (n 3) at 27.

177 Proclamation 78 of 1957 (Lesotho).

178 Chapter 240 of 1963 (Zimbabwe).

Section 11 of the Insolvency Act of Botswana,¹⁷⁹ which deals with the sequestration of the estate of an individual and of a partnership, refers to partners *en commandite* and anonymous partners, as well as “other partners who have not held themselves out as ordinary or general partners”, but not specifically to special partners under the Cape Act. However, a detailed discussion of the law of partnership in Botswana does not contain any reference to statutory limited partnerships.¹⁸⁰

References in sections 3 and 13 of the Insolvency Act 24 of 1936, *inter alia* to the “Special Partnerships Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope”, were deleted in Namibia by the Insolvency Amendment Act 12 of 2005. As one of the purposes of the latter is to delete references to laws that are not applicable in Namibia, these provisions may very well merit a conclusion that the Cape Special Partnerships Limited Liability Act of 1861¹⁸¹ is not or no longer current in Namibia.

4 Conclusion

As far as the origins of the Cape and Natal Acts are concerned, it seems that although Ireland was the first common-law jurisdiction to introduce legislation on limited partnerships, it was unpopular and relatively unknown outside its home jurisdiction, which makes it highly improbable that the Cape and Natal statutes were derived directly from the Irish legislation. The New York legislation, on the other hand, was not only popular, but most influential. It inspired similar legislation in numerous political jurisdictions in America and, especially, also in Australia and New Zealand. This colonial legislation in all probability served as the example for the Cape and Natal statutes. As such, these statutes were ultimately inspired by the provisions of the French *Code de Commerce* on the *société en commandite*, which, in turn, was based on the Ordinance *Pour le Commerce* of 1673.

Although the Cape and Natal statutes were repealed in South Africa more than a century after their introduction, the Cape Act was applied in another four Southern African jurisdictions. It was re-enacted in almost identical legislation in Lesotho and Zimbabwe.

ABSTRACT

The origins of the Cape Special Partnerships Limited Liability Act of 1861 and the Natal Special Partnerships Limited Liability Act of 1864 have been open to question for quite some time in South Africa. The view that it was taken over directly from the United Kingdom cannot be supported. This contribution traces the origins of this

179 Chapter 42:02 (Botswana).

180 Hahlo & Kahn (n 3) at 27.

181 Special Partnerships Limited Liability Act 24 of 1861 (Cape).

legislation through the limited partnership legislation of New Zealand and Australia, back to the influential New York Limited Partnerships Act of 1822, and even further back to the very first limited partnership legislation in a common-law jurisdiction, namely the Irish Anonymous Partnerships Act of 1781, French *Code de Commerce* and Louis XIV's Ordinance *Pour le Commerce* of 1673. This supports a conclusion that in the latter Ordinance, limited partnership legislation and the partnership *en commandite* ultimately share a remote ancestor. In addition, attention is drawn briefly to the fortunes of the Natal and, especially, the Cape legislation in South Africa and four other jurisdictions in Southern Africa.

MARITUS V MULIER: THE DOUBLE PICTURE IN ADULTERY LAWS FROM ROMULUS TO AUGUSTUS

Annalize Jacobs*

In the surviving literature of antiquity social criticism is a male preserve. Not that the men who wrote were in any way disingenuous. They took for granted and frankly admitted that there was one standard of moral behaviour for wives and another for husbands.¹

Unfaithfulness in a husband – as long as it took account both of the law and of convention – was, in general, a concern neither to his conscience nor to the law. That a man's virility might reasonably require greater outlet than his matronly wife could provide was a fact, men held, which should be realistically appreciated, by no one more than by the wife herself.²

1 Introduction

From Romulus to Augustus the Romans were known for their double set of moral standards for husband and wife. The double picture in spouses' moral behaviour cannot be better portrayed than by the words of Balsdon above. This article investigates this double set of standards, specifically with regard to adultery committed by spouses in Roman marriage from Romulan to Augustan laws. The investigation includes a brief look at the spouses' conduct which resulted in adultery, its consequences and

1 JPVD Balsdon *Roman Women. Their History and Habits* (London, 1962) at 214.

2 *Idem* at 215.

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the measures or remedies available to the injured spouse. Finally, possible reasons for these double standards will be searched.

2 Adultery by spouses in Rome of the kings

Early Rome was ruled by kings from 753 BC (her traditional founding date) until 510/509 BC.³ Under the kings Roman law was primitive, rigid and founded in custom, moral and religious rules of the community embellished by royal decrees (*leges regiae*).⁴ Although the decrees of the kings were mainly, but not exclusively, concerned with sacred and family law,⁵ the state did not interfere in the private lives and family relations of the Roman *familia*.⁶ Evidence of Roman law under the kings is limited to few and scattered references by authors who wrote centuries after the laws were said to be in force.⁷ In their research on the marriage laws of Romulus, the first king of Rome, scholars primarily refer to works of Plutarch⁸ and Dionysius of Halicarnassus.⁹

From her foundation, Rome strove to project a perfect image of Roman marriage and family since immorality was a sign of an unstable family and community life.¹⁰ Dionysius of Halicarnassus praises Romulus in achieving the ideal of a holy and indissoluble marriage by a single law.¹¹ One would therefore expect that adultery

- 3 P du Plessis *Borkowski's Textbook of Roman Law* (Oxford, 2015) at 1; DH van Zyl *History and Principles of Roman Private Law* (Pretoria, 1983) at 4-5; A Watson *The Law of the Ancient Romans* (Dallas, 1970) at 3 10.
- 4 For a discussion of sources of law in the archaic period, see Du Plessis (n 3) at 27-29.
- 5 Watson (n 3) at 10.
- 6 A Jacobs "Carvilius Ruga v Uxor: A famous Roman divorce" (2009) 15(2) *Fundamina. A Journal of Legal History* 92-111 at 94-95.
- 7 G Martin "Earliest Roman divorces: Divergent memories or hidden agendas?" at 1, available at <http://cathygary.com/Classics/RomanDivorce.html> (accessed 19 Jul 2015).
- 8 Plutarch (born in AD 46 and died after AD 119) was a Greek biographer, historian, philosopher and essayist. He is primarily known for *The Parallel Lives* in which he recounts the noble deeds and characters of Greek and Roman soldiers, legislators, orators, and statesmen; and the *Moralia*, or *Ethica*, a series of more than sixty essays on ethical, religious, physical, political, and literary topics. Although Plutarch lived during the first and second centuries, he could write biographies of ancient people, such as the one on Romulus, because he had access to material that is no longer available to us. See "Plutarch (Greek biographer)" available at <http://global.britannica.com/biography/Plutarch> (accessed 19 Jul 2015).
- 9 Dionysius of Halicarnassus (60 BC-7 BC) was a Greek historian and teacher of rhetoric. His work *Antiquitates Romanae* (*Roman Antiquities*) (written in 7 BC) is one of the most valuable sources on early Roman history. See "Dionysius of Halicarnassus (Greek historian)" available at <http://global.britannica.com/biography/Dionysius-of-Halicarnassus> (accessed 19 Jul 2015).
- 10 J Carcopino *Daily Life in Ancient Rome. The People and the City at the Height of the Empire* (London, 1962) at 109.
- 11 Dionysius of Halicarnassus *Antiquitates Romanae* 2 25 1-2 (*Roman Antiquities*, tr B Thayer vol 1, Loeb Classical Library, 1937) at 382, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius_of_Halicarnassus/2A*.html (accessed 19 Jul 2015).

was taboo in Rome of the kings. However, in the very same text in which Dionysius praises Romulus for stability in Roman marriage, he refers to adultery. This is proof that adultery did occur in early Rome.¹² Plutarch provides further proof in a biography of Romulus.¹³ He tells of severe laws that Romulus enacted on divorce. These laws denied a wife the right to divorce her husband, but allowed a husband the right to divorce his wife on grounds of three specific offences.¹⁴ One of these offences was adultery. The meaning of adultery in this context is clear¹⁵ and refers to an extra-marital sexual relationship by a married woman with another man who is not her husband.¹⁶

Romulus did not only prescribe adultery as one of the husband's grounds for divorcing his unfaithful wife, but also spelt out the severe consequences facing her if she committed adultery. In the first place, the ultimate punishment for an unfaithful wife was the death penalty. The husband, assisted by a family council or domestic tribunal, could judge his wife privately and sentence her to death.¹⁷ Secondly, there was a financial penalty which related to the dowry. If a husband divorced his wife for adultery, the wife or her *paterfamilias* forfeited the entire dowry with no right to reclaim any of it. The husband, however, incurred no loss of property given as dowry.¹⁸

Romulan laws undoubtedly established double standards for adultery by spouses. The husband had the right to divorce and kill his wife for adultery with impunity and no financial penalty in terms of the dowry. The wife's position was totally the opposite. She had no rights and no remedies against her unfaithful husband.¹⁹

12 Adultery did not only occur from as early as the Roman regal period, but even earlier in other ancient laws. See DE Murray "Ancient laws on adultery – A synopsis" (1961) *J of Family Law* at 89.

13 Plutarch *Romulus* 22 3 (*The Parallel Lives*: "The Life of Romulus", tr B Thayer vol 1, Loeb Classical Library, 1914) at 163, available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Romulus*.html (accessed 19 Jul 2015). See, also, Watson (n 3) at 11 35.

14 Jacobs (n 6) at 98-100. See, esp, 99 n 63 for different interpretations of the specified offences.

15 See A Watson *Rome of the XII Tables. Persons and Property* (Princeton, 1975) at 33.

16 S Treggiari *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford, 1991) at 263; Balsdon (n 1) at 77.

17 Dionysius of Halicarnassus *Antiquitates Romanae* 2 25 6; Watson (n 3) at 11. According to scholars a husband had a right to divorce his wife on grounds of adultery. However, he had no free right of killing his wife even if he had justification. An investigation involving the wife's family, and perhaps her husband's, was expected before she could be sentenced to death for adultery. See Watson (n 15) at 44. See, also, EKE von Bóné "The Roman family court (*iudicium domesticum*) and its historical development in France and the Netherlands" 2013 *Osaka University Law Review* at 26-31.

18 Plutarch *Romulus* 22 3. See, also, A Watson "The divorce of Carvilius Ruga" 1965 *TvR* at 45.

19 Watson (n 3) at 35; Treggiari (n 16) at 269-270; Murray (n 12) at 96.

3 Adultery by spouses during the Roman republic

There is no indication by later writings that the first piece of Roman legislation, the Twelve Tables (450/451 BC),²⁰ had altered the grounds for divorce (of which adultery was one) or that it had included any law on adultery. It was completely silent on this issue.²¹

During the middle of the republic in the fourth century BC the *aediles* allegedly could have taken action against men committing adultery and censors might have interfered in adultery cases using censorial discipline. However, these measures have rarely been attested.²²

According to the jurist Paul, the *lex Iulia de adulteriis* of Augustus began with an explicit abrogation of several earlier laws.²³ Unfortunately, we know nothing about the contents of these laws.²⁴ No general law on adultery is attested in the time of the republic which changed the meaning of adultery or the position of the spouses. It appears that the double standards for spouses' moral behaviour of Romulan laws still prevailed as portrayed by the literary sources referred to above. Aulus Gellius²⁵ provides evidence of this in his *Noctes Atticae*²⁶ where he summarises a speech of Marcus Cato,²⁷ *On the Dowry (De Dote)*, delivered towards the end of the second century BC. From Cato's speech it appears that adulterous women, specifically wives, were still treated harshly. If a husband caught his wife red-handed committing adultery, he could kill her with impunity without a trial (presumably that of the family council).²⁸ However, if he decided to divorce her, he could judge her, as a

20 Van Zyl (n 3) at 24-26.

21 Watson (n 15) at 32 33-34. See, also, M Carnelley "Adultery laws: Comparing the historical developments of South African common law principles with those in English law" (2013) 19(2) *Fundamina* 185-211 at 187 n 21.

22 Treggiari (n 16) at 275-277.

23 Paul *Coll* 4 2 1-2; D Wardle "Suetonius on the legislation of Augustus (*Aug* 34)" (2015) 21(1) *Fundamina* 185-204 at 188.

24 P Csillag *The Augustan Laws on Family Relations* (Budapest, 1976) at 176.

25 Aulus Gellius (ca 125 AD-after 180 AD) was a Latin author and grammarian who lived in the second century AD. He focused his interests on ancient times. In his *Noctes Atticae (Attic Nights)* many fragments of lost works are preserved. See "Aulus Gellius (Latin rethorician)" available at <http://global.britannica.com/biography/Aulus-Gellius> (accessed 22 Jul 2015).

26 Aulus Gellius *Noctes Atticae* 10 23 2-5. See, also, Watson (n 3) at 35. According to Von Bóné (n 17) at 28, this text was probably written between AD 146 to AD 158 during the reign of Antoninus Pius (AD 131-161).

27 Marcus Porcius Cato (234-149 BC), also known as Cato the Censor or Cato the Elder, was a Roman statesman during the Roman republic with oratorical and legal skills. See "Marcus Porcius Cato (Roman statesman [234-149 BC])" available at <http://global.britannica.com/biography/Marcus-Porcius-Cato> (accessed 22 Jul 2015).

28 See A Watson *Roman Private Law around 200BC* (Edinburgh, 1971) at 23 who notes that no evidence indicates that this right to punishment was extended to the wives *sine manu*. See, also, PE Corbett *The Roman Law of Marriage* (Oxford, 1930) at 128.

censor would, and condemn her. The wife could still not dare to lay a finger on her adulterous husband because the law did not permit it.²⁹ In a nutshell, the position of the spouses by the end of the second century could be summarised as follows.

3 1 Position of the unfaithful wife

Cato's speech, which Gellius quoted literally, is clear on the husband's right to kill his wife if he caught her red-handed committing adultery. However, it lacks precision about the identity of the censor, the nature of the family council, and the wife's punishment in the case of the husband divorcing his wife.³⁰

Further research indicates that Cato compares the authority of the husband towards his wife with that of a magistrate towards his citizens, hence the husband judged his wife and acted like a censor.³¹ The husband did not necessarily judge his wife alone, though. A family council or tribunal investigated the adultery of the wife and judged her in private.³² The council could consist of the unfaithful wife's husband and/or *paterfamilias*, members of the wife's and/or husband's *familia* or even friends.³³ The council could inflict severe punishment such as the death penalty and exile. If this appeared to be too grave, divorce could also be used to get rid of her. In the case of divorce, there were always financial penalties realised at the expense of the dowry. An unfaithful wife could, for example, forfeit one sixth of the dowry.³⁴ She could also be returned to her father.³⁵

3 2 Position of the unfaithful husband

The position of the unfaithful husband was the exact opposite of the unfaithful wife's. The wife had no right to immediately take revenge and kill her husband. She could not raise her hand against him; in fact, she could not lay a finger on him.³⁶ She

29 Aulus Gellius *Noctes Atticae* 10 23 5; Treggiari (n 16) at 268-270.

30 Aulus Gellius *Noctes Atticae* 10 23 4. See, also, J Zablocki "The image of a Roman family in *Noctes Atticae* by Aulus Gellius" (1996) 2 *Pomoerium* at 41-42.

31 Von Bóné (n 17) at 28-29.

32 Csillag (n 24) at 177; Von Bóné (n 17) at 28-29.

33 Dionysius of Halicarnassus *Antiquitates Romanae* 2 25 6; Aulus Gellius *Noctes Atticae* 10 23 2-5; Valerius Maximus *Memorabilia* 2 9 2; 6 3 8-9; Livius *Ab Urbe Condita* 1 58. See, also, Treggiari (n 16) at 268-269 461-462; Csillag (n 24) at 177; Von Bóné (n 17) at 28-31; Watson (n 15) at 34-35 43-44; JF Gardner *Women in Roman Law and Society* (London, 1996) at 121; A Jacobs 'n *Onderzoek na die Regsbeskerming van die Vrou se Huweliksverhouding tydens die Klassieke Romeinse Reg* (Pretoria, 1997) at 138.

34 Dionysius of Halicarnassus *Antiquitates Romanae* 2 25 6; Plinius *Naturales Historiae* 14 14 89-90; Ulpianus *Regulae* 6 12. See, also, Corbett (n 28) at 128-131 226-227; Gardner (n 33) at 121-123; Csillag (n 24) at 177; Jacobs (n 33) at 138-139; Balsdon (n 1) at 188.

35 Balsdon (n 1) at 77.

36 Aulus Gellius *Noctes Atticae* 10 23 5.

could not bring him before a family council. In the early republic divorce was also not an option.³⁷ He could commit adultery without any fear of severe punishment or financial penalties.

Significant changes in Roman law of marriage and divorce which occurred during the last two centuries of the republic resulted in the idea of free marriage and divorce, and both husband and wife now had unlimited right to divorce. No specific grounds for divorce existed. Both spouses had the right to divorce on ground of adultery with some financial implications regarding the dowry.³⁸

4 Adultery by spouses during the Augustan Empire

4 1 Introduction

When Augustus became the first Roman emperor in 27 BC, the moral depravity of the Roman society was still enormous and shook the carefully-guarded family of the ancient Romans. Roman marriage and especially the Roman family were facing a crisis. Augustus decided to promulgate laws in order to launch an attack against the lack of moral standards. The purpose of these laws was not only to curb the immoral behaviour (eg, the high divorce rate) or sexual misconduct of society (eg, adultery), but also to restore the ideal picture of the ancient Roman family.³⁹ Moral reforms therefore marked the years between 18 and 16 BC. The *lex Iulia de adulteriis coercendis*, Augustus's so-called remarkable piece of social engineering,⁴⁰ was passed in 18 BC.⁴¹ These reforms were radical since they allowed the state to interfere in the private lives and family relations of the Romans, and this was contrary to the then existing custom of dealing with adultery within the privacy of the family without state interference.⁴²

The *lex Iulia* remained the main source of law dealing with the adultery of Roman spouses during the early empire.⁴³ It was amended in AD 9 by the *lex Papia Poppaea*, but thereafter fell mostly in disuse.⁴⁴ It revived with its re-incorporation

37 Jacobs (n 6) at 101.

38 C 8 38 2 (Imp Alexander Severus); Paulus D 45 1 134 1. See, also, Kaser *Das Römische Privatrecht* vol 1 (München, 1971) at 326; Watson (n 28) at 23; Du Plessis (n 3) at 128-129 132.

39 Kaser (n 38) at 318-319; Corbett (n 28) at 133; Csillag (n 24) at 175.

40 Roman authors and modern scholars differ in their views regarding the success of the *lex Iulia de adulteriis*. See Tacitus *Annales* 25; Seneca *De Beneficiis* 3 33 4; Plutarch *Moralia* 493 E; Kaser (n 38) at 318-319; Nörr "The matrimonial legislation of August: An early instance of social engineering" (1981) 16 *The Irish Jurist* at 350-364; Treggiari (n 16) at 294-298.

41 Suetonius *Augustus* 34 1; Du Plessis (n 3) at 129-130; Csillag (n 24) at 175-176; Corbett (n 28) at 133.

42 L Betzig "Roman monogamy" (1992) 13 *Ethology and Socio-biology* at 365-366; TAJ McGinn *Prostitution, Sexuality and the Law in Ancient Rome* (New York, 1998) at 140.

43 Du Plessis (n 3) at 130.

44 Carnelley (n 21) at 188.

into the *Sententiae* of Julius Paulus Prudentissimus (Paulus)⁴⁵ and later the *Corpus iuris civilis*.⁴⁶

Unfortunately, Augustus's *lex Iulia de adulteriis* was not preserved in its entirety. Consequently, the contents of the *lex* have to be pieced together from fragments scattered over a variety of sources.⁴⁷ There are mainly four surviving legal sources that contain information relating to adultery: Justinian's *Digest* 48 5 "*Ad legem Iuliam de adulteriis coercendis*";⁴⁸ Justinian's *Codex* 9 9 "*Ad legem Iuliam de adulteriis et de stupro*" (their primary sources are the commentaries of later jurists which include some of the original words used in the *lex Iulia de adulteriis coercendis*); Justinian's *Novellae* 117 and 134; and the *Sententiae* of Paul 2 26 "*De adulteriis*" (which clarify certain points on which the other sources remain silent).⁴⁹ Scholars regard jurists' commentaries to be ambiguous in some instances, but agree that they are generally in accordance with the content of the *lex Iulia*.⁵⁰

To piece the law on adultery together from the different fragments is difficult, and more than often confusing.⁵¹ One of the lacunae in the remaining fragments of the *lex Iulia* is the lack of an original or accurate definition of adultery. However, it is accepted that adultery referred to extramarital sexual relations with or by married women.⁵² In terms of the *lex Iulia de adulteriis*, adultery was for the first time in Roman legal history a public offence with criminal penalties. Yet, it appears that the double standards of early Roman law prevailed. A wife's adultery was always a crime, but a husband's adultery was a crime only if committed with married women.⁵³

4 2 Position of the unfaithful wife

A wife committed adultery if she had a sexual relationship with any other man than her husband. Her adultery was, as said above, always a crime and could be tried by a

45 This document is generally referred to as the *Opinions of Julius Paulus Addressed to his Son* (hereunder referred to as *Paulus Sententiae*). He lived during the second to the third century AD. The references hereunder are to Book 2 in SP Scott (tr) *The Civil Law* (Cincinnati, 1932), available at <http://webu2.upmfgrenoble.fr/DroitRomain/Anglica/Paul2-Scott.htm> (accessed 28 Jul 2015).

46 Carnelley (n 21) at 188.

47 Csillag (n 24) at 178-179.

48 All references to D 48 5 in this article are from T Mommsen, P Krueger & A Watson (eds) *The Digest of Justinian* vol 4 (Philadelphia, Pa, 1985).

49 A Richlin "Approaches to sources on adultery in Rome" in HP Foley (ed) *Reflections of Women in Antiquity* (New York, 1986) at 380-381.

50 *Idem* at 381.

51 In view of the lack of legal sources, scholars have to rely on literary sources, but always have to keep in mind the gender of the authors and also the different genres of these sources. See Richlin (n 49) at 379ff; Csillag (n 24) at 199-202; Gardner (n 33) at 121ff.

52 J Evans Grubbs *Law and Family in Late Antiquity. The Emperor Constantine's Marriage Legislation* (New York, NY, 1999) at 203; Corbett (n 28) at 141.

53 Inst 4 18 4. See, also, A Mette-Dittman *Die Ehegesetze des Augustus* (Stuttgart, 1991) at 34; Csillag (n 24) at 179-180; Treggiari (n 16) at 278-279.

permanent public criminal court (*quaestio perpetua de adulteriis*). These courts were specially established to deal with adultery. In these courts *praetores* were presiding officers, *aediles* prosecuted the offenders and strict prescriptions and procedures had to be followed. These public criminal courts brought to an end the use of family councils. The outcome of a trial could result in serious consequences for the wife as the discussion below illustrates.⁵⁴

4 2 1 Death

The ultimate punishment for an unfaithful wife was death. A father⁵⁵ could kill his married daughter (if she was still under his power) and her lover if they were caught committing adultery in his house or her husband's house. He had to kill both his daughter and her lover irrespective of his status,⁵⁶ because if he killed only one of them, he could be charged with murder.⁵⁷

The husband's rights to kill his unfaithful wife were more limited. He could not legally kill his wife⁵⁸ but he could kill her lover, if he was of inferior status⁵⁹ and he caught them red-handed committing adultery in his own home.⁶⁰ If the husband decided to take revenge and kill his wife and her lover, he could be charged with murder. However, *in casu*, he faced more lenient punishment than other murderers, such as a sentence of exile or hard labour, because his act of revenge was regarded as "a result of great annoyance and just suffering".⁶¹

4 2 2 Divorce and prosecution

An unfaithful wife could face divorce and then prosecution for adultery. In terms of the *lex Iulia* divorce of the unfaithful wife was a prerequisite of her prosecution.

54 Corbett (n 28) at 133; Gardner (n 33) at 123; Richlin (n 49) at 381 399 n 5.

55 In this context, "father" refers to a *paterfamilias*, either an adoptive or natural father, who himself was not under *patria potestas*. See Papinianus D 48 5 23(22); Paulus *Sententiae* 2 26 1-2.

56 Ulpianus D 48 5 22(21) and D 48 5 24(23); Papinianus D 48 5 23 (22) 2, 4; Macer D 48 5 33 (32) *pr*; Paulus *Sententiae* 2 26 1. See, also, Mette-Dittman (n 53) at 35-36; Gardner (n 33) at 129-130; Du Plessis (n 3) at 115 130.

57 McGinn (n 42) at 146; Du Plessis (n 3) at 115 130.

58 Paulus *Sententiae* 2 26 2, 4 and 7; Du Plessis (n 3) at 130.

59 In this context, "inferior status" refers to lovers belonging to a particular category of persons, namely slaves, clutches, singers, dancers, convicted offenders and *liberti* of the man or woman. See Macer D 48 5 25 (24) *pr*; Paulus *Sententiae* 2 26 4 and 2 26 7; Du Plessis (n 3) at 130; Carnelley (n 21) at 190.

60 Ulpianus D 48 5 2 2 and D 48 5 2 5-7; Papinianus D 48 5 12(11) 13; Macer D 48 5 25(24). See, also, Mette-Dittman (n 53) at 35-36; Gardner (n 33) at 129-130; Du Plessis (n 3) at 130.

61 Paulus *Sententiae* 2 26 5. For exile, see C 9 9 4 (Imp Alexander A Iuliano); for hard labour, see Papinianus D 48 5 39(38) 8. See, also, Du Plessis (n 3) at 127 who notes that they were often not even convicted.

Since a husband could not legally kill his wife caught in an act of adultery, the law forced him to divorce her before witnesses and then to prosecute her for adultery,⁶² because he could not prosecute her for adultery if they were still married.⁶³ The law prescribed strict requirements and time frames⁶⁴ within which the husband had to divorce and prosecute his wife after her adultery, as well as severe punishment if he did not adhere to it. If he failed to act within the required timeframes, he was guilty of the crime pimping (*lenocinium*) which was punished in a similar way to adultery.⁶⁵ If he refused to divorce or prosecute her, despite the fact that he caught her red-handed in his house and her lover is still alive,⁶⁶ he could be punished with pandering.⁶⁷

If the husband did not prosecute his wife, her *paterfamilias* could proceed with the prosecution. If he failed to do so, any member of the public older than twenty five could do so within a period of four months, resulting in the adulteress being brought out in public and humiliated.⁶⁸

4 2 3 Other penalties

An unfaithful wife convicted of adultery could face severe penalties. The list of penalties include: *infamia*, which included loss of citizenship⁶⁹ and loss of dignity (the lowering of her status to that of a prostitute);⁷⁰ loss of a third of her property (separate estate) and confiscation of half of her dowry;⁷¹ exile to an island other than her lover;⁷² loss of the right to contract a valid marriage again;⁷³ loss of part of her right to inherit;⁷⁴ and inability to testify in court.⁷⁵

62 Paulus *Sententiae* 2 26 6; Balsdon (n 1) at 77.

63 C 9 9 11 (Imp Alexander A Norbano).

64 Within three days of the wife's adultery, the husband had to publicly name the adulterer and the place of adultery. Within sixty days of divorce the husband had to prosecute his wife. Scaevola D 48 5 15(14) 2; C 9 9 6 (Imp Alexander A Sebastiano); Paulus *Sententiae* 2 26 6. See, also, Du Plessis (n 3) at 129-130; Balsdon (n 1) at 78; Carnelley (n 21) at 190-191.

65 Ulpianus D 48 5 2 2 and D 48 5 2 5-7; Papinianus D 48 5 12 (11)13; Macer D 48 5 25 (24) 1; Paulus *Sententiae* 2 26 6 and 2 26 8; Carnelley (n 21) at 190-191.

66 The husband had no obligation to prosecute the lover, notes McGinn (n 42) at 178.

67 Paulus *Sententiae* 2 26 8; Ulpianus D 48 5 2 2 and D 48 5 30(29); C 9 9 2 (Imp Alexander et Antoninus AA Cassiae).

68 Ulpianus D 48 5 4; C 9 9 6 (Imp Alexander A Severus); Du Plessis (n 3) at 130; Betzig (n 42) at 366.

69 Du Plessis (n 3) at 129.

70 McGinn (n 42) at 143 147 156 238-239.

71 Paulus *Sententiae* 2 26 14; McGinn (n 42) at 141-142.

72 *Idem.* Cf McGinn (n 42) at 143.

73 Balsdon (n 1) at 77.

74 McGinn (n 42) at 143.

75 Papinianus D 22 5 13-14; Paulus D 22 5 18. See, also, Csillag (n 24) at 197.

4 3 Position of the unfaithful husband

The position of the unfaithful husband was still much more favourable than that of the unfaithful wife. He committed adultery if he had a sexual relationship with another married woman,⁷⁶ but in most cases escaped punishment for his unfaithfulness to his own wife.⁷⁷

4 3 1 Death

No evidence could be found that a wife or her *paterfamilias* had the right to punish her unfaithful husband with death.

4 3 2 Prosecution

A wife could not prosecute her unfaithful husband for adultery since the law did not allow her to act as an accuser in public proceedings.⁷⁸ However, her father, family or a third person could prosecute her unfaithful husband on her behalf, if he committed adultery with a married women whose father or husband did not prosecute him within the prescribed period.⁷⁹

4 3 3 Other penalties

If the unfaithful husband was convicted for adultery, he could face the following penalties: *infamia* which could include the lowering of his status, humiliation and emasculation;⁸⁰ relegation to an island other than his lover; and loss of half of his property.⁸¹

76 C 9 9 1 (Impp Severus et Antoninus AA Cassiae).

77 It should be noted, however, that an unfaithful husband could, as lover, be punished and prosecuted for *adulterium* (adultery) with another man's wife or for *stuprum* (dishonorable vices) with honorable unmarried women, widows and men. His extramarital relationship with a slave, prostitute or women in terms of the legal and social definitions of respectability, did not constitute adultery according to Roman law, and could not be prosecuted. See Corbett (n 28) at 141; Csillag (n 24) at 197.

78 Pomponius D 48 2 1; C 9 9 1 (Impp Severus et Antoninus AA Cassiae); Corbett (n 28) at 141-142; Csillag (n 24) at 197; Balsdon (n 1) at 77.

79 Ulpianus D 48 5 2 pr, D 48 5 2 8-9, D 48 5 4, D 48 5 16(15) 5, D 48 5 27(26). See, also, Richlin (n 49) at 382 402 n 16; Gardner (n 33) at 127-128.

80 Papinianus D 48 5 23(22) 3: "A man who has the right to kill an adulterer has all the more right to inflict humiliation on him." J Walters ("Invading the Roman body: Manliness and impenetrability in Roman thought" in JP Hallett & MB Skinner (eds) *Roman Sexualities* (Princeton, NJ, 1997) 29-43 at 39 43 50-51) interprets this to include beatings, rape and castration.

81 Paulus *Sententiae* 2 26 24; Csillag (n 24) at 198.

4 3 4 Divorce

Divorce (*repudium*) was indeed the only certain remedy for the wife against her unfaithful husband as both spouses had the right to divorce during the time of Augustus. No grounds for divorce existed. Therefore the wife could divorce her husband on grounds of adultery and he then faced financial penalties regarding the dowry.⁸²

5 Reasons for double standards

5 1 Social role and activities of wife as *materfamilias* and *matrona*⁸³

When a man married, he changed from a *caelebs* (single man) to a *maritus* (husband). If he was a *paterfamilias* before marriage, he was no more of a *paterfamilias* afterwards. However, when a woman married for the first time, she changed from a *virgo* (virgin) and became a *mulier* (wife), a change which Romans regarded as significant, natural and auspicious. She was now a wife and *materfamilias* of the household, and to the outside world a *matrona*. Her life was dominated by her position of authority in the household, her potential motherhood and a strict code of moral behaviour that required *dignitas* (dignity), *pudor* (modesty) and *pudicitia* (sexual chastity). It was this strict code of moral behaviour which differentiated the wife's role in society from that of her husband's. She had to remain chaste and behave in a way that would not draw attention to her or bring disrepute to her husband. The husband's life continued much as before, except that he now had the support of a wife. She was possibly involved in his business, the running of his estates and his political career, and socialized with him.⁸⁴

Adultery was one of the gravest offences a wife could commit⁸⁵ and indeed contrary to the code of conduct expected from the *materfamilias* and *matrona*. It was a crime that brought shame on her husband's honour,⁸⁶ since her child with a stranger would become part of the household of her unsuspecting husband.⁸⁷ The social role and activities of the wife as *materfamilias* and *matrona* were reason enough for the double standards in spouses' moral behaviour.

82 Kaser (n 38) at 326; Watson (n 28) at 24.

83 For a discussion on the use of and difference between "*materfamilias*" and "*matrona*", see Treggiari (n 16) at 34-35 278-280.

84 Dionysius of Halicarnassus *Antiquitates Romanae* 2 24 1-2 and 2 26 1; Treggiari (n 16) at 414; D'Ambra *Roman Women* (New York, 2007) at 17-18 46 49; M Johnson & T Ryan *Sexuality in Greek and Roman Society and Literature: A Sourcebook* (New York, 2005) at 6-8; G MacCormack "Wine drinking and the Romulan law of divorce" 1975 (10) *The Irish Jurist* at 172-173.

85 C 9 9 1 (Imp Severus et Antoninus AA Cassiae); Carnelley (n 21) at 189.

86 D'Ambra (n 84) at 49.

87 Papianus D 48 5 6 1. See, also, Carnelley (n 21) at 189, esp n 42.

5 2 A male-dominant Roman society

Perhaps another reason was the male-dominant Roman society. Sources were written by men and from a male's perspective.⁸⁸ Social criticism in the surviving literature of antiquity was a male reserve.⁸⁹ However, evidence exists that not all men admitted and took for granted that such a set of double standards can simply be accepted as tradition. There were jurists, writers and poets who deplored this licensed privilege of a husband. Musonius Rufus (AD 30-100), a Roman *eques*, who advocated moral values, strongly opposed such a double standard.⁹⁰ The famous jurist Ulpian⁹¹ believed that it was most unfair for a man to require from a wife the high moral values and chastity that he does not himself practise. And Plutarch stated that “[a] husband who bars his wife from the pleasures in which he himself indulges is like a man who surrenders to the enemy and tells his wife to go on fighting”.⁹²

5 3 Hidden agendas of Roman authors

Treggiari⁹³ intimates an attempt by Roman authors, for example Dionysius of Halicarnassus, to draw a parallel between Romulus and Augustus in support of the Augustan laws. Martin notes that these authors lived shortly before, during or shortly after the Augustan reforms in family law and their writings may be a response to – mostly in favour of – these laws. He even goes as far as to argue that “their ‘memories’ of the past are not only selective, but in some cases clearly fabricated to support their views”.⁹⁴ Are the hidden agendas of Roman authors perhaps another reason?

6 Conclusion

From Romulus to Augustus adultery occurred and was considered to be the extramarital relationship by or with married women. According to the law of this period, the unfaithful wife's adultery was always a crime, but the husband's only if committed with a married woman. The unfaithful wife faced prosecution with severe punishment, such as death and exile. She also faced financial penalties related to the dowry. If death or exile was too grave she was divorced, faced *infamia* or lost certain of her limited rights. In early law she was privately judged by a family council. By the time of August she was prosecuted in a public criminal court. The unfaithful husband escaped all of this. The only certain remedy for the wife since

88 Balsdon (n 1) at 25 214; Foley (n 49) at xi; S Dixon *Roman Family* (London, 1992) at 69.

89 See, in this regard, Balsdon (n 1) at 209-223; Richlin (n 49) at 380.

90 Treggiari (n 16) at 220-223.

91 D 48 5 14(13) 5.

92 Plutarch *Moralia* 145A, as translated by Balsdon (n 1) at 218.

93 (n 16) at 211-214.

94 (n 7) at 8.

the late republic was divorce, a mere private self-help measure. The other remedy in Augustan law, was the right which her father or family had to prosecute her husband if his lover's father or family did not prosecute him. A double set of standards in the case of spouses' adultery existed in adultery laws from Romulus to Augustus which undoubtedly favoured the unfaithful husband. And the social role of the Roman *materfamilias* and *matrona* in a male-dominant society appears to have justified these double standards.

ABSTRACT

This article investigates the double set of standards applicable to Roman spouses' adultery. It argues that adultery occurred from Romulus to Augustus and was always considered to be the extramarital relationship by or with married women. It examines the position of both the unfaithful husband and the unfaithful wife with regard to conduct which resulted in adultery, its consequences and the measures or remedies available to the injured spouse. Furthermore, the article argues that the social role of the Roman *materfamilias* and *matrona*, the Roman male-dominant society and the hidden agendas of Roman authors could be seen as possible reasons for the different moral principles. The article concludes by pointing out that the unfaithful husband was in a much more favourable position than the unfaithful wife and that the social role of the Roman *materfamilias* and *matrona* in a male-dominant society appears to have justified these double standards.

THE ORIGIN AND DEVELOPMENT OF EMERGENCY REGIMES IN CAMEROON

Gerard Emmanuel Kamdem Kamga* **

1 Introduction

The present paper, which is part of a larger project, examines the origin and development of emergency regimes in Cameroon. These regimes are established in exceptional circumstances, allowing states legally to suspend laws and infringe human rights when dealing with a threat. Emergency regimes include a state of emergency, a state of exception, a state of siege and martial rule. In Cameroon, these regimes are currently described by section 9 of the Constitution and Law 90/047 of 19 December 1990 on the state of emergency. Section 9 of the Constitution reads:

- (1) The President of the Republic may, where circumstances so warrant, declare by decree a state of emergency, which shall confer upon him such special powers as may be provided for by law.
- (2) In the event of a serious threat to the nation's territorial integrity or to its existence, its independence or institutions, the President of the Republic may declare a state of siege by decree and take any measures as he may deem necessary. He shall inform the Nation of his decision by message.

The purpose of this study is to trace the origin and development of these emergency regimes, to address their negative impact on the current structure of the political system

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and to highlight the need for change in the country. From a historical perspective, the idea of suspension of law derives from the canonical maxim *necessitas non habet legem*, which means that necessity knows no law, or necessity creates its own law. The idea that necessity can, in exceptional circumstances, be considered as an excuse for not complying with the rules is very old and widespread.¹ An example is given in Seneca's *Rhetoric* controversies,² of a soldier who, having lost his weapons during a battle, took the weapon of another soldier who had died and been buried. Although he emerged from the battle on the winning side, this soldier was accused of invading the grave.³ The author justified these acts by referring among others, to the *lex Rhodia de jactu*, and by asserting the following:

Necessity requires a ship's cargo to be thrown away in order to lighten it; necessity requires the demolition of houses in order to extinguish fires; necessity is the law of the moment.⁴

According to Frank Roumy, the first text that directly prefigures the formulation of the maxim *necessitas non habet legem* is to be found in the commentary of Bede the venerable on the gospel of Mark, written in the years 725-730. Commenting on the verse which proclaims that the Sabbath was made for man, not man for the Sabbath (Mk 2 27), Bede by implication refers to the case of David who, being hungry, entered the temple and ate the consecrated bread (which is not lawful for anyone to eat except the priests (Mk 2 26)), to justify a sick person's breaking the daily fast by arguing that "what is not allowed by the law, becomes permissible by necessity".⁵ By the time of the twelfth or early thirteenth century, at least five branches of medieval knowledge, namely civil law, liturgy, theology, philosophy and narrative literature had received the maxim.⁶

In the light of the above developments, it is evident that the maxim *necessitas non habet legem* was meant to be a palliative measure to remedy the inadequacy and insufficiency of the law, and was a circumstantial remedy aiming at addressing a particular emergency. The investigation into the origin and development of emergency regimes in Cameroon that follows, demonstrates that such regimes, which were introduced into the country through imperialism, have lost their exceptional character and appear to be the keystone on which the entire politico-legal system currently rests. Indeed, Cameroon came into being as a political unit in the 1880s. Before then, there were numerous states, nations, or political entities in the area,

1 F Roumy "L'origine et la diffusion de l'adage canonique *necessitas non habet legem* (VIII-XIIIe S.)" in *Medieval Church Law and the Origins of the Western Legal Tradition a Tribute to Kenneth Pennington* (Washington, 2006) 301-319 at 301.

2 *Idem* at 304.

3 *Ibid.*

4 *Ibid.*

5 *Idem* at 306.

6 *Idem* at 313.

each with its own culture, history, government, and economy.⁷ The competition engaged in by European traders to obtain the products sold at the coast by indigenous Cameroonians was by the 1880s to develop into a scramble for control over the entire area, a process that led to the colonisation of Cameroon by Germany in 1884.⁸ After the First World War, the Versailles peace conference in 1919 set up a new system of mandates over conquered colonies, which were placed under international supervision. Consequently, after thirty years of German rule (from 1884 to 1914), the former colony of Kamerun was handed over to France and Britain and soon split into two parts. Kamerun (the German spelling) became “Cameroun” under French influence and was named “Cameroon” by the British administration. On 20 July 1922, this partition was endorsed by the League of Nations, which placed the country under a regime of mandate.⁹

Note at this point that my investigation into the origin and development of emergency regimes in Cameroon focuses more on the French section than on the English one. The reason is that while operating under the authority of the League of Nations, both England and France administered their spheres of influence as they did their other African colonies. The British incorporated theirs into their colony of Nigeria, while the French portion was administered in the same way as the Ivory Coast, Congo Brazzaville and Senegal. British rule did not rely on draconian measures such as it imposed on the Mau Mau in Kenya, but on a system of indirect rule characterised by local administration by indigenous authorities over their own population. The French system of governance, on the other hand, relied heavily on brutal measures. The French applied the *politique d'assimilation*, which had drastic implications for the human rights and freedoms of the governed, because it forced the indigenous people in that area to forget about their customs and traditions and adopt French culture. This policy was implemented through the introduction of emergency regimes. Subsequently such regimes have recurred and currently occupy a central place in the country's institutions and have had a considerable impact on democratic progress in the state. Certain questions need to be answered:

What was the origin of emergency regimes in Cameroon and how did they develop?

What is the legal framework and historical context of their implementation?

What is their impact on current institutions?

Following a legal and historical approach, I shall answer these questions firstly by addressing the origin and development of emergency regimes in Cameroon before and after independence, secondly by analysing their impact on current institutions and thirdly by providing some suggestions.

7 MW Delancey *Cameroon Dependence and Independence* (Boulder, Colo, 1989) at 2.

8 R Neville *Cameroun an African Federation* (London, 1971) at 22.

9 *Ibid.*

2 Emergency regimes in Cameroon before “independence”: a legacy of colonialism

Understanding this section requires a review of the introduction of emergency regimes in Cameroon under international supervision, the Algerian experience, the move toward independence and the formalisation of emergency regimes.

2 1 The introduction of emergency regimes in Cameroon under international supervision

After World War I, possession of Kamerun was transferred from Germany to France and Britain by virtue of section 119 of the Versailles treaty of 28 June 1919.¹⁰ Sometime after French authorities took over the larger portion of the territory, the French Royal Ordinance of 17 November 1840 on the government of Senegal and its dependencies became applicable in Cameroon. Some provisions of this document essentially contain emergency measures, for it provides that “the governor shall ensure the security and peace of the colony” and that “all acts and events likely to undermine public law and order or the peace shall be immediately referred to him”.¹¹ Similarly, a Decree issued on 9 November 1901 by the French president of the time, Emile Loubet, also became enforceable in Cameroon. Two provisions of this Decree regulating the relations between governors and senior commanders of the troops clearly refer to emergencies that may arise in the colonies.¹² A Decree of 23 March 1921 relating to the prerogatives of the commissioner of the French Republic in Cameroon subsequently transferred the special powers of the governors of the colonies to the commissioner. Section 2 of this Decree conferred upon the *Commissaire de la République* powers of defence of the territory, to be exercised under the authority of the Minister of Overseas Territories of France.¹³

Emergency regimes were introduced in Cameroon not only because the French imposed on it some draconian measures already in force in their colonies, but also through international instruments which endorsed French control over the territory. Section 26 of the League of Nations Mandates of 20 July 1922, which placed the country under a mandate, vested in France and Britain the power of administering it and ensuring peace, law and order. In addition, section 3 conferred “special powers” on France and Britain to use indigenous troops to fight threats of war or to defend the territory. The harsh nature of the measures was also underlined in section 7, which entitles the mandatory powers to “take all necessary measures” to maintain public order and a good administration.

10 *Ibid.*

11 JG Bouvenet & R Bourdin *Codes et lois du Cameroun* (Yaounde, 1956) at 119.

12 See ss 1 and 2 of the Decree of 9 Nov 1901 available at <http://djibouti.frontafrique.org/?toDo=docs&ID=260&posID=116> (accessed 5 Nov 2013).

13 *Journal officiel des territoires occupés de l’Ancien Cameroun* 1 Jun 1921 at 88.

In 1939, when the Second World War broke out, French authorities took further exceptional measures and sent the indigenous population into the killing fields. Even though the Versailles treaty formally forbade Britain and France to “give military instruction to the indigenous population except in the case of policing or defence of territory”,¹⁴ the Gaullist administration ignored these provisions and under the pretext of “*effort de guerre*” instituted *l’engagement volontaire* (voluntary commitment) which forced around 10 000 indigenous Cameroonians into the battle fields. It is reported that:

In fact the French administration in Cameroon treated the indigenous population very harshly during the war. To put it frankly, the system set up by the free French in Cameroon resembled a military dictatorship. As soon as he arrived, Leclerc imposed a state of siege on the entire territory and abolished almost any public freedom.¹⁵

Then in the course of the Second World War, a state of siege, historically the foremost institution of emergency regimes, was enforced by the French administration in a country where institutional frameworks were yet to be set up.

The Second World War had highlighted the weaknesses of the League of Nations, which eventually led to the creation of the United Nations Organisation (UN) in 1946. This resulted in the two mandated territories of Cameroon being converted into United Nations Trust territories.¹⁶ With regard to emergency regimes, section 4 of the trusteeship agreement provided for the setting up of military, maritime, and air force headquarters, and entitled authorities to “take all necessary measures for the organisation and own defence to ensure the participation of the territory in the maintenance of peace and international securities, in respect of interior order and the defence of the territory”. The provision creates the impression that the trusteeship agreement was designed to be implemented in an atmosphere of turmoil.

In Cameroon, severe measures were regularly enforced when there was political agitation against colonialism, led by the *Union des Populations du Cameroun* (UPC), a nationalist movement started in April 1948 and led by Ruben Um Nyobe. The movement demanded nothing less than independence and reunification of the British and French Cameroons, a request acknowledged by two resolutions of the United Nations in January 1952 and December 1953, which required France’s trusteeship in Cameroon to move toward autonomy or independence.¹⁷ Embarrassed by these developments, the French incited the UPC to violence by subjecting the party to social, political and even religious harassment.¹⁸ On 19 February 1955, the French

14 T Deltombe *et al Kamerun! Une guerre cachée aux origines de la Françafrique 1948-1971* (Paris, 2011) at 34-35.

15 *Idem* at 34.

16 “Fiftieth anniversary independence and reunification” available at <http://www.cinquantenaires-cameroun.org/en/history.php> (accessed 12 Oct 2012).

17 *Idem* at 128.

18 Deltombe (n 14) at 122-123.

high commissioner in Cameroon, Roland Pre, issued a decree empowering all officials of the administration to “use force in order to prevent and disperse meetings that can disturb public order”.¹⁹ In the same vein, on 13 July of the same year, the UPC movement was outlawed by a decree of the president of the Council, Edgar Faure. As a result, some leaders of the movement, including its chairperson Felix Moumié, and his deputies Abel Kingue and Ernest Ouandié, went into exile. Another section of the leadership, headed by its secretary-general Um Nyobe, went underground and started guerrilla warfare, known in Cameroon as the *maquis*.²⁰ The French administration reacted to this guerrilla warfare by launching massive campaigns of repression. On 21 December, Pierre Messmer, the new high commissioner issued “special requisitions” that allowed security forces to open fire on saboteurs caught “in flagrante delicto”. A day later, on 22 December, a *Zone de maintien de l’ordre de la Sanaga-Maritime* (ZOE), (zone of law enforcement in Sanaga-Maritime) was set up for two months.²¹ This led to patrols and raids by the police, gendarmerie and Cameroon guards in Douala, Yaounde, Nkongsamba, Bafia and elsewhere.²²

The recurrence of expressions such as “meetings that can disturb public order”, “special requisitions” and “zone of law enforcement” were consistent with the colonial authorities’ developing idea of emergency regimes and suspension of the law in the country. The status of Cameroon was later amended by two French decrees: the Decree of 16 April 1957 on internal autonomy, and the Decree of 30 December 1958 on the complete autonomy of the country. With regard to emergency regimes, whereas section 39 of the Decree of 16 April 1957 allowed the headquarters of the High Commissioner to be moved “in case of necessity”, section 41 of the same document stressed that the High Commissioner was in charge of public order and the security of persons and property. He had at his disposal state security and gendarmerie stationed in the territory, and was allowed “in case of urgency to take all necessary measures for the safeguarding of order or its restoration”. Similarly, section 25 of the Decree of 30 December 1958 provided that the High Commissioner of France in Cameroon and the Prime Minister might issue a joint order declaring a state of exception in case of an armed attack, or serious anticipation of such an attack or of foreign war. Though the High Commissioner and the Prime Minister were both entitled to enforce a state of exception, the Decree provided that in case of disagreement between the two, the decision of the French High Commissioner should prevail. The High Commissioner would by virtue of an order enforcing the state of exception “take necessary measures” to safeguard order and its restoration.

19 *Idem* at 163.

20 The expression *maquis* refers to a non-conventional war or guerilla warfare in which nationalists, being aware of their inferiority and weakness in the face of a well-equipped French army, remained hidden in the forest and organised sporadic strikes in the cities.

21 Deltombe (n 14) at 214.

22 *Ibid.*

The introduction of emergency regimes in Cameroon was obviously the consequence of the reception of various draconian measures provided for either by international instruments or by legislation already enforced in other French colonies. In the 1950s the various provisions on emergencies were formally grouped into specific emergency legislation. In particular, emergency regimes as currently experienced in Cameroon were formally created by the French during Algerian colonialism. They remain the point of intersection between the history of Cameroon and that of Algeria. For an adequate understanding of the dynamics of these regimes in the context of Cameroon, a review of the Algerian experience is therefore necessary.

2.2 The Algerian experience and the genesis of emergency regimes

Having witnessed the resounding defeat of France in 1940 [and the defeat of the French in Indochina] nationalists engaged in the struggle for the emancipation of their country are now aware that they can gain independence through violence and weapons. Algerians of the FLN will remember the lesson; and so will Cameroonians of the UPC in other circumstances.²³

In the context of the struggle for independence, led by a nationalist movement, the *Front de Libération Nationale* (FLN), the French authorities continuously enforced draconian measures in Algeria in order to suppress any nationalist tendencies. The FLN on 1 November 1954 launched what was dubbed “*le massacre de la Toussaint Sanglante*” (the slaughter on All Saints’ Day) which resulted in the killing of many French as well as Algerian Muslims supporting the colonial regime.²⁴ A parliamentary session held in France on 12 November 1954 suggested a set of repressive measures aimed not only at preventing a repetition of such a massacre but also at retaliation against the FLN. Following various developments that led to the dismissal of the Mendes government on 5 February 1955, the French Assembly on 3 April 1955 finally passed bill 55/385 declaring a state of emergency. For the first time in history, a law on a state of emergency had been passed and was soon enforced in Algeria to counteract the nationalist movement. Despite the enforcement of this severe legislation, the cycle of violence continued a few months later when, on 20 August 1955, 123 Europeans and an official number of 1273 rebels were killed, although there were 12000 deaths according to the FLN.²⁵ It is important to emphasise the genesis and purpose of the French law of 3 April 1955 creating a state of emergency, because French imperialism soon reacted to the growing nationalist movement in

23 Deltombe (n 14) at 151.

24 “Guerre d’Algérie, de la colonisation à l’Indépendance” available at <http://www.curiosphere.tv/ guerre-algerie/> (accessed 2 Oct 2012).

25 “Guerre d’Algérie: Massacre du 20 Aout 1955” available at <http://www.mekerra.fr/images/ ecritures/amand-guy/20-aout-1955.pdf> (accessed 11 Nov 2013).

Cameroon by also passing similar legislation there. Thomas Deltombe and others have observed that the means and methods of French authorities in the face of events in Algeria and Cameroon closely resemble each other:

Facing “disorder” from the UPC followers, the scale of Manichean interpretation of French authorities implemented in the Algerian war is gradually introduced and pinned on the Cameroon situation by the heads of the army.²⁶

Algeria was among the first African countries to formally experience the trauma of a state of emergency, but in 1961 that country also experienced another type of emergency regime, which was the state of exception, at that time very new and also to be introduced in Cameroon. Indeed, when the escalation of violence in Algeria resulted in the return of General de Gaulle as the French head of state, he was given full powers and allowed to revise the Constitution. This led to the collapse of the Fourth Republic and the birth of the Fifth. One of the biggest innovations of de Gaulle’s new Constitution of 4 October 1958 was section 16 concerning a state of exception. This section made provision for a complete concentration of power in the hands of the president when the state’s safety, independence, international obligations or institutions were threatened.

Whereas de Gaulle was acknowledging the demands of those seeking independence, many French settlers in Algeria opposed the struggle for independence, viewed it as treason and strongly disagreed with de Gaulle’s politics. As a result, on 21 April 1961, four generals of the French army organised a military putsch in Algiers to prevent de Gaulle from relinquishing French sovereignty over French Algeria (*l’Algérie Française*).²⁷ In retaliation, de Gaulle two days later, on 23 April, formally implemented section 16 of the Constitution and declared a state of exception in Algeria which lasted until 29 September 1961.

2 3 The move toward “independence” and the formalisation of emergency regimes in Cameroon

This section examines the state of warning and the state of alert as the foremost formal emergency regimes in the country, which then became keystones in the process of constitution making.

2 3 1 From de facto emergency to de jure emergency: l’état d’alerte and l’état de mise en garde

Until 1959, the campaign of repression and the deployment of draconian measures across Cameroon had been carried out through emergency mechanisms provided

26 Deltombe (n 14) at 186.

27 “13 Mai 1958 Alger se révolte” available at <http://www.herodote.net/histoire/evenement.php?jour=19580513> (accessed 2 Oct 2012).

by international instruments and French colonial legislation designed for other colonies. That situation came to an end in May 1959, when Prime Minister Ahidjo, facing violence perpetrated by nationalist fighters and consequent insecurity issues, formally requested legal means to address the situation from the legislative assembly of Cameroon, (ALCAM).²⁸ Such legal means were provided in four executive bills, which were approved by thirty-four to fourteen votes on 22 and 27 May 1959 through Law 59/33 of 27 May 1959 on the maintenance of public order.²⁹ For the first time legislation formally acknowledged two specific types of emergency regime, namely, a state of alert (*l'état d'alerte*) and a state of warning (*l'état de mise en garde*).³⁰ These regimes were largely based on the repressive provisions of the Law of 3 April 1955 on the state of emergency and section 16 of the French Constitution that had been applied in Algeria.

As emergency institutions, a state of alert and a state of warning could be declared by both the interior minister and prime minister in the case of a “serious presumption or event threatening public order.”³¹ Whereas a state of warning could not last more than eight days, a state of alert could last for up to three months.³² Both measures were renewable and extended to *inter alia* the prohibition of meetings and publications, the imposition of a curfew and the request for administrative authorisation to enjoy certain rights. People who did not comply with these provisions could be imprisoned for twelve months or fined between FCFA 200 000 and 500 000.³³ The state of warning and the state of alert gave legitimacy to the government’s persecution of nationalist fighters, which had previously been carried out in secret. Special criminal tribunals were set up in Bafia, Douala, Dschang, Nkongsamba and Yaounde, and large numbers of suspects were arrested. Six opposition newspapers, including Bebey Eyidi’s *L’opinion au Cameroun*, were suppressed.³⁴ The following table gives an idea of the scale of enforcement of states of alert and states of warning across the country.

28 A Eyinga *Mandat d’arrêt pour cause d’élections: De la démocratie au Cameroun 1970-1978* (Paris, 1978) at 14.

29 *Ibid.*

30 *Journal officiel du Cameroun* 27 May 1959 at 637.

31 *Ibid.*

32 Eyinga (n 28) at 14.

33 *Journal officiel du Cameroun* 1 Jul 1959 at 637.

34 N Awasom “Politics and constitution-making in Francophone Cameroon, 1959-1960” (2002) 49(4) *Africa Today* 3-30 at 9-10.

Declaration and extension of a state of alert and a state of warning in Cameroon during the year 1959

<i>Reference and date</i>	<i>Type of emergency and area of implementation</i>
Order 2086, 28 Jun 1959	Declaring a state of alert in the Bamileke region. ³⁵
Order 2087, 28 Jun 1959	Declaring a state of alert in the Wouri region. ³⁶
Order 2088, 28 Jun 1959	Declaring a state of warning in the Nyong and Sanaga region. ³⁷
Order 2089, 28 Jun 1959	Declaring a state of alert in the Sanaga-Maritime region. ³⁸
Order 21/43, 4 Jul 1959	Declaring a state of alert in the Mungo region for three months. ³⁹
Order 21/48, 7 Jul 1959	Declaring a state of alert in the Nkam, Mbam Sanaga-Maritime, Nyong et Kelle, Ntem and Dja-et-Lobo regions for three months. ⁴⁰
Order 2041, 7 Jul 1959	Declaring a state of warning within the Kribi division. ⁴¹
Order 2241, 15 Jul 1959	Declaring a state of alert within the Kribi division. ⁴²
Order 3270, 29 Sep 1959	Extending a state of alert within the Wouri division. ⁴³
Order 3272, 29 Sep 1959	Extending a state of alert in the Bamileke region. ⁴⁴
Order 3272, 30 Sep 1959	Extending a state of alert within the Nyong and Sanaga for a new period of three months. ⁴⁵
Order 3414, 8 Oct 1959	Extending a state of alert for a new period of three months in the Nkam, Mbam Sanaga-Maritime, Nyong et Kelle, Ntem and Dja-et-Lobo divisions for three months. ⁴⁶
Order 3520, 16 Oct 1959	Extending a state of alert within the Kribi division for three months. ⁴⁷

The adoption of repressive legislation in May was to be followed a few months later by the heated debate on *pleins pouvoirs* during the parliamentary session of October 1959.

2 3 2 Emergency regimes, a keystone in the process of constitution making in Cameroon: the parliamentary session of October 1959 and the heated debate on *pleins pouvoirs*

According to Herbert Tingsten, a state of exception embodies the concept of “full powers” (*pleins pouvoirs*), which is characterised by a concentration of power in the

35 *Journal officiel du Cameroun* 1 Jul 1959 at 839.

36 *Idem* at 840

37 *Ibid.*

38 *Ibid.*

39 *Idem* 15 Jul 1959 at 918.

40 *Ibid.*

41 *Idem* 5 Aug 1959 at 1040.

42 Eyinga (n 28) at 151.

43 *Journal officiel du Cameroun* 14 Oct 1959 at 1391

44 *Ibid.*

45 *Ibid.*

46 *Idem* 21 Oct 1959 at 1415.

47 *Ibid.*

hands of the executive and the provisional abolition of the separation of legislative, executive and judicial powers.⁴⁸ During parliamentary debates in Cameroon in October 1959, two contradictory proposals were made: Firstly, it was proposed that full power be granted to the prime minister to draft a Constitution. Secondly, it was proposed that politicians participate in a round-table conference in order to achieve national reconciliation and elect a constituent assembly to draft a Constitution. However, Prime Minister Ahidjo opposed the idea of a round-table conference, saying that it would be a “gathering of ‘talkative people’” (*une assemblée de bavards*). Instead, he requested parliament to grant him full powers and permission to rule the country by decree for six months. In other words, Ahidjo was asking the Legislative Assembly to relinquish its legislative prerogatives in his favour and go on leave until such time as a new assembly was elected and convened.

In reality, the Prime Minister requested full powers because what was happening in Cameroon echoed events in France in the previous year. By May 1958, when war in Algeria was threatening, many Frenchmen, including the then president Rene Coty called upon General de Gaulle to take over power in order to restore peace in the country. On 1 June 1958, de Gaulle who had retired from politics, agreed to do so, subject to parliament’s granting him *pleins pouvoirs* for six months. A day later he was given full powers by the National Assembly and on 3 June he was allowed to revise the Constitution. He then drafted an entirely new Constitution that marked the transition from the Fourth to the Fifth Republic.

The situation in Cameroon resembled that in Algeria, for the country was experiencing political troubles and armed insurrection led by the UPC. Moreover, Cameroon had no Constitution, so that Ahidjo had the opportunity to become the “Cameroonian de Gaulle”, the saviour of the nation. Those who opposed granting him full powers included the members for West Cameroon, the members of the *Parti Démocrate Camerounais* (PDC) and the elected members from the divisions of Sanaga-Maritime and Nyong et Kelle.⁴⁹ Tsalla Mekongo, one of the opposition speakers of the PDC party observed as follows:

I have already mentioned that the circumstances that brought General de Gaulle to power are not similar to those currently known in Cameroon.⁵⁰

The opposition parties strongly criticised the attitude of the Prime Minister, who was merely mimicking de Gaulle’s stance. Whereas in France there was widespread support for de Gaulle’s return to power, Ahidjo sought to eliminate parliament from the process of decision-making and the drafting of the Constitution. Ahidjo

48 H Tingsten as quoted by G Agamben *State of Exception* (Chicago, 2005) at 7.

49 “Le vote des pleins pouvoirs à M. Amadou Ahidjo le 29 Octobre 1959” available at http://www.pdcccpcd.org/images/stories/publications/doc/archives/Le_vote_des_pleins_pouvoirs_a_Amado_AHIDJO_29_octobre_1959.pdf (accessed 3 Oct 2012).

50 *Ibid.*

contended that the deteriorating situation required a pause in the “democratisation” of the country because all resources had to be mobilised against “terrorism and violence”. This argument evoked a strong reaction. Daniel Kemajou, a member of the opposition, observed that if full powers were granted to the prime minister, he would be so powerful that he would be able to pass laws disadvantaging his opponents, redraw electoral districts as he saw fit and by decree suppress anything he wanted to.⁵¹ Despite these severe criticisms, Ahidjo’s emergency powers bill was formally proposed three days later, and tempers again flared in parliament. Victor Levine relates that the debate was “marked by a scene in which the opposition shouted, stamped on the floor, pounded the tables, and hurled insults at Assembly President Mabaya who, at one point, was forced to suspend the sitting for five minutes because no one could be heard above the tumult”.⁵² The Ahidjo government held a significant parliamentary majority, and the bill was eventually passed by a vote of fifty to eleven with two abstentions.⁵³ Vested with full executive and legislative powers, the Prime Minister could then freely dictate the form of new institutions.

3 Emergency regimes in Cameroon after “independence”: A major legal instrument of government

This section examines the emergency atmosphere that prevailed at the time of the drafting of the Constitution and the legal architecture of emergency regimes in Cameroon.

3 1 The emergency mechanism surrounding the drafting of the Constitution

After Ahidjo was vested with full powers, the Assembly went into recess and the Prime Minister set up an extra-parliamentary Constitutional Committee; a committee with no real power. Key opposition figures like Daniel Kemajou and Soppo Priso refused to be associated with it.⁵⁴ In truth the supreme law for Cameroon was drafted in one night by two French advisers, Jacques Rousseau and Paul Audat⁵⁵ and was later proofread by a French political science expert, Professor Maurice Duverger, who for a fee agreed to be part of this legal farce.⁵⁶ It is reported that because the initial provisions were too liberal, Colonel Jacques Richard, the French Commander of the

51 *Ibid.*

52 V Levine *The Cameroons from Mandate to Independence* (California, 1964) at 186.

53 “Le vote des pleins pouvoirs” (n 49); see, further, Deltombe (n 14) at 376.

54 Deltombe (n 14) at 384; see, further, Awasom (n 34) at 15.

55 *Idem* at 384-385.

56 *Idem* at 386.

Gendarmerie in Cameroon, persuaded Duverger to include certain repressive sections in the draft constitution to counter the ongoing rebellion.⁵⁷ As described sarcastically by Gaillard, in the absence of a secretary “an eminent professor fashioned the draft constitution for Cameroon according to the dictate of a policeman”.⁵⁸

Note the link between the constitution-making process and emergency regimes. Haste, confusion of powers, executive dominium and an absence of checks and balances are the main attributes of these regimes. This particular Constitution was hastily drafted in one night by two people and proofread by a third one without any parliamentary input, as if in time of war.

3 2 Emergency regimes within the legal structure of Cameroon

Following the so-called independence of Cameroon under French administration on 1 January 1960, the exceptional powers vested in Ahidjo were soon incorporated into the new Constitution of 4 March 1960. The provisions on emergency regimes in section 20 were largely inspired by section 16 of the French Constitution of 4 October 1958. This section provided for two new emergency regimes, namely a state of exception and a state of emergency. Indeed, until then the only such regimes had been a state of alert and a state of warning, which have been analysed above. On 5 May 1960, Ahidjo was chosen as the president of the country and two days later he issued Ordinance 60/52 of 7 May 1960 on the organic law on the state of emergency.⁵⁹ The following day, he decreed a state of emergency within eleven troubled divisions of the country for a period of four months, which was renewable indefinitely.⁶⁰ The provisions of the new Ordinance were largely based on those relating to the repealed state of alert and state of warning. Thus they concerned for instance the restriction and administrative authorisation of the movement of persons and property, the surrender of arms, ammunition and transceivers, the prohibition of meetings and publications and so on. Despite the severity of these measures, the relevant punishments were even more severe. Section 10 of the Ordinance provided for imprisonment for a period of between two and five years and a fine of between FCFA 300 000 and 1 000 000 for anyone who failed to comply with the provisions of the Ordinance.⁶¹ The following table reflects the scale of enforcement of emergency decrees in the country issued from the year 1960 until the first half of the year 1961.

57 Awasom (n 34) at 14; see, further, Deltombe (n 14) at 386.

58 Awasom (n 34) at 16.

59 *Journal officiel de la République du Cameroun* 12 May 1960 at 679-680.

60 Deltombe (n 14) at 387.

61 *Journal officiel de la République du Cameroun* 12 May 1960 at 679-680.

Declaration and extension of a state of alert and a state of emergency in Cameroun from the year 1960-1961

<i>Reference and date</i>	<i>Type of emergency and area of implementation</i>
Ordinance 62/2, 12 Jan 1960	Extending a state of alert in the Wouri, Bamileke, Nyong et Kelle, Ntem, Dja-et-Lobo, Kribi, Mungo divisions "until further notice". ⁶²
Decree 60/124, 8 May 1960	Declaring a state of emergency. ⁶³
Decree 60/102, 9 Nov 1960	Extending the state of emergency in the usual ten departments. ⁶⁴
Law 61/5, 4 Apr 1961	Declaring a state of emergency throughout the national territory of the Republic of Cameroon. ⁶⁵
Decree 61/52, 24 Apr 1961	Extending the state of emergency within the usual ten departments for a new period of 4 months. ⁶⁶
Decree 61/76a, 4 Jun 1961	Repeating the extension. ⁶⁷

After North British Cameroon became part of Nigeria on 12 February 1961, the Southern portion of this part of the territory became independent and by 1 October 1961, had officially attached itself to the Francophone Cameroon. The reunification of the two Cameroons that the UPC had been seeking for years was to give birth to the Federal Republic of Cameroon. The drafting of the new Constitution followed more or less the same process that had guided the adoption of the previous Constitution of 4 March 1960. The negotiations were conducted outside parliament by Ahidjo's adviser Jacques Rousseau for the Francophone Cameroon side and a British attorney for the Anglophone Cameroon.⁶⁸ Rousseau observed that the disagreements between them were significant as "the attorney proposed a very complicated document where he cared too much about human rights like a typical Briton. It was really ridiculous".⁶⁹ Rousseau eventually emerged as the winner and the Constitution, a mere adaptation of the previous one, was adopted on 14 August 1961 by the National Assembly.⁷⁰ This new supreme law was promulgated on 1 September and took effect

62 *Idem* 3 Feb 1960 at 131.

63 On 7 May 1960, the Ordinance on the State of Emergency was issued as provided for by s 20 of the Constitution. At that moment the state of alert and the state of warning disappeared from the legal framework of the state. *Journal officiel de la République du Cameroun* 12 May 1960 at 692.

64 *Idem* 11 Nov 1960 at 1429.

65 *Idem* 12 May 1961 at 446.

66 *Idem* 3 May 1961 at 577

67 *Idem* 19 Aug 1961 at 936.

68 Deltombe (n 14) at 484.

69 *Ibid.*

70 *Ibid.*

on 1 October 1960 in the absence of any referendum or election.⁷¹ The emergency regime continued, because the new Constitution vested President Ahidjo with full powers in the name of a “harmonious transition” for a new period of six months.⁷² Indeed section 50 of the new supreme law provided as follows:

Exceptionally, during a period of six months from 1 October 1961, the laws necessary to the setting up of institutions and, until this setting up, to the functioning of public powers and the life of the federal state, will be issued by the president of the federal republic through ordinances having the force of law.

Despite these emergency provisions, the main repressive arsenal of the state continued to be section 15, with its references to a state of exception and a state of emergency. However, the state of emergency and “state of siege” could now be proclaimed for a longer period and in a larger area than in the past, when they had been imposed only in Francophone Cameroon. On 4 October 1960 the state of emergency which had been enforced and repeatedly renewed in that part of the country since 8 May 1960 was again renewed for six months, with the possibility of further extension.⁷³ In addition, President Ahidjo issued Ordinance 61/OF/5 of 4 October 1961 on the state of emergency, which was to regulate emergencies within the new federal state.⁷⁴ One month after the release of this ordinance, Decree 23 of 6 November 1961 for the first time declared a state of emergency in some portions of former British Cameroon. A few months later, the President took another important step when he issued Ordinance 62/OF/17 of 12 March 1962, which extended to other parts of the federal territory certain provisions of Ordinance 61/OF/5 of 4 October 1961 concerning a state of emergency.⁷⁵ The peculiarity of this ordinance was that when a state of emergency was declared within a portion of the federal state, its effects automatically spread across the entire country. Section 1 reads:

When a state of emergency has been declared in a part of the territory, the following provisions of Ordinance 61/OF/5 of 4 October 1961 concerning a state of emergency will be enforceable as of right in the entire federal territory ...⁷⁶

By now, the former French Cameroon was called “Eastern Cameroon”, whereas the former British Cameroon was known as “Southern Cameroon” or “Western Cameroon”. This demarcation was purely theoretical, since the former Anglophone portion of the territory was subject to a completely authoritarian policy. As a result, in May 1972, two years after the renewal of his presidential mandate on 28 March

71 *Ibid.*

72 *Idem* at 384.

73 *Ibid.*

74 *Journal officiel de la République Fédérale du Cameroun* 1-6 Oct 1961 at 8-10.

75 *Idem* at 232.

76 *Idem* at 276.

1970, Ahidjo made a speech in which he announced: “My dear countrymen, I have decided to end the federal form of the state” (*mes chers compatriotes, j’ai décidé de mettre fin à la forme fédérale de l’Etat*). To consolidate his powers, the President kept renewing and implementing a state of emergency, thus increasing repression at the national and local level. The following table lists different emergency decrees issued in Eastern as well as Western Cameroon under the federal state.

Emergency decrees extending a state of emergency for six months from the year 1961 in eastern and western Cameroons

<i>Eastern Cameroon</i>	<i>Western Cameroon</i>
Decree 61/DF/31 a, 5 Nov 1961 ⁷⁷	Decree 23, 6 Nov 1961 ⁷⁸
Decree 62/FD/157a, 8 May 1962 ⁷⁹	Decree 62/FD/125, 7 Apr 1962 ⁸⁰
Decree 62/DF/382, 30 Oct 1962 ⁸¹	Decree 62/FD/373, 8 Oct 1962 ⁸²
Decree 63/DF/130, 24 Apr 1963 ⁸³	Decree 63/FD/131, 24 Apr 1963 ⁸⁴
Decree 63/DF/398, 14 Nov 1963 ⁸⁵	Decree 63/FD/368, 11 Oct 1963 ⁸⁶
Decree 63/DF/156a, 10 May 1964 ⁸⁷	Decree 64/FD/134, 13 May 1964 ⁸⁸
Decree 64/DF/442, 9 Nov 1964 ⁸⁹	Decree 64/FD/418, 14 Oct 1964 ⁹⁰
Decree 65/DF/168a, 11 May 1965 ⁹¹	Decree 65/FD/146, 17 May 1965 ⁹²
Decree 65/DF/500, 10 Nov 1965 ⁹³	Decree 65/FD/432, 12 Oct 1965 ⁹⁴
Decree 66/DF/221, 12 May 1966 ⁹⁵	Decree 66/FD/133, 17 Mar 1966 ⁹⁶
Decree 66/DF/545, 2 Nov 1966 ⁹⁷	Decree 66/FD/493, 8 Oct 1966 ⁹⁸

77 Eyinga (n 28) at 151.

78 Deltombe (n 14) at 485.

79 *Journal officiel de la République Fédérale du Cameroun* 1 May 1962 at 411.

80 *Idem* 15 May 1962 at 499.

81 *Idem* 1 Nov 1962 at 1252.

82 *Idem* 15 Oct 1962 at 1187.

83 *Idem* 15 May 1963 at 353.

84 *Idem* at 354.

85 *Idem* 15 Nov 1963 at 1164.

86 *Idem* at 1096.

87 Eyinga (n 28) at 151.

88 *Journal officiel de la République Fédérale du Cameroun* 15 May 1964 at 347.

89 *Idem* 15 Nov 1964 at 1284.

90 *Idem* 15 Oct 1964 at 1087.

91 *Idem* 15 May 1965 at 519.

92 *Idem* at 436.

93 *Idem* 1 Dec 1965 at 1329.

94 *Idem* 15 Oct 1965 at 1137.

95 *Idem* 15 May 1966 at 734.

96 *Idem* 1 Apr 1966 at 357.

97 *Idem* 15 Nov 1966 at 1765.

98 *Idem* 1 Nov 1966 at 1489.

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Decree 67/DF/179, 26 Apr 1967 ⁹⁹	Decree 67/FD/139, 6 Apr 1967 ¹⁰⁰
Decree 67/DF/469, 3 Nov 1967 ¹⁰¹	Decree 67/FD/375, 28 Aug 1967 ¹⁰²
Decree 68/DF/122, 27 Mar 1968 ¹⁰³	Decree 68/FD/123, 29 Mar 1968 ¹⁰⁴
Decree 68/DF/389 27 Sep 1968 ¹⁰⁵	Decree 68/FD/390, 27 Sep 1968 ¹⁰⁶
Decree 69/DF/102, 27 Mar 1969 ¹⁰⁷	Decree 69/FD/101, 27 Mar 1969 ¹⁰⁸
Decree 69/DF/413, 3 Oct 1969 ¹⁰⁹	Decree 69/FD/412, 3 Oct 1969 ¹¹⁰
Decree 70/DF/140, 31 Mar 1970 ¹¹¹	Decree 70/FD/139, 31 Mar 1970 ¹¹²
Decree 70/DF/494, 12 Oct 1970 ¹¹³	Decree 70/FD/495, 12 Oct 1970 ¹¹⁴
Decree 71/DF/123, 15 Mar 1971 ¹¹⁵	Decree 71/FD/124, 15 Mar 1971 ¹¹⁶
Decree 71/DF/498, 14 Oct 1971 ¹¹⁷	Decree 71/FD/499, 14 Oct 1971 ¹¹⁸
Decree 72/DF/151, 23 Mar 1972 ¹¹⁹	Decree 72/FD/150, 23 Mar 1972 ¹²⁰

On 20 May 1972, at the behest of President Ahidjo, a referendum was held on the abolition of a federal form of government. The referendum was held in clear violation of the first paragraph of section 47 of the Constitution of 1961, which prohibited “any proposal for an amendment of the unity and the integrity of the federation”. The referendum appeared to be a farce, aimed at hypocritically and despotically ending the federation. Citizens were left with no choice, for the referendum was structured in such a way that there was no outcome other than the establishment of a new constitution. As reported by Enoch Meyomesse:

- 99 *Idem* 1 May 1967 at 695.
 100 *Idem* 15 Apr 1967 at 561.
 101 *Idem* 15 Nov 1967 at 2261.
 102 *Idem* 1 Sep 1967 at 1905.
 103 *Idem* 1 Apr 1968 at 703.
 104 *Idem* 1 May 1968 at 1968.
 105 *Idem* 1 Nov 1968 at 1678.
 106 *Idem* 1 Oct 1968 at 1679.
 107 *Idem* 1 Apr 1969 at 483.
 108 *Idem* 1 Apr 1969 at 482.
 109 *Idem* 1 Oct 1969 at 1936.
 110 *Idem* 15 Oct 1969 at 1935.
 111 *Idem* 15 Jun 1970 at 371.
 112 *Idem* 31 Mar 1970 at 371.
 113 *Idem* 1 May 1971 at 632.
 114 *Ibid.*
 115 *Idem* 15 Jun 1971 at 857.
 116 *Idem* at 858.
 117 *Idem* 1 Dec 1971 at 2633.
 118 *Idem* at 2634.
 119 *Idem* 1 Apr 1972 at 585.
 120 *Ibid.*

We end up ourselves being subjected to the famous referendum of 20 May 1972, for which there were only two types of ballots, *Oui* [meaning ‘Yes’] and YES in the polling stations, and consequently, a new constitution.¹²¹

The federal form of state was then abolished and replaced by a unitary structure. By Decree 72/270 of 2 June 1972, the Constitution of the United Republic of Cameroon was proclaimed and like the previous constitutions, contained provisions on emergency regimes. Section 11 gave the president exceptional powers to enforce a state of emergency and the so-called state of siege. Ahidjo then enacted Ordinance 72/13 of 26 August 1972, which repealed the Ordinance of 4 October 1961 relating to a state of emergency.¹²² The provisions of this ordinance largely repeated the previous ones on the infringement of human rights and on various administrative matters. The Ordinance of 1972 also provided in section 7 that when a state of emergency was proclaimed within a division of the country, the prefects of the other divisions would be automatically clothed with prerogatives similar to those of the prefect in charge of the area subject to a state of emergency. The following table lists some emergency decrees issued by President Ahidjo in the United Republic of Cameroon.

Emergency decrees under the unitary state from the year 1972

Decree 72/550, 14 Oct 1972 ¹²³
Decree 73/174, 16 Apr 1973 ¹²⁴
Decree 73/634, 11 Oct 1973 ¹²⁵
Decree 74/248, 2 Apr 1974 ¹²⁶
Decree 74/832, 3 Oct 1974 ¹²⁷
Decree 75/266, 19 Apr 1975 ¹²⁸
Decree 75/720, 17 Nov 1975 ¹²⁹
Decree 76/199, 19 May 1976 ¹³⁰
Decree 76/553, 23 Nov 1976 ¹³¹
Decree 77/128, 9 May 1977 ¹³²

121 E Meyomesse *Une nouvelle constitution pour le Cameroun et par les Camerounais eux-mêmes* available at <http://enoh-meyomesse.blogspot.com/2008/04/une-nouvelle-constitution-pour-le.html> (accessed 12 Oct 2012).

122 *Journal officiel de la République Unie du Cameroun* 1 Sep 1972 at 81.

123 *Idem* 15 Oct 1972 at 1291.

124 *Idem* 1 May 1973 at 1186.

125 *Idem* 15 Oct 1973 at 3053.

126 *Idem* 15 Apr 1974 at 902.

127 *Idem* 15 Oct 1974 at 1838.

128 *Idem* 1 May 1975 at 560.

129 *Idem* 12 Dec 1975 at 1497.

130 *Idem* 1 Jun 1976 at 1542.

131 *Idem* 15 Dec 1976 at 2928.

132 *Idem* 15 May 1977 at 1004.

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Decree 77/532, 27 Dec 1977 ¹³³
Decree 78/268, 5 Jul 1978 ¹³⁴
Decree 78/490, 15 Nov 1978 ¹³⁵
Decree 79/183, 16 May 1979 ¹³⁶
Decree 79/468, 13 Nov 1979 ¹³⁷
Decree 80/161, 1 Jun 1980 ¹³⁸
Decree 80/466, 18 Nov 1980 ¹³⁹
Decree 81/200, 15 May 1981 ¹⁴⁰
Decree 81/474, 27 Nov 1981 ¹⁴¹
Decree 82/195, 2 Jun 1982 ¹⁴²

On the evening of 4 November 1982 Ahidjo announced his resignation and offered power to the then Prime Minister Paul Biya. President Biya's power was shaken on 6 April 1984 following an attempted coup. As a result, a state of emergency was declared in the capital city Yaounde, and more than a thousand people were imprisoned and dozens executed. The Biya regime was once again tested in the nineties by uprisings and democratic claims when the winds of democratisation were blowing over Africa. A set of laws was then enacted concerning a state of emergency,¹⁴³ in particular Law 90/047 of 19 December 1990, which repealed Ordinance 72/13 of 26 August. The provisions of this legislation are similar to those of the previous ordinances on the state of emergency and restrict freedom and human rights. The following table represents some emergency decrees issued after regime change in the country.

Emergency decrees under the unitary state following regime change

Decree 83/8, 11 Jan 1983 ¹⁴⁴
Decree 83/257, 7 Jun 1983 ¹⁴⁵
Decree 83/616, 2 Dec 1983 ¹⁴⁶
Decree 84/159, 18 May 1984 ¹⁴⁷

133 *Idem* 1 Jan 1978 at 39.

134 *Idem* 15 Jul 1978 at 1365.

135 *Idem* 15 Nov 1978 at 2263.

136 *Idem* 1 Jun 1979 at 661.

137 *Idem* 15 Nov 1979 at 1651.

138 *Idem* 1 Jun 1980 at 886.

139 *Idem* 15 Dec 1980 at 2352.

140 *Idem* 1 Jun 1981 at 1204.

141 *Idem* 1 Dec 1981 at 2666.

142 *Idem* 15 Jun 1982 at 1261.

143 *Idem* 1 Jan 1991 at 8-10.

144 *Idem* 1 Feb 1983 at 163.

145 *Idem* 15 Jun 1983 at 1478.

146 *Idem* 15 Dec 1983 at 3603.

147 *Idem* 1 May 1984 at 951.

Decree 84/619, 28 Jun 1984 ¹⁴⁸
Decree 85/110, 17 Jan 1985 ¹⁴⁹
Decree 85/847, 1 Jul 1985 ¹⁵⁰
Decree 85/1711, 9 Dec 1985 ¹⁵¹
Decree 86/462, 10 May 1986 ¹⁵²

This table appears to be short, but that does not mean that the enforcement of draconian measures in the country has diminished. On the contrary, these measures have increased and have entered the sphere of ordinary laws to such an extent that there is no need for formal declarations as required by national and international instruments. On 18 January 1996, a new Constitution drafted by a “technical committee” appointed by President Biya was proclaimed. The main emergency regimes as provided in section 9 (cited above) remain the state of emergency and the state of siege or so-called “*état d’exception*”.

4 The impact of emergency regimes on the current politico-legal system in Cameroon

In emergency situations, it is only the president who may declare a state of emergency and a so-called state of siege. This presidential exclusivity has slowly emerged from the country’s successive constitutions. In terms of the first Constitution of 4 March 1960, for instance, presidential decrees enforcing emergencies had to be issued in a council of ministers and countersigned by parliament.¹⁵³ In the subsequent Constitution of 1 September 1961, features of parliamentary government had disappeared. Thus the office of prime minister and the practice of countersignature by deputies were abolished and the federal government was no longer accountable to parliament in emergency matters. Today a presidential act declaring a state of emergency in Cameroon is an act of state. Such an act is of a political nature and as such is subject neither to parliamentary approval nor to judicial review.

Even in the absence of emergency situations, the ordinary institutions in Cameroon are permanently subject to the powers of the president, the vertebral column of the system. The Constitution of 1 September 1961 established a hierarchy and order of importance of power in the state. The Constitution of 4 March 1960 had referred to the legislature before anything else,¹⁵⁴ but all the subsequent constitutions speak

148 *Idem* 15 Jul 1984 at 1814.

149 *Idem* 1 Feb 1985 at 364.

150 *Idem* 15 Jul 1985 at 2390.

151 *Idem* 1 Jan 1986 at 4349.

152 *Idem* 1 Jun 1986 at 1019.

153 Section 20 of the Constitution of 4 Mar 1960.

154 Constitution of 4 Mar 1960: Title 2 on the Legislative Power, and Title 3 on the President of the Republic.

firstly of “president of the republic”.¹⁵⁵ The expression “president of the republic” in the context of Cameroon is significant because it refers to what most constitutions around the world refer to as “executive power”. Referring to the “president of the republic” rather than “executive power” is a choice that has recurred since then in subsequent constitutions, demonstrating the wish to classify power within the state according to a certain hierarchy of importance.¹⁵⁶ In all Cameroonian legal and historical documents, the phrase “executive power” appears only twice. It appeared firstly in the Constitution of the former federated state of the Southern Cameroon in the era of federalism.¹⁵⁷ The phrase “executive power” in this Constitution did not relate to the president of the republic but to the prime minister. This phrase appeared for the second time in the Constitution of 18 January 1996, and this time referred to both the president and the government allegedly led by a prime minister.¹⁵⁸ In reality, the government and the prime minister are subject to the wishes of the president. Thus, for example, the General Instruction of 1973 on the organisation of governmental office applicable to the ministers and the prime minister stated that “ministers are responsible only before the president” and they are not entitled to any power whether individual or administrative except that delegated to them by the president. The document further provided as follows:

- (a) It will be unconstitutional directly in a bill to empower a minister to issue certain rules;
- (b) Delegation by a minister is strictly prohibited unless there is provision for it in a presidential decree;
- (c) The president of the republic is permanently entitled to make personal decisions on any executive matters.¹⁵⁹

It is against the background of these provisions that presidential intervention is possible in various spheres. Thus the current Constitution of the country gives parliament exclusive legislative competence in section 26 of Title 3. However, in terms of section 28 the president of the republic may issue ordinances that have the force of law once they are ratified by Parliament.¹⁶⁰ It is worth recalling that the Cameroonian parliament, currently with 180 seats, is strongly dominated by the

155 Title 3 of the Federal Constitution of Cameroon of 1 Sep 1961 and Title 2 of the Constitution of 2 Jun 1972.

156 Constitution of 1 Sep 1961: Title 3 on the President of the Federal Republic and Title 4 on the Federal Legislative; Constitution of 2 Jun 1972: Title 2 on the President of Republic and Title 3 on the National Assembly; Constitution of 18 Jan 1996: Title 2 on the Executive Power and Title 3 on the Legislative Power.

157 Chapitre 3, Le pouvoir executif, Loi 61/LW/1 du 26 Oct 1961 portant Constitution de l'Etat Fédéré du Cameroun Occidental.

158 Part 2 of Law 96/06 of 18 Jan 1996 to amend the Constitution of 2 Jun 1972.

159 As quoted by J-F Bayart *L'état au Cameroun* (Paris, 1985) at 153.

160 Ruling through ordinances already features in the previous Constitutions: s 25 of the Constitution of 4 Mar 1960, s 24 of the Constitution of 1 Sep 1961, and s 21 of the Constitution of 2 Jun 1972.

ruling party headed by the president.¹⁶¹ It would therefore be unrealistic to expect a presidential ordinance not to be ratified.

Secondly, the current Constitution reaffirms the dominance of the president over Parliament in financial matters. In successive Cameroonian constitutions, Parliament was deemed to be the prime authority in financial matters.¹⁶² However, these provisions have yielded to those on the prerogative of executive power in such matters. Indeed, by virtue of section 16 (2) (b) of the Constitution, the president of the republic is entitled to proclaim the state budget by ordinance. This happened in at least one case, where the entire state budget was proclaimed by Ordinance 72/1 of 23 June 1972 on the financing of the United Republic of Cameroon.¹⁶³

Fourthly, under the current Constitution the president is not bound by the rule of law and relevant procedure. For example, according to the provisions of section 2 of three previous Constitutions:

The authorities in charge of the state shall derive their powers from the people by way of election by universal suffrage, direct or indirect.¹⁶⁴

This provision clearly involves the people in the management of the state, but this concept was discarded by the authoritarian provision of the Constitution of 18 January 1996. The new section 2 read as follows:

The authorities responsible for the management of the state shall derive their powers from the people through election by direct or indirect universal suffrage, unless otherwise provided for in this Constitution.

The last fragment of the provision “unless ...” aims to reduce the scope and judicial force of an election. In addition, with regard to the senate, section 20(2) of the Constitution provides that 70% of senators are to be elected, while 30% are to be appointed by the president. This came about in May 2013 following general elections: 70% of the senators were effectively elected while 30%, including the chairperson of the Senate, were appointed by President Biya. It was the first time in the history of Cameroon that the senate became operational, as in the past, Parliament contained only one chamber, the National Assembly. With 30% of their members being appointed it is open to question whether the appointment and the election of a senator carry the same weight.

The previous Constitutions had made provision for two authorities, namely the President of the republic and the legislature. However, the new Constitution of 18

161 In the current legislature, the ruling party is dominant with 148 seats out of 180 seats. In the previous legislature, the same ruling party controlled parliament with 153 seats.

162 Section 23 of the Constitution of 4 Mar 1960; s 23(4) of the Constitution of 1 Sep 1961; s 19 of the Constitution of the Federated State of Southern Cameroon of 26 Oct 1961; s 20(4) of the Constitution of 2 Jun 1972; s 26 (2) (d) of the Constitution of 18 Jan 1996.

163 J Owona “L’institutionnalisation de la légalité d’exception dans le droit public camerounais” (1975) 6 *Revue Camerounaise de droit* 104-123 at 113

164 See s 2 of the Constitutions of 4 Mar 1960, 1 Sep 1961, and 2 Jun 1972.

January 1996 made provision for three such authorities. What was formerly termed judicial authority has now become “judicial power”.¹⁶⁵ The judiciary has even become “independent of the executive and legislative powers” according to section 37(2). Yet the concepts of “judicial power” and “independence” are meaningless, since the new judicial power is no wider in scope than the former judicial authority. Section 37(3) of the constitution provides:

The President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department.

The above provision repeats section 31 of the Constitution of 2 June 1972. Olinga mentions that section 37(2) and (3) are incompatible, since it is hardly conceivable that one authority, which is independent of the other two, is guaranteed independence by one of the others.¹⁶⁶ This problem is highlighted by the fact that the bearers of judicial power, including the chief justice of the Supreme Court (the highest judicial organ in the country pending the setting up of the Constitutional Council) are appointed by the president. In addition, the president of the republic is the chairperson of the Higher Judicial Council, and the Minister of Justice the Deputy Chair.

5 Conclusion

This study aimed to investigate the origin and development of emergency regimes in Cameroon and their impact on the current institutions of the state. It appears that these regimes have become the mechanism to which Cameroonian institutions owe their survival. Essentially, emergency regimes have been implemented in the framework of colonialism, and of pre- and post-electoral disputes, in order to repress political opponents and deny democratic claims. Emergency regimes in Cameroon remain the device through which the ruling class evades the requirements of legitimacy and popular sovereignty. It is not possible to distinguish between presidential prerogatives in peacetime and during times of crisis. For most of the rules that govern the institutional life of the state there is another equivalent set of rules, whose purpose is to neutralise the first ones and allow the president to exercise functions which normally belong to entities such as parliament and the judiciary.

It is submitted that true democratic reform is necessary in the country. There should be a genuine separation of the powers of organs of state. In emergency situations, the president of the republic should no longer be the only one involved in the declaration of a state of emergency and a state of exception. A relationship of complementarity needs to be established among the three powers. The declaration of a state of emergency should no longer be considered as an act of state not subject to judicial review and parliamentary approval. The judiciary should have greater

165 Part 4 of Law 96/06 of 18 Jan 1996 to amend the Constitution of 2 Jun 1972.

166 D Olinga *La constitution de la République du Cameroun* (Yaounde, 2006) at 147.

independence, for instance as in 1960 when judges could not be removed in terms of section 41 of the Constitution of 4 March 1960.

ABSTRACT

The purpose of this study is to trace the origin and development of emergency regimes in Cameroon, to address their negative impact on the current structure of the political system and to highlight the need for change in the country. Emergency regimes are generally brought into being in exceptional circumstances and allow states to (legally) suspend law and infringe human rights when confronted by threats to their existence. They generally include a state of emergency, a state of exception, a state of siege and martial rule. In the case of Cameroon, these regimes are a legacy of French colonialism, and were introduced into the country's legal system to sustain harsh imperialist policies. Traditionally it is believed that a state of emergency and a state of exception are declared in response to circumstances threatening the state's existence (such as natural cataclysms, invasions, and general insurrections), but the peculiarity of these regimes in Cameroon is that they have been and still are used as a political device. Indeed, in the context of colonialism and war of independence between French colonial authorities, their local acolytes and indigenous Cameroonians, emergency regimes played a key role in eliminating political challengers, increasing the powers of the executive, and absolving it of any accountability and responsibility. However, in the process, these measures ended up losing their exceptional character as they entered the sphere of normalcy. The current hypertrophy of the powers of the executive entity in Cameroon dates back to that period, and it is consequently difficult to distinguish between a Cameroon society in crisis and one in peacetime.

RILEGGENDO L'EGINETICO DI ISOCRATE

Alberto Maffi*

1. L'Eginetico di Isocrate, una delle sei orazioni giudiziarie tramandate nel *corpus* dell'oratore e identificata con il nr 19, è l'unica orazione giudiziaria attica relativa a un processo che non si è svolto ad Atene bensì ad Egina. Benché l'orazione, datata fra il 394 e il 390 aC, sollevi molte questioni di rilevanza giuridica, essa non ha suscitato un soverchio interesse presso gli storici del diritto greco. Lo studio più ampio e approfondito resta il capitolo di Hans Julius Wolff, "Der Aiginetikos des Isokrates", inserito in una Memoria del 1979 dedicata al tema del conflitto di leggi.¹ Merito dello studio di Wolff è soprattutto quello di aver tentato di delineare la vicenda processuale nel suo complesso, mentre gli studi precedenti si erano concentrati quasi esclusivamente sulla questione del conflitto di leggi in base a cui valutare la validità del testamento di Trasiloco, che è in sostanza il tema al centro del processo.² Nonostante la novità dell'approccio proposto da Wolff, non sembra che il suo lavoro abbia suscitato commenti e discussioni di particolare interesse. Mi piace quindi dedicare all'amico e collega Laurens Winkel, di cui sono noti gli importanti contributi in ambito giusgreco, un riesame dell'Eginetico alla luce dell'interpretazione che Wolff ne ha proposto.

1 HJ Wolff *Das Problem der Konkurrenz von Rechtsordnungen in der Antike*, Sitzungsberichte der Heidelberger Akad d Wissenschaften, Phil-hist Kl, 1979 (5) 15-34.

2 HF Hitzig "Der griechische Fremdenprozess im Licht der neueren Inschriftenkunde" (1907) 28 ZSS 211 ss; H Lewald "Conflits de lois dans le monde grec et romain" (1959) 5 *Labeo* 334 ss; A Maffi "La capacità di diritto privato dei meteci nel mondo greco classico" in *Studi G. Scherillo* vol 1 (Milano, 1972) 177-200.

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2. Prendendo spunto dal § I della trattazione di Wolff (“*Parteien und Gegenstand des Prozesses*”), riassumiamo la vicenda che ha dato luogo al processo. Trasillo, originario di Siphnos, aveva fatto fortuna esercitando in vari luoghi l’attività di indovino. Nel corso di queste peregrinazioni ebbe relazioni con diverse donne, alcune delle quali generarono dei figli, che, secondo l’oratore, non furono mai riconosciuti come legittimi da Trasillo (§ 6): fra queste donne si trovava anche colei da cui nacque quella che è l’attuale avversaria dell’anonimo che pronuncia l’orazione. Di questa donna, probabilmente rappresentata in processo da un tutore, forse suo marito, non ci viene detto né il nome né la patria. Va subito notato, a questo proposito, che l’Eginetico è un’orazione cui spetta la qualifica di *amartyros*, nel senso che l’oratore non suffraga mai le sue affermazioni mediante testimonianze. Dopo altre vicende matrimoniali, Trasillo ritornò a Siphnos, dove sposò una donna di Seriphos, da cui ebbe tre figli: Sopaïos, Trasiloco e una figlia. Sopaïos morì senza discendenti prima dei fratelli, e Trasiloco, morendo a sua volta senza discendenti, lasciò per testamento il suo patrimonio all’oratore, dandogli nel contempo in moglie la sorella.

3. Oggetto del processo è quindi l’eredità di Trasiloco, il quale, insieme all’oratore, viveva come meteco ad Egina, essendo fuggito dalla sua patria Siphnos. L’avversaria avanza una pretesa sull’eredità del fratellastro Trasiloco sulla base della comune discendenza dal medesimo padre, Trasillo (*amphisbetein kata genos*: §§ 17, 48). L’oratore, che si trova probabilmente nel possesso dell’eredità, basa invece la sua pretesa sull’adozione testamentaria (*amphisbetein kata dosin*: § 12, mentre al § 45 è esplicita la contrapposizione *kata dosin/kata genos*).

Della “figlia” di Trasillo, controparte, non viene esplicitamente ammessa o negata dall’oratore la qualità di figlia legittima di Trasillo, quindi di sorella consanguinea dei tre fratelli Sopilo, Trasiloco e della loro innominata sorella, data in moglie per disposizione testamentaria di Trasiloco all’oratore. Come abbiamo visto, l’oratore si limita ad affermare genericamente che, prima di Trasiloco e dei suoi fratelli, nessuno dei figli che Trasillo ebbe durante la sua vita errabonda fu da lui riconosciuto come legittimo. Tanto più colpisce il fatto che l’oratore non faccia leva sulla qualità di figlia illegittima della controparte, dato che, in base a questo solo motivo, alle pretese ereditarie di lei sarebbe stato tolto il fondamento giuridico.

4. Passiamo al § II della trattazione del Wolff: “*Die prozessuale Lage*”. Il Wolff inizia rilevando giustamente che la controparte non contesta l’esistenza e la validità formale del testamento su cui l’oratore basa la sua pretesa ereditaria (§§ 15, 34, 50). Quel che invece vuole mettere in luce è l’invalidità sostanziale del testamento (e la conseguente richiesta ai giudici di dichiararne l’inefficacia – “*Unwirksamkeit*”: p 17). Ciò si ricava soprattutto dal § 15: “cercano di convincervi che occorre rendere inefficace (*akyrous* riferito alle *diathekai*) il testamento.” Se la controparte rivendicasse l’intera eredità o solo la metà non è specificato, ma è plausibile che

si trattasse della metà, dato che, una volta apertasi la successione legittima, aventi diritto a succedere sarebbero state le due sorellastre.

5. Il Wolff passa quindi a interrogarsi sulla natura del processo, ossia dell'azione intentata. Si ritiene in generale che sia stata la controparte ad agire in giudizio, il che pone immediatamente il problema di spiegare come mai sia il convenuto a parlare per primo. Che sia infatti colui che pronuncia l'orazione a parlare per primo lo rivelano indizi chiari disseminati nel corso dell'orazione stessa (§§ 30, 32, 42). Ora, sia che si tratti di un'azione di rivendica dell'eredità (simile alla *petitio hereditatis*) sia che si tratti di una *dike blabes*, che il convenuto parli per primo si potrebbe giustificare solo se fossimo di fronte a un procedimento analogo a quello messo in moto dalla *paragrafe* attica. Ma una simile eventualità è da escludere. Si è parlato, in alternativa, di azione speciale o di particolarità del diritto di Egina,³ ma non ci sono elementi per suffragare simili congetture. Il Wolff (pp 18-19) ritiene quindi che si tratti di una *diadikasia*, il cui scopo è ottenere una sentenza di accertamento della qualità di erede. Vari elementi testuali depongono in questo senso: l'uso del verbo *amphisbetein*, e soprattutto di *epidikazesthai* (§§ 3 e 48). Il procedimento viene quindi ricostruito dal Wolff in questo modo: la controparte ha intentato l'*epidikasia* presso la magistratura competente di Egina, probabilmente perché lì si trovava il patrimonio ereditario (fatto di beni mobili e/o denaro).⁴ Ad essa si oppone l'oratore sulla base del testamento. Il motivo per cui è l'oppositore a parlare per primo potrebbe risiedere o nel fatto che è già entrato in possesso dei beni ereditari (§ 16) oppure nel fatto che, in quanto erede testamentario, appare quale "besser Berechtigte" (p 19). In ogni caso parla per primo perché è colui che ha dato il via alla *diadikasia*.

6. L'identificazione con una *diadikasia* dell'azione che ha messo in moto il processo mi sembra da condividere. Viceversa le motivazioni proposte da Wolff per spiegare il fatto che sia l'oratore a prendere per primo la parola restano alquanto opinabili, dato che, per la stessa Atene, non sappiamo chi aveva diritto di prendere la parola per primo in questo tipo di processo. Proprio il fatto che l'oratore si trovi, come sembra probabile, nel possesso dei beni ereditari, dovrebbe legittimare la controparte a pronunciare per prima il suo discorso di rivendicazione dell'eredità. Possiamo peraltro osservare che abbiamo qui una situazione molto simile a quella che i giudici di Aristofane sono chiamati a dirimere in *Vespae*, 583-586: tuttavia

3 G Mathieu *Notice premissa all'edizione Belles Lettres* (Paris, 1929) 91.

4 Si potrebbe obiettare che di regola, almeno per quanto riguarda Atene, l'ereditiera è rivendicata tramite *epidikasia* dal parente che ritiene di avere titolo a sposarla, mentre nel nostro caso sembra che sia la donna stessa (sia pure assistita o rappresentata da un *kyrios* appartenente alla sua famiglia: §4) a intentare l'*epidikasia* (§§ 3 e 48). Tuttavia se rivolgiamo di nuovo la nostra attenzione al Codice di Gortina (IC IV 72), vediamo che, anche in assenza di aventi diritto appartenenti alla famiglia, l'ereditiera avrà diritto a conseguire l'eredità in attesa di trovare un marito (col VII 40-VIII 20).

dai versi aristofanei risulta impossibile capire se sia l'erede testamentario o l'erede legittimo a parlare per primo. In ogni caso, se il tribunale assegnasse l'eredità alla controparte, ciò comporterebbe come conseguenza implicita la dichiarazione di nullità del testamento: implicita perché appare probabile che la sentenza del tribunale eginetico, analogamente a quella di un tribunale ateniese, si esprimesse soltanto attraverso un voto.

7. Un altro punto di notevole importanza, affrontato dal Wolff in questo paragrafo della sua trattazione, riguarda la questione della competenza territoriale. Come abbiamo detto, la competenza del tribunale di Egina deriverebbe dal fatto che nell'isola si trovava il patrimonio ereditario oggetto della contesa. Tuttavia si potrebbe anche avanzare l'ipotesi che la giurisdizione eginetica fosse ritenuta competente non tanto perché i beni ereditari si trovavano a Egina, quanto perché il defunto era meteco ad Egina. D'altronde lo stesso Wolff sembra adombrare questa motivazione quando, in sede di conclusioni della trattazione relativa alla Grecia delle *poleis*, afferma che "personen-und erbrechtliche Fragen unter Umständen nach dem Heimatrecht der betroffenen Partei beurteilt wurden" (p. 45). Al diritto della patria d'origine si potrebbe allora assimilare, qualora si tratti di meteci, il "Wohnsitzrecht", ossia il diritto del loro luogo di residenza, come avviene appunto nel caso dell'Eginetico.

8. Passiamo così al § III dell'analisi di Wolff: "Das materiellrechtliche Problem". Il punto centrale della causa consiste, come si è detto, nell'accertare la validità del testamento lasciato da Trasiloco. Se la controparte abbia le carte in regola per poter rivendicare l'eredità, cioè in sostanza se possieda effettivamente la qualità di figlia legittima del *de cuius*, è questione che, come abbiamo già sottolineato, l'oratore non affronta *ex professo*, nonostante il fatto che sembrerebbe costituire un punto fondamentale intorno a cui organizzare la sua strategia processuale. A questa singolare lacuna Wolff dedica la lunga nota 44 di pagina 20, nella quale osserva che evidentemente l'oratore riteneva inutile portare un attacco diretto allo status di figlia legittima della controparte; egli si limiterebbe quindi ad avanzare delle insinuazioni indirette, sottolineando il fatto, come si è detto, che il legame con la madre della controparte era stato solo uno fra i tanti di una lunga serie che Trasillo aveva intrecciato nel suo peregrinare in qualità di indovino per il mondo greco. Nello stesso tempo l'oratore sottolinea che Trasiloco e i suoi fratelli sarebbero gli unici figli legittimi lasciati dal defunto e da lui istituiti eredi (§§ 9 e 43). Tutto ciò in definitiva per proteggersi dall'accusa di aver mentito apertamente se mettesse direttamente in dubbio la legittima filiazione della controparte.

9. Queste osservazioni di Wolff sono sicuramente calzanti. Tuttavia, secondo me, la questione è più complessa: occorre distinguere la questione della legittimità della nascita dalla questione della cittadinanza, che, d'altra parte, come sappiamo da Atene, sono collegate. La donna che rivendica l'eredità di Trasiloco a titolo di

figlia (evidentemente legittima), risulta essere cittadina di una polis diversa non solo da Egina, ma anche da Siphnos. Lo dimostra il fatto che ai §§ 12-14 l'oratore cita, oltre alla legge di Egina e a quella di Siphnos, anche quella del paese degli avversari (§ 14). Per stabilire allora la cittadinanza della donna occorrerebbe sapere qual era la legge sul matrimonio e sulla cittadinanza del luogo dove a Trasillo è nata questa figlia. Supponendo che la madre fosse una cittadina di quel luogo, si potrebbe pensare che, come ad Atene prima della legge di Pericle, un matrimonio con uno straniero – appunto Trasillo – fosse considerato valido, ma la figlia avrebbe acquisito la cittadinanza della madre. Quanto alla questione della filiazione legittima della donna, forse l'orazione permette di capire meglio per quale motivo l'oratore ritiene inutile, o addirittura controproducente, attaccare la controparte su questo punto. Vi sono infatti molti indizi, nella narrazione dei fatti che precedono la morte di Trasiloco, da cui risulta abbastanza chiaramente che la donna in questione, benché accusata dall'oratore di non essersi mai fatta viva nei lunghi mesi di malattia di Trasiloco e neanche al momento della sua morte, fosse tutt'altro che una persona lontana e sconosciuta, comparsa all'improvviso a vantare diritti inopinati; al contrario sembra essere stata coinvolta in varie vicende della vita dei tre figli "legittimi" di Trasiloco senza che la sua legittimazione ad avanzare pretese di carattere patrimoniale sia stata messa in discussione o abbia potuto essere efficacemente negata.

10. Ma ritorniamo al nocciolo della causa. Si chiede Wolff: come è possibile che la controparte chieda ai giudici di annullare il testamento se ella stessa ne riconosce l'esistenza e la redazione conforme a tutte le leggi di cui l'oratore dà lettura? Il carattere apparentemente paradossale di una simile domanda ha spinto alcuni autorevoli commentatori (come Blass⁵ e Münscher⁶) a ritenere che l'orazione non mirasse a un effettivo scopo pratico, non fosse un autentico discorso giudiziario, ma un discorso epidittico. Wolff ribadisce invece, insieme ad altri studiosi prima di lui, che si tratta di un'orazione giudiziaria redatta per un vero processo (pp 20-21). Si tratta dunque di capire per quale aspetto il testamento è considerato così manchevole o difettoso dalla controparte da chiederne ai giudici l'annullamento. La risposta di Wolff chiama in causa la legge di Solone (citata in particolare in Dem 46 *c Steph* 2, 14) secondo la quale è da considerarsi nullo il testamento redatto da chi non è nel pieno possesso delle sue facoltà mentali o per follia o per vecchiaia, o per effetto di droghe o farmaci, o per malattia o per l'influsso deviante di una donna. Wolff sostiene che a questa legge ateniese dovevano corrispondere norme analoghe in tutto il mondo greco. Applicando questo presupposto al caso dell'Eginetico, l'oratore si preoccuperebbe di stornare dai giudici il sospetto che Trasiloco non fosse nel pieno possesso delle sue facoltà mentali nel momento in cui ha redatto il testamento, in particolare, suggerisce Wolff, perché influenzato dalla sorella e dalla madre (con la quale ultima viene sottolineato il legame ai §§ 34-35).

5 F Blass *Die attische Beredsamkeit* vol 2 (Leipzig, 1892).

6 Th Münscher "Isokrates" *RE* IX 1914.

11. Il Wolff si rende conto che questa tesi va incontro immediatamente a un'obiezione basata sul tenore stesso dell'orazione: se il motivo della richiesta di annullamento fosse quello testé indicato, perché l'oratore non lo enuncia chiaramente e non adduce espliciti argomenti per rintuzzarlo? Wolff riconosce che l'oratore si limita a fugaci allusioni: così al § 34 si legge “[gli avversari] dicono che il testamento è stato redatto in modo sconveniente (*ou kalos*) e irregolare (*oud'orthos*)” (mentre meno pertinente mi sembra il § 47, pure citato a questo proposito dal Wolff, p 23). Ma spiega questa reticenza con una misura cautelare: meglio non attirare l'attenzione dei giudici su argomentazioni della controparte che, se da lui non sottolineate, potevano risultare di minor impatto sui giudici, ai fini della decisione finale, rispetto all'immagine così negativa del comportamento della donna nei confronti della malattia e della morte di Trasiloco, che, come sottolinea Wolff, costituisce l'asse portante dell'orazione e l'argomento su cui soprattutto fa leva l'oratore. Questi si limiterebbe a contrastare indirettamente la tesi dell'invalidità del testamento, evidentemente sostenuta con forza dall'avversaria, difendendosi dalla pretesa accusa (§ 36) di essere un successore indegno di Trasiloco (argomento che era probabilmente presente nel discorso della controparte ma doveva trattarsi di un elemento marginale, destinato semplicemente a rafforzare la contestazione principale).

12. Ora, la ragione che il Wolff adduce, per spiegare la reticenza dell'oratore rispetto alla motivazione su cui si baserebbe la richiesta di annullamento del testamento, non mi sembra convincente. Prima di tutto il significato degli avverbi *kalos* e *orthos* del § 34, su cui il Wolff principalmente fa leva, è così vago da essere difficilmente riconducibile a un'accusa quale quella secondo lui sollevata dalla controparte. In secondo luogo, anche ammesso che ad Egina fosse in vigore una legge analoga a quella di Solone, non credo che la donna di cui la legge paventa l'influenza deviante possa essere identificata con una sorella o addirittura con la madre del testatore; anzi, proprio al § 34 si elogia Trasiloco per essersi preso a cuore soprattutto la sorte della sorella, procurandole un marito, e della madre, donandole un figlio in sostituzione del defunto. Preoccuparsi del benessere della sorella e della madre rientra certamente nei doveri di un fratello e figlio: non c'è dubbio che Solone voleva impedire che un testatore avvantaggiasse ben altro genere di donna. Se proprio si volesse cercare un motivo di invalidità del testamento di Trasiloco modellato sul contenuto della legge di Solone, si potrebbe piuttosto pensare alla malattia, dato che ai §§ 24-27 l'oratore insiste molto sulla gravità delle condizioni di salute di Trasiloco nei suoi ultimi mesi di vita: naturalmente lo scopo è quello di sottolineare la sua dedizione nei confronti dell'amico, accentuando per contrasto il colpevole disinteresse della controparte; tuttavia l'insistenza sullo stato di prostrazione in cui la malattia aveva ridotto Trasiloco avrebbe potuto effettivamente offrire lo spunto per sostenere che il malato non fosse più in grado di esprimere una consapevole valida

volontà testamentaria,⁷ anche se la presenza dei testimoni,⁸ che peraltro, stando al testo che possediamo, non vengono presentati in dibattimento, doveva proprio servire a stornare questo sospetto.

13. A mio parere, però, quale che potesse essere la causa estrinseca di invalidità del testamento (influsso di una donna o malattia del testatore), non contrastare quello che, stando all'ipotesi del Wolff, costituirebbe il nucleo fondamentale dell'attacco della controparte – cioè l'accusa all'oratore di basare la propria pretesa su un testamento ispirato da una volontà deviata dall'influsso di una donna, o, in alternativa alterata dalla malattia, sembra una scelta strategica alquanto strana, se non addirittura controproducente, perché avrebbe permesso all'avversaria di far pesare incontrastata sui giudici le argomentazioni in appoggio alla propria tesi.

14. Io credo quindi che dobbiamo andare alla ricerca di una motivazione diversa per la richiesta di annullamento del testamento di Trasiloco da parte dell'avversaria dell'oratore. A questo scopo dobbiamo prima di tutto tentare di mettere a fuoco i rapporti fra i personaggi coinvolti nella vicenda. Come dicevo sopra, mi sembra molto probabile che fra la donna che rivendica l'eredità e i tre figli dell'ultimo matrimonio di Trasillo già da tempo ci fossero dei rapporti alquanto stretti o quanto meno frequenti: si noti che al § 30 l'oratore osserva sprezzantemente che gli avversari pretendono di *adelfizein*, cioè di sottolineare il legame di sangue con il *de cuius*, ma non contesta di fatto una simile pretesa, mentre al § 40 riconosce alla controparte il titolo di sorella del defunto; si noti anche come al § 44 è dato per scontato che Trasillo sia giustificato nel criticare, dall'al di là, il comportamento di sua figlia (la controparte) nei confronti degli altri tre figli. Non si spiega altrimenti che del fratello premorto di Trasiloco, Sopoli, si dica che odiava quella donna e che essa lo ostacolava o lo danneggiava (§ 17): con ciò, secondo me, l'oratore allude al fatto che, alla morte di Trasillo, la sua prima figlia, probabilmente più anziana dei tre fratelli, rivendicò e probabilmente ottenne una quota del patrimonio del padre⁹ (forse per questo era odiata, in particolare da Sopoli) e forse anche del patrimonio del fratellastro Sopoli, morto a sua volta senza figli prima di Trasiloco (§ 40). Il problema che si pone ora è se abbia diritto anche a una quota del patrimonio di Trasiloco.

15. Se Trasiloco non avesse fatto testamento, la risposta sarebbe molto probabilmente positiva: in base a un principio che è da considerarsi probabilmente panellenico, nei beni del genitore comune ai fratelli senza discendenti succedono le sorelle (v per es il Codice di Gortina: IC IV 72, V 17-22): quindi la controparte del nostro processo avrebbe avuto diritto di succedere per una quota di metà nei

7 Questa ipotesi di motivazione della pretesa invalidità del testamento di Trasiloco mi è stata suggerita dall'amico ed eminente collega Gerhard Thür nel corso di una conversazione privata.

8 come sottolinea Mathieu (n 3) 96 n 1.

9 Così già Mathieu (n 3) 95 n 2.

beni di Trasiloco provenienti dal comune padre Trasillo. Problema diverso è se le due sorellastre sarebbero state considerate *epikleroi* rispetto al fratello; tuttavia, dal punto di vista patrimoniale, ossia riguardo alla parte di eredità di Trasiloco spettante a ciascuna, niente sarebbe cambiato: ciascuna avrebbe avuto diritto alla metà, fossero o meno considerate *epikleroi*.

16. Il problema si pone, invece, dal momento che Trasiloco ha fatto testamento nominando l'oratore erede dei propri beni attraverso il matrimonio con la sorella, ed escludendo quindi, esplicitamente o implicitamente la sorellastra.¹⁰ Mi sembra infatti che ci troviamo di fronte ad un'alternativa: in un regime successorio che riconosceva la validità della successione testamentaria, si deve ritenere che un fratello privo di discendenti potesse legittimamente escludere per testamento una sorella a favore di un'altra, oppure entrambe le sorelle, discendenti dallo stesso padre, si devono ritenere *epikleroi* riguardo al patrimonio paterno trasmesso tramite il fratello, con la conseguenza che questi non potrebbe lasciare disposizioni testamentarie che ledono i diritti di una di loro?¹¹

17. Il problema che si pone, in altre parole, è se una sorella possa essere considerata ereditiera rispetto a un fratello senza figli maschi, oppure se si debba applicare la disciplina dell'ereditiera solo nella successione diretta da figlia a padre. Io penso che le due parti in causa sostenessero tesi opposte. L'oratore sostiene che una sorella non si può considerare *epikleros* rispetto al fratello: quindi mentre si applica al padre la norma del diritto testamentario attico in base a cui il padre che abbia soltanto figlie femmine deve disporre della mano delle figlie nel testamento a favore dei designati eredi,¹² lo stesso obbligo, per esclusione, non grava sul fratello, che non abbia figli, nei confronti delle proprie sorelle. Questo perché si suppone che la sorella abbia già ricevuto la sua quota di beni, o in proprietà, come a Gortina, o in forma di dote,

10 Di questa fattispecie si è occupato E Karabélias *L'épiclérat attique* (Athènes, 2002) 66-67. Il caso da lui esaminato, cioè la VI orazione di Iseo, mostra delle analogie ma anche delle differenze rispetto al caso di Trasiloco. La differenza più rilevante è che, mentre in Iseo l'adottante per testamento premuore al padre, nel caso dell'Eginetico il padre premuore apparentemente a tutti i suoi figli coinvolti nella vicenda. Quanto a Mathieu, egli dà per scontato che la sorella di Trasiloco diventi *epikleros* e quindi che la designazione dell'adottato come suo marito sia conforme alle regole (cita Gernet "Sur l'épiclérat" (1921) 34 *REG* 337-379). Si veda anche 94 n 1, dove per spiegare che gli avversari non debbono pagare deposito processuale, dice che la sorella di Trasiloco potrebbe passare per *epikleros* e quindi sarebbe processo per *kakosis epiklerou*. Ma qui allora Mathieu sembra riferirsi alla sorellastra!

11 Naturalmente l'orazione non ci dice se vi siano collaterali di Trasiloco che potrebbero rivendicare la mano delle sorellastre. Se non vi fossero, si porrebbe un ulteriore problema che nel nostro caso, essendo ignoto il diritto eginetico in materia, non potremmo comunque risolvere.

12 O quanto meno, se vogliamo adottare un'interpretazione estensiva, deve comunque lasciare loro una quota dei propri beni: v in proposito le opinioni contrastanti di Gagliardi e Rubinstein in Gagliardi "Per un'interpretazione della legge di Solone in materia successoria" in (2002) 5 *Dike* 16 n 45.

come ad Atene. Tuttavia va osservato che nel Codice di Gortina, colonna VIII 40-42, l'ereditera è definita colei che è priva del padre o di un fratello nato dallo stesso padre: dunque il legislatore gortinio contemplava, in via di ipotesi implicita, un caso analogo a quello in cui viene a trovarsi la donna controparte nell'Eginetico,¹³ che a Gortina sarebbe quindi stata considerata *epikleros*. Non sappiamo naturalmente quale fosse il diritto di Egina in proposito, ma mi pare si possa sostenere che l'oratore negasse alla sorella la qualifica di *epikleros* nei confronti del fratello. Ritengo invece che la controparte sostenesse appunto la tesi opposta: il testamento non è stato fatto né *kalos* né *orthos* perché non ha contemplato i diritti di colei che va considerata comunque ereditiera alla pari della sorella germana del testatore (si noti che sempre nel CdG, col IV 39, la divisione ereditaria tra fratelli e sorelle deve essere fatta *kalos*).

18. Ritornando alla posizione dell'oratore, si direbbe che adotti una doppia linea di difesa della validità del testamento. Gli avversari potrebbero sostenere, essendo a corto di altri argomenti, come dice l'oratore al § 42, che Trasillo, il defunto padre della controparte, riterrebbe di subire una grave offesa vedendo sua figlia privata dei suoi beni, mentre io erediterei ciò che egli ha guadagnato. Quel che colpisce è la replica dell'oratore a questa possibile, o probabile, argomentazione avversaria: una replica tutta basata su argomentazioni retorico-giuridiche da cui è assente l'unica affermazione che ci aspetteremmo, cioè che l'avversaria non è legittimata a rivendicare l'eredità di Trasiloco. Infatti egli obietta che adesso non è il momento di occuparsi di coloro che sono morti da tanto tempo e che, d'altra parte, così come Trasillo ha lasciato i propri beni – è da supporre per testamento – a coloro che ha voluto,¹⁴ così è giusto riconoscere a Trasiloco lo stesso diritto. Questo argomento, chiaramente specioso, implica che, per l'oratore, la sua avversaria che rivendica l'eredità non debba essere considerata *epikleros*; e ciò proprio in base al principio, non formulato esplicitamente, che il titolare di un patrimonio, se privo di figli, può nominare per adozione un erede testamentario senza dover tener conto di eventuali pretese delle sorelle. Quindi le leggi di cui l'oratore fa dare lettura ai §§ 12-14 dovevano riguardare proprio questo punto,¹⁵ e non semplicemente confermare che

13 L'Eginetico fornisce così interessanti spunti riguardo ai rapporti fra membri di famiglie aventi un solo genitore in comune: per i rapporti tra fratellastri v. per es. *Lys c Diogitone* con il commento di A. Damet *La septième porte. Les conflits familiaux dans l'Athènes classique* (Paris, 2012) 167.

14 Fra questi eredi mi pare implicito che debba essere inclusa anche la figlia ora controparte, visto che alla fine del § 43 l'oratore afferma di non temere l'opinione di Trasillo e al § 44 allude al fatto che Trasillo la diserederebbe se potesse vedere come si è comportata con suo figlio.

15 Il contenuto delle leggi, di cui ai §§ 12-14, viene d'altronde secondo me rievocato al § 49 dove non ha soltanto il valore di un luogo comune, come ritiene Mathieu (n 3) 106 n 1. In questo paragrafo l'oratore allude alla legge che consente a chi non ha figli legittimi di nominare un erede attraverso un testamento-adozione; non specifica però come sia regolato il caso in cui il testatore abbia una o più figlie femmine.

Trasiloco aveva fatto un testamento (formalmente) regolare. Altrimenti bisognerebbe pensare che la controparte avesse impugnato il testamento sulla base del fatto che le diverse leggi prevedevano differenti requisiti di forma per la sua validità, cosa che peraltro, come si è visto, lo stesso Wolff (p 25) esclude. Wolff in realtà ritiene che la solenne citazione delle tre leggi serva ancora una volta a gettare fumo negli occhi dei giudici: convincerli di qualcosa che nemmeno gli avversari contestavano, cioè la regolarità formale del testamento, mentre in realtà era in discussione la volontà viziata del testatore, che viene invece sottaciuta dall'oratore. Ma, come abbiamo visto sopra, una motivazione di questo genere appare artificiosa¹⁶ e in definitiva poco persuasiva, perché avrebbe lasciato campo libero alle argomentazioni degli avversari senza provare in alcun modo a contrastarle preventivamente.

19. Tenendo conto però del rischio che il tentativo di confermare la validità del testamento non persuadesse i giudici, in quanto convinti che la donna pretermessa dal testamento di Trasiloco fosse *epikleros*, all'oratore conviene sviluppare una seconda linea di difesa, insistendo sul fatto che la pretesa della controparte, pur astrattamente legittima, deve essere respinta in quanto la donna ha tenuto un comportamento che l'ha resa indegna di succedere a Trasiloco. Se questo sia soltanto un argomento morale, come ritiene Mathieu (p 97 n 1), o abbia anche una rilevanza giuridica resta incerto: si noti però, ancora una volta facendo riferimento al Codice di Gortina, che il figlio adottivo, per poter conseguire l'eredità dell'adottante, deve "adempiere gli obblighi verso gli dei e verso gli uomini" (col X 42-44).

20. Ritorniamo ora al tema del concorso o conflitto di leggi, che forma comunque uno degli aspetti più interessanti dell'orazione sotto il profilo giuridico, e che è oggetto del § IV della trattazione di Wolff ("Das Problem der anzuwendenden Rechtsnorm"). Wolff ritiene che proprio la sostanziale convergenza delle tre norme di cui viene data lettura ai §§ 12-14 (il cui tenore non è purtroppo riportato nel testo dell'orazione in nostro possesso) ci impedisca di avanzare congetture su quale sarebbe stata la norma da applicare qualora esse fossero state in contrasto fra loro. In ogni caso, in mancanza di regole certe, proprie ad ogni polis o condivise a livello panellenico, per risolvere eventuali conflitti di leggi in caso di processi fra cittadini e stranieri (residenti o meno), Wolff ritiene che la soluzione dovesse basarsi sulla *gnome dikaiotate* (l'opinione più giusta). Per quanto riguarda poi il rilievo che la citazione delle tre leggi avrebbe potuto avere per la soluzione del caso in discussione nell'Eginetico, Wolff ritiene che la loro lettura miri in realtà a distrarre i giudici dalla reale posta in gioco: oggetto della controversia non sarebbe infatti la conformità al diritto del testamento redatto da Trasiloco, bensì l'inefficacia sostanziale delle sue disposizioni a causa della viziata formazione della volontà testamentaria;¹⁷

16 Mi sembra una petizione di principio sostenere, come fa Wolff (n 1) 26 n 54, che confermerebbe la fama di sofista già attribuita ad Isocrate addirittura da Dem 35, c *Laer*, 40.

17 "... der Streit in Wahrheit ja gar nicht um die Rechtsmässigkeit der Testamentserrichtung ... als solche ging, sondern um die etwaige *materielle Unmassgeblichkeit* des Akts infolge der von der Gegnerin behaupteten Unfähigkeit des Erblassers zur freien Willensbildung" (25: corsivi dell'A).

sarebbe stato dunque per evitare di attirare l'attenzione del tribunale su quest'ultimo punto, giudicato pericoloso dall'oratore per assicurare il successo della sua tesi, che l'oratore fa appello a testi di legge che confermavano invece la validità formale del testamento.

21. Ritengo che il punto di vista di Wolff, almeno per quanto riguarda in generale il problema del diritto sostanziale da applicare alla soluzione di controversie fra cittadini e stranieri, sia plausibile, anche se da verificare in concreto: nei casi in cui fossero addotte da parte dei contendenti, appartenenti a ordinamenti diversi, leggi fra loro contrastanti, i giudici avrebbero deciso in base al loro prudente apprezzamento, quindi senza sentirsi vincolati da una delle leggi in conflitto. Nel caso dell'Eginetico l'appello dell'oratore ai giudici affinché rispettino il loro giuramento di applicare le leggi (§ 15) – apparentemente in contrasto con l'idea che non l'applicazione delle leggi ma il ricorso alla *gnome dikaiotate* sia il criterio a cui il tribunale dovrebbe attenersi – potrebbe essere giustificato, come sottolinea Wolff (p 25), proprio dal fatto che, stando a quel che l'oratore dichiara, le varie leggi che potrebbero essere prese in considerazione dai giudici sono fra loro concordanti. Sempre per quanto riguarda l'Eginetico, resta però il fatto, come rilevavo nel mio articolo sopra citato (p 183), che l'oratore riconosce, come elemento che potrebbe pesare sulla decisione dei giudici, il ricorso alla propria legge nazionale da parte dell'avversaria dell'oratore (§ 14). Ora, è vero che al § 15 l'oratore sostiene che gli avversari hanno riconosciuto non solo che il testamento lasciato da Trasiloco è autentico, ma anche che tutte le leggi (relative al caso) sono a favore di colui che pronuncia l'orazione. Ritengo però che sia difficile prestare fede a un'affermazione del genere, perché, se davvero gli avversari avessero riconosciuto che le leggi applicabili al caso erano a favore della tesi dell'oratore, la loro posizione processuale ne sarebbe risultata irrimediabilmente compromessa (una volta escluso, per i motivi sopra indicati, che la pretesa della controparte si basasse su una causa invalidante la capacità di intendere e di volere di Trasiloco all'atto di redigere il testamento). Può darsi quindi che gli avversari abbiano veramente riconosciuto che le leggi che l'oratore fa leggere in dibattimento, probabilmente da lui presentate già nell'*anakrisis*, fossero a favore della sua tesi. Ma avranno probabilmente replicato presentando ai giudici testi di legge (magari provenienti dagli stessi ordinamenti a cui si è appellato l'oratore) che, in contrasto con quelli addotti dall'oratore, confermavano la loro tesi. Quindi, mentre l'oratore presenta testi di legge il cui contenuto sembra riguardare soprattutto la legittimità della nomina di un erede tramite adozione testamentaria da parte di chi non abbia discendenti legittimi, possiamo pensare che la controparte presentasse testi di legge da cui risultava confermato il dovere, gravante sul fratello senza discendenti legittimi, di contemplare nel testamento entrambe le sorelle *epikleroi*. Da questo punto di vista le tre leggi presentate nei §§ 12-14, lungi dall'essere un diversivo destinato a distogliere l'attenzione dei giudici dal vero oggetto della controversia, rappresentano effettivamente il fondamento legale (sia pure parziale e funzionale al proprio scopo) su cui l'oratore basa la sua pretesa all'eredità di Trasiloco: un fondamento legale

che viene retoricamente rafforzato dal preteso carattere panellenico della legge riguardante la successione di chi non abbia discendenti (maschi) (§ 49). Il che non esclude, come abbiamo detto, che gli avversari, pur riconoscendo la sostanziale coincidenza di contenuto dei testi di legge presentati dall'oratore, abbiano replicato portando all'attenzione del tribunale altri testi di legge, provenienti dagli stessi ordinamenti e probabilmente, ma non necessariamente, altrettanto concordanti, su cui fondare la propria contrastante pretesa. Nel caso dell'Eginetico, quindi, non è in gioco un conflitto fra leggi che regolino diversamente una medesima fattispecie, bensì la scelta fra leggi, provenienti da diversi ordinamenti, di cui le parti chiedono al tribunale l'applicazione in base all'interpretazione che darà della fattispecie oggetto della controversia. Non siamo in presenza di un conflitto di leggi, che nel caso dell'Eginetico non sembra sussistere, ma di un conflitto sulla qualificazione giuridica di una determinata fattispecie, nel nostro caso la successione di due sorelle a un fratello senza discendenti. Non siamo perciò molto lontani dal passo delle Vespe, sopra citato, dove si può immaginare che la scelta fra la prevalenza della successione *kata genos* rispetto alla successione *kata dosin* potesse trovare il suo fondamento in appropriate e specifiche previsioni legislative, questa volta all'interno del medesimo ordinamento giuridico.¹⁸

21. E' certo merito di HJ Wolff aver mostrato come i problemi di interpretazione posti dall'Eginetico di Isocrate debbano essere affrontati sulla base della comparazione con le norme in materia successoria che sono in vigore in altri ordinamenti giuridici greci. Wolff faceva riferimento soltanto al diritto ateniese, e più precisamente alla legislazione solonica. Mi pare che il confronto con le norme in materia successoria del Codice di Gortina possa dare un ulteriore contributo alla comprensione della fattispecie oggetto del processo a cui si riferisce l'Eginetico.

Abstract

Taking inspiration from the opinion of HJ Wolff, the article examines the reasons that move the adversary of the speaker to seek the annulment of Trasilochos's will. According to Wolff, the request would be in accordance with a law of Aegina analogous to the law of Solon declaring a will invalid if the testator were declared out of mind, having been accused of writing a will under the influence of a woman. But in the speech only the sister and the mother of Trasilochos are mentioned, and it was certainly not this kind of women that were considered by Solon or the supposed law of Aegina. According to the author of this article the court should rather decide whether the sisters of a brother who had died without descendants should be considered *epikleroi* or not. In the first case a woman who presents herself as a daughter of Trasilochos will be entitled to obtain at least half of the inheritance of her father, thus removing it from the speaker's wife.

18 Non parlerei quindi, a proposito del potere dei giudici attestato nel passo aristofaneo, di "irregularité flagrante", come fa Karabélias (n 10) 128.

CARTA SINE LITTERIS. ENEAS SILVIO PICCOLOMINI UND DIE URKUNDENPRAXIS IM FRÜHMITTELALTER

Tamás Nótári*

Eneas Silvio Piccolomini¹ erzählt in seinem Werk *De Europa*, das er noch als Kardinal im Jahre 1458 beendet hat, im 65. Kapitel, wo er sich mit Kärnten auseinandersetzt, eine interessante Geschichte – ihrer Literaturgattung nach eine Legende – über einen Herzog namens Ingo, der während der Regierungszeit Karl des Großen gelebt haben sollte. Der Legende nach gab der Herzog im Jahre 790 seinen Untertanen ein Festmahl, bei dem die anwesenden Bauern aus silbernen und goldenen Gefäßen speisten, während die Vornehmen ihr Mahl nur aus Tonschüsseln zu sich nehmen konnten. Sein Verhalten erklärte der Herzog damit, dass die Seelen der in Hütten

1 Zum Leben und Wirken des Eneas Silvio Piccolomini siehe G Voigt *Eneas Silvio de' Piccolomini als Papst Pius der Zweite und sein Zeitalter* (Berlin, 1856-1863); W Boulting *Aeneas Sylvius (Eneas Silvio de' Piccolomini – Pius II): Orator, Man of Letters, Statesman and Pope* (London, 1908); CM Ady *Pius II, The Humanist Pope* (London, 1913); E Hocks *Pius II. und der Halbmond* (Freiburg im Breisgau, 1941); G Bürck *Selbstdarstellung und Personenbildnis bei Eneas Silvio Piccolomini (Pius II)* (Basel-Stuttgart, 1956); RJ Mitchell *The Laurels and the Tiara: Pope Pius II, 1458-1464* (London, 1962); PJ Weinig *Aeneas suscipite, Pium recipite: Aeneas Silvius Piccolomini: Die Rezeption eines humanistischen Schriftstellers im Deutschland des 15. und 16. Jahrhunderts* (Wiesbaden, 1998).

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wohnenden, aber getauften Bauern weiß und rein, die der in Palästen lebenden, und Götzenbilder anbetenden Adeligen aber schwarz und unrein seien. Der Herzog habe das Gastmahl nach diesem Prinzip veranstaltet. Beschämt waren die Adeligen unter der Leitung von Arn und Virgil, den Bischöfen von Salzburg scharenweise zum Taufbecken geströmt:

Fama est anno septingentesimo nonagesimo post Christi Salvatoris ortum imperante Carolo Magno ducem gentis, Ingonem nomine, ingens convivium provincialibus praeparasse et agrestibus quidem, ad conspectum suum intromissis, in vasis aureis atque argenteis, nobilibus vero ac magnatibus, procul ab oculis collocatis, fictilibus ministrare iussisse. Interrogatum, cur ita faceret, respondisse non tam mundos esse, qui urbes et alta palatia quam qui agros et humiles casas colerent. Rusticis, qui Christi evangelium acceperant, baptismatis unda purificatis candidas et nitidas esse animas; nobiles ac potentes, qui spurcitas idolorum sequerentur; sordidas ac nigerrimas. Se vero pro animarum qualitibus instruxisse convivium. Castigatos ea re nobiles catervatim sacri baptismatis undam quaerentes brevi tempore sub Vergilio et Arnone iuvavensibus episcopis universos Christi fidem accepisse.²

Es stellt sich mit Recht die Frage, ob Aeneas Sylvius diese biblische, bzw parabolische Geschichte von irgendeinem anderen Autor übernommen hat; und wenn ja, von wem. Die Frage scheint *prima facie* einfach beantwortbar zu sein: Die Erzählung stammt aus der *Conversio Bagoariorum et Carantanorum*, die anlässlich des Prozesses des päpstlichen Legaten und Erzbischofs von Sirmium, Methodius verfasst wurde. Der Slawenapostel Methodius wurde 870 auf der in Anwesenheit Ludwigs des Deutschen abgehaltenen Regensburger Synode unter Mitwirkung des Salzburger Erzbischofs Adalwin und seinen Bischöfen angeklagt und verurteilt. Ob die *Conversio* als Anklage- oder als eine Legitimationsschrift des Prozesses im Nachhinein verfasst wurde, ist nicht zu ermitteln. Dieses Werk beinhaltet ebenso eine Erzählung, deren Hauptfigur Ingo ist:

Simili modo etiam Arn episcopus successor sedis Iuvavensis deinceps curam gessit pastorem, undique ordinans presbyteros et mittens in Sclavinam, in partes videlicet Quarantanas atque inferioris Pannoniae, illis ducibus atque comitibus, sicut pridem Virgilius fecit. Quorum unus Ingo vocabatur, multum carus populis et amabilis propter suam prudentiam. Cui tam oboediens fuit omnis populus, ut, si cuique vel carta sine litteris ab illo directa fuit, nullus ausus est suum neglegere praeceptum. Qui etiam mirabiliter fecit: Vere servos credentes secum vocavit ad mensam, et qui eorum dominabantur infideles, foris quasi canes sedere fecit ponendo ante illos panem et carnem et fusca vasa cum vino, ut sic sumerent victus. Servis autem stauis deauratis propinare iussit. Tunc interrogantes primi deforis dixerunt: 'Cur facis nobis sic?' At ille: 'Non estis digni non abluti corporibus cum sacro fonte renatis communicare, sed foris domum ut canes sumere victus.' Hoc facto fide sancta instructi certatim cucurrerunt baptizari. Et sic deinceps religio christiana succrescit.³

2 Aeneas Sylvius *De Europa* 65.

3 *Conversio Bagoariorum et Carantanorum* 7.

In der vorliegenden Studie, nachdem die Entstehung der *Conversio Bagoariorum et Carantanorum* skizzenhaft geschildert (1) und die Anfänge der Salzburger Karantanenmission kurz dargestellt worden sind – Piccolominis Erzählung nach sollte Ingo ein christlicher Herzog Karantaniens gewesen sein – (2), wird es versucht auf folgende Fragen eine Antwort zu finden. In wie fern kann der von Piccolomini erwähnte und Jahrhunderte lang in seiner Existenz nicht angezweifelte Herzog Ingo als eine reale historische Person betrachtet werden? (3) Was konnte die in der *Conversio* erwähnte *carta sine litteris* bedeuten haben, und warum wurde dieses Motiv nicht von Enea Silvio übernommen, wo es doch zur Bekräftigung der Autorität des Ingos hätte verwendet werden können? (4) Aus welcher Quelle stammte die Erzählung von Ingos Gastmahl, und welche Rolle spielte diese Geschichte in der *Conversio*? (5) Übernahm Enea Silvio diese Parabel direkt aus der *Conversio*, oder soll es in diesem Fall mit einer vermittelnden Schrift, bzw. mit einem Mittelsautor gerechnet werden? (6)

1. Die Hauptinteressenten der Slawen- und Awarenmission im 9. Jahrhundert waren vorwiegend Byzanz und das Frankenreich, letzteres konnte sich bei der Ausführung der Missionsarbeit auf das Erzbistum Salzburg und auf das ziemlich unabhängige Politik betreibende Patriarchat von Aquileia stützen. Dieses Gleichgewicht wurde durch die eigenständige Missionspolitik von Rom ins Schwanken gebracht.⁴ Dieser dreiseitige Zusammenstoß von Interessen lag dem Zwist zwischen dem Slawenapostel Methodius und dem Erzbistum Salzburg zugrunde. Der aus Byzanz stammende Missionar, später päpstlicher Legat und Erzbischof von Sirmium, Methodius wurde im Jahre 870 auf der Regensburger Synode in Anwesenheit von Ludwig dem Deutschen von dem Salzburger Erzbischof Adalwin und den bayerischen Bischöfen verurteilt, weil er durch seine Missionstätigkeit in Pannonien, die laut der Überzeugung der bayerischen Kirche seit über siebenzig Jahren der Jurisdiktion von Salzburg unterstand, die Interessen des Erzbistums Salzburg gefährdet, und seine Gerichtsbarkeit in Frage gestellt haben sollte. Methodius wurde zwei Jahre lang in Gefangenschaft gehalten, und kam nur dank einer energischen Intervention des Papstes Johannes VIII. frei.⁵ Es ist nicht zu ermitteln, ob die

4 K Reindel „Bayern vom Zeitalter der Karolinger bis zum Ende der Welfenherrschaft (788-1180)“ in *Handbuch der bayerischen Geschichte* (München, 1981) Bd 1 S 249-349.

5 H Löwe *Der Streit um Methodius: Quellen zu den nationalkirchlichen Bestrebungen in Mähren und Pannonien im 9. Jahrhundert* (sl, 1948), S 5-62; K Bosl „Probleme der Missionierung des böhmisch-mährischen Herrschaftsraumes“ in M Hellmann, R Olesch, B Stasiewski & F Zagiba (Hrsg) *Cyrrillo-Methodiana. Zur Frühgeschichte des Christentums bei den Slaven 863-1963* (Graz, 1964) S 1-38; M Schellhorn „Erzbischof Adalwin von Salzburg und die Pannonische Mission“ *Mitteilungen der Gesellschaft für Salzburger Landeskunde* (1964) 104 S 103-121; H Dopsch „Slawenmission und päpstliche Politik: Zu den Hintergründen des Methodios-Konfliktes“ in Th Piffel-Perčević & A Stirnemann (Hrsg) *Der heilige Method, Salzburg und die Slawenmission* (Innsbruck-Wien, 1987) S 303-340; M Eggers *Das Erzbistum des Method: Lage, Wirkung und Nachleben der kyrillomethodianischen Mission* (München, 1996) S 19-44.

Conversio Bagoariorum et Carantanorum als Anklageschrift oder als Dokument, das den Prozess später zu legitimieren hatte, verfasst wurde.⁶

Das Darstellungsprinzip der *Conversio* wurde von Hans-Dieter Kahl höchst treffend mit folgenden Worten charakterisiert:

Was da getrieben wird, ist nichts anderes als ein waghalsiges Spiel dicht an der Grenze der Wahrheit, gerade noch unanfechtbar für den, der Bescheid weiß, dem Unkundigen jedoch abweichende Kombinationen offenlassend, ja nahelegend, die den Zwecken der Denkschrift ungleich besser entgegenkamen. Man ahnt einen wohlunterrichteten Gewährsmann, der jedoch sehr wohl weiß, was er will, was nicht, und man bedauert, daß er von seinen Kenntnissen keinen besseren Gebrauch gemacht hat. Raffiniertes Verschweigen unerwünschter oder gar „gefährlicher“ Zusammenhänge und Fakten, ähnlich raffinierte Zusammenziehung von Ereignissen, die womöglich weit auseinanderlagen – das sind auch sonst die Hauptmittel, die der Verfasser für seinen Zweck einsetzt.⁷

Herwig Wolfram nahm in seiner Ausgabe aus dem Jahre 1979 aufgrund des 14 Kapitels der *Conversio* 871 als Entstehungsjahr an, aber in seiner Monografie aus 1995 zog die Differenzen der heutigen und der mittelalterlichen Zeitrechnung in Betracht, und sprach sich für das Entstehungsjahr 870 aus. Fritz Lošek schloss sich in seiner Edition aus 1997 Wolframs Datierung aus 1995 an.⁸ Über die Person des Verfassers können aufgrund einiger Passagen des Werkes Vermutungen angestellt werden, die Möglichkeit einer eindeutigen Identifikation muss jedoch ausgeschlossen werden. Herwig Wolfram machte die ziemlich zurückhaltende, mehrfach relativierte Aussage, dass der *auctor* – in diesem Falle vielleicht nicht der Verfasser, sondern der Auftragsgeber des Werkes – Erzbischof Adalwin gewesen sein könnte.⁹ Es mag von Interesse sein, dass in der *Conversio* nur zwei Personen das Epitheton *piissimus* tragen, und zwar König Ludwig der Deutsche (cap 12) und Erzbischof Adalwin von Salzburg (cap 9), dh möglicherweise der Adressat und der Auftraggeber des Werkes. Mit ziemlicher Sicherheit ist aber aus der Formulierung des 5 Kapitels zu ermitteln, dass der Autor ein Bayer oder ein Salzburger sein sollte.¹⁰

6 Dazu siehe A Lhotsky *Quellenkunde zur mittelalterlichen Geschichte Österreichs* (Graz, 1963) S 155-157.

7 H-D Kahl „Virgil und die Salzburger Slawenmission“ in H Dopsch & R Juffinger (Hrsg) *Virgil von Salzburg, Missionar und Gelehrter* (Salzburg, 1985) S 112-121, 112.

8 H Wolfram *Conversio Bagoariorum et Carantanorum: Das Weißbuch der Salzburger Kirche über die erfolgreiche Mission in Karantarien und Pannonien* (Wien, 1979) S 15, 141; F Lošek *Die Conversio Bagoariorum et Carantanorum und der Brief des Erzbischofs Theotmar von Salzburg* (Hannover, 1997) S 6.

9 H Wolfram, *Salzburg, Bayern, Österreich: Die Conversio Bagoariorum et Carantanorum und die Quellen ihrer Zeit* (Wien-München, 1995) S 197. Vgl F Lošek „Sieben Fragen zu sieben ausgewählten lateinischen Denkmälern des Salzburger Frühmittelalters: Gemeinsamkeiten und Unterschiede“ in L Kolmer & Chr Rohr (Hrsg) *Tassilo III. von Bayern: Großmacht und Ohnmacht im 8. Jahrhundert* (Regensburg, 2005) S 121-136, 124ff.

10 *Conversio Bagoariorum et Carantanorum* 5 ... *orta seditione, quod carmula dicimus*. Vgl *Lex Baiuvariorum* 2, 3.

2. Als erstes slawisches Volk kamen die Karantanen mit dem bayerischen Herzogtum und dem Frankenreich in Berührung, da Fürst Boruth um 741/742 die Bayern gegen die Awaren um militärische Hilfe bat. Der Sieg über die Awaren begründete die bayerische Herrschaft über Karantanien.¹¹ Um 743 wurde Fürst Boruth gezwungen den Bayern seinen Sohn Cacatius und seinen Neffen Cheitmar als Geisel zu übergeben, die vom Salzburger Priester Lupo eine Unterweisung im christlichen Glauben erhielten.¹² Laut dem 4. Kapitel der *Conversio* ließen nach Boruths Tod die Bayern auf den Druck der Franken und die Bitte der Karantanen den bereits zum Christentum bekehrten Cacatius in sein Heimatland zurückkehren, wo er als Herrscher eingesetzt wurde. Cacatius verstarb aber nach drei Jahren und Cheitmar (752-769) konnte mit Pippins Erlaubnis das karantanische Fürstentum übernehmen. Der Priester Lupo gab seinem Patensohn Cheitmar seinen in Salzburg zum Priester geweihten Neffen, Maioranus als Begleiter zur Seite, der seiner Aufgabe eifrig nachkam den jungen Fürsten an seine christlichen Pflichten und den gegenüber dem Salzburger Kloster gebührenden Gehorsam zu erinnern. Dieses Verhältnis versucht die *Conversio* aus den schon erwähnten politischen Gründen als eine Art Vasallentum darzustellen.¹³ Aufmerksamkeit verdient jedoch, dass in der Entlassung der späteren Fürsten Cacatius und Cheitmar der fränkische Einfluss eine erhebliche Rolle gespielt hat, und dass weder Lupo, noch Maioranus – beide einfache Priester – auf Geheiß des Salzburger Abtbischofs Virgil (749-784) ihre Ratgebertätigkeit an der Seite des Karantanenfürsten ausgeübt haben. Hätte eine engere Verbindung zwischen den Karantanenfürsten, den Priestern Lupo und Maioranus und dem Salzburger Bistum bestanden, hätte der Verfasser der *Conversio* diese Tatsache mit Sicherheit nicht unerwähnt gelassen. Es ist daher nicht auszuschließen, dass die ersten Bekehrungsversuche der Karantanen nicht von der bayerischen Kirche, sondern von dem Frankenherrscher selbst ausgingen.¹⁴

Bedeutende Erfolge konnte das Bistum Salzburg in der Karantanenmission erst danach verbuchen, als auf Cheitmars Bitte Bischof Virgil den Chorbischof

11 Wolfram (Fn 8) S 73; S Szádeczky-Kardoss *Az avar történelem forrásai 557-től 806-ig (Die Quellen der Awarengeschichte von 557 bis 806)*. (Budapest, 1998) S 266f; Schellhorn (Fn 5) S 104; H Dopsch „Rupert, Virgil und die Salzburger Slawenmission“ in *1000 Jahre Ostarrichi: Seine christliche Vorgeschichte, Mission und Glaube im Austausch zwischen Orient und Okzident* (Innsbruck-Wien, 1997) S 88-139, 101ff.; W Pohl „Bayern und seine Nachbarn im 8. Jahrhundert“ in L Kolmer & Chr Rohr (Hrsg) *Tassilo III von Bayern: Großmacht und Ohnmacht im 8. Jahrhundert* (Regensburg, 2005) S 57-66, 59.

12 *Conversio Bagoariorum et Carantanorum* 4. Vgl H-D Kahl „Zwischen Aquileia und Salzburg: Beobachtungen und Thesen zur Frage romanischen Restchristentums im nachvölkerwanderungszeitlichen Binnen-Noricum“ in H Wolfram & F Daim *Die Völker an der mittleren und unteren Donau im fünften und sechsten Jahrhundert* (Wien, 1980) S 33-81, 44; Kahl (Fn 7) S 116; Dopsch (Fn 11) S 102.

13 *Conversio Bagoariorum et Carantanorum* 4; Wolfram (Fn 8) S 86; Dopsch (Fn 5) S 307; Dopsch (Fn 11) S 103-107; Schellhorn (Fn 5) S 104.

14 Kahl (Fn 7) S 114; Pohl (Fn 11) S 65.

Modestus mit der Missionsleitung betraute. Nach dem Tode des Modestus konnte Bischof Virgil die Mission fortsetzen, obwohl die Bekehrungsarbeit von zahlreichen Heidenaufständen (*carmula*) erschwert und gehindert wurde. Neuen Schwung bekam die Missionstätigkeit, als 772 der Widerstand der Karantanen von Tassilo III mit Waffengewalt endgültig bezwungen wurde. Nachdem Karantaniens in das Herzogtum Bayern eingegliedert wurde – obwohl es seine eigenen Fürsten (*duces gentis*) behalten durfte –, waren alle Hindernisse der von der Salzburger Kirche geleiteten und unter Mitwirkung des Freisinger Bistums ausgeführten Missionsarbeit aus dem Wege geräumt.¹⁵ Von einer aktiven Beteiligung des Papsttums an der Bekehrungsarbeit wird zwar *expressis verbis* nicht berichtet; da aber ein Teil Karantaniens auf dem Gebiet des Patriarchats Aquileia lag, der dort jedoch keine nennenswerte Missionstätigkeit ausübte, kann ein stillschweigendes päpstliches Einverständnis bezüglich der Erweiterung der Herrschaftsgebiete vom Salzburger Bistum angenommen werden.¹⁶ Als später der Patriarch Ursus Aquileias Rechte bezüglich Karantaniens wieder ins Leben zu rufen versuchte, berief sich der Salzburger Erzbischof Arn (784-821) auf die Privilegien der Päpste Zacharias (741-752), Stefans II (752-757) und Pauls I (757-767), die das Gebiet Karantaniens dem Bistum Salzburg zusprachen. Karl der Große bestimmte die Karantaniens durchquerende Drau als Grenzfluss zwischen den beiden Metropolen.¹⁷ Obwohl die Originalfassungen der besagten päpstlichen Urkunden uns nicht erhalten blieben, kann deren Existenz nicht angezweifelt werden. Einerseits ist die Erlangung dreifacher päpstlicher Bestätigungen der Salzburger Rechtsansprüche auf Karantaniens durchaus typisch für die präzise Vorgehensweise Virgils bezüglich seiner Missionspolitik, andererseits hätte es Erzbischof Arn nicht gewagt sich beim Kaiser auf nicht vorhandene Papsturkunden zu berufen, zumal sein Gegner der rechtskundige Patriarch Ursus von Aquileia war.¹⁸

- 15 *Conversio Bagoariorum et Carantanorum* 5; H Wolfram „Das Fürstentum Tassilos III, Herzogs der Bayern“ *Mitteilungen der Gesellschaft für Salzburger Landeskunde* (1968) 108 S 157-179; Schellhorn (Fn 5) S 105; W Störmer „Zum Problem der Slawenmission des Bistums Freising im 9. Jahrhundert“ in Th Piffil-Perčević & A Stirnemann (Hrsg) *Der heilige Method, Salzburg und die Slawenmission* (Innsbruck-Wien, 1987) S 207-220. Zu Virgils Wirken in Salzburg und seiner Missionstätigkeit siehe H Löwe „Salzburg als Zentrum literarischen Schaffens im 8. Jahrhundert“ *Mitteilungen der Gesellschaft für Salzburger Landeskunde* (1975) 115 S 99-143; H Wolfram „Virgil als Abt und Bischof von Salzburg“ in H Dopsch & R Juffinger (Hrsg) *Virgil von Salzburg, Missionar und Gelehrter* (Salzburg, 1985) S 342-356; J Jahn „Arbeo und Cozroh: Verfassungsgeschichtliche Beobachtungen an bairischen Quellen des 8. und 9. Jahrhunderts“ *Mitteilungen der Gesellschaft für Salzburger Landeskunde* (1990) 130 S 202-291, 208-226; Wolfram (Fn 9) S 252-275.
- 16 Dopsch (Fn 5) S 308; zur Salzburger Missionspolitik siehe noch B Wavra *Salzburg und Hamburg: Erzbistum und Missionspolitik in karolingischer Zeit* (Berlin, 1991) S 157-199.
- 17 W Hauthaler & F Martin *Salzburger Urkundenbuch* (Salzburg, 1916) Bd 2 S 3; Eggers (Fn 5) S 24.
- 18 Dopsch (Fn 5) S 309.

3. Ingo trat als Herzog zum ersten Mal im Werk *Liber certarum historiarum* des Viktringer Abtes Johann (gest um 1345/1347) in der ersten Hälfte des 14 Jahrhunderts in Erscheinung:

*Nam anno Domini septingentesimo nonagesimo sub Karolo imperatore et Ingone duce et Vergilio et Arnone episcopis Iuvavensibus Ingo dux nobiles terre et servos eis subiectos ad convivium invitavit et nobiles quidem tamquam canes et immundos deputavit et pane et carnibus foris ab oculis suis pavit et vinum in vasis fuscis propinavit, servos vero vasis splendidis et deauratis in sua presencia collocavit. Et dum quererent nobiles, quid in hoc pretenderet, respondit hos simplices et fideles, mundos et sacro baptismate confirmatos, eos autem immundos atque indignos sine sacri fontis ablucione existere et fedatos. Qui audientes certatim ad baptismum cum fervore fidei cucurrerunt et ergo hoc privilegium honoris et commercium rusticale cum principe non ad nobiles, sed ad simplices usque huc creditur propagatum.*¹⁹

Johann von Viktring nahm nebst der Ingo-Sage auch die Geschichte über den Missionsauftrag von Karl dem Großen an Arn, und das Auftreten des Methodius aus dem 12 Kapitel der *Conversio* über. Im Gebrauch der *Conversio* als Quelle beschränkte sich jedoch der Autor hauptsächlich auf das Inhaltliche, stilistisch weist der *Liber certarum historiarum* eine größere Unabhängigkeit zur *Conversio* auf.²⁰ Marcus Hansitz identifizierte Ingo im 18 Jahrhundert mit dem legendären Herzog Domitian. Der Sage nach war der heidnische Herzog Domitian ein vehementer Christenverfolger, es wurde ihm durch Gottes Gnade die Bekehrung zu teil, daraufhin stürzte er die Götzenstatuen selber in den See, und wurde zum heiligen Herzog Karantaniens.²¹ Die Existenz des oft als legendäre Figur angesehenen Domitian könnte durch eine Inschrift aus dem Millstätter Kloster aus dem 9. Jahrhundert belegt werden, wegen den Datierungsproblemen der Inschrift und den inkongruenten Fakten ermahnt Herwig Wolfram mit Recht zur Vorsicht.²² Es ist zu erwähnen, dass der für die Annerkennung der historischen Realität und die Kanonisation Domitians eintretende Robert Eisler, hinter dem Namen Domitianus die Form Domislaus, einen Namen slawischen Ursprungs vermutete, und die Aufmerksamkeit auf die mögliche Verbindung zwischen der Legende des Statuen stürzenden Herzogs und der gelehrten Etymologie des Namens von Millstatt (*mille statuæ*) lenkte.²³

19 Iohannes abbas Victoriensis, *Liber certarum historiarum* 2, 13.

20 Zu Johann von Viktring siehe Lhotsky (Fn 6) S 293; Lošek (Fn 8) S 52; H Fichtenau „Herkunft und Sprache Johanns von Viktring“ *Carinthia* (1975) 165 S 25-39; A Lhotsky „Johann von Viktring“ in H Wagner & H Koller (Hrsg) *Aufsätze und Vorträge* (Wien, 1970) Bd 1 S 131-148.

21 M Hansitz *Germania Sacra* (Augsburg, 1729) Bd 2 S 104; R Eisler „Die Legende vom heiligen Karantanenherzog Domitian“ *Mitteilungen des Instituts für österreichische Geschichtsforschung* (1907) 28 S 52-116, 91.

22 F Nikolasch „Domitian von Millstatt – eine Erfindung des 12. Jahrhunderts?“ *Carinthia* (1990) 180 S 235-253; F Glaser „Eine Marmorinschrift aus der Zeit Karls des Großen“ *Carinthia* (1993) 183 S 303-318; Wolfram (Fn 9) S 289.

Der Großteil der modernen Geschichtsforschung sah in dem Herzog Ingo eine historische Person, und versuchte ihn als Träger eines germanischen aber nichtbayerischen Namens mit jemandem aus den Parallellquellen der *Conversio* zu identifizieren.²⁴ Michael Mitterauer zB identifizierte Ingo mit Etgar aus dem 10 Kapitel der *Conversio*, einem Karantanenfürst bewiesener Existenz.²⁵ Als weiterer Identifikationsversuch ist seine Gleichsetzung mit dem Slawen Woinimir (*Wonomyrus Sclavus*) zu erwähnen, der auf den Befehl des Fürsten Erich von Friaul im Jahre 795 den awarischen Ring angegriffen hat. Über den Rang und die Stellung des Woinimirs ist aber nichts Genaueres bekannt.²⁶ Ebenfalls als bloße Hypothese kann die Identifikation Ingos mit dem im *Rhythmus de Pippini regis victoria Avarica* auftauchenden Unguimeri betrachtet werden. Unguimeri hatte 796, als das fränkisch-bayerische Heer sich dem Land der Awaren näherte, dem Awarenkagan und dessen Hauptgemahlin, der Katun ein schreckliches Ende prophezeit. Unguimeri wird oft mit Inguimer(us), dem Germanenfürsten aus den *Annalen* des Tacitus (1, 60. 68; 2, 17. 21. 45, 46) in Verbindung gebracht, und deswegen als einer der Gepiden im Awarereich angesehen. Walter Pohl meinte, dass Unguimeri ein unter den Awaren lebender Langobarde in der Emigration gewesen sein musste. Andere Forscher setzten Unguimeri wiederum mit dem schon erwähnten Slawen Woinimir gleich, wodurch die Identifikationsversuche anfangen sich in einem *circulus vitiosus* zu drehen.²⁷

In seiner Ausgabe aus dem Jahre 1979 und in seiner Monografie aus 1995 zieht Herwig Wolfram den Giftzahn der Frage, indem er behauptet, dass Ingo als Herzog sein historisches Dasein nur einem schematischen Übersetzungs-, bzw Interpretationsfehler zu verdanken hat. Das Relativpronomen des Satzanfanges „*Quorum unus ...*“ wurde nämlich nicht mit den von Arn nach Karantanien und in das untere Pannonien gesandten Glaubensboten, den *presbyteri*, sondern mit den dort wohnenden Edelsleuten in Verbindung gebracht.²⁸ Da die im Dativ stehende Wendung „*illis ducibus atque comitibus*“ dem Satzende näher steht, als der Akkusativ „*presbyteros*“, wurde der Subjekt des nächsten Satzes allzu schematisch, sowohl grammatisch, als auch inhaltlich inkorrekt, nicht mit dem direkten Objekt

23 Eisler (Fn 21) S 90.

24 Ingo findet auch als Graf Erwähnung, der sich energisch für die kirchlichen Interessen einsetzte, so zB A Hauck *Kirchengeschichte Deutschlands* (Berlin-Leipzig, 1954) Bd 2 S 480.

25 M Mitterauer „Slawischer und bayerischer Adel am Ausgang der Karolingerzeit“ *Carinthia* (1960) 150 S 693-726, 695.

26 W Pohl *Die Awaren: Ein Steppenvolk in Mitteleuropa 567–822 n. Chr.* (München, 1988) S 319-320; Szádeczky-Kardoss (Fn 11) S 286; H Wolfram *Die Geburt Mitteleuropas: Geschichte Österreichs vor seiner Entstehung: 378–907* (Wien, 1987) S 258.

27 So zB J Lésny „Unguimer“ in *Lexicon Antiquitatum Slavicarum* (Wratistlawiae, 1977) Bd 6 S 264-265; *Magnae Moraviae Fontes Historici* (Praha-Brno, 1967-1969) Bd 2 S 14; Bd 2 S 305.

28 Wolfram (Fn 8) S 96; Wolfram (Fn 9) S 288. Zu Erzbischof Arn siehe G Demmelbauer *Arno, der erste Erzbischof von Salzburg 798–821* (Dissertation, Wien, 1950); M Niederkorn-Bruck & A Scharer (Hrsg) *Erzbischof Arn von Salzburg* (Wien-München, 2004).

des vorherigen Satzes (*presbyteros*) verbunden.²⁹ Zu Arns Zeiten wurde dieses Gebiet von den *duces*, dh den Karantnenfürsten und den *comites*, den Vertretern der fränkisch-bayerischen Herrschaft verwaltet, und die behandelte Stelle betont, dass die von Bischof Virgil auf Karantianen angewandte Missionsmethoden von Arn auf das untere Pannonien übertragen wurden. Wie auch der heilige Rupert nie nach Unterpannonien gelangte, so konnte Virgil auch nicht die Missionstätigkeit auf diesem Gebiet organisieren: diese Behauptungen dienten bloß jenem Zweck, dass die Rechtsansprüche von Salzburg auf Karantianen und das untere Pannonien untermauert werden. Mit dem Satzanfang „*Simili modo...*“ betont der Verfasser, dass der Leiter des Salzburger Bistums auch in das untere Pannonien Priester entsandte.³⁰

Diese Argumentation wird auch durch das *Excerptum de Karentanis* unterstützt. Das an der Wende des 12 und 13 Jahrhunderts entstandene *Excerptum de Karentanis* enthält hauptsächlich die Namen der weltlichen und kirchlichen Leitern Karantaniens. Obwohl es alle in der *Conversio* erwähnten und mit den Karantanen in Verbindung stehenden Namen, außer die der Priester und Diakone, aufzählt, wird ein Herzog, bzw Fürst mit dem Namen Ingo nicht erwähnt.³¹ Diese Liste erstellte der Verfasser aus den Sätzen und Satzteilen der *Conversio*, aber die Schreibweise der Namen weicht von jener der *Conversio* ab. Wenn wir uns für die Interpretation „... *presbyteros ... Quorum unus ...*“ entscheiden, müssen wir versuchen, die Existenz eines Priesters namens Ingo zu Arns Zeiten aus den Salzburger Quellen belegen. Es befindet sich in dem *Liber confraternitatis*, dh dem Verbrüderungsbuch von Sankt-Peter zu Salzburg ein Eintrag über einen „*Ingo presbyter*“.³² Erwähnenswert ist zugleich, dass uns außer dem *Liber confraternitatis* und der *Conversio* kein Beleg dafür zur Verfügung steht, dass in jener Zeit in Bayern jemand den Namen Ingo getragen hätte. Die besagte Stelle des Salzburger Verbrüderungsbuches erwähnt

29 Die Frage, ob „*unus*“ auf die Priester oder auf die Herzöge und Grafen bezogen werden sollte, warf schon August Jaksch auf. Vgl A Jaksch „Fredegar und die *Conversio Carantanorum* (Ingo)“ *Mitteilungen des Instituts für österreichische Geschichtsforschung* (1926) 41 S 44-45.

30 Wolfram (Fn 8) S 97; Wolfram (Fn 9) 228ff. Über Ruperts angebliche Reise nach Pannonien siehe *Conversio Bagoariorum et Carantanorum* 1; zur Rupertlegende (*Gesta sancti Hrodberti confessoris*) vgl E Zöllner „Woher stammte der heilige Rupert?“ *Mitteilungen des Instituts für österreichische Geschichtsforschung* (1949) 57 S 1-22; I Zibermayr „Die Rupertlegende“ *Mitteilungen des Instituts für österreichische Geschichtsforschung* (1954) 62 S 67-82; H Wolfram „Der heilige Rupert und die antkarolingische Adelsopposition“ *Mitteilungen des Instituts für österreichische Geschichtsforschung* (1972) 80 S 4-34; H Baltl „Zur Datierungsfrage des hl. Rupert“ (1975) 61 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* S 1-16; K Reindel „Die Organisation der Salzburger Kirche im Zeitalter des hl. Rupert“ (1975) 115 *Mitteilungen der Gesellschaft für Salzburger Landeskunde* S 83-98; J Jahn *Ducatus Baiuvariorum: Das bairische Herzogtum der Agilolfinger* (Stuttgart, 1991) S 54ff; K Forstner „Quellenkundliche Beobachtungen an den ältesten Salzburger Güterverzeichnissen und an der *Vita s. Ruperti*“ (1995) 135 *Mitteilungen der Gesellschaft für Salzburger Landeskunde* S 465-488.

31 *Excerptum de Karentanis* 2.

32 *Liber confraternitatum sancti Petri Salisburgensis vetustior* 48.

Ingo als ersten einer vierzehnköpfigen Gruppe, in der es sich neben jedem Namen – im Gegensatz zu den Zeilen im Umfeld – der Zusatz „*presbyter*“ findet. Ingo musste mit großer Wahrscheinlichkeit der Leiter der Glaubensboten in Karantanien gewesen sein, dessen Wirken in die Zeit zwischen 785 und 799 anzusetzen ist. Wie es im 8 Kapitel *Conversio* berichtet wird, betraute Arn in 799, ein Jahr nach seiner Erhebung zum Erzbischof einen Chorbischof namens Theoderich mit der Organisation und Leitung der Karantanenmission. Ingo leitete also die Mission in Karantanien beinahe anderthalb Jahrzehnte lang, und die bei der Verrichtung dieser Aufgabe so wichtige *prudentia* verlieh ihm höchstes Ansehen, wie es aus den zwei, von der *Conversio* erwähnten Beispielen hervorgeht. Der Lösungsversuch von Herwig Wolfram fand in der Fachliteratur allgemeine Anerkennung, ua pflichtete diesem sowohl Karl Schmid in seiner Studie über das Verbrüderungsbuch, als auch Fritz Lošek in seiner *Conversio*-Ausgabe bei.³³

4. In der Erzählung der *Conversio* sollte Ingo ein Blatt, bzw Pergamen ohne Schrift (*carta sine litteris*) geschickt haben, das für seinen Boten genügend Legitimation gab, vom Volke Gehorsam zu verlangen. Die *carta* als Urkunde von größter Beweiskraft wurde zwar von den Germanen in ihr Rechtssystem aus dem römischen Recht übernommen, erreichte jedoch, weil ihnen einerseits das Latein der Urkunden, andererseits die Schreib- und Lesekunst nur in geringem Maße zugänglich war, bei ihnen kein allzu hohes Ansehen, dh mit dem Rezeptionsakt nahm zugleich der Abweisungsprozess seinen Anfang.³⁴ Im Zusammenhang mit dieser Tatsache ist es festzulegen, dass im Falle der von Ingo gesandten *carta* das Fehlen der Schrift auch deswegen nicht als überraschender Moment überbewertet werden dürfte, weil die neu bekehrten Slawen und Awaren des Lesens unkundig waren, wie es auch aus dem Protokoll des *Conventus episcoporum ad ripas Danubii* aus dem Jahre 796 hervorgeht.³⁵

Im fränkischen, bayerischen, alemannischen und burgundischen Rechtswesen wurde eine ziemlich seltsame Art des urkundlichen Beweisverfahrens ausgearbeitet. Die Urkunde, oder genauer gesagt das leere Pergament, das eben durch die Beschriftung zur Urkunde werden sollte, entwickelte sich zu einem bei Liegenschaftsübertragungen gebräuchlichen Symbol. Beim Rechtsakt wurde es auf die Erde gelegt, und der Aussteller der Urkunde hob es während der entsprechenden Willensäußerung von der Erde auf, und überreichte es dem Schreiber. Anlässlich

33 Wolfram (Fn 8) S 98f; K Schmid „Das Zeugnis der Verbrüderungsbücher zur Slawenmission“ in Th Piffli-Perčević & A Stirnemann (Hrsg) *Der heilige Method, Salzburg und die Slawenmission* (Innsbruck-Wien, 1987) S 185-205, 188; Lošek (Fn 8) S 112.

34 Vgl M Kos „Carta sine litteris“ (1954) 62 *Mitteilungen des Instituts für österreichische Geschichtsforschung* S 97-100, 98.

35 F Zagiba „Die Missionierung der Slawen aus ‚Welschland‘ (Patriarchat Aquileia) im 8. und 9. Jahrhundert“ in M Hellmann, R Olesch, B Stasiewski & F Zagiba (Hrsg) *Cyrillo-Methodiana. Zur Frühgeschichte des Christentums bei den Slawen 863–1963* (Graz, 1964) S 273-311, 280.

der Forderung, dass das Pergament mit der Erde in Berührung kommen sollte, ist als Parallele aus dem römischen Recht die Eigenheit der *mancipatio* und der *legis actio sacramento in rem* herauszuheben, dass die Parteien mit Hilfe eines Stabes den Gegenstand des Rechtsaktes, bzw des Rechtsstreites haben berühren müssen. Die Berührung kann nicht ausschließlich zur genaueren Bestimmung gedient haben, denn dazu hätte eine eindeutige Hindeutung gereicht, der Berührungsakt erschuf in den archaischen, mit dem Sakralen noch engere Verbindungen hegenden Rechtsordnungen eine stärkere Bindekraft und die Möglichkeit der Willensübertragung.³⁶ Das Blatt konnte manchmal auch schon im Voraus, gleichsam formelhaft ausgefüllt werden, aber die Siegel der Zeugen, die Unterschrift des Schreibers und die Datierung wurden erst *suo tempore* zum Pergament gebracht – solange galt die Urkunde *de iure* als ungeschrieben, da sie den notwendigen Gültigkeitskriterien nicht entsprach. Die Symbolhaftigkeit der *carta* wurde in manchen Fällen auch dadurch verstärkt, dass neben das Pergament auch der Tintenfass und die Feder auf die Erde gelegt wurde, und der Aussteller diese Gegenstände zusammen mit dem Pergament von der Erde aufheben, und dem Schreiber übergeben musste.³⁷ Herwig Wolfram stellt die Frage, ob ein leeres Pergament, wie auch in der Geschichte des Ingo, ausreichende Beweiskraft besaß, und es noch nicht irgendwelche Zeichen (*signa*) und Siegel erforderlich waren. Das Missachten des herzoglichen Siegels wurde bekanntlich sowohl vom alemannischen, als auch vom bayerischen Recht sanktioniert.³⁸

Der Gegenstand, das Symbol, das unausgefüllte, dh noch nicht zur *carta* gewordene Pergament hatte in manchen Fällen mehr Wert, als die schon ausgestellte, gültige Urkunde, die sowieso nur wenige zu lesen vermochten. Die Erzählung der *Conversio* macht eben die Tatsache deutlich, dass die bloße Versendung des Pergaments, das entsprechend ausgestellt erst später zur rechtmäßigen Urkunde hätte werden können, ausreichte, die gewünschte Wirkung beim Volke zu erzielen. Diesen Verhältnissen entsprach der Brauch vollkommen, dass der Eigentumsübertragung nicht die ausgefüllte *carta*, sondern die, mit der Willenserklärung gleichzeitig verlaufende Zeremonie, bei der das Pergament von der Erde aufgehoben und dem Schreiber überreicht wurde, ihre Gültigkeit verlieh. In der des Schreibens und des Lesens unkundigen Umgebung diente das Pergament, das das Material für die Urkunde lieferte als ausreichendes Beweismittel. Genauso „sprach“ der Siegel selbst für diejenigen, die dessen Schriftzeichen nicht lesen konnten, eine wohl verständliche Sprache. In der Formulierung von Milko Kos bedeutete die *carta sine litteris* nichts anderes: „*Ingo sandte mich, gehorche meinem Befehl!*“. Als Analogie erwähnte er

- 36 Vgl A Hägerström *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (Uppsala, 1927) Bd 1 S 33-41; T Nótári „Comments on the origin of the legis actio sacramento in rem“ (2006) 47 *Acta Juridica Hungarica* S 133-155.
- 37 O Redlich „Privaturkunden des Mittelalters“ in W Erben, L Schmitz-Kallenberg & O Redlich *Urkundenlehre* (München, 1911) Bd 3 S 47; E Goldmann „Cartam levare“ (1914) 35 *Mitteilungen des Instituts für österreichische Geschichtsforschung* S 1-59; Kos (Fn 34) S 99.
- 38 Wolfram (Fn 8) S 199; *Leges Alamannorum* 22, 2; *Lex Baiuvariorum* 2, 13.

das Siegel von Otto von Trixen aus dem 12. Jahrhundert, auf dem folgender Satz zu lesen war: „*Otto de Trussen me misit*“.³⁹

Aufgrund all dessen ist es mehr oder weniger irrelevant, ob wir das Versenden des Pergaments durch Ingo als einen historischen Fakt, oder als eine Parabel, die sein Ansehen zu demonstrieren hatte, bewerten, denn irgendwie musste diese Erzählung über die *carta sine litteris* den Verhältnissen des 12. Jahrhunderts entsprechen, ansonsten wäre es für den Adressaten und den anderen Lesern der *Conversio* unverständlich geblieben. Es ist eben den besagten Schwierigkeiten bei der Interpretation zuzuschreiben, dass das Moment der *carta sine litteris*, zu dessen Verständnis das Vertrags- und Urkundensystem des frühmittelalterlichen germanischen Rechtswesens von Nöten ist, für die Autoren späterer Zeiten keinen lehrreichen und für eine Erzählung geeigneten Stoff bot. So fand die *carta sine litteris* weder Eingang in den *Liber certarum historiarum* des Johanns von Viktring, noch in die *De Europa* des Enea Silvio Piccolomini – im Gegensatz zur Geschichte über Ingos Gastmahl.

5. Die Erzählung über Ingos Gastmahl in der *Conversio Bagoariorum et Carantanorum* ist ihrer Literaturgattung nach als christliche Parabel einzuordnen, in ihrer Struktur folgt sie auch den biblischen Vorbildern: in ihr sollte den schon Bekehrten der Erfolg der Mission in Karantanien geschildert werden. Der Gastgeber erweist den Christen die Ehre, selbst wenn sie Knechte sein sollten, ihnen das Mahl in goldenen Gefäßen aufzutischen, während dessen müssten die Ungläubigen, und sollten sie selbst die mächtigsten Herren der Welt sein, vor den Türen aus schmutzigen Tonschüsseln wie die Hunde speisen. Das Fazit der Geschichte steht im deutlichen Einklang mit der Erzählung über das Königsmahl aus dem Matthäusevangelium (22, 1-14), bei dem diejenigen, die nicht im Festgewand erscheinen, in die Dunkelheit hinausgestoßen werden, wo ihnen nichts anderes übrig bleibt, als zu weinen, zu jammern und die Zähne zu knirschen. Das Christentum macht selbst die Knechte zu Adligen, während die ungläubigen Herren ihr Leben in Schmutz und in Knechtschaft der Sünde zubringen müssen. Für die Parabel des ingonischen Gastmahles lassen sich auch aus der Literatur ihrer Zeit Parallelen finden, so zB wird uns eine ähnliche Geschichte über den im Hofe des Skatopluk in Moravien lebenden Fürsten Bořivoj überliefert.⁴⁰ Aufmerksamkeit verdient auch eine Textstelle bei Fredegar, auf die schon Arnold Jaksch als mögliches Vorbild der Erzählung in der *Conversio* hingewiesen hat.⁴¹

Sowohl in der Erzählung über Ingos Gastmahl in der *Conversio*, als auch in der Geschichte bei Fredegar werden die noch ungetauften Heiden als Hunde bezeichnet,

39 Kos (Fn 34) S 99f; Redlich (Fn 37) Bd 3 S 108.

40 *Legenda Christiani: vita et passio sancti Wenceslai et sanctae Ludmillae avae eius* 1-3. Zu der Verbindung mit der *Conversio* siehe J Pekař *Die Wenzels- und Ludmilla-Legenden und die Echtheit Christians* (Prag, 1906) S 88ff.

41 Jaksch (Fn 29) S 154.

bzw beschimpft. In Fredegars *Chronik* (4, 68) sagt der sich wegen der Niedermetzlung der fränkischen Gesandten beklagende Königsbote Sicharius dem Fürsten Samo, dass er es für unmöglich hielte, dass die Diener Gottes mit den Hunden zusammen speisten. Darauf entgegnet Samo, dass, wenn sie schon als Hunde beschimpft worden wären, ihnen das Recht zustehen würde ihren Feinden Bisse zuzufügen. An diesem Punkt vollzieht sich jedoch ein Aspektwandel: Während der Verfasser der *Conversio*, der die fredegarischen Werke kennt und gebraucht, den Ingo die ungetauften Herren vor die Tür setzen lässt, wird bei Fredegar der Sicharius, ein Christ und Gesandter des Frankenkönigs vom Heiden Samo zur Tür hinausgeworfen:

Eo anno Slavi coinomento Winidi in regno Samone neguciantes Francorum cum plure multitudine interfecissent et rebus expoliassint, haec fuit initium scandali inter Dagobertum et Samonem regem Sclavinorum. Dirigensque Dagobertus Sycharium legatarium ad Samonem, paetens, ut neguciantes, quos sui interfecerant aut res inleceate usorpaverant, cum iusticia faceret emendare. Samo nolens Sicharium vedere, nec ad se eum venire permetteret, Sicharius vestem indutus ad instar Sclavinorum, cum suis ad conspectum pervenit Samonem [...] Sicharius dicens: 'Non est possebelem, ut christiani et Dei servi cum canebus amicicias conlocare possint.' Samo a contrario dixit: 'Si vos estis Dei servi, et nos Dei canes, dum vos adsiduae contra ipsum agetis, nos permissum accepimus vos morsebus lacerare.' Aegectus est Sicharius de conspectum Samonis.⁴²

Die Vorbildfunktion der Fredegar-Stelle wird auch dadurch untermauert, dass das hier von uns behandelte 7 Kapitel der *Conversio* nicht der einzige gemeinsame Punkt zwischen beiden Werken ist. In dem sich mit Samo befassenden Teil des 4 Kapitels der *Conversio* wird reichlich aus Fredegars *Chronik* geschöpft. Aus den angeführten Stellen wird eindeutig ersichtlich, dass Fredegars Erzählung die Ereignisse aus einem vollkommen anderen Blickwinkel schildert, als die *Conversio*. Laut Fredegar sollte der Franke Samo in 623/24 als Waffenhändler und vielleicht als Beauftragter des Frankenkönigs Dagobert I (623-639) unter die Slawen gegangen sein, um sie bei ihren Selbstständigkeitsbestrebungen zu unterstützen. Die Krise des durch die Besetzungsniederlage bei Byzanz im Jahre 626 geschwächten ersten Awarenkaganats ermöglichte Samo sich zum Fürsten eines von ihm gegründeten mitteleuropäischen Staates erheben zu lassen. Diesen Staat wollte König Dagobert I vernichten, seine Versuche blieben jedoch erfolglos, und somit löste sich der besagte Staat erst mit dem Tode des Samo in 658 auf. Laut der *Conversio* sollte Samo ein *dux gentis* karantanischer Herkunft gewesen sein, und das Heer des Dagoberts I hätte die Rebellion der Slawen erfolgreich niedergeschlagen. Um seine eigene Version schreiben zu können musste aber der Verfasser der *Conversio* nicht Fredegars *Chronik*, sondern die auf Fredegar zurückgehende *Gesta Dagoberti I. regis Francorum* als Vorlage gebrauchen. So wurde der Fürst des Slawenstaates Samo

42 *Chronicarum quae dicuntur Fredegarii scholiastici libri IV cum continuationibus* 4, 68.

selber zum Slawen, und die von den Franken und Langobarden angegriffene Staat mit Karantanien indentifiziert.⁴³

Ohne bei dieser literarischen Vorlage der *Conversio* (und zugleich bestem morphologischen Paradebeispiel des Lateins der Merowingerzeit) aus dem 7 Jahrhundert länger verweilen zu müssen, lässt es sich feststellen, dass die Erzählung über Ingos Gastmahl als Teil des durch die Slawen- und Awarenmission notwendig gewordenen Missionskatechismus der Karolingerzeit entstand,⁴⁴ Diese Parabel wirkte über Jahrhunderte hindurch fort, und wurde selbst im 14 Jahrhundert von Johann von Viktring und im 15 Jahrhundert von Enea Silvio Piccolomini als ein charakteristisches Beispiel des Kulturgutes des ausgehenden 8 Jahrhunderts geschätzt.

6. Als ursprüngliche Quelle der Erzählung über Ingos Gastmahl im 65 Kapitel des Werkes *De Europa* von Enea Silvio Piccolomini kann der 7 Kapitel der in 870 entstandenen *Conversio Bagoariorum et Carantanorum* gelten. Obwohl Enea Silvio die *Conversio* gekannt und gelesen haben muß, ist die Geschichte von Ingo, wo er von dem Weißbuch der Salzburger Kirche als Quelle Gebrauch macht. Festgestellt werden konnte auch, dass in der *Conversio* Ingo nicht als Herzog oder Graf auftritt, und dank der *interpretatio grammatica* und der Parallelstelle des Salzburger Verbrüderungsbuches war auch zu ermittelt, dass er in der Zeit zwischen 785 und 799 der von Arn beauftragte Leiter der Karantanenmission tätig war. Sein Dasein als Herzog verdankt Ingo einer Fehlinterpretation, die zum ersten Mal am Anfang des 14 Jahrhunderts in dem *Liber certarum historiarum* des Abtes Johann von Viktring anzutreffen ist. Diese missglückte Deutung übernahm die Literatur von mehreren Jahrhunderten, und so versuchten manche Forscher den angeblichen Herzog Ingo mit einer tatsächlich belegbaren historischen Gestalt zu identifizieren zu.

Die Geschichte des ingonischen Gastmahles weist neben den biblischen Parallelen einige Verbindungen mit der *Chronik* des Fredegars auf. Der Verfasser der *Conversio* verwendete das bei Fredegar gefundene Motiv zu seinen eigenen Zwecken, und fügte es harmonisch in seine Erzählung hinein – eine Erzählung, die sich hervorragend als Parable der Slawen- und Awarenmission eignete. Die Tatsache, dass Enea Silvio, ein Kenner des Werkes des Johanns von Viktring über

43 *Conversio Bagoariorum et Carantanorum* 4. *Temporibus gloriosi regis Francorum Dagoberti Samo nomine quidam Sclavus manens in Quarantanis fuit dux gentis illius. Qui venientes negotiatores Dagoberti regis interficere iussit et regia expoliavit pecunia. Quod cum comperit Dagobertus rex, misit exercitum suum et damnum, quos ei idem Samo fecit, vindicare iussit.* Hierzu vgl die Stelle der Fredegar *Chronik* des Fredegar (4, 48) und jene der *Gesta Dagoberti I. regis Francorum* (27), zu ihrer Analyse siehe Szádeczky-Kardoss (Fn 11) S 171; Pohl (Fn 26) S 256; Lošek (Fn 8) S 31. Zu den anderen Aspekten siehe J Goll „Samo und die karantanischen Slaven“ (1890) 11 *Mitteilungen des Instituts für österreichische Geschichtsforschung* S 441-446.

44 H Löwe *Die karolingische Reichsgründung und der Südosten: Studien zum Werden des Deutschtums und seiner Auseinandersetzung mit Rom* (Stuttgart, 1937) S 119, 170.

Ingo den Karantanenherzog schrieb, lässt uns annehmen, dass er die viktringische Interpretation der von ihm selber auch gelesenen Stelle der *Conversio* akzeptiert hatte. Es ist allzu unwahrscheinlich, dass Enea Silvio von Johann von Viktring unabhängig zur selben Fehldeutung des Textes gelangt wäre. Der Wertunterschied zwischen Christen und Ungläubigen zeigt sich in allen von uns hier untersuchten Erzählungen in der Relation des Drinnen und Draußen, in der Dualität des Einlasses und des Aussperrens. Der Vergleich der Heiden mit den Hunden ist jedoch bei Enea Silvio und Iohannes Victoriensis nicht mehr zu finden. Bei Fredegar lässt sich das Hundemotiv zwar antreffen, wird aber mit einer Parabel über ein Gastmahl in keinerlei Verbindung gebracht, da es ja in der Fredegarstelle nicht um ein Gastmahl, sondern um das Verantworten der Niedermetzelung fränkischer Gesandten und Händlern geht. Die besagten Motive werden nur in der *Conversio* und im *Liber certarum historiarum* miteinander kombiniert. Jener Satz der *Conversio*, der besagt, das Volk hätte Ingo selbst dann gehorcht, wenn er ihnen ein leeres Pergament, eine *carta sine litteris* zugesandt hätte, stieß bei Enea Silvio und Johann von Viktring wahrscheinlich auf Interpretationsschwierigkeiten wegen der allzu organischen Verbindung des Bildes mit dem frühmittelalterlichen Urkundenwesen, und fand weder in die *De Europa*, noch in den *Liber certarum historiarum* Eingang.

ABSTRACT

Enea Silvio Piccolomini, in his work entitled *De Europa* written in 1458, tells an interesting story defined as a legend in terms of genre about a duke called Ingo, who lived during the reign of Charlemagne. This narrative claims that in 790 *dux gentis* Ingo held a feast for the inhabitants of his province where food was served in golden and silver bowls to the peasants allowed to appear before him, while to the dignitaries standing further away from him received their food in bowls made of clay. The researchers' attention is deservedly raised by the question why this parabolic story with biblical tone was included in Enea Silvio's work; and if it had been borrowed, from whom? The answer seems to be very simple: it derives from the *Conversio Bagoariorum et Carantanorum* drafted regarding the lawsuit instituted Methodius. In the case narrated in the *Conversio* Ingo sent a charter, or rather a parchment without any writing or letters on it (*carta sine litteris*), which provided his legate with sufficient authenticity to demand obedience from the people.

In this study – after having compared the two narratives and outlined the place of *De Europa* in Enea Silvio Piccolomini's oeuvre as well as the circumstances of the drafting and tendencies of the *Conversio Bagoariorum et Carantanorum*, the author attempts to answer the following questions: To what extent can duke Ingo, mentioned by Enea Silvio and not questioned in the literature for long centuries, be considered a real historical person? Does the *Conversio* refer to Ingo as a duke, and if it does, what is his existence as a duke and introduction in the literature as a duke

owing to? What could the meaning of *carta sine litteris* referred to in *Conversio* have been, and why did Enea Silvio not take this item over although he could have put it forward as a further proof of Ingo's dignity? To what literary prefigurations can the description of the feast held by Ingo be traced back to, and what role did it play in the *Conversio*? And, regarding the borrowing of the Ingo story by Enea Silvio, what possible intermediary writing and author can be reckoned with?

LIKE A BAD PENNY: THE PROBLEM OF CHRONIC OVERCROWDING IN THE PRISONS OF COLONIAL NATAL: 1845 TO 1910 (PART 2)

Stephen Allister Peté*¹

1 Introduction

Part 1 of this article examined the problem of chronic overcrowding in the prisons of colonial Natal from 1845, the year in which Britain took over the administration of the Colony, to 1875, which saw the penal system of the Colony still adjusting to the influx of prisoners resulting from the Langalibalele Rebellion of late 1873. In the introduction to Part 1 it was pointed out that, like a bad penny, the problem of chronic overcrowding was to turn up time and time again throughout the colonial period, indicating that this scourge is not a recent phenomenon, affecting only the prisons of post-apartheid South Africa.¹ Neither is it a problem which can be

- 1 See, in general, S Peté “The politics of imprisonment in the aftermath of South Africa’s first democratic election” (1998) 1 *South African J of Criminal Justice* 51-83; S Peté “The good the bad and the warehoused – The politics of imprisonment during the run-up to South Africa’s second democratic election” (2000) 13(1) *South African J of Criminal Justice* 1-56; and S Peté “Between the devil and the deep blue sea – The spectre of crime and prison overcrowding in post-apartheid South Africa” (2006) 27(3) *Obiter* 429-453.

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ascribed solely to the policies imposed during the apartheid period, although the problem was clearly evident during that period and apartheid policies were certainly implicated in the chronic overcrowding experienced during that time.² The fact that prison overcrowding first emerges around the start of the colonial period in Natal and becomes increasingly “entrenched” within the penal system, indicates the deep social, political and economic roots of the problem within the South African historical landscape. It may even indicate, thinking along the functionalist lines suggested by Michel Foucault, that chronic overcrowding is a structural feature of imprisonment in South Africa.³ This latter line of thinking is certainly radical in its implications, but it is by no means the first time that this type of argument has been made in relation to the South African penal system. For example, Lukas Muntingh, one of South Africa’s leading penologists, has made a compelling argument pointing out the “value” to be gained by politicians and businessmen from the apparent and continued “failure” of South African prisons to reform criminals.⁴ Whether or not

- 2 See S Peté “Holding up a mirror to apartheid South Africa – Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Part 1 ” (2014) 35(3) *Obiter* 485-505; and S Peté “Holding up a mirror to apartheid South Africa – Public discourse on the issue of overcrowding in South African prisons 1980 to 1984 – Part 2” (2015) 36(1) *Obiter* 17-40.
- 3 In *Discipline and Punish – The Birth of the Prison* (London, 1979) at 264 Michel Foucault points out that the birth of the modern prison around the beginning of the nineteenth century in France was almost immediately denounced as a failure. He puts his finger on the cyclical and repetitive nature of critiques leveled at imprisonment as a form of punishment, stating that “the critique of the prison and its methods [which] appeared very early on ... was embodied in a number of formulations which – figures apart – are today repeated almost unchanged” (at 265). Foucault goes on to point out that the same “solutions” to the continuously repeated “problems” have been recycled over and over again for the past 150 years. He puts it as follows: “For a century and a half the prison has always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure; the realisation of the corrective project as the only method of overcoming the impossibility of implementing it ... Word for word, from one century to the other, the same fundamental propositions are repeated. They reappear in each new, hard-won, finally accepted formulation of a reform that has hitherto always been lacking. The same sentences or almost the same could have been borrowed from other ‘fruitful’ periods of reform ...” (at 268 and 270).
- 4 Muntingh begins his argument by pointing out that there is almost no evidence that prisons have been able to reduce crime to any significant extent anywhere in the world. Why then do almost all societies choose to retain this form of punishment? Muntingh’s answer is that, despite their apparent “failure”, prisons provide various types of value to those in power. It is beyond the scope of this article to set out Muntingh’s complex argument in full, but the following extract provides some idea of the type of “value” he has in mind: “[W]ho stands to benefit from prisons – and the answer is simple: politicians and the private sector ... Prisons have symbolic value; they communicate the message that government is tough on crime and is willing and capable of legally depriving citizens of their liberty because they have committed a crime and offended society. Prisons symbolise the state’s power over its citizens. More importantly, they communicate the willingness of the state to use its coercive power” (see L Muntingh “Punishment and deterrence – Don’t expect prisons to reduce crime” (Dec 2008) 26 *SA Crime Quarterly* at 5).

prison overcrowding – one of the most obvious ways in which the South African penal system has been “failing” since its inception – forms part of the “value” pointed out by Muntingh, is an open question.

As stated in Part 1, the aim of this article is to shed light on one small part of South Africa’s penal history – namely the genesis, evolution and development of the problem of prison overcrowding in the Colony of Natal – thereby contributing to a more nuanced understanding of this problem in the context of the South African penal system as a whole. Part 1 of the article covered the period 1845 to 1875. Part 2 starts in 1875 and covers the remainder of the colonial period through to 1910.

2 Continuing Efforts to Keep the Ideal of a “Separate System” Alive in the Mid to Late 1870s

In Part 1 of this article, it was noted that the Imperial authorities were anxious to see the introduction of the so-called “separate system” into the prisons of colonial Natal. On 31 August 1875 Lord Carnarvon, Secretary of State for the Colonies, complained that the system of prison discipline in Natal was “at variance in almost every particular” with the principles set out in the Digest.⁵ He painted a bleak picture of an excessively overcrowded penal system, of cells without lighting, where groups of prisoners were forced to huddle together during the long hours of darkness. He could only wonder at the “extent of depravity” which must prevail under such conditions.⁶ He severely reprimanded the Natal authorities as follows:

It is a serious aggravation of the scandal that the state of things disclosed by these Returns is not now made known for the first time, nor can the Colony plead that the subject has not been brought to the notice of their Government, for I observe that my Predecessors have not failed to urge reform upon the Colony in this most important matter.⁷

He expressed the hope that the legislature would rectify matters and place the prison system of the Colony “on a footing which will be creditable to the community”.⁸ However, on 8 November 1876 the Secretary of State noted that it did not appear as if any material improvement had been made and requested a “full and early report” from the Lieutenant-Governor on the subject.⁹

Clearly the Lieutenant-Governor had to act. In May 1877 he compiled an important Minute in which he analysed the lack of accommodation at the Pietermaritzburg

5 NAB (KwaZulu-Natal Pietermaritzburg Archives Repository) Government House Natal 66/Despatch 124: Carnarvon to Bulwer, 31 Aug 1875: par 3.

6 *Idem* at par 7.

7 *Idem* at par 9.

8 *Idem* at par 11.

9 NAB GHN (Government House Natal) 73/Despatch 324: Carnarvon to Bulwer, 8 Nov 1876.

Gaol and the implications of this for prison discipline.¹⁰ He pointed out that the prison population of the Pietermaritzburg Gaol had risen from a daily average of fifty-seven in 1872 to 106 in 1875. Occasionally over 130 prisoners were confined in the gaol at one time. Between 1869 and 1877 the number of cells available for prisoners in the Pietermaritzburg Gaol had only increased from seventeen to twenty-eight.¹¹ The Lieutenant-Governor noted that if each prisoner was given 500 cubic feet of space – well below what had been laid down in the Digest – the prison could accommodate eighty prisoners. However, the daily average prison population was 106. He thus drew the following conclusion:

The present accommodation then is wholly inadequate to the demands upon it, the daily number of prisoners being far greater than the prison can properly accommodate, whilst sometimes there is *excessive* overcrowding ... Additional accommodation therefore is urgently and imperatively needed ...¹²

As a result of the overcrowding the system of prison discipline was gravely defective. Individual separation of prisoners was completely impossible, and the only classification carried out was that between male and female, and black and white. At night “prisoners of European descent” were kept separate from “prisoners of African and Indian nationalities”.¹³ Other than that, untried prisoners were held alongside convicted prisoners, juveniles were held with adults, felons with misdemeanants, and long sentenced prisoners with short sentenced prisoners. The Lieutenant-Governor thus recommended “the erection of a strong double storied building containing eighty or one hundred cells” so that prisoners could be separately confined at night and a proper system of classification introduced.¹⁴

A Special Committee was set up to consider these recommendations of the Lieutenant-Governor and point out possible problems. As to be expected, there was a degree of cynicism among certain of the colonial officials. The Colonial Engineer seemed to think that the authorities in England were out of touch with the practical difficulties of applying penal policies designed in Europe, within the context of a racially divided society such as that which existed in colonial Natal. In Natal, prisoners were already divided into four different racial groups or “nationalities”,

10 NAB COL (Colonial Office London) 179/ 126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure No 1 – Minute of Lieutenant Governor, 31 May 1877.

11 Most of these extra cells were made available by the departure of the lunatics from the gaol in the early part of 1875. A “temporary lunatic asylum” had been set up in the Pietermaritzburg Gaol in 1866 and it was only in 1875 that a separate lunatic asylum was established. See NAB CSO (Colonial Secretary’s Office, Natal) 261/Letters 2257: Letter from the Colonial Secretary, Natal to the Colonial Engineer’s Office, Natal, 27 Nov 1866 and NAB COL 179/ 126: Bulwer to Hicks Beach, 9 Jan 1878: par 4.

12 NAB COL 179/126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure Number 1 – Minute of Lieutenant-Governor, 31 May 1877.

13 *Ibid.*

14 *Ibid.*

namely “Europeans”, “Kafirs”, “Coolies” and “Hottentots”. Further dividing each of these four separate groups into a number of separate categories – males and females; juveniles and adults; untried and convicted; felons and misdemeanants – was unworkable. The Colonial Engineer speculated, perhaps tongue in cheek, that forty-eight different classes of prisons would be required to accommodate all the different categories.¹⁵ The Committee decided, however, that most of the difficulties in effecting a proper system of classification could be overcome by building a sufficient number of cells so as to allow separate accommodation for each prisoner at night. During the day, it would be sufficient to divide prisoners into a more manageable set of categories.¹⁶ A plan was drawn up for the construction of a new cell block at the Pietermaritzburg Gaol which, had it been built, would have contained seventy cells.¹⁷ This would have solved the perennial problem of overcrowding since, as the Special Committee noted, the Pietermaritzburg Gaol would then have contained “separate cell accommodation for one hundred prisoners, or more than double the number which can be separately confined in the largest gaol of the Cape Colony”.¹⁸

Less ambitious plans were drawn up for extending the accommodation at the Durban Gaol, and in his address on opening the seventh session of the Legislative Council, the Lieutenant-Governor stated as follows:

The large increase in the number of prisoners annually committed to the Pietermaritzburg and Durban Gaols urgently calls for additional accommodation in these two Central Gaols, and you will be asked to make provision for the purpose of supplying such further accommodation in conformity with the requirements of a sound penal system.¹⁹

On 9 January 1878, the Lieutenant-Governor was able to report to the Secretary of State that

the Legislature has voted £11,000 (£8,000 for Pietermaritzburg and £3,000 for Durban) for the improvement of the two Central Gaols during the year 1878; and, however short that amount may fall of what will be necessary to make these Gaols what they ought to be, it is a very liberal contribution for the year, and will enable the Government to make some essentially necessary additions to the accommodation and efficiency of these two important institutions.²⁰

- 15 NAB COL 179/126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure No 5 – Notes by Colonial Engineer, 1 Jul 1877.
- 16 For a more detailed discussion of this point, see S Peté “Falling on stony ground: Importing the penal practices of Europe into the prisons of Colonial Natal – Part 2” (2007) 13(2) *Fundamina* at 123-124.
- 17 NAB COL 179/126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure No 10 – Lieutenant-Governor to Colonial Secretary, 12 Sep 1877.
- 18 NAB COL 179/126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure No 9 – Report of Committee, 4 Sep 1877.
- 19 NAB COL 179/126: Bulwer to Hicks Beach, 9 Jan 1878: Enclosure No 4 – Opening Address of Lieutenant-Governor, 7 Jun 1877.
- 20 *Idem* at par 12.

The initial response of the authorities in England was very favourable. The Secretary of State approved the steps being taken, his only complaint being that more money had not been allocated for the improvement of the Durban Gaol. He instructed Lieutenant-Governor Bulwer as follows:

You should strongly urge on the Legislature the necessity of carrying on the work more vigorously next year and of devoting a considerable sum of money to providing fresh accommodation and reconstructing the interior of the present building.²¹

The Secretary of State approved of the proposed system of classification of prisoners, noting that in his opinion race and colour were not “among the points most urgently demanding to be provided for”.²² Clearly, many of the colonists would have disagreed. As to the problem of overcrowding, just as it seemed as if real progress was to be made in eliminating this scourge, fate intervened in the form of war. The outbreak of the Anglo-Zulu War in 1879 forced the English authorities to shelve their plans for prison reform in Natal, as the reality of events on the ground forced them to begin operating in crisis mode.

3 The Outbreak of the Anglo-Zulu War of 1879 and its Effect on Chronic Overcrowding

The outbreak of the Anglo-Zulu War in 1879 impacted adversely on the problem of prison overcrowding in the gaols of Natal in a number of respects. In the first place, it was decided to confine military prisoners in the already overcrowded civilian gaols of the colony, which tended to exacerbate the problem of overcrowding even further. Clearly, it was not ideal for soldiers convicted of military offences to be imprisoned in civilian prisons alongside “common criminals”. In the case of the Colony of Natal at the time of the Anglo-Zulu War, however, the authorities apparently felt that the only practical solution to the problem of housing increasing numbers of military offenders was to confine them in the central gaols of the colony in Pietermaritzburg and Durban. In order to make this legally possible, these two prisons were appointed in 1880 as “authorised prisons” in terms of the Army Discipline and Regulation Act of 1879.²³

Another adverse impact of the Anglo-Zulu War on the problem of overcrowding was that the already parlous financial position of the Colony deteriorated even further. This meant that plans to extend prison accommodation came to an abrupt halt. The British Government contended that it had a claim in equity on Natal to recoup part of the money spent in fighting the Anglo-Zulu War. Figures of between

21 NAB GHN 83/Despatch 56: Hicks Beach to Bulwer, 30 May 1878 at par 3.

22 *Idem* at par 4.

23 NAB COL 179/135: Natal No 828, 17 Jan 1880; and NAB GHN 4/Letter from Hicks Beach to Bulwer, 24 Jan 1880.

£1,000,000 and £1,500,000 were mentioned.²⁴ With this financial threat hanging over it, Natal could not afford to allocate large sums of money to public works such as prisons. The authorities in Natal were instructed to expend such sums as were absolutely necessary to prevent half finished work from deteriorating. Lieutenant-Governor Bulwer was understandably unhappy about this instruction and on 30 July 1879 he reminded the Secretary of State that it was the British Government which had insisted on prison reform in the first place:

Few subjects, perhaps, have of late years more engaged the attention of successive Secretaries of State than the reform and proper organisation of the Prison and Hospital Establishments in the Colonies ...²⁵

He further pointed out the *bona fides* of the Natal Government:

The Legislative Council of the Colony has met the proposals of the Government in a spirit that reflects much credit on it, for popular Assemblies in new Colonies are apt to prefer the expenditure of Public money on objects which bring about more material advantage to the various individual or class interests of the community rather than on institutions and Establishments of the kind to which I have been referring.²⁶

While the Secretary of State acknowledged the truth of the above statements, he insisted firmly that circumstances had been totally altered by the outbreak of the war. As a small concession, the extension of the Durban Gaol at a cost of £3,000 was to be proceeded with. The major reform of Natal's prisons, however, would have to wait.²⁷

In his annual report for 1880 the Colonial Engineer was able to state that the extension of the Durban Gaol mentioned above had been completed, and would "afford additional accommodation for a considerable number of prisoners".²⁸ Even with the extra accommodation that had been built, however, he pointed out that even more additional cells were needed, since the gaol was still overcrowded. The state of repair of the Durban Gaol at this time was far from satisfactory. On 20 October 1880 the Durban Gaol Board expressed its deep concern as follows:

The Superintendent has brought to our notice the very dilapidated state of the cells in the old Gaol, and also the corridor. The flooring in each case has crumbled away leaving the floor quite unfit for washing and for Kafir's sleeping. The plaster on the walls of nearly all the cells has dropped off. Our attention again has been brought to the present state of the 'Gaol yard' which in bad weather is nothing but a chain of water holes ...²⁹

24 NAB COL 179/130: Bulwer to Hicks Beach, 31 Jul 1879.

25 NAB COL 179/130: Bulwer to Hicks Beach, 30 Jul 1879.

26 *Ibid.*

27 NAB GHN 93/Despatch 68: Hicks Beach to Wolseley, 27 Sep 1879.

28 NAB Natal Blue Book 1880 at p JJ45.

29 NAB CSO (Colonial Secretary's Office, Natal) 777/4202: Meeting of Durban Gaol Board, 20 Oct 1880.

The situation at the Pietermaritzburg Gaol was even worse, since no additional accommodation had been provided. The Colonial Engineer noted that the accommodation provided at the Pietermaritzburg Gaol was “wholly inadequate for the number of prisoners confined in this Gaol”.³⁰ The overcrowding was made worse by the increasing number of military prisoners sent to the Gaol.

On 10 November 1880, the Superintendent of the Pietermaritzburg Gaol complained as follows:

[It] is almost impossible to crowd more prisoners into the cells where the prisoners have not 200 cubic feet each. Additional accommodation is urgently required and then we can take in as many court martial prisoners as may be sent.³¹

Inevitably the overcrowding led to deterioration in the standard of health within the gaol. The District Surgeon made the following comment in support of the Superintendent’s call for additional accommodation:

The crowded state of the Central Gaol had, since September shown a great increase in the sick list ... As many as 40, out of a total of 185, have been on the sick list on various days during the last month. Serious forms of Dysentery and Diarrhoea are of frequent occurrence. I consider that additional accommodation is urgently needed.³²

Despite this serious state of affairs, the Government regarded the needs of the military as paramount. The Superintendent was instructed to comply with the wishes of the military authorities “by pitching tents for Kafirs, or by some other means ...”³³ Clearly the interests of white military prisoners were placed above those of black civilian prisoners. The above order was reluctantly obeyed, with the Resident Magistrate of Pietermaritzburg stating as follows:

Order has been complied with; but it involves crowding and it is impossible to put men under long sentence in tents. Moreover, measles have broken out in the Gaol.³⁴

Being forced to accommodate military prisoners in the civilian prisons was a millstone which was to remain firmly around the necks of prison administrators in the Colony for years to come. There were further legal developments in May 1882 when, following a request from the War Office in England, the Rules and Regulations of Natal’s gaols were altered to include the following classification:

Military prisoners convicted of breaches of discipline only, who shall, so far as may be practicable, having regard to the prior accommodation and the circumstances of the case,

30 NAB Natal Blue Book 1880 at p JJ45.

31 NAB CSO 778/Letters 4359: Enclosure – Letter from the Superintendent Pietermaritzburg Gaol to the Resident Magistrate Pietermaritzburg, 10 Nov 1880.

32 NAB CSO 778/Letters 4359: Enclosure – Undated minute of the District Surgeon Pietermaritzburg.

33 NAB CSO 778/4359: Colonial Secretary to Resident Magistrate Pietermaritzburg, 10 Nov 1880.

34 NAB CSO 778/4359: Resident Magistrate Pietermaritzburg to Colonial Secretary, 17 Nov 1880.

be kept separate and distinct from prisoners convicted of offences of an immoral dishonest, shameful, or criminal character.³⁵

The respective Superintendents of the Durban and Pietermaritzburg Gaols did not have any objection to the above clause, but made it clear that due to lack of space, military prisoners could not at that time be separated from other prisoners. Both Superintendents also stated that due to overcrowding, only a certain number of military prisoners could be admitted to their gaols. The Colonial Secretary was quick to point out as follows:

The Superintendents of both Gaols ... lose sight of the facts which should be within their knowledge that they are acting illegally in refusing to receive military prisoners duly committed under the 'Army Discipline Act'.³⁶

It is clear that the colonial authorities who were charged with actually administering the prisons were caught between the legally valid demands of the military authorities on the one hand, and chronic overcrowding in the gaols of the colony on the other hand.

This was a long-standing problem which would remain unresolved for many years. For example, in February 1887, the military authorities requested that a certain number of cells in the Durban Gaol be set aside especially for the use of military prisoners.³⁷ The Superintendent of Durban Gaol reported that forty-four prisoners were at that time confined in the "European Block" which contained thirty-four cells. He pointed out that in the case of "European prisoners" "to have 3 prisoners in many of the cells is very undesirable and to be avoided if possible".³⁸ The military authorities were thus informed that due to the overcrowding, a definite number of cells could not be set aside for military prisoners. It is clear that by utilising the Durban and Pietermaritzburg Gaols for the confinement of military prisoners over the years, the problem of overcrowding within these prisons was aggravated.

4 The "Separate System" Remains an Elusive Ideal due to Chronic Overcrowding Throughout the 1880s and 1890s

During 1881 and 1882 additional accommodation was constructed at both the Durban and the Pietermaritzburg Gaols. At the Durban Gaol an additional block of cells and a hospital were provided at a cost of £10,500. A block containing separate

35 Regulation 1e of the Rules and Regulations for the Gaols of Natal – Approved by the Governor in Council on 5 May 1882.

36 NAB GHN 380/G. No 80 of 1882: Minute of Colonial Secretary, 29 March 1882. See also NAB GHN 380/G. No 80 of 1882: Enclosure – Circular from Kimberley to Bulwer, 23 Jan 1882.

37 NAB CSO 1119/Letters 504: Enclosure – Letter from the Colonel on Staff Commanding Troops Natal District to Acting Colonial Secretary, 2 Feb 1887.

38 NAB CSO 1119/Letters 504: Minute of the Superintendent Durban Gaol, 4 Feb 1887 in response to the Regional Magistrate, Durban.

cells for sixty-two prisoners was constructed at the Pietermaritzburg Gaol at a cost of £6,425.³⁹ In the words of the Colonial Engineer, the extra accommodation was constructed “on what is known as the ‘separate system’, a system which is now universally adopted in all modern Gaols”.⁴⁰

The authorities thus clearly intended to introduce the separate system into the Durban and Pietermaritzburg Gaols. However, due to the rapidly increasing prison population, it proved impossible almost from the start for this intention to be carried into effect. In the case of the Pietermaritzburg Gaol, for example, the Gaol Board resolved as follows on 5 September 1882:

[T]hat the New block be reserved, for the present, for long sentenced prisoners each to be confined in a separate cell and that the remainder of the long sentenced prisoners who cannot be accommodated in the New Block, should be, as far as possible confined in separate cells in the Old Block ...⁴¹

However, a mere two months later, on 5 December 1882, the Superintendent of the Pietermaritzburg Gaol reported as follows:

That it is impossible to comply with the recommendation of the Board to keep natives in separate cells in the New Block, and recommends that 10 cells be kept for separate prisoners, and that 3 natives be placed in each of the other cells instead of one, owing to the present pressure.⁴²

Thus, as with the attempt to introduce strictly penal labour into Natal’s two Central Gaols, the rapidly expanding prison population combined with a lack of resources, prevented the separate system from being widely introduced into the Natal penal system. The separate system was applied to a very limited extent, but was restricted mainly to white prisoners. However, even this limited application of the separate system was to be curtailed as the problem of chronic overcrowding arose once more.

By February 1886, a mere three years after additional accommodation had been provided at the Durban Gaol, the problem of overcrowding had once again reached such proportions that the Superintendent found it necessary to write to the District Surgeon as follows:

All the cells in the Central Gaol are crowded to excess notwithstanding the additional accommodation lately afforded which had given room for 47 more. I think it is advisable that you should report to Government the necessity of providing extended accommodation as early as possible, so that in case of any epidemic breaking out amongst the Prisoners – with a serious result – the responsibility then would not be attached to us.⁴³

39 NAB Natal Blue Book 1882 at p FF109.

40 NAB Natal Blue Book 1882 at p FF91.

41 NAB CSO 897/Letters 858: Enclosure – Report of the District Surgeon Pietermaritzburg, 14 Apr 1883, in which he sets out the resolution of the Gaol Board, Pietermaritzburg.

42 *Ibid.*

43 NAB CSO 1066/Letters 684: Enclosure – Report of the Superintendent Durban Gaol to District Surgeon Durban, 13 Feb 1886.

The District Surgeon complied with this request and drew particular attention to the plight of the black prisoners in Durban Gaol:

I found that the cells in the portion of the Gaol appropriated for the Coloured prisoners are far too much crowded especially at night. As many as from 5 to 8 adults are placed frequently in a small cell of say 577 feet cubic space.⁴⁴

As for the forty-eight white prisoners confined in Durban Gaol, these were accommodated in thirty-three cells – twenty-five single cells and eight containing three prisoners each. The Executive Council ordered that three European prisoners be allocated to each cell, and that the cells left vacant in this way be set aside for African prisoners.⁴⁵

There was thus no place for the separate system, even in the case of “European” prisoners, in Natal’s grossly overcrowded gaols at that time. Clearly, additional accommodation was once again required, especially in the case of the Durban Gaol, and the sum of £8,000 was placed on the Estimates for 1887 for this purpose. In the struggle by the Natal authorities to secure approval for the above expenditure, it is interesting to note that they seem to have accepted the impracticability of introducing the separate system in its entirety, into Natal’s prisons. The proposed construction was to be the final stage of the successive improvements which had been carried out according to the plans drawn up in 1879, for enlarging and improving the Durban Gaol. Of course these plans had been drawn up with the aim of providing sufficient accommodation for the introduction of the separate system. As if indicated by the following statements made by the Clerk of Works in October 1886, it was now accepted that this would be impossible:

[O]wing to the large increase in the number of prisoners confined in the Gaol, it has been found altogether impracticable, without incurring considerable outlay in providing large additional accommodation, to carry out the solitary system, except in special instances.⁴⁶

In a despatch to the Secretary of State, the Governor too pointed out that the proposed additional accommodation, while desperately and urgently needed, would not permit of the introduction of the separate system:

The complete scheme provides accommodation on the separate system for 160 convicted prisoners only. The number of convicted prisoners in Durban Gaol, as shown by the daily return of last week, is 301 and this number is below average. The urgency of this work is obvious. Any further delay in carrying it out is to be deprecated.⁴⁷

44 NAB CSO 1066/Letters 684: Enclosure – Report of District Surgeon Durban, 15 Feb 1886.

45 NAB CSO 1066/Letters 684: Minute of the Clerk of the Executive Council, 22 Feb 1886.

46 NAB GHN 140/Despatch 27: Stanhope to Havelock, 4 Oct 1886: Statement by Clerk of Works.

47 NAB COL 179/ 164: Havelock to Granville, 17 Aug 1886.

Despite the urgency of the situation, permission to undertake the necessary expenditure was not immediately forthcoming. The authorities in England at this time were very concerned to keep expenditure in Natal as low as possible and pointed out as follows:

The financial condition of the Colony ... renders it of the utmost importance that all works, which are not of pressing urgency, should be postponed until the equilibrium of the finances has been restored.⁴⁸

The Governor was thus forced to further justify the proposed alterations. In December 1886 he informed the Secretary of State as follows:

[T]he buildings which it is proposed to erect ... include, in addition to thirty two cells, the whole of the Administration Block; and ... by the construction of this Block, cells now appropriated for untried prisoners, rooms now occupied as offices, storerooms etc will become available for occupation by convicted prisoners. In this way ... additional accommodation for at least seventy prisoners, in all, will be provided ...⁴⁹

Only following this despatch did the authorities in England approve of the expenditure. Finally, after all the above arguments and debates, the Legislative Council of Natal decided to grant only £4,000 – namely half the amount required – for additions to the Durban Gaol in 1887.⁵⁰ In 1888, however, the permissible expenditure for additions to the Durban Gaol was increased to £10,000.⁵¹ The additions were finally completed in 1889 at a cost of £10,000 18s 3d.⁵² In March 1889 construction was begun on a new block of cells at the Pietermaritzburg Gaol.⁵³ The Governor reported as follows to the Secretary of State on 28 June 1889:

When the extension of the Pietermaritzburg Gaol, now under construction, is completed there will be little danger of overcrowding in that Gaol ...⁵⁴

The new cell block was completed in 1890 at a cost of £8,251 4s 11d.⁵⁵

Despite these additions to the Durban and Pietermaritzburg Gaols, it did not take long before the problem of overcrowding once again reared its ugly head. The problem was particularly pressing in the case of the Durban Gaol. In October 1892 that gaol was overcrowded to the extent that over fifty short sentenced prisoners were forced to sleep in the corridors at night.⁵⁶ In December 1893 the Superintendent

48 NAB GHN 140/Despatch 27: Stanhope to Havelock, 4 Oct 1886.

49 NAB COL 179/ 165: Havelock to Stanhope, 6 Dec 1886.

50 NAB GHN 141/Despatch 1: Holland to Havelock, 17 Jan 1887.

51 NAB Natal Blue Book 1888 at p J4-5.

52 NAB Natal Blue Book 1889 at p J6-7.

53 GN 306 GG of 23 Apr 1889 (Natal).

54 NAB COL 179/168: 28 Jun 1889.

55 NAB Natal Blue Book 1890-91 at p JJ12-13.

56 NAB CSO 1345/Letters 4668: Enclosure – Report in *Natal Witness*, 11 Oct 1892.

of the Durban Gaol informed his superiors that chronic overcrowding had resulted in seventy-three prisoners being forced to sleep in the corridors at night.⁵⁷ The Governor of the Durban Gaol pointed out in each of his annual reports for the years 1896 and 1897 that the Resident Engineer in charge of the harbour works wished to increase the number of convicts employed on the works, but that the lack of accommodation in the Durban Gaol made this impossible.⁵⁸ Finally, in his annual report for the year 1897, the Chief Commissioner of Police was able to report as follows:

A new wing is about to be commenced at the Durban Central Gaol to accommodate extra convicts required for the harbour works, nearly all the convicts confined in this gaol being long-sentenced natives employed upon these works, and the Engineer-in-Charge is continually crying out for more convict labour.⁵⁹

This new cell block was completed in June 1898, and provided accommodation for an additional 114 African and Indian convicts. The Governor of the Durban Gaol reported, however, that there were not sufficient convicts to immediately fill up all the additional accommodation. This was of very little satisfaction to the Engineer of the Harbour Department “who was urgently in need of much more convict labour than could be sent to him at that time”.⁶⁰ This critical shortage of convict labour began to ease towards the end of 1898, however, as the new cell block at the Durban Gaol became more fully occupied.

The brief respite in overcrowding at the Durban Gaol due to the completion of building works in 1898 was not to last for long. The following year saw the outbreak of the Second Anglo-Boer War which, as in the case of the Langalibalele Rebellion of 1873 and the Anglo-Zulu War of 1879, greatly exacerbated the problem of overcrowding in the gaols of the colony. As increasing numbers of prisoners flowed into the gaols during this period, greatly increased strain was placed on the prison infrastructure. In his report for the year 1899, for example, the Chief Commissioner of Police stated as follows:

In speaking of the Gaols throughout the Colony I have nothing but praise for the way they stood the extra strain thrown upon them by the large increase in the number of prisoners they were called on to accommodate ...⁶¹

The Gaols were similarly crowded during 1900 and the Chief Commissioner reported as follows:

- 57 NAB CSO 1382/Letters 5780: Minute of the Superintendent Durban Gaol to the Regional Magistrate, Durban, 13 Dec 1893.
- 58 NAB Natal Blue Book 1896 vol 2 Departmental Reports at p F44; and NAB Natal Blue Book 1897 vol 2 Departmental Reports at p F55.
- 59 NAB Natal Blue Book 1897 vol 2 Departmental Reports at p F25.
- 60 NAB Natal Blue Book 1898 vol 2 Departmental Reports at p F59.
- 61 NAB Natal Blue Book 1899 vol 2 Departmental Reports at p F11.

In consequence of the large numbers of rebel prisoners, the central gaols have been inconveniently crowded, but the opening of the new central gaol at Eshowe in November afforded a certain relief to the gaols of Durban and Pietermaritzburg ...⁶²

5 Into the New Century with No Relief in Sight to the Problem of Chronic Overcrowding

Despite the construction of a new wing at the Durban Gaol during 1902, Natal's gaols remained generally overcrowded.⁶³ For example, the Governor of the Durban Gaol stated as follows in his report for the year 1903:

[T]hough the new block ... has been completed and occupied during the year, the cell accommodation is still insufficient for the requirements, and the Gaol is practically always much overcrowded ... The great majority of cells, each intended for only one convict, are occupied by three, and even then a considerable number of convicts have to be accommodated to sleep in corridors of Blocks.⁶⁴

The Pietermaritzburg Gaol was similarly overcrowded. The District Surgeon of Pietermaritzburg stated as follows in his report for the year 1903:

At present I consider the Gaol very much overcrowded ... If the present state of things is continued, undoubtedly a high rate of sickness will result.⁶⁵

In February 1905, following much agitation on the part of concerned citizens in favour of prison reform in Natal, a Parliamentary Commission of Enquiry was appointed to look into the matter. The so-called "Prison Reform Commission" finally completed its work and delivered its report on 28 May 1906.⁶⁶ As to the problem of overcrowding, the Commission was well aware of the fact that the problem was exacerbated by the imprisonment of black petty offenders – often those who had fallen foul of rules and regulations aimed at the social control of the indigenous population:

The Natives are not only subject to their own special laws, of which there are many contraventions, but also to a number of artificial restraints and disabilities, chiefly when in towns, which go to swell the number of offences committed by them.⁶⁷

62 NAB Natal Blue Book 1900 vol 2 Departmental Reports at p F13.

63 NAB Natal Blue Book 1902 vol 2 Departmental Reports: Report of Chief Commissioner of Police at p 5.

64 NAB Natal Blue Book 1903 vol 2 Departmental Reports: Report of Chief Commissioner of Police at p 9.

65 *Ibid.*

66 GN 344 GG of 5 Jun 1906 (Natal): Report of the Prison Reform Commission.

67 *Idem* at par 67.

It was well understood that prisoners who had offended against social control legislation – such as the Native Code, Pass Laws, and Master and Servants Laws – could “in no sense of the word ... be said to be criminals”.⁶⁸ The Commission proposed a number of ways in which such offenders would be kept out of the existing overcrowded prisons. These included banishing certain offenders to their *kraals*; punishment by means of corporal punishment rather than by short sentences of imprisonment; and sentencing petty offenders to work on the roads or other public works.⁶⁹ With regard to the proposed sentences of forced labour on the roads, the Commission recommended the establishment of “movable prisons”. These movable prisons would be similar to road construction camps, but would be designed to ensure the safe custody of short-sentence black prisoners when they were not working on the roads. Clearly education, reform and scientific treatment were not priorities in the case of black prisoners. To the white colonists, this category of prisoners had two important lessons to learn: Firstly, fear the white man and give him due respect as your natural “master” and, secondly, acquire the habit of docile, obedient manual labour in service of the white man. The first lesson could be taught by the cat-ò-nine-tails and the second by forced labour. To the colonists, modern European-style prisons, which were focused on the rehabilitation of prisoners, were not particularly suitable for black prisoners. Despite the plans and proposals put forward by the Prison Reform Commission noted above, the problem of overcrowding in the prisons of Natal was destined to continue.⁷⁰

In 1906 the overcrowded prisons of Colonial Natal experienced a further shock due to the influx of large numbers of “rebel” prisoners following the “Bambata

68 NAB CSO 2847/Undated Précis of Evidence of the Prison Reform Commission, Natal by B Haslewood, Secretary of the Prison Reform Commission at p 2.

69 The proposal that recourse be had to sentences of corporal punishment in place of imprisonment is interesting from the perspective of the role that whipping, as a form of “racial punishment”, played in the history of the colony. See S Peté & A Devenish “Flogging, fear and food: Punishment and race in Colonial Natal” (Mar 2005) 31(1) *J of Southern African Studies* at 3-21; and S Peté “Punishment and race: The emergence of racially defined punishment in Colonial Natal” (1986) 1(2) *Natal University Law and Society R* at 99-114. The proposal is also interesting due to the fact that a similar proposal was to be made decades later at the height of the apartheid period in the 1980s in a desperate effort to find solutions to the problem of chronic overcrowding. See Peté (n 2) *passim*.

70 Note that the problem of overcrowding was only one of many issues addressed by the Prison Reform Commission. Another interesting proposal put forward by the Commission, which is not directly relevant to this article, was the proposal to build a separate “industrial prison” for the treatment and rehabilitation of white prisoners. In the Commission’s own – shockingly racist – words: “[P]ride of race alone ought to rouse us from our indifference and lethargy ... Several reasons may be suggested for limiting the proposed innovation to Europeans; of a higher average intelligence, and possessing a higher moral basis, with a better knowledge of the claims of society, and of the advantages of being reconciled thereto, they offer a more promising field for reform than would be presented by individuals of other races.” See GN 344 GG of 5 Jun 1906 (Natal): Report of the Prison Reform Commission at par 67.

Rebellion”. The rebellion began in February of that year when Bambata, a minor chief in the Umvoti region, defied the magistrate in charge of that area. It ended on 10 June of the same year, with a massacre of Bambata and 500 of his followers in the Mome Gorge.⁷¹ Following the Bambata Rebellion there was a massive increase in Natal’s prison population, as a result of the influx of a large number of “rebel” prisoners. An intolerable strain was placed on the already overcrowded prisons of Natal, and the Government was forced to take swift action.⁷² A Bill was rushed through Parliament which, in the words of the Minister of Justice, conferred power on the Government “to enter into contracts with any municipality, township, or other public body, or with any company or individuals, for the employment of prisoners who are sentenced to terms of imprisonment exceeding three months”.⁷³ The Bill was promulgated as Act 32 of 1906.⁷⁴ Clearly, this legislation was very similar to Law 18 of 1874 discussed in the Section 4 of Part 1 of this article dealing with the Langalibalele Rebellion. The legislation put forward after the Bambata Rebellion seemed to have similar objectives to that put forward after the Langalibalele Rebellion. In each case the legislation seemed to be aimed at preventing the prisons becoming chronically overcrowded with “rebels”, but was clearly just as concerned – if not more concerned – with achieving the objective of providing cheap black labour to white colonists and to the colonial state. Act 32 of 1906 also showed clear similarity to legislation which had been passed in the Cape Colony following the “Langberg Rebellion”.⁷⁵ Natal’s Minister of Justice stated in connection with the Cape legislation as follows:

[T]he Cape Government for some years have been in the habit of hiring out prisoners to De Beer’s and other large employers of labour, and I think the experience of that Colony is that the system works very well both in the interests of the Government and in the interests of the prisoners themselves.⁷⁶

The Minister stated that Act 32 of 1906 was to apply to all prisoners, and not simply to political prisoners – namely “rebels”.⁷⁷ It would seem, therefore, that the large influx of non-criminal “rebel” prisoners into Natal’s penal system had provided the ideal excuse for the colonists to push through their agenda of implementing legislative measures to secure a supply of cheap black labour. By Government Notice 497 of 1906, regulations were promulgated under the Act, setting out the conditions for the

71 E Brookes & C De B Webb *A History of Natal* (Pietermaritzburg, 1965) at 220-230.

72 Debates of the Legislative Assembly of the Colony of Natal 1906 vol 40 Debate of 2 Jul 1902 at 420-423.

73 *Idem* at 420: Minister of Justice.

74 Act 32 of 1906 (Natal) “To amend the Gaol Law of 1887”.

75 Debates of the Legislative Assembly of the Colony of Natal 1906 vol 40 Debate of 2 Jul 1902 at 422: Mr Tatham.

76 *Idem* at 422: Minister of Justice.

77 *Ibid.*

employment of prisoners.⁷⁸ In practice it is not certain how many prisoners were hired out, since a convict station was established at the Point in Durban to accommodate large numbers of “rebel” prisoners.⁷⁹ In addition, about 200 rebels were confined in “movable prisons” and made to perform road work.⁸⁰ By 1908 the convict station at the Point could accommodate about 700 men.⁸¹ The focus in terms of the punishment of black offenders in the colony had clearly swung decisively in favour of productive forced labour in service of the colonial state. As for the problem of overcrowding, it would be fair to conclude that it remained a problem in the prisons of Natal until the very end of the colonial period.

6 Conclusion

Chronic overcrowding remained a pressing problem in the gaols of Colonial Natal throughout the period of the Colony’s existence. Like the proverbial bad penny, the problem reared its ugly head over and over again. Colonial officials commented time and again on the poor and unhygienic living conditions caused by overcrowding in the gaols. The result was decades of unnecessary discomfort and suffering on the part of those unlucky enough to be on the receiving end of a sentence of imprisonment during the colonial period. Furthermore, reading between the lines of the various reports and despatches cited in this article, it is almost certain that overcrowding resulted in an unnecessary loss of life, although it is unlikely that the numbers of prisoners who died because of this scourge will ever be fully known. Both black and white prisoners suffered due to overcrowding in the prisons of colonial Natal but, of course, those who suffered the most were the black prisoners.

The problem of chronic overcrowding in the prisons of colonial Natal was greatly exacerbated by a number of factors: First, due to the fact that Natal was a reluctant addition to the British Empire, the colonial state was generally weak and under-resourced, with the result that it was unable to provide sufficient accommodation for the prisoners in its care. Second, the prisons were used as a means for the social control of the black population, meaning that they were continually overcrowded with petty offenders who were not criminals in the strict sense of the word. Third, the outbreak of war and rebellion at regular intervals throughout the short history of the Colony, meant that the penal system was subjected to a series of severe shocks in terms of increased numbers of prisoners, which greatly exacerbated the problem of overcrowding. Finally, since the colonists regarded imprisonment as an inherently

78 NAB CSO 1827/Minute Papers 1124: Government Notice 497 of 1906.

79 Debates of the Legislative Assembly of the Colony of Natal 1908 vol 46 Debate of 15 Sep 1908 at 251: Attorney General.

80 NAB CSO 1827/Minute Papers 1124: Remarks on recommendations contained in Section 74 of the Natal Prison Reform Commission – Report of the Assistant Commissioner of Police, 13 Feb 1907 at par 14.

81 Debates of the Legislative Assembly of the Colony of Natal 1908 vol 46 Debate of 15 Sep 1908 at 251: Attorney General.

unsuitable form of punishment for the majority of black offenders – preferring forced labour and/or corporal punishment – it is submitted that there was a lack of political will on the part of the local prison authorities to push aggressively for the building of more and more fixed prison accommodation.⁸²

To conclude, an examination of the endless despatches and debates concerning the problem of overcrowding in the prisons of the colonial Natal, from the beginning to the end of the colonial period, must, it is submitted, lead one to the conclusion that the problem was much more deeply rooted – socially, politically and economically – than many commentators may be prepared to admit. It is beyond the scope of this article to propose definitive “solutions” to the present problem of overcrowding within the South African penal system. It may be tentatively argued, however, that what was true of prison overcrowding in colonial Natal was, generally speaking, to prove true of overcrowding in South African prisons in the century-and-a-bit which followed. One is struck by the fact that this scourge simply refused to disappear, turning up over and over again, from year to year, from decade to decade, and from one century to the next.⁸³ This article has shown that prison overcrowding is a deeply rooted phenomenon, with considerable historical reach. Whether or not it is a structural feature of this form of punishment in South Africa, along the functionalist lines discussed in the introduction to Part 2 of this article, is a matter for further research.

Abstract

During recent decades, like the proverbial bad penny, the problem of chronic overcrowding has turned up over and over again to haunt South African prison administrators. As this article indicates, however, overcrowding in South African prisons is not only a recent phenomenon. Overcrowding has been a significant feature of imprisonment in South Africa from the very introduction of this form of punishment into the country. This article examines overcrowding in the prisons of colonial Natal from 1845 until 1910. Through an analysis of the official discourse surrounding this difficult problem throughout the colonial period, this article shows that imprisonment as a form of punishment in South Africa has always been inextricably bound up with the problem of overcrowding. By illustrating the deeply entrenched nature of the problem from a historical perspective, this article hopes to provide present day prison administrators with useful insights into the nature of their struggle to overcome the problem in the present. The article is in two parts. Part 1 of the article covers the period 1845 to 1875, while Part 2 covers the period 1875 to 1910.

82 Much of the focus in dealing with overcrowding among black prisoners was on facilitating labour gangs to perform forced labour in the open air on public works and, later in the colonial period, in developing the concept of “mobile prisons” – essentially mobile labour camps.

83 See Peté (n 2).

“HE’S ONE WHO MINDS THE BOSS’S BUSINESS ...”

Rena van den Bergh*

1 Introduction

The title of this article derives from Plautus’ *Menaechmi*.¹ Messenio, a slave, tells himself that a good slave takes care of his master’s business, organises it, thinks about it, and in his master’s absence attends to his affairs as diligently as if he were present, or even more so. This, then, was the normal state of affairs in Rome, since Roman law never developed the idea of direct representation.

In this article, the following will be discussed: why the Romans did not know agency; the position of slaves and children in the *paterfamilias*’ power who acted as “agents”; the praetorian actions that made commerce possible; *institores* and *exercitores* who acted as independent “agents”; and the *peculium*.

2 Why did the Romans not know agency?

Roman law did not have a general concept of agency.² Agency was not to be found in any part of ancient Roman law, for example in the formal modes of conveying

1 See *Menaechmi* 967-969.

2 See William M Gordon “Agency and Roman law” in *Roman Law, Scots Law and Legal History. Selected Essays* (Edinburgh, 2007) 54-60 at 54; Reinhard Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996) at 47. See, also, Alan Watson *Roman Slave Law* (Baltimore, Md, 1987) at 90.

3 Cf WA Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* 4 ed (Holmes Beach, Fla, 1992) at 609.

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property.³ This was obviously because of the formal nature of certain transactions. The Romans believed that a person who had not participated in one of these solemn legal acts, in other words had not taken part in the ceremonies, nor repeated any of the ceremonial words or performed any act during the formal ceremony could not benefit from them. No duties or rights conferred by these ceremonies attached to such a person.⁴ In addition, Roman lawyers continued to apply the *alteri stipulari nemo potest*-principle, and this obviously impeded the development of agency or contract in favour of a third party.⁵

Roman law consequently did not recognize representation in legal acts.⁶ Only the parties to a legal act were affected by it, and a third party could therefore not act on behalf of someone else. This did, however, cause problems once primitive Roman society started developing. In practice, people could not always act on their own behalf, and gradually it became obvious that some kind of representation was required. Thus the eventual recognition of some forms of representation was based purely on necessity and utility.

In principle, it was unthinkable that an agent might conclude a contract with a third party that would give rise to compulsory rights and obligations between a third party and the principal. In Roman law, a contract concluded by a representative always imposed a liability on the contracting party, not on the person represented.⁷

The Romans therefore did not accept the idea that third-party beneficiaries could derive rights from contracts they themselves had not concluded.⁸ It was a basic rule of Roman law that a contract in favour of a third person had no effect; not even for the contracting parties. Another rule of Roman law, namely *per extraneam personam nihil adquiri posse*, provided that nothing could be acquired through a third person unless that person was a slave or child under paternal control.⁹

3 If not agency, what then?

3.1 Sons and slaves

From the time of the Punic Wars onwards, financial and social life in Rome was dictated by trade and finance, and the economy was growing. The flourishing

4 See Max Kaser *Das Römische Privatrecht* vol 1 2 ed (München, 1971) at 260; Hunter (n 3) at 610.

5 See Fritz Schulz *Principles of Roman Law* trl M Wolff (Oxford, 1936) at 83ff.

6 See D 44 7 11: “et ideo neque stipulari neque emere vendere contrahere, ut alter suo nomine recte agat, possumus.”

7 Rudolph Sohm *The Institutes. A Textbook of the History and System of Roman Private Law* trl JC Ledlie 3 ed (Oxford, 1935) at 432.

8 Jan Hallebeek “Contracts for a third-party beneficiary: A brief sketch from the *Corpus Iuris* to present-day civil law” in (2007) 13(2) *Fundamina* 11-32 at 12.

9 Inst 2 9 5: “Et hoc est quod dicitur, per extraneam personam nihil adquiri posse.”

economy of that time may largely be ascribed to the way in which the Roman family unit was organised and functioned.

Although there was obviously a dire need for an institution such as agency in Roman law,¹⁰ the Romans succeeded in conducting their commercial life without it, since slaves and children subject to power could acquire rights for their masters or fathers, regardless of whether they stipulated on behalf of these persons or themselves.¹¹ Slaves and sons were quite active in commercial affairs and entered freely into contractual relations. They had no separately recognised legal identity and could therefore not enter into transactions that were legally binding on their owner or father as the case might be.¹² Since they did not have proprietary rights, everything they acquired became the property of the owner or father. Whether they had acted in their own names or not was irrelevant; neither did it normally matter whether the *paterfamilias* knew of such acts or ordered or wished them to be performed.¹³ The *paterfamilias* therefore acted through the children in his power and through his slaves.¹⁴

In this regard, no distinction was drawn between slaves, persons under *potestas*, wives *in manu*, and free persons *in mancipio*. All rights they acquired belonged to the person in whose power they were.¹⁵ The owner could sue, but they could not. Furthermore, such rights were acquired through the operation of law, even if the *paterfamilias* did not know of the transaction or had not authorised it, or had expressly forbidden it.¹⁶ The slave was merely the master’s voice.¹⁷

Obligation was a personal matter. At civil and praetorian law, a slave was *pro nullo*, but *iure naturali* he was a man like another, hence the rule: *servi ex contractu civiliter non obligantur; naturaliter obligant et obligantur*.¹⁸ About property, civil law reached the point of declaring that a slave’s contract created a so-called “natural obligation”. According to the classical jurists, he could even incur a contractual

10 Agency may be defined as the relationship between one person or party (the principal) and another, which originates when he engages another person to act for him. The law of agency thus governs the legal relationship that arises when the agent deals with a third party on behalf of the principal.

11 Cf Dennis P Kehoe “Law, agency and growth in the Roman economy” in Paul J du Plessis (ed) *New Frontiers. Law and Society in the Roman World* (Edinburgh, 2013) 177-191 at 177-178.

12 Watson (n 2) at 90.

13 Gaius 2 86ff.

14 See Zimmermann (n 2) at 51. Further, JA Crook *Law and Life in Rome* (London, 1967) at 241 states that in Roman law a human could only be a “conduit-pipe” if he was a slave or a *filiusfamilias*. Cf Gaius 2 94 according to which a person could possess and acquire something through a slave whom he *bona fide* possessed; further, see Gaius 2 95 and 3 103.

15 Hunter (n 3) at 610.

16 *Idem* at 611. See D 45 1 62.

17 D 45 1 45pr.

18 See WW Buckland *The Roman Law of Slavery* (New York, 1969) at 167.

19 *Idem* at 165.

obligation, but only a “natural” one, so that the creditor could not institute an action against him.¹⁹

At a very early stage, therefore, a slave or another member of the *familia* could act in a representative capacity. The reasoning behind the recognition of such types of representation was that the *familia* formed a unit, and its members acted not so much as representatives as members of the unit. In fact, the *paterfamilias* may be seen as a member of the *familia*, although he was the head of the unit and therefore all rights vested in him and he incurred most duties.²⁰

He could consequently obtain both ownership and possession through members of his family: sons and slaves, people whom he held in usufruct, and people who thought that they were his slaves, but really belonged to another or were free.²¹ The capacity given a slave to represent his master in certain juristic acts – and thus to borrow, so to say, his master’s personality so that the latter could acquire property or become a creditor – represents the first significant change to the view that a slave was a mere thing. In this respect, the slave was considered not merely as property, but as the instrument of a juristic act. However, the slave was allowed to act only in the interests of the owner, and by way of “involuntary” agency, and his capacity to do so was strictly limited. As far as the relevant members of the *paterfamilias*’ family are concerned, anything acquired by a *filius* or a slave immediately vested in his *pater* or *dominus* even if the latter had not consented to the acquisition.²² Although the slave or *filius* could provide the corpus of possession, the head of the family acquired complete ownership only when he agreed to the transaction, and so created the *animus* of possession; though such consent could be given either in advance or by ratification.²³

Thus the *paterfamilias* conducted business through his slaves or dependent sons, who were seen not as agents, but as mere “extensions” of himself. In this manner, the Romans succeeded in carrying on their intensive and far-reaching commercial activities without a developed concept of agency.²⁴ Since slaves and sons were not bound by contractual bonds of agency and representation to the people they served, the Roman *familia* was a significant source of non-contractual agents.

One of the main purposes of slavery was that the slave had to improve the master’s economic standing.²⁵ There were various legal rules that enabled a slave

20 Gaius 2 86, 94 and 95; Gaius 4 75; Inst 2 9*pr* and 3-4; Inst 3 17*pr*-1; Inst 3 28*pr*-2; D 41 1 10*pr*-5; D 41 1 53.

21 JAC Thomas *Textbook of Roman Law* (Amsterdam, 1981) at 185.

22 D 41 1 32.

23 D 41 2 34 2; D 41 2 48; D 41 3 31 3.

24 See Aaron Kirschenbaum *Sons, Slaves and Freedmen in Roman Commerce* (Jerusalem, 1987) at 2.

25 Cf Watson (n 2) at 102; Jane F Gardner “Slavery and Roman law” in Keith Bradley & Paul Cartledge (eds) *The Cambridge World History of Slavery* vol 1 *The Ancient Mediterranean World* (Cambridge, 2011) 414-437 at 419.

(or a son) to do so. With regard to acquisition through slaves and sons in classical law, Gaius states as follows: “Therefore, whatever children in our power and slaves in our ownership receive by *mancipatio* or obtain by delivery, and whatever rights they stipulate for or acquire by any other title, they acquire for us. For a person in our power can have nothing of his own.”²⁶ From this, as well as the rest of the text, it is apparent that slaves and sons played an extremely important role in commercial and other acquisitions.

Binding contracts could only be entered into between two principals.²⁷ Because of the wide prevalence of slavery, there was no real need for a true relationship of agency. Owners could both sue and be sued on contracts made by their slaves, but had no direct right of action on contracts made by an outsider on their behalf. Ulpian stated that because they profited from the acts of their business managers, it was only fair that they should be held liable and could be sued on the contracts they entered into.²⁸

3.2 Praetorian actions

Usually, when the *filiusfamilias* or slave had incurred an obligation, the *paterfamilias* was not bound.²⁹ The creditor’s position was weak: slaves could not be parties to a lawsuit, and execution was not possible against children subject to the power of the *paterfamilias*, as long as they did not have proprietary capacity.³⁰ In classical law, these obligations of persons subject to the power of the *paterfamilias* were regarded as *obligationes naturales*³¹ and consequently were void or could not be enforced against them directly.³² It was therefore not desirable to enter into contracts with such persons, since such contracts involved serious risks and obviously hampered financial enterprises. Early in the second century BC the praetor, in an attempt to encourage financial activity, interceded and permitted some legal actions to be instituted against the *paterfamilias* in clearly defined circumstances.³³

26 Gaius 2 87ff.

27 See Gaius 2 95.

28 D 14 3 1.

29 See Zimmermann (n 2) at 52. Cf. further, Barry Nicholas *An Introduction to Roman Law* (Oxford, 1965) at 201; D 50 17 133 according to which, under civil law, the rights but not the obligations arising from a slave’s contracts vested in the master.

30 Zimmermann (n 2) at 52.

31 D 44 7 14: “ex contractibus autem civiliter quidam non obligantur, sed naturaliter et obligantur et obligant.”

32 PJ du Plessis *Borkowski’s Textbook of Roman Law* (Oxford, 2015) at 290.

33 See D 14 1 5 2: “[H]oc enim edicto non transfertur actio, sed adicitur.”

34 The praetorian action therefore “supplemented” the civil law action: “non transfertur actio, sed adjicitur.”

35 Du Plessis (n 32) at 290.

These actions, known as *actiones adiecticiae qualitatis* (an *actio adiecticiae qualitatis* was a particular kind of *actio utilis*),³⁴ enabled parties who had contracted with slaves acting as business agents, to sue them directly.³⁵ They created an exceptional liability for the *paterfamilias* since they were all founded on a “debt” incurred by the slave (or son) acting as a business agent on behalf of the *paterfamilias*. The praetor granted these actions against the *dominus*, the *paterfamilias* and the principal. This resulted in both persons being liable to the creditor. The agent – that is, the person who had concluded the contract – was liable by the civil law, and could be sued by means of an *actio directa*.³⁶ The *dominus negotii* was liable by praetorian law, and could be sued by the *actio utilis*.³⁷ This important reform originated in the praetor’s edict. Previously civil law permitted the slave to acquire property for his master, but not to incur debt on his behalf. Promulgation of the edict created a situation where masters could become not only creditors but also debtors, through their slaves’ actions. In terms of praetorian law, a slave who had acted with his master’s consent could henceforth bind his master.

A number of actions, all arising out of transactions entered into by subordinate members of the family, were of special benefit to creditors since they could be instituted where a slave had acted with the master’s knowledge. The *actio quod iussu* could be instituted when the slave was treated as an agent who could bind his master.³⁸ This action lay against a *dominus* or *paterfamilias* when he had authorised or ratified a contract entered into by his slave or son in power.³⁹ The *iussus* was directed to the third party and not to the slave or son, and the creditor could institute an *actio quod iussu* against the master for the whole amount (*in solidum*).

The *actio de peculio et in rem verso* lay, independently of authorisation or ratification, when a slave or son with a *peculium* had bound himself by contract. It was instituted against the master or father, who was held liable to the amount of the *peculium* (*de peculio*) or to the extent to which he had derived a profit from the transaction (*de in rem verso*) regardless of which was the greater.⁴⁰ The action for the profit (*actio de in rem verso*) was instituted only together with the action for the *peculium*, and the master was liable not only for the amount currently in the *peculium* but also for as much of the *peculium* as had been spent for his benefit.⁴¹ It was

36 Sohm (n 7) at 431-432.

37 *Idem* at 432.

38 See D 15 4 and especially D 15 4 1 1. Cf, too, Gaius 4 69-70; Inst 4 7.

39 D 15 4 1.

40 See RW Lee *The Elements of Roman Law* 4 ed (London, 1956) at 359-360.

41 See D 15 3 3.

42 See D 15 3. The *actio de in rem verso* was the equivalent of the *actio negotiorum gestorum*; it lay whenever the slave, an unauthorised agent, had acted in effect for the benefit of his master’s property: see D 15 3 3 2. In D 15 3 *pr* Ulpian (book 29) states that if the *peculium* of the slave who is subject to the power of another is empty or not sufficient to pay the debt in full, and the person who has *potestas* has materially benefited from the performance rendered, that person is liable, as if he himself had been party to the transaction.

instituted where a slave had used the benefits obtained from commercial transactions to enrich the estate of the *paterfamilias*.⁴² Where the slave had used the *peculium* or any part of it to trade with the master’s knowledge, though not necessarily with his authorisation, any creditor could demand that the *peculium* be divided among the creditors.

If the master tried to defraud the creditors, the *actio tributoria* could be instituted against him. This action had limited application since it was available only when a slave or a son had been using his *peculium* to trade, his master or father had known about this, and the slave or son had run up debts exceeding the value of the *peculium*.⁴³ The praetor could then compel the *paterfamilias* to liquidate the assets of the *peculium* and divide the proceeds amongst the creditors.

The action on the *peculium*, the *actio de peculio*,⁴⁴ could be instituted where the master had not known about or authorised the transaction. It was used when slaves with the requisite skills were given a *peculium* to enable them to become economically active.⁴⁵ Creditors could then institute this action, which was based on the existence of the *peculium*.⁴⁶

In cases where the *actio quod iussu* or the *actio de in rem verso* lay, the son or slave was really an “agent”: he acted either with explicit or implicit authorisation, and the master or father alone could sue or be sued on the contracts.⁴⁷ A master who authorised the slave’s contract was liable for the full sum involved.⁴⁸ Authorisation (to the other contracting party) could take any form, and subsequent ratification was sufficient.⁴⁹ However, since it was more convenient for masters to leave their slaves to conduct business without their constant supervision, other actions were introduced, in terms of which the extent of the master’s liability for his slave’s dealings was defined.⁵⁰ These were applicable only to the dealings of persons in the *potestas* of the principal; and two of them protected the owner of a slave from the potentially disastrous consequences of the slave’s unsupervised dealings.

Two other actions particularly benefited creditors, since they could be instituted where the slave had acted with the master’s knowledge. A kind of semi-agency was recognised in respect of freemen, as well as slaves and *filiifamilias*, in two instances where there was a great need for a law of agency.⁵¹ The master or captain of a ship

43 See D 14 4; Inst 4 7 3. See Du Plessis (n 32) at 291.

44 D 15 1.

45 See D 15 2.

46 See Inst 4 7 4. Cf Du Plessis (n 32) at 290.

47 See Hunter (n 3) at 617.

48 See Gaius 4 70: “In primis itaque, si iussu patris dominiue negotium gestum erit, in solidum praetor actionem in patrem dominumue comparauit; et recte, quia, qui ita negotium gerit, magis patris dominiue quam filii seruiue fidem sequitur.”

49 Watson (n 2) at 93.

50 D 15 1 1.

51 Hunter (n 3) at 617.

52 D 14 1pr.

(*exercitor*), whether a freedman or a slave,⁵² was an agent whose legal acts bound the owner. If a man had appointed his son or slave as master (*magister navis*),⁵³ thus conferring on him full authority to execute the duties of a ship's captain, any third party contracting with the son or slave in his capacity of captain (eg for the carriage of goods), could institute the *actio exercitoria* against the owner of the ship for the whole amount of his claim.⁵⁴ The *exercitor* could generally enter into contracts relating to the ship, its seaworthiness and freight.⁵⁵ Since the contracts seem to have been entered into in accordance with the desires of the father or master, the praetor deemed it appropriate to allow an action for the entire amount.⁵⁶ In terms of the *actio exercitoria*, the owner of a ship was therefore fully responsible for commercial debts incurred by slaves or workers employed on a ship provided they were carrying out their duties.⁵⁷

Furthermore, if a master had appointed his slave to act as an *institor* (ie as his authorised representative in any other kind of business, eg as a waiter, clerk or shopkeeper⁵⁸), any person contracting with the slave in his capacity of *institor* or general business manager could institute the *actio institoria* against the master for the whole amount due under the contract.⁵⁹ According to Ulpian, a manager was called an *institor* because the business transaction was at his instance. Whether he was a shopkeeper or ran some other kind of business was irrelevant.⁶⁰ The *actio institoria* could be instituted in respect of dealings by both free representatives and slaves, and in each case the principal had unlimited liability for dealings on his behalf. It was consequently an action relating to the business manager's conduct, binding his principal.⁶¹ Slave owners had come to rely heavily on certain slaves in matters of

53 See D 14 1 1 1: "Magistrum navis accipere debemus, cui totius navis cura mandata est."

54 See D 14 1 *pr.*

55 D 14 1 in general, and especially D 14 1 1 7.

56 Gaius 4 71; D 14 1 *pr.*

57 See Du Plessis (n 32) at 292. See, further, Gaius 4 71; Inst 4 7 2 1.

58 D 14 3 5 4. The word *institor* has also been applied to pedlars, and other people to whom pedlars and cloth merchants entrusted clothes to hawk, deliver and sell.

59 See D 14 3 in general, and especially D 14 3 3-5. See, also, D 14 3 5 1-2; D 14 3 5 5; D 14 3 5 12. Further Du Plessis (n 32) at 292; and Kirschenbaum (n 24) at 90-94.

60 D 14 3 deals with the contractual liability of those who appointed agents to conduct business for them. Any number of enterprises could thus be in the hands of slaves: managing farms; buying houses, cattle or slaves; shop keeping and inn keeping; banking and money lending; as well as all kinds of trading and contracting. See, further, Keith Bradley *Slavery and Society at Rome* (Cambridge, 1994) at 75.

61 See Gardner (n 25) at 421; Kirschenbaum (n 24) at 90-121. The master could be held responsible for the contracts of his *institor* only if these fell within the scope of the business entrusted to him.

62 It should be kept in mind that commercial activities were not limited to slaves: "Si dominus, qui seruum institorem apud mensam pecuniis accipiendis habuit, post libertatem quoque datam idem per libertum negotium exercuit, uarietate status non mutabitur periculi causa" (D 14 3 19 1).

63 Hunter (n 3) at 619.

trade and commerce.⁶² The *institor* had some of the attributes of a real agent, the most important being that his business transactions had to have been authorised by his principal.⁶³

In the law of agency, the exercitorian and institorian formulas therefore allowed third parties to bring actions against slave owners for arrangements made by slaves who were their agents in trade and enterprises at sea and on land.⁶⁴ Slaves engaged in shipping and shop keeping had many opportunities for personal gain as well as for everyday physical mobility and independence of activity and judgement. During the age of the classical lawyers, Roman commerce was mainly in the hands of such slaves.⁶⁵

The rule that only the *institor* or *exercitor* (son in power, slave, or freedman) could acquire rights for his principal was based on an even more fundamental rule of the Roman law of contract, namely that a contract creates a personal bond between parties.⁶⁶ We are therefore dealing with cases where a freedman, son in power or slave was able to create an obligation for a third party who had authorised him to do business on his behalf. The introduction of these actions, in terms of which someone contracting with a person in charge of a ship or business could proceed against that person’s principal, clearly represented a shift in civil law and introduced something that did resemble agency. During most of the period of classical law, the actions were not, however, of general application.

The common denominator of all these actions was the tacit or express, general or specific authority given to the person subject to power to act on behalf of the *paterfamilias*. It therefore seems as if agency originated within the family circle. In the last two such actions, however, the same consequences ensued when a person unconnected with the family of the principal was appointed to manage a business or be master of a ship. Although this marked a step closer to agency, it was limited to these two cases.⁶⁷

Business agents and managers (*actores* or *institores*) conducted much of the daily business of commerce. Because they were not juridical *personae* they could, in contracting, represent their owners vicariously in a way that free persons, even freedmen, employed in the same capacities, could not.⁶⁸ Within a legal system that did not recognise a concept of direct representation, free persons, having their own juridical identities, were personally responsible for contracts they entered into, and for work they did. This severely detracted from their usefulness as business agents: if an *institor* was not the principal’s slave, the principal in a contract had no action against a third party, but could be sued by one. Dealing with free persons at the level at which most *institores* operated, meant engaging directly in commerce, whereas

64 See Keith Bradley “Slavery in the Roman Republic” in Bradley & Cartledge (n 25) 241-264 at 260. See, too, Gaius 4 71; D 14 1 1 9; D 14 5 1.

65 Buckland (n 18) at 131.

66 See D 14 3 1-2.

67 Lee (n 40) at 360.

68 John Bodel “Slave labour and Roman society” in Bradley & Cartledge (n 25) 311-336 at 316.

conducting business through slaves or freedmen enabled a slave owner to maintain a respectable distance from the sordid business of trade, while yet retaining full control over profits.

3.3 *Peculium*

As stated above, slaves acting as agents on behalf of their owners or even conducting business on their own account through the legal fiction of the *peculium*, played an important role in business and commerce. This gave rise to problems of legal liability and responsibility.⁶⁹

A *peculium* was a fund⁷⁰ given to a slave by his *paterfamilias* in order to conclude juristic acts and conduct business, which greatly added to his usefulness. Although the master allocated the *peculium* to a separate account, it remained his property. If something was acquired through such a *peculium*, the *paterfamilias* was held to acquire it even without being informed about the transaction.

The slave usually managed the *peculium* independently, but on occasion also had to carry out his master's instructions. When the slave conducted business on his own account the master could be sued by the *actio de peculio* in respect of any contract the slave had concluded and the *paterfamilias* was held liable to the extent of the *peculium*.⁷¹

The praetor gave a certain legal validity to the *peculium* by granting the slave the right to contract with a third party to the limit of his *peculium*. An action could therefore be instituted against the master himself in respect of the slave's contracts, limited to the amount of the *peculium*. The *peculium* was conceived in the interests of both the master himself and those who wanted protection when they contracted with slaves. Thus the praetor expanded the slave's independence and individual status in the eyes of the law.

Since only indirect agency was allowed, the principal on whose behalf a legal transaction was performed received the benefit of the transaction only after it had been assigned to him.⁷² Similarly, he was not bound by it immediately. Any action against him had to be assigned to the other contracting party. The "agent" was personally liable to the party with whom he had contracted. The principal and the other contracting party were at risk if the "agent" became insolvent and there was the inconvenience of making the necessary assignments of actions to the principal and the other contracting party.

The last step in the process of development was taken when the principle of these actions was extended to other cases of independent persons acting as agents.⁷³

69 See Neville Morley "Slavery under the Principate" in Bradley & Cartledge (n 25) 265-286 at 278.

70 This *peculium* comprised objects, livestock, money, houses, fields, etc.

71 See Sohm (n 7) at 165, 428-429; Gardner (n 25) at 415.

72 Gordon (n 2) at 57.

73 Lee (n 40) at 360-361.

This was the work not of the praetor but of the jurists. Papinian advised that when a principal had given his procurator authority to raise loans, the lender could maintain an *utilis actio* based on the analogy of the *institoria*.⁷⁴ The situation was similar if the procurator wished to sell a mandate.⁷⁵ In practice, cases of mandate to perform a particular act may also have been included. If so, the third party could hold the principal liable in every case in respect of a contract entered into by an agent in the principal’s name and within the scope of the agent’s authority. However, the agent remained liable.⁷⁶

Such activities may have overlapped with the slave’s use of the funds that had been given to him as *peculium*. Slaves were used as agents either on a permanent basis or for particular tasks.⁷⁷ This practice also functioned as a form of limited liability, since the owner could be held liable for no more than the original sum of the *peculium*, regardless of the size of the debt that his slave had run up. In general, the Romans preferred conducting business through their dependants, including family members, rather than through salaried employees. Consequently, slaves who were *institores* and procurators, with privileged access to capital compared with the majority of the freeborn, became quite wealthy and even obtained some kind of status in Roman society.

4 Conclusion

It emerges from the above discussion that Roman jurists failed to recognise direct agency (a well-known institution in Roman public law) in private law, even when it became quite obvious that there was a dire need for such an institution. According to Schulz, this failure may be ascribed to the Romans’ so-called “isolation” and adherence to tradition.⁷⁸

The strictly binding nature of an agreed contract of obligation was, in addition, characteristic of Roman fidelity.⁷⁹ A contract continued to be binding once it had been concluded, which may be because it was always entered into with a person who was physically present, but also because fidelity was a generally accepted principle of Roman life, a principle which included being bound by one’s word.⁸⁰ A number of particularly characteristic features of Roman law stem from the principle of fidelity: the early recognition of the informal act-in-law was significant; *fides* demanded that

74 D 14 3 19pr: “utilis ad exemplum institoriae dabitur actio.”

75 D 19 1 13 25.

76 D 14 1 1 17: “est autem nobis electio, utrum exercitorem an magistrum conuenire uelimus.”

77 Morley (n 69) at 279.

78 Schulz (n 5) at 25, 30, 96 and 98.

79 *Idem* at 225.

80 “fit quod dicitur”: see Cicero *de Off* 1 7 23.

a man kept his word, no matter in what form it was given;⁸¹ and an agreed contract was of a strictly binding nature.

Roman civil law permitted acquisitions by sons and slaves for their masters and fathers, which reduced the need to develop the concept of agency. In addition, the *actiones adiectitiae qualitatis* bound them by praetorian law.⁸² Although Roman law did not recognise agency as it is known today, through their practice the pragmatic Romans obtained results that were as satisfactory in all respects as modern agency. In respect of the interests of all parties involved, failure to recognise agency did not really matter and never had a negative impact on commerce.

It follows that slaves (and sons) were highly visible in the workplace, and actively involved in commercial enterprises. They participated in every aspect of Roman economic life, particularly in everyday commercial activities such as shop keeping, trading, banking, and acting as owners, managers and agents with a great degree of latitude and independence.

The *actiones exercitoria* and *institoria* seem to have been introduced for the benefit of the masters of slaves. The advantage of these actions was that in certain cases slaves could be implied agents where it would have been impossible to prove that the particular contract had been authorised (*quod iussu*) by the master. The master was bound to pay the whole debt, and could not escape by merely surrendering the *peculium*. This was because if slaves could not be trusted, the foundation of commerce, which was gradually becoming more important, would fall away. Without agents, commerce would have been limited to masters, which would have seriously impeded commerce in Rome and the Roman world.

It also seems that while slaves and children under *potestas* could be agents who imposed duties on their father or master, freedmen could become partial agents in two cases only. Both the *institor* and the *exercitor* were agents only to the extent that the persons with whom they contracted could sue their principals directly.

This discussion shows that Roman law was gradually adapting to increasing commercial needs and approaching full recognition of agency in contracts. The Romans were so pragmatic that one may well ask why, given the pressure of business demands, Roman law never allowed or even recognised the true doctrine of agency? The answer to this question may probably be that in the commercial world the considerable and effective use made of slaves and sons subject to power, as well as the *de facto* agency exercised by *institores* and *exercitores* (which was the closest the Romans ever got to real agency), were regarded as quite sufficient. These actions, however, fell short of true agency (1) in that they did not exonerate the agent from liability; and (2) in that they enabled the principal to be sued directly, but did not enable him to sue directly the persons contracting with his agent. They were nevertheless the closest approach by the Romans to a law of agency.

81 Schulz (n 5) at 224.

82 Gordon (n 2) at 55.

ABSTRACT

This article deals mainly with the question why the Romans did not know agency and how they successfully managed to cope without it. Various relevant matters are discussed, such as the position of slaves and children in the *paterfamilias*'s power, the praetorian actions that made commerce possible despite the lack of an institution such as agency, and the *peculium*. Although Roman law never really developed an institution of direct representation, it gradually adapted to the increasing commercial needs and approached recognition of agency in contracts. Factors that contributed to this, were firstly the considerable use of slaves and sons subject to power, and secondly the *de facto* agency exercised by *institores* and *exercitores*.

MULTILINGUALISM IN SOUTH AFRICAN COURTS: THE LEGISLATIVE REGULATION OF LANGUAGE IN THE CAPE DURING THE NINETEENTH CENTURY

Gardiol van Niekerk*

1 Introduction

In the European Commission's 2011 report on translation and multilingualism, South Africa is presented as an example of a country where "radical multilingualism" prevails.¹ That is probably not surprising in view of the record eleven official languages in this country with its multicultural society.

Historically, the multicultural character of South Africa ensued when Bantu-speakers migrated from Nigeria and Cameroon, and entered the territory south of the Limpopo (the northern border of South Africa) around 1700 years ago.² The original inhabitants of the country were the San and the Khoi, collectively known as the Khoisan. The first European intrusion into the territory of a more enduring and organised nature than that of missionaries and merchants, occurred when Jan van

- 1 European Commission, Directorate-General for Translation *Studies on Translation and Multilingualism. Lingua Franca: Chimera or Reality* (Jan 2011) available at <http://cordis.europa.eu/fp7/ict/language-technologies/docs/lingua-franca-en.pdf> (accessed 13 May 2015) at 36.
- 2 R Olivier & JD Fage *A Short History of Africa* (New York, 1979) at 30, 34; PD Curtin *Precolonial African History* (Washington, 1974) at 38-39; cf, also, GJK Campbell-Dunn *Comparative Linguistics. Indo-European and Niger-Congo* (Christchurch, NZ, 2004) available at http://home.clear.net.nz/pages/gc_dunn/Comparative_Linguistics.pdf (accessed 18 Aug 2015) at 14-15.

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Riebeeck, an official of the Dutch-East India Company, established a refreshment station at the Cape for the Company's ships *en route* to and from the East Indies.³ The refreshment station expanded into a Dutch settlement and introduced deep legal pluralism and with that, multilingualism into the territory. The Dutch language was the first European language imposed on the African population.⁴ A few years after Van Riebeeck's arrival, the Dutch East India Company issued an instruction, dated 16 April 1657, that nobody, especially not its officers, were allowed to use any language other than the "mother tongue" (Dutch) in their dealings with slaves and that slaves should be permitted to speak only Dutch.⁵

Although French played a role through the French Huguenots and became fashionable in Cape Dutch High Society in the latter part of the eighteenth century, it never officially gained any foothold.

When the British first occupied the Cape in the late eighteenth century and then again in the early nineteenth century, English was introduced into the language mix. During the short-lived first occupation, there was no concerted effort to advance the English language. The actual imposition of English on the local population started in earnest only during the second British occupation of the Cape.

Academic materials on the history of South African law focus mainly on the introduction of English as a component of a general Anglicisation process and the establishment of British hegemony. But one has to consider whether that was the primary reason for the introduction of English as the legal language. A possibility that should be considered is whether it was introduced in legal proceedings for practical reasons, merely as a *lingua franca*.

"Lingua franca", literally the language of the Franks,⁶ has been variously defined, but in essence it is understood as "a common second language, shared by people

3 Interestingly, in 1620 two English subjects occupied the Cape on behalf of King James I of England. However, he was not interested and the occupation was never confirmed: GG Visagie *Regspiegeling en Reg aan die Kaap van 1652-1806* (Cape Town, 1969) at 40.

4 During the Dutch rule of the Cape, the language of the courts was Dutch. The governor-in-council had extensive powers during the period, including the power to convene the courts and approve all judgments, subject only to the directorate of the Dutch East India Company: GW Eybers *Select Constitutional Documents Illustrating South African History, 1795-1910* (New York, 1918) at xix.

5 Instructions by Ryckloff van Goens (Governor-General of the Dutch East India Company 1678-1681) to Jan van Riebeeck in HCV Leibbrandt *Précis of the Archives of the Cape of Good Hope 1649-1662* vol 8 (Cape Town, 1898) Part 2, doc 1, 216-254 at 250. Van Goens pointed out in the instruction that "[t]his will in the course of years cause tranquillity". It is obvious, though, that the *lingua franca* (Portuguese and Malay-Portuguese) of the early slaves from Angola, Madagascar, Bengal and Guinea was regarded as a threat to the Dutch language: see Peter Broeder, Guus Extra & Jeanne Maartens *Multilingualism in South Africa with a Focus on KwaZulu-Natal and Metropolitan Durban* PRAESA Occasional Papers 7 (2 Jul 2012) available at <http://www.praesa.org.za/occasional-paper-7-multilingual-in-south-africa-with-a-focus-on-kwazulu-natal-and-metropolitan-durban/> (accessed 28 Jul 2015) at 21.

6 "Franks" in the original, medieval meaning of "lingua franca" referred not to the subjects of the Frankish Empire, but to all the inhabitants of Western Europe other than the Greeks: European Commission (n 1) at 20.

who are unable to communicate [with one another] in their native tongues”.⁷ To this definition is often added that the phenomenon goes hand-in-hand with political dominance and that the introduction of a *lingua franca* may be a by-product of an empire.

The use of a common vehicular language dates back to a time before the birth of Christ.⁸ Of course, the prominence of Greek and Latin in Western Europe from the Middle Ages is well-known and these two languages shared the position of *lingua franca* for several centuries. In legal proceedings, the language medium was already regulated during the Roman Principate: the classical jurist Tryphoninus wrote that the *praetor* should render his decisions in Latin.⁹ But by the time of the Dominate, practicality had steered emperors Honorius and Arcadius to recognise Greek as well.¹⁰ Thus, Voet commented in his *Commentarius ad Pandectas* that a judgement should be given “of old in the Latin language only, though afterwards also in the Greek language, as being at the time well-known and in common use”.¹¹

- 7 History World sv “lingua franca” available at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=099> (accessed 13 May 2015). In the *Encyclopædia Britannica*, sv “lingua franca” available at <http://global.britannica.com/EBchecked/topic/342377/lingua-franca> (accessed 13 May 2015) it is described as “language used as a means of communication between populations speaking vernaculars that are not mutually intelligible. The term was first used during the Middle Ages to describe a French- and Italian-based jargon, or pidgin, that was developed by Crusaders and traders in the eastern Mediterranean and characterized by the invariant forms of its nouns, verbs, and adjectives. These changes have been interpreted as simplifications of the Romance languages.”
- 8 The term was coined by the Arabs (*lūghat al-Iffranj*) and documented from the ninth century AD. It was only during the sixteenth century that the term “lingua franca” started appearing in Western European documents: see European Commission (n 1) at 20; Viveka Velupillai *Pidgins, Creoles and Mixed Languages: An Introduction* (Amsterdam, 2015) at 151. Aramaic was the first example of a vehicular language used as a communication medium between peoples who speak different languages. From the eighth century BC, Babylonian merchants used Aramaic as a second language in the Assyrian and Babylonian empire. It is only in the second century BC that Greek dethroned Aramaic as the *lingua franca*, even though Aramaic continued to be spoken widely and is today still spoken by some in the Middle East (European Commission (n 1) at 9-10; cf, also, Velupillai (n 8) 151-152).
- 9 D 42 1 48 (2 *disp*): “Decreta a praetoribus latine interponi debent”. Claudius Tryphoninus was a contemporary of Papinian and eighty extracts of his *Disputationes* were incorporated into the Digest: see Henry John Rory *An Introduction to the Study of Justinian’s Digest* (Cambridge, 2011) at 190-191.
- 10 C 7 45 12: “Iudices tam Latina quam graeca lingua sententias proferre possunt” (AD 397). Honorius was Emperor of the Western Empire AD 393-423 and Arcadius was Emperor of the Eastern Empire AD 383-408.
- 11 42 1 18: “linguâ olim Latinâ tantum, post etiam Graecâ, tanquam tunc vulgari & usitata” (vol 2 (Geneve, 1769) tr Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* vol 7 (Durban, 1955). See, also, PC Anders “Judges and judgements” (1911) 28 *SALJ* 28-35 at 28: “Judgements must be delivered by the judge in an open court, on a business day, and in a language prescribed by the law of the land”. It is a known fact that one of the reasons why the *Corpus iuris civilis* was not popularly received in Justinian’s time was that it was written in Latin while the Eastern Empire was dominated by Greek culture and Greek was the *lingua franca* of the region. However, Latin remained the leading academic and scientific language long after the fall of the Western Empire and it is trite that the legal language of the Western European continent was Latin.

Indigenous African cultural institutions, including languages, have notoriously been ignored¹² in the history of early South Africa. Thus the needs of the indigenous population played no role in any decisions relating to judicial language both during the Dutch and the English administrations of the Cape, and later in the territories beyond the borders of the Cape.¹³ This article will focus on the legislative regulation of the language medium in the nineteenth-century Cape courts and on the contest between Dutch and English for the position of the official judicial language.

2 The introduction of English

2.1 The First British Occupation of the Cape (1795-1803)

Although the general perception is that English gradually displaced Dutch as official language between 1822 and 1832, and so became the language of the courts,¹⁴ a perusal of the Cape government's correspondence with the Colonial Office reveals that efforts to introduce English into the courts started much earlier. The first tentative attempt may in fact be detected two years into the First British Occupation.

When Britain took over in 1795, the seventh article of the Articles of Capitulation secured all privileges of the colonists in accordance with the British principle that a conquered or ceded country retained its laws until a competent authority changed

- 12 In trade and in missionary activities, interpreters were used to communicate with the indigenous population. There are indications of individual local inhabitants who were able to communicate in Dutch already prior to the arrival of Jan van Riebeeck in 1652. In a letter from Leendert Jansz and N Proot to the Dutch East India Company, dated 26 Jul 1649, regarding the suitability of the Cape as a half-way station, it is, eg, mentioned that some of the local people had learnt to speak short sentences in their interaction with the sailors of the shipwrecked *Haarlem*, who had been stranded at the Cape for five months: Leibbrandt (n 5) Part 1, doc 1, 3-18 at 14. Further, in a letter from Jan Woutersen to Jan van Riebeeck, dated 12 Oct 1654, he remarked that the Khoi who had accompanied the settlers to Dassen Island were able to understand Dutch, even though they could not yet speak the language: *idem* doc 51, 153-154 at 154. There were also instances of Dutch settlers who had learnt the indigenous languages and acted as interpreters. Nicolaas Gülde, eg, served as interpreter from 1785-1789: HCV Leibbrandt *Précis of the Archives of the Cape of Good Hope 1715-1806* F-O vol 2 (Cape Town, 1906) *sv* "Gülde, Nicolaas" at 504.
- 13 By the late seventeenth century, the local Khoi were subject to Dutch laws and procedure: cf Eduard Fagan "Roman-Dutch law in its South African historical context" in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross. Civil Law and Common Law in South Africa* (Oxford, 1996) 33-64 at 37-40.
- 14 See, eg, Wouter de Vos "Roman-Dutch law in South Africa at the end of the century – and thereafter" in Antony Anghie & Garry Sturgess (eds) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (The Hague & London, 1998) 73-98 at 77; James Sturgis "Anglicisation at the Cape of Good Hope in the early nineteenth century" (1982) 11(1) *The J of Imperial and Commonwealth History* 5-32 at 7ff.

them. That included their existing laws and freedom of religion.¹⁵ There was accordingly no change in the character of the courts.

However, soon after, English was for the first and only time during the First Occupation formally introduced into the courts, even if only to a very limited extent. Although Earl Macartney, the Governor during that time, was not in favour of imposing English law and institutions on the Cape,¹⁶ it was during his tenure that the Proclamation of 24 July 1797¹⁷ abolished appeals from the Court of Justice (*Raad van Justisie*) at the Cape¹⁸ to the Court of Justice in Batavia. This Proclamation instituted a Court of Appeals for Civil Cases, consisting of the governor and the lieutenant-governor, and made provision for further appeals to the King-in-Council. As a rule, the governor had a military rather than legal background and was a British official. For obvious reasons, it was determined that appellants and respondents' briefs and statements of their cases to the Court of Appeals had to be translated into English. A proviso was added that the secretary of the court *a quo* had to certify that the briefs were a true reflection of the proceedings before that court.¹⁹

The Cape reverted to the Batavian Republic in 1803, only to be recaptured by Britain in 1806. During this Batavian interlude, the status of the courts returned to that before 1795 and Dutch remained the language medium.

2.2 The Second British Occupation of the Cape

2.2.1 The early years

In 1807, a year after the Cape's second occupation by Britain,²⁰ a Court of Appeals for Civil Cases was instituted once again, the instituting proclamation in essence

15 CG Botha "The early influences of the English law upon the Roman-Dutch law in South Africa" (1923) 40 *SALJ* 396-406 at 396-397; Sturgis (n 14) at 14.

16 Macartney was governor from 1797-1798: Daniel Visser "Cultural forces in the making of mixed legal systems" (2003) 78 *Tulane LR* 41-78 at 51.

17 Eybers (n 4) doc 64 at 99-101. This Procl confirmed the continued application of the existing laws in as far as they had not been amended or repealed (at 99): "Now considering that the Inhabitants of the Colony have been long accustomed to the subsisting laws and jurisprudence, and that no abuse of the same has come to my knowledge, I think it proper to declare ... that the administration of the civil and criminal Justice do continue on the ancient Ground, except where it shall have already been altered and improved since the surrender of the Colony, or shall hereafter be altered and improved as occasion may require."

18 This was the highest criminal and civil court and was instituted in 1656; cf HJ Erasmus "The interaction of substantive law and procedure" in Zimmermann & Visser (n 13) 141-161 at 144.

19 Six months earlier, in Jan 1797, a Vice-Admiralty Court had been instituted for the Cape. Being a British court the language medium was English. See HB Fine *The Administration of Criminal Justice at the Cape of Good Hope 1795-1828* (unpublished PhD thesis, University of Cape Town, 1991) at 1-2.

20 The Cape was finally ceded to Britain only in 1814.

repeating the 1797 provisions, including the requirement that briefs had to be in English.²¹ Again, this requirement is not surprising as the governor who served as presiding officer in the Court of Appeals, was invariably of British origin while the character of the Court of Justice remained Dutch.²² In 1811 circuit courts were established.²³ They were founded on the English model and paved the way for the introduction of the English law of procedure. In these courts preference was given to candidates for presiding officers who were conversant in English.²⁴

During the second decade of the nineteenth century, the drive for the advancement of English gained momentum. This is generally regarded as part of the Anglicisation endeavour, although the policy of Anglicisation became most prominent only during the 1820s. Anglicisation was not the principal goal of British policy at the Cape. In practice, the colonial policies fundamentally supported the continuation of the existing, predominantly European social order – of course, completely disregarding the indigenous African law and social order. Different colonial secretaries and governors had different views about Anglicisation; in fact, some were quite indifferent towards this ambition.²⁵

In 1813, the Governor, Sir John Cradock,²⁶ publicised his sentiments about the importance of English in an “Advertisement concerning the advantages of acquiring knowledge of the English language”.²⁷ His reasoning was determined by practical needs: he indicated that commerce had suffered because of the lack of proper translators and because the use of translators was an “imperfect and limited” way of communicating and “contrary to the spirit and effect of government”. In consequence, Cradock intended to make a proficiency in English a requirement of government employment “in future generations” when everybody would have had the opportunity of an education in English.

Nevertheless, Anglicisation was also coupled with an objective to “civilise” the Dutch colonists, not unlike the Cape administrators’ general goal to “civilise”

21 Procl of 29 May 1807 in Eybers (n 4) doc 65 at 102.

22 In fact, the Dutch civil procedure of Johannes van der Linden was followed in the Court of Justice and remained largely unaltered until 1827: see Erasmus (n 18) at 145.

23 Procl of 16 May 1811 in Eybers (n 4) doc 67 at 103-104; *cf.*, also, HJ Erasmus “Circuit courts in the Cape Colony during the nineteenth century: Hazards and achievements” (2013) 19(2) *Fundamina* 266-299.

24 Fine (n 19) at 4-5.

25 Sturgis (n 14) at 6-7; *cf.*, also, Fine (n 19) at 7.

26 Governor of the Cape of Good Hope from 1811-1814.

27 Dated 19 Feb 1813: “His Excellency the Governor conceives it to be necessary to make known his sentiments upon the general acquirement of the English Language, that the earliest attention may be paid to this essential Study by Parents and all Persons concerned in the Education of the Youth of this Colony.” See George McCall Theal *Records of the Cape Colony 1793-1831: Copied for the Cape Government, from the Manuscript Documents in the Public Record Office, London* 36 vols (1898-) (hereafter *RCC*) vol 24 at 471-472.

the indigenous African population.²⁸ Certain officials in the employ of the British Administration played an important role in the (British) perception of the Dutch inhabitants of the Cape Colony, especially the so-called “peasantry,” as being “rude and uncultivated”.²⁹ Both Sir John Barrow, Lord Macartney’s secretary³⁰ during the

- 28 The drive to “civilise” the indigenous African population is well-documented. Eg, one of the tasks of the Colebrooke-Bigge Commission of Enquiry into the state of the settlement at the Cape of Good Hope was to investigate the condition of the “native tribes” (see the “Copy of the Instructions given to the Commission of Enquiry proceeding to the Cape of Good Hope, Mauritius, and Ceylon”: Bathurst [Secretary of State for War and the Colonies 1812 – Apr 1827] to Major WMG Colebrooke and JT Bigge, 18 Jan 1823, in *RCC* (n 27) vol 15, 237-242 at 240-241). There are numerous examples in the Commission’s report of this goal to advance the uncivilised indigenous African population in the extracts of evidence and information collected between 1823 and 1827 (*Papers Relative to the Condition and Treatment of the Native Inhabitants of Southern Africa, within the Colony of the Cape of Good Hope, or Beyond the Frontier of the Colony. Part I. Hottentots and Bosjesmen; Caffres; Griquas*: see Colebrooke to T Spring Rice, 14 Aug 1834 *Irish University Press Series of British Parliamentary Papers: Colonies Africa* vol 39 (Shannon, 1835) Paper 50). In a report of 1805 on the indigenous population, Genl Jan Willem Janssens, Governor of the Cape from 1804-1806, remarked that it was “the spirit and absolute wish of the republic and the government of this colony ... to protect the original natives of the colony, namely the Hottentots ... to civilize and render them more happy, and at the same time to cause them to be of the best possible advantage to the country” (*idem* at 162). There was further an extract from a journal of Col Collins during a tour of the “North Eastern Boundary, the Orange River, and the Storm Mountains” in which he referred to the “Bosjesmen” as an “uncivilized and unfortunate race” (*idem* at 50). Also enclosed in the Colebrooke-Bigge Commission’s report is Lord Charles Somerset’s Procl of 23 Jul 1824 which issued regulations regarding fair traffic with the indigenous people. In the preamble of this Procl, reference is made to an earlier Procl of 20 Jul 1821 that instituted an annual fair to be held on the banks of the Keiskamma River “for the purpose of supplying the Caffres with such articles as might tend to civilize them, and to promote industry amongst them ...” (*idem* at 204).
- 29 Sir John Barrow *An Account of Travels into the Interior of Southern Africa in the Years 1797-1798* ... vol 1 (London, 1801) at 83. In vol 2 (London, 1804) at 79 he describes them as “more indolent, more ignorant and more brutal than any set of men, bearing the reputation of being civilized, upon the face of the earth”. His low esteem of the Dutch colonists may be detected throughout both volumes of this work.
- 30 Barrow arrived at the Cape in 1797, as secretary to the first governor under British rule, Earl Macartney. His work referred to above was “the first detailed English account of the colony of the Cape, after its capture in 1795”: see William Wilberforce Bird [1784-1857; Deputy-Governor of Bengal, Acting Governor-General of India] *State of the Cape of Good Hope 1822* ... (London, 1823) at 1. Barrow remained interested in and vocal about the Cape even after he left the British colonial service when it was returned to Batavian rule and he had become the Secretary to the Admiralty in London. He voiced his views in the *Quarterly Review*: see JMRC Cameron sv “Barrow, John” in *Oxford Dictionary of National Biography* (2004, online ed May 2008) available at <http://www.oxforddnb.com/index.jsp> (accessed 20 Aug 2015); cf, also, Sturgis (n 14) at 9.

First British Occupation, and later Henry Ellis, Deputy-Secretary at the Cape of Good Hope,³¹ publicised the fact that they despised the colonists' character and lifestyle.³²

Barrow's views were expressed in his *An Account of Travels into the Interior of Southern Africa in the Years 1797-1798*, the first standard work on the Cape of Good Hope that appeared at the turn of the century³³ and later in various articles he had published in the *Quarterly Review*, a popular literary and political journal in Britain. He saw reform of the language policy as an important tool in the process of civilisation, the ultimate goal of which would be to make "the next generation ... Englishmen". According to him "the general introduction of our laws and manners" would follow if the English language were established and all official documentation was rendered in English.³⁴ But civilising the colonists was not his only goal; he also aspired to attain a harmonious community through a single language³⁵ – a notion that would appear again some years later.

Of course, the perception of the Dutch culture being generally inferior encompassed also their law and it is not surprising that Ellis voiced the sentiment to the Colonial Office in London that there should be "some modification of the Colonial Laws ... which are in many points founded upon principles abhorrent to English practice".³⁶

By 1821 the idea of a general reformation of the courts had come to the fore in the correspondence with the Colonial Office. Two memoranda emanating from Ellis, as Deputy-Secretary at the Cape, proposed several changes,³⁷ most of which were eventually implemented by the Charters of Justice, however, not on Ellis's

31 Ellis was the third son of the Earl of Buckinghamshire, and was appointed as Deputy-Secretary at the Cape of Good Hope in 1819: Bathurst to Somerset, 1 Mar 1819, in *RCC* (n 27) vol 12 at 157. One of Ellis's tasks was to "prepare the way" for the 1820 settlers. It is evident from Ellis's letters to the Colonial Office (to Goulburn, Under-Secretary of State for War and the Colonies 1816-1821 and to Robert Wilmot Horton, Under-Secretary of State for War and the Colonies 1821-1827) that he took his task seriously and that he was an avid supporter of the drive towards Anglicisation and the language policy.

32 While Ellis regarded them as violent and barbaric, he nevertheless appreciated them as "an admirable description of force" against their "savage neighbours" and as "a great means of clearing our frontier" from the threat of the indigenous population: see Ellis to Goulburn, 19 Oct 1819, in *RCC* (n 27) vol 12 at 348-350 at 348.

33 Twenty years after its publication, Edward Blount [the name of the author of this book was unknown until 1943 when it was attributed to Blount, a barrister-at-law] *Notes on the Cape of Good Hope, Made During an Excursion in that Colony in the Year 1820* (London, 1821) at 151 still recognised Barrow's book as the "standard work upon the Cape", but noted that it was "of somewhat ancient date".

34 Sturgis (n 14) at 9; Visser (n 16) at 52.

35 *Ibid.*

36 Ellis to Goulburn, 22 Oct 1819, in *RCC* (n 27) vol 12, 350-351 at 351; *cf.* also, Sturgis (n 14) at 9-10. This view of the colonists' law is clearly similar to the British Administration's perception of the indigenous African law which gave rise to the notorious repugnancy clause.

37 Ellis to Bathurst, 1 Dec 1821, and two enclosures, in *RCC* (n 27) vol 14 at 183-187.

recommendation but on that of the Colebrook and Bigge Commission of Enquiry that was instituted two years later to investigate the state of affairs at the Cape.

An underlying reason for the proposed reforms was to sever the Cape's ties with the Netherlands as the Cape was seen as "an integral part of the Colonial Dominion of Great Britain".³⁸ The introduction of English as the exclusive official language was regarded as an important first step in this endeavour, because the continued use of Dutch was perceived as perpetuating the bond with Holland. Ellis viewed the Church and Bar as instrumental in strengthening the ties with the Dutch culture and forms of civil administration as their members were "the only educated classes"³⁹ in the Colony and had received their education and training in Holland. Most of the Dutch colonists, especially in Cape Town,⁴⁰ were familiar with English due to their extended contact with the language for almost twenty-five years.⁴¹ By contrast, the English inhabitants could not understand Dutch and had to rely on translators, also in legal proceedings, given that the language medium of the Court of Justice in Cape Town was still Dutch. Also, municipal administration and correspondence had to be translated into English and this caused unnecessary duplication and adversely affected the English inhabitants, particularly the merchant class: trade was conducted almost exclusively in English "and yet the various cases incident to English Shipping and English commerce generally, [were] tried in a foreign language [Dutch] before a Court, the members of which, if not wholly unacquainted with the English language, are certainly quite incompetent to decide on interpretations of contracts, policies of insurances, licenses and other similar matters submitted to their decision".⁴² In civil cases, the Court of Justice conducted business mostly in written pleadings rather than *viva voce*. Ellis thus proposed that "an examination" in English be introduced as a requirement for holders of civil office.

The fact that the judiciary was largely untrained and unable to speak English,⁴³ had elicited mockery of the Court of Justice and, as to be expected, wide-spread

38 *Idem* (Encl 1) at 183.

39 *Ibid.*

40 In certain districts, such as Albany and Uitenhage which were principally inhabited by British Settlers, English was the dominant language. These districts further had English magistrates, mainly because the commanding officers of the district usually also filled that office. Ellis further pointed out that the only *landdrost* who was not conversant in English, in Tulbagh, was "on the eve of retiring from extreme age": *idem* at 185.

41 This was also confirmed in a letter by William Dunn (an 1820 settler) to the Secretary of War (9 Jun 1821, in *RCC* (n 27) vol 14 at 20) in which he wrote that "the Dutch Authorities ... having practiced the English Language for about eighteen years could, *if they would*, inform the colonists of their arrangements in *good English*" (the emphasis in the original is significant).

42 Ellis to Bathurst, 1 Dec 1821, and two enclosures, in *RCC* (n 27) vol 14 at 183-187 (Encl 1) at 185.

43 William Dunn, however, was of the opinion that the Dutch officials were competent in English, remarking in a letter to the Colonial Office that while the "Dutch are generally like the untutored peasants of England", the Dutch officials had been "frightened by their conquerors" and "speak a good English". He accordingly predicted that the court officials would not retire merely because the language of the courts was changed: Dunn to the War Secretary of War, 9 Jun 1821, in *RCC* (n 27) vol 14 at 21.

discontent.⁴⁴ Ellis therefore recommended a reduction in the number of judges from seven to three: the only judge that he valued worthy to be spared the axe was the Chief Justice, Sir John Truter, even though he had been trained in Holland.⁴⁵ All the other members of the Bench had no legal education and were “imperfectly acquainted with the English language”.⁴⁶ The single reason for their election to the Bench had been that their sound financial positions safeguarded them against any accusation that corrupt motives could be behind alleged erroneous decisions. That the Court of Justice was not competent to try English commercial legislation was to be expected and was confirmed by frequent complaints. Ellis’s solution was that the Admiralty jurisdiction should vest in the Court of Justice and that the judge of the Vice-Admiralty Court should become a puisne judge. This was a logical proposition, as the Vice-Admiralty Court was a British Court manned by a British judge.⁴⁷ These changes would have paved the way for the adoption of the English language and for a modification of the colonial laws.⁴⁸

But not everyone was in favour of the introduction of English as the exclusive language in the courts. In 1820, Edward Blount, an English barrister-at-law, commented that it was “a fair subject of complaint, that, in an English colony, all proceedings are in the Dutch language; an Englishman being heard through the medium of an interpreter: whereas it would be easy to hear trials in *either language*, and then the court would be open to no imputation of misconstruction”.⁴⁹

44 See, eg, Bishop Burnett [an aggrieved 1820 settler] to Bathurst, 30 Jul 1822, in *RCC* (n 27) vol 14, 493-497 at 496: “The administration of justice is notoriously a burlesque, and a theme of laughter and ridicule ... The members of the Court of Justice, on whose fiat hang the liberties and properties of the British Subject, are all Dutch, bearing to us English the most unextinguishable hatred ... [they] are for the most part unacquainted with their own laws ...” See, also, Barrow (n 29) vol 2 at 90-92; he observed (at 90) that certain aspects of their procedure “was particularly repugnant to the feelings of Englishmen and to the principles of English jurisprudence” and he was particularly scathing about the “provincial judicature” (at 338-339). He was no less contemptuous about the attorneys “who, in the Cape, may truly be called a nest of vermin” without any knowledge of the law (at 421).

45 Sir John (Johannes Andreas) Truter studied in Leyden and obtained a doctor of laws in 1787. He must not be confused with Dr PJ Truter, a medical doctor who qualified in the Netherlands and served on the Court of Justice from 1823-1827: see IG Farlam “The origin of the Cape Bar” (1988) Apr (1) *Consultus* 36-39 at 36.

46 Ellis to Bathurst, 1 Dec 1821, and two enclosures, in *RCC* (n 27) vol 14 at 183-187 (Encl 2) at 186.

47 In 1821, when Ellis made these proposals, George Kekewich, trained at the Inns of Court, was, and had been for many years the Judge of the Vice-Admiralty Court: Stephen D Girvin “The architects of the mixed legal system” in Zimmermann & Visser (n 13) 95-139 at 100.

48 Of course, one other puisne judge had to be added. The only problem at that stage though was to find a practicing attorney or advocate willing to take up the position as the salaries of the judges were so low. It turned out that when the Supreme Court of the Colony of the Cape of Good Hope was eventually established in 1827, there was no problem in finding suitable candidates who met the Royal Charter of Justice’s requirements of being members of the English, Scots or Irish Bars.

49 My emphasis. See Blount (n 33) at 77.

The Colonial Office responded favourably to Deputy-Secretary Ellis's suggestions regarding the introduction of English as exclusive, official language in business and judicial proceedings and accordingly instructed the Governor, Lord Charles Somerset,⁵⁰ to effect by proclamation the necessary changes to the language policy. Somerset was directed to abrogate any law that entrenched the use of Dutch as the official language. As an interim measure both Dutch and English were to be allowed for a certain period until English could be exclusively adopted.⁵¹

The Colonial Office supported the suggested changes to the Bench as a necessary step towards the introduction of English in the courts. It likewise supported the proposed retention of Chief Justice Truter.⁵² The feeling was that the drastic reduction in the number of judges would not impact negatively on the business of the court but would rather contribute to greater effectiveness, as one properly trained lawyer would be "superior in efficiency to two Members of the present Court thus employed".⁵³ Importantly, the Colonial Office firmly believed that a "gradual assimilation of Colonial Law to the more liberal and enlightened maxims of British Jurisprudence"⁵⁴ would follow on the importation of the English language.

Lord Charles Somerset, though, was not enthusiastic about the proposed changes to the Courts,⁵⁵ but, upon the instruction from the Colonial Secretary, he issued the Proclamation of 5 July 1822 for the adoption of English as the exclusive official and judicial language.⁵⁶

2 2 2 1822 onwards

In its preamble, the Proclamation of 1822⁵⁷ stated that it was "deemed expedient, with a view to the prosperity of the Settlement, that the Language of the Parent Country should be more universally diffused" and that it would unite the local inhabitants

50 Lord Charles Somerset was the first governor of the Colony of the Cape of Good Hope during the Second British Occupation of the Cape. He was in office from 1814 to 1826. The expansion of the Colony to include the Eastern Cape took place during his term.

51 In commerce the period was set at six months, "as there are few persons so engaged who have not obtained some knowledge of English, and many who actually carry on their communication in that language". In judicial proceedings, though, the period was two years: Bathurst to Somerset, 23 Feb 1822, in *RCC* (n 27) vol 14, 297-298 at 298.

52 See Bathurst to Somerset, 20 May 1822, in *RCC* (n 27) vol 14 at 371-373. They recommended Sir John Truter as Chief Justice and remarked that the appointment of the existing Judge of the Vice-Admiralty Court as one of the Puisne Judges would immediately bring the necessary expertise, "professional ability and local knowledge" to the new Court.

53 *Idem* at 373.

54 *Ibid.*

55 Somerset to Bathurst, 6 Sep 1822, in *RCC* (n 27) vol 15 at 25-28: Somerset was opposed to the reduction in the number of judges – especially since that would have left the circuit courts with a single judge only. *Cf* Fine (n 19) at 11.

56 See, generally, Fine (n 19) at 8-9.

57 Eybers (n 4) doc 17 at 23-24; *RCC* (n 27) vol 25 at 215.

and those of British origin – again the curious notion that a single language would lead to unity. The Proclamation determined, among others, that English would be the exclusive language in all judicial acts and proceedings, in both the superior and lower courts of the Colony. The date set for its coming into operation was 1 January 1827.

Although its implementation date was only 1827, Lord Somerset introduced from 1824 onwards under this Proclamation English as the exclusive language medium in certain minor courts. It appears that the reason behind his further proclamations was the needs of practice. For example, in the Albany district the use of English was indicated because “in almost every case brought before the local Court ... the parties use English, and ... the only two (out of Seven Members who compose that Court) who are not Englishmen born, are well acquainted with the English Language”.⁵⁸ Somerset further established Courts for the Cognizance of Minor Civil and Criminal Cases in Simon’s Town and instituted English in them as the exclusive language because in that area the majority of the population consisted of “British-born Subjects”.⁵⁹ This happened also in the “Township of Algoa Bay (Port Elizabeth)” because the majority of the inhabitants were “native British subjects” and “it would be highly inconvenient to them to use any other but the English language in their Judicial Proceedings before the said Court of Magistracy”.⁶⁰

However, the proposed reform of the courts itself was put on hold. Less than a month after the issue of the Proclamation of 5 July 1822, Robert Wilmot Horton, the Under-Secretary of State in the Colonial Office, proposed the institution of a commission of enquiry into, among other matters, the “state of the settlements”, including “the state of the laws” and the “practical administration of justice” of the Cape, Mauritius and Ceylon.⁶¹ The Commission of Enquiry headed by Major WMG Colebrooke and JT Bigge, received its instructions on 18 January 1823.⁶² The judicial part of its enquiry was to “embrace the whole system and administration of civil and criminal justice ... [and] [t]he introduction of the English language in the courts of law, and in all public proceedings”.

58 Procl of 2 Feb 1824, in *RCC* (n 27) vol 17, 44-45 at 45.

59 Procl of 3 Dec 1824, in *RCC* (n 27) vol 25 at 215.

60 Ord 1 of 1825, in *RCC* (n 27) vol 24, 343-344 at 343; *cf.* also, *RCC* (n 27) vol 24 at 260 for the minutes of the Council meeting of 28 May 1822 at which the Ordinance was submitted for approval.

61 [Hansard’s Parliamentary Debates] Address to the King on a Commission of Enquiry, 25 Jul 1822, in *RCC* (n 27) vol 14 at 486-487. In his address to Parliament, he mentioned that measures had already been introduced for English to be the exclusive language in legal proceedings.

62 Copy of the Instructions given to the Commission of Enquiry proceeding to the Cape of Good Hope, Mauritius, and Ceylon: Bathurst to Major WMG Colebrooke and JT Bigge, 18 Jan 1823, in *RCC* (n 27) vol 15 at 237-242.

The report of the Colebrooke and Bigge Commission was released on 6 September 1826.⁶³ One of their recommendations was that English be introduced as the only language in the courts. The first and second Royal Charters of Justice followed on this report. However, it was only in 1828, after the implementation of the First Charter of Justice, that the necessary fundamental changes were effected to the court system.

The institution of the Commission of Enquiry did not stop the steady flow of communication about the deficiencies of the courts – specifically the Bench – between the Colonial Government and the Colonial Office. The name of the Chief Justice, Sir John Truter, regularly crops up in the correspondence and it is obvious that he was regarded as an important means to effect the change in the courts from Dutch to English.

Truter was Secretary to the Government during the Batavian rule prior to the Second Occupation, and was one of those who had signed the Articles of Capitulation.⁶⁴ He was highly esteemed by the Cape governors who had great regard for his opinion in matters of public interest and, as indicated, the Colonial Office too supported him.⁶⁵ Although the Secretary to the Cape Government remarked in a letter to the Colonial Office that Sir John’s “Dutchified English [was] not very clear”,⁶⁶ his command of the language is apparent in the numerous reports and opinions that he compiled for the Government,⁶⁷ and in his correspondence with the Government and the Colonial Office.⁶⁸ Already during his term as fiscal, in 1810, he quoted from

63 The Commission’s Report on the administration of justice with a proposed Charter of Justice was despatched to the Cape on 5 Aug 1827: see Goderich [Secretary of State for War and the Colonies Apr – Sep 1827, 1830-1833] to Bourke, in *RCC* (n 27) vol 32 at 254-273; for a detailed discussion of the Report, see Fine (n 19) at 14-29.

64 See, generally, Graham Botha “Sir John Andries Truter, Kt, LLD, Chief Justice of the Cape of Good Hope” 1763-1845” (1918) 35 *SALJ* 135-154; *cf.* also, Fine (n 19) at 6-7.

65 He was Fiscal for a short time, before in 1812 he became the first and last Chief Justice of the Court of Justice. See Botha (n 64) *passim*. Truter was knighted in 1820. He became a member of the Council of Advice (the duty of which was to assist the governor in important decisions) in 1825 (*idem* at 150). His role as advisor is apparent in numerous communications from the Cape Government with the Colonial Office. See, eg, Letter from the Chief Secretary to Government [1824-1827] Richard Plasket to Sir John Truter, 7 Jul 1825, in *RCC* (n 27) vol 22, 181-184 at 182: “His Excellency ... feels himself bound to impress in the strongest manner the necessity of the general introduction of the English language as the only language to be made use of in future in all public and legal transactions of every kind, he feels the force of the observations made by you in regard to such obligation not being binding with reference to Religious Worship, and His Excellency will feel inclined to give the most liberal interpretation to this important point, and he therefore cannot object to the Religious Instruction being for some time to come given in the Dutch Language, provided always that the English language be taught in all the schools.”

66 Secretary to Government to Wilmot Horton, 26 Sep 1825, in *RCC* (n 27) vol 23 at 161.

67 See, eg, his reports on land tenure (drafted for Sir John Cradock in *RCC* (n 27) vol 8 at 277ff) and taxation (in *RCC* (n 27) vol 9 at 368ff); *cf.* further, Botha (n 15) at 144-147.

68 See, eg, the correspondence as fiscal in *RCC* (n 27) vol 8 *passim*.

Blackstone's *Commentaries* and Bacon in prosecuting a case against the Reverend Laurence Hynes Halloran, Chaplain to the Military and Naval Forces.⁶⁹

Somerset's reluctance to accept the Chief Justice's request to resign for reasons of health⁷⁰ confirms his reliance on Truter in the replacement of Dutch with English in the courts and the envisaged introduction of new judges.⁷¹ In 1825, he implored Truter to reconsider his request: "[I]t would certainly obviate many very embarrassing difficulties, if you could be induced to wave the consideration of your Health ..."⁷² Truter duly acceded⁷³ and remained in office until 1827.

Richard Bourke, Acting Governor from 1826 to 1828, delayed the implementation of the English language in the courts until the new court could be established.⁷⁴ He thought that the exclusive use of English would lead to bizarre consequences if implemented before English judges were in place. For example, where the parties, counsel and the presiding officer were Dutch, documents and pleadings would have had to be translated back and forth into Dutch and English. As a result, he issued an Ordinance in 1826⁷⁵ repealing Somerset's Proclamation of 1822 in as far as it determined that English should be the exclusive language in all the courts in the Colony. It determined that Dutch could lawfully be used. In the preamble it was stated that the reason for delaying the introduction of English was that there had been delays due to "unavoidable causes" and that it was deemed "expedient to postpone [the date of introduction] ... until such Arrangements shall be made as may facilitate the introduction of this beneficial measure, and render its utility at once certain and permanent ...". According to section 2, the governor could nevertheless by proclamation determine that English be used "in the Judicial Acts and Proceedings of all or any of the Courts of Justice in this Colony, at such subsequent period as to him shall seem fit." This Ordinance apparently did not affect the proclamations introducing English in the courts of the Albany District, Simon's Town and Algoa Bay.

A year later, Bourke issued Ordinance 33 of 19 Dec 1827,⁷⁶ for the creation of the office of Resident Magistrates in anticipation of the Royal Charter of Justice of 1827. Section 7 of this Ordinance declared that all sentences, decrees, judgments, writs and summonses had to be in English.

69 Botha (n 15) at 141-143.

70 Sir John Truter to Lord Charles Somerset, 5 Sep 1825, in *RCC* (n 27) vol 23 at 45-47.

71 Plasket, though, did not share Somerset's sentiments and was quick to write to the Colonial Office "I hope and trust that you will take advantage of this resignation and send us a Chief Justice without delay ... who may sit in the Court of Appeals until the new Charter with the English language be promulgated and enforced": Secretary to Government to R Wilmot Horton, 28 Sep 1825, in *RCC* (n 27) vol 23, 177-180 at 179.

72 Somerset to Truter, 8 Sep 1825, in *RCC* (n 27) vol 23, 50-51 at 50.

73 This was transmitted to the Colonial Office on 16 Oct 1825: see *RCC* (n 27) vol 23 at 303-304.

74 Sturgis (n 14) at 24.

75 Ord 27 of 13 Dec 1826 in Eybers (n 4) doc 71 at 107.

76 Eybers (n 4) doc 73 at 109-112.

2 2 3 The Royal Charters of Justice

Although the Colonial Office in the main agreed with the report of the Colebrooke-Bigge Commission, it did not implement all the suggested changes. Importantly, it found that there was no immediate reason to abolish the existing Roman-Dutch law in favour of English law as recommended by the Commission, but that the newly-appointed judges should gradually assimilate the English law into the Roman-Dutch law.⁷⁷

The First Charter of Justice, dated 24 August 1827, came into force on 1 January 1828. It determined that the language medium of the Supreme Court and circuit courts was to be English.⁷⁸ The new Supreme Court of the Colony's first session was in January 1828: Sir John Wylde was appointed Chief Justice, the senior Puisne Judge was William Menzies, the second Puisne Judge was William Burton and George Kekewich was the third Puisne Judge – naturally they were all British.⁷⁹

The Second Royal Charter of Justice of 4 May 1832⁸⁰ came into effect on 1 March 1834. It was in essence identical to the 1827 Charter. Section 32 determined that all sentences, decrees, judgements and orders had to be pronounced by the judges in an open court and in English. Section 39 determined the same for the circuit courts.

It is significant that section 34 which instituted a jury in criminal cases, determined that “[n]o person otherwise competent to serve on a jury [would] be disqualified by reason of his ignorance of the English Language”. The same applied to juries in circuit courts. That it would lead to absurd consequences where a person who did not understand English acted as a juror in a case conducted entirely in English, is to be expected.⁸¹ Not surprisingly, provision was made for interpreters.⁸²

77 See Viscount Goderich to Major-General Bourke, 5 Aug 1827, in *RCC* (n 27) vol 32 at 256: “Without affecting to institute any comparison between the Civil Code of England, and that which formerly prevailed in the Seven United Provinces, it is obvious that the Roman Dutch Law adequately provides for the ordinary exigencies of life in every form of Society, and is not liable to any such inseparable objections as should require its abrupt and immediate abandonment.” And at 258: “I am fully prepared to admit the propriety and importance of gradually assimilating the Law of the Colony to the Law of England. The Judges of the Supreme Court will be more competent than any other of the local Authorities to consider by what steps this change could be most conveniently introduced.”

78 See *RCC* (n 27) vol 32, 274-292 at 282.

79 Wylde was the Judge of the Vice-Admiralty Court of New-South Wales and Kekewich was his equivalent in the Cape Vice-Admiralty Court. Menzies was a former member of the Scots Bar and Burton was Recorder of Daventry: see Farlam (n 45) at 37; Girvin (n 47) at 97-100; Fine (n 19) at 48.

80 Issued at the Cape by Procl of 13 Feb 1834.

81 Section 34 was the result of a dispute that arose among the Cape judges whether persons who were not conversant in English should be disallowed to act as jurors. The Secretary of the Colonies eventually stepped in with s 34. See Erasmus (n 23) at 287ff.

82 Eg, HR van Ryneveld, who held an LLD, acted as such: JS de Lima (comp) *Cape of Good Hope Almanac, for the Leap Year, 1840* (Cape Town, 1840) at 84.

In 1852, the Cape of Good Hope Constitution Ordinance⁸³ further strengthened the position of English, when it provided that English should be the language medium in “[a]ll debates and discussions in the Legislative Council and House of Assembly”.

The last legislative regulation for the compulsory use of English in the Cape courts was the Act for Amending and Consolidating the Laws relative to the Courts of Resident Magistrates, Act 20 of 1856.⁸⁴

3 The return of Dutch to the Cape⁸⁵

English remained the exclusive language in the Cape Parliament and courts for close on a further three decades until two legislative measures were passed to institute equal language rights for Dutch and English in both houses of Parliament and in the courts.⁸⁶

83 Dated 3 Apr 1852 (as amended and confirmed by the Order-in-Council, dated 11 Mar 1853) and declared in s 89 to come into operation on 1 Jul 1853 (Eybers (n 4) doc 29, 45-55 at 55).

84 Section 7: Eybers (n 4) doc 80 at 125-127.

85 When the Zuid-Afrikaansche Republiek (ZAR) was annexed to the British Empire in 1877, the Annexation Procl dated 12 Apr 1877 (Eybers (n 4) doc 198, 448-453 at 452-453) instituted English as the second official language, retaining the status of Dutch. Significantly, in terms of this Procl all laws, proclamations and government notices had to be published in Dutch. In the Legislative Assembly either language could be used. Both languages were allowed in the courts, according to the choice of the parties. According to JM Huisamen “Afrikaans en die Eerste Vryheidsoorlog” (2014) 11 *Scientia Militaria South African J of Military Studies* 40-44 at 40, the protection of Dutch was a diplomatic move by Theophilus Shepstone who lacked a proper military armed force when he occupied the ZAR in 1877. The ZAR gained independence after the First Anglo-Boer War. Law 1 of 1882 (s 7) (Eybers (n 4) doc 207 n 1 at 477) instituted Dutch as the exclusive language medium in all schools. In terms of s 1 of Law 10 of 1888 (Eybers (n 4) doc 215 at 482-483) Dutch was declared the exclusive official language. Section 3 determined that all officials in the Courts had to use Dutch and that all pleadings had to be in Dutch. However, it could be accompanied by a translation. In the Vereeniging Peace Treaty of 31 May 1902 (Eybers (n 4) doc 173, 345-347 at 346), concluded after the Second Anglo-Boer War, it was agreed in art 5 that Dutch would be taught in the public schools in the Transvaal and the Orange River Colony where the parents desired it and that Dutch would be allowed in the courts of law if that served the administration of justice better.

In the Orange Free State, Dutch was firmly established shortly after it became independent from Britain. Ord 3 of 1854 (Eybers (n 4) doc 160 at 296-270) determined that Dutch would be the exclusive language in the territory and the chief language in all courts of justice as the majority of the population was of Dutch descent and generally not familiar with other languages. It further ruled that any official documentation in another language had to be translated into Dutch and that “[l]anddrosts and other public Offices shall have a sufficient knowledge of both the Dutch and the English language to be able to act as interpreters in all cases”.

86 According to Eybers (n 4) at xli, this legislation evidences the increasing influence of the so-called “country people”. CP Lucas *A Historical Geography of the British Colonies. Volume IV South and East Africa Part I Historical* (Oxford, 1900) at 76-77 explains that there was a clear division between the “town” population (those centered around Table Bay whose interests were focused on the passing trade) and the “country” population (the rural dwellers). It is apparent that English gained more ground in the urban setting while Dutch was firmly entrenched in the country.

In 1882 the Constitution Ordinance Amendment Act⁸⁷ was promulgated. Section 1 repealed section 89 of the Constitution Ordinance of 1852 because it was held to be “repugnant to or inconsistent with the provisions of this Act”.⁸⁸ Section 2 restored Dutch as language in the Legislative Council and House of Assembly, awarding it the same status as English.⁸⁹

Some two years later, in 1884, the Dutch Language Judicial Use Act⁹⁰ was passed. Its preamble stated that notwithstanding the provisions of the Charter of Justice and the Courts of Resident Magistrates Act of 1856, it was “expedient to afford facilities for the use of the Dutch language equally with the English in courts of justice and in legal proceedings ... when requested to do so by any of the parties”. Interestingly, in terms of section 1, judges of the Supreme Court had a discretion to

87 Act 1 of 1882 in Eybers (n 4) doc 38 at 66.

88 In Natal, the demands of the population had no effect on the introduction of English as exclusive language in the courts. Natal was annexed to the Cape in 1844 and became a separate colony in 1845. In anticipation of their submission to British rule, the Volksraad of Natal made a submission on 4 Sep 1843 to Her Majesty’s Commissioner Henry Cloete demanding certain civil liberties. They indicated that they were prepared to submit to the Queen’s sovereignty and asked that certain constitutional liberties be guaranteed. Among these were that “the Dutch Language shall be used in all Courts of Law, except where the majority of the inhabitants of the District shall speak English” (Eybers (n 4) doc 107, 174-180 at 175). These demands were ignored and s 22 of Ord 14 of 1845, which established a District Court for Natal, proclaimed English as the sole language in these courts. In terms of s 23, no juror in criminal cases before a recorder and a jury could be disqualified merely because he could not speak or understand English. Ord 16 of 1846 (Eybers (n 4) doc 140 at 233-235) which created the office of Resident Magistrate determined in s 20: “All sentences, documents, etc.” must be in English. This was later reaffirmed in Law 82 of 1889 (Eybers (n 4) doc 150 at 255-259). Law 10 of 1857 (Eybers (n 4) doc 144 at 242-246) instituted a Supreme Court of Justice and circuit courts and at the same time English as the exclusive language medium.

89 According to this provision “all debates and discussions in the Legislative Council and House of Assembly [could] be conducted in either English or Dutch, but in no other language”.

90 Act 21 of 1884 in Eybers (n 4) doc 86 at 133-134. Interestingly, the survival of the Dutch language in South Africa found support also from the Netherlands. In Oct 1885, the Nederlands Zuid-Afrikaanse Vereniging established a study fund for South African students (Studiefonds voor Zuid-Afrikaanse studenten). This fund was later awarded official status and became known as the Stichting Studiefonds voor Zuid-Afrikaanse studenten (The Foundation Study Fund for South African Students). The aim of the fund was not only of an academic nature, but also to strengthen the Dutch cultural influence in South Africa – especially in the two Boer republics, the ZAR and the Orange Free State. Language was regarded as an important vehicle in this endeavour. Then, in 1890, with a view to boosting the position of the Dutch language, *Het Fonds ten behoeve van Hollands Onderwijs in Zuid-Afrika* was established. I thank my colleague, Dr Heleen Gall, chairperson of The Study Fund Foundation for South African Students for this information. (See, further, the websites of the Foundation Study Fund at <http://www.studyfoundation-sa-students.com/en/node/2> and of Zuid-Afrikahuis available at www.zuidafrikahuis.nl/ (both accessed 13 Oct 2015). It is well-known that numerous Southern African lawyers completed post-graduate studies in the Netherlands in the nineteenth century.

allow the use of both languages whereas resident magistrates, special justices of the peace and field-cornets were required to do so.⁹¹

Section 2 of this Act caused some problems. In terms of it, a divisional council, by majority decision, or one-third of the registered voters in any division, could request the governor in writing by petition to order that all summonses, notices, and documents referred to in any summons, should be issued in both languages in all courts in the division.⁹² The logical consequence of the provision was that even where all the parties were conversant in one language, or where a party had waived the right to use one language, the documents still had to be translated. That caused unnecessary delays and an escalation in the cost of litigation. The impracticality of this provision was further illustrated by a case in the Aliwal North District where the measure had been proclaimed. In a case before the Circuit Court the defence relied on this provision, arguing that an indictment had to be quashed because it had not been translated in accordance with section 2 of the Act and had to be regarded as *pro non scripto*.⁹³

Indeed, in 1886 the Appeal Court and Sheriff's Duties Act⁹⁴ added a proviso to section 2 of the Dutch Language Judicial Use Act of 1884. According to this section it would not be necessary to issue the process also in Dutch if it was apparent to the officer of the court issuing a summons, notice or document that the person upon whom it was served was "sufficiently acquainted with the English language to understand the purport of such process" or if his command of the Dutch language was insufficient.

That this would cause discontent among Dutch speakers is obvious, and in 1888 the Dutch Language Judicial Use Amendment Act⁹⁵ was promulgated, enacting the same where a person sufficiently understood Dutch or did not understand English.

4 Conclusion

It seems that the importation of English in the nineteenth-century Cape courts was not driven only by considerations of dominance or perceptions of cultural superiority, although these were evident in the correspondence of the time. Another important if underlying reason was quite simply the needs of practice and, of course, the need to promote justice for the English-speaking section of the population. The influx of British settlers and administrators, the introduction of Scottish Ministers in the

91 Section 1 reads: "[T]he judges of the superior courts of justice *may*, and the resident magistrates, special justices of the peace, and field-cornets *shall*, allow the use of the Dutch language equally with the English language ..." (my emphasis).

92 See Anon "A confusion of tongues" (1885) 2 *Cape LJ* 151-153 at 153 who described the measure as "a piece of hap-hazard legislation, ill-defined and obscure".

93 See *idem* 151-153.

94 Act 17 of 1886, s 14 in Eybers (n 4) doc 88 at 135-136.

95 Act 15 of 1888 in Eybers (n 4) doc 89 at 136-137.

Dutch Reformed Church and of British teachers, added up to a large section of the (European) population – the indigenous African population being considered of no consequence – that could neither speak nor understand Dutch. By contrast, the Dutch colonists who had been exposed to English for a long time could find their way around in English. Further, there was then, as today, much criticism against the use of translators who invariably lacked the necessary legal knowledge, especially in judicial proceedings where the accuracy of the translation is of the essence. Judges were generally not legally educated and the existing legal practitioners who were well-educated and conversant in both English and Dutch were not susceptible to the idea of serving on the Bench because the salaries were too low. It was only practical to import English as the language of the courts.

It took several decades for the British authorities to realise the fallacy of excluding Dutch from legal proceedings and commerce. Eybers saw the legislation that brought Dutch back to the legal forum as evidencing the increasing influence of the so-called “country people”.⁹⁶ The Dutch colonists resisted yielding to British supremacy,⁹⁷ a phenomenon that was mirrored also in their resistance to give way to English law and in the consequent survival of Roman-Dutch law in spite of the drive to gradually assimilate it “to the more liberal and enlightened maxims of British Jurisprudence”.⁹⁸

In 1909, section 137 of the South Africa Act⁹⁹ declared English and Dutch as the official languages of the Union of South Africa, to be “treated on a footing of equality”. In 1925, the Official Languages of the Union Act¹⁰⁰ amended the Union Constitution and determined that Dutch included Afrikaans retrospectively. Afrikaans eventually replaced Dutch. In both the 1961 and 1983 republican constitutions, English and Afrikaans were entrenched as the official languages. It was only in the new constitutional democracy that indigenous African languages were for the first time recognised and that all of eleven languages were declared official.¹⁰¹

Today the language medium in the High Courts is limited in practice to English and Afrikaans, but it is apparent that English has evolved as the legal *lingua franca* and de facto most proceedings take place in English. In a parliamentary address, the Minister of Justice and Correctional Services recently confirmed his Department’s policy “to promote the use of indigenous languages in all our service points”. He referred to a legislative framework being in the pipeline to promote the use of African languages in court proceedings as a matter of practical need.¹⁰²

96 Cf n 86 above.

97 See Vivian Bickford-Smith “Revisiting Anglicization in the nineteenth-century Cape Colony” (2003) 31(2) *The J of Imperial and Commonwealth History* 82-95 at 83.

98 Cf n 45.

99 9 Edw 7 c 9 in Eybers (n 4) doc 235, 517-558 at 552; cf, also, De Vos (n 14) at 78.

100 Section 1, Act 8 of 1925.

101 Section 6, Constitution of the Republic of South Africa, 1996.

102 See “Address by Michael Masutha, MP (Adv), Minister of Justice and Correctional Services on the occasion of Justice Budget Vote Debate, Tuesday 19 May 2015, National Assembly, Parliament”

There is a movement towards the use of African languages as the language medium (the language of record and the court process) in magistrate's courts in KwaZulu-Natal, the Western Cape and Limpopo. This movement is clearly not politically driven. Thus the Mitchell's Plain Magistrate's Court in the Western Cape conducts trials in Afrikaans (notoriously regarded as the apartheid language) and the Khayelitsha Magistrate's Court uses isiXhosa. The endeavour appears to have emerged out of the practical need to expedite justice by getting rid of time-consuming and invariably inaccurate verbal translations. In the courts where these measures were introduced, the majority of the people and the magistrate speak the same language. The policy of the Department of Justice is that in cases where one of the parties does not speak the language, the case should be conducted in English – the legal *lingua franca* – and should a case go on review, the records have to be translated in English.¹⁰³

Although language is an integral part of a culture and as such endowed with the subtext of identity, ethnic belonging, shared values, traditions and history, on a practical level it is merely a tool of communication. In a court of law, language should serve the ends of justice. The experience in the magistrate's courts mentioned above testifies to the fact that language can be removed from its personal context and that on an *ad hoc* basis any of the eleven languages can successfully become the language of record as and when the need arises.

Abstract

Legal pluralism, and with it multilingualism, was introduced into Southern Africa when the first Dutch refreshment station expanded into a settlement. Dutch remained the official language until after the second British Occupation of the Cape in 1806. Indigenous African cultural institutions, including languages, were notoriously ignored in early South African history and the needs of the indigenous population played no role in any decisions relating to judicial language both during the Dutch and the English administrations of the Cape, and later in the territories beyond its borders. This article focuses on the legislative regulation of the language medium in nineteenth-century Cape courts and the contest between Dutch and English for the position of official judicial language. Today the language medium in the High Courts is limited to English and Afrikaans, but it is apparent that English has evolved as the legal *lingua franca* and de facto most proceedings take place in English.

available at http://www.justice.gov.za/m_speeches/2015/20150519_BudgetVote.html#_sthash.tk6cRv5I.dpuf (accessed 24 Jul 2015).

103 See Media Club South Africa "African languages in the SA courts" available at <http://www.mediaclubsouthafrica.com/land-and-people/1018-indigenous-languages-in-sa-courts> (accessed 24 Jul 2015).

OF NAVAL COURTS MARTIAL AND PRIZE CLAIMS: SOME LEGAL CONSEQUENCES OF COMMODORE JOHNSTONE'S SECRET MISSION TO THE CAPE OF GOOD HOPE AND THE "BATTLE" OF SALDANHA BAY, 1781 (PART 1)

JP van Niekerk*

1 Introduction

When viewed from a slightly unorthodox or novel angle, well-known historical events often acquire a quite unexpected relevance. That is true when the British attempt at capturing the Cape of Good Hope in 1781 is viewed from a legal-historical perspective. The relevant events in that year gave rise to a surprising number of legal consequences, both in England and at the Cape. This contribution attempts to trace and describe some of them.

2 General background

2.1 The Fourth Anglo-Dutch War and British and French interest in the Cape

A series of three naval wars in the course of the seventeenth century between two competing maritime and mercantile powers, the ascendant Dutch and the emerging

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English, became commonly known as the Anglo-Dutch wars, or, to the Dutch, as the English Naval wars. They were mainly fought in the North Sea and the (English) Channel.¹ Essentially trade wars,² they involved conflicting claims, not only by the two states but also by chartered trading companies, merchants and shipowners on both sides, as regards navigation and maritime trade.³ There was also an underlying and growing colonial rivalry.

- 1 The First Anglo-Dutch War, Jul 1652 to Apr 1654, was decided by the final Battle of (Ter Heijde, near) Scheveningen on 31 Jul to 10 Aug 1653. The death there of the popular Adm Maerten Tromp (1597-1653) became emblematic of English victory and Dutch defeat. The Second Anglo-Dutch War, 1665-1667, was preceded in Aug 1664 by attacks on and intermittent skirmishes at the Dutch settlement of New Amsterdam which, after its surrender by Pieter Stuyvesant to the English, was promptly renamed New York. It involved several famous sea battles, and was brought to a culmination by Adm Michiel de Ruyter's (1607-1676) daring naval raid on the Medway, 10-14 Jun 1667, the destruction of several unprotected English warships laid up at the Chatham naval base, and Dutch raiders making off with the naval flagship the *Royal Charles* as a prize. As one historian has observed, "[i]t can hardly be denied that the Dutch raid on the Medway vies with the battle of Majuba in 1881 and the fall of Singapore in 1942 for the unenviable distinction of being the most humiliating defeat suffered by British arms": CR Boxer *The Anglo-Dutch Wars of the 17th Century 1652-1674* (London, 1974) at 39. Some time after the raid, rumours of further Dutch attacks persisted and in his diary for 19 Jul 1667 Samuel Pepys wrote that "[t]he Dutch fleet are in great squadrons everywhere still ... but God knows whether they can do any hurt, or no, but it was pretty news come so fast of the Dutch fleets being in so many places, that Sir W[illiam] Batten [a naval officer, surveyor of the Navy, and colleague of Pepys] at table cried: "'By God', says he, 'I think the Devil shits Dutchmen'": see <http://www.pepysdiary.com> (accessed 22 Jan 2015). The Third Anglo-Dutch War, 1672-1674, resulted in the ageing Dutch fleet under De Ruyter again (this time narrowly and less convincingly) gaining the upper hand over the English fleet, the poor financial situation of the English state and the unpopularity of her French alliance at the time having as much to do with the outcome as De Ruyter's strategic leadership.
- 2 But see, eg, Gijs Rommelse "The role of mercantilism in Anglo-Dutch, 1650-74" (2010) 63 *Economic History Review* 591-611, observing that mercantilism – commercial, industrial and maritime rivalry – was a dominant factor in Anglo-Dutch political relations only until after the second war, after which the always present political and, to a lesser extent, ideological differences gained in importance.
- 3 These claims are reflected in the conflicting views on the international law of the sea advanced by Hugo Grotius in his *Mare liberum* (1609) and, following on the Portuguese cleric Serafim de Freitas's *De iusto imperio Lusitanorum Asiatico* (1625), by John Selden in his *Mare clausum* (1635). Cornelius van Bynkershoek supported a compromise in his *De domino maris* (1702), namely that the high seas should be "free", ie, international territory, and open to and transnavigable by all seafaring trade, while waters within a certain "controllable" distance of land should be "closed" territorial waters belonging to and under the jurisdiction of the coastal state concerned. The Italian Ferdinand Galiami's suggestion that the controllable width of territorial waters should be the range of the most advanced canon of the time, became accepted and hence the three-nautical-mile canon-shot rule. See, generally, Mónica Brito Vieira "*Mare liberum vs Mare clausum*: Grotius, Freitas, and Selden's debate on dominion over the seas" (2003) 64 *J of the History of Ideas* 361-377.

The outcome of these wars confirmed the position of the Dutch as the leading naval and maritime force and dominant mercantile state, at least for the time being.⁴

Although coming more than a century after the last of the previous wars, and only tenuously linkable to them, the next conflict between these protagonists, (then) Britain and the Dutch Republic, was called the Fourth Anglo-Dutch War. On 20 December 1780, Britain declared war on the Netherlands after the latter became involved in the American War of Independence. Given her declining commercial and naval power and having been surpassed by the British in both respects, the Dutch support of the rebellious American colonies by means of her neutral trade caused a reaction from Britain.

According to the Dutch they were merely asserting a recognised right of neutral shipping.⁵ Britain, again, thought they were acting in breach of such a right by illegally smuggling contraband goods to the American revolutionaries while also assisting the French and Spanish who had sided with the Americans.⁶

- 4 There is a wealth of material on these wars. Good points of entry are Boxer (n 1), with an extensive bibliography at 66-68; “De VOC en de Engelse oorlogen” available at <http://www.vocsite.nl> (accessed 9 Jan 2015) which contains a summary of the more important naval battles and a list of the Dutch East India Company ships captured or lost during these wars; and the comprehensive bibliography at <https://anglodutchwars.wordpress.com> (accessed 23 Jan 2015).
- 5 After the American Revolution had in 1776 become the War of Independence, the French in 1778 chose the side of the Americans, leading to the Anglo-French War being declared in March of that year. Other European states were forced to take sides. The Dutch, aware of the potential risk to her international maritime trade and of her inability to oppose the larger European powers, declared her neutrality, hoping to continue trading with both sides.
- 6 The old rule of “free ships, free goods” had been accepted between England and the Netherlands in their Treaty on Commerce and Navigation of 1674. The rule recognised the right of a neutral to convey goods to parties on both sides of a conflict; a belligerent had to consider cargo on board a ship sailing under a neutral flag as neutral cargo, even if consigned to another belligerent. Excluded from the rule were contraband goods, ie, at first, weapons and necessities of war, canon, shot, gunpowder, and horses. Visitations (detention and searches) of neutral ships at sea enforced the rule and in the event of transgressions, neutral ships and prohibited (contraband) cargoes were captured and declared lawful prizes to the captors. In the run-up to the Fourth Anglo-Dutch War (see, eg, Alice Clare Carter “The Dutch as neutrals in the Seven Years’ War” (1963) 12 *International & Comparative LQ* 818-834 for the political (diplomatic) and judicial (international law) background to the (contested) Dutch neutrality in the eighteenth century), especially during the Seven Years’ War, 1756-1763), the British adopted a wide definition of contraband: for them it included not only weapons but also naval stores and shipbuilding materials such as iron, wood, sails, and rope. The Dutch in their own interest continued to regard contraband in its original, narrow sense. The British sought to prevent the Dutch supplying her enemies with militarily strategic supplies while the latter wished her neutral maritime trade to be restricted as little as possible. Confrontations between the Royal Navy and Dutch merchant ships at sea were the result as the British sought to enforce her prohibitions and exercise her – now contested – right to search neutral shipping for what she considered to be “contraband”. There were also clashes with British privateers: on the scale and operation of British privateering during this period generally, see David J Starkey “A restless spirit: British privateering enterprise, 1739-1815” in David J Starkey, ES van Eyck van Heslinga & JA de Moor (eds) *Pirates and Privateers. New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries* [*Exeter Maritime Studies*] (Exeter, 1997) at 126-140.

The Fourth Anglo-Dutch War itself was a relatively low-key affair.⁷ There was only one minor but bloody sea battle, at Dogger Bank in August 1781, where both sides suffered heavy losses, and the armistice concluded in January 1783 was followed by a peace treaty in 1784.

The outcome of the War, for which they were both navally and economically totally unprepared, was disastrous for Dutch overseas trade and led indirectly to the ruin of the Dutch East India Company (the “DEIC”).⁸ Britain, again, obtained the important right to free trade on East India and around the East Indian archipelago which ultimately put an end to many sources of Dutch colonial prosperity, such as the export of wheat from the Cape to both the East and the Netherlands.⁹

See, eg, Jeroen ter Brugge “Onrust voor de storm, de kaping van de *Gouden Roos* in 1779” (2011) 26(3) *Leidschrift historisch tijdschrift* [issue title: *Een behouden vaart? De Nederlandse betrokkenheid bij kaapvaart en piraterij*] 131-149 as regards the search (involving plunder) and detention in the Atlantic of the merchantman the *Gouden Roos* in Sep 1779 and her eventual release on the order of an American court. Her Dutch owners sought compensation for the losses suffered as result of her illegal detention and capture in the High Court of Admiralty in London, arguing that the search and detention were illegal because there were no shipbuilding materials or naval stores on board. After several delays, they relinquished their claim sometime in 1782.

The Dutch, on their part, vigorously contested the validity in international law of the expanded view of “contraband”, but, given the declining state of her navy, could not place all her merchantmen under the protection of naval convoys – the introduction of a system of “onbeperkt convooi” proved practically unworkable – and could ultimately do little more than protest the actions of the British. See, generally, ES van Eyck van Heslinga “De vlag dekt de lading. De Nederlandse koopvaardij in de Vierde Engelse Oorlog” (1982) 1 *Tijdschrift voor zeeschiedenis* 102-113.

7 By far the majority of Dutch losses – 324, mainly small, merchantmen in total – occurred during the first three months of the War, most probably due to the fact that home-bound Dutch merchant ships could not rely on any protection from the depleted Dutch navy and were in any event unaware of the outbreak of war and unprepared to defend themselves against the numerous British naval and privateering vessels already on the alert because of the war with France: see Jan van Zijverden “The risky alternative: Dutch privateering during the Fourth Anglo-Dutch War, 1780-1783” in Starkey, Van Eyck van Heslinga & De Moor (n 6) 186-205 at 189-190. As will be recounted shortly, four *Indiamen* forming part of the home-bound fleet of 1780, having left the East Indies before news of the outbreak of war had arrived there, were lost under these circumstances at the Cape in 1781, as were another out-bound vessel. But the Dutch quickly took steps to prevent such losses. The Dutch East India Company outbound-fleet of mid-1781 sailed secretly and in a convoy accompanied by several naval warships, the return fleet of 1782 remained in Batavia, and the fleets of 1783 were cancelled for fear of falling prey to British naval or privateering vessels (see, also, Anna J Boeseken “Die Nederlandse kommissaris en die 18de eeuwse samelewing aan die Kaap” (1944) 7 *Argiefjaarboek vir Suid-Afrikaanse Geskiedenis* at 231). By 1782 Dutch shipping had virtually returned to its normal, pre-war volume, mainly because of a resort to neutral flags.

8 See, eg, CR Boxer *The Dutch Seaborne Empire 1600-1800* (London, 1973, repr 1988) at 124-125.

9 *Idem* at 282. For a Dutch perspective on the War, see, eg, JC Mollema *Geskiedenis van Nederland ter zee* vol 3 (Amsterdam, 1941) at 271-310.

However, there was a new dimension to the Fourth Anglo-Dutch War: the belligerents' colonial interests.¹⁰

Gaining control of Dutch colonies – the Cape of Good Hope, Ceylon, and the Dutch East Indies (Indonesia) – became of strategic and pressing importance to Britain, the more so because of the perceived threat to its trade on Asia from France. Possession of the Cape, in particular, became crucial to both now that the Netherlands were no longer neutral but on the side of the French. The French already had naval bases on Mauritius and Reunion, and showed a renewed interest in India. They made frequent use of the Dutch settlement at the Cape as a port of call for their East India trade and to provision their bases and settlements in the Indian Ocean. For that purpose they wished to protect the small Dutch garrison there against British attack, especially as the weak Dutch navy were largely unable to do so. For the British, too, the Cape's victualling capacity was crucial: the Dutch settlement supplied not only passing British ships but also her base on St Helena, where warship and merchant fleets rendezvoused and re-supplied on their way to and from the East Indies.¹¹ “[T]he Cape was a prize of decisive importance for both Britain and France in their struggle for supremacy in the Indian Ocean.”¹²

In short, as a result of the end of Dutch neutrality with her entry into war against Britain in 1780, it became crucial for both the British and the French to reach the Cape first to secure their respective interests.

2.2 Johnstone and Suffren and the race for the Cape

Soon after the outbreak of the war with the Netherlands, Britain sent a squadron of naval ships accompanied by troops on what was intended to be a secret mission to the Cape of Good Hope.¹³ The aim was to capture the Cape from the Dutch and to occupy the settlement for Britain.

- 10 HM Scott “Sir Joseph Yorke and the waning of the Anglo-Dutch alliance, 1747-1788” in Bob Moore & Henk van Nierop (eds) *Colonial Empires Compared. Britain and the Netherlands, 1750-1850* [Papers delivered at the Fourteenth Anglo-Dutch Historical Conference, 2000] (Aldershot, 2003) at 11-32 refers at 13 to the War as “when Britain’s far superior fleet swept its rotting Dutch counterpart from the seas, facilitating a series of British seizures of Dutch shipping and conquests of colonial territory”.
- 11 On the role, importance and value of the Cape settlement in Anglo-French commercial and colonial rivalry in, and *en route* to, the East (India) at this time, see, eg, Vincent Harlow *The Founding of the Second British Empire, 1763-1793. Vol 1: Discovery and Revolution* (London, 1952) at 106-125 and 132-135.
- 12 LCF Turner “The Cape of Good Hope and Anglo-French rivalry, 1778-1796” (Apr 1966) 12 *Historical Studies: Australia and New Zealand* 166-185 at 166. Even after the British failure to capture the Cape in 1781, the English East India Company urged the government to make another attempt, a suggestion that was soon rejected: see *idem* at 173-174 for the relevant correspondence.
- 13 On the Cape mission, see generally G Rutherford “Sidelights on Commodore Johnstone’s expedition to the Cape. Part I” (1942) 28 *Mariner’s Mirror* 189-212 and *idem* “Sidelights on Commodore Johnstone’s expedition to the Cape. Part II” (1942) 28 *Mariner’s Mirror* 290-308; Robert Beatson *Naval and Military Memoirs of Great Britain from 1727 to 1783* vol 5 (London, 1804, repr 1972) at 311-312.

The expedition was under the command of Commodore George Johnstone, a former colonial governor who had limited experience in naval matters but was politically well connected.¹⁴

Johnstone did not sail under Admiralty orders but under the authority of the Secretary of State.¹⁵ Although responsible solely to his political masters, Johnstone seems to have had a relatively free hand in determining how the principal aim of the expedition had to be achieved. In what was to become a central theme of the mission and his involvement in it, Johnstone, who was at the time in command of the British

- 14 Johnstone (1730-1787) had a patchy career as a naval officer. While diligent and fearless (he was praised in dispatches for bravery in encounters with the enemy and in capturing prizes), he was also at times insubordinate and censured for disobedience (eg, in 1747 he was involved in a duel with Capt Cruikshank under whom he had served as a midshipman on the *Lark*, and in 1757, having killed the captain's clerk in a duel, he was court-martialled for disobeying orders and found guilty, but in view of his earlier record of gallantry merely reprimanded and ordered to resume his duties). In Nov 1763, his political contacts resulted in the lucrative appointment as governor of the newly acquired but short-lived British colony of West Florida, a position curtailed after little more than two years as result of clashes with both the local military establishment and his superiors in London. Johnstone, who called himself governor rather than captain (he was, after all, "a sailor turned politician": Harlow (n 11) at 110), then continued his political career as a Member of Parliament until 1780. But, after nineteen years ashore, he returned to his former career when, in Nov 1779, he was offered and accepted the naval commodoreship of a squadron based in Lisbon. This appointment was preceded and may have been facilitated by suggestions and requests he made in Jun 1779 to the Admiralty for what he called "some trifling alterations to the establishments of the Navy which from repeated experience I have found very beneficial to the easy working of Ships of War": see DB Smith "Commodore Johnstone's improvements, 1799" (1930) 16 *Mariner's Mirror* at 85-86. It was a fruitful appointment in that as flag officer from Dec 1779 to Nov 1781 Johnstone, although ashore for most of 1780, shared in a sizeable sum of prize money resulting from several enemy captures by the cruisers in his squadron (see, further, par 3 2 2 in Part 2 of this article for one of his claims in this regard). Then, at the beginning of 1781, he was given command of a secret expedition to South America which promised rich prizes but which was, after some reinforcement, diverted against the Dutch settlement at the Cape of Good Hope. On Johnstone, see, further, Robin FA Fabel *sv* "Johnstone, George" in *Oxford Dictionary of National Biography* (hereafter *ODNB*) (online ed Jan 2008, accessed 8 Jan 2015); RFA Fabel *Bombasts and Broadside: The Lives of George Johnstone* (Tuscaloosa, Ala, 1987); RFA Fabel "Governor George Johnstone of British West Florida" (1976) 54 *Florida Historical Quarterly* 497-511; J Ralfe *The Naval Biography of Great Britain ...* vol 1 (London, 1828) at 364-373.
- 15 The British government had diverted a planned privateering expedition to South America to the Cape. As Rutherford "Part I" (n 13) observes at 203, "the genesis of the expedition was political". The need for secrecy may account for the fact that a mere commodore, placed in charge of what was initially a privateering expedition to South America but then, on the outbreak of the war with the Dutch, became diverted to the Cape, remained in command, albeit of a somewhat strengthened fleet, even though the nature of the expedition had been significantly altered from a maritime and strategic point of view. Beatson (n 13) at 311 observes that the outbreak of the war caused the British government "to lay aside the expedition designed against the Spanish colonies, and to substitute in its place, an attack on the settlement at the Cape of Good Hope".
- 16 Rutherford "Part I" (n 13) at 200, quoting (Mar 1781) *Political Magazine*.



Portrait of Commodore Johnstone, Caird Collection, National Maritime Museum, Greenwich; BHC2808: half-length portrait in oil of Johnstone, in captain's uniform; from an original painting by Henry Raeburn, painted 1768-1774. There is also an enlargement from the miniature of Raeburn by John Bogle in the Scottish National Portrait Gallery, Acc no PG 2523, watercolour on ivory, height 9,9cm, bought in 1982 from a Christies' auction.

naval station at Lisbon, accepted his orders with some reluctance as they apparently meant that he would lose out on an anticipated opportunity to share in prize money: he “sailed in ill-humour [on the expedition to the Cape], saying he had lost £100 000 by a change of his orders”.¹⁶

Delayed by stormy weather and other factors, the squadron under Johnstone sailed from Spithead only on 12 and 13 March 1781. It was a sizeable company of ships, comprised of forty-six naval vessels (including five ships of the line and

17 The ships of the line (ie, warships mounting at least fifty heavy guns) were HMS *Hero* (seventy-

four frigates, a fireship and a bombship, and a number of light armed cruisers and storeships) and thirteen East Indiamen sailing under convoy.¹⁷

Also in the squadron were eleven transport ships¹⁸ carrying not only supplies and equipment, but also three battalions of more than 2 500 soldiers as well as a small detachment of artillery, all under the command of General William Medows.¹⁹

The fact that, nominally, there were both a naval and a military commander on the expedition to the Cape would prove strategically problematic and also give rise to at least some of the legal issues arising from it.

Although the British took the first steps in preparing to reach and attack the Cape, the French did not get left behind. Having obtained information of the British

four guns, third rate, built in 1759, commanded on the expedition by Capt James Hawker); HMS *Monmouth* (sixty-four guns, third rate, built in 1772, Capt James Alms snr); HMS *Isis* (fifty guns, built in 1774, Capt Evelyn Sutton); HMS *Jupiter* (fifty guns, fourth rate, built in 1778, Capt Thomas Pasley); and the flagship – she carried the flag of Johnstone, the commander of the expedition – HMS *Romney* (fifty guns, fourth rate, built in 1762, Capt Rodham Home). Among the other ships in the squadron, the following will feature later on: HMS *Active* (a thirty-two-gun frigate, built in 1780, Capt Thomas Mackenzie: see, further, at n 73 below); HMS *Porto* (a sloop, commanded initially by the Hon Thomas Charles Lumley until 22 Apr 1781, and then by George Linzee: see, further, n 367 in Part 2 of this article); HMS *Rattlesnake* (a cutter armed as a sloop of war, which but a few days into the expedition on 17 Mar 1781 chased a Dutch merchantman and captured her after a sharp action: see George McCall Theal *History of South Africa [1691-1795]* (London, 1888) at 249); HMS *Lark* (an armed cutter under Lieut Philip D’Auvergne: see, further, n 99 below); and HMS *Infernal* (a fireship, under Henry d’Esterre Darby: see, further, nn 29 and 177 below).

On the ships in Johnstone’s squadron, see, further, eg, William Laird Clowes *The Royal Navy. A History from the Earliest Times to the Present* vol 3 (London, 1898) at 545-546; Rodney MS Pasley (ed) *Private Sea Journals: 1778-1782: Kept by Admiral Sir Thomas Pasley* (London, 1931) at 121-122; Rutherford “Part I” (n 13) at 204-205; and (Fri 16 Mar 1781) no 1250 *Lloyd’s List*. More general sources on British naval vessels include Michael Phillips’ “Ships of the old Navy” available at <http://www.ageofnelson.org> (accessed 16 Jan 2015) and <http://threedecks.org/index> (accessed 30 Jan 2015). The discrepancy in the number and identity of the vessels in Johnstone’s squadron in these and other sources must be ascribed to the fact that ships were detached from and attached or re-attached to the squadron at various stages of the voyage to the Cape.

18 Four of them were privately-owned vessels on hire to the military, and among the others was HMS *Resolution*, one of Capt James Cook’s ships on his second expedition 1772-1775: see, further, Alistair MacLean *Captain Cook* (London, 1972) and Frank McLynn *Captain Cook. Master of the Seas* (New Haven, Conn, 2011).

19 Sir William Medows (also spelt Meadows) (1738-1813) was made a colonel of the 89th Foot in 1780 and in Mar 1781, as maj genl for the expedition, he commanded the troops which sailed for the Cape with Johnstone. Although not always successful as a military commander, Medows was well liked and admired by his troops; he resigned to the soldiers under him his share of the prize money due after the attack on Tipu Sultan’s capital of Seringapatam in Feb 1792, worth nearly £5 000. In 1788 Medows was appointed governor of Madras, and in 1790 governor of Bombay. See, further, Alastair W Massie *sv* “Medows, Sir William” in *ODNB* (online ed Jan 2008, accessed 8 Jan 2015).

secret plans through spies resident in London,²⁰ they quickly ordered an assembled naval expedition to the Indian Ocean under Admiral Suffren²¹ to head first for the Cape. Smaller than its British counterpart,²² the French squadron was likewise accompanied by a military compliment of some 1 200 troops of the Luxemburg and Pondicherry regiments, the latter under command of an Irishman, Colonel Thomas Conway. Suffren was instructed to beat the British to the Cape, to disembark the troops at and in defence of the allied Dutch settlement, and then to sail on to reinforce the French fleet in the Indian Ocean. The French squadron sailed from Brest a mere nine days after Johnstone had left England, on 22 March 1781.

Thus were the two main and contrasting protagonists involved in the race for the Cape – “a trial of speed, in which the possession of the Cape was to be the prize of the winner”²³ – Johnstone, a navally inexperienced politician, and Suffren, an experienced naval officer and brilliant tactician and strategist.²⁴

En route to the Cape, though, there occurred an event that predetermined the outcome of the race: the confrontation at Porto Praya.²⁵

2 3 The battle of Porto Praya

Johnstone first made for the neutral Portuguese harbour of Porto Praya in the Cape Verde Islands, to resupply, take on water and to allow slow transports to catch up

- 20 One of them, François Henri de la Motte, was arrested in Jan 1781 and sentenced to be executed for high treason and for carrying on a treasonable correspondence with the enemy. He was hanged in London on 27 Jul 1781 – ultimately for fifty-seven minutes – but, as directed by his sentence, not until dead, and was then cut down, beheaded, disemboweled, and quartered. A report on De la Motte’s trial and execution is contained in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature* sv “Principal Occurrences” at 81-82.
- 21 Pierre André de Suffren (also spelt Suffrein, Suffrin) de Saint Tropez (1729-1788) was one of France’s greatest but least liked naval commanders. He went on from the Cape inconclusively to contest established British naval power in the Indian Ocean. See generally Howard Ray Killion *The Suffren Expedition: French Operations in India during the War of American Independence* (DPhil thesis, Duke Univ, 1972) at 193 *et seq.* GJ Schutte sv “De Suffren Saint-Tropez, Pierre André” in *Dictionary of South African Biography* (hereafter *DSAB*) vol 1 (Cape Town, 1968) at 222-223 refers to him as the “defender of the Cape”.
- 22 The five relatively new and better armed ships of the line in the French squadron were the flagship *Héros* (seventy-four guns); *Annibal* (seventy-four guns, commanded by Capt De Trémignon); *Artésien* (sixty-four guns, under Capt De Cardaillac); *Vengeur* (sixty-four guns, Capt De Forbin); and *Sphinx* (sixty-four guns, Capt De Duchillon). A weakness of the French squadron was the absence of any frigates. See, further, on the French vessels, eg, Clowes (n 17) at 545-546, Theal (n 17) at 249; Rutherford “Part I” (n 13) at 205-206.
- 23 Theal (n 17) at 248.
- 24 Rutherford “Part I” (n 13) at 205 points out that the only features they had in common were age and stoutness.
- 25 On the battle there, see, eg, Rutherford “Part I” (n 13) at 200-212 (on the voyage to Porto Praya), 290-298 (on the battle itself) and 299-308 (on subsequent events); William B Willcox “The Battle of Porto Praya, 1781” (1945) 5 *American Neptune* 64-78; Theal (n 17) at 249-252; Turner (n 12) at 170-172; Clowes (n 17) at 546-549 (there is a map at 547 illustrating the battle positions); AT

with the rest of his squadron. His ships started arriving in drips and drabs from 10 April 1781. Despite local intelligence of the anticipated arrival of French ships that had to be provisioned, they anchored haphazardly in the Porto Praya roads, ill prepared to fend off and unprotected against any enemy attack.²⁶

The French, too, had decided to put into Porto Praya for watering and provisioning. After an advance vessel had informed him of Johnstone's presence there, and knowing the latter's ultimate destination, Suffren decided to take the initiative, leave his convoy behind, and attack with his warships in the hope of destroying or at least disabling the unsuspecting British contingent.

On 16 April 1781, the French attacked. Confused close action followed for five hours, but without any side gaining the upper hand.²⁷

When the superior British force had gathered itself, with the element of surprise gone and with two of his naval commanders killed in action²⁸ and the loss or capture of one of his damaged warships threatening, Suffren retreated to sea, content to take with him a few prizes.²⁹

The British suffered relatively little damage, but Johnstone delayed any retaliation which was in any event made difficult by the position of his warships.

Mahan *The Major Operations of the Navies in the War of American Independence* (New York, 1916, repr 1969) at 235-238 (with a map at 236); Beatson (n 13) at 313-320. Johnstone's version of the events in a letter to the Secretary of State dated 30 Apr 1781 was reprinted in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature* sv "Principal Occurrences" at 72-78.

- 26 Thus, the transports and merchantmen were anchored outside the port while the flagship *Romney* and the other men-of-war were inside the port from where they could not fire freely on any attackers. Pasley (n 17) at 299 refers to the "slovenly arrangement" of the British ships; John Campbell *Naval History of Great Britain* ... vol 6 (London, 1813) observes at 43 that Johnstone's vessels "were suffered to lie at anchor in a very confused and promiscuous manner"; and Beatson (n 13) at 313 describes the fleet as having come to anchor in "the most intermixed manner". Further, a large contingent of experienced seamen were ashore, on leave or performing tasks related to replenishing, while the decks of the warships were laden with cargo, casks and livestock. Also, Johnstone had not sent a vessel cruising to keep a lookout for and to warn of approaching enemy vessels.
- 27 According to NAM Rodger *The Command of the Ocean. A Naval History of Britain 1649-1815* (London, 2005) at 349, "[n]either officer showed to great advantage; each had warning of the others's presence but neglected to inform his captains, so that both attack and defence were muddled".
- 28 Captain De Trémignon of the *Annibal* and Capt De Cardaillac of the *Artésien* were mortally wounded at Porto Praya. British sailors boarded the latter ship and sought unsuccessfully to capture her. However, they did take twenty-five prisoners and from them learnt that the French vessels were destined for the Cape: see Theal (n 17) at 250.
- 29 These included two Indiamen. The vessels were all recaptured within a few days. The French also took the fireship *Infernal* (see n 17 above), but later abandoned her on the British approaching. She returned to the squadron with a skeleton crew, minus Capt Henry d'Esterre Darby and five seamen and nine soldiers who had been taken prisoner of war. The French left Darby at the Cape, from whence he returned to England. See, further, at n 177 below for Darby's court martial.

He laid the blame for the delay of almost three hours at the door of Captain Sutton, of the HMS *Isis*. This was to have significant legal repercussions.³⁰ By the time the British eventually put to sea in pursuit of the retreating French who were only a short distance away with a damaged warship in tow, darkness had fallen, the chase was abandoned, and the enemy managed to slip away.³¹

Ultimately Johnstone's conduct at Porto Praya came in for severe criticism: "[T]he commodore was greatly censured for his want of foresight, and for the disposition of squadron: ... he totally neglected the first precautions every prudent man, well knowing his profession, ought to have taken in time of war."³²

Because of the indecisive action at Porto Praya – it was “a drawn battle at most”³³ – the race for the Cape was in theory still on.

However, despite having learnt of Suffren's orders but assuming wrongly that he would send part of or go with his squadron to South America for repairs and supplies, Johnstone stayed a further fortnight at Porto Praya to repair relatively minor damage to his ships. He only sailed for the Cape on 2 May. Suffren, again, sailed directly for the Cape, effecting temporary repairs *en route* and in fact towing the damaged and demasted warship all the way there.

With a fair wind at his back, Suffren arrived at the Cape in his flagship *Héros* on 21 June, with the rest of the slower transport ships in his squadron entering False Bay a few days later. There he disembarked the troops and strengthened the settlement against attack.³⁴

By his prior arrival, Suffren for all intents and purposes frustrated the very object of the British expedition: the Cape would remain in Dutch hands or at least not fall into British hands.³⁵

At home, Johnstone himself was widely blamed for the failure of his expedition, maybe even more so because he would nevertheless manage to turn it into an

30 See, further, par 3 1 2 *et seq* below.

31 See, further, Isaac Schomberg *Naval Chronology; or an Historical Summary of Naval and Maritime Events* (London, 1802) vol 2 at 64-65, pointing out that a further factor causing Johnstone to call off the pursuit and return to port was that he had left most of his squadron behind without orders to conduct the convoy to a proper rendezvous, raising the fear of enemy doubling around and attacking it.

32 Ralfe (n 14) at 370.

33 Willcox (n 25) at 67.

34 On Suffren's voyage to, and stay at the Cape, see Killion (n 21) at 248-251; Kathleen M Jeffreys (ed) *Kaapse archiefstukken ... 1781, 1782 Deel 1 en 2, 1783 Deel 1...* (Cape Town, 1930, 1931, 1935, 1938) (hereafter *Kaapse archiefstukken*) 1781 at 251-252 (Dagregister, 21 and 22 Jun 1781); *idem* 1781 at 252 (Dagregister, 24 Jun 1781); *idem* 1781 at 254 (Dagregister, 3 Jul 1781: the troops marched overland and arrived in Cape Town on 3 Jul “met vliegende vaandels en slaande trommels”); and HCV Leibbrandt *Precis of the Archives of the Cape of Good Hope. Requesten (Memorials) 1715-1806*, vol 1: A-E and vol 2: F-O (Cape Town, 1905), vol 3: P-S (Cape Town, 1988), vol 4: T-Z and vol 5: Index (Cape Town, 1989), the volumes with continuous pagination, at 121-123.

35 Beatson (n 13) at 324-325 observes that the “timely arrival of the French armament saved the settlement at the Cape of Good Hope from changing masters”. Suffren remained at the Cape until it was confirmed that Johnstone's squadron had departed and then made his way to Mauritius and

apparently lucrative personal venture.³⁶ Although no formal official action was ever taken against him, the naval establishment and even his political contacts were not supportive and his subsequent career was unremarkable.³⁷

2 4 The position at the Cape

The political situation at the Cape at the time was turbulent.³⁸ Local defences were also severely defective,³⁹ while there was no naval protection in 1781 for the returning DEIC fleet rounding the Cape.⁴⁰

News of the outbreak of war between Britain and the Netherlands was delivered by the French frigate *Sylphide* towards the end of March 1781 and thus after both

the Indian Ocean where in 1782 and 1783 he clashed in a number of severe but indecisive naval encounters with the British under Adm Hughes.

36 Ralfe (n 14) at 372 refers to his “inglorious but lucrative expedition”.

37 See, again, n 14 above for his biographical sources.

38 As a result of dissatisfaction with the conduct of local Company officials, including the governor and, in particular, the fiscal Boers (about whom more in n 393 in Part 2 of this article), a disgruntled group of free burghers (the “Cape Patriots”, as they were subsequently labelled) had in 1779 sent a delegation to the Netherlands to present their grievances about local conditions to the DEIC: see, eg, Theal (n 17) at 230-238. The governor, Plettenberg (1739-1793), was a law graduate from the University of Utrecht, a member of the Court of Justice in Batavia 1764-1766, the independent fiscal at the Cape Oct 1766-Aug 1771, acting head of the Cape government Sep 1771-May 1774, and governor May 1774-Feb 1785. For details of his tenure at the Cape, see Theal (n 17) at 220-270; GC de Wet & GJ Schutte *sv* “Van Plettenberg (Plettenburg), Joachim Ammema (Amama)” in *DSAB* vol 5 (Cape Town, 1987) at 820-823.

39 The local garrison consisted of about 500 regulars under the command of Capt Robert Jacob Gordon (he had arrived in Jun 1777, became commander in 1780 and was promoted to col in Mar 1782). Although some 3 000 burghers could theoretically be called up for military service, they were not all readily available and were in any case reluctant to leave their farms open to attack by local tribesmen: see Theal (n 17) at 228-229, 239. The DEIC was accordingly forced to hire mercenary units, mainly French, to protect the settlement and to bolster the garrison. The French regiments landed by Suffren, eg, built new defensive batteries: see Andrew B Smith “The French period at the Cape 1781-1783: A report on excavations at Conway Redoubt, Constantia Nek” (1981) 5 *Military History J* 107-113; SA Cannon Association “The French period at the Cape of Good Hope” available at <http://www.sa-cannon.com> (accessed 31 Jan 2015); and Thean Potgieter “Maritime defence of the Cape of Good Hope, 1779-1803” (2003) 48 *Historia* 283-308. The Pondicherry regiment remained at the Cape from Jul 1781 until the conclusion of the Anglo-Dutch War in 1783; the Swiss De Meuron Regiment followed in 1783 and stayed on until 1788, long after the end of hostilities. See, further, on the French and other foreign military influx and influence during this period, Nigel Penn “Soldiers and Cape Town society” in Nigel Worden (ed) *Cape Town between East and West. Social Identities in a Dutch Colonial Town* (Johannesburg, 2012) 176 at 188-190; Turner (n 12) at 167-175. On the De Meuron Regiment, see Adolphe Linder *The Swiss at the Cape of Good Hope 1652-1971* (Basel, 1997) at 169-171 and Nigel Penn “The Meuron Regiment at the Cape, 1783-1788” (2012) 66 *Quarterly Bulletin of the National Library of South Africa* 13-29.

40 See Theal (n 17) at 246-248. The Dutch navy was employed mainly to escort merchant ships from the East Indies on the last part of their voyage home and given Dutch neutrality seldom ventured as far as or beyond the Cape.

Johnstone and Suffren had left Europe for the Cape. News of their departure reached the Cape only on 12 May by the French ship *Fine*. Seven anxious weeks later, on 20 May, another French frigate, the privateer *Sérapis*,⁴¹ arrived at the Cape with news of the imminent arrival (eventually only on 21 June) of Suffren's fleet with troop reinforcements for the Cape.

The local government also received a missive from the Dutch ambassador in France, dated 29 December 1780, in which he advised the taking of necessary defensive measures to protect not only the local settlement against British attack, but also all Dutch shipping there.⁴² A letter from the Amsterdam Chamber of the DEIC, dated 12 January 1781, and received at the Cape on 11 June 1781, sent the governor a copy of the British declaration of war and drew his attention to the danger of British naval and privateering attacks.⁴³ Later on, instructions also arrived on how to deal with foreign shipping and goods arriving at the Cape in order to prevent any transgression of treaties the Netherlands had with allied and neutral states during the war with the British.⁴⁴

- 41 The famous British frigate HMS *Serapis* was captured in Sep 1779 by Capt John Paul Jones of the USS *Bonhomme Richard* in the North Sea during the American Revolutionary War. She was then sold to the French and reconditioned as the privateer *Sérapis* and sent out in operations against the British in the Indian Ocean at the end of Feb 1781. She was lost in Jul 1781, shortly after her departure from the Cape, off the coast of Madagascar when a sailor accidentally dropped his lantern into a tub of brandy! Her wreck was only discovered in Nov 1999: see Willcox (n 25) at 72 n 20, Rutherford "Part I" (n 13) at 208-209; and James C Bradford *sv* "Jones, John Paul" in *ODNB* (2004 online ed, accessed 4 Mar 2015).
- 42 See *Kaapse archiefstukken* (n 34) 1781 at 294 (Incoming Letters, letter from the Dutch ambassador in France, dated 29 Dec 1780, received at the Cape 31 Mar 1781).
- 43 *Idem* 1781 at 324 (Incoming Letters, letter from the Amsterdam Chamber). It pointed out "dat lettres de marque en Represaille stonden te worden uitgegeeven [by the British government], tot het aanhouden, aantasten en neemen van Scheepen en goederen aan Hun Hoog Mogende of de Ingezeetenen van dezen staat toebehoorende, soo als de uitgave van de dusdanige brieven dan ook reeds werkelyk plaats heeft gehad".
- 44 *Idem* 1783 *Deel 1* at 351-352 (Incoming Letters, letter from the Council at Batavia, dated 27 Sep 1782, received at the Cape 23 Feb 1783, instructing, in accordance with the basic principle of "vry Schip vry goed ... volgens welke vyandelyke goederen in de Scheepen van vrienden vry zyn", that "geen goederen van de Engelsschen, die in Scheepen, of Vaartuigen van onseydigen, het zy Europese of Inlandse, gevonden worden, aanteslaan of de Scheepenen Vaartuigen, waar in dezelve geladen zyn, deswegens te besetten en bekommeren", unless the goods consisted of such as were expressly and specially declared by the treaties "voor Contrabande en Confiscabel"). See, also, *idem* 1783 *Deel 1* at 398 (Incoming Letters, letter from the Lords Seventeen in Amsterdam, dated 7 Dec 1782, received at the Cape 8 Aug 1783, concerning neutral ships chartered to convey goods to and from the Cape that came to be delayed there because of the war, and instructing the local government to observe the terms of the relevant charterparties ("Certepartijen") closely and to be careful not to do anything that would be against the wishes of the state with whose subjects "die Contracten van bevragting zyn aangeaan").

The arrival of news of the outbreak of war had immediate local consequences: arriving British ships were captured,⁴⁵ while British sailors present at the Cape were placed on board Dutch vessels as prisoners of war so that they could be prevented from communicating with approaching British vessels. British visitors who happened to be present in the settlement, as well as some naval personnel, were sent to outposts for the same reason.⁴⁶

All Dutch ships in the roadstead were immediately ordered to remain at the Cape until convoys could be arranged, a dim prospect as a relatively small number of serviceable naval escorts were available.

The approaching winter meant that Table Bay was unsuitable for their anchorage, while Simon's Bay could not be defended effectively against a British naval attack. Four of the smaller Dutch Indiamen on their way to Europe were accordingly sent to the relatively safe Hout Bay.⁴⁷ However, the larger ships, it was considered, could not be accommodated there. There were six of them at the Cape at the time, five of them arriving at the Cape roadstead on or within a few days of 30 March,⁴⁸ fully laden from the East Indies and forming part of the homeward-bound fleet, and one of them *en route* to the East. All would play a central role in what was to follow. The Dutch ships involved were:⁴⁹

- 45 See, eg, *idem* 1781 at 231, 233 and 234 (Dagregister, 1, 3, 4 and 6 Apr 1781) on the capture by the French vessels present at the Cape of the brig *Betsy* that had arrived in Table Bay from St Helena and had unknowingly dropped anchor there: see, further, Theal (n 17) at 247-248. Other ships (eg, two Danish Indiamen) were prohibited, on the advice of Suffren, from sailing north from the Cape to prevent information of the French arrival reaching the advancing British fleet or their base at St Helena: see *Kaapse archiefstukken* (n 34) 1781 at 98 (Council of Policy Resolution, 3 Jul 1781).
- 46 See *idem* 1781 at 44-45 (Council of Policy Resolution, 2 Apr 1781); see, further, in n 61 below.
- 47 See *idem* 1781 at 76 (Council of Policy Resolution, 1 May 1781: the *Batavia*, *Amsterdam*, *Morgenster*, *Indiaan* were sent there as would all still to be expected return ships); *idem* 1781 at 108 (Council of Policy Resolution, 23 Jul 1781). These Indiamen ultimately escaped British capture and subsequently arrived safely in the Netherlands: see Mollema (n 9) at 278. Also in Hout Bay with the four Indiamen, was a solitary Dutch cruiser, *Jagtrust*: see Potgieter (n 39) at 290.
- 48 See *Kaapse archiefstukken* (n 34) 1781 at 230 (Dagregister, 30 Mar 1781).
- 49 The following details of these ships were obtained from Resources Huygens ING "The Dutch East India Company's shipping between the Netherlands and Asia 1595-1795: Overview of voyages" available at <http://resources.huygens.knaw.nl> (accessed 13 Jan 2015); "De VOC Site" available at <http://www.vocsite.nl/schepen/> (accessed 9 Jan 2015); JR Bruijn, FS Gaastra & I Schöffers *Dutch Asiatic Shipping in the 17th and 18th Centuries. Vol 3: Homeward-bound Voyages from Asia and the Cape to the Netherlands (1597-1795)* (The Hague, 1979) [vol 167 *Rijks geschiedkundige publicatiën. Grote serie*] *passim*; and Leibbrandt (n 34) *passim*. The spelling of the names of the various Dutch ships and their commanders is wildly inconsistent, not only, as may be expected, in English sources (see, eg, Schomberg (n 31) vol 4 at 66n and vol 5 at 67 and (Tue 16 Oct 1781) no 1311 *Lloyd's List* sv "Marine List"), but even in Dutch ones.

- *Hoogkarspel*,⁵⁰ 850 tons, built for the Delft Chamber of the DEIC in 1771, under Captain Gerrit Harmeyer⁵¹ – who was also the flag officer (“wimpelvoerder”) of the return fleet – *en route* from China, with a cargo for the Delft Chamber valued on invoice at Dutch fl516 911;
- *Honkoop*,⁵² 1 150 tons, built for the Zeeland Chamber in 1770, Captain Alex Landt,⁵³ also *en route* from China, with a cargo for the Zeeland Chamber valued at Dutch fl657 355;
- *Middelburg*,⁵⁴ 1 150 tons, built for the Zeeland Chamber in 1775, commanded by Captain Justus van Gennep,⁵⁵ *en route* from China, with a cargo for the Amsterdam Chamber with an invoice value of Dutch fl643 543;
- *Paarl* (Pearl),⁵⁶ 1 110 tons, built for the Amsterdam Chamber in 1778, Captain Dirk Corneliszoon Plokker,⁵⁷ *en route* from China, with a cargo worth Dutch fl658 673 for the Amsterdam Chamber; and
- *Dankbaarheid* (Gratitude),⁵⁸ 850 tons, built for the Rotterdam Chamber in 1772, Captain Hendrik Steedsel,⁵⁹ *en route* from Bengal with a cargo⁶⁰ for the

50 Various spellings are encountered: *Hoogkarspel*, *Hoogcarspel*, *Hoog Carspel*, *Hoogkarspee*, *Hoegcarspel*, *Heogearsel*, and *Hoogskarpel*. The first is the correct one, being the name of a small town in the district of Drechterland in north Holland, between Enkhuizen and Hoorn on the Ijsselmeer; nearby there is a town called Bovenkarspel.

51 Also Harmeyer, Harmeyr, Harmeyer, Harremeyer, Harmier.

52 Also *Honcoop*, *Hencoop*; she was named after the Amsterdam merchant Willem Huyghens, the Lord of Honkoop.

53 Nikolaas Sevie was her commander Jul 1778 – Jul 1781, when Landt (also Land) took over and was in command at Saldanha Bay.

54 Also *Middleburg*, *Middelburgh*.

55 Also Justinus Genoep, Van Geunip, Van Gennip. Also on board the *Middelburg* and to be encountered again, was Abraham de Smidt, whose journal – an English translation of which was published as “Dutch East Indiamen attacked while sheltering in Saldanha Bay. Ship ‘Middelburg’ blown up. Journal of ship’s company’s march to Cape Town” in (Dec 1969) 18(8) *Africana Notes and News* at 328-336 – provides important information on the battle of Saldanha Bay. There are several archival copies of the original and the translation: Cape Archives A1762: Copy of the original journal of Abraham de Smidt, being an account of an attack on the “Middelburg” in Saldanha Bay; Cape Archives A1637: (containing) the English translation of the Journal of Abraham de Smidt, being an account of an attack on the “Middelburg” in Saldanha Bay, 1781; MSB173 in the Abraham de Smidt (1755-1809) Collection, SA Library: Translation of the original account of the destruction of the “Middelburg” in Saldanha Bay, 1781; and MSA214 in the JPL Strange Collection, Johannesburg Public Library: photocopy of “Journaal in dienst van de Oost-Indische Compagnie op het schip ‘Middelburg’, 1781”.

56 Also *Parel*, *Paerl*.

57 Also Plo(k)kert, Plocker, Plockker.

58 Also *Dankbaarheyt*, *Dankbaarheid*, *Donkbraykeyt*, *Dankbrakeyt*.

59 Also Steesel, Steedsee, Streetsel.

60 Later considered by the British captors to be most valuable of all: see Pasley (n 17) at 174-175.

61 They and their families had been granted passage to the Netherlands by the DEIC when the ship departed from Bengal on 20 Jan 1781. These passengers were landed and permitted, because of prevailing circumstances, to stay at the Cape for the time being. They were housed in the countryside, at the Vissershok outpost, where also other British subjects arriving on British and

Rotterdam, Delft and Amsterdam chambers worth respectively Dutch fl427 490, fl353 265 and fl130, as well as with a number of English passengers on board.⁶¹

Not part of the west-bound return fleet was the 1 110-ton Ceylon-bound Indiaman *Held Woltemade*.⁶² Built for the Amsterdam Chamber in 1774, she departed from Texel under the command of Captain Swerus Vrolijk⁶³ on 19 December 1780, a day before the War broke out, and arrived at the Cape on 14 April 1781, in urgent need of repairs.⁶⁴ On board she carried stores, gunpowder and bullion (unminted silver

other (eg, Danish) ships, including the captain and officers of the *Betsy* (see n 45 above), were kept. The main condition was that they remained there and refrained from any correspondence with British subjects or forces elsewhere. See, further, eg, *Kaapse archiefstukken* (n 34) 1781 at 54 (Council of Policy Resolution, 10 Apr 1781); *idem* at 72 (Council of Policy Resolution, 27 Apr 1781); *idem* at 76 (Council of Policy Resolution, 1 May 1781); *idem* at 234 (Dagregister, 10 Apr 1781); and *idem* at 238 (Dagregister, 25 Apr 1781).

Not all the detainees were happy with this arrangement and some sought alternative arrangements: see *idem* 1781 at 313-314 (Incoming Letters: letter dated 29 Apr 1781 from an English passenger Thomas Hinchman on board the *Dankbaarheid* in Table Bay); *idem* 1781 at 327 (Dagregister, 17 Aug 1781, concerning Thomas Hinchman). Also, the local authorities balked at the cost involved in supporting the detainees (see *idem* 1781 at 115 (Council of Policy Resolution, 14 Aug 1781, indicating that the support (“onderhoud”) of English prisoners of war from 5 Apr 1781 to 14 Sep 1783 at the Vissershok outpost amounted to more than Rds2 806, which had to be paid from Company coffers) and later resolved to send a memorial to the Lords Seventeen to seek reimbursement from the English East India Company whose employees these persons were (*idem* 1783 *Deel 1* at 257 (Council of Policy Resolution, 9 Dec 1783)). There were also administrative and other problems caused by the crowded conditions at Vissershok and the constant stream of requests for special dispensation from the detainees (see, eg, *idem* 1781 at 121 (Council of Policy Resolution, 27 Aug 1781); and at 327-329 (Dagregister, 26 Aug 1781) concerning the transfer of the English detainee Richard Lewin from Vissershok to the outpost at Ganse Craal because of “de wijngige Commoditeijt, die hij met desselfs Huisvrouw en domesticquen aldaar quam te genieten, door de veelheijd der andere Engelszen”). The Council of Policy considered the whole matter problematic and observed “dat men niet weynig is g'embarrasseerd met de Engelsche Krygsgevangenen, die op differente Plaatsen verdeeld zynde” and thought it better to get rid of them sooner rather than later and not even to allow them to land in the first place (see *idem* 1782 *Deel 1* at 105 (Council of Policy Resolution, 19 Mar 1782)).

62 Also *Heldweltemade*, *Held Wolthemade*, *Held Wottemade*. On hearing of Cape dairy farmer Wolraad Woltemade's heroic but ultimately fatal attempt to rescue those on board the Company ship the *Jonge Thomas* in June 1773, the DEIC made a substantial reward to his widow and sons and also honoured him by naming one of its vessels after him: see, further, Theal (n 17) at 263; Malcolm Turner *Shipwrecks and Salvage in South Africa – 1505 to the Present* (Cape Town, 1988) at 68.

63 Also Sweris Vrolijk, Vrolyk.

64 Two other outgoing ships, the *Mercur* and the *Vrienschap*, had departed from Texel and arrived in Table Bay together with the *Held Woltemade*. They received permission to depart for Batavia a few days later: see *Kaapse archiefstukken* (n 34) 1781 at 61 (Council of Policy Resolution, 20 Apr 1781); *idem* 1781 at 236 (Dagregister, 14 Apr 1781); *idem* 1781 at 237 (Dagregister, 20 Apr 1781); *idem* 1781 at 239 (Dagregister, 30 Apr 1781); and *idem* 1781 at 242 (Dagregister, 8 May 1781).

and gold) in chests, destined for the Ceylonese government and valued at a sum equivalent to £40 000.⁶⁵

What to do with these Indiamen, then?

The five returning Indiamen, it was decided, were to be sent to Saldanha Bay, a safe and sheltered anchorage some twenty hours' sailing from Cape Town where there was a ready availability of cheap provisions and water and where, so the local authorities hoped, they and their valuable cargoes would be safe from enemy attack and capture. They would remain there, it was thought, until a naval convoy arrived that could escort them, and the others in Hout Bay, home.⁶⁶

In order to lighten the ships and create space for the placement of canon, they were ordered to discharge in Table Bay the cargoes in the cabins⁶⁷ and in between their decks,⁶⁸ as well as all their sails that were not rigged. The damaged *Held Woltemade*, too, was sent to Saldanha Bay to be repaired in safety there, and then to continue to Ceylon.⁶⁹

Orders – extensive but not clear nor practicable in all respects and subsequently revised and altered – were given to Captain Harmeier of the *Hoogkarspel*, who was put in charge of the squadron and had authority to call together a ships' council (“skeepsraad”) to decide on tactics to ensure the safety of the fleet. These orders included how and where they had to anchor and line up in the Bay, what lookouts had to be kept and batteries erected on land and armed with canon to warn of and prevent enemy warships entering the Bay, and how they had to obtain provisions from local farmers who had been ordered to withhold all forms of subsistence to British ships, so as also to prevent an overland attack of the Cape. Once there, all the ships' sails and ropes had to be taken down and stored in accompanying local hookers – the *Zon* and the *Snelheid*⁷⁰ – that had to be anchored some way off further into the lagoon near the local outpost. These hookers had to be set alight with the sails and ropes on board in the event of an enemy attack, thus thwarting any attempt

65 See Theal (n 17) at 253-254. As to the conveyance of bullion, see, further, Arent Pol *Schepen met geld. De handelsmunten van de Verenigde Oostindische Compagnie, 1602-1799* ('s-Gravenhage, 1989) at 22-23; GB Elliott “Currency and bullion carried by ships of the Vereenigte [sic] Oostindische Compagnie [sic]: Their routes, numismatic patterns and precursors” (1989) 75 *Mariner's Mirror* 241-251.

66 See *Kaapse archiefstukken* (n 34) 1781 at 232 (Dagregister, 2 Apr 1781). Saldanha Bay had since 1666 been one of the outposts (“buiteposte”, decentralised assistant service stations) of the settlement or service station (“buijten comptoir”) at the Cape of Good Hope. It was under the control of a post holder (“posthouer”). See generally D Sleigh *Die Buiteposte. VOC-buiteposte onder Kaapse bestuur 1652-1795* (Pretoria, 2007) at 94-96.

67 Part of the officers' and seamen's private-trade goods: see, further, n 146 below.

68 De Smidt in his journal ((1969) *Africana Notes and News* (n 55) at 328-330) refers to an instruction to lift the top layer of the ships' cargoes, mainly silks, fine tea, rhubarb, and aniseed.

69 See *Kaapse archiefstukken* (n 34) 1781 at 61 (Council of Policy Resolution, 20 Apr 1781).

70 Because of the War, they could no longer be employed on the coastal trade: Theal (n 17) at 247; and see, further, par 3 3 4 in Part 2 of this article.

to make off with the Indiamen and their cargoes in the event of an enemy capture. Further, preparations had to be made for the eventuality that, after a brave defence, the vessels themselves had to be abandoned as a last resort, and for their masts first to be cut down, and for them to be run aground and set alight to prevent the British taking them as prizes.⁷¹

The squadron of Dutch Indiamen departed from Table Bay on 13 May 1781 and arrived in Saldanha Bay three days later. On 28 June, the *Held Woltemade*, having been repaired, was allowed to depart from Saldanha Bay and continue on her – now roundabout – voyage to Ceylon without again touching Table Bay.⁷² It was thought she would not encounter enemy ships but, as it turned out, that was not to be the case.

In the meantime, Johnstone's squadron had approached the Cape. He dispatched one of the frigates, HMS *Active*, accompanied by a few other smaller vessels, to sail ahead to reconnoiter and gather intelligence of the position and activities of the French fleet. On 1 July, the British detachment, flying French colours, encountered the *Held Woltemade*, south of False Bay, *en route* from Saldanha Bay to Ceylon. Deceived by their false colours, Captain Vrolijk surrendered to the British without any resistance and “with almost indecent alacrity”.⁷³

Crucially, the British thus obtained intelligence from both the correspondence and the passengers⁷⁴ and the crew on board the *Held Woltemade* – considered of greater value than the vessel and her cargo which was taken prize – of the arrival

71 See *Kaapse archiefstukken* (n 34) 1781 at 45-46 (Council of Policy Resolution, 2 Apr 1781) and *idem* 1781 at 243 (Dagregister, 13 May 1781, pointing out that Harmeyer, as flag officer of the return ships (and the *Held Woltemade*) was handed “een ampele Ordre en Instructie, wat bij arrivement dier kielen in de Saldanha baaij, tot beveiliging van deselve in't werk gesteld, en hoedanig bij onverhoopte vijandelijke attacque aldaar, met de scheepen selve sal moeten werden gehandeld”); *idem* 1782 *Deel 2* at 307 (Outgoing Secret Letters, letter to Lords Seventeen, dated 20 Apr 1781: as the supercargo of the *Middelburg*, Egbert van Carnebeek, was about to depart with a Danish ship to Europe, the governor instructed him to report orally – it was not deemed advisable to give details in the letter itself – to the Lords Seventeen “nopens de Schickingen die door ons zyn genoomen om meerm Vier Chinaasse Scheepen en haare Kostbare Ladingen ten besten doenlyk te secureeren ... in hoope dat sulx van uwer Wel edele Hoog agtb geEerde approbatie zal mogen zyn”).

72 *Idem* 1781 at 253 (Dagregister, 30 Jun 1781).

73 Jose Burman & Stephen Levin *The Saldanha Bay Story* (Cape Town, c1974) at 59; see, also, Schomberg (n 31) vol 2 at 65-66 and vol 5 at 67; Beatson (n 13) at 323-324.

74 On board when she was captured, was, in the words of Pasley, the Cape “Fiscal's Sister bound (poor Girl) on a Matrimonial Voyage to Ceylon”. She was one of those “examined” for information on board the *Active* by Johnstone and the other officers. She also gave up her private letters to be copied for Johnstone's information. Dining with her on board the *Romney*, Pasley described her as “the fair Dutch captive”: see Pasley (n 17) at 116, 169, 170. The lady in question was Miss Adriana Boers, sister of independent fiscal Willem Cornelis Boers: see *Kaapse archiefstukken* (n 34) 1781 at 414-415 (Outgoing Letters, letter to the governor of Ceylon, dated 18 Jun 1781, informing that with the ship *Held Woltemade* had been sent letters and papers with their bearer “Juffr Adriana Boers”; the papers included a sealed parcel containing “de secrete zeinvlaggen te worden vertoond, in het gezicht van Ceilon komende”).

of the French contingent and the landing of military reinforcements at the Cape and, crucially, of the presence of the unprotected Dutch Indiamen in Saldanha Bay. Importantly, too, the authorities at the Cape and hence also the Indiamen in Saldanha Bay were then still blissfully unaware of her capture.⁷⁵

After some initial and heated difference of opinion between Johnstone and Medows as to the viability of the options open to them – a naval attack or an overland attack on the settlement – Suffren’s presence at the Cape was deemed to exclude the success of proceeding with any such attack.⁷⁶

However, the Dutch merchantmen in Saldanha Bay presented the tardy Johnstone with the opportunity of gaining a “substantial consolation prize”.⁷⁷ He accordingly determined, and Medows quickly came around to agreeing, to attack them in the Bay.⁷⁸

Accordingly, whatever dissension there may have been between the naval and military components as to how to proceed with expedition after having been beaten to the Cape by the French, the lure of prize meant that there was broad general consensus among the British that the next step would be to capture the Dutch Indiamen in Saldanha Bay.⁷⁹

75 See *Kaapse archiefstukken* 1781 at 146 (Council of Policy Resolution, 9 Oct 1781, from which it appears that on that date they still hoped that the *Held Woltemade* would arrive safely in Ceylon).

76 The two commanders also disagreed on other issues, eg, whether to proceed to India as Medows wanted, or to abandon the mission and sail to South America, as was Johnstone’s idea: see, further, Rutherford “Part I” (n 13) at 201, 203, 300, 302-304, who points out that Johnstone and Medows had to discuss and broadly agree on the conduct of the expedition as it was (at least informally, practically) “a joint sea and land operation” and as the two officers were on equal terms of command; Pasley (n 17) at 300-301 likewise observes that nothing could be done on the expedition without Medows’s consent.

77 Rodger (n 27) at 349. Willcox (n 25) at 78 observes that Johnstone was saved by circumstances from losing the battle of Porto Praya but not from losing his campaign; Killion (n 21) at 254 explains that after his indecision at Porto Praya, Johnstone “gave up on the Cape too soon, settling for some rich but strategically unimportant prizes without checking Suffren’s dispositions”.

78 Pasley (n 17) at 300-301: “Agreement could only be reached on the capture of the East Indiamen, which was too good a chance to be missed”; *idem* at 169 and 171 further observes that if Johnstone could have divided the squadron, he would have attacked Indiamen in Saldanha Bay with only one of the warships (the *Jupiter*) to assist him in the *Romney* and without the presence of any of the troop carriers: “it wou’d have been a noble affair” as he would not have had to face the possibility of having to share the prize with the military component of the expedition. Pasley himself (*idem* at 173) was critical of Johnstone’s plan of attack as it “seems more to serve the Army than Navy”, it not being clear to him what the troops would do once landed, for they could not assist even in the smallest degree in the attack on and capture of the merchantmen. However, the exclusion of the Army was not possible as Medows would not pass up on the possibility of sharing in any prize. He accordingly gave orders for his troops to be landed during the action, “expecting by that means to share Prize Money if they are taken” (*idem* at 170). Pasley at 302 suggests that the prospect of prize money “was one cause of the lack of harmony in the squadron”.

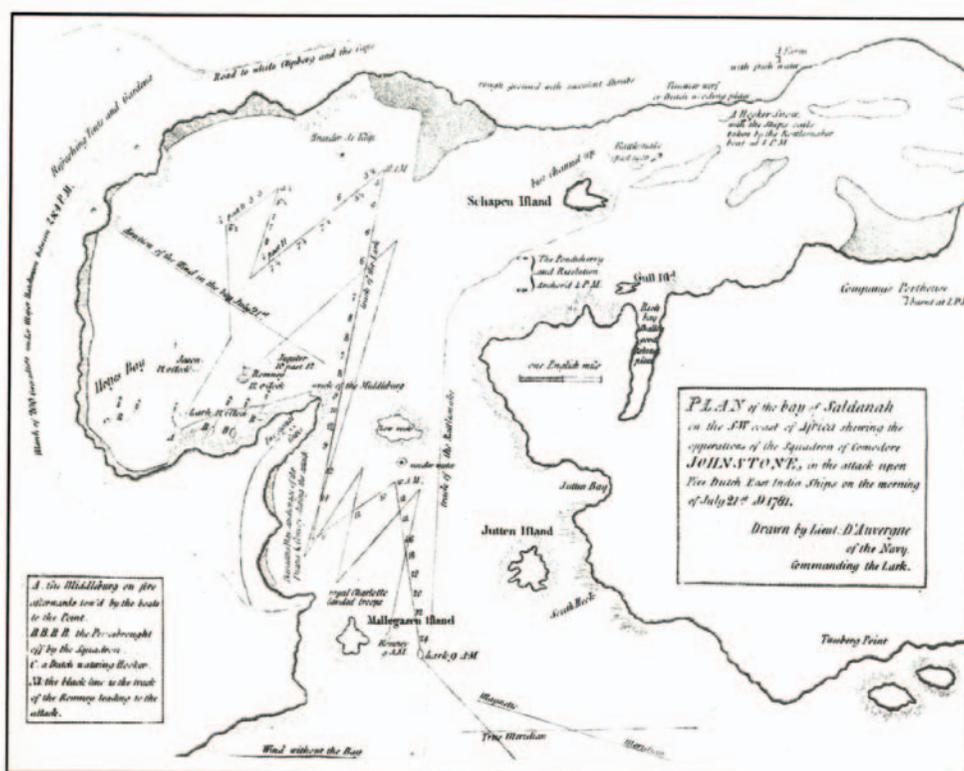
79 Harlow (n 11) at 117.

2.5 The “battle” of Saldanha Bay^{80 81}

Unaware of the British arrival and their plans, the Dutch merchant ships anchored in the calm of Saldanha Bay in a roughly defensive formation, replenished and carried out minor repairs, and allowed the crews and troops on board to fish and hunt ashore. Because of practical difficulties, the Council of Policy agreed that no batteries had to be erected on land as had been instructed: the landing of heavy canon proved impossible and lighter canon would have been ineffective because of their shorter range.⁸² By the time Johnstone’s squadron arrived at the Bay, they had been there a little more than two months, and had heard of the arrival of the French squadron under Suffren. They expected, any day, to be ordered to leave, what was by at least some considered to be a “decidedly exposed place of concealment”,⁸³ for Europe or at least for the Cape, a belief strengthened by the departure of the *Held Woltemade* at the end of June. Vigilance was at a low level, despite the news having been received in the meantime of the subsequent capture of the Ceylon-bound ship.

On the morning of Saturday 21 Jul 1781, at just after nine, under cover of a thick fog and flying French colours (and hence when sighted by the bored Dutch lookout at first taken to be part of the French squadron sent to escort them home), ships of the British squadron entered Saldanha Bay with speed and in close formation. They were lead in by Johnstone on HMS *Romney*. The attackers knew the layout of the Bay and the positions of the Dutch ships there and also of their instructions to destroy the vessels to avoid capture.

- 80 See, generally, Theal (n 17) at 254-255; Pasley (n 17) at 164-177; Beatson (n 13) at 325-328; Sleight (n 66) at 462-464. For Johnstone’s account of the action at the Cape, see (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 89-90. For a Dutch version, see De Smidt (1969 *Africana Notes and News* (n 55)) at 330-331. Popular accounts include Tim Couzens *Battles of South Africa* (Johannesburg, 2004) at 17-24; John Gribble “The battle of Saldanha and the loss of the Middelburg” in Gabriel & Louise Athiros (eds) *The Best of The Cape Odyssey. A Journey into the Colourful and Fascinating History of the Cape vol 1* (Cape Town, 2007) at 31-33 (also in Gabriel, Louise & Nikolai Athiros & Mike Turner (eds) *A West Coast Odyssey. A Journey into the Colourful and Fascinating History of the Cape’s West Coast Peninsula* (Cape Town, 2008) at 29-31); [John Gribble] “‘Shooting a Fish in a Barrel’. Middelburg – 1781” in Gabriel Athiros & John Gribble (eds) *The Cape Odyssey 104. Wrecked at the Cape. Part 1* (Cape Town, 2014) at 57-64; Coenraad Potgieter *Skipbreuke aan Ons Kus* (Kaapstad, 1969) at 1001-1006; and Burman & Levin (n 73) at 57-64.
- 81 One should distinguish the first “battle” of Saldanha Bay in 1781 from the second, proper battle of Saldanha Bay in 1796: see, eg, Couzens (n 80) at 32-36; Turner (n 62) at 75-77; Burman & Levin (n 73) at 65-75. See, further, my “The First British Occupation of the Cape of Good Hope and two prize cases on joint capture in the High Court of Admiralty” (2005) 11 *Fundamina. A J of Legal History* 155-182.
- 82 See, further, *Kaapse archiefstukken* (n 34) 1781 at 84-85 (Council of Policy Resolution, 26 May 1781); *idem* 1781 at 245-246 (Dagregister, 26 May 1781). The Council retained the instruction concerning storage of sails and ropes on the hookers.
- 83 De Smidt (1969 *Africana Notes and News* (n 55)) at 328-330, who points out that Suffren had several times suggested that the Indiamen should return under his squadron’s protection, advice governor Plettenberg chose to ignore.



Cape Archives, M748: Plan of Saldanha Bay showing the operations of the squadron of Commodore Johnstone in his attack on the five Dutch East India Company's ships on 21 Jul 1781 [drawn by Lieutenant D'Auvergne on the Lark (see further n 99) and published in the rare pamphlet "A Letter to Lord Viscount Howe on the subject of a late determination at a Cockpit in a Prize Cause, 1787"]; see, also, M1/951: map of Saldanha Bay with soundings showing the inland expedition of Admiral Johnstone in 1781 (1786).

Only when the approaching ships struck their French colours and opened fire did the surprised and ill-prepared Dutch realise what was happening. Unable to escape from the Bay and from inevitable British capture, they did not even contemplate defence but immediately cut their cables, loosened the top-foresails, and drove the ships on or close to the shore. There they landed the crews and troops on board, hastily set or tried to set fire to them, and then abandoned them. It was all over in less than two hours.

The British were quick to react, launch their boats, board the abandoned Dutch ships and get the ill-prepared fires on board under control. Then they got the stranded vessels afloat with the assistance of the soldiers, and thus managed to save all their prizes, except one.⁸⁴

84 See Campbell (n 26) at 45.

The *Middelburg* alone escaped capture. Her captain, Van Gennepe, had heeded the orders to resort to self-destruction more precisely, and had made proper preparation for her destruction to avoid capture by having a quantity of combustible materials (bundles of rope soaked in tar, sulphur and tallow) at the ready. After the rest of the crew had abandoned her, the *Middelburg's* first mate, Abraham de Smidt,⁸⁵ stayed behind and lit several fires earlier prepared in the bowel of the ship. She was soon ablaze and drifted off, and nearly collided with two of the other Indiamen were it not for intervention on the part of the captors (Johnstone himself was said to have been involved) to tow her away from the remaining Dutch ships on which fires had already been extinguished. Shortly after, the *Middelburg* exploded when the fire reached her powder magazine and her remains and the cargo that were not destroyed in the explosion, sank in relatively shallow water.⁸⁶ She was the only Dutch vessel not to fall into British hands on that day.

- 85 De Smidt, born in Middelburg in the Netherlands on 17 Jun 1755 and whose journal has already been referred to (n 55 above), first visited the Cape in Apr 1780. He became permanently domiciled there after the incident at Saldanha Bay, his effective action in the face of certain enemy capture winning him gubernatorial approval. He became a free burgher in 1784 and an influential citizen – *inter alia* president of the insolvency branch of the Orphan Chamber – with wide business interests. He remained at the Cape during the Batavian administration and died in Cape Town on 29 Dec 1809. His son Abraham (1793-1868) became a civil servant in the Cape Colony. See, further, MJ Bull *sv* “De Smidt, Abraham” in *DSAB* vol 4 (Cape Town, 1981) at 122-123; [Georgina Lister] *Reminiscences of Georgina Lister* (Johannesburg, 1960) at 16 (the author was Abraham de Smidt’s great granddaughter).
- 86 There had been several attempts at salvaging the scuttled vessel and her cargo, consisting mainly of Chinese porcelain. In 1794 Gerhardus Munnik, former “heemraad” of Drakenstein but then from Stellenbosch, who had obtained permission to salvage goods from the wreck of the *Middelburg* on condition that one-third went to the Company, declared that he had already salvaged a considerable amount of goods but requested an advance of Rds2 000 to cover his expenses, those goods to serve as security for the loan: see Leibbrandt (n 34) at 1537 (Memorial, 27 Mar 1794). According to Sleight (n 66) at 438, Munnik had salvaged no more than five canon and some porcelain. Other salvage attempts at the end of the nineteenth century likewise had limited success while also damaging the wreck site by the use of explosives: see Turner (n 62) at 75-77; John Gribble “Past, present and future of maritime archaeology in South Africa” in Carol V Ruppé & Janet F Barstad (eds) *International Handbook of Underwater Archaeology* (New York, 2002) 553-567 at 555-556. The most successful salvage operation took place in 1969 when the Dodds brothers from Cape Town recovered almost 200 pieces of Ch’ien Lung china (1736-1795), including some figurines, in an almost perfect condition: see Turner (n 62) at 76 for a list of the pieces of china recovered from the *Middelburg* and at 51, 82, and 110 for photos. Most of the salvaged ceramic items and also some coins were auctioned off in Cape Town and Johannesburg in Jan and Apr 1972: see John Marcus & Sons Galleries (Cape Town) *Catalogue of Priceless Treasure and Antique China Recovered from Beneath the Sea Off the South African Coast from the Two Famous Dutch East Indiamen, “Meresteijn” (1702), “Middelburg” (1781), as also the “Fame” (1823)* (Johannesburg, 1972) available at <http://www.sunken treasurebooks.com/catalogs.htm> (accessed 20 Feb 2015). See, further, also <http://wrecksite.eu/wreck> (accessed 20 Feb 2015) *sv* “Middelburg”.



“Capture of the Dutch East India Company Fleet in Saldanha Bay 1781”, by Thomas Luny (1759-1837), a lesser but prolific English marine painter, especially of naval battles and incidents: see Pieter van der Merwe sv “Luny, Thomas” in *Oxford Dictionary of National Biography* (online ed Jan 2012, accessed 27 Jan 2015). The painting reproduced here is in the collection of Museum Africa (ex Africana Museum), Johannesburg, L96: see RF Kennedy (comp) *Catalogue of Pictures in the Africana Museum Vol 3: E-L* (1967) at 235. It is also reproduced in Lister (n 85) opp 36; Turner (n 62) at 74; *Gribble Cape Odyssey 104* (n 80) at 62-63. For an explanation of the painting, see “Wat heeft HONKOOOP met de VOC te maken?” at <http://home.planet.nl/~choncoop/> (accessed 20 Jan 2015): the painting shows Saldanha Bay on the morning of 21 Jul 1781; in the middle front is the British flagship *Romney* with Johnstone at the rail; on the *Middelburg* the fire had reached her powder room and we see her explosion; to the right of the *Middelburg* lies the *Hoogkarspel*; to the left of the *Romney* is the *Dankbaarheid*; close behind the *Middelburg* is a DEIC ship on the beach and further on in the Bay, to the right behind the rocks, the masts are visible of other merchantmen: one of these two therefore is the *Honkoop* and the other the *Paarl*. On the Dutch ships (except the *Middelburg*) Union Jacks are already fluttering above the Dutch tricolour; the British ships fly the red ensign.

To their delight the British then also discovered the two packets or hookers, the *Snelheid* and the *Zon*, at the other end of the Bay⁸⁷ laden with some of the sails and cordage of the captured Indiamen.⁸⁸ The *Snelheid* had been abandoned by her captain,

87 The packets, called “hookers” by the Dutch, were, according to Beatson (n 13) at 327n, a type of coastal or fishing craft “peculiar to the Cape of Good Hope”. According to Theal (n 17) at 223, one of them, the *Zon*, of about 300 tons, was the vessel that had taken the first ever cargo of Cape produce (wheat, rye, barley, tallow and assorted wines, including some from Constantia) to Amsterdam in 1772. Such consignments continued annually until the outbreak of the Anglo-Dutch War.

88 Some of the sails that had initially been stored on them, had been retrieved to enable the Indiamen to move to better anchorages, and had not been returned but were still on board the captured ships.

Roeloff Pietersz, and his crew and had not been destroyed as instructed despite there having been ample opportunity to do so.⁸⁹ The British captors were therefore able, a few days later, to sail the four captured and refloated Dutch Indiamen out of Saldanha Bay, leaving the two empty hookers behind.⁹⁰

The crews of the Dutch ships, who had either been landed or had waded ashore from their abandoned ships, pursued by British salvos, fled in panic, fearful of being taken prisoner of war by the landing troops. They reached Cape Town overland a few days later, shedding personal earthly possessions as they went.⁹¹ British prisoners of war on board the Dutch ships were either released or had jumped overboard and were picked up by the British boats, or accompanied their captors.⁹²

- 89 Sleigh (n 66) at 464-465 and 513-514 recounts that at first sight of the British, and without any attempt at defence or giving orders, Pietersz simply climbed into the hooker's boat with her crew and joined the fleeing Dutch crews on land. The postholder at the Saldanha Bay outpost, Jacobus Stofberg (he held the post from 1780 to 1807), who had been instructed to ensure that on the arrival of an enemy fleet, cattle and food were moved away from the post – he also had to send news of arrival by horse to the Cape – burnt down the posthouse (although never instructed to do so) and drove away the cattle there before the British sailors that had been landed could reach it. Stofberg came across Pietersz on the nearby Geelbeksfontein, the farm of – or leased by – Johannes Heufke. They set the farm buildings and corn in a warehouse alight and when Heufke later complained to the government and sought damages, he was simply turned away and never received any compensation for his loss: see *idem* at 443, 458-459, 465. On the Heufkes (or Höffkes or Heuffken), see, also, CG de Villiers, revised and rewritten by C Pama *Genealogies of Old South African Families* vol 1 (Cape Town & Amsterdam, 1966) at 312, and on Stofberg, see *idem* vol 3 at 935. See, also, EC Godée Molsbergen *Reizen in Zuid-Afrika in de Hollandse tijd. Tweede Deel: Tochten naar het Noorden 1686-1806* ('s-Gravenhage, 1916) at 278, where there is a description of plates depicting maps, including one of Saldanha Bay at the end of the eighteenth century, and where there is mention of “J Heufke, Geelbeksfontijn”.
- 90 The British version was that they had been left behind as being too old and decayed to be of any use to them. According to Beatson (n 13) at 327, Johnstone, “being determined to shew no marks of barbarity towards a settlement in which the wants of the British had so often been relieved, would not permit them to be destroyed”. The Dutch version was that the hookers were irreparably damaged by the enemy and had to be dismantled, the equipment on board being sold or, like their crews, otherwise employed by the Company and the salvaged wood later being used to build a new outpost: see *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 105-107 (Council of Policy Resolution, 19 Mar 1792); *idem* 1782 *Deel 1* at 342 (Dagregister, 26 Jun 1782); *idem* 1783 *Deel 1* at 130-131 (Council of Policy Resolution, 29 Apr 1783); *idem* 1783 *Deel 1* at 309 (Dagregister, 30 Jun 1783); Sleigh (n 66) at 465, 513-514.
- 91 See De Smidt (1969 *Africana Notes and News* (n 55)) at 332-336 for a description of their overland journey; the captains went on horseback and arrived there on 24 Jul, the fleeing (or, in official terms, “saved”) Dutch crews arrived on 26 Jul, having received food *en route* from other outposts.
- 92 In a letter from A de Smidt, the grandson of the original Abraham, to archivist Leibbrandt, dated 20 Jul 1886, concerning the probable fate of British prisoners of war allegedly secreted on board the *Middelburg*, he observed that British statements that the Dutch had either forgotten or intentionally left their chained prisoners behind on the burning ships, were without proof. The letter is in the Unisa Archives, WAGE4757.

The loss at the Cape in 1781⁹³ of six Indiamen (the *Held Woltemade*, *Hoogkarspel*, *Honkoop*, *Dankbaarheid*, *Paarl*, and *Middelburg*) with their valuable cargoes, five of them being captured as prize by Johnstone's squadron after what was a sea "battle" only by some stretch of the imagination, was a great financial loss to the already financially strained DEIC, and hastened its eventual bankruptcy in 1796.

After the events at Saldanha Bay, and although both remained reluctant – the realistic Medows probably more so than Johnstone – to land troops and engage either or both the French naval or military forces at the Cape, the debate between Johnstone and Medows continued as to which ships had to be sent on to India and which were to return to England. Ultimately a part of the squadron proceeded to India, arriving there only in February 1782. It consisted of five warships, including the *Monmouth* under Captain James Alms Senior and with General Medows and his staff now on board, the *Hero* and the *Isis*, and the frigate *Active* which was sent ahead, as well as all the troopships, storeships and the Indiamen in the convoy. The remainder of the fleet, including Johnstone on the *Romney*, departed for England via St Helena on 6 August,⁹⁴ after the *Romney*, *Jupiter* and the cutter *Lark* had fruitlessly and, fearing an attack from Suffren's squadron, unenthusiastically cruised Cape waters for ten days in the hope of obtaining some further advantage from the expedition by capturing French vessels as prizes.⁹⁵

2 6 A diversion: Some interesting personalities at Saldanha Bay

There were several interesting personages involved in and present at the incident in Saldanha Bay.

- 93 In Jan 1782, the Indiaman *Groenendaal*, built in 1770 for the Amsterdam Chamber and sailing under Capt Christoffel Beem, was captured in the Bay of Trincomalee on the return-leg her fourth India voyage with a valuable cargo on board. Beem's objections to undertaking the return voyage on the basis that he had a very valuable cargo on board and that his ship was not in fit state for defence and would become an easy prey to any enemy, had been overruled by the local governor. Beem himself was taken prisoner by the British and later exchanged for Capt Edward Harvey of the *Betsy* (see n 45 above), which had earlier been taken capture by the Dutch at the Cape. See, further, Leibbrandt (n 34) at 143 (Memorial 20 of 1784); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 345 (Dagregister, 15 Jul 1782); *idem* 1783 *Deel 1* at 158-159 (Council of Policy Resolution, 17 Jun 1783, approving the prisoner exchange, subject to ratification by the Lords Seventeen and the English East India Company).
- 94 *En route*, Johnstone interrupted his voyage at his old station at Lisbon where he married the daughter of the vice-consul on 31 Jan 1782 (in Florida, he had fathered four illegitimate children with a woman with whom he was then in a long-term relationship).
- 95 Harlow (n 11) at 117-120 points out that Johnstone was shrewd enough to realise that if he returned empty-handed from the otherwise failed Cape expedition, his career would be ruined. He therefore sought to gain whatever other, personal and financial, advantage from it that he could. Hence the attempts at capturing further prizes (he also later accompanied a few vessels in the squadron to cruise off the River Plate in South America, likewise without any success) and the attempt at colonisation of the Island of Trinidad (see nn 99 and 154 below) to provide a substitute for the Cape of Good Hope that he had failed to secure.

In command of HMS *Jupiter*, one of the warships in Johnstone's squadron, was Captain, later Admiral, Sir Thomas Pasley, whose private sea journals provide an intimate, insider's account of the commodore's Cape expedition. After the Cape mission, Pasley served in HMS *Bellerophon* in 1790, and again in 1793, lost a leg in the battle of the Glorious First of June 1794, and was present at the second battle of Saldanha Bay on 17 August 1796.⁹⁶

One of the 350 men aboard HMS *Jupiter* on the Cape expedition and present in Saldanha Bay on 21 July, was Micheal Hogan, then an ordinary seaman but later a resident merchant at the Cape during the First British Occupation and infamous for his nefarious dealings in slaves and collusion with corrupt British officials.⁹⁷ Also serving in HMS *Jupiter* was a nephew of Pasley, the future Admiral Sir Pulteney Malcolm.⁹⁸

The commander of another of Johnstone's vessels at Saldanha Bay, the sloop HMS *Lark*, was the colourful Lieutenant, later Vice-Admiral, Philip D'Auvergne, subsequently a – an unsuccessful – claimant to the Duchy of Bouillon.⁹⁹

96 Pasley (1734-1808) had been with Johnstone on the Lisbon station when the expedition to the Cape was put together. He had been to the Cape earlier, in Feb 1780, when he was sent there to protect two home-ward bound East India Company ships. At the Cape, Pasley found the *Resolution* and *Discovery* (see n 18 above) returning home from Capt Cook's voyage and escorted them (and duplicates of Cook's journals and drafts) home, arriving in Aug 1780. His private sea journals, 1778-1782, were published in 1931: see n 17 above. See, further, PK Crimmin "Pasley, Sir Thomas" in *ODNB* (online ed 2004, accessed 8 Jan 2015). In his report on the battle at Porto Praya, in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* "Principal Occurrences" at 78, Johnstone acknowledged his indebtedness to "the indefatigable attention of Captain Paisley, whose zeal on this, and every other occasion, I wish may be presented to his majesty".

97 See, further, Michael H Styles *Captain Hogan: Seaman, Merchant, Diplomat on Six Continents* (Fairfax Station, VA, 2003) at 4-7, 9-14.

98 See, further, JK Laughton, rev Roger Morriss *sv* "Malcolm, Sir Pulteney" in *ODNB* (online ed Jan 2008, accessed 8 Jan 2015).

99 D'Auvergne (at first merely Dauvergne) (1754-1816), a Channel islander (Jersey), was later a claimant to the Duchy of Bouillon through having allegedly been adopted by Charles Godefroy de la Tour D'Auvergne, the duke of Bouillon, who was proclaimed the (last) duke only in Dec 1814, after the abdication of Napoleon. Rival claimants soon appeared, disputing D'Auvergne's claim of inheritance which he lost when the duchy was awarded to the Netherlands by the Congress of Vienna the next year. D'Auvergne was a doctor of laws (1785) and a British spy-master who had contact with the royalist French resistance. He was further interested in and worked on the improvement of navigational instruments (he wrote a book on sea compasses in 1789) and was an accomplished mathematician and naval calculator, as appears from the map he drew when captain of HMS *Lark* at the battle of Saldanha Bay (see at nn 83-84 above). He was one of Johnstone's favourite captains on his Cape expedition: Rutherford "Part II" (n 13) at 303 and 307. In his dispatch of 21 Aug 1781 to London, Johnstone referred to D'Auvergne as "a very promising young officer" (see (1781) 50 *The London Magazine or Gentleman's Monthly Intelligencer* at 503 and (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* "Principal Occurrences" at 89). In an apparent promotion, D'Auvergne was later removed from the *Lark* to the cutter *Rattlesnake* which was, with two warships under Johnstone, detached from the squadron on its return at St Helena and sent to survey and possibly settle the fertile island of Trinidad, 800 miles east of Rio off the Brazilian coast as an alternative refreshment

On board the Dutch ships were no less interesting figures.

The French traveller and botanist, François le Vaillant, was a passenger on board the *Middelburg*. He had travelled to the Cape on the *Held Woltemade*, but then accepted an invitation from Captain Van Gennepe to join the *Middelburg* when she was sent to Saldanha Bay. He was therefore not on board the *Held Woltemade* when she was captured and so escaped being taken prisoner of war. Van Gennepe's invitation was also fortuitous in another sense in that a stay in the desolate Bay allowed for an exploration of the local fauna and flora.¹⁰⁰ Le Vaillant was ashore on a hunting expedition at the time of the battle, but lost his papers and what he subsequently referred to as "a considerable and precious collection of birds, shells, insects, madrepores [corals], etc" in her destruction. "It was agony", he later wrote, "to see my collections, and my fortune, and my projects, and all my hopes gone into mid-air and there dissolve in smoke".¹⁰¹

Also on board one of the captured Dutch ships, probably or supposedly for their own safety, were the princes of the islands of Tidore and Ternate¹⁰² with their respective

station on the sailing routes to both the East Indies and the Pacific. Johnstone, aware of the failure of his Cape mission, thought the establishment of a settlement on the uninhabited island might compensate to some extent, even if it was never part of the original scheme. The aborted attempt at colonisation gained Johnstone little credit: see Harlow (n 11) at 117-120; Pasley (n 17) at 301. D'Auvergne's ship, having been left there by the warships, was lost in a storm off the island and he and his party of settlers were marooned for almost two months and only fortuitously rescued by a passing naval ship with a convoy of Indiamen in Dec 1782. A subsequent court martial led to his acquittal. See, further, James Falkner *sv* "D'Auvergne" in *ODNB* (online ed Jan 2008, accessed 24 Feb 2015); Henry Kirke *From the Gun Room to the Throne, Being the Life of Vice-Admiral HSH Philip D'Auvergne, Duke of Bouillon* (London, 1904).

100 Le Vaillant (1753-1824) is famous for his paintings and identification of birds: the streaky-backed Lavaillant's cisticola (*cisticola tinniens*), redwinged francolin (*francolinus levaillantii*) and crested barbet (*trachyphonus vaillantii*) are named after him. Le Vaillant was financially and logistically backed by the wealthy Amsterdam merchant, co-collector, and treasurer of the DEIC, Jacob Temminck, after whom Temminck's courser (*cursorius temminckii*) was named: see, also, LC Rookmaaker *The Zoological Exploration of Southern Africa 1650-1790* (1989, Rotterdam) at 250-251 for the species Le Vaillant identified on this (the first of three) collecting expedition. He eventually left the Cape only in Jul 1784. Le Vaillant is now known for his travelogues on Southern Africa and his ornithological works: see, further, François le Vaillant *Travels into the Interior of Africa via the Cape of Good Hope* 2 vols (Eng tr by Ian Glenn with the assistance of Catherine Lauga du Plessis and Ian Farlam, Cape Town, 2007 [Second Series No 38 Van Riebeeck Society]) at 23-40 for his sojourn at Saldanha Bay; M Bokhorst *sv* "Le Vaillant, Francois" in *DSAB* vol 2 (Cape Town, 1972) at 396-399; Jane Meiring *The Truth in Masquerade. The Adventures of François le Vaillant* (Cape Town, 1973) at 5-13. Le Vaillant is today in some quarters considered a self-promoting exaggerator with a lively imagination whose ornithological work is largely unreliable. In his first ornithological work, *Histoire naturelle des oiseaux d'Afrique* (1796), he described some 134 Southern African bird species, another fifty recognisable species that he claimed occurred there but in fact do not, ten species that do not occur anywhere at all, and a further 110 species that are unrecognisable: see Penny Olsen "The independent ornithologist" (Mar 2009) 1(1) *The National Library Magazine* 18-20 at 19.

101 See his *Travels* (n 100) at 29.

102 Two adjacent islands in the north of the Maluku Islands (Moluccas), in eastern Indonesia. Both were sultanates, major producers of cloves, and under the influence of but not directly controlled by the DEIC, even though it did have forts and settlements on both and a governor on Ternate.

families. The Batavian government had banished them and had them imprisoned and confined on Robben Island for political offences after they had resisted DEIC endeavours on the islands. Robben Island had long been used as a prison not only for local criminals, but also for those exiled from other DEIC settlements.¹⁰³ The prisoners had recently been moved from the Island to Saldanha Bay with the fleet.¹⁰⁴ During the action there, they managed to escape and seek refuge with the British,¹⁰⁵ a matter that caused some concern in Batavia and necessitated an explanation from the Cape authorities.¹⁰⁶

While contemporary sources do not identify the prisoners with more precision, it may be speculated that one of them may well have been the well-known Cape religious leader Tuan Guru.¹⁰⁷

- 103 See, further, Kerry Ward *Networks of Empire. Forced Migration in the Dutch East India Company [Studies in Comparative World History]* (Cambridge, 2009) at 51, 56, 71, 179, 191-192, 236, 245, 258, 285 for details of the main circuit of DEIC penal transportation and political exile (“forced migration”) along the shipping routes from Batavia to, *inter alia*, the Cape. The Cape was an important exile site not only for convicted criminals (“bandieten”) but also for high-ranking political and religious leaders (“bannelingen”) from the Indonesian archipelago.
- 104 On receipt of news of the outbreak of the War, the Council ordered all “bannelingen” on Robben Island to be sent to Cape Town: see *Kaapse archiefstukken* (n 34) 1781 at 42-43 (Council of Policy Resolution, 2 Apr 1781). From *idem* 1781 at 233, 235-236 (Dagregister, 4, 11 & 12 Apr 1781) it appears that the hooker *Snelheid* had departed to Robben Island to fetch “de aldaar leggende Besettelingen en Bandieten”. See, also, (1781) 50 *The London Magazine or Gentleman’s Monthly Intelligencer* at 503 and (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 90.
- 105 According to Beatson (n 13) at 326-327, during the battle a boat was observed rowing from the shore to the *Romney*, filled with “people in the eastern garb” who “made the most humiliating signs of supplication”; they were East Indian rulers who had been deposed by the Dutch “according to the harsh and cruel maxims which have ever disgraced their Government in the East”.
- 106 See *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 351 (Incoming Letters, letter from the governor general and Council in Batavia, dated 14 Sep 1782, received at the Cape 23 Feb 1783, referring to the escape to the British of “een Tidors en een Ternaats prins” as “een Zaak van vry nedeelige gevolge Soude konnen zyn in den presenten tyd”, requesting further information from governor Plettenberg as to their identities, and recommending that exiles (“der bannelingen van staat”) be properly guarded); *idem* 1783 *Deel 1* at 421 (Incoming Letters, letter from the same, dated 19 Aug 1783, received at the Cape 29 Oct 1783, requesting clarification about the “balier adbul Radeff” who had reportedly fallen into British hands at Saldanha Bay and was taken by them to Madras, and was still listed in Jan 1783 by the Cape government as being a prisoner, but no longer included in a list compiled in Mar 1783); *idem* 1783 *Deel 1* at 543 (Outgoing Letters, letter by the Cape governor to the governor general and Council in Batavia, dated 8 Sep 1783, expressing dismay at the Batavian Council’s dissatisfaction with local government’s handling of those confined on Robben Island and explaining that the receipt of news of the outbreak of war had necessitated the relaxation of the conditions of their captivity “om een aantal van meer dan 100 zo Europeesche als Indiaansse Ballingen elders te kunnen bewaren”).
- 107 Imam Adbullah ibn Qadi Abd al-Salam (1712-1807) was a prince from the island of Tidore who was exiled to the Cape as a political or “state” prisoner in Apr 1780 for conspiring with the English against the Dutch in the East Indies. He wrote a 600-page manuscript in 1781 on Islamic jurisprudence (*Ma’rifah al-Islam wa al-Iman*, or *The Manifestation of Islam and Faith*) in Arabic and Malayu and also made copies of the *Qur’an* from memory while imprisoned on Robben Island. After his release from the island in 1793, he remained at the Cape and eventually became

2.7 Some consequences of the events in Saldanha Bay and the fate of the Dutch prizes

Before coming to the legal consequences of the battle of Saldanha Bay, some of the other, non-legal consequences may be mentioned briefly.

News of the sighting of an enemy fleet in Saldanha Bay, sent from the outpost there, reached Cape Town on 22 July. Fearing an attack by the British forces, the Cape came on high alert and rumours abounded.¹⁰⁸ Then came the terrible news of the fate of the Dutch Indiamen¹⁰⁹ and that the enemy had left with their prizes. The captains of the merchantmen in Hout Bay were alerted and ordered to Table Bay,¹¹⁰ the batteries were manned, and the local military forces readied. However, Suffren and his squadron stayed put.

Tension remained high, but a week later the authorities assumed that in view of their reported departure from Saldanha Bay and given the favourable prevailing wind, the British squadron had already left the Cape for the East.¹¹¹

The Dutch captains also reported to the Cape authorities, stressing the role of the element of surprise, the numerical superiority of the enemy, and the urgency of

the first imam of the first mosque established there, in Dorp Street. Earlier he had also established the first organised religious school (“madrassah”) at the Cape where he taught the *Qur’an* to slaves and free (manumitted) black children (hence his nickname Tuan Guru, Mr Teacher), where the literary teaching of Arabic-Afrikaans first emerged, and where several later prominent Cape imams were first taught. He is buried in the Tana Baru kramat (a Muslim tomb or shrine) in the Bo-Kaap. See, further, Yusuf da Costa & Achmat Davids *Pages from Cape Muslim History* (Pietermaritzburg, 1994) at 47-56; Frank R Bradlow & Margaret Cairns *The Early Cape Muslims. A Study of Their Mosques, Genealogy and Origins* (Cape Town, 1978) at 9-10, 14, 19, 21-23, 66-67, 106; “Kramats” at <http://bokaap.co.za/kramats> (accessed 10 Mar 2015) and at <http://www.sahistory.org.za/archive/1700-1799> (accessed 10 Mar 2015); “History of Muslims in South Africa” at <http://www.bosmontmasjid.co.za> (accessed 10 Mar 2015). Ward (n 103) at 231 has it that Tuan Guru was a prisoner on the Island during the 1780s and before his release in 1792; Sleigh (n 66) at 386-387, again, holds that various princes had been banished to the Cape from the 1760s and that one of them, Prince Achmet of Ternate and his three sons were, after their lamentable request, transferred from the Island to Cape Town in 1786, where they afterwards tried to promote the Muslim faith amongst slaves.

108 See *Kaapse archiefstukken* (n 34) 1781 at 108 (Council of Policy Resolution, 23 Jul 1781); *idem* 1781 at 258-259 (Dagregister, 22 and 23 Jul 1781).

109 *Idem* 1781 at 109-110 (Council of Policy Resolution, 26 Jul 1781); *idem* 1781 at 261 (Dagregister, 26 Jul 1781, referring to the “smertelijk berigt” of the “fataal geval” from Saldanha Bay).

110 But could for various reasons, including insufficient manning, not do so. Only the frigate *Jagtrust* (see n 47 above) came around to “deeze Caabse Rheede”.

111 *Idem* 1781 at 110-111 (Council of Policy Resolution, 3 Aug 1781); *idem* 1781 at 264-265 (Dagregister, 3 Aug 1781).

112 *Idem* 1781 at 111-113 (Council of Policy Resolution, 3 Aug 1781).

getting their crews ashore safely as the main factors contributing to the loss of the Indiamen.¹¹²

The Company's reaction to the disaster, both in Batavia and in the Netherlands, was not unexpected and in any event not ameliorated by the Cape's inexplicably delayed and incomplete reporting of events.¹¹³ After all, it soon appeared, the Saldanha Bay losses were enormous – “zeekerlijk een der grootste en gevoeligste Slagen welke de comp'e gedurende dezen Oorlog getroffen hebben”¹¹⁴ – and came at a time when the DEIC was already in increasingly dire financial straits. The losses sustained in Saldanha Bay were emblematic of the direct losses it suffered during the Fourth Anglo-Dutch War¹¹⁵ and from which it never recovered.

At first there was some incredulity back home. The Lords Seventeen, in a letter to the Cape, refused to believe the rumours that had reached them via England and had been reported locally, the more so as these had it that the Indiamen had been captured without putting up any defence.¹¹⁶ They also wrote to Batavia requesting further information of the events in Saldanha Bay as they expected that the Cape authorities had sent a report to the East.¹¹⁷

Once it had transpired what had happened, the Cape authorities were requested to explain, or were criticised for taking, certain decisions: why they had decided to allow the *Held Woltemade* to depart,¹¹⁸ why only the cargo in the cabins and

113 See Leibbrandt (n 34) at 793-794 (Council letter, dated 14 Jun 1786 at 675).

114 So thought the Council in Canton about the capture of the China ships in Saldanha Bay, in a letter sent to the Cape: see *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 368-369 (Incoming Letters, letter from the Council at Canton, dated 2 Jan 1783, received at the Cape 21 Apr 1783).

115 Estimated at some 40 million guilders (see Jur van Goor “Continuity and change in the Dutch position in Asia between 1750 and 1850” in Moore & Van Nierop (n 10) 185-200 at 193), mostly from the loss of ships to the British (*idem* at 194).

116 See *Kaapse archiefstukken* (n 34) 1782 *Deel 2* at 174-175 (Incoming Secret Letters, letter from the Lords Seventeen, dated 2 Nov 1781, received at the Cape 6 May 1782, which was sent “[i]n dat vertrouwen dat kunnen wij geen geloof slaan, aan de tyding, welke in Engeland verspreijd is”, but which appeared to be true: “alles breeder blykende bij de hier neevens gevoegde Leydsche Courant van den 22 Octob laasleeden”. However, this story contained “zoo veele onwaarschynelikheden ... dat wij ons naauelyks van de echtheid van het zelve kunnen overtuygd houden” and that the Lords could not imagine (“kunnen ... van de geval geen denkbeeld vormen”) what had happened to make the rumours true. See, also, Leibbrandt (n 34) at 793-794 (Council letter, dated 14 Jun 1786 at 675).

117 See *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 418-419 (Incoming Letters, letter from the Lords Seventeen to the Council in Batavia, dated 8 Dec 1781, referring to the events “van al t welk wy niet twyfelen of de caabsche ministers zullen alle de omstandigheden welke daar by hebben plaats gehad zo omstrent het geval van voorn'e Retourscheepen als van het schip *de Held woltemade*, indien de daar van ingekome tyding conform de waarheid is aan UE hebben bedeed, voor zo verre dezelve, tot huner kennisse zyn gekomen”).

118 See *idem* 1783 *Deel 1* at 391 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, referring to the decision as “te beklagelijker” as it probably lead to the discovery of the return ships in Saldanha Bay).

on the in-between decks had been discharged rather than all the (most valuable) cargo so that the Indiamen could be sent to Saldanha Bay with ballast,¹¹⁹ why the initial instructions on the defence of the Bay and where the Indiamen had to anchor had been given, and later altered, without apparently consulting experts;¹²⁰ why the hookers in which the sails and ropes had been stored, were not ordered to return to the Cape to prevent the enemy, after taking the merchantmen, from simply sailing them out of the Bay;¹²¹ and why, with Suffren having arrived at the Cape with his squadron, the Indiamen were not ordered back from Saldanha Bay to False Bay where they would have been much safer.¹²²

The conduct of the commanders, too, came in for severe criticism¹²³ and with allegations of a criminal failure in their duties, further action against them was in the offing.¹²⁴

As for the Dutch seamen, the authorities in Batavia instructed their immediate repatriation on foreign ships bound for Batavia or the Netherlands so that they could be redeployed for the Company's benefit.¹²⁵ However, that did or could not happen in all cases and a considerable number of seamen remained stranded at the Cape¹²⁶ and

119 See *idem* 1783 *Deel 1* at 391-393 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, observing that from the manifests ("Carga") of the *Hoogkarspel* and the *Paarl* published in England it appeared, "tot ons leedweezen", that the captured vessels still contained a considerable amount of goods).

120 *Ibid*, expressing "onse verwondering" that the orders were given "sonder alvorens van de mogelijkheid van derselver executie door deskundigen te weesen geïnformeerd".

121 *Ibid*.

122 *Idem* 1783 *Deel 1* at 368-369 (Incoming Letters, letter from the Council at Canton, dated 2 Jan 1783, received at the Cape 21 Apr 1783, concerning the capture of the China ships, the loss of which was considered "te beklaglijker om dat het zelve is gebeurt na dat uw Gouvernement reeds was voorzien van een toereijkende Land en Zeemagt ter afweering van het Gevaar waar mede de Colonie en aldaar zijnde Schepen bedriegt weird", and expressing surprise that for ships detained at the Cape there was "geen betere Schijl Plaats ... als een weerlooze Baai").

123 See Sleigh (n 66) at 465-466, who points out that the incident was but an example of the low morale and unreasonable fear of the British that plagued the DEIC at the time.

124 For the fate of the captains, see, further, at n 411 in Part 2 of this article.

125 See *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 354 (Incoming Letters, letter from the Council in Batavia, dated 18 Oct 1782, received at the Cape 23 Feb 1783, renewing an earlier order to send "het daar op bescheijden en door vlugt g'echapeerde volk soo spoedig mogelijk voor het grootste gedeelte herwaarts"). One possibility was to redeploy them on neutral ships the DEIC had chartered (see at n 138 below) to carry its goods from the Cape: *idem* 1783 *Deel 1* at 395 at 399 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, instructing that for the manning of those ships "het Volk zo van even gem Scheepen [ie, those detained and still at the Cape, presumably the *Amsterdam*, *Morgenster*, *Indiaan*, *Batavia*, which had been sent to Hout Bay] als van de in Saldanhabaaij genomen Vier Scheepen, en het aldaar Verbrande Schip *Middelburg* zal kunnen worden geëmployeerd"). The local authorities were not clear about these instructions and sought clarification: *idem* 1783 *Deel 1* at 542-543 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783).

126 By Jun 1783 there was said still to be 200 men from the captured Saldanha Bay ships who were locally employed and "dienst doende als vooren": *idem* 1783 *Deel 1* at 310 (Dagregister 30 Jun 1783); but *cf idem* 1783 *Deel 1* at 516 (Outgoing Letters, letter to the Lords Seventeen, dated 22 Jul 1783, stating the number of Company servants at the Cape at the end of Jun 1783 to be 2 177

in Company employment and on its payroll for some time.¹²⁷ Clearly not all of them could be gainfully employed at the Cape;¹²⁸ some found employment on passing ships,¹²⁹ while others soon got into trouble.¹³⁰

There is record of many requests directed by these sailors to the local authorities.

A few requested and were granted permission to stay at the Cape.¹³¹ Many others requested and obtained permission to return to the Netherlands or Europe, with any

in total, including 339 men from the captured return ships who were “dienst doende als vooren”). There are more specific details of these numbers (ie, at the end of Jun 1783) in a subsequent letter to Batavia: *idem* 1783 *Deel 1* at 548-550 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783). According to this return, there were a total of 1 946 employees at the Cape which included forty-six men – there is a precise breakdown of their ranks and occupations – from the *Middelburg*, thirty-five from the *Honkoop*, fifty-nine from the *Paarl*, thirty-two from the *Hoogkarspel* and thirty-six from the *Dankbaarheid* as well as eighteen from the *Zon* and five from the *Snelheid*, the two hookers.

- 127 They requested to receive their earned salaries (“haare bij d’E Comp’ie verdiende en te goed behoudene Maandgelden”) locally, and that the pay still to be earned would also be paid to them every month. The Council decided that the salary books (“Soldij-Boeken”) of the return ships would be closed off (“afgesloten”) on 21 Jul, the date on which they had to leave their ships, and that they would be taken on to the local government’s payroll as from that date, that the pay due to them would be paid at the end of August, and that they would receive future payments monthly rather than only every four months: see *idem* 1781 at 117 (Council of Policy Resolution, 20 Aug 1781).
- 128 A few were employed, even if not properly qualified for it, on various batteries and redoubts (“tot bediening van het geschut zijn geplaatst geworden”): *idem* 1783 *Deel 1* at 542-3 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783).
- 129 See *idem* 1781 at 120 (Council of Policy Resolution, 27 Aug 1781) for a request by the captain of a Danish ship in False Bay for officers so that she could continue the voyage to Europe. The Council decided that as events in Saldanha Bay had resulted in sailors (“stuurlieden”) being without employment at the Cape, some of them could be assigned. Accordingly the chief mate (“Opperstuurman en Derdewaak”) of the *Paarl*, Hermanus Kikkert (see, also, n 166 below) from Burg on the Texel and Laurens Steenboom from Visby were dismissed from the Company’s service and allowed to transfer to the Danish ship.
- 130 In Nov 1783, the governor gave notice that a number of sailors who had been on board the return ships that were captured by the enemy or burnt in Saldanha Bay, “verscheijden baldadigheeden hadden gepleegd, die egter niet Sodanig waaren om deselve diesweegens Crimineel te doen actioneeren”. Some of these were demoted (“degraderen”) to ordinary seamen (“Mattroosen”) at a (lower) salary of f9 per month and the others (who were still at that level) were sent to Batavia: *idem* 1783 *Deel 1* at 231-232 (Council of Policy Resolution, 18 Nov 1783).
- 131 Eg, Hendrik Jacobus [Jan] Colijn, who had arrived as a sailor in the *Middelburg* from China, asked for burgher papers: Leibbrandt (n 34) at 269 (Memorial 67 of 1781, 11 Sep 1781); Johan Godlieb Mader, from Bareuth, who had served as chief surgeon (“opperchirurgijn”) on the *Middelburg* and had since remained at the Cape, was on the death of the chief surgeon in False Bay appointed in his place at a salary of f6 per month, subject to approval by the Lords Seventeen: *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 218 (Council of Policy Resolution, 16 Jul 1782); Claas Vreedenburg, from Oud-Loosdregt in Holland, former chief surgeon on the *Paarl*, arrived back at the Cape in 1782 and requested permission to settle and practise here as burgher-surgeon: Leibbrandt (n 34) at 1297 (Memorial 52 of 1782); and Johannes Boomgard [Bongard], from Dusseldorf and formerly junior mate on the *Paarl*, asked for burgher papers: *idem* at 137 (Memorial 86 of 1783).

available (foreign) ship or, sometimes, with the ship on which they specified they had obtained a passage.¹³² Some were only able to leave in 1783.¹³³

Many who found themselves stranded and unemployed at the Cape (also) requested the severance of their employment with the DEIC so that they could, either locally or elsewhere, obtain employment on foreign ships.¹³⁴

Then there was the cargo on the Indiamen that had been off-loaded at the Cape before the vessels were sent to Saldanha Bay.

The DEIC made elaborate plans to charter and send ships under neutral flags to the Cape and Batavia in an attempt to continue its trade during the Anglo-Dutch War, plans which made provision for forwarding the goods stranded at the Cape. That

132 Eg, the supercargo on the *Middelburg*, Egbert van Karnebeek, was allowed to depart for Europe on a Danish ship so that he could inform the “heeren majores in ’t Patria” of what had transpired in Saldanha Bay: *Kaapse archiefstukken* (n 34) 1781 at 237 (Dagregister 20 Apr 1781). David Vis, who had left the Netherlands in 1779 as a gunner’s mate (“constabelsmaat”) on the *Middelburg* for China, and arrived back at the Cape on her return voyage, mentioned that he had been unable to obtain any passage home in any Company ship and, as he longed to serve his country in these anxious times, requested and was granted permission to leave on a Danish ship: Leibbrandt (n 34) at 1296-1297 (Memorial 38 of 1782, 18 Apr 1782); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 148 (Council of Policy Resolution, 18 Apr 1782); *idem* 1782 *Deel 1* at 490-491 (Outgoing Letters, letter to the Middelburg Chamber concerning approval of Vis’s request). Permission was also granted, eg, to the former quartermaster (“equipagiemeester”) at Surat, Johannis Boelen, (apparently a passenger) on the *Honkoop*: *idem* 1782 *Deel 1* at 502 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782); and to Johannes Henricus Geevels [Gevels], chief mate of the *Hoogkarspel*: Leibbrandt (n 34) at 483 (Memorial 117 of 1782); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 303-304 and 305 (Council of Policy Resolutions, 24 and 27 Dec 1782).

133 Eg, Lourens Smidt, of Amsterdam, mate (“onderstuurman”) on the *Honkoop* (*Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 171 (Council of Policy Resolution, 14 May 1782); *idem* 1782 *Deel 1* at 502 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782), Leibbrandt (n 34) at 1118 (Memorial 53 of 1783); Cornelis van Vlaenderen, chief mate (“opperstuurman”) on the *Middelburg* with his young son, “den jong Matroos” Leendert van Vlaenderen (*idem* at 1298 (Memorial 28 of 1783)), *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 44-45 (Council of Policy Resolution, 18 Feb 1783); and Gerrit Esman, chief mate on the *Dankbaarheid* (Leibbrandt (n 34) at 430 (Memorial 45 of 1783)); *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783). Hans Barentse, formerly third officer on the *Paarl*, who had been permitted to proceed to India in 1782, returned to the Cape and requested to be permitted, should his service no longer be required by the Company, to continue his journey to Europe (Leibbrandt (n 34) at 138 (Memorial 101 of 1783)).

134 See, eg, *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 44-45 (Council of Policy Resolution, 18 Feb 1783); *idem* 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783); *idem* 1783 *Deel 1* at 85-86 (Council of Policy Resolution, 11 Mar 1783). Hans Barendse, “derdewaak” on the *Paarl*, was permitted to resign from Company service and to transfer to a Danish ship to travel to and from China, on condition though that when on return to the Cape his services were required by the Company, he would have to return to its service (*idem* 1782 *Deel 1* at 208 (Council of Policy Resolution, 18 Jun 1782)). The request of Anselmus Bernard, chief surgeon on the *Honkoop* to be released from Company service and to return to Europe, was granted on condition that he be dismissed “met afgeschreeven gagie uijt den dienst der E Compagnie” (ie, that he would not earn any salary on that voyage): *idem* 1783 *Deel 1* at 77 (Council of Policy Resolution, 6 Mar 1783).

included not only the cargoes on board the Indiamen still stuck there – those that had been sheltered in Hout Bay – but also the goods discharged from the ships later captured or destroyed in Saldanha Bay.¹³⁵

In the meantime, the Cape authorities sent some smaller chests and parcels from the captured Indiamen (“eenig kleine Cassen en Pacquetten met papieren”) as well as from the other returning ship detained locally with a Danish ship to Copenhagen.¹³⁶

They also managed to ship the Company’s own home-bound cargo that had been discharged (“de ... hier ontloste Thee en verdere Cinaase goederen”) to Europe in another way. The opportunity to do so arose when the – neutral – Portuguese ship, *Senhor de Bonfim e Sancta Maria*, under command of Captain Philippo Nery da Silva, arrived at the Cape in April 1782, *en route* for India.¹³⁷ When the French bought her whole cargo to be conveyed to Mauritius by Suffren’s squadron, she was free and available for hire and was chartered for the Company’s account.¹³⁸ She departed for Europe in early June 1782, “voor Reecq onser Comp’ie beladen naar Lissabon geretourneerd”¹³⁹ with the relevant goods.¹⁴⁰ Although she was destined for Lisbon, the cargo would either be discharged there or carried onwards to the Netherlands, depending on conditions and the state of the War.¹⁴¹ The Cape authorities instructed the former quartermaster (“equipagiemeester”) at Surat, Johannes Boelen, who was a passenger on board the *Honkoop*, to return to Europe with the Portuguese ship and to ensure the proper delivery of the goods shipped on her; he had to report on the ship’s arrival at Lisbon “bij den Heer Consul Gildemeester”, to deliver despatches to him, and to obtain further instructions concerning the goods.¹⁴²

135 *Idem* 1783 *Deel 1* at 395, 399 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783).

136 *Idem* 1782 *Deel 1* at 152 (Council of Policy Resolution, 23 Apr 1782).

137 *Idem* 1782 *Deel 1* at 325 (Dagregister, 11 Apr 1782).

138 *Idem* 1782 *Deel 1* at 137 (Council of Policy Resolution, 16 Apr 1782, instructing fiscal Boers and cellarmaster JJ le Seur to negotiate with the Portuguese). *Idem* 1782 *Deel 1* at 141-147 (Council of Policy Resolution, 18 Apr 1782) and *idem* 1782 *Deel 1* at 327 (Dagregister, 16 and 18 Apr 1782), indicating that the papers of the Portuguese ship, provided by her supercargo Caetano Januario de Souza, were examined and found in order and that the Council of Policy unanimously resolved to the lease of the ship, even if the hire of Rds45 000 seemed high, as the goods lay “renteloos” at the Cape and the tea was deteriorating and depreciating.

139 *Idem* 1782 *Deel 1* at 338 (Dagregister, 6 Jun 1782).

140 *Idem* 1782 *Deel 1* at 484 (Outgoing Letters, letter to the Lords Seventeen dated 18 Apr 1782, from which it appears that the cargo was valued at “f9-10’00’000” and consisted of “fijne Thee Zyde Stoffen en ruuwe Zijde”).

141 *Ibid.* Supercargo De Souza requested the Cape authorities “een briefje aan zijnen Vader op een secure Wijse met onse brief [to the Lords Seventeen] te mogen overzenden rakende de Assurantie van het Schip”, which was acceded to.

142 As appears from *idem* 1782 *Deel 1* at 501-503 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782); this letter also contained, for the information of the Lords Seventeen, the relevant authenticated copies of the ship’s papers, the lease, and the “cognoscement factura der Chinase goederen” shipped on her.

At a later stage, after some deliberation in the Political Council,¹⁴³ further goods, both from the captured vessels and from the other, smaller Indiamen detained at the Cape, were sent to Europe with other chartered, neutral vessels as the opportunity arose.¹⁴⁴

Perishable cargo or cargo in broken chests that could not be forwarded, were sold locally by public auction.¹⁴⁵

Some of those seamen who had private-trade goods,¹⁴⁶ mainly tea in chests (“afgepakte thee”), that had been off-loaded and left behind in Cape Town, requested its release and permission to sell it by auction locally.¹⁴⁷ When granted, a common

143 See *idem* 1783 *Deel 1* at 91-92 (Council of Policy Resolution, 21 Mar 1783, concerning cargo “alhier in Retour hebbende moeten werden belaaen en ten dien eijnde in deselve afgescheept zijnde geworden zo veel van de goederen die aan handen waaren en gehoort hebben tot de Ladingen der door den vijand uijt Saldanhabaaij vervoerde Chinaase Retour scheepen, mitsgaders dewelke uijt de Bataviase en Ceylonsse Retourbodems zijn gelost geworden”).

144 See *idem* 1783 *Deel 1* at 469 (Outgoing Letters, letter to the Council in Batavia, dated 2 Apr 1783, listing among the goods sent with the chartered French ship *l'Angelique Benech*, “80 Cassen Thee in zoort” from the *Hoogkarspel* and 3 000 cases of tea from the *Honkoop*, and with the Prussian ship *Kroonprins van Pruijssen*, 273 cases from the *Hoogkarspel* and 927 cases from the *Honkoop*). See, also, *idem* 1783 *Deel 1* at 559 (Outgoing Letters, letter to the Lords Seventeen, dated 21 Oct 1783, listing among the goods loaded on the “Zeeuws particulier schip” the *Factor*, which was about to sail, items from the cargo of the *Middelburg* (“35 cassen Rhabarbar, 10 cassen porcelain, 579 cassen thee Souchon, 133 cassen thee Pecco, 88 cassen thee Heijisan, 270 cassen thee Heijisan Schin, 9 cassen thee Joosjes”), the *Hoogkarspel*, and the *Paarl*).

145 *Idem* 1783 *Deel 1* at 519 (Outgoing Letters, letter to the Lords Seventeen, dated 22 Jul 1783) and *idem* 1783 *Deel 1* at 533 (Outgoing Letters, letter to the Council in Batavia, dated 30 Jul 1783, referring to different sorts of tea from the cargo of the China return ships “dewelke door het ontramponneerd raken der Cassen niet weederom gevoeglijk hebben kunnen werden afgescheept” and to “bedurvene” coffee beans and damaged “Lijwaaat Pakken”).

146 After failing to prevent the corruption connected to and the threat to its monopoly trade presented by private trade conducted by its employees, including officers and crew on its ships, the DEIC from the mid-eighteenth century onwards sought to regulate rather than prohibit the so-called private trade (“vrije vaart”). It recognised but controlled (through various, constantly changing decrees promulgated from 1743 onwards) the right of employees to trade for their own, private account inside the structures of, and, eg, with ships belonging to, the Company. Officers of DEIC ships and local governors or directors obtained the right to ship a particular number of chests to and from Batavia, filled with their own goods. The underlying idea with this change in policy was that the income lost to the Company by allowing such trade in particular goods and on particular trade routes (at first, intra-Asian, later the Asia-Europe trade) could be recouped by the imposition of taxes. These private traders were even from 1745 supported by a financial institution called the “Bank van lening” (known, from 1751, as the “Bataviasche bank-courant”). This freedom of trade was subject to a general condition, viz, that it had to be to the advantage of the DEIC (“tot voordele van de Compagnie”) and therefore not in products close to the Company’s monopoly but only in goods the Company was not or no longer interested in trading with, and only on Company ships so that it could in that way exercise control over the trade. See, further, Chris Nierstrasz “Reguleren of corrumperen? De VOC en hervorming nein de privé-handel (1743-1799)” (2006) 25 *Tijdschrift voor zeegecheidenis* 165-176.

147 Such requests were also made by some sailors who had powers of attorney (“het afschrift eener procuratie”) on behalf of their companions who were no longer at the Cape: see, eg, *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 159-161 (Council of Policy Resolution, 17 Jun 1783).

condition was that the Company had to receive the duties due on the goods.¹⁴⁸ Requests were also made to take such cargo back to Europe.¹⁴⁹ Such requests were granted on condition that the consignment had to be delivered on arrival to the relevant chamber in the Netherlands, presumably so that the duty could be levied on it there.¹⁵⁰ Requests were also made for the release of personal goods, referred to as being contained in “voets Casjes”.

As far as the prizes were concerned that the British had taken during the battle of Saldanha Bay,¹⁵¹ Johnstone had them fitted out and placed prize crews on board the *Honkoop*, the *Dankbaarheid*, the *Paarl* and the *Hoogkarspel* and on 25 July sent them ahead to St Helena in the company of a few frigates and under the command of Captain James Alms Junior¹⁵² in the fireship *Infernal*.¹⁵³ Johnstone himself arrived at St Helena on 17 August and found the four prizes and also the *Held Woltemade* there. From there they were sent home on 2 November under escort of Johnstone’s former flagship, the *Romney*.¹⁵⁴

- 148 See, eg, *idem* 1783 *Deel 1* at 12-13 (Council of Policy Resolution, 21 Jan 1783, involving requests for the release (“afgeeven”) of cargo in permitted chests (“gepermitteerde kisten”) that had been discharged and remained at the Cape (“hier ontscheepte en verbleevne”) and for their sale by public auction, which were approved, on condition that from the proceeds of their sale “het geene d’E Comp’ie daarvan toekomt door d’Eijgenars alhier in cassa zal moeten werden betaald”). The duty was 1,5 per cent: see, eg, *idem* 1782 *Deel 1* at 165 (Council of Policy Resolution, 7 May 1792).
- 149 Eg, the two permitted chests of the chief mate of the *Hoogkarspel*, Johannes Henricus Geevels, who had obtained permission to return to Europe, were released to him on condition that he did not sell the contents locally: see *idem* 1782 *Deel 1* at 303-304 (Council of Policy Resolution, 24 Dec 1782). One such request came from the Amsterdam Chamber on behalf of a trading house (Brinkman and Determeyer Wesling) and sailors on the *Honkoop*, either for the chests, discharged but left behind at the Cape, to be repatriated directly with one of the Company’s ships, or with another ship on the payment of freight: see *idem* 1783 *Deel 1* at 383 (Incoming Letters, letter from the Amsterdam Chamber, dated 6 Mar 1783, received at the Cape 18 Jun 1783).
- 150 Eg, the request by Gerrit Esman, chief mate of the *Dankbaarheid* for permission to return to Europe and for the release of his two permitted chests to be taken with him, was granted on condition that he provided proper security to the satisfaction of the Cape authorities that the chests would be delivered to the India House of the Rotterdam Chamber in whose employ he was: see *idem* 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783).
- 151 The Cape authorities would later send the passes (“de Turkse Passen met de daar toe behoorende Bijlaagen”) of the *Hoogkarspel* and the *Paarl* to the Netherlands, as well as sworn copies of those of the *Middelburg*, the *Honkoop* and the *Dankbaarheid* that had been “door de op die kielen geCommandeert hebben Schippers in zee zyn geworpen”: see *idem* 1782 *Deel 2* at 309 (Outgoing Secret Letters, letter to the Lords Seventeen, dated 28 Apr 1782).
- 152 Alms snr was in charge of the convoy of vessels sent on to India: see at n 94 above.
- 153 She was formerly under the command of Henry d’Esterre Darby, who was captured at Porto Praya (see n 29 above); for his court martial, see n 177 below. Burman & Levin (n 73) at 64 are wrong to state that the prizes were sent to St Helena unescorted.
- 154 Johnstone himself did not accompany them, but returned home via Trinidad and Lisbon (see, again, nn 95 and 99 above), arriving only at the end of Feb 1782. A warship, HMS *Hannibal*, had been sent out from Britain to St Helena to escort home-bound merchantmen if Johnstone did not turn up. He promptly sent her on 29 Sep to cruise off the Cape, during which voyage she managed to capture two French prizes (the *Severe* and the *Neckar*) that were brought back to St Helena: see, further, Rutherford “Part II” (n 13) at 306; Beatson (n 13) at 328-329.

En route, the convoy ran into a gale at the mouth of the Channel in January 1782 and two of them, the *Honkoop* and the *Dankbaarheid* were lost as a result.¹⁵⁵ The rest straggled home to Portsmouth separately, the damaged *Hoogkarspel* and the *Paarl* fortuitously escaping pursuit and capture by French warships and privateers in the Channel. Fortunately the two lost prizes were insured at Lloyd's so the captors still benefitted from the insurance payout. Although the premiums were high,¹⁵⁶ prizes taken by either naval ships or privateers were regularly insured for their voyages to the nearest prize court if the value of the prize justified it and if such insurance had been or could be arranged in time.¹⁵⁷

- 155 According to Pasley (n 17) at 175 n 1, the *Dankbaarheid* went down before she got home but the prize crew on board escaped and reached Lisbon safely, while the *Honkoop* was supposed to have foundered. Beatson (n 13) at 329 refers to the account given by the prize crew of the *Dankbaarheid* of her loss and observing that as the *Honkoop* was never heard of, she was supposed to have sunk.
- 156 As appears from the decisions referred to in n 157 below; see, also, David J Starkey *British Privateering Enterprise in the Eighteenth Century* [Exeter Maritime Studies] (Exeter, 1990) at 64 and 233, mentioning that in 1778 the premium on a sum insured of £57 000 on a valuable French prize was £1 194.
- 157 The captor (eg, the officers and crew of a capturing naval vessel or the captain and crew of a privateer) did not acquire ownership – and therefore had no perfect or absolute right – in the prize until the capture had been adjudicated as lawful and the prize property condemned to it by a prize court, at which time the captor acquired a retrospective right of ownership in it or, usually, in the proceeds derived from its judicial sale. If the capture was declared unlawful, the property was restored to the owner with compensation. However, after the capture and prior to such adjudication, the captor's imperfect and inchoate right gave rise to a defeasible and contingent interest (which automatically ceased when the property was placed in the custody of a prize court) that was insurable. See, eg, *Le Cras v Hughes* (1782) 3 Dougl 81, 99 ER 549, holding that the officers and crew of a capturing squadron had an insurable interest in a captured ship and her cargo (which they had insured for £500 at a premium of 20 per cent) prior to her condemnation and could recover from the underwriter on her loss on the insured voyage. Lord Mansfield held (at 85, 551) that the policy was not a gaming policy; the claimants had an interest based on the Prize Act and “the possession and ... the expectation [of a future benefit, founded on the contingency of a condemnation as lawful prize] warranted by almost universal practice” were sufficient to amount to an insurable interest. See, also, eg, *Curling & Others v Long & Others* (1797) 1 Bos & Pul 634, 126 ER 1104 obiter at 639, 1107: “the mere hope or expectation of interest is sufficient to entitle the insured in a policy of insurance to recover against the underwriters”.

Accordingly, it was held in *Boehm & Others v Bell* (1799) 8 TR 154, 101 ER 1318 that where a prize was insured but its capture was afterwards declared unlawful and the prize restored to the owners, the captors who had insured it, as they were entitled to do given that they doubtlessly had an insurable interest, were not entitled to a return of their premium. (In this case the prize was the Dutch Indiaman *Westcapelle*, captured off the Cape of Good Hope in Jan 1797; the captors had insured her at a rate of 20 or 8 per cent, depending on whether she sailed to England without or with a convoy; and her capture was declared unlawful by the Admiralty Court in London as there was at the time not, yet, a Vice-Admiralty Court at the Cape.) Given their interest, the underwriters who had insured it, had run a risk (of the prize not arriving and being lost on the insured voyage home, and not of her capture being declared lawful) and had, therefore, earned the premium. Cf, also, *Routh v Thompson* (1809) 11 East 428, 103 ER 1069 holding that in the absence of any interest, because the capture had been made before the outbreak of war, the premiums were returnable.

Prizes were usually insured in his own name by the captors' prize agent who himself had an insurable interest in his profits, though they were likewise contingent (see *Craufurd & Others v*

The *Held Woltemade*, too, arrived in Portsmouth on 3 February 1782, presumably with her valuable cargo of bullion.¹⁵⁸

On 4 September 1782, the Dutch prizes, referred to in contemporary publications as the Saldanha Bay prizes, were decreed by the High Court of Admiralty in London sitting as a Prize Court – that is, exercising its prize jurisdiction – to be lawful prizes and were accordingly condemned. However, Sir James Marriot then specifically reserved the question as to who were the captors and as such entitled to share in the prize money derived from the sale of the vessels and their cargoes. Although the suit had been brought in June of that year by the Navy, claiming the sole interest in the prizes, there was an argument that the Army too may be entitled to a share. The decision of the High Court of Admiralty in May 1785, that it was a case of joint capture entitling the Army to share, saw the commencement of prolonged litigation on the sharing of the prize money to which I will return in due course.

The reason for the fierce legal battles that ensued must be seen against the background of the value of the prizes. Soon after the initial decision of the High Court of Admiralty, the prize agents who had been appointed to oversee the Navy's interests, caused the ships and their cargoes to be sold and started paying out the sums derived from the proceeds of those sales, as well as the insurance money received for the lost prizes, to the various naval officers and seamen involved.¹⁵⁹

Hunter (1798) 8 TR 13, 101 ER 1239 at 23, 1245: “an agent for prizes, though he has not the possession, has such an interest in the ships coming home that he may insure”; and stating at 24, 1245 that the insurance of a prize “would be good, as a matter of public notoriety”). However, even if commonly made, such insurances were not (yet) considered a necessity so that the premiums could be included in the captor's expenses that the owner had to pay in cases where the captured property was ordered to be restored: see *Catherine and Anna* (1801) 4 C Rob 39, 165 ER 528, so holding on the basis that the captor's insurance was incurred voluntarily and for his own benefit and was not chargeable to the owner.

158 How she got there is not immediately clear. Having been captured before the others, her arrival at St Helena may have been unconnected. Sleigh (n 66) at 464 has it that she was first taken to Madras; according to Rutherford “Part II” (n 13) at 303, she and another transport became separated from the squadron in a storm and only turned up at St Helena later. She appears to have departed from St Helena in convoy with the others, but may again have become separated at some stage and arrived separately. However, she was certainly considered to be part of the prizes captured at Saldanha Bay: see (1781) 50 *The London Magazine or Gentleman's Monthly Intelligencer* at 503, where she is referred to as “prize”, although she is not mentioned at 504, where the list of prizes is given; see, also, the advertisement in (22-26 Feb 1785) no 12624 *London Gazette*, referred to in n 159 below, and Johnstone's report of the action at the Cape in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 89).

159 See, eg, (6-9 Nov 1784) no 12593 *London Gazette* (notice to those officers and crew actually on board HMS *Active* at the capture of the Dutch Indiamen *Dankbaarheid* and *Honkoop* in Saldanha Bay by the squadron under Johnstone of how and when their respective shares of proceeds of the insurance made on the two ships would be made); (22-26 Feb 1785) no 12624 *London Gazette* at 104-105 (notice to the company of HMS *Rattlesnake* and HMS *Lark* who were actually on board at the capture of the Dutch East Indiaman *Held Woltemade* of the payment of the remainder of their respective shares of that prize); (7-11 Jun 1785) no 12654 *London Gazette* (notice to officers and crews of a list of named warships and armed transports who were actually on board them at the capture of the *Paarl* and the *Hoogkarspel* of the payment of their respective shares of the

Large sums were involved. All the prizes were insured for a sum of £1 700 000¹⁶⁰ and the prize money for the *Hoogkarspel* and the *Paarl* alone amounted to at least £68 000.¹⁶¹

One final and unexpected but culturally invaluable consequence of the battle of Saldanha Bay and the condemnation of three of the Dutch Indiaman captured there was the fact that a large collection of official, commercial and private correspondence on board them at the time survived. Also still extant are some papers taken off the other two prizes before their loss. This confiscated correspondence, known as “intercepted sailing letters”, together with the ships’ papers (inventories of their crews, equipment and provisions, maps, receipts) and other official instructions and documentation, were delivered over to the High Court of Admiralty together with the other prize goods. And they came to be kept, together with similar items from other captures in the Fourth and earlier Anglo-Dutch wars, first in the Court’s archives and later in the British National Archives.¹⁶²

Altogether there are some 38 000 letters alone from the second half of the seventeenth to the early nineteenth century, some 15 000 of them private correspondence. Both correspondence originating in the Netherlands (in the case of the outgoing *Held Woltemade*) and in the East (in the case of the homecoming *Hoogkarspel* and *Paarl*) are contained in the prize letters taken at the Cape. When this collection of letters, many of them still unopened, were “rediscovered” by a Dutch researcher in 1980, interest was rekindled and their historical and linguistic value was immediately appreciated. They have since been catalogued, digitalised, studied and have, as part of the Letters as Loot Project (“Brievenalsbuitproject”), resulted in a number of websites¹⁶³

prize money); (18-21 Jun 1785) no 12657 *London Gazette* at 303 (notice to the officers and crew of HMS *Monmouth* who were actually on board at the capture of the *Paarl* and the *Hoogkarspel* of payment of their respective shares of the prize money, an earlier obstacle to such payment that prevented her being listed with the other vessels in the earlier advertisement, having been removed).

160 Rutherford “Part II” (n 13) at 304, referring to Schomberg (n 31) vol 2 at 160.

161 See (7-11 Jun 1785) no 12654 *London Gazette*; cf, also, *Sutton v Earl of Scarborough* (1803) 9 Ves Jun 71, 32 ER 528 at 72, 528 (see, further, par 3 2 9 in Part 2 of this article) where it was likewise stated that the proceeds of the two ships captured in Saldanha Bay and condemned in London were £68 000 (and that a captain’s share was £1 416 213s 4d). This may well have been only the amount initially paid to and distributed by the Navy’s prize agent: see n 350 in Part 2 of this article as to the redistribution of the prize proceeds.

162 In the HCA 30 series (High Court of Admiralty and Supreme Court of Judicature: Admiralty Miscellanea, including registers) in the British National Archives (“NA”) are to be found ship’s and DEIC papers and commercial and private letters taken from the Saldanha Bay prizes, more specifically in HCA 30/719/1; HCA 30/722; HCA 30/723; HCA 30/724; HCA 30/735; HCA 30/336; HCA 30/745; HCA 30/747/1; HCA 30/747/2; and HCA 30/750. See, also, HCA 65/28 (papers of the ship *Hoogkarspel*, 1780).

163 The gateway site to the project is at <http://www.brievenalsbuit.nl/zeebrieven> (accessed 21 Jan 2015) where there are clickable references to other relevant sites, including <http://www.hum.leidenuniv.nl/onderzoek/brieven-als-buit> (an online searchable database of transcribed letters); <http://gahetna.nl/collectie/index/nt00424/>; and <http://www.gekaaptebrieven.nl/tekst/> (all accessed 21 Jan 2015).

and a flood of publications,¹⁶⁴ including some as part of an ongoing sociolinguistic and lexicographic project.¹⁶⁵

There are some fascinating letters and much further information on the ships and those on board them.¹⁶⁶ The letters, and the private correspondence in particular, provide a fascinating glimpse of personal relations between and the living conditions of Dutch serving in the East Indies and their families at home at the end of the eighteenth century. They also constitute valuable evidence of the state of the Dutch language as used at the time by ordinary, often uneducated, lower and middle class people, including women. There are not only letters still *en route*, that is, carried on board as post,¹⁶⁷ but also a few letters written by or addressed to the inhabitants of Cape Town, letters sent and received earlier and still in possession of members of the crews at the time of the capture, as well as, poignantly, an undated and uncompleted letter by Captain Gerrit Harmeier to his mother, brother and family.¹⁶⁸

Some of them pose mysteries yet to be solved¹⁶⁹ and provide the opportunity for further historical investigation.¹⁷⁰

- 164 Including a collation and publication of some of the letters in a series entitled *Sailing Letters Journaal* (2008-): see, further, at <http://www.nationaalarchief.nl/internationaal/preject-sailing-letters/> (accessed 21 Jan 2015). One of these publications is Erik van der Doe, Perry Moree & Dirk J Tang (eds) “Buitgemaakt en teruggevonden: Nederlandse brieven en scheepspapieren in een Engels archief” (2013) 5 *Sailing Letters Journaal*.
- 165 See, eg, Marijke van der Wal, Gijsbert Rutten & Tanja Simons “Letters as loot. Confiscated letters filling major gaps in the history of Dutch” in Marina Dossena & Gabriella del Lungo Camiciotti (eds) *Letter Writing in Late Modern Europe* (Amsterdam, 2012); Gijsbert Rutten & Marijke van der Wal *Letters as Loot: A Sociolinguistic Approach to Seventeenth- and Eighteenth-Century Dutch* (Amsterdam, 2014).
- 166 See, eg, Perry Moree, Vibeke Roeper, Ingrid Dillo & Theo Timmer (eds) *Kikkertje lief. Brieven van Aagje Luijtsen, tussen 1776 en 1780 geschreven aan haar man Hermanus Kikkert, stuurman [op de Paarl] in dienst van de VOC* (Texel, 2003). On Kikkert, see, also, n 129 above.
- 167 As to which see Perry Moree “*Met vriend die God geleide*”. *Het Nederlands-Aziatisch postvervoer ten tijde van de Verenigde Oost-Indische Compagnie* (Zutphen, 1998).
- 168 See NA, HCA 30/735/24. There are also earlier letters by Harmeier to his father, dated Batavia 1 Dec 1780 and to his brother, dated Batavia Dec 1780 (see HCA 30/735/24), and an eight-page letter by Harmeier to his father from the Cape of Good Hope dated Feb 1781 (see HCA 30/735/31 or 33)). There are also several official letters, debit notes, and the like to and from Harmeier; and also three loose pages to him, dated 19, 22 and 23 May 1781, and signed “R Pietersz”, indicating that he had obtained ballast and tools from the hooker *Snelheid* (see HCA 30/735/32). There are also some further documents relating to Harmeier in HCA 30/747/1.
- 169 See, eg, Perry Moree “Het superbe legaat van Tante Pieper en andere mysteries: Een inventaris van twaalf bundels Sailing Letters uit de Vierde Engelse Oorlog” available at <http://prizepapersconsortium.huygens.knaw.nl/> at 47-65 (accessed 21 Jan 2015). The author provides an inventory and a brief discussion of the letters contained in one of the boxes in HCA 30 series, viz HCA 30/735, in bundles 22-33 (including letters from the three Dutch prizes captured at the Cape). He also speculates on mysteries such as how and why certain unexpected items – eg, a letter written in 1768, the resolution of an extraordinary ship’s council held in 1767/9 (?) on board the *Jonge Thomas* (see, again, n 62 above), and a scabrous verse – came to be present on one of the Dutch East Indiamen in Saldanha Bay in 1781.
- 170 For a fascinating piece of detective research based on one of the letters from the *Held Woltemade*, see the pieces entitled “De brief uit Surhuizum die nooit aankwam (1779)” (Oct 2013) and “De brief uit Surhuizum die nooit aankwam (1779), Deel 2” (Apr 2014), both available on the website “Stamboompagina Sake Wagenaar” at <http://www.sakewagenaar.nl> (and both accessed 8 Jan 2015).

3 Legal consequences

The legal consequences arising from Commodore Johnstone's expedition to the Cape and the action in Saldanha Bay may conveniently be considered under three topics: litigation in England on matters pertaining to naval law and, more specifically, intra-naval immunity; litigation there on matters pertaining to prize law and, more specifically, the question of joint captures; and finally litigation at the Cape and in Batavia involving the Dutch naval officers present in Saldanha Bay on that fateful day in July 1781.

3 1 Naval Law

3 1 1 Introduction

One legal consequence of Johnstone's expedition was the litigation concerning issues of naval discipline. The commodore was inexperienced in naval matters, leading to several tactical miscalculations on his "inglorious but lucrative expedition" to the Cape.¹⁷¹

Although no official action was ever taken against him, Johnstone was generally and widely¹⁷² blamed for the failure of his expedition, one that was in any event rendered more difficult by imprecise orders, the involvement of a military element, and an overriding obsession with financial gain through the capturing of enemy prizes. "[P]rize and plunder seem to have been uppermost in his mind during and after the expedition to the Cape."¹⁷³

He further did not always enjoy the best of relationships with all those serving under him and was certainly more than ready to place the blame on them when things did not go according to plan.

One example that occurred on the Cape expedition concerned the French capture of the fireship HMS *Infernal* under the command of Captain Henry d'Esterre Darby at Porto Praya.¹⁷⁴ She was captured because Darby had, on arrival, dropped anchor

171 Ralfe (n 14) at 372. Pasley (n 17) at 16 had written *en route* to the Cape that in the event of the French foiling the British there, "I should blush to shew my face in Manchester Buildings after so unsuccessful an Expedition"; at 120 he observed that Johnstone lacked the special qualities of firmness and initiative required by a commodore of a squadron detached for a distant service in days of slow communication.

172 Eg. James Madison (1751-1836), statesman, political theorist and fourth president of the US (1809-1817), wrote in a letter on Christmas Day 1781 to Edmund Pendleton (1721-1803), politician, lawyer and at the time president of the Virginia Supreme Court of Appeals, concerning a newspaper report of the success of Commodore Johnstone in taking five returning Dutch East Indiamen as prizes and destroying a sixth, that "[w]hatever may be thought of this stroke of fortune by him and his rapacious crew, the Ministry will hardly think it a compensation to the public for the danger to which the remains of their possessions in the East will be exposed by the failure of his expedition": *Letters and Other Writings of James Madison ... Vol I: 1769-1783* (Philadelphia, 1867) at 58.

173 Harlow (n 11) at 110.

174 See, again, n 29 above.

outside of the warships and not inshore as all the small vessels in the squadron had been ordered to do. Although she was shortly after her capture abandoned by the French and then rejoined Johnstone's squadron only slightly damaged, Darby was taken prisoner by the French and only managed to return to England much later.¹⁷⁵

Johnstone then promptly had him court-martialled at Portsmouth.¹⁷⁶ The Court, though, found that it did not appear from Johnstone's evidence that he gave any orders directly to Darby, after the *Infernal* had anchored at Porto Praya, to shift his birth and move further in. Darby was accordingly honourably acquitted. He went on to serve with distinction under Nelson and to knighthood.¹⁷⁷

Darby also subsequently gave evidence at another and, for present purposes, more prominent court martial instigated by Johnstone, that against Captain Sutton.

3 1 2 The Sutton court martial

Another incident at Porto Praya, involving Captain Evelyn Sutton¹⁷⁸ of HMS *Isis*, had more serious implications for and resulted in litigation involving Commodore Johnstone that occupied him right until the end of his life. The litigation lasted from 1783 until 1787, was a *cause célèbre* in naval and political circles,¹⁷⁹ and quickly

175 See, further, Rutherford "Part I" (n 13) at 206 n 2, 211 n 1, 297, 298; Beatson (n 13) at 321.

176 The proceedings are to be found in NA, PRO Ad 1/5319 (Court Martial Papers, 1 Jan 1781 to 30 Apr 1782). For Johnstone's version of what had transpired, see his report on the battle of Porto Praya in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ...* sv "Principal Occurrences" at 78.

177 Darby (1750-1823), an Irishman whose uncle George was a vice admiral, rose through the naval ranks slowly but steadily. He became a naval lieutenant in Nov 1776, a commander – of the *Infernal* – in Jan 1781, and was promoted to post captain in Jan 1783. In 1796 he was appointed to command HMS *Bellerophon* ("Billy Ruffian") and served under Lord Nelson at the Battle of the Nile in Aug 1798 where he was injured while forty-nine of his officers and crew were killed and 148 wounded. He was made rear admiral in 1804, vice admiral in 1810 and admiral in 1819 and, finally admiral of the Blue in the year of his death. See, further, "Sir Henry D'Esterre Darby" in <http://threedecks.org> (accessed 4 Mar 2015) and "Battle of the Nile" in <http://www.nelson-society.com> (accessed 5 Mar 2015); David Cordingly *Billy Ruffian. The Bellerophon and the Downfall of Napoleon. The Biography of a Ship of the Line, 1782-1836* (London, 2003) at 106 (observing that Darby, her fourth captain, spent several of his early naval years serving in frigates, and first came to prominence at the battle of Porto Praya). Thomas Joseph Pettigrew *Memoirs of the Life of Vice-Admiral Lord Viscount Nelson ...* 2 vols 2 ed (London, 1899) vol 1 at 204 n 1 observes that John Jervis, First Earl St Vincent (1735-1823), referred to Darby as "my old friend, ... who is a good humoured blundering Irishman".

178 Born in Screveton, near Bingham, Notts, Sutton was the illegitimate son of Lord Robert Manners-Sutton, son of the Third Duke of Rutland. He married his cousin Roosilia (1752-1829, the daughter of Thomas Thoroton), was made a captain in 1771, and ultimately became a rear admiral (superannuated) in 1794. He died in 1817.

179 It gave rise to a spate of publications, mainly of the pamphlet type, in defence of the one or the other of the litigants, or by way of dissemination to lawyers and naval men of further information on the litigation. Three examples should suffice: Anon *Letters which passed between Commodore Johnstone and Captain Sutton, in 1781, with respect to the bringing Captain Sutton to Trial* (London, 1784, reissued 1787); William Paultney *Considerations on the Question lately agitated*

became a textbook example of the different ways in which a judicial decision could be appealed and reviewed.¹⁸⁰

It will be remembered that British reaction to and pursuit of the retreating French attackers was delayed by some hours as a result of which the French managed to escape further British attention and counter-attack.¹⁸¹

In Johnstone's view, most of the blame for the delay belonged squarely on the shoulders of Sutton. The latter had failed to respond quickly enough to bring his vessel out of the port and put her to sea when Johnstone had verbally ordered and by signals instructed the warships in the squadron to do so. And after eventually joining, Sutton had further failed to obey repeated signals to join the others in pursuit of the French. However, as Sutton had signalled in response and also later explained to Johnstone, the *Isis* had been seriously damaged in the French attack and that had prevented him from obeying with the required alacrity. He might also have pointed out that the commodore could as well have pursued the enemy without waiting for the *Isis* to get ready.¹⁸²

So enraged was Johnstone at what he perceived to be Sutton's cowardice¹⁸³ or at least his insubordination without a proper excuse, and no doubt at having lost the opportunity of going after the withdrawing French and, possibly, capturing some valuable prizes, that he accused him of numerous offences. He then suspended and deprived him of command of the *Isis* and, on 22 April 1781, had him arrested and imprisoned on his own ship until he could be court-martialled. He appointed another of his officers, the Hon Thomas Lumley of the *Porto*, to take command of the *Isis*.

in Westminster-Hall, whether the proceedings of Commanders acting within the Military Powers delegated to them, and in the course of discipline, are subject to the review of the Civil Courts of Law ... (London, 1787); and Anon *The Speeches of the Judges of the Court of Exchequer, upon granting a New Trial in the Case of Captain Sutton, against Commodore Johnstone, on the 30th of June 1784; together with Baron Eyer's Speech, on the Motion to arrest the judgment ... The Report of the two Chief Justices, Lords Mansfield and Loughborough, to the Lord Chancellor, on an Appeal from the Judgment of the Court of Exchequer, in the Case of Sutton against Johnstone* (London, 1787).

180 See Anon *Considerations Concerning a Proposal for Dividing the Court of Session into Classes or Chambers* (London, 1807) at 107-110: after a discussion of the different methods in English law of reviewing a judicial verdict, namely by a new trial, an arrest of judgment, and a writ of error or appeal, the illustrating example provided was of the litigation involving Johnstone and Sutton.

181 See, again, at n 30 above.

182 See Ralfe (n 14) at 371.

183 Sutton had been under such suspicion before and was therefore an easy scapegoat: Rutherford "Part II" (n 13) at 299 n 1. In Dec 1780, in the Channel, the *Isis* under Capt Sutton encountered the Dutch warship *Rotterdam*. However, Sutton withdrew when they became engaged on the pretense of his being some sixty men short of a full compliment and of the rawness of the rest of his crew. An enquiry was ordered into Sutton's conduct, but he was absolved of any misconduct or want of courage. Finding the report not in all respects satisfactory, Sutton was brought before a court martial, and as his conduct did appear in some degree reprehensible, he was reprimanded. See Schomberg (n 31) vol 2 at 37-38.

Rather than calling together a court martial without further delay, as Sutton kept demanding and as he may have been entitled¹⁸⁴ and able¹⁸⁵ to do, Johnstone kept Sutton under arrest on the *Isis*, throughout the subsequent voyage to the Cape and during the battle of Saldanha Bay. Although Johnstone himself returned home, Sutton then accompanied his old ship to India as a prisoner when she was detached shortly after the battle and sent there with other warships in the squadron. In India, too, Sutton was not brought to a court martial. That happened only when he returned to England in December 1783.¹⁸⁶

The court martial of Captain Evelyn Sutton took place on board HMS *Princess Royal*, in Portsmouth Harbour, on 1 December 1783, on charges exhibited against him by Commodore George Johnstone.¹⁸⁷

On 11 December 1783, the Court Martial acquitted Sutton on the charge of delaying or discouraging the public service on which he was ordered on 16 April 1781. As to the particular order of Johnstone which he was also charged with disobeying, the sentence proceeded to say that from the circumstances proved and the condition the *Isis* was in, the Court merely found that not immediately cutting or slipping the cable of the *Isis* “was justifiable” and that afterwards Sutton had done “his utmost to gain his station in the line of battle”. However, it “honourably acquitted him of the whole of the charge”.¹⁸⁸

Thus failed, for a second time, an attempt by Johnstone to discipline one of his officers for the disastrous outcome of the battle of Porto Praya. Certainly, what the Navy thought of his conduct there “was clearly shown at the courts martial of

184 But see William Hickman *A Treatise on the Law and Practice of Naval Courts-Martial* (London, 1851) at 10, pointing out that specific authority from the Admiralty was required for a court martial in foreign parts or at sea, which Johnstone, not being under Admiralty authority, did not have on his mission.

185 There being sufficient a number of warships in the squadron whose captains could have constituted a proper court martial.

186 As the alleged offence did not take place within the limits of Sir Hugh Edward’s command in the Indian Ocean, he would therefore not take cognizance of it (the lack of evidence and the absence of witnesses in India no doubt also contributed to this decision), but sent Sutton back to England (see Ralfe (n 14) at 372n), seemingly only after Sutton had appealed to the Admiralty (see Hickman (n 184) at 11-12). Sutton’s letter to the Admiralty of 28 Apr 1781 is in NA, PRO Ad 1/2485.

187 The proceedings are in NA, PRO Ad 1/5323 (Court Martial Papers, 1 Jan 1783 to 31 Mar 1784). See also: *Minutes of the Proceedings at a Court-Martial ... for the Trial of Captain Evelyn Sutton ... upon a charge exhibited against him by Captain George Johnstone ...* (London, 1789); *The Defence of Captain Sutton, as pronounced to ... the Court-Martial, that tried him upon a complaint exhibited against him by Captain George Johnstone and the Court’s Sentence thereon* (London, 1785).

188 The specific wording – and the implication that Sutton did disobey orders, but was justified by the circumstances and, accordingly, that he was acquitted not on the ground of not having disobeyed, but on the ground of his justification – caused some discussion in the litigation that followed (see n 205 below). However, that is not germane for present purposes. On the importance of the wording of a court-martial sentence acquitting an officer, see, further, John Delafons *Treatise on Naval Courts Martial* (London, 1805) at 280-281.

Captain Darby of the *Infernal* and of Captain Sutton when at last he returned to England”.¹⁸⁹

Not surprisingly, as the affair was already prominently in the public eye, Sutton felt himself aggrieved and sought redress. Not only did he suffer hardship during the unnecessarily long period it took to bring him to trial,¹⁹⁰ but, he felt, the damage that this did to his reputation was not properly restored by the ultimate verdict while he also lost out on sharing in the prizes captured at Saldanha Bay.¹⁹¹

Sutton therefore brought a civil suit against his former commander, Johnstone. The result was a remarkable series of decisions on what may be referred to as the vexed question of intra-military immunity. The fact that these decisions, and those that came after them, were, by and large, different interpretations of the (ever changing) public-policy principles underlying the issue, may explain why, even today, the matter cannot be regarded as having been finally settled.¹⁹²

3 1 3 Sutton's claim against Johnstone in the King's Bench

At common law, no action for damages lay in a civilian court against an officer in his personal capacity for bringing a subordinate to court martial, nor for arresting or suspending him in anticipation. Such acts were clearly within the limits of the superior's authority to maintain discipline. The same applied, in principle, to all other civil wrongs committed by one officer or seaman in the exercise of his naval duties against another fellow officer or seaman. If the power or duty was

189 Rutherford “Part II” (n 13) at 308.

190 Delafons (n 188) at 203-204, referring to the “discretionary power of ascertaining the proper time to assemble courts martial” being “lodged in the breast of the commander-in-chief ... [and] not to be unnecessarily prolonged”, considers the Sutton case an instance “of an extraordinary portion of time elapsing between the initial suspension and the eventual trial”, and observes that Sutton was only absolved from blame “after laying under suspension and public opprobrium for the space of two years and two hundred and thirty-four days!”. Johnstone's delay, and not his arrest of or the unfounded charges he brought against Sutton, appears to have been the main aggravating circumstance in Sutton's injury: see, eg, Harris Prendergast *The Law relating to Officers of the Navy Part 1* (London, 1852) at 381-382 who points out that the issue “came repeatedly before the Courts of Westminster and gave rise to very elaborate considerations of the whole question concerning the due exercise of a commander's authority”.

191 See, eg, Delafons (n 188) at 281 for the important point that although a court martial can restore credit and reputation to an absolved officer, it has no power to award pecuniary damages for injuries which may have been sustained in consequence of his suspension. See also, eg, *Warden v Bailey* (1811) 4 Taunt 67, 128 ER 253 (CP) at 78, 257: “A court-martial cannot give damages for injurious conduct, as a jury can.”

192 See, generally, for further background to and an elucidation of the principles involved, WS Holdsworth “The case of *Sutton v Johnstone*” (1903) 19 *Law Quarterly Review* 222-229; Donald Zillman “Intramilitary tort law: Incidence to service meets constitutional tort” (1982) 60 *North Carolina LR* 489-541; and Christopher G Froelich “Closing the equitable loophole: Assessing the Supreme Court's next move regarding the availability of equitable relief for military plaintiffs” (2005) 35 *Seton Hall LR* 699-737. See, also, Ernest C Thomas *Leading Cases in Constitutional Law Briefly Stated* (London, 1876) at 67-68; Herbert Broom *Constitutional Law viewed in relation to Common Law, and Exemplified by Cases* (London, 1866) at 650-733.

exercised oppressively or improperly, the superior's conduct could, in appropriate circumstances, merely constitute a distinct offence cognizable by a court martial.¹⁹³

In short, there was intra-naval¹⁹⁴ immunity – in civil courts – against tortious claims resulting in personal or financial loss.¹⁹⁵

The underlying rationale, or at least some of its tenets, was founded in the recognition of the separateness of a naval community governed by its own exhaustive system of law, in the national importance of naval discipline, and in the perceived inappropriateness of allowing civilian courts to intervene in this arena. An analogous, but by no means identical, immunity was enjoyed by other officials of the Crown acting within the scope of their authority, as also by the Crown itself.

But what if the wrong was committed when the superior exceeded or abused his authority; if he exercised his authority maliciously and without reasonable or probable cause?¹⁹⁶

A naval officer, it was clear, was certainly liable to damages by proceedings in the Admiralty Court for improperly capturing merchant ships and goods on an unfounded suspicion of their being lawful prize.¹⁹⁷ But was there such liability outside the realm of prize law? That was the dilemma faced by Captain Sutton in bringing a civil claim against Commodore Johnstone.

Sutton's claim for damages against Johnstone, instituted in the Court of King's Bench in January 1784,¹⁹⁸ was therefore not based merely on his arrest, or his suspension, or on his being brought before a court martial: Johnstone certainly had the authority and power to do so. Rather it was for Johnstone having maliciously and without probable cause charged him with offences of which he was not guilty, and

193 See, eg, Prendergast (n 190) at 380. But, of course, a court martial's jurisdiction is criminal and its sentences penal and it has no authority to award damages in favour of the subordinate, even if it did find the superior officer guilty: see, again, n 191 above.

194 Or intra-military: whatever is said about the Navy and naval discipline below, applies equally to the Army and military discipline generally. One has to bear in mind, as was pointed out in *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 117, that intra-military (as opposed to intra-naval) disputes were relatively rare as a standing army was unknown to the common law.

195 For a useful introduction to intra-military immunity from tort liability in the English common law, see Anon "On the liabilities of naval and military officers for private wrongs" (1848) 8 *LR & Quarterly J of British & Foreign Jurisprudence* 17-61; Zillman (n 192) at 491-493; Froelich (n 192) at 701-706.

196 To be distinguished from the issue of the actionability or otherwise in a civil court of intra-naval wrongs, are other matters that are not in dispute. They are that a court martial acting within its jurisdiction cannot be prohibited by a civil court of law, and that a conviction obtained before a court martial acting within its jurisdiction cannot be challenged before such a court. See, further, Holdsworth (n 192) at 223.

197 When a prize court adjudicated the capture unlawful and ordered restoration of the property to the owners, it could additionally also award damages against the captors. See at n 288 in Part 2 of this article. But there was no action against a naval officer in a civil court of law for merely seizing and detaining a vessel on suspicion of her being a hostile prize (*Le Caux v Eden* (1781) 2 Dougl 594, 99 ER 375), at least not if the suspicion was reasonable and the exercise of power not malicious.

198 The King's Bench proceedings and decisions are not reported, but are reflected in the published reports of subsequent proceedings in higher courts.

for aggravating that measure by having maliciously and without probable cause kept him under arrest until his trial and for longer than was necessary and as a result of which he suffered damage.¹⁹⁹

Johnstone pleaded the general issue. His defence was that of immunity: no civil cause of action for redress could ever be established where claims involving court-martial proceedings were based on actions taken by superior officers in the course and enforcement of military discipline. In any event, even if there were no absolute but merely a qualified immunity, Johnstone argued he did have probable cause to suspend and court-martial Sutton, given the latter's admitted refusal to obey his orders.

On 19 June 1784, after a trial lasting twenty-three hours, the special jury found for Sutton and awarded him damages in the amount of £5 000.

Johnstone then applied for and obtained a new trial, alleging the jury had mistaken the case in that there existed no grounds for charging him with malice, but on 11 December 1784 the jury again returned a verdict for Sutton, now awarding him £6 000 in damages.

3 1 4 Johnstone's recourse to the Exchequer Court

Johnstone submitted to the last verdict and made no application for a third trial, but early in 1785 he applied for a reversal or "an arrest of judgment" before the Exchequer Court at the Guildhall in London.

After elaborate discussion, Eyre CB refused to arrest the judgment and dismissed Johnstone's application in *Johnstone v Sutton*,²⁰⁰ thus confirming the earlier verdict in Sutton's favour.

Johnstone's first and for present purposes his main objection in arrest of the earlier judgment was that no action for malicious prosecution lay for a subordinate officer against his commanding superior officer for an act done in the course of discipline and under powers incident to his situation; in any event, the issue was not cognizable by a court of common law but only by a naval court.²⁰¹

In response, Eyre CB observed that Johnstone could refer to no adjudged case or other authority in English law, save for analogous decisions that granted immunity to judges and jurors. He could merely refer to "general principles of public policy and convenience" in support of his objection. In fact, there were several decisions

199 Having been relieved of his command before the battle of Saldanha Bay, Sutton argued that he was deprived of several sums of money amounting to £20 000 which he would otherwise have gained from prizes and captures taken from the enemy by the *Isis* and the other ships in Johnstone's squadron. He also suffered severe hardship and was put to great expense in the sum of £5 000 in defending himself against Johnstone's charges; and he was further also injured in his good name and character in an amount of £30 000.

200 The Court's judgment is contained in *Sutton v Johnstone* (1786) 1 TR 493, 99 ER 1215 (Exch Ct) at 501-510, 1220-1225; some, older sources refer to TR (Term Reports) as Durn & East TR (Durnford & East's Term Reports).

201 See at 502, 1220-1221.

that went the other way, and that provided support for actions against military men in command by a subordinate officer or another person subject to their authority. These decisions undermined arguments based on public policy and inconvenience. Further,²⁰² the immunity of judges and jurors were distinguishable as the law presumed that they would do nothing maliciously. A naval commander, as superior officer, by contrast, “is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation” and arguments to distinguish him along the lines of judges and jurors, the Court thought, “are dangerously loose and indefinite”.

Likewise, the Court rejected²⁰³ the argument that the issue was not cognizable in a court of law as it concerned naval matters peculiarly within the specialisation of naval courts: “considerations of this nature cannot exclude the established jurisdiction of the country” and in fact “those jurisdictions must be presumed to be equal to their functions” and that courts of law will do their duty honestly and competently.

The Court accordingly dismissed Johnstone’s main objection “upon the mere abstract state of it” and unsupported as it was by any reported decisions.²⁰⁴

In short, the Court thought that there was no absolute immunity against civil actions for superior officers, nor any reason to extend such immunity to them by analogy to the immunity enjoyed by judges and jurors. Further, naval conduct could be examined or reviewed by a civil court and there was no reason to suppose naval discipline would suffer if superior officers were faced by the prospect of civil litigation.

The Court likewise rejected Johnstone’s other objections²⁰⁵ and ruled against him by discharging the rule for arresting judgment.

202 See at 503-504, 1221.

203 See at 504, 1221.

204 See at 504-505, 1222.

205 His second objection was that Sutton’s action, being one founded on a want of probable cause for making the charge against him, had to fail because on the face of the record and Sutton’s own admission that he had disobeyed orders, there probably was cause to have charged him (see at 505, 1222). On this point the Court did express some hesitation, given the specific wording of the sentence of the court martial (see at 505-506, 1222, considering whether, if circumstances are such that an order given cannot be obeyed, not obeying can actually amount to disobedience for which there is justification, or whether there ought not to have been an acquittal on the ground of the charge of disobedience not having been made out at all; and see, again, n 188 above and Delafons (n 188) at 282 and 283-284). However, ultimately the Court thought that it was bound to accept that Sutton did disobey an order, but was justified in doing so and that there was therefore a reasonable suspicion in this case to have charged him for that disobedience (see at 506-507, 1222-1223). But, the justifiable cause, the Court thought, existed only as regards one of the charges against Sutton and not as regards the other one – he was found innocent of having delayed the public service – and the jury must be taken to have awarded him damages on that basis and in respect of that charge (see at 507-508, 1223).

Johnstone’s third objection (see at 508-509, 1224) was that the jury’s award of damages was improper as there had been no averment or allegation of Sutton’s title to any prize money or, given

3 1 5 Johnstone takes the matter to the Exchequer Chamber

In November 1785, Johnstone brought a writ of error in the Exchequer Chamber, the next superior court.²⁰⁶

The case was argued twice, on 2 and 4 February 1786, at Serjeant's Inn, before Lord Mansfield, Lord Chief Justice of the King's Bench, and Lord Loughborough, Lord Chief Justice of the Court of Common Pleas. In *Johnstone v Sutton*²⁰⁷ their Lordships declared that the judgment of the Court of Exchequer ought to be reversed and each reported his reasons to the Lord High Chancellor.

Johnstone again argued that exposing superior officers to civil claims for the consequences of their conduct in enforcing naval discipline would undermine that very discipline. They should enjoy absolute immunity against such claims. Also, the specialised nature of naval matters made it impossible for a civilian court of law, judge or juror to assess a naval dispute and offences properly and those matters should therefore be determined by naval proceedings only. A court martial was the proper institution to punish a superior's excess towards a subordinate. He again also contended that, supposing an action did lie, he did have reasonable and probable cause to arrest, suspend and bring Sutton to trial and, alternatively, that Sutton had not established any loss for which damages could be awarded.²⁰⁸

that a suspended captain remaining on board was probably generally still entitled to prize-money for captures made during his suspension, that any was in fact lost. The Court, again, thought that although it was a matter outside its jurisdiction and only within that of a prize court (see, further, at n 292 in Part 2 of this article), a captain who had been suspended and removed from his rank when a prize is taken is not or no longer "the captain of such ship actually on board" within the meaning of the applicable proclamation (see, further, par 3 2 2 in Part 2 of this article). It held, but only for purposes of the matter before it, that by reason of his suspension and removal, Sutton did lose the prize money which he would have gained from prizes taken by the *Isis* and that damages had been awarded on a proper basis.

The Court likewise gave short shrift to Johnstone's final objection, namely that as by law no term had been fixed, short of three years, within which courts martial had to be held, he was under no obligation to have one called together for Sutton within three years, or as soon as reasonably and conveniently possible after the charge against him had been exhibited. The Court was of the view (see at 509-510, 1224) that the three-year period referred to was merely the limit of time beyond which no court martial could be held, and that the superior's duty to bring a subordinate to a court martial, as many other of his duties, had to be exercised within a reasonable time and thus possibly much sooner. The superior certainly did not have the power to hold a charged subordinate imprisoned for up to three years prior to having him court-martialled.

206 The Court of the Exchequer Chamber was the appeal court for common-law civil actions from the King's Bench, from (as in this case) the Court of the Exchequer (whose equity jurisdiction ceased in 1880) and (from 1830) from the Court of Common Pleas. It was constituted by judges belonging to those inferior courts. From it there was a further appeal to the House of Lords. The Chamber was superseded by the Court of Appeal in 1873.

207 (1786) 1 TR 510, 99 ER 1225 (Exch Ch).

208 The full list of errors upon which Johnstone relied are set out at 510-511, 1225 (see, also, the House of Lords judgment below n 225 at 92, 438). The arguments for Johnstone are to be found at 511-528, 1225-1235. His objections are summarised by their Lordships at 545, 1244.

Sutton was against such absolute immunity and relied on the general rule that if an individual suffers damage from the unlawful act of another, the law gives him a civil remedy, as well as on earlier decisions in which the recovery of civil damages was in fact allowed in naval or quasi-naval situations.²⁰⁹

Their Lordships found in Johnstone's favour.

Their main reasoning²¹⁰ was that he could not be held liable because his prosecution of Sutton by court martial had not been without probable cause. For liability to ensue, it was essential that the prosecution was carried on maliciously and without a probable cause, and that had to be substantially and expressly proved and could not be implied. Sutton's acquittal by the court martial alone was not sufficient to establish want of probable cause on the part of Johnstone.²¹¹

The question of probable cause, it was clear, is a mixed proposition of law and fact²¹² and here there had not been any proof of a lack of probable cause.²¹³ Although Sutton's defence raised "a most complicated point", there appeared to their Lordships under all the circumstances to be no difficulty to support their opinion that, in law, Johnstone had had a probable cause to bring Sutton to trial by court martial.²¹⁴

This particular part of the opinion assumed, of course, that intra-naval claims were not absolutely barred, irrespective of the presence or absence of probable cause,

209 These (unreported) decisions were *Swinton v Molloy* (1783, KB), where a false imprisonment action by a ship's purser against her captain was entertained, and *Wall v M'Namara* (1779) where there was a false imprisonment claim by a captain in the Africa Corps against the governor of Senegambia and where the direction by Lord Mansfield to the jury, who ultimately awarded damages, was in striking contrast to his opinion in *Sutton v Johnstone*: see Holdsworth (n 192) at 225 and also *Hannaford v Hunn* (1825) 2 Car & P 148, 172 ER 68 in note* at 157-158, 72. Both decisions are referred to at 536-537, 1239. The arguments for Sutton are to be found at 528-544, 1235-1243.

210 The reasons for the opinions of Lords Mansfield and Loughborough are at 544-550, 1243-1246 and at 544, 1243 respectively.

211 The point was made at 545, 1243 that from a want of probable cause, malice may and most commonly is implied; the defendant's knowledge of the lack of probable cause may also be implied in such a case. However, even from the most express malice, a want of probable cause cannot be implied, for a man may prosecute another with a malicious motive also where there is a probable cause. And there is therefore no action if he prosecutes upon an apparent guilt, even if he acted maliciously.

212 See at 545, 1244: whether or not circumstances were true and actually existed that showed there was a cause, is a question of fact; but whether, if such existed, they amounted to a probable cause, is a question of law. See also, eg, *Panton v Williams* (1841) 2 QB 169, 114 ER 66 at 193, 75-76, where it was observed that the authorities referred to, and the judgment in *Sutton v Johnstone* itself, "prove incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not; but that what is reasonable or probable cause is [a] matter of law".

213 Sutton had disobeyed Johnstone's orders and then justified himself by physical impossibility to obey. That and "nothing less could be a justification", but whether it existed was a most complicated and subjective matter, depending on circumstances and the view taken of them: see at 545, 1244.

214 Their Lordships further chose at 547, 1245 to give no opinion on whether Sutton had established his loss as the right to prize money was still in litigation between him and others (ie, Capt Lumley) not party before them: see, further, par 3 2 8, n 359 in Part 2 of this article.

but that there was the possibility of an action. But, as their Lordships recognised,²¹⁵ “the great and important question now brought into judgment for the first time, is, whether such an action can lie?”. They noted²¹⁶ that frequently in the past men before a court martial have thought the charge without probable cause and have felt the injury of such act of malice; yet, “till this experiment”, it has never arisen that an action such as this can be brought; “consequently there is no usage, precedent, or authority, in support of it”; “[t]his case stands upon its own special ground”.

On this – perceived to be novel – issue of intra-naval immunity, though, their Lordships were less firm and ultimately stressed that they expressed no final opinion on it.

Lord Mansfield seems to have supported the notion of absolute immunity as naval discipline would be threatened if every acquittal before a court martial could give rise to a civil suit against the superior officer who had acted, often in difficult circumstances and on “delicate suspicions”, to enforce and maintain discipline by arresting and suspending subordinates and then later bringing them to trial.²¹⁷ “But what condition will a commander be in,” he asked, “if, upon the exercising of his authority, he is liable to be tried by a common law judicature?”, for “[i]f this action is admitted, every acquittal before a court-martial will produce one”.

He also pointed out²¹⁸ that a person unjustly accused is not without remedy but has “the properest remedy” as reparation is done to him by an acquittal, and the unjust accuser “is blasted forever, loses his reputation and may be dismissed from the service”.²¹⁹

Further, Lord Mansfield reasoned that naval law, not the civil system, was appropriately equipped to address all grievances by servicemen, even where superior officers used discretionary powers maliciously to abuse or oppress subordinates. Naval men were governed by their own “sea military code” which prescribed and regulated the duties of every man in the fleet by rules and ordinances adapted to sea military discipline. This “code” also provided that every man in the fleet had to be tried by a court martial for any offence against his duty. If a man is charged with an offence against the articles or (if silent) against naval usage, his guilt or innocence “can only be tried by a court-martial”.²²⁰ In the case of complaints arising from a court martial held without probable cause, the same jurisdiction which tries the original charge must also try the probable cause, which is in effect a new trial; every reason which requires the original charge to be tried by a naval jurisdiction equally holds to try the probable cause by that jurisdiction.

215 See at 548, 1245.

216 *Ibid*; not in all respects correctly, it appears: see n 209 above for the cases relied upon by Sutton.

217 See at 549, 1246.

218 See at 550, 1246.

219 But, of course, there is no claim for damages: see, again, n 191 above.

220 See at 548-549, 1245-1246.

But then, although clearly and outspokenly in favour of absolute intra-naval immunity for the sake of naval discipline, Lord Mansfield significantly observed that he had found no authority of any kind either way. While the question certainly seemed to require a resolution “by the highest authority”, it was not necessary to do so for purposes of the matter before him, given that even supposing an action to lie, judgment had to be given for *Johnstone*.²²¹

In short, their Lordships’ opinion considered and touched on two distinct aspects.

First, as to whether an intra-naval action did lie in a civil court of law, although they thought it was doubtful that such an action was available and rather favoured absolute intra-naval immunity for the sake of maintaining naval discipline, they stressed that their view on this aspect was merely *obiter*.²²²

Secondly, supposing that such an action did lie and that there was therefore no absolute but only limited intra-naval immunity, it was clear that no action will lie and that there will be immunity for merely bringing a person to a court martial, or for an earlier arrest or suspension for that purpose, as such acts are clearly within limits of naval authority. Only if those limits had been exceeded, such as where the conduct had been performed maliciously and without probable cause, was the immunity lifted and could a civil action lie. Here *Johnstone* did in law have probable cause for arresting and suspending Sutton and the requirements for intra-naval litigation in a civil court, supposing such to be possible, had therefore not been established.

As Holdsworth explains,²²³ the decision proceeded not on the broad ground that no such action would (ever) lie – even though, without deciding the issue, their Lordships did express themselves very strongly in favour of that ground – but on the narrow ground that an action did not lie in the present case because there was reasonable and probable cause for Sutton’s prosecution. Put differently, the view expressed by the Exchequer Chamber in *Sutton v Johnstone* on the issue of actionability was *obiter* and the only point it decided was that, assuming an action

221 See at 550, 1246: “These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned that the question is doubtful; and when judgment shall depend upon a decision of this question [which was not case here], it is to be settled by the highest authority.”

222 According to *Anon* (n 195) at 30, the Exchequer Chamber’s *obiter* opinion was that no civil action was ever available against a superior or fellow officer. The aggrieved naval man had to seek recourse against the superior by way of a court martial. But, *Anon* deduced, once the second court martial had found the superior guilty of an offence (and had thus established improper conduct for a lack of probable cause, a matter properly only within naval jurisdiction), it was possible for the subordinate to take civil action and for a court of law to hear the matter and award damages. According to this view, a civil action was thus not excluded, but merely postponed.

223 (n 192) at 222-223.

could lie, there was probable cause for the superior's conduct so that an action did not lie.

The judgment of the Exchequer Court was accordingly reversed by the Lord Chancellor on this opinion of the Exchequer Chamber.

3 1 6 And then Sutton goes to the House of Lords

Having lost, Sutton then took the matter further to the House of Lords. After hearing arguments on his writ of error,²²⁴ the following question was put to the judges: "What judgment or other award ought to be made on the record as it now lies before the House?"

On 22 May 1787 Gould J delivered the unanimous opinion of the judges present, namely that the judgment given in the Exchequer Chamber should be affirmed.²²⁵ Thus, the House of Lords confirmed the decision that Captain Sutton had no right of action against Commodore Johnstone. Sutton had lost and Johnstone had won their long-running and costly battle of litigation. This provided no more than some small consolation for the commodore, who died two days later.²²⁶

Although Sutton was unsuccessful, his legal battles were not yet over as he was still in the process of attempting to recover his share of the prize money the *Isis* received from the captures in Saldanha Bay.²²⁷

As for naval law, the litigation in *Sutton v Johnstone* did no more than express an *obiter* opinion on the scope of intra-naval immunity and the possible success of a future action such as that of Sutton. The matter was still open for final argument and decision. However, as will appear, subsequent cases read the judgments rather differently.

3 1 7 The aftermath of Sutton v Johnstone in the nineteenth century

In the century after the litigation in *Sutton v Johnstone*, a long line of decisions covered the same, or at least analogous, ground. They sought to interpret, in particular, the decision in the Exchequer Chamber and, because none of them ever reached the House of Lords again, the matter ultimately remained undecided. For

224 These are set out in *Sutton v Johnstone* (1787) 1 Bro PC 76, 1 ER 427 (HL) at 93-100, 439-443.

225 The judgment of the House of Lords is reported (without reasons) in *Sutton v Johnstone* (1787) 1 Bro PC 76, 1 ER 427 (HL) at 100, 443, and in *Sutton v Johnstone* (1787) 1 TR 783, 99 ER 1377 (HL). As to the proceedings in the House, see (May 1787) 37 *House of Lords J* 603, 656-659.

226 After the Cape expedition, Johnstone returned to politics in England, was again elected to Parliament in 1781-1784 and 1786-1787, and was also nominated a director of the India Company in 1784. Illness necessitated his retirement from politics and business and it has been surmised that Hodgkin's disease, the probable cause of his ultimate death, may have been responsible for some of the lapses of judgment in his earlier naval career: see, again, n 14 above for the biographical references. Rutherford "Part II" (n 13) at 299 n 1 opines that his death was regretted by Sutton's supporters who would otherwise have carried the matter yet further.

227 See, further, pars 3 2 8 and 3 2 9 in Part 2 of this article.

present purposes some of the decisions that came in the wake of *Sutton v Johnstone* may be considered very briefly.²²⁸

In *Warden v Bailey*²²⁹ it was decided that an action for false imprisonment lay for an inferior military officer against his superior military officer who imprisoned and later court-martialled him for disobedience to an order that was invalid for not being within the scope of the superior's military authority. In the course of argument Lawrence J remarked²³⁰ that he had "heard from good private information that the reasons assigned by Lord Mansfield for reversing the judgment of the Court of Exchequer, were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed". As the House did not provide reasons for its affirmation of the Exchequer Chamber's decision, this observation sowed the first seed of doubt as to the scope and weight of the views taken in *Sutton v Johnstone*. But, the Court stressed, the Exchequer Chamber had not decided on the validity of, nor established, the alleged doctrine that an inferior cannot ever maintain an action against a superior officer.²³¹ Their Lordships had there expressly avoided determining the matter though they had intimated a very strong opinion and had observed that it was an important case and had allowed it to be sent it "to the dernier resort".²³²

The decision went on appeal to the King's Bench,²³³ which did not refer to *Sutton v Johnstone* but held that there was insufficient proof of the alleged improper conduct (disobedience) on the part of the subordinate to have justified his imprisonment. The Court, per Lord Ellenborough, clearly did not decide nor assumed that no action lay, for then it would not have found it necessary to determine the sufficiency of the evidence presented by the plaintiff; it appears that the Court in fact thought that an action could and would lie in appropriate circumstances.²³⁴

In *Hannaford v Hunn*²³⁵ where there was no reference to *Sutton v Johnstone*, the jury in an action for false imprisonment by the master of a warship against her captain²³⁶ gave verdict for the plaintiff and awarded him damages.

228 I will not recount their facts in any detail, but rather focus on their interpretation of *Sutton v Johnstone*. For further analysis, see, eg, Zillman (n 192) at 489-499; Froelich (n 192) at 699-706.

229 (1811) 4 Taunt 67, 128 ER 253 (CP & KB).

230 See at 75, 256.

231 See at 88, 261. Sir James Mansfield CJ of CP observed that the view that such doctrine had been established by the case of *Sutton v Johnstone* was "a very wide inference" to draw from that decision which in any case concerned orders issued in the heat of battle, when obedience, and instant obedience, was necessary.

232 See at 89, 261.

233 *Bailey v Warden* (1815) 4 M & S 400, 105 ER 82 (KB).

234 For an explanation of the proceedings and *dicta* here, see *Dawkins v Lord Paulet* (1869) LR Q5 QB 94 at 105-106 and *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 (Ex Ch) at 272; see, generally, Holdsworth (n 192) at 225-226.

235 (1825) 2 Car & P 148, 172 ER 68.

236 A master, strictly speaking, is the sailing officer, responsible for a ships's navigation; the captain is her commanding officer. The same person could be both, as in Patrick O'Brian's *Master and Commander* (London, 1969), adapted for the screen as *Master and Commander: The Far Side of the World* (2003).

Likewise there was no such reference in *Dickson v Earl of Wilton*²³⁷ but apparently there was no issue that an intra-military action for libel could lie in a civil court, the only question being if the defendant commanding officer's claim to privilege on the basis of an absence of malice could be upheld. On it being decided that there had been malice on the part of the superior, the jury found for the plaintiff and awarded damages.²³⁸

*Keighly v Bell*²³⁹ held that a military person cannot maintain an action against an officer for acts (imprisonment and prosecution) done by or under orders from superiors and which they have the right to give and he the duty to obey, unless the officer acted maliciously and also without any reasonable or probable ground. The question, therefore, was whether the acts done by the superior were done in discharge of his military duty, or done without any reasonable or probable cause and merely for the malicious purpose of injuring the subordinate, in which case they could not be acts done in discharge of any military duty.²⁴⁰ The Court, per Willes J, found insufficient evidence of any malicious motive "such as would sustain an action" and accordingly non-suited the plaintiff. Thus, the Court recognised, or at least assumed, actionability in appropriate circumstances and hence merely a limited intra-military immunity.²⁴¹

Then came a series of decisions, all involving the rather litigious Colonel Dawkins.

In *Dawkins v Lord Rokeby*²⁴² Dawkins sued his commanding officer, Lord Rokeby, for false imprisonment, malicious prosecution and false testimony before a Court of Enquiry, and conspiracy to cause his removal or early retirement from the Army. Now, though, the Court of Common Pleas held that there was no cause of action on any of the counts as those matters were purely military. The Court, per Willes J, referred²⁴³ to the absolute necessity of maintaining the constitutional liberties of subjects, but thought that they had to be confined within proper limits. As regards the liberties of the military, "military men must determine them" as persons entering the military, although they do not cease to be citizens, "yet they do, by a compact which is intelligible ..., become subject to military rule and military discipline". As authority for this he referred to *Sutton v Johnstone*.²⁴⁴ In that case,

237 (1859) 1 F & F 419, 175 ER 790.

238 Cf, also, *Dickson v Viscount Combermere & Others* (1863) 3 F & F 527, 176 ER 236 (QB), concerning an action against the military authorities for causing the plaintiff's removal from his military post and doing so maliciously and without reasonable or probable cause.

239 (1866) 4 F & F 763, 176 ER 781.

240 See at 801, 798.

241 See at 784, 791, Willes J referring *in arguendo* to "just exceptions to the discussion of military jurisdiction in a court of law".

242 (1866) 4 F & F 806, 176 ER 800 (Ct of CP); see, further, Zillman (n 192) at 495, Froelich (n 192) at 704-705.

243 See at 831, 811.

244 See at 832, 811, describing it as a case decided by the highest authority (the House of Lords), upon the advice of one of the greatest lawyers who ever sat in our courts (Lord Mansfield), assisted by a man of very considerable weight and authority (Lord Loughborough).

Justice Willes continued, “was it shown that military matters, properly brought within the true limits of military jurisdiction, are not to be called in question in civil courts”, and elsewhere²⁴⁵ he referred to “the doctrine that military men are to dispose of military questions”.

Thus, the Court continued,²⁴⁶ even if it had been established – which it had not²⁴⁷ – that the superior officer here had acted maliciously and without reasonable and probable cause, Dawkins could not have obtained redress in a civil court. He was accordingly non-suited.

And, it appears, Willes J had no doubts on the matter: “I cannot entertain a doubt that this is the law”²⁴⁸ and “I have no doubt that this is the law, and I have no doubt that it is that which is most beneficial to the community”.²⁴⁹

However, his Lordship’s view that – what was clearly no more than *obiter dicta* in – *Sutton v Johnstone* had established the “doctrine” of absolute intra-naval immunity is further rather inexplicable, given that he had apparently thought otherwise in the recent decision in *Keighly v Bell*.²⁵⁰

While his litigation against Lord Rokeby had not yet been completed, Dawkins took on another of his superiors, Lord Paulet. The decision in *Dawkins v Lord Paulet*²⁵¹ shows, if nothing else, what difference of opinion there was on the precise scope of intra-military immunity against civil actions and, also, on the weight to be attached to *Sutton v Johnstone*.

Dawkins sued Lord Paulet for libel in letters the latter had sent and reports he had made concerning his (Dawkins’s) military conduct, duties and qualifications. Lord Paulet’s defence was that he had compiled those documents in the ordinary course of and as an act of military duty. Dawkins, though, contended that the libel was made maliciously and without reasonable, probable or justifiable cause.

The majority of the Court, per Mellor and Lush JJ, held against Dawkins on the basis that no action lay against a military officer for an act done in the ordinary course of his duty as such an officer, even if it had been done maliciously and without reasonable or probable cause.

According to Mellor J,²⁵² the immunity for officers in such circumstances rested on grounds of policy and convenience. The reasons advanced in *Sutton v Johnstone*, an analogous case of an action for malicious prosecution of a naval officer by his superior, applied equally here and, even though *obiter* and thus not binding, were of

245 See at 837, 813.

246 See at 833, 812.

247 See at 834, 812; 836, 813; 839, 814.

248 See at 833, 812.

249 See at 841, 815.

250 See at n 239 above and, eg, Holdsworth (n 192) at 226. Willes J did refer to that decision, stating (at 839, 814) that he had acted upon *Sutton v Johnstone* in it and that as his ruling was not questioned, he had to be consistent and act on his own earlier ruling!

251 (1869) LR 5 QB 94. See, further, Zillman (n 192) at 496-497, Froelich (n 192) at 705.

252 His judgment (with whom Hayes J agreed before his death) is at 111-120.

“greatest weight” and given “after the fullest consideration”. And, he continued, the exposition of the law in that case “has been generally accepted”. The judgment in *Sutton v Johnstone*, Mellor J continued, “proceeds upon the principle that ‘the law will rather suffer a private mischief than a public inconvenience’”. The reasons of public policy and convenience applicable in cases of immunity for judges, jurymen and witnesses, as also of members of Parliament, applied equally to the conduct of superior officers in the execution of their duty. Furthermore, given that both parties were military men and that the issues here related purely to military duties and discipline, Dawkins was bound to make his complaint to the tribunal specially provided for that purpose and best equipped to adjudge military matters.

In a much shorter judgment, Lush J agreed with these sentiments.²⁵³ Referring to the elaborate judgments of Lords Mansfield and Loughborough in what he described as the analogous though not similar judgment in *Sutton v Johnstone*, he thought that although *obiter*, they were of “high authority”. Further, despite the many years that had passed, no change had been made to the military law so that the Legislature “must have concurred” in it, and despite the many occasions for questioning it, the judgment stands “unassailed”.²⁵⁴ In short, his Lordship considered the judgment “as one which has received the tacit assent of both the legislature and the profession”.

In a minority judgment of considerable eloquence and weight, Cockburn CJ extensively surveyed what he termed the “great question of absolute privilege in military matters”.²⁵⁵

His conclusion was that an action would lie against a military officer if reports, though made under the circumstances alleged, were made with actual malice and without reasonable or probable cause. He agreed that “acts done in the honest exercise of military authority are entirely privileged”, but could not concur with the “startling and apparently unjust” view that that applied also to acts intentionally done in the exercise of military authority for the purpose of injury and wrong. Such absolute immunity for the superior would leave the inferior officer entirely at the mercy of his superior acting under the disguise of duty and leave him without protection as far as “civil redress” or “redress in court of law” was concerned.

253 His judgment is at 120-122. The question raised, he thought, was one of purely military cognizance – it was a report about Dawkins as a soldier, not as a citizen, made to a military authority and not for public circulation – and therefore not within the province of a court of law. He also referred to the argument that the only remedy open to an inferior, namely to have his commanding officer court-martialled, was “imperfect, because no pecuniary compensation is given to the injured party”. If it were a defect, it is one in the military code, and not one a court of law could rectify by adding to a plaintiff’s rights and remedies under military law. Dawkins could not complain as he had everything which military law, to which he submitted himself when he had joined, entitled him to have.

254 Although in both *Dickson v Lord Whilton* (n 237 above) and *Dickson v Lord Combermere* (n 238 above) the question of malice had been left to the jury, in neither was the point now in controversy (ie, whether an action lies) pertinently raised; contrarily, in *Dawkins v Lord Rokeby* (n 242 above) the Court ruled that an action was not maintainable.

255 His judgment is at 100-111. He was also the judge in *Dickson v Combermere* (n 238 above).

To entitle an otherwise libellous matter to the protection attached to communications made in the course of duty, honesty of purpose was necessary, that is, it must have been made not only in the course of duty but also from a sense of duty and thus not maliciously and also with belief in its truth and thus with reasonable cause.

In coming to this conclusion, Cockburn CJ considered three angles.

First, the legal authority.²⁵⁶

When the issue was first raised in 1875 in *Sutton v Johnstone*, Cockburn CJ explained, there were two questions: first, whether an action lies by an inferior against a superior officer, and second, whether on the facts in that case there was reasonable and probable cause for the superior's conduct. On the first question, the Court of Exchequer had no doubt: an action does lie.²⁵⁷ The reversal in the Exchequer Chamber was not on the ground that an action would not lie, but solely on the ground that the facts sufficiently showed the existence of reasonable and probable cause. Lord Mansfield "in a masterly argument" gave reasons for thinking the action ought not to be allowed, but he stopped short of deciding the point. This decision was subsequently affirmed in the House of Lords, but apparently on the same grounds, namely the existence of a reasonable and probable cause. After referring to the judgments in the subsequent decisions, his Lordship observed "that so much of the decision of the Court of Exchequer [in *Sutton v Johnstone*] as is immediately in point in the present case, stands unreversed".²⁵⁸

Turning in the second place to the underlying general principles,²⁵⁹ Cockburn CJ considered the argument that as a matter of public policy, actions of this nature ought not to be allowed and that affording anything less than absolute immunity to superior officers acting in the course of military authority would impact negatively on the maintenance of military discipline.²⁶⁰

256 See at 102-107.

257 Cockburn CJ referred at 104 to Eyer CB's "remarkable and, to my mind, satisfactory judgment".

258 At 107. The view that an action does lie – and thus that there is no absolute immunity – was, his Lordship explained, not overruled either by the judgment in error in *Sutton v Johnstone*, nor by subsequent decision of the Court *in banco*, while it was supported by decision of the Court of Common Pleas in *Warden v Bailey* and incidentally and indirectly so by the decision of the Court of King's Bench when that case came to it in error. Although the decision in *Dawkins v Lord Rokeby* was no doubt to the contrary, he thought that he could not be held bound by a single ruling at *nisi prius*, however positively expressed, in a matter in which the Court of Exchequer in *Sutton v Johnstone* expressly, and the Court of Common Pleas in *Warden v Bailey* incidentally, entertained a different opinion, and which Lord Mansfield himself declared to be open to grave doubt and fit to be decided by the highest authority.

259 See at 107-110.

260 The argument has it that obedience to all orders, however desperate and peremptory, should be enforced and not be hampered by the apprehension of vexatious actions in civil courts, whose juries were in any event incompetent to form a proper judgment in matters of a military or naval character. If those who submitted themselves to military law should suffer injustice or oppression at the hands of a superior, they had to be content with such redress as military law afforded them.

He thought the reasoning unconvincing. The possibility of harassment by vexatious actions was no more than an idle apprehension that would have no effect on superior officers' exercise of their duty to enforce discipline. They would have no reason to fear ill treatment in civil courts.²⁶¹ In any event, it could not be essential to the well-being of the forces that where authority is intentionally abused for the purpose of injustice or oppression,²⁶² an injured inferior, whose professional prospects may be ruined and reputation blasted, can be told that in the Queen's Courts, in a system where it is boasted that there is no wrong without redress, he cannot complain. In short, his Lordship thought that it would be far more beneficial to the forces that its subordinate members know that redress may be found in the civil tribunals of the country against intentional oppression and manifest wrong resulting in consequences disastrous to their professional aspirations.

Further, his Lordship was not convinced that a person who joins the forces consents to being subject to military law and being entitled only to – limited, non-compensatory – military redress in a case where he suffers injury by the dishonest exercise of superior authority. And in any case, there was no express prohibition in the military code on a resort to civil tribunals in cases of wrong inflicted under the colour of military authority, which would have settled the matter authoritatively.

Thirdly, Cockburn CJ dismissed²⁶³ the notion that an analogy could be drawn between judges, jurors and witnesses to whom absolute immunity is afforded in the interest of the administration of justice,²⁶⁴ and members of the forces. It did not follow that because the principle of absolute immunity is required for the proper administration of justice, it is to be applied, without positive enactment or precedent, to a wrong inflicted by one member of the forces on another and in so doing to refuse redress in a case of an admitted wrong “simply because on grounds of public convenience the action between the particular parties ought not to be allowed”.

Finally, Cockburn CJ thought that what was involved here was a question of policy, and that if the law had to be settled so that no action lies in a court of law against a superior officer, that should be done by legislative enactment, or at least

261 His Lordship thought that while a military tribunal was certainly better qualified and equipped in military matters, in cases of manifest wrong and proved malicious motives, no tribunal was better qualified than a jury, under the instruction of a judge and assisted by professional evidence, to form a correct and just judgment: “trial by jury in matters of wrong between man and man is an essential part of our judicial system”. In short, the issue of the competency of the tribunal cannot be admitted as an element in deciding the question of whether an action lies.

262 Such as where charges are preferred against a subordinate which the superior knows are intentionally unjust, or where representations are made which the superior knows are slanderous and false.

263 See at 110-111.

264 An immunity, he thought, in any event settled by authority and decision rather than resting on sound or satisfactory principles.

by a superior court. Until then, a court of first instance, confronted by the question, should allow Dawkins his action.

Despite the setback of a majority decision going against him, Dawkins would not lie down and pursued his earlier claim against his commanding officer Lord Rokeby in a higher court, alleging libel and slander for comments made by the latter during the hearing before the Court of Enquiry. He did so on the basis that he could recover upon showing those defamatory statements were made maliciously and lacked any probable cause. Lord Rokeby again claimed absolute immunity.

And again Dawkins failed in his claim.

In *Dawkins v Lord Rokeby*²⁶⁵ the Exchequer Chamber held, on the narrower ground, that statements before a Court of Enquiry, even though it was not a court of record nor a court of law nor a court of justice in the ordinary sense of the word, were absolutely privileged, even though they had been made in bad faith, with actual malice and without reasonable and probable cause.

But Kelly CB then also decided²⁶⁶ that there was “a higher ground” upon which the action could be dismissed. All the issues here were “purely questions of a military nature”, to be determined by military tribunal and not by a court of law. His Lordship approved of the reasoning of Lord Mansfield in *Sutton v Johnstone* and that in *Keighley v Bell* and in the Court below and held that these decisions “are all authorities to shew that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal, and not by a court of law”. By contrast, he noted, Dawkins’s case was “really destitute of all authority to support the action”. After referring to the contrary minority judgment of Cockburn CJ in *Dawkins v Paulet*, the Court remained satisfied that questions of privilege, “though governed, and, as we think, for the present decided, by the decisions referred to in the Exchequer Chamber, [are] yet open to final consideration before a court of last resort”. It therefore agreed with the majority in *Dawkins v Paulet* that the motives as well as the duty of a military officer, acting in a military capacity, were questions for a military tribunal alone, and not for a court of law to determine.

The inexhaustible Colonel Dawkins then had a last stab at recovering damages when he appealed to the House of Lords, sadly for him, again without any success.

In *Dawkins v Lord Rokeby*²⁶⁷ the House, by a unanimous decision, affirmed the outcome in the Exchequer Chamber and additionally also held Lord Rokeby entitled to recover £258 18s from Dawkins for his costs, charges and damages from the delay in the execution of judgment.

265 (1873) LR 8 QB 255 (Ex Ch); also (1873) 28 LTR 134 (Ex Ch); see, further, Zillman (n 192) at 496; Froelich (n 192) at 705 n 47.

266 See at 270-271.

267 (1875) LR 7 HL 744 (HL).

The decision was merely on the narrow ground determined below, that of (military) witness immunity in civil litigation; nothing was said about the conduct of military officials in other capacities.²⁶⁸ The House of Lords held that the rule, based on public policy, that no action will lie against a witness for what he says when giving evidence before a court of justice, applies where a military man was bound to appear and give evidence before a military court of inquiry. His statements were absolutely privileged and evidence of falsehood and malice was immaterial and irrelevant.

Kelly LCB referred to the long series of decisions, numerous and uniform, that had settled the principle of public policy that no action will lie against a witness for what he says or writes in giving relevant evidence before a court of justice.²⁶⁹ For Cairns LC the “narrowly circumscribed principle” was settled law, while public-policy considerations also supported the extension of the principle applicable to witness in judicial proceedings to witnesses before military courts of inquiry concerning matters of military discipline and in respect of statements relevant to that inquiry. Finally Lord Penzance dismissed the supposed hardship of law in this case on the injured and remediless subordinate and thought it was outweighed by the policy consideration that to allow an action may impinge on the freedom of a witness to give evidence in the administration of justice.

The upshot of the series of decisions in the *Dawkins* cases²⁷⁰ was an apparent acceptance, on suspect grounds, including the elevation of – admittedly strong – *obiter dicta* in *Sutton v Johnstone* to a principle, by the majority in *Dawkins v Lord Paulet* of the rule of absolute intra-military immunity. That was contrasted by a less than ringing support, on pertinently narrow grounds, of the rule by the House of Lords in *Dawkins v Lord Rokeby* and by a powerful minority judgment in *Dawkins v Paulet* opposing so broad a principle and allowing intra-military litigation in appropriate circumstances.

By the end of the nineteenth century, therefore, it could not yet be said that the question of the scope of intra-military immunity had been settled finally and conclusively. Although it could no longer be raised in a court of first instance, the

268 Holdsworth (n 192) at 224 points out that the House of Lords at 754 carefully guarded itself from the supposition that it decided anything else except the absolute privilege of a witness giving evidence before a military court of enquiry.

269 He merely observed at 271 that *Sutton v Johnstone* provided authority “that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal and not by a court of law”.

270 In *Dawkins v Prince Edward of Saxe-Weimar* (1876) 1 QBD 499, too, Dawkins lost. He brought actions claiming damages charging the defendants with conspiring to make false statements concerning him to his commanding officer that resulted in his being placed on half pay. The defendants’ case was that the conduct complained of involved acts done by them in the due course of their duty as members of a military court of enquiry. The Court stayed the actions on the ground that the decision of the House of Lords in *Dawkins v Lord Rokeby* had determined “the precise point” that an action under such circumstances would not lie.

broad issue remained open for argument in the Court of Appeal or before the House of Lords.²⁷¹

3 1 8 Resolution in the twentieth century?

Although a few decisions did once more touch on the question of intra-military immunity and whether an action will lie, in appropriate circumstances, for a subordinate against a superior officer, the main development in the twentieth century was legislative.

In *Fraser v Hamilton*²⁷² the Court of Appeal decided that an action will not lie in a civil court against a superior official – here Admiral Hamilton, formerly the Second Sea Lord of the Admiralty – of the Navy or Army for wrongly and maliciously causing a subordinate to be retired from the service. It was pointed out that since the decision of the House of Lords in *Dawkins v Lord Rokeby*, it was doubtful whether the House itself had jurisdiction to entertain an appeal of this kind, in a purely military matter, but in any event the Court of Appeal certainly had not.²⁷³

Shortly after, in *Fraser v Balfour*,²⁷⁴ the same subordinate brought another action against the naval authorities – in the person of Admiral Balfour, the First Lord of the Admiralty – claiming damages for false imprisonment and for maliciously causing his wrongful retirement from the Navy. At issue was whether the conduct of the naval authorities in retiring him could be reviewed in a civil court.

Earlier the Court of Appeal had held that the matter had been settled against Fraser by its previous decision in *Fraser v Hamilton*. The House of Lords, though, observed that although in *Dawkins v Lord Rokeby* it (the House of Lords) had affirmed the decision of the Exchequer Chamber below, a close reading of its decision showed that it proceeded solely on the privilege of witnesses and did not affirm the other and wider proposition laid down in Exchequer Chamber that questions of intra-military liability were not cognisable in a court of law. Thus, it thought, the question remained open, at least in the House of Lords. And as the question involved “constitutional questions of the utmost gravity”, a decision upon it should be given only when the full facts were before the House in a complete and satisfactory form. Therefore, their Lordships felt, on the materials before them they could not affirm the decision

271 See Holdsworth (n 192) at 227, who points out that the underlying policy issues for and against absolute intra-military immunity had forcibly been expressed, on the one side by Lords Mansfield and Loughborough’s *dicta* in *Sutton v Johnstone* (in favour) and, on the other side by those of Eyre CB in *Sutton v Johnstone* and Cockburn CJ in *Dawkins v Paulet* (against).

272 (1916) 33 TLR 431 (CA).

273 The Court expressed support for the view that when a man became a member of the services, he subjected himself to a code of law which ousted the jurisdiction of ordinary courts and confined him to redress in military courts. The fact that the latter would award no damages was not something a civil court could do anything about.

274 (1918) 87 LJKB (ns) 1116 (HL); see Zillman (n 192) at 497.

of the Court of Appeal, dismissing an action, without deciding the most important question which the House in *Dawkins v Lord Rokeby* had left unresolved. It therefore remanded the action for further evidence.

Lastly, in *Heddon v Evans*²⁷⁵ there was if not a refinement of the principle of absolute immunity, then at least a focus on another requirement for such immunity that may have been lost sight of in the debate on whether malicious and groundless actions were also immune.

The King's Bench accepted – and was bound to accept²⁷⁶ – that a military officer will not be liable in damages if he commits an act which amounted to false imprisonment or another common-law wrong within his jurisdiction or authority and actually done in the course of military discipline solely on the ground only that he had done it maliciously and without reasonable and probable cause.

However, as was “reasonably clear” from authorities and on principle, he may be liable if the act done was in excess of or without his jurisdiction even though he may have purported to act in the course of actual military discipline. And, of course, it was open to a civil court to determine whether or not the act complained of was done within or outside jurisdiction.²⁷⁷

If it was outside and the superior had exceeded his powers, the court may award damages; if it was within his powers, the court cannot award damages even if it was a malicious and groundless abuse of that authority.

Thus was the – still unsettled – state of English law at the beginning of the last century. The uncertainty should not come as a surprise. After all, the issue, that of the scope of intra-military immunity, is solidly based on considerations of public policy. And not only are such considerations not fixed, but the weight attached or to be attached to each of them differs according to the perceptions of the valuer.

Temporal and societal factors that may have played a role and have to be borne in mind in evaluating the approach of the English courts up to the end of the nineteenth century include the fact that in the age of empire, the Navy and, later, the Army constituted, or were at least considered to constitute, a distinct society separate from the civilian world to a greater extent than either before or afterwards; there was then a

275 (1919) 35 TLR 642 (KB); see Zillman (n 192) at 497 n 39.

276 McCardie J explained at 645 that while the question may still be open to the House of Lords, it was not open to him as a judge of first instance, nor even to the Court of Appeal. Only the House of Lords could hold that an action will lie for a malicious abuse of military authority. He had to follow the “vast preponderance of authority on this point” that there is no such action, which seemed to him to have been fully established by *Dawkins v Paulet*, *Dawkins v Lord Rokeby*, *Fraser v Hamilton*, and *Fraser v Balfour*.

277 It may be pointed out that the same distinction is drawn when a military man's liability towards an outsider is at issue. Broom (n 192) at 714-717, eg, makes it clear that an officer incurs no tortious liability towards a (non-military) stranger for an act done in discharge of his ordinary duty, but does incur personal liability if the act is not within the scope of his duty and hence not justifiable by virtue of being authorised by the Crown.

greater reliance on force and harsh discipline to secure military performance; and the protection of superior officers against possibly vexatious civil litigation by inferiors may have weighed heavier than the protection and compensation of subordinates against malicious and baseless acts that were nevertheless within the scope of the superior's authority.

The difficulty of even just formulating, let alone weighing up against one another, all the considerations on either side of the argument, for and against absolute immunity for actions, within the scope of military authority, already explains the state of uncertainty.²⁷⁸

It was not surprising, then, that rather than await another opportunity for the House of Lords to pronounce on the issue, the Legislature intervened.²⁷⁹

The Crown Proceedings Act, 1947,²⁸⁰ which removed governmental common-law immunity from suits in tort, contained provisions relating to the armed forces in section 10. Subsection (1) absolved members of the armed forces (and also the Crown) from liability in tort for acts done by such members while on duty as such and causing the death of or personal injury to another person, in so far as that death or personal injury was due to anything suffered by that other person while he is a member of the armed forces and on duty as such.

This measure therefore finally and clearly established intra-military immunity, as the common-law right of action in tort by one member of the armed forces against

278 See, further, Holdsworth (n 192) at 227-228 for a summary and Zillman (n 192) at 497-499 for some conclusions.

In favour of absolute immunity (no action): • absolute immunity is necessary for the maintenance of discipline and superiors must be able to maintain discipline without fear of vexatious actions by subordinates at law; any possible gains from access to civilian courts (subordinates compensated and liability imposed on superiors) are outweighed by the harm to the maintenance of military discipline; • military matters are regulated by a code of military law and by military courts alone; just as a subordinate must be put on trial before a military tribunal, if that is done allegedly without probable cause, the same tribunal which tries the original charge must also, and for all the same reasons, determine the issue of probable cause by way of a new trial; • civilian courts are not competent and qualified to determine military matters involving military expertise, including issues of malice and probable cause in the exercise of military authority.

Against absolute immunity (action in appropriate cases, when malicious and without reasonable cause): • liability and hence accountability at law will not undermine but rather strengthen military discipline as superiors will be held accountable in suitable cases; • acts performed maliciously and without probable cause are an abuse of military authority and no different from an act outside such authority; • there is no need to assume civil courts are incapable of dealing with military matters, including determining whether or not there is sufficiently clear evidence of abuse (malice and an absence of reasonable cause) on the part of a superior officer; in any event, the absence or presence of malice and reasonable cause is not a military matter; • military men must like all others be liable in a civil court for civil wrongs.

279 Elsewhere, and in the absence of legislation, *Sutton v Johnstone* therefore still casts its spectral shadow: see, eg *Colonel AD Nargolkar v Union of India & Others* (2011) 4 Indian LR (Delhi) 114 (HC) at 142-143 in par 45.

280 10 & 11 Geo VI c 44.

another member was abolished. A proviso made it clear, though, that there would be no exemption from liability in tort for a member in any case where the court was satisfied that the act (although committed while on duty) was not connected with the execution of his duties as member. Also, the exemption only applied to tortious liability for injury or death and not to other heads of damage.²⁸¹

As if to confirm the pendulum-like motion of the fluctuating policy considerations underlying the notion of intra-military immunity, section 1 of the Crown Proceedings (Armed Forces) Act, 1957,²⁸² suspended section 10 of the 1947 Act. Observe, section 10, and the immunity it granted, was not repealed, merely suspended. It therefore merely ceased to have effect, until such time as it is revived.²⁸³

(to be continued in (2016) 22(1) *Fundamina*)

ABSTRACT

Commodore Johnstone's secret mission to the Cape of Good Hope in 1781 had a surprisingly large number of legal consequences, not only in England but also at the Cape. In the main they concerned two matters, namely naval law, more specifically intra-naval immunity, and prize law, more specifically, the question of joint captures.

281 Eg, defamation, trespass, or property damage. See, further, Harry Street "Crown Proceedings Act, 1947" (1948) 11 *Modern LR* 129-142 at 136-137.

282 c 25.

283 Provision for which is made in s 2.

THE THIRTY-THREE ARTICLES AND THE APPLICATION OF LAW IN THE ZUID-AFRIKAANSCH REPUBLIEK

Liezl Wildenboer*

1 Introduction

The Thirty-Three Articles was adopted by the Potchefstroom Burgerraad¹ on 9 April 1844 and confirmed four years later by the unified Volksraad of the Zuid-Afrikaansche Republiek (ZAR) at Derdepoort near Pretoria on 23 May 1849.² The Thirty-Three Articles contained provisions pertaining to general and judicial administration and

- 1 At a public meeting in Potchefstroom in Oct 1840 it was decided that the emigrant territories east and west of the Drakensberg would unite to form one “maatskappy”. Pietermaritzburg would be the main seat of the Volksraad. In Feb 1841 an Adjunct Volksraad, seated at Potchefstroom, was established for the territory west of the Drakensberg. After the British annexation of Natal, the Potchefstroom Adjunct Volksraad declared itself independent and continued as the Burgerraad of Potchefstroom. See FAF Wichmann “Die wordingsgeskiedenis van die Zuid-Afrikaansche Republiek 1838-1860” in *Archives Year Book for South African History (sd)* vol 4(2) (Cape Town, 1941) at 24-25, 27-29, 37-38.
- 2 See the minutes of the general assembly at Derdepoort, published as R.180/49 in HS Pretorius, DW Kruger & C Beyers (eds) *Voortrekker-Argiefstukke 1829-1849* (Pretoria, 1937) at 388-390. Due to political instability and civil strife, there was not a unified legislature in the ZAR after its split from Natal in 1843 until the establishment of the Volksraad at Derdepoort on 22 May 1849: see, generally, JH Breytenbach & HS Pretorius (eds) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel I (1844-1850)* (Cape Town, sd) (hereafter *Volksraadsnotule Part 1*) at xxiv-xxvi; Wichmann (n 1) at 47-64, 86-88; AN Pelzer *Geskiedenis van die Suid-Afrikaanse Republiek Deel I Wordingsjare* (Cape Town, 1950) at 115.

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was held out at the time as a kind of constitution.³ It retained its status as a basic law despite the adoption of the ZAR Constitutions of 1858, 1889 and 1896,⁴ and was only repealed in 1901 after the British annexation of the ZAR.⁵

This contribution takes a look at the impact of the Thirty-Three Articles on the legal development of the ZAR, first, by examining the nature and content of the Thirty-Three Articles and, secondly, by studying a few examples of case law in which it was followed.

2 The nature of the Thirty-Three Articles

Scholars have described the Thirty-Three Articles by using a myriad of phrases: a mirror of the political views of the Voortrekkers;⁶ the foundation of the judicial administration of the ZAR;⁷ the primary legislation of the state with regard to judicial administration;⁸ “a mixed bag of legal provisions mostly of a criminal nature”;⁹ a code of conduct;¹⁰ “a collection of regulations dealing mainly with criminal law”;¹¹ as belonging to the category of standard state legislation;¹² and as the law code of an undeveloped society.¹³

Scholars disagree on whether the Thirty-Three Articles could be viewed as a constitution.¹⁴ This is understandable because there is no standard definition of a constitution, as will appear shortly. The Thirty-Three Articles arguably contained several elements of a constitution. It indeed reflected the national will and represented

- 3 Pelzer (n 2) at 115. The question whether it met the requirements for a constitution is considered in the next section.
- 4 See, respectively, GW Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (London, 1918) doc 182 at 362-410; doc 218 at 485-488; and doc 227 at 505.
- 5 Procl 34 of 1901 (Transvaal). In terms of this proclamation, Milner repealed a long list of statutes, government notices and Volksraad resolutions issued by the former ZAR government.
- 6 Wichmann (n 1) at 38.
- 7 *Idem* at 41.
- 8 “[D]ie wet van die staat ... waarvolgens ‘n voorkomende saak in die eerste plek beoordeel is”:
Pelzer (n 2) at 115.
- 9 Ian Farlam “The old authorities in South African practice” (2007) 75 *Tijdschrift voor rechtsgeschiedenis* 399-408 at 403.
- 10 R van den Bergh “The remarkable survival of Roman-Dutch law in nineteenth-century South Africa” (2012) 18(1) *Fundamina* 71-90 at 88.
- 11 *Ibid.*
- 12 Pelzer (n 2) at 116.
- 13 *Ibid.*
- 14 WJ Badenhorst *Die Geskiedenis van Potchefstroom* (Johannesburg, 1939) at 61 refers to the Thirty-Three Articles as a constitution. Those who disagree with this view include Pelzer (n 2) at 116; JS du Plessis “Die ontstaan en ontwikkeling van die amp van staatspresident in die Zuid-Afrikaansche Republiek” in *Archives Year Book for South African History* (1955) vol 18(1) (Elsies River, 1955) at 52; and G van den Bergh “Die aandeel van Potchefstroom in Voortrekkerstaa[t]svestiging” (2013) 53(3) *Tydskrif vir Geesteswetenskappe* 452-464 at 457-458.

a mirror of the values of that time;¹⁵ was viewed as a key component of the ZAR's legal system;¹⁶ enjoyed the support of the voters;¹⁷ had a higher status than other legislation,¹⁸ rules or laws;¹⁹ and “contain[ed] an effectively established presumption of public rule in accordance with principles or conventions, expressed as law, that cannot easily be suspended”.²⁰ Nevertheless, the Thirty-Three Articles lacks other essential elements of a constitution. Importantly, it does not say anything about the political structure of the state, its governmental institutions, or the relationship between the government and the citizens;²¹ nor does it indicate the process for amending the document itself.²² It is therefore submitted that the Thirty-Three Articles was not a constitution in the true sense of the word and should, at least for purposes of this contribution, not be seen as such.²³

A closer inspection of the content of the Thirty-Three Articles reveals that the best description is probably that of Sir John Gilbert Kotzé, esteemed Chief Justice of the ZAR in later years.²⁴ He observed that the Thirty-Three Articles “form[ed] ... a brief code or instruction, prescribing the rule of conduct for the early community of pioneers”.²⁵ The Thirty-Three Articles was not drafted by lawyers, but by the community itself.²⁶ Its provisions were therefore not formulated in legal or even official language, but rather represented the viewpoints of the general populace.²⁷

15 See IM Rautenbach *Rautenbach-Malherbe Staatsreg* 6 ed (Durban, 2012) at 20.

16 *Ibid.*

17 *Ibid.*

18 *Idem* at 21.

19 M Ryan *Unlocking Constitutional & Administrative Law* (London, 2007) at 13.

20 See C Thornhill *A Sociology of Constitutions* (Cambridge, 2011) at 10-11 with regard to the sociological definition of a constitution.

21 Rautenbach (n 15) at 20-21; Ryan (n 19) at 9, 12; Thornhill (n 20) at 11.

22 Ryan (n 19) at 12.

23 Unfortunately, space does not allow for a detailed discussion of this question.

24 President Burgers offered Kotzé the position of Chief Justice of the newly envisaged High Court in 1877; he accepted the offer. On his arrival in Pretoria, unfortunately, he found that Shepstone had already annexed the ZAR on behalf of Britain. Due to a lack of government funds, the British offered Kotzé the position as the only judge of the High Court, and not as one of three as originally planned. He accepted in the expectation that if additional judges were appointed, he would become Chief Justice. After the annexation ended in 1881, Kotzé became Chief Justice of the ZAR. He was dismissed in 1898 after his public spat with President Paul Kruger about the testing powers of the courts. For more on Kotzé, see VG Hiemstra *sv* “Kotzé, Johannes Gysbert (Sir John Gilbert)” in *Dictionary of South African Biography* (hereafter *DSAB*) vol 1 (Cape Town, 1968) 438-441; and Kotzé's memoirs published as Sir John Kotze [*sic*] *Biographical Memoirs and Reminiscences* (Cape Town, *sd*) (hereafter *Kotze Memoirs* vol 1) and Sir John Gilbert Kotzé *Memoirs and Reminiscences* vol 2 (Cape Town, *sd*) (hereafter *Kotzé Memoirs* vol 2).

25 *Kotze Memoirs* vol 1 (n 24) at 436.

26 It is uncertain who was responsible for drafting the document. The versions published in *Volksraadsnotule Part 1* (n 2) and in Eybers (n 4) doc 174 at 349-356 both bear the signatures of JD van Coller and Pieter Dietrichsen in their respective capacities as chairman and secretary of the Burgerraad. Furthermore, the preferred version published in the *Volksraadsnotule Part 1* appears to have been copied from the original by Pieter Dietrichsen before 1849 (at 4). (This is probably the same Pieter Diederiks who translated letters for the magistrate of Winburg in 1843

They were practical guidelines for establishing law and order in a pioneer society. They were, in fact, exactly what they purported to be, namely general provisions and laws relating to judicial administration.²⁸ This is evident from the provisions themselves, which will be discussed in the next section.

In its time, the Thirty-Three Articles was usually referred to either by name²⁹ or as the “Algemeene Bepalingen en Wetten” (General Provisions and Laws).³⁰ In only one document was it called “the Constitution”.³¹ Ordinary citizens did not hesitate to cite it, usually in conjunction with the (1858) Constitution, when petitioning the Volksraad concerning their rights.³² Government officials, such as magistrates, commandants and field-cornets, were expected to be familiar with the contents of the Thirty-Three Articles.³³ The magistrate for the district of Wakkerstroom requested copies of the *Government Gazette*, the Thirty-Three Articles and the Constitution because he did not know what was expected of him (“weet my niet te gedragen”).³⁴

(See *Bylaag 24*, 1843 in JH Breytenbach (ed) *Notule van die Natalse Volksraad (Volledig met alle Bylae daarby) (1838-1845)* (Cape Town, sd) (hereafter *Natal Volksraadsnotule*) at 457)). Pelzer (n 2) at 115 attributes the document to AH Potgieter, the then political leader at Potchefstroom. Nevertheless, the identity of the individual drafters becomes irrelevant in view of the fact that the document was adopted by the elected body of representatives, the Burgerraad, and approved by the Volksraad five years later. Moreover, its resilience over a period of fifty-seven years and its use, not only by government officials and the courts, but also by ordinary members of the public (see n 32 *infra*), attests to its popularity and acceptance by the ZAR society as a whole.

27 Wichmann (n 1) at 38.

28 The original title was *Algemeene Bepalingen en Wetten (33 Artikelen) van de Teregtzettingen*. Eybers (n 26) translates the title as “Being General Regulations and Laws for the Law Sessions”.

29 That is, as “the Thirty-Three Articles”: see, eg, art 1 of the minutes of the Volksraad of 12 Oct 1863, published in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel IV (1859-1863)* (Cape Town, sd) (hereafter *Volksraadsnotule Part 4*) at 171-179; *Bylaag 45*, 1863 in *Volksraadsnotule Part 4* at 519-520; *Bylaag 69*, 1860 in *Volksraadsnotule Part 4* at 407; *Bylaag 20*, 1863 in *Volksraadsnotule Part 4* at 495-496; *Bylaag 49*, 1865/66 in JH Breytenbach & DC Joubert (eds) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel V (1864-1866)* (Parow, sd) (hereafter *Volksraadsnotule Part 5*) at 361-362.

30 See, eg, *Bylaag 49*, 1855 in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel III (1854-1858)* (Cape Town, sd) (hereafter *Volksraadsnotule Part 3*) at 367-370; *Bylaag 50*, 1855 in *Volksraadsnotule Part 3* at 370-377.

31 “[D]e bestaande Grondwet, bekend onder den naam van de 33 artikelen” (see art 1 of *Bylaag 6*, 1856 in *Volksraadsnotule Part 3* (n 30) at 433-434). For more on this document, see n 70 *infra*. It is important to bear in mind that this 1856 document pre-dated the 1858 Constitution.

32 See, eg, the petitions and requests mentioned in n 29 *supra*.

33 See, eg, art 30 of the minutes of the Lydenburg Volksraad of 23 May 1850 published as “E.V.R. 3, pp. 61-87” in *Volksraadsnotule Part 1* (n 2) at 130-132; and art 10 of the minutes of the Kommissieraad of 20 Nov 1852 published as “E.V.R. 3 pp. 281-288” in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel II (1851-1853)* (Cape Town, sd) (hereafter *Volksraadsnotule Part 2*) at 91-96.

34 See the undated letter to the Volksraad published as *Bylaag 4, ongedateerd* in *Volksraadsnotule Part 4* (n 29) at 614.

3 The contents of the Thirty-Three Articles³⁵

Twenty-one of the articles make provision for the prosecution of specific crimes such as theft;³⁶ murder;³⁷ libel;³⁸ assault;³⁹ perjury;⁴⁰ the issuing of false medical certificates;⁴¹ crimes against the public peace;⁴² the disruption of court proceedings;⁴³ the transgression of building regulations;⁴⁴ the unlawful opening of post;⁴⁵ public defamation of character;⁴⁶ non-compliance with the rule that a person had to report

- 35 Various versions of this document are available (see *Volksraadsnotule Part 1* (n 2) at 3-4). For purposes of this contribution, all references to the provisions of the Thirty-Three Articles will be to the version as published in *Volksraadsnotule Part 1* (n 2) at 5-9.
- 36 Art 21. Although a specified penalty was not determined, this provision stated that Dutch law should be followed.
- 37 Art 20 explicitly included patricide, infanticide and poisoning, all of which were punishable by death.
- 38 Art 19. The penalty was a fine of anything between Rds5 to Rds100 payable to the state.
- 39 Art 18. The penalty was a fine of anything between Rds5 to Rds100. The perpetrator also had to pay all (presumably legal) costs. If the victim's injuries were of such a nature that he required bedrest, the perpetrator also had to pay damages for the victim's time, pain and suffering. If the perpetrator was unable to pay these debts, he could be arrested.
- 40 Art 17. A person convicted of perjury would receive a sentence similar to that imposed on the person convicted of the original crime.
- 41 Art 14 applied only to doctors and members of the medical profession who issued false medical certificates or provided false evidence for the purpose of rendering an otherwise healthy person exempt from public service or to benefit such a person; the penalty was a fine of Rds150 or imprisonment in accordance with the facts of the case. A doctor had to obtain the approval of the Burgerraad before being allowed to practise.
- 42 Art 22. The punishment was forced labour.
- 43 Art 3 provided that a person who disrupted the court proceedings and refused to comply with the presiding official's order to leave, could be arrested and imprisoned for twenty-four hours or longer, depending on the circumstances.
- 44 Art 26 provided that a person who ignored a warning not to build too close to his neighbour, would forfeit all rights to that building. The dispute could be settled by way of arbitration before either the field-cornet or the commandant, but if the parties could not reach an agreement, the matter had to be referred to the magistrate and the land commissioners.
- 45 Art 24. The penalty was a fine of Rds50. In cases where treasonous correspondence was suspected, a letter could be opened by a military commander; if the content of the letter proved harmless, the military commander had to deliver it to the correct address as soon as possible. This provision was later repealed by art 183 of the 1858 Constitution. From then, any person found guilty of opening the post of another would be punished severely ("ten strengste") with a fine of Rds500 and in accordance with the merits of the case. A person reporting such a crime could claim half of the fine amount as a reward (see the version of the 1858 Constitution published as *Bylaag 2*, 1858 in *Volksraadsnotule Part 3* (n 30) 496-525 at 520).
- 46 Art 27. This crime specifically included insulting or slandering females and further only applied if the defamation caused the victim harm. The penalty was a fine of anything between Rds50 and Rds100, the monies being forfeited to the state. The version used in this contribution also included the following phrase at the end of the provision, namely "schennes, transportatie of de dood, naar de aard der zaak", which was removed from later drafts (*Volksraadsnotule Part 1* (n 2) at 9 n 18; cf Eybers (n 26)). The meaning of this phrase is unclear. "Schennis van de eerbaarheid" is a crime against morality in Dutch law (see art 239 of Wetboek van Strafrecht of 1881 available at <http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht.html> (accessed 4 Aug 2015)).

to the field-cornets of the districts from and to which he would be relocating,⁴⁷ the removal of indigenous children from their native communities,⁴⁸ and the abuse of servants by their landlords.⁴⁹

Quite a number of crimes relate to national security. These included treason;⁵⁰ conspiracy;⁵¹ the falsification of official documentation;⁵² dereliction of duties by military commanders;⁵³ as well as the refusal to comply with military orders.⁵⁴

“Schennis” means “ontheiliging” (see *Van Dale Nieuw handwoordenboek der Nederlandse taal* 9 ed (Utrecht, 1984)) which may in turn be translated as desecration, profanation or sacrilege. However, the term “schennis” appears not to have been a standard term; it was not used by Roman-Dutch authors such as Van der Linden, Grotius or Matthaëus, nor does it appear in the *Crimineel Wetboek voor het Koninkrijk Holland* of 1809. The choice of the use of this term by the early ZAR community is therefore curious. The two other terms in the phrase, namely “transportatie” and “de dood”, could be interpreted as alternative punishments, namely that of banishment (see *Van Dale Nieuw handwoordenboek der Nederlandse taal* sv “transportatie”) and the death penalty. If this interpretation is correct, it is possible that “schennis” here referred not to the crime, but to a third possible punishment, similar to the Dutch punishment of being declared dishonourable (see art 25 of the *Crimineel Wetboek voor het Koninkrijk Holland* of 1809; and Joannes van der Linden *Regtsgeleerd, practicaal, en koopmans handboek; ten dienste van regters, practijzins, kooplieden, en allen, die algemeen overzicht van regtskennis verlangen* (Amsterdam, 1806) 2 2). It is also possible that the phrase merely represented notes made by the original drafters of the Thirty-Three Articles, indicating their initial thoughts on the crime (“schennis”) and its possible punishments (banishment or the death penalty) which through oversight was not removed before the document was signed.

- 47 Art 25. The penalty was a fine of Rds5. A person was required to report to the field-cornet of the area in which he had settled within fourteen days.
- 48 Art 28. The crime was considered so serious that it was punishable by either a fine of Rds500 or six months’ imprisonment. In addition, the children involved had to be returned to their communities.
- 49 Art 33. A master was allowed to discipline his servants, but no abuse was tolerated. The punishment had to be determined in accordance with the facts of the case.
- 50 Arts 9 and 10. The punishment entailed a fine of Rds500 and banishment. Those who dared to return to the country after being banished could be declared outlawed. Any person who had been found guilty of treason in the past, was not eligible for election to an official position. In addition, anyone who became aware of such treasonous conspiracies and failed to report it to the authorities within eight days, could be punished by a fine of Rds100 and one months’ imprisonment: art 11. (The penalty was later changed to a fine of Rds25 or arrest, depending on the facts of the case, and a two-year suspension of the right to vote: see *Volksraadsnotule Part 1* (n 2) at 7 n 12).
- 51 Art 12. Each perpetrator could be punished by a fine of Rds25 or arrest, in accordance with the facts of the case, and a two-year suspension of the right to vote. This crime also included preventing others by the use of deeds or threats from exercising their rights.
- 52 Art 13. This crime included falsification of signatures, altering documents, subscribing false names of persons or inserting anything into registers or public deeds after they had been finalised. It was punishable with a fine of Rds300 and dismissal.
- 53 Art 8. The penalty was a fine of anything between Rds50 and Rds150 or imprisonment, depending on the circumstances.
- 54 Art 23. The penalty for the first conviction was a fine of Rds20, for the second conviction Rds30 and for the third conviction Rds50 payable to the state.

Although the Thirty-Three Articles does not explicitly provide for the establishment of courts of law,⁵⁵ it does make provision for procedural regulations and for maintaining order in the courts. In particular, it stipulates that all court proceedings had to be held in public;⁵⁶ that all members of the public who attended such proceedings had to uncover their heads, “maintain a decorous and respectful silence”, follow all the instructions of the President,⁵⁷ and not disrupt court proceedings;⁵⁸ that all members of the public present were obliged to assist the presiding officer in removing (arresting) disruptive elements from the court;⁵⁹ that judicial officers would not be prevented from doing their duties through insults or threats;⁶⁰ that a judicial officer could be disqualified in the event of a conflict of interests;⁶¹ that a person had the right to either represent himself or appoint somebody

- 55 Rather, when read in its entirety, it becomes clear that the document assumed that such courts already existed. A magistrate’s court was created for the territory west of the Drakensberg as early as Sep 1839. The first magistrate to be appointed was J de Klerk (art 3 of the minutes of the Volksraad of 7 Sep 1839 published as “N.1, pp. 26-30” in *Natal Volksraadsnotule* (n 26) at 16-17).
- 56 Art 1. In the original document, this article referred to “teregtzittingen”. Eybers (n 26) translated the term as “law sessions”.
- 57 Art 2. The quoted translation is that of Eybers (n 26). It is possible that the use of the term “President” here probably referred to the presiding judicial official. After the arrangements made by the Voortrekkers at Thaba Nchu on 2 Dec 1836 and later on 17 Apr 1837, the chief judicial official (Gerhardus Marthinus Maritz) was referred to by various titles, including that of “rechter” (judge), “president”, “President-Regter” (judge president) and “Magistraat” (magistrate), and that even after Retief had been elected as the political leader: see, eg, GS Preller *Joernaal van ‘n Trek uit die Dagboek van Erasmus Smit* (Cape Town, 1988) at 43, 61 and 67; J Bird *The Annals of Natal 1495 to 1845* vol 1 (Pietermaritzburg, 1888) at 367; HB Thom *Die Lewe van Gert Maritz* (Cape Town, 1947) at 228.
- 58 Art 3. The wording of this provision was very detailed and prohibited disruption through any means whatsoever at any stage of the proceedings, including during the parties’ arguments, the reading of the court’s findings, or the pronouncement of sentence. It specifically prohibited the making of noise, indicating one’s approval or disapproval, or causing disruption through bodily movements. See, also, n 43 *supra* regarding the penalty for non-compliance.
- 59 Art 4. Although a penalty was prescribed, the article provided for the prosecution of persons who refused to assist the presiding officer.
- 60 Art 5. Transgressors would be charged and, if found guilty by an independent judicial officer, fined or imprisoned in accordance with the severity of the case.
- 61 Art 6 mentioned seven grounds for disqualification, namely (1) if he was related to the “beklaagde of beschuldigde” (Eybers (n 26) translates these terms as the plaintiff or the defendant) within the third degree through blood or marriage; (2) if he had a personal interest in the matter; (3) if he had provided any written advice in the matter; (4) if he had received, or had been promised and accepted, any gifts from interested parties during the proceedings; (5) if he was the “voog, toeziende voog, redderaar of vermoedelyke erfgenaam of begiftigde” (guardian, supervising guardian, executor (*cf* Eybers (n 26) who translates “redderaar” as “agent”) or probable heir or beneficiary) of one of the parties; (6) if a high degree of enmity developed or existed between him and one of the parties; and (7) if any insults or threats had been exchanged between him and any of the parties since the start of the proceedings or within six months (it is not clear whether the six months referred to the period before or since the start of the proceedings; however, in light of the restriction that these grounds had to be raised at the start of the proceedings, this period probably referred to the former interpretation). A party to the proceedings or a member of the

to act on his behalf (in legal proceedings)⁶² although members of the Burgerraad could not represent others or give advice outside of public meetings,⁶³ and that the field-cornet was obliged to hand over all so-called “onwilligers”⁶⁴ in his district to the magistrate.⁶⁵

In summary, the Thirty-Three Articles contained provisions mostly regarding the regulation of law and order. It was a basic guideline identifying the transgressions that were considered worth prosecuting. These included crimes against the national security as well as crimes against individuals. Further, it made provision for the enforcement of law in an orderly way in those forums where the crimes would be adjudicated. Lastly, it determined the law to be applied by the courts. This will be considered in the next section.

Burgerraad could raise one of these grounds of disqualification in writing or orally at the start of the proceedings and before the hearing commenced (arts 6 and 7 read together). An eighth ground for immediate disqualification appears to have been inserted in art 6 as an afterthought as it concerned not only court proceedings but extended to membership of the Burgerraad as well. It stated that “geene bastaarden ... tot het tiende gelid” would be allowed to preside or sit as member of the Burgerraad. Eybers (n 26) translates this phrase as “no half-castes, down to the tenth degree”, but the original meaning could also have been to exclude the illegitimately born, ie, those born out of wedlock, from court proceedings and other official duties.

62 Art 16.

63 Art 15. Members of the Burgerraad could not act as a “scheidsman” (Eybers (n 26) translates it as an “umpire”) either. The use of this term is ambiguous as it either indicated that members of the Burgerraad were prohibited from presiding in judicial processes or that they could not even try to settle disputes extra-judicially. The former interpretation would imply that there was a separation of powers between the judicial and legislative or executive authorities. Wichmann ((n 1) at 40) is of the opinion that there was no separation of powers at that time and that the Burgerraad also functioned as a court, although probably only as a court of appeal. The question regarding the separation of powers falls outside the scope of this contribution and will not be considered here. It should be noted that art 15 was amended by a decision of the Volksraad in 1864 in that members of the Volksraad were no longer prohibited from representing others in a court of law: see art 19 of the minutes of the Volksraad of 17 Feb 1864 published as “Staats Courant, 1 en 8 Mar. 1864” in *Volksraadsnotule Part 5* (n 29) at 9-14.

64 Art 32. The meaning of the term “onwilligers” in this provision is not clear. It is translated by Eybers (n 26) as “undesirables [or, all persons unwilling to serve]”, implying a reference to military service. Wichmann (n 1) does not include art 32 in his discussion of the Thirty-Three Articles (at 38-41). It is submitted that art 32 was not restricted to persons unwilling to serve or perform military duties. Rather, it was meant as a general provision concerning the practical application of law and order, in that it compelled the field-cornets to apprehend any person suspected of any of the crimes mentioned in the Thirty-Three Articles and to hand him or her over to the office of the magistrate to ensure the rule of law and a fair trial. Its purpose could, arguably, have been to prevent vigilante justice.

65 Two remaining provisions, namely arts 29 and 30, are not discussed here. They concerned non-judicial matters regarding the settlements of the indigenous peoples and the election of members of the Volksraad respectively. For a discussion of these two provisions, see, eg, Wichmann (n 1) at 40-41.

4 Article 31: The law to be applied

The most important provision for purposes of this contribution is article 31 which concerned the applicable law. It provided that in those cases where the legal principles laid down in the Thirty-Three Articles proved insufficient, Dutch law should serve as a guideline, although always in a moderate style and form in accordance with the customs of South Africa and to the benefit and welfare of the community.⁶⁶

As mentioned above, the Thirty-Three Articles was confirmed and approved by the unified Volksraad of the ZAR on 23 May 1849.⁶⁷ Despite the apparently clear stipulations, there seemed to have been uncertainty regarding the applicable law. In 1853, Commandant-General AWJ Pretorius received a letter from one J Howell⁶⁸ containing some suggestions for the improvement of the newly created Republic. One of these suggestions was for an official declaration on whether English law, Roman-Dutch law, the law of the Cape Colony, or the ZAR's own law should be the law applicable in the Republic.⁶⁹

MW Pretorius and S Schoeman drafted a document in 1856 on the state of the nation⁷⁰ in which they acknowledged that certain provisions, including article

66 "In alle gevallen waarin deze wetten te kort komen mogten, de Hollandsche Wet tot bases zal verstreken, doch op een gematigde styl en vorm en overeenkomstig het constum (costuum) van Zeud Africa en tot nut en welvaard voor deze maatschappij." The wording in the version used by Eybers (n 26) is slightly different: "In alle gevallen waarin deze wetten tekort mogten komen zal de Hollandsche wet tot basis verstreken, doch op eene gematigde stijlvorm en overeenkomstig van het costuum van Zuid Afrika en tot nut en welvaart van de maatschappij." Eybers translates the provision as follows: "In all cases in which these laws may prove insufficient the Dutch Law shall serve as basis, but only in a moderate way and according to the customs of South Africa and for the prosperity and welfare of the community."

67 See n 2 *supra*.

68 Possibly the same J Howell who was appointed magistrate at Winburg in 1858. He is described as a "Jack of all trades" and had, during his career, served in various capacities including that of soldier, magistrate's assistant, public prosecutor for Natal, attorney, editor of a newspaper (the *Natal Standard and Farmers' Courant*) and author. He was a friend of AWJ Pretorius and had once saved the life of Judge William Menzies. See BJT Leverton *sv* "Howell, James Michael (Michiel) Gristock" in *DSAB* vol 3 (Cape Town, 1977) 418.

69 See R.493/53 in DW Krynauw & HS Pretorius (eds) *Transvaalse Argiefstukke Staatsekretaris; Inkomende Stukke, 1850-1853* (Pretoria, 1949) at 311-312.

70 See n 31 *supra*. This document was drafted by the then two rival commandants-general, Marthinus Wessel Pretorius (later to be the first president of the ZAR) and Stefanus Schoeman, at a meeting held on 12 Apr 1856 in an attempt to restore order to the country during a period of dissension and the threat of military conflict. One of the aims of the meeting was to review the draft Constitution of 1855 that had provisionally been adopted by the Potchefstroom Volksraad in Nov of that year: see art 8 of the minutes of the Volksraad of 6 Nov 1855 published as "Soutter, pak II No. 8" in *Volksraadsnotule Part 3* (n 30) at 106-107; for an overview of the political events of that period, see, in general, Wichmann (n 1) at 86-194. Schoeman had been elected and sworn in as commandant-general in 1855. He had a stormy relationship with the ZAR government, but appears to have remained, at least officially, on a good enough footing with Pretorius to be entrusted with governmental duties in later years: see Wildenboer "Schoemansdal: Law and justice on the frontier" (2013) 19(2) *Fundamina* 441-462 at nn 7 and 33; OJO Ferreira *sv* "Schoeman, Stephanus" in *DSAB* vol 5 (Pretoria, 1987) 685-688.

31 of the Thirty-Three Articles, contained inaccuracies that could result in legal uncertainty. Furthermore, they stated that the use of Dutch law, a “[k]oninglyke wet”,⁷¹ was deemed inappropriate in a republic⁷² such as the ZAR as it prescribed severe punishments for transgressions. They agreed that it was impossible to govern a country or nation without proper legislation (or law) as experience had shown and that, without it, the inhabitants of an otherwise beautiful and plentiful country would not be prevented from turning to destruction, chaos, discord and mockery. They proposed a separation of powers between the legislature, the executive⁷³ and the judiciary with an emphasis on the independence of the latter, but did not make any recommendation regarding the law to be applied. Instead, they proposed that all legislation should be promulgated by the legislature (namely the Volksraad) subject to approval by the nation within three months.⁷⁴

Despite the reservations expressed in the abovementioned 1856 document, the 1858 Constitution made no mention of the law to be applied. In the following year this was remedied with the promulgation⁷⁵ of an addendum to the Constitution. The purpose of this addendum, known as Addendum 1,⁷⁶ was to address the uncertainty surrounding the interpretation of article 31 by providing clarity on the sources of law.⁷⁷ It stipulated that the law book of Van der Linden, in so far as it was not in conflict with the Constitution, other legislation or decisions of the Volksraad, would remain the “law book” of the ZAR.⁷⁸ If Van der Linden dealt with a matter

71 The Kingdom of the Netherlands (*Koninkrijk der Nederlande*) was established in 1815 after Napoleon’s defeat. On 27 Sep 1815 William, Prince of Orange and Nassau, was crowned as King William I. See HR Hahlo & E Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 526.

72 The ZAR became an independent state on the signing of the Sand River Convention with Britain on 16 Jan 1852. The name “De Zuid-Afrikaansche Republiek” was adopted by the Volksraad on 19 Sep 1853. See Eybers (n 4) doc 179 at 360. See, also, L Wildenboer “For a few dollars more: Overcharging and misconduct in the legal profession of the *Zuid-Afrikaansche Republiek*” (2011) 44 *De Jure* 339-363 at 339 n 2.

73 The proposal regarding the third branch, namely the executive, was recorded in a separate document signed five days later by the same authors: see *Bylaag 7, 1856* in *Volksraadsnotule Part 3* (n 30) at 434-435.

74 This latter suggestion was accepted by the Kommissieraad in May 1856: see minutes of the Kommissieraad of 27-30 May 1856 published as “E.V.R. 5, pp. 484-501” in *Volksraadsnotule Part 3* (n 30) 134-144 at 136.

75 Art 52 of the minutes of the Volksraad of 19 Sep 1859 published in *Volksraadsnotule Part 4* (n 29) at 22-24. Art 4 of Addendum 1 stipulated that the Addendum would be implemented three months after it was made public; it was published in the *Government Gazette* of 28 Oct 1859 and therefore came into force on 28 Jan 1860: see *Bylaag 39, 1859* of *Volksraadsnotule Part 4* (n 29) at 315-316.

76 Published as *Bylaag 39, 1859* in *Volksraadsnotule Part 4* (n 29) at 315-316.

77 The preamble stated that the existing uncertainty regarding the applicable Dutch law was to the detriment of the citizens and caused the judicial officers much effort and doubt.

78 Art 1 of Addendum 1 referred to the “wetboek van van der Linden”.

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72 The ZAR became an independent state on the signing of the Sand River Convention with Britain on 16 Jan 1852. The name “De Zuid-Afrikaansche Republiek” was adopted by the Volksraad on 19 Sep 1853. See Eybers (n 4) doc 179 at 360. See, also, L Wildenboer “For a few dollars more: Overcharging and misconduct in the legal profession of the *Zuid-Afrikaansche Republiek*” (2011) 44 *De Jure* 339-363 at 339 n 2.

73 The proposal regarding the third branch, namely the executive, was recorded in a separate document signed five days later by the same authors: see *Bylaag 7, 1856* in *Volksraadsnotule Part 3* (n 30) at 434-435.

74 This latter suggestion was accepted by the Kommissieraad in May 1856: see minutes of the Kommissieraad of 27-30 May 1856 published as “E.V.R. 5, pp. 484-501” in *Volksraadsnotule Part 3* (n 30) 134-144 at 136.

75 Art 52 of the minutes of the Volksraad of 19 Sep 1859 published in *Volksraadsnotule Part 4* (n 29) at 22-24. Art 4 of Addendum 1 stipulated that the Addendum would be implemented three months after it was made public; it was published in the *Government Gazette* of 28 Oct 1859 and therefore came into force on 28 Jan 1860: see *Bylaag 39, 1859* of *Volksraadsnotule Part 4* (n 29) at 315-316.

76 Published as *Bylaag 39, 1859* in *Volksraadsnotule Part 4* (n 29) at 315-316.

77 The preamble stated that the existing uncertainty regarding the applicable Dutch law was to the detriment of the citizens and caused the judicial officers much effort and doubt.

78 Art 1 of Addendum 1 referred to the “wetboek van van der Linden”.

inadequately or not at all, the law book of Simon van Leeuwen and the *Inleiding tot de Hollandsche rechtsgeleertheyd* of Grotius would be binding.⁷⁹ Nevertheless, the use of these three legal works⁸⁰ remained subject to the restrictions set out in article 31 of the Thirty-Three Articles,⁸¹ namely that it should always be interpreted in a moderate style and form in accordance with the customs of South Africa⁸² and to the benefit and welfare of the community.

Addendum 1 in effect created a constitutionally entrenched hierarchy of sources of law. In order of importance, these sources of law were legislation, custom and the specified common-law authors, again in order of importance, Van der Linden, Leeuwen and Grotius.⁸³

In 1866, the Volksraad received two petitions from the public regarding article 31. In the first, received from Rustenburg,⁸⁴ the petitioners complained, among other matters, that Dutch law was unsuitable and should not apply in the ZAR. They proposed that new and more suitable laws be drafted by two or three representatives from each district who were familiar with the local customs. In the second, received from Potchefstroom,⁸⁵ the petitioners complained about the application of foreign, monarchic laws in the “vrije Republiek” of the ZAR. In particular, they were offended by the continued use of Van der Linden as an authoritative source of law. They wanted to know why Van der Linden, who was no longer seen as an authoritative source in his own country, should be so highly regarded in the ZAR. They pointed out that their (ancestors) had left Holland because of the oppressive Dutch laws and called for new legislation to be drafted by the ZAR legislature that would satisfy the general population. Lastly, they complained that the three authoritative works of Van

79 Art 2 of Addendum 1 referred to the “wetboek van Simon van Leeuwen en de Inleiding van Hugo de Groot”.

80 It has been suggested that the choice of these three legal works had a lot to do with the fact that they had been written in Dutch, as knowledge of Latin (the only other language in which some of the other important works on Roman-Dutch law were available at that time) was probably rare in the ZAR during those early years: see Farlam (n 9) at 402. In addition, all three these works had been regarded as authoritative in former Dutch colonies such as the Cape, Guiana and Ceylon (*ibid*).

81 Art 3 of Addendum 1.

82 See n 66 *supra*.

83 L Wildenboer & K Dietrich “*Pretorius v Dietrich* 1872: Klinkende munt of papiergeld?” (2015) 12(1) *LitNet Akademies* available at <http://www.litnet.co.za/pretorius-v-dietrich-1872-klinkende-munt-of-papiergeld/> (accessed 20 Aug 2015) 1-22 at 7. See, also, M Josson *Schets van het recht van de Zuid-Afrikaansche Republiek* (Gent, 1897) at 10-11, 96; HR Hahlo & E Kahn *The Union of South Africa. The Development of its Laws and Constitution* (London, 1960) at 21.

84 Petition dated 13 May 1865 published as *Bylaag* 4, 1866 in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel VI (1866-1867)* (Cape Town, sd) (hereafter *Volksraadsnotule Part 6*) at 94-95.

85 Petition dated 20 Aug 1866 published as *Bylaag* 32, 1866 in *Volksraadsnotule Part 6* (n 84) at 114-115.

der Linden, Grotius and Leeuwen were unobtainable and therefore inaccessible to the man on the street.

The Volksraad responded positively and agreed that there was a need to compile the laws of the ZAR in one code (“wetboek”).⁸⁶ After much debate and an initial suggestion to appoint a commission to codify the laws of the ZAR which would contain all the legislation previously issued there,⁸⁷ it was eventually decided that the President and the Executive Council would be responsible for submitting new laws for approval to the Volksraad. In the interim, the existing position would pertain until such time as it was repealed.⁸⁸ In other words, Roman-Dutch law would apply in those cases where the Constitution and the Thirty-Three Articles were silent – not generally though, but in the limited sense referred to above.⁸⁹ Moreover, the Volksraad expressed the wish that the citizens would be more supportive of the legislature and invited the public to participate in the process by submitting suggestions for new laws and to raise their grievances regarding any existing repugnant or harmful laws.⁹⁰

Despite the apparent enthusiasm for a complete overhaul of the laws of the ZAR, nothing ever came of the proposed codification. Article 31 of the Thirty-Three Articles remained in force. The courts of the ZAR continued to apply Roman-Dutch law as contained in the three authoritative works of Van der Linden, Leeuwen and Grotius.⁹¹ The next section will consider the application of article 31 by the courts as illustrated by a few decisions.

86 Art 190 of the minutes of the Volksraad of 24 Sep 1866 and art 239 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-20 and 22-24 respectively.

87 Art 190 of the minutes of the Volksraad of 24 Sep 1866 and art 239 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-20 and 22-24 respectively. The commission had to complete their task within six months.

88 Art 242 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 22-24.

89 See, also, arts 190 and 191 of the minutes of the Volksraad of 24 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-21. These two articles were, however, not adopted by, and were never official decisions of, the Volksraad.

90 Art 242 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 22-24.

91 These three common-law sources were used until the end of the century as is apparent from requests for copies of these works from, eg, the special magistrate for Barberton and the public prosecutor for Middelburg (see, respectively, TAB SS 2595 R15543/90 and TAB SP 195 SPR481/99: this reference is to the National Archives Repository (Pretoria) (TAB) followed by the relevant document series). The works were apparently used not only by lawyers and judicial officials, but also by the public, as is evident from a similar request from a teacher (see TAB OD 0 OR9888/97) for copies of Van der Linden’s “Wetboek” and the “Lokale Wetboek”, the latter probably referring to F Jeppe & JG Kotzé *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (Pretoria, 1887).

5 The application of article 31 by the courts

5.1 *Rooth v The State*⁹²

In *Rooth v The State*, a decision of the High Court of the ZAR in 1888, the Court had to decide whether the applicants could reclaim transfer duties in terms of the *condictio indebiti* on the ground that they had been ignorant of the law. Counsel for the applicants relied on the authoritative sources as prescribed by the Thirty-Three Articles and Addendum 1 to the 1858 Constitution and argued that money paid in error, whether in fact or in law, could be recovered. The Court confirmed that it was obliged to follow the three prescribed texts, but qualified this obligation by saying that “in the interpretation and use of these three textbooks the Court shall always proceed in the manner prescribed by [Art] 31 of the thirty-three Articles”.⁹³ The Court found that since none of these three works addressed the question before it “satisfactorily or with clearness,”⁹⁴ it not only had a discretion to depart from that authority, but was compelled to follow the Roman-Dutch law “yet upon a reasonable system and in accordance with the usage of South Africa, and for the benefit and welfare of the community”.⁹⁵ The Court then proceeded to look at various other authorities on Roman-Dutch law, French law, German law and English law and to consider also the opinions of Roman jurists and the commentators, before concluding that monies could not be recovered on the basis of *error iuris*.⁹⁶

5.2 *Van Diggelen v Wepener*⁹⁷

Van Diggelen v Wepener was a judgement of the High Court of the ZAR in 1894 that concerned the prescription of the fees of law agents. The Court had to decide whether article 16 of the *Placaat* of the Emperor Charles V of 4 October 1540⁹⁸ applied in the ZAR.

92 (1885-1888) 2 SAR TS 259. Also reported in (1888) 5 *Cape LJ* 304-309. Unless otherwise specified, all references are to the former citation.

93 At 261.

94 At 262.

95 At 261-262.

96 The Court (Kotzé CJ, with Esselen and De Korte JJ concurring) considered the views of authors such as Van der Keessel, Huber, (Heinrich) Coccejus, Peckius, Vinnius, D’Aguessau, Leyser, Mühlenbruch, Cujacius, Donellus, Merenda, Brunnean, Domat, Voet, Glück, Savigny, Mackeldey, Goudsmit, Windscheid, (Wiardus) Modderman, (Joseph) Story, Burge, Pothier, Austin and the opinions contained in the *Hollandsche consultatien*.

97 (1894) 1 Off Rep 31; also reported in (1894) 11 *Cape LJ* 218-222. Unless otherwise specified, references to and quotations from this decision are from the latter citation.

98 *Groot placaet-boeck* Part 1 cols 311-322. This *Placaat* is also known as the Perpetual Edict (*Eeuwich Edict*) and is available online on the Utrecht University Repository at <http://objects.library.uu.nl/reader/index.php?obj=1874-44882&lan=en#page//13/34/56/133456283560534604448817005324474664610.jpg/mode/lup> (accessed 9 Sep 2015). JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) summarises the purpose of the *Placaat* as “not a law dealing

The majority found that since the Roman-Dutch authorities⁹⁹ were undecided on this question, a decision of the Supreme Court of the Cape¹⁰⁰ and one of the High Court of the Orange Free State¹⁰¹ should be followed because “this course is pointed out to us by the provision in the Thirty-Three Articles”. However, it did not elaborate further on the reason for this approach. As a result, the Court held that article 16 of the *Placaat* of 1540 indeed applied in the ZAR and that the fees of law agents became prescribed within two years.

with some single subject, but an ordinance which strove to amend existing abuses and to introduce some uniformity into the practice of the courts” (at 221). The preamble of the *Placaat* confirms “that it was promulgated in order to ... remedy the expense connected with lawsuits, and to provide for a pure administration of justice which would deal equally with both rich and poor” (tr Wessels at 218). For more on the Perpetual Edict in general, see Wessels at 218-221; DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1983) at 438; Hahlo & Kahn (n 71) at 572; G Abraham “[In] the path of the good Emperor Justinian’: Charles V and the impact of his legacy on the development of the South African common law” (2001) 118 *SALJ* 532-555 esp at 542, 547-552. In short, art 16 of the *Placaat* provided that the fees of advocates, attorneys, secretaries, doctors of medicine, surgeons, apothecaries, clerks, notaries and other labourers prescribed after two years. The only exception to this rule was where the debt had been put in writing, in which case the claim prescribed after ten years. In the event that the principal debtor died, the creditor had two years from the date of hearing of the death to claim the debt from the heir. (For a full translation of art 16, see RW Lee *An Introduction to Roman-Dutch Law* (Oxford, 1931) at 287.) In *President Insurance Co Ltd v Yu Kwam* [1963] 3 All SA 443 (A) at 447 the Appellate Division acknowledged that the common-law principles pertaining to prescription along with the provisions in terms of art 16 of the *Placaat* had been received into the law of (at least) the old Transvaal (ZAR). (Abraham at 550 n 172 argues that it had also been received into the law of the other provinces.) Art 16 of the *Placaat* was explicitly repealed in South Africa by s 15 of the Prescription Act 18 of 1943.

- 99 In the majority judgement, the Court not only referred to the three prescribed authorities, namely Van der Linden, Leeuwen and Grotius, but also consulted the works of Merula, Coren, Groenewegen, Voet, Van der Keessel, Van Alphen and De Haas (at 219). It is interesting to observe that the reference here to Van der Linden was not to the authorised work, the *Koopmanshandboek*, but to his translation and comments on the work of the French jurist, Robert Joseph Pothier: J van der Linden *Verhandeling van contracten en andere verbintenissen door Robert Joseph Pothier... Tweede Deel* (Leyden, 1806) 706 at 261.
- 100 The unreported decision in *Drew v The Executors of Wolfe* (1858). However, a summary of the decision does appear in (1868) 1 Buch 119. In this case, which concerned the prescription of claims for medical fees, the Court held that the 1540 *Placaat* was “not, as to medical men, in disuse”.
- 101 *Rabie v Neebe* 1879 OFS 57. The case also involved the prescription of claims for medical fees. In truth, it is difficult to determine from the report what the Court’s view on the application or not of the 1540 *Placaat* was. The reported judgement appears to contain conflicting views which may possibly be due to the fact that there were majority and minority decisions. On the one hand the Court expressed its doubt (at 58) at the correctness of the decision in *Drew v The Executors of Wolfe* (n 100 *supra*) and held that while the plaintiff had tried to prove that the 1540 *Placaat* had fallen into disuse in the Orange Free State, it would have been sufficient for him to prove that the *Placaat* was no longer in use in the Netherlands. The Court was satisfied that the latter had indeed been proven and even went further to say that those who alleged that the *Placaat* still applied, had to prove that it had been resurrected (“degene die beweert dat het Plakaat van 1540 ergens nog van kracht is, moet bewijzen dat het aldaar wederom in leven geroepen is geworden door eene latere wetsbepaling”) (at 58). The Court consequently held that a prescription period of two years did not apply to medical bills (at 59). On the other hand, however, in the last paragraph, the report states that the Court agreed with the judgement in *Drew v The Executors of Wolfe* and held that the fees of medical doctors prescribed after two years (at 59).

In a dissenting judgement, Morice J gave a very different interpretation of the provisions of the Thirty-Three Articles. He likewise considered the three Roman-Dutch authors,¹⁰² but concluded that according to them, article 16 of the 1540 *Placaat* had fallen into disuse.¹⁰³ Furthermore, he was of the opinion that the Cape and Free State decisions referred to by the majority did not constitute evidence of the customs of the ZAR. By contrast, he was of the view that, taking into account local circumstances such as the great distances, the slow means of communication and the fact that “a large proportion of the population live[d] in wagons during half the year”, it was not a custom in the ZAR to recognise the prescription of the fees of law agents within two years. He held that “[a] custom means what is practised amongst ordinary persons, and not an interpretation of Roman-Dutch Law by Judges”. Finally, Morice J emphasised that in terms of the Thirty-Three Articles, Dutch law had to be followed to promote the welfare of the state; in his opinion an interpretation allowing for a prescription of legal fees within two years did not promote that welfare.¹⁰⁴

5 3 The Reform Trial (*S v Phillips, Rhodes and Others*)¹⁰⁵

The Thirty-Three Articles also influenced the outcome of the controversial Reform Trial¹⁰⁶ that took place in 1896 after the failed Jameson Raid.¹⁰⁷ For various reasons not

102 Like the majority, Morice J referred not only to the three prescribed authorities, but also to the works of other authorities, including Van der Keessel, Voet, Groenewegen and Van Alphen (at 221).

103 This view is shared by LE Krause “The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law” (1923) 40 *SALJ* 26-41 at 36. Krause at 35 n 7 lists a number of judgements that had held that art 16 of the 1540 *Placaat* applied in South Africa, but he is of the opinion that these judgements were decided wrongly. Interestingly, Krause bases his argument on the same text by Van der Linden (see n 99 *supra*) relied on by the majority judgement in *Van Diggelen v Wepener*, but follows a different interpretation.

104 Morice J referred (at 222) to a draft Bill on prescription that set the period for prescription for much longer than two years. That Bill had been rejected by the Volksraad in 1892. After the British annexation, a statute was promulgated to amend the law relating to prescription. Art 1 of the Prescription Amendment Act 26 of 1908 (Tvl) replaced all former laws or customs and expressly stated that art 16 of the 1540 *Placaat* was “withdrawn from operation”.

105 (1896) 3 Off Rep 216. The judgement was also reported in “High treason” (1900) 17 *Cape LJ* 15-30 by the editors of the journal (see the footnote at 15). However, as pointed out by the presiding judge Gregorowski himself, the latter report differs from the officially reported judgement, which he described as “fairly correct” (see R Gregorowski “Mr Justice Gregorowski and the Reform Trial. Mr Gregorowski’s reply” (1900) 17 *Cape LJ* 311-326 at 311). This was contested by the editors of the *Cape LJ* (see “Note on Mr. Gregorowski’s reply” (1900) 17 *Cape LJ* 326-327 at 326). The two versions do indeed differ, and for that reason both are referred to in this discussion.

106 Named for the Reform Committee formed at the time of the Jameson Raid and of which some of the accused had been members.

107 Much has been written about the Jameson Raid. For those interested in the historical facts of the Raid, as well as its causes and consequences, the following works might serve as a basic introduction: The State Library *From Manifesto to Trial. A Full History of the Jameson Raid and*

one of the five judges on the High Court bench at the time was available to preside at the trial.¹⁰⁸ In response to this predicament, the ZAR government requested Reinhold Gregorowski,¹⁰⁹ the then State Attorney of the Orange Free State, to preside. He accepted the offer. He was much criticised¹¹⁰ for his judgement and, in particular, for the way in which he had applied the law.

After Jameson's invasion had been halted and the concomitant rebellion put down, sixty-four persons¹¹¹ were accused of high treason and

the Trial of the Members of the Reform Committee and of Dr Jameson and his Staff (Pretoria, 1896 repr 1970); Kotzé *Memoirs* vol 2 (n 24) at 231-246 (for his involvement, see n 108 *infra*); HM Hole *The Jameson Raid* (London, 1930) (the author was a contemporary of and had known Jameson and many of the other role players in person); IR Smith *The Origins of the South African War, 1899-1902* (New York, 1996) ch 3.

- 108 The reasons are set out in Anon "Mr. Justice Gregorowski and the Reform Trial" (1900) 17 *Cape LJ* 164-171 at 164-165. Of the five judges, Kotzé CJ and Ameshoff J had been members of the commission appointed to negotiate with the Reform Committee previously; De Korte J was under threat of suspension for entirely other reasons; and Jorissen J and Morice J could not preside due to their respective political views. De Korte resigned in June 1896 after being charged with misconduct – for more on the charges against him and the finding of the special court in this regard, see Wildenboer (n 72) at 358-359.
- 109 Gregorowski had been a judge of the Orange Free State Bench from 1881 and the Attorney General there since 1892. He later served on the ZAR Bench from May 1896 and succeeded Kotzé as Chief Justice after the latter's dismissal by President Kruger (see n 24). For more on Gregorowski's life and career, see M Wiechers *sv* "Gregorowski, Reinhold" in *DSAB* vol 2 (Cape Town, 1972) 274-275; Anon "Mr Justice Gregorowski" (1921) 38 *SALJ* 1-2. Both these biographies praise Gregorowski's intellectual abilities and his ability to deliver sound judgements.
- 110 See, eg, EP Solomon "Mr Justice Gregorowski and the Reform Trial" (1901) 18 *SALJ* 78-99; Anon (n 108); 29 Apr 1896 *The Cape Times*; 30 Apr 1896 *The Manchester Guardian*; and 2 May 1896 *The Grahamstown Journal* (the latter contains a scathing personal criticism of Gregorowski's judicial suitability). He was not only accused of partiality, but it was also opined that his "allegations of fact are erroneous, his conclusions in law are bad, the sentences passed were, if not illegal, too severe, whilst [his arguments in support of those sentences] are unsound and illogical" (Solomon at 99). The direct or indirect involvement in the trial of some of these critics should be noted here. Apart from the general impact on the political affairs in Southern Africa at that time and the passionate debates it stimulated, some of these reviewers had experienced the consequences of the Jameson Raid and the Reform Trial more personally. For example, the editor of the *Cape Law Journal*, the main vehicle for publishing criticism against the judgement, had been one of the accused in the trial. William Henry Somerset Bell had been the editor of the *Journal* from 1884 until 1896, and resumed this position again from 1900 until 1913 (see WG Schulze "A conspectus of South African legal periodicals: Past to present" (2013) 19(1) *Fundamina* 61-105 at 65-66). EP Solomon, an attorney, had been one of the accused in the trial. The objectiveness of these reviews and criticisms is therefore an open question and the reader is invited to form his or her own opinion in this regard.
- 111 The so-called "rank and file" (or those other than the first four accused) pleaded guilty to the third and fourth charges but "without any hostile intention to disturb, injure or bring into danger the independence or safety" of the ZAR (see "High treason" (n 105) at 17). They all received sentences of two years' imprisonment and a fine of £2 000. These sentences were later commuted to a fine of £2 000 each with an undertaking to refrain from meddling in the internal or external politics of the ZAR (see the editor's note *idem* at 30). However, these charges and sentences

conspiracy.¹¹² The first four accused had pleaded guilty to the first charge in that they had “treated, conspired, agreed with and urged Leander Starr Jameson, *an alien residing without the boundaries* of [the ZAR], to come into the territory of [the ZAR] at the head of and with an armed and hostile troop and to make a hostile invasion ...”.¹¹³

The judgement centred around which law was applicable: Roman-Dutch law or the local law of the ZAR? Article 9 of the Thirty-Three Articles provided for the punishment for treason.¹¹⁴

Counsel for the defence pointed out that the prosecution had not proved that Jameson was a representative of any foreign government, but simply that he “came in as a private man and was in charge of armed men”.¹¹⁵ The contention was that the accused were therefore guilty of a lesser crime than that contained in article 9 of the Thirty-Three Articles, which concerned acts of treason with foreign governments, their governors or officials. Since article 9 prescribed the penalty of banishment and a fine of Rds500, counsel argued that a lesser form of punishment accordingly applied.¹¹⁶

For its part the prosecution argued that Jameson was a “robber and a freebooter” and that it was “regarded as more serious for persons to conspire with freebooters or robbers against the independence of the country than it would be if they had conspired with the government of a foreign Power”. The prosecution was of the view that article 9 did not apply; instead, Roman-Dutch law as contained in Van der Linden’s textbook had to be followed in sentencing the accused.¹¹⁷

The judgement of the Court was brief. Gregorowski J held that article 9 dealt “only with certain open treasonable acts, such as corresponding with a view to [an] invasion by a foreign Power, which is not on the same footing as the present case,

will not be discussed in further detail here as it was accepted that the crimes committed did not constitute high treason and was therefore not judged in terms of art 9 of the Thirty-Three Articles. Moreover, the main controversy surrounding the trial was rather concerned with the death sentence imposed on the first four accused.

112 For more detail on the four charges, see “High treason” (n 105) at 16-17.

113 *Ibid*, emphasis added. It is interesting to observe that at the time, criticism was not only levelled at the severity of the sentences, but also at the counsel of the defendants who advised their clients to plead guilty. See, eg, 30 Apr 1896 *The Manchester Guardian*; 1 May 1896 *The Manchester Guardian*.

114 See n 50 *supra*. Art 9 stipulated as follows: “All those who shall have formed plans or come to an understanding with foreign powers or their governors or officials with a view to inducing them to perform acts of hostility or to undertake the waging of war, or with a view to supplying them with the means necessary thereto, and those who attempt to commit treason, shall be punished with a fine of 500 Rix-dollars and shall be expelled from our community, and on returning shall be declared outlawed” (tr Eybers (n 26)). Gregorowski maintained that art 9 did not apply to the lesser crime of *crimen laesae majestatis* (Gregorowski (n 105) at 323).

115 “High treason” (n 105) at 21.

116 *Idem* at 21-22. See, also, *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 236-238.

where [an] invasion has actually been brought about”.¹¹⁸ As a result, the penalty prescribed in article 9 was not applicable. Rather, the Court was obliged to apply article 31 of the Thirty-Three Articles in terms of which Roman-Dutch law, and in particular Van der Linden’s work, had to be followed.¹¹⁹ The Court then proceeded to impose the death sentence on the first four accused.¹²⁰

As already mentioned, the judgement elicited strong criticism. First, Gregorowski was criticised for not, at the very least, bearing in mind “the mildness of the legislation of the uneducated old Voortrekkers”.¹²¹ Secondly, he was criticised for his interpretation of Van der Linden’s prescribed punishment. The relevant text in Van der Linden’s *Koopmanshandboek* stated that the punishment for high treason was in general the sentence of death, but that the merits of the case had to be taken into account.¹²² Gregorowski was lambasted for choosing to interpret Van der Linden’s guideline in the strictest sense possible in order to impose the maximum sentence.¹²³ Thirdly, and (for purposes of this contribution) most importantly, it was pointed out that Gregorowski could have chosen to follow Roman-Dutch law with respect to high treason and *crimen laesio majestatis* as it had been interpreted by the Cape courts.¹²⁴

117 “High treason” (n 105) at 25-26; *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 238.

118 *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 242.

119 See “High treason” (n 105) at 28. In the official report of the judgement, the Court did not explicitly mention Van der Linden, but merely held that the “old punishments of the Roman-Dutch Law” remained in force (at 242).

120 Not one of the four accused was eventually executed. The very next day, President Kruger mitigated each death sentence to fifteen years’ imprisonment and again later to a fine of £25 000 each as well as the compulsory signing of an undertaking to refrain from meddling in the affairs of the ZAR (Hole (n 107) at 267-268). Only one of the four refused to sign the undertaking and was subsequently banished. The fines were eventually paid by Cecil John Rhodes, rumoured to have been the centre of the conspiracy: see Smith (n 107) at 95; 1 May 1896 *The Manchester Guardian*.

121 Anon (n 108) at 168. See, also, the arguments of counsel for the defence regarding the mild nature of punishment (at least with regard to European citizens) in terms of the law of the ZAR. Counsel stated: “The Afrianders are not a bloodthirsty or vindictive people. Capital punishment is very seldom carried out in this country against a white man. The people of this Republic have published in their law books their humane views with regard to the punishment of high treason” (*S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 236-237).

122 Van der Linden (n 46) at 2 4 2: “De straf van deeze misdaad [Hoog-verraad] is in’t algemeen de doodstraffe, waar van de soort en de wijze van uitvoering, naar mate van de meer of min verzwaaende omstandigheden, bepaald wordt” (The punishment for this crime [treason] in general is the death penalty, of which the nature and the method of execution are determined by the aggravating or mitigating circumstances).

123 Solomon (n 110) at 96-97. See, also, Anon “Lawyers in prison” (1896) 13 *Cape LJ* 129-131 where it was bemoaned that Gregorowski had not applied his judicial discretion, allowed in terms of Roman-Dutch law, when passing sentence (at 130).

124 Solomon (n 110) at 98. These cases had been heard by a special court for the trial of cases of high treason. The court had been constituted by s 8 of The Indemnity and Special Tribunals Act 6 of 1900 (Cape) (the Act was promulgated on 12 Oct 1900) and consisted of a three-judge bench of Solomon (not EP, but WH), Maasdorp and Lange. The trials concerned the sentencing of a

The law of the ZAR was decried in that it had “by local legislation been reduced to a hide-bound system”, dependent on three law books which, “however good in themselves, were never intended to form a complete digest of the laws required by a civilised state”.¹²⁵ In a jurisdiction such as the Cape, where the interpretation of the Roman-Dutch law was not “bound down to Thirty-three Articles or to the dictum of one single text writer”,¹²⁶ the courts were able to exercise their discretion in passing sentences according to the merits of each case.¹²⁷

Surprisingly, Gregorowski responded publicly to these criticisms.¹²⁸ He vehemently denied the allegations that he had been prejudiced before or during the trial. Furthermore, he defended his decision to pronounce the death sentence on several grounds, namely the severity of the crimes committed,¹²⁹ his suspicion, even before the trial, that any death sentence would be commuted,¹³⁰ and the fact that English law punished all treasonous acts by death.¹³¹ He further contended that the prescribed fine in terms of article 9, namely Rds500 (£37 10s at that time) was not “an adequate and proper punishment” for “a parcel of millionaires”.¹³²

number of persons convicted of high treason against the British government during the Second Anglo-Boer War. Sentencing in these trials took place on 17 Dec 1900 at Colesberg and on 16 Mar 1901 at Dordrecht respectively, and therefore at least four years *after* the Reform Trial of 1896. The Court took into account the mitigating circumstances of each individual case before passing sentence. This is in contrast with the general sentences passed in the Reform Trial. The judgements of the special court was published in (1901) 18 *SALJ* 164-177. See, also, *R v Malan and Bruvyns* (1902) 19 SC 187 where De Villiers CJ expressed his concern at the overlap of the administration of martial law and colonial law, especially where an official could act in both capacities.

125 Anon (n 108) at 166.

126 *Idem* at 171.

127 *Idem* at 170. The reviewer here seems to have lost sight of the fact that the Cape trials were in accordance with statutory prescriptions (see n 124 *supra*). For example, in sentencing Pieter de Villiers, the Court held that it was bound by s 32 of The Indemnity and Special Tribunals Act 6 of 1900 (Cape) and expressed the sentiment that it was unfortunate that they could not sentence the accused to imprisonment but could only impose a fine ((1901) 18 *SALJ* (n 123) at 175-176). Section 32 provided: “No person who complied with the provisions of a certain proclamation relating the laying down of arms by certain residents in the districts of Aliwal North, Wodehouse, and Barkly East, issued by Brigadier-General Brabant, dated at Dordrecht the 22nd day of February, 1900, and who shall have surrendered thereunder shall, if prosecuted under this Act, be liable to the punishment of death or imprisonment.” Unfortunately, I was not able to uncover any further information on Brabant’s proclamation.

128 Gregorowski (n 105).

129 *Idem* at 313-314, 325. He had taken into account factors such as the pre-meditation of the accused, their purpose and intended consequences, as well as the real consequences of the invasion, including that many had lost their lives, property or fortunes as a result of the events.

130 *Idem* at 316.

131 *Idem* at 321-322, 325.

132 *Idem* at 313. Many of the accused were eminent and wealthy persons. Solomon (n 110) at 96 pointed out that the alternative punishment mentioned by Van der Linden, namely banishment for life, would have been a viable and sufficiently severe punishment, especially for those accused with business interests in the ZAR. He criticised Gregorowski for not imposing this alternative punishment instead.

6 Conclusion

Until the end of the nineteenth century, article 31 of the Thirty-Three Articles determined the law to be applied in the ZAR by creating a constitutionally entrenched hierarchy of sources of law. In order of importance, these sources of law were legislation, custom,¹³³ and the specified authors on Roman-Dutch law, namely, in order of importance, Van der Linden, Leeuwen and Grotius. However, the courts did not always treat article 31 as a rigid rule, but rather as a flexible guideline. For example, antiquated legislation that contradicted existing custom or did not promote the welfare of the state could be declared to have fallen into disuse.¹³⁴ Also, if the three prescribed Roman-Dutch authorities were found to be silent on a point or did not provide a clear answer to a question, the court not only had a discretion to depart from them, but was compelled to follow other Roman-Dutch (and other relevant) authorities on that point, provided that it was reasonable, not in conflict with local custom and that it promoted the welfare of the state.¹³⁵ The interpretation of article 31 depended to a great extent on the court's approach, and whether it followed a flexible or a rigid¹³⁶ interpretation.

Abstract

The Thirty-Three Articles was adopted by the Potchefstroom Burgerraad on 9 April 1844 and confirmed four years later on 23 May 1849 by the unified Volksraad of the Zuid-Afrikaansche Republiek at Derdepoort. The Thirty-Three Articles contained provisions pertaining to general and judicial administration and was held out as a kind of constitution in its day. It retained its status as a basic law despite the adoption of the constitutions of 1858, 1889 and 1896, and was only repealed in 1901 after the British annexation of the Republic. The Thirty-Three Articles had a lasting impact on the legal development of the Zuid-Afrikaansche Republiek. This contribution examines its nature and content, focusing in particular on article 31 which made provision for the law to be applied. Reference is made to three different approaches in the application of this provision by the courts.

133 Jossou (n 83) at 11 stated that custom had the same status as legislation and could replace conflicting legislation. For a custom to be legally acknowledged as such, it had to be supported by good reasons and had to be proven by witnesses or by an uninterrupted series of usages.

134 See, eg, the dissenting judgement of Morice J in *Van Diggelen v Wepener* (1894) 1 Off Rep 31.

135 *Rooth v The State* (1885-1888) 2 SAR TS 259.

136 *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216. In this judgment, the court chose to interpret both art 9 of the Thirty-Three Articles, as well as the prescribed authority, namely Van der Linden, in the strictest possible sense.

Tamás Nótári *Handling of Facts and Forensic Tactics in Cicero's Defence Speeches*

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In his monograph Tamás Nótári intends to get closer to understanding the mechanism of operation of forensic impact by analysing ten texts (*Pro Roscio Amerino*, *Pro Cluentio*, *Pro Murena*, *Pro Plancio*, *Pro Caelio*, *Pro Sestio*, *Pro Milone*, *Pro Marcello*, *Pro Ligario* and *Pro rege Deiotaro*) of Cicero's life-work more profoundly from a legal and rhetorical view. Since they are oral pleadings and statements of defence, the order of procedure of penal adjudication in Cicero's age is first discussed. Thereafter the ten speeches are grouped according to the facts of the case that provide grounds for the charge, and the chronological order.

The speeches given in defence of Sextus Roscius from Ameria in 81 and in defence of Aulus Cluentius Habitus in 66 were delivered in lawsuits brought by the charge of homicide (*parricidium* and *veneficium*). *Pro Sexto Roscio Amerino* was Cicero's first "criminal case", in which he tried to clear his defendant of the charge invented by his relatives and the dictator's confidant under the pretext of Sulla's massacres. Sextus Roscius junior was charged with patricide by his relatives asserting that he had his father murdered in June 81. With the assistance of Sulla's confidant, Chrysogonus, the relatives attained that the victim's name should be included in the register of persons inflicted by *proscriptio* so that his property could be sold by auction. The case covered a dangerous political swamp, and they thought that none of the illustrious advocates of the age would undertake the defence. Young Cicero resolved to represent the case that seemed to be hopeless – not so much for legal but for political reasons. First, the author describes the historical situation;

thereafter he outlines the statutory background of the crime that provides grounds for the charge; and finally he analyses the handling of the facts of the case applied in *Pro Roscio Amerino* and the rhetorical tactics.¹ The speech of defence delivered in the case of Aulus Cluentius Habitus dates from 66, that is, the year when Cicero was *praetor*. Cluentius was charged, on the one hand, with poisoning his stepfather, Statius Albius Oppianicus. The other hand the charge was founded on the criminal proceedings under which eight years previously Cluentius charged Oppianicus with attempting to poison him, as a result of which Oppianicus was compelled to go into exile. The *Lex Cornelia de sicariis et veneficiis* of 81 served as basis for judging crimes that provide grounds for the charge of poisoning. However, the prohibition of bribing judges applied only to the order of senators, and Cluentius belonged to the order of knights.

Nótári first outlines the historical facts of the case, and then turns his attention to the opportunity of applying the statutory facts of the case, namely the *lex Cornelia de sicariis et veneficiis*. Thereafter he analyses the handling of the charge of bribery arising in relation to the *iudicium Iunianum*, and the counts of the indictment on poisoning commented upon briefly by Cicero in terms of the rhetorical tactics and handling of the facts of the case followed in the speech. Finally, he examines the rhetorical tools of Cicero's strategy to explore how the orator handled, modified or distorted the system of the charges and chronology.²

Cicero delivered his speech in November 63 in defence of Lucius Licinius Murena, who was charged by his competitors with election fraud, *ambitus*. The condemnation of Murena would not only have ended his political career, but would also have placed the Republic in serious danger. In his statement of defence, it is not only the personal merits of the competitors, Licinius Murena and Sulpicius Rufus, that Cicero compares, but also their careers, the commander's, and the jurist's activities that he places on the scales of the public good. This results in a fairly humorous and witty assessment. The court acquitted Murena, who was consequently able to start serving as consul, thus replacing Cicero, the previous year's consul and his own counsel for defence. Nótári first analyses the historical background of *Pro Murena*, describing the political events surrounding the delivery of the speech in detail. After that he describes the order of the election of consuls in the last century of the Republic, and the state of facts of election bribery and the role of associations (*collegia*) in the election campaign.³ Finally he discusses the rhetorical tactics used

- 1 See, also, JD Cloud "The primary purpose of the *lex Cornelia de sicariis*" (1969) 86 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 258-268; W Stroh *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden* (Stuttgart, 1975).
- 2 See, also, CJ Classen "Die Anklage gegen A. Cluentius Habitus (66 v. Chr. Geb.);" (1972) 89 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* pp 1-17.
- 3 See, further, J Adamietz *M. T. Cicero, Pro Murena* (Darmstadt, 1989); A Bürge *Die Juristenkomik in Ciceros Rede Pro Murena* (Zürich, 1974); T Nótári *Law, Religion and Rhetoric in Cicero's Pro Murena* (Passau, 2008).

by Cicero in *Pro Murena*. The speech in defence of Cnaeus Plancius was delivered in early autumn 54. Plancius won the office of aedile for the year 54, and his competitor, who lost in the election, M Iuventius Laterensis, charged him with *ambitus*. As co-prosecutor L Cassius Longinus took sides with him and the defence was provided by Cicero who rose to speak as the last one. The court of justice was chaired by C Alfius Flavius. The close relation between Cicero and his defendant was highly influenced by the fact that Plancius, who acted as quaestor in Macedonia, gave shelter to the exiled politician, and according to the orator this was equal to saving his life. Cicero briefly responded to the allegations of general significance made by the prosecution. Thereafter he turned his attention from the accused and his acts to his own person, and the style of this speech is elevated to a hymn of gratitude addressed to his friend, Plancius. After the description of the historical background of the lawsuit, the author discusses *Pro Plancio* to investigate the rhetorical handling of the facts of the case. It is compared to *Pro Murena* that had been examined earlier. Although the case was not one of the events that caused huge political storms in Rome, Nótári considers it as an important speech because *Pro Plancio* is the second (and the last) speech delivered by Cicero concerning *ambitus*.⁴

The speech in defence of Marcus Caelius Rufus charged *de vi* was delivered on 4 April 56, on the first day of the *Ludi Megalenses*. According to Nótári *Pro Caelio* represented a very important stage in Cicero's fight with Clodius. In 56, as a result of peculiar coincidence of political and private relations, Cicero was given the opportunity to deal a heavy blow to Clodia, Clodius's elder sister in his *Pro Caelio*, whom he mocked in the trial with murderous humour – using the means of Roman comedy – by arranging a peculiar theatre performance during the *Megalensia*. After outlining the background of the *Bona Dea* case that planted the seeds of the conflict between Cicero and Clodius and the circumstances and historical background of the lawsuit, the author analyses the rhetoric situation provided by the *Ludi Megalenses*. It was brilliantly exploited by Cicero and the orator's tactics applied in the speech in defence of Caelius.⁵ Cicero delivered his speech in March 56 in defence of Publius Sestius who was charged on the grounds of *lex Plautia de vi* with acts of violence offending public order. Nótári considers the speech primarily as a skilfully executed statement of one of the important fundamental postulates of Cicero's philosophy of the state rather than a lawyer's or orator's achievement. His defendant was acquitted: owing not only to the brilliant handling of the facts of the case but most probably

4 See W Kroll "Ciceros Rede für Plancius" (1937) 86 *Rheinisches Museum* 127-139; J Adamietz "Ciceros Verfahren in den Ambitus-Prozessen gegen Murena und Plancius" (1986) 93 *Gymnasium* 102-117; T Nótári "Election bribery and forensic strategy in Cicero's *Planciana*" (2011) 17(1) *Fundamina* 96-111.

5 See, further, R Heinze "Ciceros Rede pro Caelio" (1925) 60 *Hermes* 193-258; CJ Classen "Ciceros Rede für Caelius" in *Aufstieg und Niedergang der römischen Welt* (Berlin-New York, 1973) vol 1(3) 60-94.

also to the political program presented in the speech. The author starts by outlining the historical-legal background of the speech, and then turns his attention to the contemplation of the philosophy of the state as articulated in *Pro Sestio* since Cicero determines the notion of *optimates* destined to govern the State by taking an individual approach. In this respect, Cicero defined the goal that guides decent citizens in public life: *cum dignitate otium*. Finally, Nótári examines briefly how – and possibly with which modifications – the thought of philosophy as formulated in *Pro Sestio* appear in a fully-developed form in Cicero’s *De re publica*.⁶ On 18 January 52, Milo and Clodius clashed in Bovillae, and some of Milo’s followers killed Clodius. Milo was defended by Cicero and the final hearing was held on 8 April. It was perhaps the worst performance in Cicero’s career: the *Clodiana multitudo* and Pompey’s soldiers made him irresolute and frightened and he could not deliver his prepared speech. Moreover, he was flustered and unable to collect his thoughts. His speech was taken down in shorthand as usual. The *Pro Milone*, as published later, is not identical with the *oratio* made on 8 April 52. Nótári outlines the historical situation that provides the background of the lawsuit. Then, after clarifying the events around the murder of Clodius, he attempts to reconstruct the course of the lawsuit. He starts off by outlining the structure and legal background of the argument. After that, the author makes an attempt at outlining the reasons, in more details, for publishing the revised version of *Pro Milone*, a speech delivered in a lost case. Finally, Nótári sums up the elements of philosophy of the state that appear in *Pro Milone* since this speech is the first Ciceronian work in which the motif of killing the tyrant appears as a Roman citizen’s right.⁷

The speech in defence of Marcus Claudius Marcellus was delivered in September 46 at a session of the senate. *Pro Marcello* may be regarded as a political speech for it is a vote of thanks addressed to Caesar for granting pardon to M Claudius Marcellus. Thus, *Pro Marcello* (the first item of the so-called *orationes Caesarianae*) seems to have been created as a statement of the defence. The author starts off by giving a brief account of the changes in the relationship between Cicero and Caesar; he thereupon outlines the historical background of the speech, determining its place in Cicero’s philosophy of the state. After that, Nótári analyses the orator’s tactics as applied in *Pro Marcello*, and examines the role of the political virtue *sapientia* attributed to the dictator in the oration. Finally, he compares the image of Caesar outlined in the speech with the reality of politics of the period, the image of Caesar entertained by contemporaries.⁸

6 See F Materiale “L’ideale politico di Cicerone nella pro Sestio” in F Salerno (ed) *Cicerone e la politica* (Napoli, 2004) 145-153; M Fuhrmann “Cum dignitate otium – Politisches Programm und Staatstheorie bei Cicero” (1960) 67 *Gymnasium* 481-500.

7 See, also, AW Lintott “Cicero and Milo” (1974) 64 *J of Roman Studies* 62-78; J Ruebel “The trial of Milo in 52 BC” (1979) 109 *Transactions of the American Philological Association* 231-249.

8 See RR Dyer “Rhetoric and intention in Cicero’s Pro Marcello” (1990) 80 *J of Roman Studies* 17-30; T Nótári “Staatsdenken und Rhetorik in Ciceros Marcelliana” (2010) 16(2) *Fundamina* 64-84.

Pro Ligario, delivered in 46, may be considered a classical example of *deprecatio* in ancient literature. It is Cicero's first oration made on the Forum, that is, in front of the general public, and by praising Caesar's *clementia* he appeared to legitimise dictatorship. First, the author describes the historical background of the *oratio* and the process of the proceedings; then he examines the issue whether the proceedings against Ligarius may be considered as a real criminal trial. After analysing the genre of the speech, *deprecatio*, Nótári reviews the appearance of Caesar's *clementia* in *Pro Ligario*.⁹ Finally, he turns his attention to Cicero's irony and highlights some elements of the relation between Caesar and Cicero by showing how the orator voices his conviction that he considers the dictator's power and *clementia* illegitimate. In November 45, Cicero delivered his statement of the defence before Julius Caesar in favour of King Deiotarus. The King's grandson, Castor, and the one-time royal physician, Phidippus, acted as prosecutors of King Deiotarus. They charged him with a capital offence, namely an assassination attempt against Caesar (dated 47) and a conspiracy. First, Nótári reviews the charge against King Deiotarus to find out whether the proceedings conducted against the King may be considered a criminal action at all. Thereafter he analyses *Pro rege Deiotaro* as a rhetoric work with respect to the political program that appears in it.¹⁰

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- 9 See K Bringmann "Der Diktator Caesar als Richter? Zu Ciceros Reden Pro Ligario und Pro rege Deiotaro" (1986) 114 *Hermes* 72-88; T Nótári "Staatsdenken und forensische Taktik in Ciceros *Ligariana*" (2013) 19(1) *Fundamina* 12-27.
- 10 See, further, RA Baumann *The Crimen Maiestatis in the Roman Republic and Augustan Principate* (Johannesburg, 1967); H Botermann "Die Generalabrechnung mit dem Tyrannen. Ciceros Rede für den König Deiotarus" (1992) 99 *Gymnasium* 320-344.

Wilhelm Brauner *Europäische Privatrechtsgeschichte*

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UTB-Band-Nr 3487 / ISBN 978-3-8385-3487-9, Euro 24,99)

Although this is, to the best of my knowledge, the latest addition to studies on the history of European private law, it does not presume to supplant any of the previous works, such as the monumental historical gems of Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (1967) and Paul Koschaker, *Europa und das Römische Recht* (1966). It does, however, give a useful overview (the author refers to it as a *Grundriss* or outline) of the history of European law in historical context.

After an introduction distinguishing private and public law, and defining European legal history in the context of domestic law (*heimisches Recht*), German law, Roman and common law (*gemeines Recht*), canon law and natural law, the author presents his subject in fifteen chapters, commencing in the Middle Ages and continuing to modern times. He rounds it off with a section on sources, a bibliography, a list of abbreviations, a list of illustrations and a succinct index of topics and persons.

Chapter 1 deals with development during the Middle Ages. It commences with domestic law as developed in various communities, with the focus on customary law (*Gewohnheitsrecht*) in such forms as provincial, municipal and rural law (*Landrecht*, *Stadtrecht* and *Hofrecht*). This introduces a comparative slant in its reference to the various European legal spheres, including the French, Hispanic (Iberian), Italian, Scandinavian, German (*Deutsche Recht*) and the common law of England. It is, of course, the various aspects of German law on which the focus is primarily placed, more particularly topics such as property, family, persons and succession, all of which have their origin in Roman and Byzantine law and were further developed

during the medieval rebirth in the time of the Glossators, Commentators, Humanists, Canonists and the school of Natural Law.

Chapter 2 deals with the English common law in historical perspective. Aspects of law such as the various forms of trust are given particular emphasis because of their uniqueness. The German *Treuhand* has been likened to it. Reference is also made to the fact that Scots law underwent a separate development and, perhaps more importantly, that the common law was transferred to the various parts of the British Empire, such as South Africa, where it linked up with Roman-Dutch law to become a substantive portion of the “mixed” legal system of which South African lawyers are justifiably proud. This was followed by further extension of this mix between common law and “civil law” to other parts of Africa and also to places like Srilanka (Ceylon), Louisiana in the United States of America and Quebec in Canada.

In chapter 3 the author turns to the phase of development to which he refers as *die frühe Neuzeit* in the sense of the “early modern period” commencing with the humanitarian or “elegant” jurisprudence (*humanistische* or *elegante Jurisprudenz*) of the sixteenth century. Central to this development was the Roman *Corpus Iuris Civilis* (the Code of the Emperor Justinian) which gave rise to what became known as the “Italian custom” (*mos italicus*) and the “French custom” (*mos gallicus*) of Europe. This overview is followed by a discussion of what the author terms “the so-called reception” of Roman law into Europe, more specifically Germany, where it is called “*Römisch-Deutsche Recht*” or *Ius Romano-Germanicum*. This reflected a nationalisation of the common law and a legal dualism between what Johann Gottlieb Heineccius (1681-1741) referred to as “the elements of the civil (Roman) law” (*Elementa Iuris Civilis*) and “the elements of the German law” (*Elementa Iuris Germanici*). The chapter is concluded with a brief discussion of marriage law in canonical private law, with specific reference to Catholic and Evangelical differentiation.

The Roman-Germanic law (*Ius Romano-Germanicum*), as the basis of “a new legal culture” (*eine neue Rechtskultur*) and a peculiarly German common law (*deutsches Gemeinrecht*), is dealt with in somewhat more detail in chapter 4. A basic principle or rule applicable in this regard is that this common law was, in general, subsidiary to local or domestic law, but this could differ from one region to another. This subsidiary application came to be known as “the modern use of the Pandects” (*usus modernus pandectarum*),” being the name of a well-known work by Samuel Stryk (1640-1710). The author points out that this German common law developed over approximately two centuries until it was supplanted by the natural law codifications such as the *Allgemeines Landrecht* (ALR) of Prussia (1794) and the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) of Austria (1811). In countries without codifications it continued into the eighteenth century as Germanic or Pandectist legal science (*Germanistik* and *Pandektistik*) in the works of a number of

accomplished jurists and in various legislative enactments. It was likewise prevalent in legal practice in a variety of forms.

Chapter 5 deals briefly with the origin and development of Scandinavian (Nordic) law in Denmark, Norway, Sweden, Iceland and Finland inasmuch as it accords to a certain extent with that of Germany, particularly with regard to a wide range of legislation. Canon law likewise played a role in this regard, more particularly in the law of marriage and succession. Roman law, however, was not as influential as in Germany except, perhaps, after 1650 when universities in Denmark and Sweden began placing greater emphasis on the importance of Romano-Germanic and Roman-Dutch law in the seventeenth and eighteenth centuries.

Natural law as such is dealt with in chapter 6. The author speaks in this regard of the doctrine of the law of reason (*Vernunftrecht*), in the sense of law or legal principles emanating from human nature, as opposed to positive law (*positives Recht*). In historical context natural law could be traced back to the Greek philosophical schools of Plato and Aristotle, from whom it progressed via Cicero and the Stoa to St Augustine, Thomas Aquinas and the late-Scholasticism of the sixteenth and seventeenth centuries. From there it moved to individual exponents of natural law such as the Dutch jurist Hugo Grotius (1583-1645), with his famous *De iure belli ac pacis*, and German jurists like Samuel Pufendorf (1632-1694), Gottfried Wilhelm Leibniz (1646-1716) and Christian Thomasius (1655-1728). They played an important role in developing aspects of private law during the period prior to natural law codifications.

The prominence of natural law codifications in European legal development prompted the author to deal specifically with such codifications in chapter 7. The idea was to reduce the mass of sources into a code containing the relevant principles in an easily accessible unit. Predecessors of the famous natural law codifications were the 1750 Prussian code of King Friedrichs II (*Corpus Iuris Fridericiani*) and the 1756 Bavarian civil law code of Maximilian III (*Codex Maximilianeus Bavaricus Civilis*). The Prussian *Allgemeines Landrecht für die Preussischen Staaten* (ALR) of 1794, which contained both private and public law in some 20,000 paragraphs, was the first natural law codification of substance. These early codes were, as might be expected, largely supplanted by the German civil code (*Bürgerliches Gesetzbuch* or BGB) when it came into operation on 1 January 1900.

Prior to that, however, the French civil code (*Code Civil*) of 1804, a product of the French Revolution and Napoleon Bonaparte's initiatives (hence also known as the *Code Napoléon*), became widely influential throughout Europe. In its 2,300 paragraphs it dealt with many aspects of private law and effectively put an end to the distinction between French customary law (*droit coutumière*) and written law (*droit écrit*). It was in fact translated into German for use in German states as *Napoleons Gesetzbuch* until the BGB replaced it in 1900. It was similarly applicable in the

Netherlands until 1838 when the *Burgerlijk Wetboek* was promulgated and in Italy until 1865 when the *Codice Civile* came into operation.

The natural law codification process in Austria was pre-empted by a code of Emperor Leopold I of 1671 (*Codex Leopoldinus*) and the civil code of the Habsburg Monarchy of 1704 (*Codex Austriacus*), prior to the French *Code Civil* being received in Austria and remaining operational until the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) became law in 1811. In view of the author's close link with the University of Vienna, one can understand his going into the historical background of the ABGB more deeply than he does the other codifications. He also addresses, in some depth, the meaning and effect of the ABGB on Austrian legal development in general and its influence on other legal systems, including those of Poland, Hungary and Upper Italy (*Oberitalien*). He observes that it has been strongly influenced by German law and throughout by natural law and canon law principles, but it demonstrates minimal influence by the ALR and the French *Code Civil*. In natural law sense its principles could be applied consistently and everywhere. That is why it was applied over a wide area outside Austria.

Further to the discussion of natural law and codifications, chapter 8 deals with the European private law families around 1800. In this regard the focus is on the families constituting English common law, Scandinavian law and continental European law with particular reference to the role of universities, jurists, the courts and the legislature in applying and developing the law and in establishing the special links between these families of law.

Chapter 9 deals with schools of legal science within the bounds of codifications. At the outset the exegetic school of the ABGB is discussed as the first post-codification school of law in Europe. The focus is primarily on the methods employed by prominent representatives of the school in its exegesis of the Romano-Germanic roots of the ABGB. A number of dogmatic examples are presented to illustrate this method from a German-Austrian private law perspective and in its Austro-Italian jurisprudential context. This is followed by a succinct discussion of the methods of the exegetic school (*École de l'exégèse*) of the *Code Civil*, which relates to French law as opposed to the methods of the ABGB exegetic school, which is focussed on Austria. These schools continued their activities until well into the eighteenth century, the French enduring some fifty years longer than the Austrian.

The Historical School (*die Historische Rechtsschule*), in the sense of a national-historical-systematic (*nationalhistorisch-systematische*) law school, is discussed in chapter 10. It takes its historical matter from the legal development of a particular nation with a view to creating a systematic unity from the norms and principles of the existing legal order. This differs from ideas on enlightenment and rationality or reasonableness as set forth in logically constructed natural law and, to a certain extent also, from thought on codification.

Among the important exponents of the Historical School were Gustav Hugo (1764-1844) and Karl Friedrich Eichhorn (1781-1854), but it was particularly Friedrich Carl von Savigny (1779-1860) with his *History of Roman Law in the Middle Ages* (*Geschichte des Römischen Rechts im Mittelalter*, 1834-1851), *System of Current Roman Law* (*System des heutigen Römischen Rechts*, 1840-1849) and *Calling of our Time for Legislation and Legal Science* (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1840), who demonstrated his hostility to codifications such as the ALR, ABGB and *Code Civil*. This gave rise to what became known as the “historical-systematic method” (*die historisch-systematische Methode*) in the sense that legal science was historical science in that it relied on legal principles extracted from historical sources for use in creating a unified system of current law. Inasmuch as the systematising of the law was based on logical grounds it was not, however, strictly historical. Although the divisions of the law were generally based on those occurring in the Pandects (*Digesta*) of Justinian, the term “Pandectism” (*Pandektistik*) came to be regarded as a form of “terminological jurisprudence” (*Begriffsjurisprudenz*). The author refers to this as “scientific positivism” (*wissenschaftlicher Positivismus*) and suggests that the dogmatism (*Dogmatik*) arising from the Pandects is in fact linked to natural law thought. This prompted a jurist like Bernhard Windscheid (1817-1892) to name his work on the Pandects a *Text-Book on Pandect Law* (*Lehrbuch des Pandektenrechts*).

A German branch of the Historical School related to German rather than Roman law and was termed “German philology” (*Germanistik*). Although its terminology was essentially that of the *Pandektistik*, it was not similarly hostile to codification, as appears from the work of Anton Friedrich Justus Thibaut (1772-1840) “on the necessity of a general civil code for Germany” (*Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814)). This gave rise to a codification conflict (*Kodifikationsstreit*) which resulted in success for the anti-codification group.

The topic was extended to a differentiation between regions without modern codifications and codification areas such as Austria. This gave rise to Pandectist innovations of the ABGB and East-European renditions thereof. From there it spread to other parts of Europe and overseas countries such as the Far East and a number of South American countries. A variety of important contributions emanated from the areas of *Pandektistik* and *Germanistik*, with canon law having no small influence and dogmatic changes also becoming prevalent.

A logical extension of this topic appears in chapter 11 where Pandectist codifications are discussed. This went hand in hand with historical and political events. In Germany it commenced with a general statute on bills of exchange (*Allgemeine Deutsche Wechselordnung*) in 1848 and a general commercial code (*Allgemeine Deutsche Handelsgesetzbuch*) in 1861. A number of smaller private law codifications preceded the German *Bürgerliches Gesetzbuch* (BGB), which is

regarded as the most significant of the Pandectist codifications. It was approved and published in 1896 but only came into operation on 1 January 1900. In accordance with the Pandectist system it was divided into a general section, followed by sections on obligations, things, family and succession. It enjoyed a wide sphere of influence, including Switzerland, Austria, Greece, Japan, China, Brazil and Peru and, more recently, during the twentieth century, the former East-Block countries.

This chapter continues with a discussion of the Pandectist codifications of Switzerland with its canton system. The codification movement commenced with the promulgation of Cantonese codes of private law in Bern, Luzern, Genf, Tessin and Zurich, which were followed by the influential Code of Obligations (*Obligationenrecht*) of 1883 before culminating in the Swiss civil code (*Schweizerisches Zivilgesetzbuch*) of 1912. These two codes, which are read and applied together, were particularly influential in countries like Turkey, Liechtenstein and Italy, but also played a role in the development of law in Yugoslavia and other South-East European countries, while exerting some influence in Peru and China.

It is interesting to note that in Austria there was discussion as early as 1850 of a Pandectist civil code to take the place of the ABGB of 1811. Initially it was directed at the adaptation of aspects of private law such as marriage law for Catholics and the supplementing or amendment (“novation”) (*Novellierung*) of parts of the ABGB. This gave rise to the three partial “novations” (*Teilnovellen*) relating to the law of persons and succession (1914), the drawing of boundaries (1915) and the law of things and obligations (1916). It also resulted in dogmatic innovations such as the abolition of the Roman legal rule that improvements fall to the land on which they are built (*superficies solo cedit*).

Chapter 12 contains a discussion of reactions, during the latter part of the nineteenth century, to Pandectism (*Pandektistik*) and German philology (*Germanistik*) as “terminological jurisprudence” (*Begriffsjurisprudenz*). The essence of the criticism was that it was not sufficient to collect law into a series of terms or concepts, to distinguish legal principles logically and to apply such principles mechanically. It was not merely a matter of terminology, but of interests, evaluation and the application of living law. This appears from works of jurists like Rudolf von Jhering (1818-1892), who was originally an exponent of *Begriffsjurisprudenz* but turned to the jurisprudence of interests (*Interessen-jurisprudenz*) with his “struggle for law” (*Kampf ums Recht*) of 1872 and “purpose in law” (*Zweck im Recht*) of 1877. Studies like this related to sociological considerations and the intention and object of the legislator in achieving a balance or equalisation of interests (*Interessenausgleich*).

Alongside this developed a jurisprudence of evaluation (*Wertungsjurisprudenz*) regarding an appreciation of the values emanating from various interests. In doing so use was made of a “natural-historical method” (*naturhistorische Methode*) based on life experience, and hence referred to as a jurisprudence of “experiential science” (*Erfahrungswissenschaft*). This gave rise to the so-called “free” or “independent”

law schools of jurists like Hermann Kantorowicz (1877-1940) who focussed on general clauses such as good faith (*Treu und Glauben*), good morals (*gute Sitten*) and equitable considerations (*billiges Ermessen*) in legal practice. Their attention was also directed to the correction or modification of statutes, particularly after the World Wars when the law relating to labour and social matters (*Arbeits- und Sozialrecht*) required special consideration next to issues of private law.

Chapter 13 deals with the private law of totalitarian states with their particular ideologies, characterised by a restriction of private autonomy and a selective distribution of property to individuals. A good example is the socialist legal family (*sozialistischer Rechtskreis*) which, since the dissolution of the East-Block and other fascistic or authoritarian states, has become limited to countries like China, North Korea, Vietnam and Cuba. In this regard the author deals with the theoretical and practical aspects of National-Socialism (*Nationalsozialismus*) and private law and gives some dogmatic examples by way of illustration. He deals in similar vein with the (now former) *Deutsche Demokratische Republik* (DDR or East Germany) as a member of the socialist legal family.

The topics of “de-codification” and “re-codification” are dealt with in chapter 14. The majority of former East-European countries and members of the erstwhile Soviet Union moved away from the codification idea, and hence “de-codified”, but a country like the Netherlands produced a new code of civil law (*Nieuw Burgerlijk Wetboek*) in the period between 1970 and 1992. This was then a “re-codification” on a grand scale, as opposed to a partial codification movement in a number of former East-Block countries. In this regard the author discusses spheres of law reform and gives a number of dogmatic examples by way of illustration.

The concluding chapter 15 contains a brief presentation of private law families in the period around 2000, bearing in mind that the BGB celebrated its 100th year of existence in 2000 and the *Code Civil* and ABGB their 200th in 2004 and 2011 respectively. The author initially addresses the law of Continental Europe and follows this up with an overview of the Scandinavian and Socialist legal families before turning finally to the Common Law. He points out that the Scandinavian countries have retained their unique nature, characterised by the fact that they have no codifications comparable with those of Europe, while there are no longer any European countries in the Socialist legal family. The Common Law of England, he observes, is characterised by its system of binding precedents (*stare decisis*), while the United States of America has gained recognition for its Uniform Commercial Code of 1956 and its acceptance of the Common Law marriage based on the principle of agreement (*consensus facit nuptias*). In all these legal systems and families of law, however, the historical foundations of European law continue to play a significant role.

This overview of European legal history constitutes a valuable contribution to legal history in general and to comparative law in a wide-ranging historical context

BOOK REVIEW

in particular. It is clearly of great use to law students in Austria, where the author is a professor of legal history at the University of Vienna, and to other countries in Europe, including Hungary, where the author is an honorary professor of legal history at the Budapest University. Indeed his work has been translated into Hungarian, hence making it easily accessible to his Hungarian students. It goes without saying that I strongly recommend it to any legal historian engaged in legal historical research or simply having an interest in the legal sphere covered by the work.

The Honourable Mr Justice DH van Zyl
Cape Town

In memoriam János Zlinszky

(1928-2015)

Am 18 Juni 2015 ist der Doyen der ungarischen Romanistik, János Zlinszky, emeritierter Professor und Gründungsdekan der Staats- und Rechtswissenschaftlichen Fakultät der Pázmány Péter Katholischen Universität, ehemaliger Verfassungsrichter der Republik Ungarn, korrespondierendes Mitglied der Österreichischen Akademie der Wissenschaften in seinem 88. Lebensjahr verstorben.

János Zlinszky ist am 7 März 1928 in Budapest geboren. Nach seinem Abitur am Ordensgymnasium der Piaristen im Jahre 1946 begann er sein Jurastudium in 1947 an der Pázmány Péter Universität (seit 1950 – aufgrund der Namensänderung – Eötvös Loránd Universität) in Budapest. Seine Berufswahl stand im Einklang mit der Familientradition: sein Vater, seine beiden Großväter und drei seiner Urgroßväter waren ebenfalls Juristen. Sein Interesse für das römische Recht wurde von seinem Professor Géza Marton bereits sehr früh geweckt, ab 1948 war er als studentische Hilfskraft am Lehrstuhl und in der Bibliothek für römisches Recht tätig.

Im März 1951, das heißt wenige Monate vor Beendigung seines Studiums wurde er aufgrund eines – im Rahmen eines schauprozessähnlichen Verfahrens erlassenen – Beschlusses von sämtlichen ungarischen Universitäten verwiesen und im Juni desselben Jahres zusammen mit seiner Familie nach Zsáka, ein kleines Dorf in Ostungarn deportiert. Von hier wurde er für ein Jahr zum Arbeitsdienst einberufen. Nach der Absolvierung einer Facharbeiterprüfung als Zimmermann war er gezwungen sich mehrere Jahre als Bauarbeiter zu betätigen. Nach Budapest durfte er erst im Jahre 1956 nach seiner Eheschließung mit der Kunsthistorikerin Mária von Sternegg-Günther zurückkehren.

Im Jahre 1957 wurde es ihm gestattet seine Studien fortzusetzen und seine Staatsexamen zu absolvieren. Nachdem er im März desselben Jahres sein Diplom erhielt, war er bis 1968 als Jurist bei diversen staatlichen Unternehmen tätig. Von 1968 bis 1983 konnte er zwar als Rechtsanwalt praktizieren, allerdings nur in Dunaújváros, das heißt außerhalb seines Wohn- und Geburtsortes Budapest.

Erst in seinem 55 Lebensjahr wurde es ihm gestattet Lehrtätigkeit auszuüben: Ab 1983 konnte er an der Universität in Miskolc Vorlesungen und Seminare aus römischem Recht halten. Im Jahre 1984 erwarb er – nach mehreren Ablehnungen seiner Bewerbung aus politischen Gründen – den akademischen Grad *CSc* [*Candidatus Scientiarum*], und war ab 1985 als Universitätsdozent und Lehrstuhlinhaber in Miskolc tätig.

Die politische Wende brachte auch im Hinblick auf seine berufliche Laufbahn gewaltige Änderungen mit sich. In 1990 erwarb er den höchsten wissenschaftlichen Grad der Ungarischen Akademie der Wissenschaften (*DSc* [*Doktor Scientiarum*]), und wurde noch im selben Jahr zum Professor des römischen Rechts und zum Leiter der Doktorenschule in Miskolc ernannt. Dank seiner organisatorischen Arbeit konnte im Jahre 1991 der Kongress der SIHDA in Miskolc stattfinden.

Im Herbst 1989 wurde er vom ungarischen Parlament zu Verfassungsrichter gewählt und versah diesen Posten bis zu März 1998, der Vollendung seines 70 Lebensjahres. Im Jahre 1993 wurde er zum korrespondierenden Mitglied der Österreichischen Akademie der Wissenschaften gewählt. Zwischen 1992 und 1998 versah er den Posten des ungarischen Delegierten in der Venedig-Kommission des Europarates.

Vom Sommer des Jahres 1994 stand er der Organisationskomitee der Staats- und Rechtswissenschaftlichen Fakultät der Pázmány Péter Katholischen Universität vor. Neben seiner Professur und der Leitung des Instituts für Rechtsgeschichte versah er von 1995 bis 2000 auch den Posten des Dekans an der – zum Großteil dank seinen Bemühungen gegründeten – Fakultät. Im Jahre 2002 wurde er emeritiert.

Seine ersten Schritte auf dem Gebiet der Rechtswissenschaft machte er als Student unter der Leitung seines Meisters Géza Marton. Sein Interesse galt unter anderen dem Zwölftafelgesetz, dessen zweisprachige und mit Kommentar versehene Ausgabe er mehrere Jahre später veröffentlichte.¹ Vier Jahrzehnte nach seinen Vorarbeiten zu diesem Thema widmete er auch seine – später als Monografie veröffentlichte – Dissertation zur Erlangung des akademischen Grades *Doctor Scientiarum* dem Rechtssystem Roms in der archaischen Zeit.² Mehrere Fragen des Staatswesens und der Rechtsentwicklung der archaischen³ und vorklassischen⁴ Periode behandelte er in eigenständigen Aufsätzen.

1 *A tizenkétábrás törvény töredékei* [Die Fragmente des Zwölftafelgesetzes] Budapest, 1991.

2 *Állam és jog az ősi Rómában* [Staat und Recht im archaischen Rom] Budapest, 1996.

3 *Staat und Recht im archaischen Rom* Helikon Universitas 28. 1988. 169-182; „Familia pecuniaque“ 1988 (16) *Index* 32-42; „Gedanken zur legis actio sacramento in rem“ (1989) 106 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 106-151; „Punitions à Rome avant les XII Tables“ *Publications Universitatis Miskolciensis Series Juridica et Politica* 5 (1990, 97-115); „Consort et domina – filiae loco: la famille romaine archaïque“ in R Ganghofer (Ed) *Le droit de la famille en Europe. Son évolution depuis l'Antiquité jusqu'à nos jours* (Strasbourg, 1992) 233-240.

4 „Die Anfänge des praetorischen Rechts“ (2005) 45 *Acta Antiqua Academiae Scientiarum Hungaricae* 35-44; „Die frühe Schicht des Edictum praetoris“ in G Hamza, I Kajtár, K Pókecz,

In jenen Jahren, in denen er sich als Bauarbeiter zu betätigen gezwungen war, widmete er seine übriggebliebene Zeit der Forschung: Im Jahre 1954 wurde er auf Empfehlung des Althistorikers Endre Ferenczy von der Kommission für lateinische Literatur der Ungarischen Akademie der Wissenschaften mit der Vorbereitung einer kommentierten Ausgabe der *Historien (Commentarii de rebus Ungaricis)* des ungarischen Humanisten Johannes Decius Barovius (János Baranyai Decsi) betraut. Zu diesem Thema kehrte er auch in seinen späteren Arbeiten zurück.⁵

In seinem ersten längeren fremdsprachigen Aufsatz, der ihm ein positives Echo einbrachte, behandelte er die Frage der Verschollenheit im römischen Recht.⁶ Als Betreuer der Werke von Géza Marton veröffentlichte er dessen Monografie über die zivilrechtliche Haftung⁷ – ein Fragekreis mit dem er sich auch in seinen eigenen Arbeiten auseinandersetzte.⁸ Jene seiner Werke, in denen er die Frage des Fortlebens des römischen Rechts, bzw die Wege und Versuche der Rezeption des römischen Rechts in Ungarn behandelte, sind sowohl für die Romanistik, als auch für die ungarische Rechtsgeschichte von größter Bedeutung.⁹

Seine Kurzmonografien, in denen er das *ius publicum*,¹⁰ das *ius privatum*¹¹ und das römische Strafrecht¹² aufgearbeitet hat, eignen sich einerseits hervorragend als

A Kovács & J Zlinszky (Hrsg.) *Iura antiqua – iura moderna. Festschrift für Ferenc Benedek zum 75. Geburtstag* (Pécs, 2001) 277-283.

- 5 „Legal Studies and Works of János Baranyai Decsi“ *Acta Ethnographica Hungarica* (2000) 327-336; „Legal Studies and Works of János Baranyai Decsi“ in G Barna, Á Stemler & V Voigt (Hrsg): *Igniculi Sapientiae. Symposium und Ausstellung zum 400. Jahrestag des Erscheinens der Adagia von János Baranyai Decsi in der Széchényi Nationalbibliothek*, 1998 (Budapest, 2004) 104-118.
- 6 „Zur Frage der Verschollenheit im römischen Recht“ *Acta Antiqua Academiae Scientiarum Hungaricae* 8. (1960) 95-132.
- 7 G Marton *A polgári jogi felelősség [Die zivilrechtliche Haftung]* (Budapest, 1992).
- 8 „Nichtvermögensschaden im ungarischen Recht“ in *Bericht über den fünfzehnten österreichischen Historikertag in Salzburg* (Wien, 1984) 1230-1241; „Haftung für immateriellen Nichtvermögensschaden im ungarischen Recht“ (1983) 25 *Acta Juridica Hungarica* 207-221.
- 9 „Die Krone als Symbol der Freiheit – Die Freiheit als Sinn des Rechts“ in H Szilágyi I.–Paksy, M. (edd.): *Ius unum, lex multiplex. Liber Amicorum – Studia Z. Péteri dedicata* (Budapest, 2005) 437-453; *Römisches Recht in Ungarn* in MJ Rainer, MJ Schermaier & LC Winkel (Hrsg.) *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag* (Köln–Weimar–Wien, 2002) 945-963; „L'expropriation dans le droit médiéval de la Hongrie in „L'expropriation, II. Moyen Âge et temps modernes (Paris, 2000) 297-301; *Wissenschaft und Gerichtsbarkeit. Quellen und Literatur der Privatrechtsgeschichte Ungarns im 19. Jahrhundert* (Studien zur europäischen Rechtsgeschichte, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte; 91) (Frankfurt am Main, 1997); „Two questions about the Adaptation of Juridical Models: The XII Tables and Hungarian Reception“ (1991) 33 *Acta Juridica Hungarica* 39-56; „Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert“ in Ö Both (ed) *Studia in honorem Velimirii Pólay Septuagenarii* (Szeged, 1985) 1-31; „Ein Versuch zur Rezeption des römischen Rechts in Ungarn“ in F Horak & W Waldstein (Hrsg) *Festgabe für Arnold Herdlitzka zu seinem 75. Geburtstag* (München, 1972) 315-326.
- 10 *Ius publicum* (Budapest, 1996).
- 11 *Ius privatum* (Budapest, 1998).
- 12 *Római büntetőjog [Römisches Strafrecht]* (Miskolc, 1992).

propädeutische Lehrbücher, andererseits sind sie so verfasst worden, dass sie auch für einen breiteren Leserkreis ansprechen können. In mehreren Aufsätzen akzentuierte er die Wichtigkeit des Unterrichts des römischen *ius publicum* als Propädeutikum für das öffentliche Recht.¹³ Er widmete zahlreiche Monografien, Aufsätze und Essays dem Fragekreis der juristischen Ethik,¹⁴ bzw arbeitete mehrere Themen zu Aufsätzen und Vorträgen aus, die ihn als Verfassungsrichter anhand der von ihm behandelten Fälle beschäftigten.¹⁵

Sowohl zu seinem 70,¹⁶ als auch zu seinem 80 Geburtstag wurde er von seinen Kollegen mit je einer Festschrift beehrt.¹⁷ Ebenfalls zu seinem 80 wurde der Band *Durch das römische Recht, aber über dasselbe hinaus*¹⁸ veröffentlicht, der eine repräsentative Auswahl seiner römischrechtlichen,¹⁹ rechtshistorischen²⁰ und verfassungsrechtlichen²¹ Aufsätze beinhaltet.

- 13 „Rechtsstaat Rom“ in MJ Schermaier & Z Végh (Hrsg) *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag* (Stuttgart, 1993) 471-480; „Unterricht des *ius publicum* als Propedeuticum zum öffentlichen Recht“ in L Breneselović & B Bogišić (Hrsg) *Spomenica Valtazara Bogišića o stogodišnjici njegove smrti* 24. apr. 2008. godine. (Beograd, 2011) 157-164; „Römisches Recht. Beispielsammlung für Rechtsphilosophie und Staatskunde“ in Cserne, P.–H. Szilágyi, I.–Könczöl M.–Paksy M.–Takács P.–Tattay Sz. (edd) *Theatrum legale mundi. Symbola Cs. Varga oblata* (Budapest, 2007) 599-608.
- 14 *Keresztény erkölcs és jogászai etika [Christliche Moral und juristische Ethik]*. Budapest, 2000; *Közéleti és jogászai etika gyakorlatban [Ethik des öffentlichen Lebens und juristische Ethik in der Praxis]*. Budapest, 2007.
- 15 *Eigentumsschutz versus Marktschutz*. In: Grupp, K.–Hufeld, U. (Hrsg.): *Recht – Kultur – Finanzen. Festschrift für Reinhard Mußgnug zum 70. Geburtstag*. Heidelberg, 2005. 59–70; *Zur Entwicklung der Verfassungsgerichtsbarkeit in Ungarn*. Jahrbuch für Ostrecht 43. 2002. 137–144; *Legalität und Eigentum. Probleme des werdenden Rechtsstaates*. JURA, Zeitschrift für europäisches Privatrecht 1995. 524–533; *Theorie und Institutionen der Gewaltenteilung*. In: Máthé, G. (Hrsg.): *Theorie und Institutionssystem der Gewaltentrennung in Europa*. Budapest, 1993. 37–50.
- 16 Bánrévy, G.–Jobbágyi, G.–Varga Cs. (Hrsg.): *Iustum, aequum, salutare. Emlékkönyv Zlinszky János tiszteletére [Festschrift zu Ehren von János Zlinszky]*. Budapest, 1998.
- 17 Horváth, A.–Koltay, A.–Máthé, G. (Hrsg.): *Sapientia iniuria fieri non potest. Ünnepi tanulmányok Zlinszky János tiszteletére [Festschrift zu Ehren von János Zlinszky]*. Budapest, 2009.
- 18 El Beheiri, N. (Hrsg.): *Durch das römische Recht, aber über dasselbe hinaus*. Budapest, 2008.
- 19 1) *Ein Kapitel der Wirkungsgeschichte europäischer Rechtskultur; Rechtswissenschaft und Rechtsunterricht in Ungarn*; 2) *Zur Frage der Verschollenheit im römischen Recht*; 3) *Rechtsstaat Rom*; 4) *Schriftlichkeit und Mündlichkeit im römischen Recht*; 5) *Familia pecuniaque*; 6) *Gedanken zur legis actio sacramento in rem*; 7) *Arbeit im archaischen Rom*; 8) *Die Anfänge des praetorischen Rechtes*; 9) *Die frühe Schicht des Edictum praetoris urbani*; 10) *Kontrakte des ius publicum*; 11) *Der Prozess Jesu aus dem Gesichtspunkt des antiken Prozessrechts*; 12) *Römisches Recht in Ungarn*.
- 20 13) *Die Stellung Ungarns zum römisch-deutschen Reich*; 14) *Ein Versuch zur Rezeption des römischen Rechts in Ungarn*; 15) *Die Rolle der Gerichtsbarkeit in der Gestaltung des ungarischen Privatrechts vom 16. bis zum 20. Jahrhundert*; 16) *Richterliche Rechtsentwicklung als lebendige Tradition im ungarischen Privatrecht*; 17) *Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert*; 18) *Gusztáv Szász-Schwarz (1958–1920)*; 19) *Die Krone als Symbol der Freiheit – Die Freiheit als Sinn des Rechts*.
- 21 20) *Der werdende Rechtsstaat aus der Sicht eines Verfassungsrichters*; 21) *Einige Gedanken über Rechtsstaat und Verfassungsmäßigkeit*; 22) *Legalität und Eigentum. Probleme des werdenden*

OBITUARY

Sein Lebenswerk, seine Persönlichkeit, seine Haltung und seine Hilfsbereitschaft machten ihn zu einer unanfechtbaren Autorität unter den Romanisten und zum Vorbild für seine Kollegen, Schüler und Studenten. Der Mensch und der Gelehrte János Zlinszky lässt sich vielleicht am besten mit jenen Worten charakterisieren und würdigen, mit denen er das befolgenswerte – und was sich mit Gewissheit behaupten lässt: von ihm erreichte – Ideal beschrieb, als er am 28 November 2013 am Rechtswissenschaftlichen Institut der Ungarischen Akademie der Wissenschaften den Preis *Iuris Consulto Excellentissimo* übernahm:²² *vir bonus, dicendi peritus, amicus certus, consors fidelis, dator hilaris*.

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Rechtstaates; 23) Gedanken zur Wahrung der Rechte der Kirche in einer zukünftigen Verfassung des vereinten Europas.

22 Életművem? – díjazva! [*Mein Lebenswerk? – Anerkannt!*]. *Iustum, Aequum, Salutare* 9. 2015/2. 7.

SOUTHERN AFRICAN SOCIETY OF LEGAL HISTORIANS

Conference: 5–9 October 2015

The biannual conference of the Southern African Society of Legal Historians (SASLH) took place at Sun City from 5 to 9 October 2015. The theme of the conference was “Legislation in the Western legal tradition”.

Prof Caroline Nicholson, President of the Society, presented the welcoming address, and the opening address was presented by Prof Andrew Domanski, former president of the Society. Thereafter Mr Justice Deon van Zyl, our keynote speaker, delivered his paper on “Justice and equity in the Western legal tradition: From early Greek thought to the new constitutional dispensation in South Africa”.

Twenty papers were presented by participants from seven countries. The papers dealt with a large variety of topics, for example Greek, Roman and South African legal history, canon law, “lawgivers” and “lawmakers” and the problems presented by the translation of texts; and Roman law, human rights and codification.



Good evening ladies, gentlemen, colleagues, friends and Romanists. It is wonderful to be able to welcome you to the 2015 conference of the Southern African Society of Legal Historians. This is a small and select group of legal academics who recognise the importance of legal history to the development of modern law and who remain dedicated to promoting legal history through scholarship. It is thus a very great pleasure to welcome so many of you back and to welcome some new faces in our midst.

This conference differs from most other academic conferences insofar as it is a gathering of friends and acquaintances and I sincerely hope that the newcomers in our midst will quickly make new friends and become regular participants in the Society's affairs. I would like to thank those of you who have travelled from abroad and from across the length and breadth of South Africa for joining us, and I am confident that your participation will be rewarded by scholarly engagement and thought-provoking conversation. This small and intimate group here this evening will be joined over the next few days by other colleagues who will attend only portions of the conference.

I would also like to extend a warm welcome to the partners and families of our delegates who have accompanied them. We hope that you will enjoy the facilities that Sun City have to offer and that you will leave South Africa with a desire to return soon.

In preparing this speech I searched the internet for some humorous, but insightful comments on Legal history and Roman law. These two disciplines are both the subject matter of this conference and also two disciplines within law that are gradually losing support within the LLB-curriculum. My search revealed some very interesting facts about the demise of Roman law as an element of the LLB curriculum in, of all places, New Zealand, where the modern trend to relegate these courses to the status of elective courses was experienced as early as 1960.

Peter Spiller, writing on Roman law in the New Zealand curriculum indicated that, in New Zealand, the incorporation of Roman law in the curriculum was heralded by an observation in a Royal Commission Report on the state of legal education in New Zealand that unless a marked change is effected in the legal education provided in New Zealand, the term *my learned friend* "runs the risk of being regarded as a delicate sarcasm". Following this report, the Solicitors' professional course was, as Spiller puts it, given a greater cultural dimension when both Latin and Roman law were added to the curriculum.

Sadly, however, the removal of Latin from the school curriculum in New Zealand resulted in its removal from the law curriculum barely a decade after its introduction. This in turn, sped up the demise of Roman law as a compulsory element in the curriculum. Students lacked context to understand Roman law and Roman law teachers were in short supply. Roman law passed into relative oblivion in preference to English and New Zealand law and is in imminent danger of suffering a similar fate

in South Africa with few institutions clinging defiantly to including Legal history and Roman law as part of their core LLB curriculum.

Why, you may well ask, is what happened in New Zealand relevant to our discussions? Simply put, lawyers need to be apprised of a deep understanding of the historical basis of the law in order to understand its workings, analyse problems and to research effectively. If the fate of Roman law is regretted in New Zealand, a legal system with no direct Roman law influence, how much more will its loss be felt in a country such as South Africa whose entire legal system, especially its private law, reflects strong Roman law influences?

The trend to remove these disciplines from law curricula has become a flood in more recent years throughout the Western world. This is a state of affairs that we have repeatedly bemoaned at these events and in our publications. However, the increased pressure on the curriculum and the need to adapt it to incorporate further skills development, courses on computer law, legal ethics and the like, without any real prospect that the duration of LLB studies will be extended by a year to accommodate for this, is forcing a further reconsideration of the curriculum.

The Council for Higher Education in South Africa has called for a national review of the LLB in 2016. Accreditation of LLB curricula at the various South African institutions will ultimately depend upon the outcome of the review process. It is thus imperative for legal historians in South African institutions to promote their subject field if Legal history and Roman law are to be retained in the curriculum. As in many European curricula, these subjects have been relegated to the pool of elective courses or scrapped altogether in many institutions in South Africa. This is unfortunate, as the constant reminders of the importance of these disciplines are consistently overlooked in curriculum design conversations. Thus, despite the fact that the Council for Higher Education has not directed itself towards the prescription of an LLB curriculum for use in all universities in the country, it is determined to create a workable framework that is socially relevant and politically correct. Roman law, as part of the legal history component of law teaching, may well find itself sacrificed on the altar of Eurocentrism in efforts to offer a curriculum more patently Africanised in its content.

Certainly, Roman law had less claim to inclusion in the New Zealand curriculum than the South African, given that the New Zealand legal system was not subject to the same civil law influences as South African law was. Despite this, the common-sense resort to Roman law principles to supplement the law where this was appropriate in comparable situations meant that Roman law continued to exert an influence on New Zealand law even after its removal from the curriculum. The principles and thought processes associated with Roman law have enriched the New Zealand law and, sadly, as the last of those educated in Roman law gradually retire from the profession in New Zealand, this knowledge will be lost and the law impoverished by it.

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If this is true of New Zealand, how much more important to preserve Roman law in the South African context where vast areas of the law have been subject to extensive Roman law influences. Not only is Roman law and Legal history an essential tool in legal historical and comparative legal research, but its influences in reasoning in court decisions is undeniable. Thus, while we enjoy this conference I ask that you reflect on this conundrum that faces modern legal education and that you leave here with renewed vigour to fight for the future of our subject discipline.

Please enjoy your evening and the next few days of academic exchange.