

THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES: A CONSIDERATION OF THE INFLUENCE AND CONTINUED IMPORTANCE OF THE HISTORICAL REGULATION OF (UN)FAIR LABOUR PRACTICES PRE-1977

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interpretation and development of the right to work; right to associate; right to collective bargaining; right to withhold labour; right to be protected; right to develop

1 Introduction

It is safe to state that the right to work – to provide labour in return for remuneration – has its origin in a person’s right to existence. A person’s right to physical and emotional existence is probably the most fundamental of all human rights. In primitive times this right was subdivided into seven categories:¹ the right to fish, to hunt, to work land, to harvest, to associate, to be free from troubles and the right to loot. But an increase in the population on earth and a consequent decrease in natural resources led to the exchange of the first four rights (fishing, hunting, cultivation and harvesting) for a right where independent existence was lost forever: labour.²

Any relationship between two or more parties must be legally regulated in order to ensure that it is fair and that the parties’ interests are protected. The employment relationship between an employer and a worker is no different: In order to maintain a labour economy that provides conclusive proof of the prospering stability of labour relations and the enforcement of fair labour practices, measures to that effect need to be in place.³ Section 23(1) of the Constitution, 1996⁴ reads as follows: “Everyone has the right to fair labour practices.” Although this right is guaranteed in the Constitution, it remains a relatively novel concept. Until 1841⁵ the general employment relationship was mainly regulated by principles relating to the Roman-Dutch commercial contract of letting and hiring.⁶ These principles focussed on the commercial nature of the relationship and fair treatment of the worker was of little concern.⁷ Although many attempts (both legislative and judicial) had been made

1 Singer 1895: 10-11. Renewed research on the primitive “right to existence” during the eighteenth century led Singer to this conclusion. Other writers who confirmed it included Charles Fourier, Walther Malachowski, Theodor Brauer, Arthur Nikisch & Johann Gottlieb Fichte (see Wiehahn 1982: par [2 1]).

2 Singer 1895: 11; Wiehahn 1982: par [2 1].

3 It is submitted that, due to the fact that the employment relationship is primarily based on an agreement between the employer and the worker, these measures mainly refer to (legislative) measures which should aim to balance the interests of both parties and which should prescribe the limitations applicable to such an agreement: “The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship” (see Davies & Freedland 1983: 18).

4 The Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

5 The first general enactment on the relationship between an employer and an employee was an Ordinance of 1 March 1841 (Cape Colony).

6 See *Ongevallekommissaris v Onderlinge Verskerings Genootskap AVBOB* 1976 (4) SA 446 (A) at 450B-C; *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A); Van Jaarsveld *et al* 2009: par [76]; Du Plessis & Fouche 2015: 9.

7 See discussion to follow in par 2 *infra*.

since 1841 to regulate the employment relationship, it was only in 1979 that the concept of “fair labour practices” officially surfaced in the South African labour sphere.⁸

In order to comprehend the true nature and meaning of the constitutional right to fair labour practices, it is imperative to consider the historical development of (un)fair labour practices. In this article I will first discuss the historical development of the regulation of the employment relationship in order to put this concept, which was transplanted into South African law, into perspective. This discussion will cover the respective roles and influences of Roman law, Roman-Dutch law and English law. It will be followed by a summary of examples of unfairness in the employment relationship necessitating legislative regulation.⁹ Thereafter I will consider the relevant recommendations made by the Wiehahn Commission and I will also include an indication of the post-Constitutional (current) legal regulation. This will be followed by an evaluation of the current role of common law in the regulation of labour relations. These discussions will not only provide a better understanding of the constitutional right to fair labour practices, but will also illustrate the need for the continued reference to, and the continued development of, the common law in order to give effect to this constitutional right.

2 Historical development of the regulation of the employment relationship as transplanted into South Africa

2.1 Roman law¹⁰

Although services were mainly performed by slaves in the Roman Empire, Roman law comprised a “surprisingly sophisticated body of employment

8 A Commission of Inquiry into Labour Legislation (later known as the Wiehahn Commission) was established in 1977 in order to inquire into, report upon and make recommendations regarding existing labour legislation, with special reference for laying a foundation for sound labour relations. (See Notice 445 GG 5651 of 8 Jul 1977.) The Commission first reported on “fair labour practices” in 1979 and expressed the need to secure individual employees’ interests because of the fact that the principle of work-reservation was no longer adequate. It was proposed that the development of legislation pertaining to fair labour practices was one of the ways to achieve it (see Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1979: par [3.137.10]). Detailed recommendations on fair labour practices, which will be discussed in more detail in par 4 *infra*, were contained in a later report (see Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4.129.6]). Reference can also be made to Du Plessis & Fouche 2015: 225.

9 These examples will be limited to the period until 1977, when the Wiehahn Commission was appointed to report, *inter alia*, on legislation pertaining to fair labour practices.

10 It is necessary to briefly consider the relevant principles of Roman law. Although “our courts have to apply Justinian’s law as understood and interpreted by the Roman-Dutch lawyers of the

law”.¹¹ It was mainly regulated by principles relating to the contract of lease (*locatio conductio*).¹² Three contracts of lease could be distinguished:¹³

(a) *Locatio conductio operarum*: In terms of this contract a certain amount of a free man’s personal services (*operae suae*) could be let to someone else (*conductor operarum*) for a certain period of time and in return for the payment of money.¹⁴ Payment was made for services so rendered and this payment was similar to the amount paid as rent by a lessee.¹⁵ The most important duty of the employer was the payment of agreed wages.¹⁶ Interest on wage arrears could also be imposed.¹⁷ The most important duties of the workman were the proper execution of work¹⁸ and to take care of the things entrusted to him.¹⁹ Other

eighteenth century, and not classical Roman law ...”, Roman law is considered to be a living part of the Roman-Dutch law (see Hahlo & Kahn 1968: 581; Van Zyl 1979: 13). Roman law started infiltrating the Netherlands even before the twelfth century – with varied paces and to different degrees in the different provinces. An early reception of Roman law took place between the twelfth and the fifteenth century and the “actual reception” of Roman law in the Netherlands occurred from the middle of the fifteenth century (see Van Zyl 1979: 303, 315). The first official recognition of the reception in Holland occurred in 1462 (see Hahlo & Kahn 1968: 515-516).

- 11 Brassey 1998: [A1: 10]. This was despite the fact that labour was mostly provided by slaves and it was only on rare occasions that payment was rendered for services delivered (see *Smit v Workmen’s Compensation Commissioner* at 57; Grogan 2014b: 2; Van Jaarsveld & Van Eck 1996: 6).
- 12 Sandars 1874: 362-363; *Smit v Workmen’s Compensation Commissioner* at 56; Du Plessis & Fouche 2015: 3, 9. Although the employment relationship as such was never dealt with as an autonomous institution, the Roman contract of lease (*locatio conductio*) was regarded as the equivalent of the current contract of employment (see Jordaen 1996: 391; Van Jaarsveld *et al* 2001: par [1-8]; Van Jaarsveld & Van Eck 1996: 8).
- 13 Howes & Davis 1923: 196; Van Zyl 1977: 299. This distinction was based on the type of performance rendered in consideration for the payment of money (Du Plessis 1982: 2).
- 14 See Sohm 1907: 404; Du Plessis 1982: 2; Van Jaarsveld & Van Eck 1996: 6.
- 15 *Potchefstroom Municipal Council v Bouwer* 1958 (4) SA 382 (T); Van Jaarsveld & Van Eck 1996: 8-9. It is therefore interesting to note that the ordinary principles applicable to lease agreements also found application in the present instance (Du Plessis 1982: 2). This would then, for example, also imply that a workman could be held liable for incompetency to render the services he agreed to – based on the ordinary principles of lease agreements (*Smit v Workmen’s Compensation Commissioner* at 56).
- 16 “A man who has hired his services is entitled to compensation for the entire time for which he was employed, if he was not to blame for failing to do the work”: D 19 2 38 (tr Scott. All following translations of the *Digest* will be those of Scott.).
- 17 “The Governor of the province shall see that what is due as rent is paid without delay, and he is aware that as an action on leasing and hiring is one of good faith, it admits of the collection of legal interest when there is any delay”: C 4 65 17 (tr Scott. All following translations of the *Codex* will be that of Scott.).
- 18 “Therefore, an action on lease can be brought against him who performed the work badly ...”: D 19 2 51 1.
- 19 Although this duty was not explicitly stated as such, it can be deducted from various passages in the *Digest* addressing the liability of workmen for damages caused by negligence or unskillfulness (Hunter 1994: 339). See, eg, D 19 2 9 5: “Celsus also states in the Eighth Book of the Digest that want of skill should be classed with negligence. Where a party rents calves to be fed, or cloth to be repaired, or an article to be polished, he must be responsible for negligence, and whatever fault he commits through want of skill is negligence, because he rents the property in the character of an artisan.”

THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

duties could be imposed upon the workman if specially agreed to by the employer and the workman.²⁰ If the services could not be rendered due to a reason falling within the sphere of the employer, the employer remained liable for the payment of remuneration.²¹ The *locatio conductio operarum* applied only to menial workmen, for example painters and sculptors.²² Professionals and mandataries could therefore not conclude contracts of this kind and could only claim an honorarium for their services.²³ The *locatio conductio operarum* may be equated with our modern contract of employment.²⁴

(b) *Locatio conductio operis faciendi*: In terms of this contract one party (*conductor operis*) agreed to perform a specific task for another (*locator operis*) in consideration for a fixed amount of money.²⁵ “Specific task” refers to the supply of a specific result of labour and not to the labour itself.²⁶ The subject matter of this contract was the delivery of the actual promised result and not the labour spent to produce such a result.²⁷ The result of the workman’s services was compensated.²⁸ Note that the workman was not bound to follow the instructions of the employer but was only bound to produce the desired result.²⁹ This contract was utilised mainly in the building,³⁰ manufacturing³¹ and craftsmen industries,³²

20 Hunter 1994: 340-341.

21 “A man who has hired his services is entitled to compensation for the entire time for which he was employed, if he was not to blame for failing to do the work”: D 19 2 38. Impossible working conditions would suffice as an example of such a reason (Van Zyl 1977: 302). It follows that if the services could not be rendered due to a reason falling within the workman’s sphere (eg, illness of the employee), the employer was released from the duty to pay remuneration (*ibid*).

22 Grogan 2014b: 2. The subject-matter of this contract had to consist of unskilled services (Sohm 1907: 404).

23 *Ibid*.

24 Van Zyl 1977: 301. It is, however, submitted that this contract did not play an important role in Roman law. The reasons are twofold: a) the Romans preferred slave labour over free labour (*Smit v Workmen’s Compensation Commissioner* at 57); b) the majority of service-related agreements were classified under the *locatio conductio operis* (Van Jaarsveld *et al* 2001: pars [1] –[8]).

25 *Smit v Workmen’s Compensation Commissioner* at 57; Du Plessis 1982: 2.

26 Sohm 1907: 405. Joubert JA puts it as follows: “What the parties to the contract contemplated was not the supply of services or a certain amount of labour but the execution or performance of a certain specified work as a whole” (*Smit v Workmen’s Compensation Commissioner* at 57).

27 *Ibid*.

28 *Ibid*; see, also, Van Jaarsveld & Van Eck 1996: 8.

29 Sohm 1907: 405.

30 “Where I contract for the construction of a house, with the understanding that the person I employ is to be responsible for all of the expense, he transfers to me the ownership of all the material used, and still the transaction is a lease; for the artisan leases me his services, that is to say, the necessity for performing the labour”: D 19 2 22 2.

31 “It is also questioned whether, when Titius has agreed with a gold smith to make him rings of a certain weight and pattern ... If Titius gives the gold, and a sum is agreed on to be paid for the work, there is no doubt that the contract is then one of letting to hire”: *Inst* 3 24 4 (tr Sandars. All following translations of the *Institutiones* will be from Sandars).

32 “Where a precious stone has been given to an artisan for the purpose of being set or engraved ...”: D 19 2 13 5.

as well as with the transportation of goods³³ and training of slaves.³⁴ The *locatio conductio operis faciendi* may be equated with the modern contract of letting and hiring of work.³⁵

(c) *Locatio conductio rerum*: This contract regulated the lease of things such as buildings, land, a horse and the like.³⁶ This type of lease agreement must be taken note of in the context of the lease of services as it was possible for a slave's owner to let the slave out to someone else.³⁷ The *locator* allowed the *conductor* to hire the use of an object in return for the payment of money.³⁸

The Roman law contract of lease was regarded as a purely contractual relationship and was based on the individual contract between the parties.³⁹ Although the contract required the exercise of good faith⁴⁰ by both parties, it was based mainly on consent⁴¹ and contractual freedom, and the employer could pressurise the employee into agreeing to almost anything.⁴²

As mentioned above, money was required to be paid as consideration for the hiring of services, results of services or the use and enjoyment of a thing.⁴³ Although the consideration, in principle, consisted of money, it seems as if exceptions were

33 “Where a party hired his services for the transportation of wine from Campania ... he will be liable to an action on hiring ...”: D 19 2 11 3.

34 Sohm 1907: 405; *Smit v Workmen's Compensation Commissioner* at 57-58.

35 Du Plessis & Fouche 2015: 10.

36 Du Plessis 1982: 2.

37 Brassey 1998: [A1:1].

38 See Sohm 1907: 404. Where the object was a fruit-bearing object, the fruits formed part of the hirer's right of use and enjoyment.

39 Van Zyl 1977: 298; Grogan 2008: 6. It is therefore safe to state that, from the start, the employment relationship was contractual in nature. This was in sharp contrast with other jurisdictions where the employment relationship originated as a status relationship (master and servant).

40 See Sohm 1907: 405. He describes the contract as a *bonae fidei negotium* (agreement in good faith) in terms of which both parties were bound to exercise *omnis diligentia*. They had to exercise good faith according to the circumstances of each case.

41 “Leasing and hiring ... is contracted not by words but by consent ...” (D 19 2 1). “As the contract of sale is formed as soon as a price is fixed, so a contract of letting to hire is formed as soon as the amount to be paid for the hiring has been agreed on ...” (*Inst* 3 24). Agreement upon the thing to be let and the amount to be paid completed the contract (Howes & Davis 1923: 197).

42 See Van Niekerk & Smit 2015: 3-4, where the relationship between employer and employee is described as “inherently unequal”.

43 “[A]nd so also is leasing and hiring understood to be contracted where an agreement is made as to the rent” (D 19 2 2). “Where rent has been promised in general terms, to be decided by a third party, a lease is not held to have been made. But where it is stated that the amount of the rent shall be estimated by Titius, the lease will be valid subject to this condition; and if the party mentioned fixes the rent, it must, by all means, be paid in accordance with his estimate, and the lease will become operative. If, however, he refuses to do this, or is unable to fix the rent, the lease will be of no effect, just as if the amount of the rent had not been determined” (D 19 2 25).

allowed.⁴⁴ Payment was only due after services had been rendered, after a specified result had been delivered or after an object had been used.⁴⁵

2 2 Roman-Dutch law⁴⁶

2 2 1 The regulation of the employment relationship from 1652 to 1795

Jan van Riebeeck, an official of the *Vereenigde Oost-Indische Compagnie* (VOC),⁴⁷ arrived at the Cape of Good Hope on 6 April 1652, having been instructed to establish a refreshment station at Table Bay.⁴⁸ The arrival of the first Dutch settlers in 1652 did not only introduce Roman-Dutch law⁴⁹ into South Africa, but also earmarked the first fundamental demand for labour in South Africa.⁵⁰ During the time when the Cape was administered by the VOC, Roman-Dutch law was the common law in the Cape and applied in practice.⁵¹ The most important sources of law in the Cape were legislation, Dutch law as portrayed in the works of Dutch writers and customary law.⁵²

Roman law as applied to the relationship between employer (master) and employee (servant), was received in the Netherlands, and then gradually altered by legislation in the form of local ordinances and general *placaeten*.⁵³ Pertaining to the relationship of master and servant, three general *placaeten* need mention:⁵⁴

44 “What we have said above of a sale in which the price is to be fixed by the decision of a third person, may be applied to the contract of letting to hire, if the amount to be paid for the hire is left to the decision of a third person ...” (*Inst* 3 24 1).

45 Sohm 1907: 406.

46 The Roman-Dutch law which applied to South Africa and which regulated the employment relationship, will be discussed with reference to four main time-frames: 1652-1795, 1795-1803, 1803-1806 and 1806-1910.

47 The VOC, in turn, acted upon the instruction of the States General of the Republic of the United Netherlands (Van Zyl 1979: 424-425).

48 Ploeger 1951: 58-59.

49 Brassey 1998: [A1:9]. Brassey, very aptly, describes Roman-Dutch law as a law “being rooted in Justinian’s *Corpus Iuris Civilis* but shaped by the statutory and customary law of Holland and the United provinces ...”

50 Finnemore 2006: 21.

51 Van Zyl 1979: 420.

52 *Idem* 433.

53 *Spencer v Gostelow* 1920 AD 617 at 627. The general principles laid down by the South African Appeal Court provided for the following: a) All general *placaeten* of the States General dated before 7 April 1652 applied to South Africa; b) *Placaeten* of Holland dated before 1652 were only valid insofar as those were expressly promulgated in South Africa; c) All *placaeten* of the States General and Holland dated after 1652 were valid in South Africa insofar as they were intended to be promulgated in South Africa in respect of those regulated general matters (Van Zyl 1979: 438). Van der Merwe & Du Plessis conclude that only some of the *placaeten* contained in the *Groot Placaet Boek* therefore applied to South Africa (Van der Merwe & Du Plessis 2004:48).

54 *Spencer v Gostelow* at 627-628, 638-639. Although all of these *placaeten* were supposed to apply to South Africa (if the principles of the Appeal Court set out *supra* are taken into consideration), Innes CJ stated that, mainly due to the existence of slavery in South Africa, these were never

(a) *Placaet* of 2 September 1597:⁵⁵ It only dealt with apprentices.⁵⁶ This *placaet* provided for duties of masters and apprentices: Masters were obliged to maintain apprentices with food, shelter and clothing and to provide training to servants; apprentices were obliged to complete their training and to conduct themselves in an appropriate manner.⁵⁷

(b) *Placaet* of 1 May 1608:⁵⁸ The greater part of it was only applicable in The Hague.⁵⁹ These provisions did not only apply to servants but also to craftsmen; the few provisions which operated generally, however, only applied to domestic servants.⁶⁰ This *placaet* mainly regulated penalties that could be imposed on servants for incomplete and unsatisfactory services, for misconduct, for disrespect against masters or for the desertion of their services.⁶¹

(c) *Placaet* of 29 November 1679:⁶² It was based on the *placaet* of 1608 and only applied to *dienstboden* – servants who either lived in the house or who were involved in an intimate relationship with the master/mistress.⁶³ Most of the provisions of the 1608 *placaet* were repeated.⁶⁴ Some of the provisions which were added included provisions regarding required notice by servants when terminating their services,⁶⁵ as well as provisions regarding the right of masters to terminate the services of servants: the servant’s services could be terminated without any valid reason, provided that outstanding wages were paid; if the termination was based on a servant’s intolerable inappropriate conduct, no outstanding wages had to be paid.⁶⁶

Dutch writers, especially Johannes Voet, addressed the position regarding the rendering of services in return for remuneration.⁶⁷ A distinction, similar to that of Roman law, was made between two different “types” of contracts in terms of which services could be rendered:⁶⁸ A contract for the letting and hiring of personal services

recognised or enforced in South Africa (*Spencer v Gostelow* at 628). Mason AJA, however, stated that these *placaeten* were referred to by South African courts in cases which dealt with forfeiture of wages and, more importantly, anticipated “many of the provisions of South African Statutes ...” (*Spencer v Gostelow* 639).

55 Cau 1658: 514-515.

56 *Spencer v Gostelow* at 627, 638.

57 Cau 1658: 514-515.

58 Cau 1664: 2256-2259.

59 *Spencer v Gostelow* at 627.

60 *Ibid* 638-639.

61 Cau 1664: 2256-2259.

62 Van Leeuwen 1683: 527-530.

63 *Spencer v Gostelow* at 627, 639. Although two sections thereof only applied to The Hague, the remainder of the *placaet* found general application.

64 Refer to the contents of the 1608 *placaet* in par [b] *supra*.

65 Van Leeuwen 1683: 529.

66 *Ibid*. Examples of inappropriate conduct included rowdiness (*baldadigheyt*), wantonness (*moetwilligheyt*) and naughtiness (*stoutigheyt*).

67 Voet addressed this topic in his *Commentarius ad Pandectas* (refer to references later on). Hugo Grotius also addressed it, although to a lesser extent, in his *Inleiding tot de Hollandsche rechtsgeleerdheid* (refer to references later on).

68 Maasdorp 1907: 236. The opinion was also held that the principles of the hiring of services were substantially the same as those which applied to the letting and hiring of property (Voet 1827: 19 2 33; Maasdorp 1907: 236).

as well as a contract for the letting or giving out of work to be done by another. In Roman-Dutch law the contract for letting and hiring of personal services was commonly referred to as a *dienstcontract* or *huur en verhuur van diensten*.⁶⁹ The *dienstcontract*, similar to the Roman *locatio conductio operarum*, was based on consensus⁷⁰ pertaining to the rendering of services⁷¹ in return for remuneration.⁷² It covered a whole range of employees⁷³ and this *dienstcontract* regulated the rights

- 69 *Smit v Workmen's Compensation Commissioner* at 58. Unfortunately Roman-Dutch writers did not deal with the *locatio conductio operarum* in as much detail as they did with the *locatio conductio operis* – Voet, for instance, believed that the principles applicable to the *locatio conductio operis* could be applied fully to the *locatio conductio operarum*: “Besides the use of an article and the services of an individual, ... a piece of work also may be let out to be done, of course, by the labour of an artisan, who hires it or contracts to do it ... though this also is true, that he who hires a piece of work may at the same time be said to let his services ...” (Voet 1827: 19 2 33) and translated by Solomon (all following translations of Voet will be those of Solomon). It was also because of the fact that it was more common to make use of slave-labour than to make use of paid labour (Kunst 1968: 557-558). Also see Van Jaarsveld & Van Eck 1996: 7.
- 70 “[S]ince ‘letting and hiring’ is an equitable contract, depending upon consent, for the exchange of the use of an article or of labour for hire” (Voet 1827: 19 2 1). Grotius 3 19 2 noted that consensus could also be reached by words or even tacitly (all following translations of Grotius will be that of Herbert). It is furthermore important to take note of the fact that the consensual nature of the contract implied that both employers and employees could exercise a choice as to whom to work for or whom to hire, although exceptions also occurred. Voet, for example, refers to certain corn mills (and millers) which exercised a monopoly over the grinding of corn of inhabitants of their regions (Voet 1827: 19 2 6).
- 71 It seems as if services could be rendered to only one employer at a time. See Voet 1827: 19 2 15: “And though in the case of a man’s services being let to each of two persons, Ulpian was of opinion that it was proper that preference should be given to the one who had first hired the services ...”
- 72 “For the use of things or of the services of workmen a sum must be fixed as ‘hire’, and this must be certain either from the very beginning of the contract, or subsequently by relation to the award of a determinate third person” (Voet 1827: 19 2 7); “The ‘hire’ should properly consist of money, as the ‘price’ in the case of sale, not of other articles, nor one small coin, nor of part of the fruits; unless it has been agreed upon at the commencement of the lease that the lessor shall receive annually a certain quality of corn from the land at a fixed price” (Voet 1827: 19 2 8; Nathan 1913: 884). Grotius, however, disagreed: “[T]hat is, in money: and it is held that the consideration or payment of hire can consist in other things, which are capable of measure, number or weight ...” (1767: 19 2 6). See, also, Voet 1827: 19 2 6; Grotius 1767: 3 19 1.
- 73 These included domestic servants, workmen, labourers, apprentices, sailors and a number of other employees (*Smit v Workmen's Compensation Commissioner* at 59). Skilled services were therefore also included under the contract of employment although liberal services rendered by professional men were excluded (“Just as things may be let, so also the services, as well of free men as of slaves, may be let, at least of such of them as work for wages, but not the free services of advocates and such like men, who usually receive fees but not wages ...” (Voet 1827: 19 2 6). It is, however, very interesting that Grotius held the opinion that the services of a craftsman, eg a jeweller, did not constitute a *dienstcontract* but rather a contract of sale: “but if one party promises to another to make a ring and serve him in that respect, as in this case the sale and hiring come together, so will such a contract be characterized by what is most valuable, and is consequently deemed a sale ...” (Grotius 1767: 3 19 4).

between employer and employee. Similar to Roman law, the person rendering the services was considered the lessor and the person remunerating the services was considered the lessee.⁷⁴ The most important characteristic of the common law contract of employment was the duty of the employee to obey lawful commands and the instructions of his employer regarding the performance of the services agreed upon.⁷⁵ If services were not rendered according to the agreement, the employer could withhold a *pro rata* amount of remuneration or could compel the employee to deliver the services according to the agreement.⁷⁶ Employees could have been lawfully dismissed for the following reasons:⁷⁷ (1) lengthy absence on account of illness; (2) desertion or absenteeism without reasonable excuse; (3) refusal to obey lawful orders; (4) conducting business in competition with his master; and (5) dishonesty and general misconduct. Employees could even be held liable for neglect.⁷⁸ The *actio conducti* was available to the lessees to “compel them to grant the use of the property or the services hired ...”.⁷⁹ Similarly, the *actio locati* was available to the lessor to “proceed for the full amount due upon the lease ...”.⁸⁰ If the employer terminated the contract without just reason, the employee was entitled to full wages.⁸¹

As mentioned above,⁸² the letting and hiring of a piece of work was also addressed.⁸³ This contract was referred to as “*aanbesteding van werk*”.⁸⁴ The remuneration was established with reference to either the nature of the job or the time needed for completion of the job.⁸⁵ In the absence of an agreement to the

74 Maasdorp 1907: 236.

75 *Smit v Workmen's Compensation Commissioner* at 60.

76 Voet 1827: 19 2 27.

77 Nathan 1913: 912-913.

78 “[T]here is no liability for very slight neglect in this contract, unless ... he has given himself out as a skilled workman ...” (Voet 1827: 19 2 30). However, some account was also taken of the blameworthiness of the employee: “[I]f an artisan has given a new form to the material of another person, a certain sum having been agreed upon to be paid for the work, but if before he has completed the alteration, or, if it has been completed, before he restored it to the owner of the material, who, we will suppose, has not been in default, it be lost while in his possession by fire or theft, or some similar casualty happening through no fault of his own, under such circumstances it appears equitable that the loss of the material should fall upon the owner, and the loss of the labour upon the artisan” (Voet 1827: 19 2 31).

79 Voet 1827: 19 2 14; Kunst 1968: 556.

80 Voet 1827: 19 2 21; Kunst 1968: 556.

81 Grotius 1767: 19 2 13. This, however, can be qualified as follows: Damages suffered by an employee due to wrongful dismissal should be approached according to the same rules applicable to damages. This implies that damages are represented by the loss which an employee has sustained, or the gain which the employee has missed; provided that damages should not exceed double the immediate value (Nathan 1913: 907).

82 Refer to n 70 *supra*.

83 Voet 1827: 19 2 33.

84 *Smit v Workmen's Compensation Commissioner* at 58. As will be proven during the course of the discussion, this contract was similar to the Roman *locatio conductio operis faciendi*.

85 Voet 1827: 19 2 34.

contrary, this remuneration was to be paid only upon the completion of the job.⁸⁶ If no agreement to the contrary existed, it was possible for the workman to appoint someone else to perform the job on his behalf.⁸⁷ The work and the quality⁸⁸ thereof needed to be according to the satisfaction and approval of the employer.⁸⁹ Similar to Roman law, the result of the labour constituted the subject-matter of this contract.⁹⁰ It was also important for the work to be finished within the time⁹¹ and at the place⁹² agreed upon.

Slavery was the dominant mode of service in the Cape.⁹³ The Cape Colony commenced taking part in East African and East Indian slave trade to such an extent that by the eighteenth century “slavery had become an integral part of the Cape Colony”.⁹⁴ These slave-practices were transferred to the interior by nomadic Boer farmers and this is believed to be the most influential factor that led to the idea of “channelling blacks into the unskilled and semi-skilled labour force”.⁹⁵ Initially the indigenous Khoisan were utilised as herdsmen. They were completely dispossessed and were largely dependent on the rural burghers for a livelihood.⁹⁶ From 1702 the Dutch also engaged the services of Xhosa men (as herders) and Xhosa women (as domestic workers).⁹⁷

2 2 2 Regulation of the employment relationship from 1795 to 1803

The British era in South Africa commenced with the first occupation of the Cape in 1795.⁹⁸ In terms of a proclamation of 1795, the Court of Justice was re-established in order to administer justice “in the same manner as has been customary till now, and according to the Laws, Statutes and Ordinances which have been in force in this

86 Voet 1827: 19 2 40; Grotius 1767: 3 1911.

87 *Ibid.*

88 “[W]hen it is settled by the judgment of a good man whether the quality of the work answers to the terms of the agreement ...” (Voet 19 2 36).

89 Voet 1827: 19 2 35. Note however that, contrary to the Roman position, this provision required the employee to also follow the instruction of the employer. (The approval rests with the employer or his heir ... in which case the agreement is held to mean nothing more than that the workman, in performing the work, shall follow out the instructions of his employer to the satisfaction of any good man ...”).

90 Kunst 1968: 558.

91 Voet 1827: 19 2 38.

92 *Idem* 19 2 39.

93 Böeseken 1951: 156.

94 Finnemore 2006: 21.

95 *Ibid.*

96 Brassey 1998: [A1: 11]. The indigenous population was “subordinated to provide labour” for the settlers.

97 *Ibid.*

98 Articles of Capitulation, 16 Sep 1795, Rustenburg (see Eybers 1918: 3).

Colony ...”⁹⁹ The law as applied under the rule of the VOC therefore continued to be applied in an unaltered manner.¹⁰⁰

2 2 3 Regulation of the employment relationship from 1803 to 1806

In 1803¹⁰¹ the Cape was restored to the Dutch (Batavian Republic) in terms of the Treaty of Amiens.¹⁰² Again, the law, unaltered, continued to be applied under the rule of the VOC.¹⁰³

2 2 4 Regulation of the employment relationship from 1806 to 1910

The Second British occupation of the Cape in 1806, theoretically speaking,¹⁰⁴ did not affect the legal system in force at that time.¹⁰⁵ The Articles of Capitulation of 1806 guaranteed that Roman-Dutch law would remain in force in the Cape Colony.¹⁰⁶

Originally the demand for labour was largely met by the availability of slave labour.¹⁰⁷ The abolition of slavery in England in 1807, however, caused an end to slave imports to the Cape which, in turn, caused a serious shortage of labour.¹⁰⁸ The

99 Proclamation of 11 Oct 1795 (Cape Colony) by General A Clarcke (see Theal 1897: 187-188).

100 Van Zyl 1979: 445. Although more emphasis was placed on writers of the late eighteenth century, continued reference was made to Voet and Grotius.

101 Proclamation of 21 Feb 1803 (Cape Colony) by Dundas (see Eybers 1918: 13-14).

102 Art 5 of the Treaty of Amiens of 27 Mar 1802 by Cornwallis, Bonaparte, De Azara and Schimmelpenninck (see Eybers 1918: 12-13).

103 Van Zyl 1979: 447-448.

104 Refer to par 2 2 5 *infra* for a discussion on the influence of the English law.

105 The Roman-Dutch law (and more specifically, the law of Holland) brought to South Africa by Jan van Riebeeck in 1652 remained the prevailing law of the Cape (Hahlo & Kahn 1968: 572).

106 Section 8 of the Articles of Capitulation of Cape Town, 10 Jan 1806, provided as follows: “The burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto ...” (Cape Colony 1862: 42). But this was only applicable to the burghers and inhabitants of Cape Town. Section 8 of the Articles of Capitulation, 19 Jan 1806, extended this provision to all of the inhabitants of the Cape Colony. The laws of the conquered country therefore continued in force until altered by the conqueror. The Roman-Dutch law was also taken over by the South African Republic in 1844 (see art 31 of The Thirty-Three Articles of 9 Apr 1844 (Eybers 1918: 356). Although the Thirty-Three Articles were adopted as the constitution in 1849 before the independence of this territory was acknowledged in 1852, the Thirty-Three Articles served as the constitution until 1858 (Van Zyl 1979: 460-461). A new constitution was adopted only in 1858 but did not make specific provision for the adoption of Roman-Dutch law. Article 31 was, however, confirmed by the Volksraad in 1859 in the Addenda to the Grondwet nos 1 & 2 of 19 Sep 1859 (South African Republic) (Eybers 1918: 416-418); the Republic of the Orange Free State in 1854 (see art 56 of the Constitution of the Republic of the Orange Free State of 10 Apr 1854) (Eybers 1918: 295); and by the District of Natal in 1845 (see Cape Ordinance 12 of 1845 (Eybers 1918: 227-229). Natal became the Colony of Natal in 1856.

107 Jordaan 1996: 396.

108 *Ibid.*

shortage was addressed by various measures, including the following: a) the Khoisan were “encouraged” to take up employment in the Cape Colony by a proclamation in 1809;¹⁰⁹ b) farmers were allowed to apprentice Khoisan-children over the age of eight for a period of not more than ten years;¹¹⁰ c) the Khoisan were also relieved of the obligation to wear passes, and passes were issued to Xhosas who could never take up employment before;¹¹¹ d) hoping to encourage the Khoisan to an even greater extent to tender their services to the settlers, they were afforded the same protection¹¹² and freedoms enjoyed by the settlers in 1828;¹¹³ and e) workers were imported from China, India and Mozambique.¹¹⁴ Slavery was abolished in 1834,¹¹⁵ although the continued working relationships of the Khoisan and Xhosa resembled much of the disrespect for workers that was so typical of the whole notion of slavery.

Formal regulation of employer/worker relations was necessitated by the natural increase in the country’s population, the large number of freed slaves and the expansion of the economy.¹¹⁶ The first general and true enactment on masters and servants appeared only in 1841.¹¹⁷ This 1841 Ordinance was repealed by Act 15

109 Proclamation of 1 Nov 1809 (Cape Colony) by Du Prè & Caledon (see Cape of Good Hope 1827: 119-121). Section 1 provided that the Khoisan were compelled to have a fixed and registered place of residence and were only allowed to travel between districts after a certificate to that effect had been issued. This measure was therefore intended to compel them to live and work on farms (Jordaan 1996: 396). It must, however, also be mentioned that increased protection, as opposed to the position of the slaves, was afforded by this proclamation regarding the conclusion of contracts of employment (s 2), the freedom to leave upon the expiry of the contract (s 4) and the payment of wages (s 5).

110 Proclamation of 23 Apr 1812 (Cape Colony) by Cradock (see Cape of Good Hope 1827: 189-190). Strict instructions, however, needed to be followed.

111 Proclamation 49 of 14 Jul 1828 (Cape Colony) by Bourke (see *idem* 462). This proclamation was repealed and the issuing of passes were extended to all natives in 1857 by Act 27 of 1857 (Cape Colony) (see Cape Colony 1858: 275-279).

112 This increased protection related to, *inter alia*, ownership of land (s 3), limited prescribed periods for contracts of employment (s 4), payment of wages (s 7) and so forth.

113 Proclamation 50 of 17 Jul 1828 (Cape Colony) by Bourke (see Harding 1838: 463-471).

114 Brassey 1998: [A1: 13] – [A1: 14].

115 Van Zyl 1979: 452. Although slavery was abolished there is one school of thought which regards a voluntary contract of employment as an alienation and transfer of a person’s right to self-determination – therefore similar to the concept of slavery. But the other view prevails, it seems, that a contract of employment should rather be regarded as an instrument to secure the inalienable right to self-determination (see “Rethinking the employment contract: what can today’s corporate reform movement learn from the old anti-slavery and democratic movements?” by Prof David Ellerman, University of California).

116 Nel 2012: 80.

117 Cape Ordinance of 1 Mar 1841 by Bell and Hamilton (see Harding 1845: 240-265). (Due to the fact that this Ordinance was repealed almost *verbatim* in Act 15 of 1856 (Cape Colony), the said provisions will not be discussed.) A few proclamations dated before 1841 have already been discussed. (Apart from the proclamations already mentioned, another proclamation may also be briefly mentioned: Proclamation of 26 Jun 1818 (Cape Colony) by Somerset (see Theal 1902: 14-18). This proclamation, however, applied only to workmen and apprentices introduced from overseas.) It is, however, submitted that none of these proclamations truly regulated the relationship between master and servant in general.

of 1856¹¹⁸ in order to regulate the relationship between master and servant in the Cape Colony. The following laws – all based on the 1841 Ordinance – regulated the relationship between master and servant:¹¹⁹ Natal: Ordinance 2 of 1850;¹²⁰ the South African Republic: Law No 13 of 1880;¹²¹ and the Republic of the Orange Free State: Ordinance 1 of 1873.¹²² These laws regulated bilateral individual relationships and no provision was made for collective bargaining, trade unions and the like.¹²³ Apart from containing general provisions on the repeal of previous laws,¹²⁴ definitions,¹²⁵ duration of contracts,¹²⁶ notice periods,¹²⁷ provision of food and lodging,¹²⁸ payment of wages,¹²⁹ apprenticeship of children¹³⁰ as well as the payment of wages and the termination of contracts in the event of death, insolvency, and relocation of a master,¹³¹ special provisions were also included. The following may serve as examples: a) a servant was sometimes entitled to wages during periods of absence caused by illness;¹³² b) the family of a servant did not have an automatic right of residence

118 Act 15 of 1856 (Cape Colony) (see Cape Colony 1858: 106-131).

119 These master and servant laws were repealed in 1974 by the Second General Law Amendment Act 94 of 1974.

120 Ordinance 2 of 1850 (District of Natal) by Boys on 21 Mar 1850 (see Cadiz & Lyon 1879: 133-147).

121 Law No 13 of 1880 (Republic of the ZAR) (see Jeppe & Gey van Pittius 1910: 56-83).

122 Ordinance 1 of 1873 (Republic of the OFS) by Visser on 21 May 1873 (see Oranje-Vrystaat 1880: 237-240). This Ordinance was applicable only to coloured servants. Although it is stated that an Ordinance of 1904 (Brassey 1998: [A1: 15]; Jordaan 1996: 396; <http://www.sahistory.org.za/archive/chapter-9-struggle-against-sweating>) was the first corresponding enactment to the 1856 Act, it is submitted that this Ordinance of 1873 – which was repeated almost *verbatim* – was indeed the first corresponding enactment (see *Spencer v Gostelow* at 629, 643).

123 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par 4 8.

124 Act 15 of 1856 (Cape Colony): s 1; Orange Free State Ordinance 1 of 1873: s 24; ZAR Law No 13 of 1880: s 1. The Natal Ordinance 2 of 1850 did not contain such a provision.

125 Act 15 of 1856 (Cape Colony): s 2; Natal Ordinance 2 of 1850: s 2; ZAR Law No 13 of 1880: s 2.

126 Act 15 of 1856 (Cape Colony): ch 2, ss 2-5; Natal Ordinance 2 of 1850: ch 1, ss 2-5; Orange Free State Ordinance 1 of 1873: s 3; ZAR Law No 13 of 1880: ch 2, ss 8-11. Increased protection was afforded to servants in the Cape Colony with the promulgation of Act 18 of 1873 (Cape Colony): s 1 (see Tennant & Jackson 1895: 1293).

127 Act 15 of 1856 (Cape Colony): ch 2, ss 7-8; Natal Ordinance 2 of 1850: ch 1, ss 7-8; ZAR. Law No 13 of 1880: ch 2, ss 13-14.

128 Act 15 of 1856 (Cape Colony): ch 2, s 9; Natal Ordinance 2 of 1850: ch 1, s 9; ZAR Law No 13 of 1880: ch 2, s 15.

129 Act 15 of 1856 (Cape Colony): ch 2, s 10 and ch 5, s 20; Natal Ordinance 2 of 1850: ch 1, ss 10-11 and ch 5, s 2; Orange Free State Ordinance 1 of 1873: s 10; ZAR Law No 13 of 1880: ch 2, s 16.

130 Act 15 of 1856 (Cape Colony): ch 3; Natal Ordinance 2 of 1850: ch 2; ZAR Law No 13 of 1880: ch 3.

131 Act 15 of 1856 (Cape Colony): ch 4; Natal Ordinance 2 of 1850: ch 3; ZAR Law No 13 of 1880: ch 4. The Orange Free State Ordinance 1 of 1873 s 16 provided that the contract continued in the event of relocation within the Orange Free State.

132 Act 15 of 1856 (Cape Colony): ch 2, s 11; Natal Ordinance 2 of 1850: ch 1, s 12; ZAR Law No 13 of 1880: ch 2, s 17.

with the servant's master;¹³³ c) different forms of misconduct were punishable with imprisonment, hard labour, solitary confinement, a spare diet and the requirement of payment of compensation (if damage had been caused);¹³⁴ and d) participation in meetings to host consultations on wages and working hours was allowed and consequently was not punishable with any penalties or prosecution.¹³⁵

2 2 5 The influence of English law

Although the Articles of Capitulation of 1806¹³⁶ and the Charters of Justice¹³⁷ guaranteed that Roman-Dutch law would remain in force, English law and institutions did have a considerable influence on Roman-Dutch law.¹³⁸ Formal law was regularly amended by the British and later on, especially after the implementation of the Charters of Justice, material law was also changed.¹³⁹ Van Zyl provides an account of the factors which either evidenced or contributed towards this English influence in the legal system and the community at large. These included:¹⁴⁰

(a) A general Anglicisation of the Colony and the community: i) the 1820 settlers chose to live according to their own customs, values and laws; ii) English schools were established and teachers with an English education were appointed in these schools; iii) Scottish ministers were imported to occupy the vacancies in the reformed churches; and iv) trade was ruled by English merchants and many English customs took root in the Colony.

133 Act 15 of 1856 (Cape Colony): ch 2, s 14; Natal Ordinance 2 of 1850: ch 1, s 15; ZAR Law No 13 of 1880: ch 2, s 20.

134 Act 15 of 1856 (Cape Colony): ch 5, ss 3-6 and s 13; Natal Ordinance 2 of 1850: ch 4, ss 3-6; Orange Free State Ordinance 1 of 1873: ss 6, 7 and 15; ZAR Law No 13 of 1880: ch 5, ss 3-13, 20-21 and 34. These types of punishment were somehow softened with the promulgation of Act 18 of 1873 (Cape Colony): ss 3-7 (see Tennant & Jackson 1895: 1293-1297). The moderated amendment provided for the imposition of a fine. Imprisonment (with accompanying hard labour and so forth) could only be imposed if the servant failed to pay the penalty. It was also stated that these provisions pertaining to criminal sanctions, could be equated with a modern-day disciplinary code (Jordaan 1996: 397).

135 Act 15 of 1856 (Cape Colony): ch 7, s 2; Natal Ordinance 2 of 1850: ch 5, s 3; ZAR Law No 13 of 1880: ch 7, s 3.

136 Refer to par 2 2 4 *supra*.

137 "And we do further give and grant to the said Supreme Court of the Colony of the Cape of Good Hope, full power, authority, and jurisdiction, to apply, judge and determine upon matters according to the laws now in force in our said Colony ...": Second Charter of Justice 1832: s 31 (Tennant & Jackson 1906: 100). The First Charter of Justice was issued on 24 Aug 1827 and the Second Charter of Justice on 4 May 1832 (Erasmus 1996: 146).

138 Hahlo & Kahn 1968: 576. This influence was especially significant from 1860-1910.

139 Van Zyl 1979: 448.

140 Van Zyl 1979: 453-458. A summary of this account is provided here. This account corresponds with that of Hahlo & Kahn 1968: 575-578.

(b) The English language was to be used in all judicial acts and proceedings and all official acts and documents had to be drawn up and promulgated in English.¹⁴¹

(c) Not only was the *Raad van Justitie* replaced with the Supreme Court,¹⁴² but judges presiding in the Supreme Court had to be barristers in England and Ireland or advocates admitted in English courts.¹⁴³ Conversely, an advocate could only be admitted if such a person had been admitted as a barrister in England or Ireland, an advocate in Scotland or to the degree of Doctor of Laws at the Universities of Oxford, Cambridge or Dublin.¹⁴⁴

(d) The principle of *stare decisis*¹⁴⁵ became an established principle in the Colony's courts. The final court of appeal was the Privy Council in England.

(e) Much of the new legislation enacted during the British occupation was modelled on English legislation. Examples include the law of evidence and company law. Other English legal principles including "time of the essence", "restraint of trade" and "vicarious liability" also took root in the Colony's courts.

The Roman-Dutch legal position regarding the employment relationship was minimally influenced by English law¹⁴⁶ and only in respect of vicarious liability, forfeiture of wages, specific performance, payment of wages during periods of illness and implied terms of the contract of employment.¹⁴⁷

2 2 6 The extent to which fairness was addressed by the common law

It seems safe to state that the common law did not specifically make provision for fair labour practices in the employment relationship.¹⁴⁸ Recently, however, it appeared as if the courts were willing to develop the common law in order to import into contracts of employment generally, rights flowing from the constitutional right to fair labour practices.¹⁴⁹

141 Proclamation of 5 Jul 1822 (Cape Colony) by Somerset (Eybers 1918: 23-24).

142 Second Charter of Justice 1832: s 1 (Tennant & Jackson 1906: 93-94).

143 Second Charter of Justice 1832: s 3 (Tennant & Jackson 1906: 94). Due to the fact that judges were much more comfortable and familiar with English law, many decisions were based on English law (based on their argument that there was no real difference between English law and Roman-Dutch law in such an instance).

144 Second Charter of Justice 1832: s 17 (Tennant & Jackson 1906: 97).

145 In terms of this principle, previous decisions of a concurrent or higher court had to be followed by another court, unless the previous facts differed from the present facts or unless the previous decision was based on an error.

146 Hahlo & Kahn 1968: 578.

147 Jordaan 1996: 397-415.

148 See the discussion *supra*. Also refer to Grogan 2010: 5; Grogan 2008: 2. This general conclusion stands despite the fact that, since the beginning of time, the general concept of fairness prevailed as an ideal and ideology.

149 These decisions reflected the notion that the common law should be developed to address the fairness concept in order to promote the spirit, purport and objects of the Bill of Rights. See the discussion in the following text.

In both *Boxer Superstores Mthatha v Mbenya*¹⁵⁰ and *Murray v Minister of Defence*¹⁵¹ it was held that all contracts of employment contain an implied term that employers must treat employees fairly. Consequently it was found in the *Jonker* case¹⁵² that an ordinary breach of contract may constitute an infringement of the employee's wider constitutional right to fair labour practices. In *Tsika v Buffalo City Municipality*¹⁵³ as well as *Mogothle v Premier of the Northwest Province*¹⁵⁴ it was also held that employers owe a general duty of fairness to employees in terms of the contract of employment. Another example is that of *Globindlal v Minister of Defence*¹⁵⁵ where it was decided that, in a situation where an employee is not covered by labour legislation, "it could be argued that it was an implied term of the contract that the rights enshrined in section 23 of the Constitution, 1996, form an integral part of the contractual relationship".

The abovementioned position was, however, overturned by the decision in *SA Maritime Safety Authority v McKenzie*¹⁵⁶ where it was held that the development of the common law, "to import into contracts of employment generally rights flowing from the constitutional right to fair labour practices ...", can only be possible where there is no existing statutory provision which already gives effect to the Constitution and which already regulates the matter in dispute.¹⁵⁷ The court therefore acknowledged the possibility that the common law could be developed to import rights flowing from the constitutional provision, but only where legislation does not provide protection or does not apply to an employee.¹⁵⁸

3 Summary of examples of unfairness in the employment relationship necessitating legislative regulation

As already mentioned in the introduction to this article, the Wiehahn Commission in 1979 recommended the adoption of legislation pertaining to fair labour practices.¹⁵⁹ From the preceding discussion it may be observed that the general nature of the law¹⁶⁰ which regulated the employment relationship did not bear much evidence of fairness.¹⁶¹ A general imbalance in the relationship between the employer and the

150 (2007) 28 ILJ 2209 (SCA).

151 (2008) 29 ILJ 1369 (SCA).

152 *Jonker v Okhahlamba Municipality* (2005) 26 ILJ 782 (LC) at 568-569.

153 (2009) 30 ILJ 105 (E).

154 (2009) 30 ILJ 605 (LC).

155 (2010) 31 ILJ 1099 (NGP).

156 (2010) 31 ILJ 529 (SCA).

157 Par [55].

158 Par [54].

159 Refer to n 8 as well as to par 4 *infra* for a detailed discussion of these recommendations.

160 That is the law until, at least, the nineteenth century.

161 At least not of a standard of fairness that we currently require.

employee as well as inadequate protection of the majority of people (mainly based on political policy considerations) was endorsed by the general prevailing law and the legal system of that time.¹⁶² Although the preceding discussion might already have served as an explanation of the rationale for the Wiehahn Commission's recommendation, it is necessary also to highlight other examples¹⁶³ of unfairness during the twentieth century which have not only perpetuated this unfairness, but basically characterised the entire sphere of labour in South Africa.¹⁶⁴

3 1 The right to work

From the preceding discussion it may be seen how a person's right to work was often negatively influenced in that: a) only free men could tender their services in return for remuneration;¹⁶⁵ b) the Khoisan were initially "encouraged" to live and work on farms (no matter whether they wanted to or not) as they were compelled to have a fixed and registered place of residence, and were only allowed to travel if certified to do so;¹⁶⁶ c) people were explicitly prohibited from performing certain kinds of work;¹⁶⁷ and d) work could be performed only if a non-white worker was allowed to be present at a particular place. The non-white worker's right to work consequently depended on whether the law allowed for the application of a pass, and, if so, also on the success of such an application.¹⁶⁸ Apart from these examples, a person's right to work was also directly and indirectly curtailed in various other ways.

The so-called system of pass laws was an example of an indirect manner of limiting a person's right to work.¹⁶⁹ In terms of these laws people needed consent,

162 When discussing other instances of unfairness, brief reference will be made to the relevant instances of unfairness which were reflected in the general laws and prevailing legal system, as discussed in par 2 *supra*.

163 These examples will be discussed under similar categories of unfair labour practices as portrayed in the recommendations of the Wiehahn Commission (of which a more detailed discussion will follow in par 4 *infra*).

164 The highlights will be categorised according to the categories of unfairness which were contained in the 1979-recommendation of the Commission.

165 Refer to par 2 1 *supra*.

166 Refer to par 2 2 4 *supra*.

167 One such example can be found in a proclamation issued by the Cape Colony in 1848 to regulate the provisional government in the Orange River Sovereignty. This proclamation, *inter alia*, provided that "(n)o person of colour is ever to be employed in conveying summonses, or in the execution of any point of law, nor are any of the military at present stationed at Bloemfontein to be employed in matters of a civil nature" (Proclamation 8 March 1848 by Smith (Cape Colony) in Eybers 1918: 273-275). Another example was the prohibition of black people performing skilled work on buildings in urban areas, except in the segregated townships (Native Building Workers Act 27 of 1951 in GG 4601, 4 May 1951).

168 Refer to par 2 2 4 *supra*.

169 A few examples of the specific part of the pass law system that influenced the right to work, will be referred to. The general system will therefore not be discussed. The pass law system applicable to coloured persons, other than some coloured persons residing in the Orange Free State, was repealed in 1923 (Natives (Urban Areas) Act 21 of 1923: s 28 in GG 1326 of 19 Jun 1923). The pass law system applicable to black people was repealed only in 1986.

evidenced by a pass, to be present at a certain place (at a certain time) – which might of course have included the workplace – or to work at a certain place (at a certain time). One of the earliest examples in this regard dates back to 1872. In terms of a proclamation,¹⁷⁰ “uncivilised” black servants¹⁷¹ needed to obtain a daily pass to be present at the diamond fields in Kimberley.¹⁷² If such a servant managed to secure employment, another pass was issued by the master to signify the servant’s right to be present at the workplace.¹⁷³ The servant also had to obtain a third pass on leaving the field, certifying that he had carried out his employment satisfactorily.¹⁷⁴ Another example is the pass law that became effective in 1896.¹⁷⁵ This law required male servants of the coloured races to acquire district passes and metal badges, in addition to their travel passes, in order to work on the gold-fields.¹⁷⁶ Surprisingly, the government implemented a labour tax in the same year in terms of which all Africans, who could not prove that they had been in *bona fide* wage employment for at least three months in a year, had to pay ten shillings.¹⁷⁷ The system of pass laws therefore had an enormous impact on a person’s right to work. Similar provisions pertaining to the regulation of black people’s right to residence also limited a black person’s right to work: the Natives (Urban Areas) Act of 1923 not only made provision for the urban residence of black people in “registered” areas, but also provided that employers were prohibited from employing black people if they did not reside in

170 Proclamation 14 of Aug 1872 (Cape Colony) (Davenport (2010)).

171 It is noteworthy to make mention of South Africa’s “civilised labour policy” at that time. “Civilised labour” was defined as “labour ... rendered by persons, whose standard of living conforms to the standard ... tolerable from the usual European standpoint ...”. “Uncivilised labour” was defined as labour performed by labourers who “enjoyed a standard of living restricted to the bare requirement of the necessities of life as understood among underdeveloped people ...”. In terms of the civilised labour policy state departments not only received an instruction to give preference to civilised labour but the Board of Trade and Industries was empowered to withhold import rebates from firms that employed too few white workers in terms of the Customs Tariff and Excise Duties Amendment Act 36 of 1925 (Brassey 1998: [A1: 29]).

172 Meredith 2007: 45. Due to the fact that white workers were to some extent relieved of this restriction, it soon led to differences between the different races, which in turn led to the first recorded strike by black workers in 1883 (McGregor 2012: 82).

173 *Ibid.* This meant that a person was not able to apply for work or to work if such a pass was not issued.

174 Davenport 2010.

175 Witwatersrand Chamber of Mines 1896: 59.

176 Law No 23 of 1895 (Republic of the ZAR) (Witwatersrand Chamber of Mines 1896: 60-68). The Master and Servants Act 49 of 1901 (Cape Colony) also required all workers working and living in urban areas to be issued with passes that had to be carried at all times.

177 This tax was implemented in terms of the Glen Grey Act 25 of 1894 (Cape Colony). One of the reasons for introducing this measure was to remove “natives from that life of sloth and laziness, teaching them the dignity of labour, and [make] them contribute to the prosperity of the state and ... give some return for our wise and good government ...” (the words of Cecil Rhodes during his speech of 27 Jul 1894 available at <http://www.sahistory.org.za/people/cecil-john-rhodes> (accessed 7 Feb 2016)).

such registered areas.¹⁷⁸ Later restrictions confirmed extended control to all urban areas and to black women.¹⁷⁹

Another system which had a direct influence on a person's right to work was the system of "work reservation". Work reservation entailed the reservation of work for persons of a specified race or for persons belonging to a specified class.¹⁸⁰ The consequences of work reservation for black and coloured people were that¹⁸¹ black and coloured people, including highly skillful and semi-skilled people: a) were forced into the "cheap labour" category; b) were only allowed to undertake "unskilled labour"; and c) could only earn low wages.¹⁸² This system was, for the first time, endorsed by legislation in 1926 – but only for the mining industry.¹⁸³ The Mines and Works Amendment Act provided that certificates for competency required to perform skilled work on mines could not be issued to black and coloured people.¹⁸⁴ The Industrial Conciliation Act of 1956 officially endorsed work reservation (as seen on the mines) to be applied in the entire industry in full force.¹⁸⁵ It was also provided that employers who gave work to a person, where the work was not reserved for a person of that race, were guilty of an offence.¹⁸⁶ In 1964, after the owners of twelve gold mines applied for an applicable concession, black people were, however, allowed to perform some work reserved for whites only.¹⁸⁷ In 1967 black miners were

178 Natives (Urban Areas) Act 21 of 1923: s 18. The position was worsened in 1930 when the Governor-General could proclaim that no natives were to enter any urban area for the purpose of seeking employment or residing in such area (Natives (Urban Areas) Amendment Act 25 of 1930: s 3(d) in *GG* 1875 of 30 May 1930). Also refer to s 28 of the Native Administration Act 38 of 1927 (*GG* 1645 of 5 Jul 1927).

179 Natives Laws Amendment Act 54 of 1952 (*GG* 4873 of 27 Jun 1952).

180 Industrial Conciliation Act 28 of 1956: s 77(6)(a) (*GG* 5679 of 11 May 1956). It may also be defined as the setting aside, by law, of certain skilled grades of employment for certain ethnic groups: see <http://www.oxforddictionaries.com/definition/english/job-reservation> (accessed 7 Feb 2016). The alternative definition is evidence of the fact that the system of job reservation was also supported by regulations prescribing the type and quality of education which were to be given to black and coloured people. Further regulations enabled the government to require certain levels of education – which were not available to persons in certain race groups – for allowing the development of skills (see also the discussion in par 3 4 *infra*).

181 Apart from the fact that no work was ever reserved for non-white people (Alexander & Simmons 1959: 20).

182 See http://www.southendmuseum.co.za/index.php?option=com_content&view=article&id=28&Itemid=30 (accessed 7 Feb 2016).

183 Mines and Works Amendment Act 25 of 1926 (*GG* 1555 of 25 May 1926).

184 Section 1.

185 Section 77. A few examples can be provided: In 1958 the positions of ambulance drivers, firemen and traffic police in Cape Town were reserved for whites. In 1959 the operation of lifts (other than for the conveyance of non-Europeans or for goods only) in Bloemfontein, Johannesburg and Pretoria, was reserved for whites. The distribution of races within the clothing industry was frozen in 1960. Section 77 was only repealed in 1979 (Industrial Conciliation Act 94 of 1979: sec 17).

186 Section 77(13)(a).

187 Brassey 1998: [A1: 40]. This was necessitated by an expansion of South Africa's economy. Although this proved to increase productivity, government put an end to it.

again permitted to participate in “reserved work” but only under certain conditions, namely that white miners should not be retrenched as a result of this and that whites were to receive the majority share of the increase in productivity.¹⁸⁸

A person’s right to work was also affected by the limitation to engage in work of a person’s choice. A second example of this limitation was the Native Laws Amendment Act¹⁸⁹ which restricted the movement of “native labour” from farms to urban areas.¹⁹⁰ Local municipal officers and native commissioners also had to control the influx of blacks into urban areas.¹⁹¹ Apart from restricting racial groups to certain occupations, other groups of people were also directly or indirectly restricted from occupying an employment position of choice: women, for example, were mostly prevented from occupying professional or other formal positions of employment due to conservative, patriarchal ideas.¹⁹²

3 2 The rights to associate, to bargain collectively and to strike

We have already noticed, from the preceding discussion, that no provision was made for the registration of trade unions, the right to belong to trade unions, the right to bargain collectively or the right to strike.¹⁹³ Apart from this, these rights were directly and indirectly curtailed in various other ways as well.

3 2 1 The right to form a trade union and to belong to a trade union

European tradesmen introduced South African workers to British trade unionism and principles thereof such as protective labour legislation, safe working conditions and basic worker protection.¹⁹⁴ The arrival of employees from abroad resulted in the establishment of the first trade union on 22 December 1881.¹⁹⁵ The main objective of this union was to protect the status of their members.¹⁹⁶ The first locally based union, the Durban Typographical Society, was established in 1886 and it combined forces with similar trade unions in 1898 in order to form the first true South African

188 *Ibid.*

189 54 of 1952.

190 Sections 27, 28.

191 Brassey 1998: [A1: 39].

192 Shephard 2008: 5-6.

193 Refer to par 2 2 4 *supra*.

194 McGregor 2012: 3.

195 The so-called “Carpenters’ and Joiners’ Union” (Nel 2012: 81; see <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm> (accessed 3 Mar 2011). It was, however, a mere branch of the English trade union called the “Amalgamated Society of Carpenters and Joiners of Great Britain”.

196 Finnemore 2006: 21-22. Interestingly, it was not only black workers who were initially excluded from the benefits of these unions, but also Afrikaans-speaking workers.

trade union, namely the South African Typographical Union.¹⁹⁷ This union served the printing, newspaper and packaging industries and concentrated on organising the technical employees in these sectors.¹⁹⁸ The first trade union to organise black employees was the Industrial Workers of Africa, formed in September 1917.¹⁹⁹ After merging with the Industrial and Commercial Workers' Union of Africa in 1920, its membership comprised of workers from harbours, farms, domestic services, factories, education and retail.²⁰⁰

The Industrial Conciliation Act of 1924²⁰¹ provided for the registration of employers' organisations and trade unions.²⁰² But it seems as if these trade unions and employers' organisations could only be registered for the benefit of white, coloured and Indian people: black people were not included in the definition of an employee as an employee was defined as any person, excluding a person whose contract of service or labour was regulated by any black pass laws²⁰³ or regulations or by the Native Labour Regulation Act 15 of 1911.

Although black employees were not allowed union membership in terms of the 1924 Industrial Conciliation Act, unregistered industrial unions were emerging and in 1928 the South African Federation of Non-European Trade Unions (SAFNETU) was formed.²⁰⁴ The non-racial South African Trade and Labour Council (SATLC) was formed in 1930 and called for legal recognition of African trade unions.²⁰⁵ The 1937 Industrial Conciliation Act²⁰⁶ was enacted to promote and attain industrial peace between employers and employees, but major strikes characterised this period and Africans were still excluded from joining unions.²⁰⁷ Trade union registration and membership, to the contrary, increased with rapid strides.²⁰⁸

197 Nel 2012: 81. By now, however, Afrikaans-speaking workers were no longer excluded: only black workers were excluded.

198 See <http://www.satu.co.za/> (accessed on 12 Feb 2016).

199 Van der Walt 2004: 68.

200 Gioliomee & Mbenga 2007: 248.

201 Industrial Conciliation Act 11 of 1924 (*GG* 1380 of 31 Mar 1924).

202 Chapter 3 of the Act. Unions were defined as "any number of persons associated together ... for the purpose of regulating relations between themselves and their employers or for protecting the interests of employees ...": s 24.

203 According to Nel 2012: 85, black females were not compelled to carry passes. A Supreme Court decision in 1944 confirmed this and held that black women could gain membership of registered trade unions. Later, the Industrial Conciliation Act 28 of 1956, however, explicitly excluded all black people.

204 Brassey 1998: [A1: 31-32].

205 Godfrey *et al* 2010: 46.

206 36 of 1937.

207 Du Toit 2006: 8.

208 In 1941, a conference of forty-one organisations convened by the Transvaal branch of the African National Congress (ANC), established the African Mine Workers Union. By 1945 the Council of Non-European Trade Unions stood at 119 affiliates representing 158 000 workers on the Witwatersrand. The SATLC, the SAFNETU and the Western Province Federation of Labour Unions collaborated in 1954. In 1955, fourteen erstwhile affiliates of the South African Trade Union Council and nineteen members of the Council of Non-European Trade Unions formed the

With the promulgation of the 1956 Industrial Conciliation Act, much of the 1924 Act remained intact.²⁰⁹ White and coloured employees were guaranteed the right to freedom of association.²¹⁰ The weaker position of the black employees remained since this Act was applicable to whites and coloureds in the private sector only.²¹¹ Provision was made for the registration of trade unions, employers' organisations and industrial councils.²¹² Much more use was made of this Act than its predecessor insofar as more employees, especially black employees, belonged to internal work committees.²¹³ Although this might have seemed more favourable than previously, it must be borne in mind that these committees were not totally independent and also did not possess the same degree of collective bargaining powers as unions did.²¹⁴ Moreover, certain limitations were placed on mixed unions²¹⁵ and African workers were still prohibited from joining unions. It is therefore accurate to state that the interests of black employees were not adequately promoted in this regard.

In 1961, the 1956 Industrial Conciliation Act was amended to provide that no objections by mixed unions, pertaining to the registration of white unions, would be entertained if the mixed union's membership of coloured people exceeded one half of the number of white persons employed in that workplace.²¹⁶

Revolt in reaction to the racially segregated system and the absence of promotion of certain workers' interests²¹⁷ resulted in strikes by unorganised black workers in Durban in 1973.²¹⁸ The strikes were followed by the establishment of numerous unorganised unions for black workers. As Du Toit *et al* put it: "[T]he new unions grew rapidly and increasingly won recognition."²¹⁹ In reaction to this the 1953

South African Congress of Trade Unions (SACTU) in order to mobilise the black working class for securing political liberation. In the same year, SACTU entered into an alliance, the Congress Alliance, with the ANC. (See, also, Brassey 1998: [A1: 34, 35 and 39]).

209 Du Toit 2006: 9.

210 Industrial Conciliation Act 28 of 1956: s 78.

211 Industrial Conciliation Act 28 of 1956: s 1(1)(xi); Nel 2012: 87. An employee was defined as "any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive, any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer".

212 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 16].

213 Refer to par 3 2 2 *infra*.

214 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 17 4].

215 Examples of limitations included that these unions had to establish separate branches for white and coloured members, had to hold separate meetings and had to ensure that such a union's executive body consisted only of white persons: s 8(3) of the Industrial Conciliation Act 28 of 1956. Mixed unions referred to unions with both white and coloured members. The registration of any more multi-racial unions was, in fact, prohibited (s 5(6)).

216 Industrial Conciliation Amendment Act 18 of 1961 (GG 6661 of 30 Mar 1961).

217 Du Toit 2006: 10.

218 *Ibid*.

219 *Ibid*. Also see Van Jaarsveld & Van Eck 1996: 14. At the end of 1975 more than 608 000 Africans belonged to these committees.

Native Labour (Settlement of Disputes) Act²²⁰ was drastically amended in 1973 to make provision, *inter alia*, for a Central Black Labour Council. This Council played an important role in representing black employees' interests pertaining to conditions of employment and wage determinations at meetings of industrial councils and the Wage Board.²²¹

3 2 2 The right to participate in collective bargaining

The 1924 Industrial Conciliation Act was intended to serve as a vehicle to ensure labour peace and to provide machinery for bargaining over conditions of employment and resolving disputes. Prominent features of this Act included features including, but not limited to, the registration of industrial councils²²² (and *ad hoc* conciliation boards) promoting voluntary collective bargaining and a dispute resolution mechanism with the emphasis on the settlement of collective disputes.²²³ These benefits of collective bargaining and dispute resolution were, however, not available to pass-bearing African employees.²²⁴

The Native Labour (Settlement of Disputes) Act²²⁵ was initially enacted as a measure to serve as an alternative for the acknowledgement of black unions. Employees were not really encouraged to participate directly in the determination of their conditions of employment. Provision was made for the establishment of internal works committees in industrial establishments employing twenty or more black workers.²²⁶ The main purpose of these committees was to serve as a vehicle through which white employers could communicate with black workers. These committees were therefore only consulted in the event of a dispute in a workplace.²²⁷ The Act also made provision for regional native labour committees, chaired by a white official, to regulate labour within communities.²²⁸ These committees were overseen by a whites-only Central Native Labour Board.²²⁹ After problems were experienced with the control over bargaining by unregistered unions,²³⁰ the Native Labour (Settlement

220 Native Labour (Settlement of Disputes) Act 48 of 1953 (*GG* 5162 of 9 Oct 1953).

221 *Kommissie van Ondersoek na Arbeidswetgewing* 1981: pars [4 15 1], [4 152].

222 This can be compared with our current bargaining council (Brassey 1998: [A1: 28]).

223 Industrial Conciliation Act 11 of 1924: ch 3. Dispute resolution could occur in respect of wages, work hours, and other general conditions of employments (s 10). Similar to our current position, strikes and lock-outs were not permissible during the conciliation process (s 12). Municipal and other essential service employees were also prohibited from striking (s 11).

224 It only applied to white, coloured and Indian workers (Godfrey *et al* 2010: 43-44).

225 48 of 1953.

226 Section 7.

227 *Ibid.* These committees consisted of representatives of black employees who were intended to serve as spokespersons in negotiations on matters of mutual interest with employers (Suid-Afrika. *Kommissie van Ondersoek na Arbeidswetgewing* 1981: par [4 15 1]).

228 Section 4.

229 Brassey 1998: [A1: 38].

230 Du Toit 2006: 10.

of Disputes) Act was renamed the Bantu Labour Relations Regulations Act²³¹ and expanded the internal works committees' powers, made provision for liaison committees representing employers and employees and introduced new mechanisms for regulating of wages – and especially black wages.²³²

3 2 3 The right to strike and to participate in other forms of industrial action

It may be concluded that, from as early as 1911,²³³ non-white employees were not permitted to strike as they could be punished for desertion from employment.²³⁴ Despite the prohibition of desertion, 13 000 black mineworkers went on strike in 1913 with a resultant intervention by the army.²³⁵ This was followed by a strike of both white and black miners during July 1913.²³⁶ After Ghandi called for a general strike by all Indian workers in the Natal Colony in 1914, the government followed with the Riotous Assemblies Act.²³⁷ Protest action reoccurred in 1918 with a strike by sanitary workers and mineworkers boycotting mine stores in protest against high prices and also in 1919 with a strike by 71 000 black mineworkers.²³⁸ In January 1922 as many as 22 000 mineworkers went on strike which eventually developed into a revolt,²³⁹ later referred to as the Rand Rebellion.²⁴⁰

231 70 of 1973.

232 Brassey 1998: [A1: 41].

233 The Industrial Disputes Prevention Act 20 of 1909 (Transvaal Colony), which applied only to employers and white workers in the Transvaal Colony, prohibited strikes and lock-outs over disputes which had not served before a Conciliation and Investigation Board (Jeppe & Gey van Pittius 1910: 2377-2393).

234 Native Labour Regulation Act 15 of 1911: s 14(1) (*GG* 112, 2 May 1911). This punishment included a fine of £10 or, in default of payment, imprisonment with or without hard labour for two months.

235 Giliomee & Mbenga 2007: 245.

236 *Ibid.* The strike involved strikers setting fire to the Johannesburg railway station, The Star offices as well as the Rand Club. Hundreds of people were shot dead by the army.

237 27 of 1914 (*GG* 536 of 20 Jul 1914). This Act permitted the government to disperse public gatherings and to close public places in the event of any likelihood of a breach of peace. A public gathering was defined as a “gathering, concourse or procession in, through, or along any public place, of twelve or more persons having a common purpose ...” (s 22). Breach of a contract of employment by participating in riotous behaviour, constituted an offence (s 12(3)). A person who induced persons to cease work was also guilty of an offence (s 10). The prohibition of gatherings or assemblies of black people was confirmed in s 27 of the Native Administration Act 38 of 1927.

238 Brassey 1998: [A1: 25]; M Finnemore 2006: 25. It is believed that this strike was largely organised by the Industrial and Commercial Union (hereafter ICU), which was established in 1919.

239 Giliomee & Mbenga 2007: 247. Jan Smuts fought this revolt with the use of aircraft bombing, field guns, tanks and trench warfare.

240 Nel 2012: 84; Twyman 2001: 319.

The revolt of white mineworkers during the Rand Rebellion in 1922 resulted not only in the bloodiest civil revolt, with almost 250 deaths,²⁴¹ 687 injuries, 4 750 arrests, eighteen condemnations to death and four hangings, but also in the 1924 Industrial Conciliation Act.²⁴² As mentioned above, this Act, apart from providing machinery for bargaining over conditions of employment and the resolution of disputes, also recognised the right to strike by white employees not engaged in essential services. White employees, except those employed to perform essential services,²⁴³ could lawfully engage in a strike: (1) after the dispute was considered and reported on by an industrial council or a conciliation board; (2) if there was no existing agreement to settle the dispute; and (3) if it was not in contravention of the Riotous Assemblies Act of 1914.²⁴⁴ In 1928 the Pact Government proposed amendments to the 1924 Industrial Conciliation Act.²⁴⁵ However, only slight improvements in the form of widened functions of councils and conciliation boards occurred.²⁴⁶

In 1942 the Council of Non-European Trade Unions' members went on a series of strikes over minimum wages. These strikes were very violent and a War Measure²⁴⁷ was promulgated to penalise black employees who went on strike. In 1944 another War Measure²⁴⁸ also prohibited gatherings of more than twenty persons on proclaimed mining ground. But, despite this, the largest strike ever in South African history broke out in 1946.²⁴⁹ Much labour was lost due to prevailing strikes during these times.²⁵⁰ As a result of this, in 1953 strikes by all black people were prohibited by the Native Labour (Settlement of Disputes) Act,²⁵¹ any contravention of which was punishable by imprisonment.²⁵²

241 Van Jaarsveld & Van Eck 1996: 11. Brassey 1998: [A1: 26] refers to 153 deaths.

242 Du Toit *et al* 2006: 6.

243 The reference to essential services included "work connected with the supply of light, power, water, sanitary, transportation or fire extinguishing services ...": see the Industrial Conciliation Act 11 of 1924 s 11. This can be compared with our current description of "maintenance services".

244 Industrial Conciliation Act 11 of 1924: s 12.

245 Brassey 1998: [A1: 28]. These proposed amendments were that: industrial council agreements should remain in force until the expiry-time was arrived at or those were replaced by new agreements; industrial councils should have the power to solve both individual and collective disputes; membership of conciliation boards should be open to persons other than employers, employees and collective bargaining representatives; there should be no need for the formal declaration of a strike; special arrangements should be in place for the recovery of unpaid wages; industrial council agreements should be open to be suspended in native areas; and industrial council agreements should be capable of covering blacks excluded from the Industrial Conciliation Act 11 of 1924.

246 These amendments were effected only in 1930 with the coming into operation of the Industrial Conciliation (Amendment) Act 24 of 1930 (*GG* 1875 of 30 May 1930). See Du Toit 2006: 7.

247 145 of Dec 1942. In the next two years, however, almost 60 breaches of this Measure occurred.

248 War Measure Proclamation 1425 of 1944.

249 Godfrey *et al* 2010: 49-50.

250 Brassey 1998: [A1: 40-41]. 160 000 black and Indian workers took part in strikes in Natal in 1973. In 1974, 189 strikes occurred and in 1975 there were a number of 119 strikes taking place.

251 Native Labour (Settlement of Disputes) Act 48 of 1953: s 18. This included the support of such a strike.

252 *Ibid.*

The 1956 Industrial Conciliation Act regulated white and coloured employees' right to strike.²⁵³ This right was limited by agreements which already regulated the dispute, by wage determinations and by the delivery of essential services.²⁵⁴ Surprisingly, prohibitions on strikes by black employees were amended so as to place black employees in the same position as white employees under the 1956 Act.²⁵⁵

3 3 The right to protection

We have already noticed, from the preceding discussion, how a person's right to protection was negatively influenced in many instances. These include that: a) slaves were not entitled to remuneration for the rendering of services;²⁵⁶ b) the contract of employment was based on, and equated with, the ordinary commercial contract of lease and, consequently, as long as the agreement was based on consensus, the worker could be pressurised into agreeing to almost anything;²⁵⁷ c) although the employer was obliged to pay remuneration, such remuneration could easily be withheld if the employer was, for example, not satisfied with the services or due to the illness of the worker;²⁵⁸ d) the worker did not have any say in management decisions affecting working conditions and legitimate interests;²⁵⁹ e) workers were subject to inhumane forms of punishment, such as imprisonment, hard labour and a spare diet;²⁶⁰ f) a worker's services could be terminated without any valid reason (or at least for any trivial reason) and it was also possible to withhold wages upon such termination;²⁶¹ g) farmers were allowed to apprentice children over the age of eight;²⁶² h) much of the disrespect embedded in slavery-practices continued even after the abolishment of slavery;²⁶³ and i) the families of workers did not enjoy an automatic right of residence with the worker.²⁶⁴ Apart from these, this right to protection was directly and indirectly curtailed in various other ways.

Many employees did not enjoy adequate protection with regard to working conditions, punishment and fair wages.²⁶⁵ Regulation became more "civilized", in

253 Industrial Conciliation Act 28 of 1956: s 65.

254 *Ibid.*

255 Compare this with the previous prohibition/ban on strikes. For an example of such a previous prohibition, refer to the Industrial Conciliation Further Amendment Act 61 of 1966: s 1(a) (*GG* 1585, 4 Nov 1966).

256 Refer to pars 2 1 and 2 2 1 *supra*.

257 Refer to par 2 1 *supra*.

258 Refer to pars 2 1, 2 2 1 and 2 2 4 *supra*.

259 Refer to par 2 1 *supra*.

260 Refer to pars 2 2 1 and 2 2 4 *supra*.

261 Refer to par 2 2 1 *supra*.

262 Refer to par 2 2 4 *supra*.

263 *Ibid.*

264 *Ibid.*

265 Interestingly, from as early as 1914, all workers (including black workers) were guaranteed compensation for injuries sustained within the scope of the employment relationship (Workmen Protection Act 25 of 1914 in *GG* 527 of 2 Jul 1914).

this regard, with the promulgation of the Industrial Conciliation Act of 1924.²⁶⁶ But the protection remained limited and was initially only afforded to an exclusive group of employees.²⁶⁷

Many workers were subjected to unfair and almost inhumane conditions of employment. The first example in this regard was the practice on mines that African workers had to be strip-searched when going off shift.²⁶⁸ The government of the South African Republic was called in to regulate conditions of service on the mines in 1894 and the Chamber of Mines formed the Rand Native Labour Association.²⁶⁹ The first legislation truly regulating employment conditions was the Factories Act²⁷⁰ as well as the Regulation of Wages, Apprentices and Improvers Act.²⁷¹ The Natives (Urban Areas) Act required employers of black people to provide or to hire accommodation for their black employees working in urban areas.²⁷² This Act also enabled the Governor-General to make regulations for contracts of employment of black people residing in registered urban areas.²⁷³ The Shops and Offices Act was enacted in 1939.²⁷⁴ Although it applied to all shops and offices, it did not apply to watchmen, deliverers and cleaners.²⁷⁵ In 1941, the 1918 Factories Act (as amended by the 1931 Factories Amendment Act) was replaced by the Factories, Machinery and Building Work Act²⁷⁶ which made provision for the regulation of working conditions in factories, the supervision of machinery and for general safety and the taking of precautions against accidents. This Act also enabled the Minister to prescribe special

266 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [410]. The most important trendsetting principle of this Act was that of self-regulation in the employer-employee relationship.

267 Black persons were not recognised as employees in terms of the Industrial Conciliation Act 11 of 1924.

268 McGregor 2012: 82; Finnemore 2006: 23.

269 Brassey 1998: [A1: 17].

270 28 of 1918 (*GG* 899 of 4 Jun 1918). It included protective provisions pertaining to working hours, protection of pregnant women, overtime, etc. Although it could be considered as a huge improvement, it applied only to factories.

271 29 of 1918 (*GG* 899 of 4 Jun 1918). This Act made provision for the determination of minimum wages of women and young persons, but it applied only to the industries in which hardly any non-white persons were employed.

272 Natives (Urban Areas) Act 21 of 1923: s 1(1)(e). It is submitted that this regulation, pertaining to the provision of accommodation, was not only intended to ensure the improvement of working conditions (by providing accommodation), but also to ensure that all black people were restricted to living in areas reserved for native occupation.

273 Section 23. Regulations could be made to regulate matters such as conditions of service, conduct between employers and employees, restrictions on the periods of contracts, as well as allowable deductions from wages.

274 41 of 1939 (*GG* 2654 of 23 Jun 1939). It regulated, *inter alia*, hours of work (forty-six hours per week), overtime, paid annual leave, maternity leave and adequate seating for female employees. This Act was later repealed and replaced by the Shops and Offices Act 75 of 1964.

275 Section 1.

276 22 of 1941 (*GG* 2893 of 17 Apr 1941).

conditions of work for employees where such special provision was necessary to safeguard the physical, moral or social welfare of employees.²⁷⁷

Black employees were subjected to punishment if they neglected to perform their duties, worked under the influence of alcohol, refused to obey lawful commands, and used abusive language.²⁷⁸ More severe punishment could be imposed for desertion from employment or for causing injury to property or persons.²⁷⁹

Although the Workmen Wages Protection Act²⁸⁰ secured the payment of wages, it did not provide any regulation of minimum wages. The Wage Act of 1925²⁸¹ was promulgated with the purpose of fixing minimum wages and working conditions for certain employees and, although it did not provide any warrant for racial discrimination, authorities found many ways to mainly benefit white workers by this Act.²⁸² Another Act which worsened the position of black workers was the Mines and Works Amendment Act,²⁸³ which made express provision for discrimination on the mines. The position of African workers was slightly improved in 1930 when the Minister was particularly authorised to specify minimum wages and maximum working hours for persons not defined as an employee.²⁸⁴ The United South African National Party came to power in 1933. Although the Industrial Conciliation Act of 1924 was replaced by a new consolidated Industrial Conciliation Act in 1937,²⁸⁵ it “did not solve the major problems inherent in the dual industrial relations system”.²⁸⁶

In 1974 the South African government came to realise that much-needed changes in the labour market should take place.²⁸⁷ A Wage Board was appointed to investigate the wage rates of the lower paid workers in Natal.²⁸⁸ The Unemployment Insurance Act,²⁸⁹ which previously only operated to the benefit of white employees, was amended to include black workers as well.²⁹⁰

277 Section 51(1)(h). The Minister could therefore require an employer to segregate employees by race or sex on the factory floor, in rest rooms and toilets; see <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01797.htm> (accessed 5 Feb 2016).

278 Native Labour Regulation Act 15 of 1911: s 19(2). This punishment included a fine of forty shillings.

279 *Idem* s 14(1). This punishment included a fine of £10 or, in default of payment, imprisonment with or without hard labour for two months.

280 15 of 1914 (*GG* 522 of 22 Jun 1914).

281 27 of 1925 (*GG* 1494 of 30 Jul 1925).

282 Brassey 1998: [A1: 29], [A1: 30]. Wage Boards were manipulated, determinations were made only for certain grades of workers and a ceiling was put on the number of unskilled workers who might be employed.

283 25 of 1926.

284 Wage Amendment Act 23 of 1930 (*GG* 1875 of 30 May 1930). This was not principally intended to protect African workers but to benefit white workers from being undercut by cheaper African labour (Du Toit 2006: 7; Godfrey *et al* 2010: 46).

285 36 of 1937.

286 Du Toit 2006: 8; Brassey 1998: [A1: 32].

287 Weissman 1985: 169. One of the final factors leading to this realisation was probably the threatening African Mineworkers Union coal boycott of 1974.

288 Brassey 1998: [A1: 41].

289 30 of 1966.

290 Unemployment Insurance Amendment Act 12 of 1974.

3 4 The right to develop

It has emerged from the preceding discussion that provision was made for apprenticeship contracts and for the provision of food, shelter and clothing to apprentices, and it was possible to apprentice Khoisan children from the age of eight years.²⁹¹ Apprentices were also compelled to complete their training.²⁹² The right to development was directly and indirectly curtailed in various other ways.

With the discovery of diamonds and gold²⁹³ South Africa experienced an influx of artisans and skilled workers from Europe.²⁹⁴ This led to the industrialisation of the country. Although natural resources were readily available at that stage and although the growth in the labour force was enormous,²⁹⁵ South Africa could not provide adequate skilled and unskilled labour to work the resources.²⁹⁶ Scarce-skilled employees were recruited mainly from Europe and Australia and these, mainly white employees, occupied elite positions that required skills which could not be provided by white or black South Africans at that stage.²⁹⁷ In an attempt to reduce labour costs, unskilled workers were furthermore required to perform skilled work. This posed a threat to white miners and after a strike in 1902, these miners formed the Transvaal Miners' Association.²⁹⁸ Another strike by white miners at the Knights Deep Mine took place in 1907 due to their dissatisfaction after employers proposed to extend skilled work to black workers as well. The shortage of skilled workers, however, continued and even worsened. The government replied to this problem by declaring "dilution" as permissible.²⁹⁹ In essence, dilution was a relaxation of the "civilized labour policy". It allowed unqualified black workers outside the mines permission to perform skilled work under white supervision.³⁰⁰ Ironically, it was found that the performance of skilled labour by unskilled black employees had no detrimental effect on the quality of production.³⁰¹

291 Refer to par 2 2 4 *supra*.

292 Refer to par 2 2 1 *supra*.

293 Diamonds were discovered at the Orange River valley in 1867 and gold was discovered at the Witwatersrand in 1886 (Giliomee & Mbenga 2007: 158 & 199).

294 Employment opportunities did not only exist on the mines but labour was also needed on the roads, the railway services and on the farms supplying those areas.

295 Brassey 1998: [A1: 15]. By 1874 there were 10 000 black workers employed on the Kimberley mines.

296 Finnemore 2006: 21.

297 *Ibid*. Despite the import of scarce-skilled employees, South Africa experienced a shortage of unskilled labour. Most black peasants were subsisting on the land although a small number resorted to working on the mines. The reasons for this included: earning a livelihood; earning money to buy guns in order to protect themselves against the deprivation of their land; for those who were already deprived of their land (eg the Sotho and Griqua), having to find an alternative means of income; and simply hoping to find fortunes.

298 Brassey 1998: [A1: 20].

299 *Idem* [A1: 34].

300 The discrimination on mines, although, continued under the auspices of the Mines and Works Amendment Act.

301 Brassey 1998: [A1: 34]. The Board of Trade and Industries actually made the following remark: "Blacks, it was able to report, were better at performing skilled and semi-skilled work than was generally thought."

The development of skills of black and coloured people was controlled (and limited) by the government. The Apprenticeship Act of 1922³⁰² only applied to skilled trades and, therefore, excluded black people. The Apprenticeship Act of 1944³⁰³ contained similar restrictions. The Bantu Education Act³⁰⁴ was promulgated to prevent black and coloured people from receiving an education that would pose a threat to whites and lead them to aspire to positions that they were not allowed to hold.³⁰⁵ Black and coloured people were only allowed to attend special native (Bantu) schools established by the government,³⁰⁶ which was then in a position to prescribe the courses of training or instruction in these schools.³⁰⁷ Furthermore, a person was only allowed to enter into an apprenticeship having passed standard 6:³⁰⁸ this requirement was beyond the reach of the vast majority of coloured youths as it was an educational entry level that only a handful of coloured schools met.³⁰⁹

4 The recommendation (by the Wiehahn Commission) to develop legislation pertaining to fair labour practices

A Commission of Inquiry into Labour Legislation³¹⁰ was established in 1977 in order to inquire into, report upon and make recommendations regarding existing labour legislation, with special reference to laying a foundation for sound labour relations.³¹¹ The Commission first reported on “fair labour practices” (as a crucial element ensuring sound labour relations) in 1979 and expressed the need to secure individual employees’ interests.

The Commission stated the obvious: legislation did not adequately address the parameters of fairness and unfairness.³¹² As early as in 1979, the South African

302 Apprenticeship Act 26 of 1922 (*GG* 1252 of 19 Jul 1922).

303 Apprenticeship Act 37 of 1944 (*GG* 3353 of 8 Jun 1944).

304 47 of 1953 (*GG* 5162 of 9 Oct 1953).

305 Dr HF Verwoerd explained the policy as follows: “There is no place for the Bantu in the European community above the level of certain forms of labour. Until now he has been subjected to a school system which drew him away from his own community and misled him by showing him green pastures of European society in which he was not allowed to graze” (see <http://webcache.googleusercontent.com/search?q=cache:L7i5iselt3MJ:www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s+&cd=2&hl=en&ct=clnk&gl=za> (accessed 15 Feb 2016)).

306 Section 7.

307 Section 15(d).

308 Apprenticeship Act 26 of 1922: s 8(1) (*GG* 1252 of 19 Jul 1922).

309 See http://www.southendmuseum.co.za/index.php?option=com_content&view=article&id=28&Itemid=30 (accessed on 15 Feb 2016).

310 Later known as the “Wiehahn Commission”.

311 See n 8 *supra*.

312 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [4 1271].

labour market was heterogeneous in terms of race, colour and culture and it was this heterogeneous nature which necessitated regulation in terms of fair³¹³ principles.³¹⁴ It was stated that the content of such fair principles was to be guided by a consideration of existing laws and common law principles in the context of freedom, legislative justice, equality and equal participation.³¹⁵ The recommendation was consequently made to adopt and implement legislation, based on non-discrimination, equality and justice, on fair labour practices.³¹⁶ The Commission also identified the following as six basic elements of such legislation:³¹⁷

(a) **The right to work** This right originated in the right to existence as well as in religious-ethical values.³¹⁸ This right is regarded as a manifestation of a person's right to the ultimate actualisation of his personality.³¹⁹ This right is, however, subject to economic factors and the availability of work and should, at the very least, be interpreted to guarantee a right to have equal access to employment opportunities.³²⁰ (This element of fair labour practices is currently regulated, mainly, in the Employment Equity Act of 1998.³²¹)

(b) **The right to associate** It is necessary for an employee to be able to associate with a trade union³²² because of the fact that a trade union is defined as "an association of employees whose principal purpose is to regulate relations between employees and employers ...".³²³ A trade union should, therefore, act as the guardian of its members' interests. The employee should be able to associate freely with a trade union without prior authorisation and without distinction on grounds such as race, colour, religion or sex.³²⁴ (This element of fair labour practices is currently regulated, mainly, in the Labour Relations Act 66 of 1995.)

(c) **The right to bargain collectively** Collective bargaining was regarded as a process of decision-making between employers and trade unions with the purpose of establishing rules to regulate the substantive and procedural conditions of their relationship.³²⁵ It covers both the individual and the collective relationship and is aimed at reaching agreement.³²⁶ (This

313 The Commission identified fairness as a concept, relevant to practices, in accordance with the principles of natural justice (*idem* par [4 127 3]).

314 *Idem* par [4 127 13]. Such a heterogeneous nature required the special protection of anti-discrimination and equality.

315 *Idem* par [4 127 17].

316 *Idem* par [4 129 1].

317 *Idem* par [4 129 6]. These six elements have developed a normative character in accordance with the increasing social conscience and growing concern with the employee and the workplace.

318 *Idem* par [2 4].

319 *Ibid.*

320 *Idem* pars [2 4 1] – [2 4 2].

321 Employment Equity Act 55 of 1998.

322 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 5 1].

323 Labour Relations Act 66 of 1995: s 213.

324 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 5 3].

325 Labour Relations Act 66 of 1995: par [2 6].

326 *Ibid.*

THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES

element of fair labour practices is currently regulated, mainly, in the Labour Relations Act of 1995.³²⁷)

(d) **The right to withhold labour** This right was considered to be available to both the employer (lock-out) and the employee (strike).³²⁸ This right, properly regulated, is an essential component of collective bargaining: without this element, collective bargaining may result in nothing else than collective begging.³²⁹ (This element of fair labour practices is currently regulated, mainly, in the Labour Relations Act of 1995.³³⁰)

(e) **The right to be protected** This right received more attention with the increased concern over employees' physical and emotional well-being.³³¹ Accessible, healthy and safe working conditions form the backbone of this right.³³² Due to the connection between a person's work and his social life, this right may be extended to his family and *lewensfeer* outside the workplace.³³³ The safeguarding of an employee's right to work can be equated with the "humanisation of the workplace".³³⁴ (This element of fair labour practices is currently regulated, mainly, in the Basic Conditions of Employment Act of 1997,³³⁵ the Occupational Health and Safety Act of 1993³³⁶ and the Compensation for Occupational Injuries and Diseases Act of 1993.³³⁷)

(f) **The right to develop** In order to truly exist, a person must be able to assert himself in his natural environment.³³⁸ The development of the environment, however, necessitates the development of the person.³³⁹ Such development can only take place with the necessary education and training. (This element of fair labour practices is currently regulated, mainly, in the Skills Development Act of 1998.³⁴⁰)

This recommendation of the Wiehahn Commission may be viewed as a reaction to historically unfair labour practices. It may also be regarded as the first official recognition of the need to protect fair labour practices. If our current labour legislation, giving effect to the constitutional right to fair labour practices, is considered, it is not by accident that the same six elements identified by the Wiehahn Commission, remain the guiding elements of our current constitutional right.

327 Labour Relations Act 66 of 1995.

328 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 7].

329 Du Plessis & Fouche 2015: 277.

330 Labour Relations Act 66 of 1995.

331 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 8].

332 *Idem* par [2 8 1].

333 *Ibid.*

334 *Ibid.*

335 Basic Conditions of Employment Act 75 of 1997.

336 Occupational Health and Safety Act 85 of 1993.

337 Compensation for Occupational Injuries and Diseases Act 130 of 1993.

338 Suid-Afrika. Kommissie van Ondersoek na Arbeidswetgewing 1981: par [2 9].

339 *Ibid.*

340 Skills Development Act 97 of 1998.

5 The continued relevance and importance of common law

In 1968, Hahlo and Kahn stated that “Roman-Dutch law is our ‘common-law’ system”.³⁴¹ For a long time the common law contract of employment was of considerable importance because it was accepted that all employment relationships involved a contractual component and were based on and established by the common law contract of employment.³⁴² As indicated above,³⁴³ the common law was also required to be referred to by courts in the absence of governing legislation or judicial precedent. It was also stated that the courts could not only turn to the common law in the absence of legislative or constitutive regulation, but even in spite of it, especially, for example, where the common law contract provided more beneficial terms than the legislation³⁴⁴ (and as long as it was not in conflict with the Constitution or other legislation).³⁴⁵ Where an employee was entitled to a right in terms of the common law, legislation as well as the Constitution, nothing prevented the employee from utilising the common law if that would secure a more favourable position.³⁴⁶ The courts were indeed unafraid to apply the common law where it overlapped with legislation.³⁴⁷

It is, however, suggested that the importance of the common law contract of employment, as the basis of the employment relationship, is slowly but surely fading.³⁴⁸ This is for two reasons. The first reason is to be found in the changing circumstances of modern-time working relationships and also because of the fact that common law is “largely blind to the unequal status and bargaining power of employers and their employees”.³⁴⁹ The unequal status and bargaining power have consequently been addressed³⁵⁰ in various instruments. The common law principles may therefore be overridden by the provisions of the contract itself,³⁵¹ legislative

341 Hahlo & Kahn 1968: 303.

342 Van Jaarsveld & Van Eck 2006: 36; Brassey 1998: [C1: 6]. Without such a valid and legal contract of employment, no employment relationship was acknowledged.

343 Refer to the introductory quotation of this paragraph.

344 Le Roux & Jordaan 2009: E1-2.

345 *Idem* E1-1.

346 *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA).

347 *Ibid*; *Media 24 Ltd v Grobler* (2005) 26 ILJ 1007 (SCA); *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA).

348 Van Niekerk *et al* 2012: 5. The essentials of the employment relationship itself should be relied on, rather than the contract of employment.

349 Van Eck *et al* 2004: 904.

350 Unequal and unfair common law principles are usually addressed in agreements, legislative measures and the Constitution.

351 Contracts of employment, although based on the principles of the common law contract of employment, may contain (and regularly do) agreed provisions that are much more beneficial than the common law itself: the agreed provision in the contract will, in such an instance, override the specific principle of common law (Du Plessis & Fouche 2015: 5).

measures,³⁵² provisions of collective agreements³⁵³ as well as the Constitution.³⁵⁴ Secondly, it must be acknowledged that the common law contract of employment is no longer regarded as the only basis upon which an employment relationship will be established: An employment relationship can be established even in the absence of such a contract of employment.³⁵⁵

It is therefore submitted that, although the common law contract of employment has become “less relevant” and “less important”, its relevance and the importance have not entirely disappeared from the scene. The *SA Maritime*-decision limits the relevance of the contract of employment in so far as it concerns employees who do not enjoy legislative protection and in so far as it concerns the implication of provisions into contracts of employment. It follows that the principles of the common law contract of employment remain extremely relevant and important to employees who are not protected by legislation.³⁵⁶ It also remains relevant and important to

352 Legislative measures, in this sense, include legislation, ministerial determinations as well as sectoral determinations. Legislation takes precedence over common law and a contract of employment (unless it provides for more favourable conditions of employment); ministerial determinations and sectoral agreements take precedence over the common law, contracts of employment and legislation (Du Plessis & Fouche 2015: 5).

353 Despite the fact that this topic requires an in-depth discussion, only the basic principles will be set out here. A collective agreement varies any individual contract of employment between an employer and an employee if they are both bound by the collective agreement. The Labour Relations Act 66 of 1995 provides, in s 23, that collective agreements bind parties to the agreement, members of such parties, as well as non-member employees (if the necessary requirements have been met). Sections 31 and 32 provide for the binding effect of collective agreements concluded by bargaining councils (Van Niekerk & Smit 2015: 402; Grogan 2014a: 165-174). Collective agreements take precedence over the common law, individual contracts of employment and legislation; bargaining council agreements take precedence over the common law, individual contracts of employment, legislation and other collective agreements (Du Plessis & Fouche 2015: 5-6).

354 The Constitution takes precedence over everything else as it is the supreme law of South Africa. However, where an employee is protected by legislation which was promulgated to give effect to the Constitution, eg the Labour Relations Act, such an employee may not invoke the Constitution to benefit from implied terms (*SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) 56).

355 Until recently the common law contract of employment was regarded as the only basis to establish an employer-employee relationship. In *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC), however, it was found that a prostitute, engaged in an illegal employment contract, could be regarded as an employee on the basis of her participation in an employment relationship – she delivered services in return for remuneration and under the authority of her employer. The same approach was also followed in *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC), where the court found that, even where a contract of employment of an illegal immigrant is invalid because of the provisions of the Immigration Act, such a person is nonetheless an employee because of the fact that the definition of an employee, contained in the Labour Relations Act of 1995, is not dependent on a valid and enforceable contract of employment, but rather on an employment relationship.

356 Also refer to Bosch 2006: 29, who stated that the common law “permeates ... labour legislation, remaining available where it has not been statutorily superseded”.

employees who are protected by legislation if they choose to approach a court on the basis of the law of contract instead of on the basis of labour law.³⁵⁷ And it also remains relevant and important because, although no longer the only basis for constituting an employment relationship, the common law contract of employment remains one of the most important sources for the legal basis of the employment relationship.³⁵⁸

6 Conclusion

The regulation of labour matters in South Africa has long been characterised by an absence of fairness. In 1979, the Wiehahn Commission recommended the adoption of legislation pertaining to fair labour practices. The right to fair labour practices was addressed in legislation and was also consequently entrenched in the South African Constitution. The remaining importance of the common law and the common law contract of employment has been questioned in many instances.

A brief outline of the history of labour regulation up until 1977 has been provided and significant aspects that impacted on and necessitated the right to fair labour practices, were discussed. It may be concluded that the history of labour regulation, or more specifically, that of fair labour practices, has indeed impacted on the current regulation of the right to fair labour practices: The Wiehahn Commission's recommendation was based upon the history of unfairness and the subsequent regulation of labour has in fact, whether intentionally or not, addressed the former recommendation of the Wiehahn Commission. The consideration of the historical development of (un)fair labour practices, therefore, provides insight into the meaning of section 23(1) of the Constitution.

It is also concluded that the common law and the common law contract of employment, despite improvements in the regulation of fair labour practices, remain relevant and important. Not only do they provide insight into the meaning of the current right to fair labour practices, but they remain crucial for ensuring that employees, who are not protected and covered by labour legislation, also enjoy the right to fair labour practices. It also remains pivotal with respect to issues dealing with the lawfulness of the contract of employment and the lawfulness of actions in terms of the contract.

ABSTRACT

The gradual increase in the earth's population and the consequent decrease in natural resources necessitated the exchange of the right to an independent existence for the

357 Refer to *Nyathi v Special Investigating Unit* (2011) 32 ILJ 2991 (LC). The law of contract (including the principles of the common law contract of employment) regulates the lawfulness of the contract and of the contractual relationship; labour law regulates the fairness of the contract and of the contractual relationship (par [34]). Depending on whether the party challenges the lawfulness or the fairness of the dispute in question, such a party may approach the court on the basis of either common law principles or labour law principles (par [34]-[36]).

358 Le Roux & Jordaan 2009: E1-3.

right to labour. Parties to the employment relationship, especially the employee, have been subject to unfair labour practices since primitive times. The common law contract of employment and subsequent legislation enacted since 1911, might have regulated the relationship between the employer and the employee to a certain extent, but did not specifically address fairness or fair labour practices, at least not until 1979. It is necessary to take note of an overview of the history of labour law until 1979, as such an overview emphasises the need for the regulation and protection of fair labour practices. It also provides insight into the current regulation of labour relations as well as the constitutional guarantee of fair labour practices. But it is not only important for the value which it provides in terms of the meaning of the current regulation; it also remains important to ensure the lawfulness of the contract of employment and actions in terms of the contract, and to ensure fairness of labour practices for employees not protected by existing labour legislation.

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L'EMPLOI DES STANDARDS EN DROIT ROMAIN

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Définir en quoi consiste un standard en droit est une question délicate qui relève plus de l'épistémologie que de la science juridique.¹ En dépit de la difficulté à définir le standard, le droit positif français emploie à plusieurs reprises cette technique,² bien que l'apparition du mot "standard" en droit français soit très récente. Ce terme, qui

1 Voir Bernard 2010: aux pages 19sq.

2 Sur le standard en droit positif, voir Rials 1980: aux pages 1sq. Cet auteur analyse l'apparition du concept de standard en France aux pages 16sq. Un colloque a été consacré au standard en 1988 et il a eu lieu à la Faculté de droit et de Sciences Politiques d'Aix-Marseille. Les actes ont été publiés par la *Revue de la recherche juridique, droit prospectif* dans le vol 4 de l'année 1988. Parmi les nombreuses contributions, voir notamment: Dale 1988: aux pages 887sq; Delebecque 1988: aux pages 871sq; Delmas-Marty 1988: aux pages 1019sq; Navarro 1988: aux pages 833sq; Orianne 1988: aux pages 1037sq; Pattaro 1988: aux pages 813sq; Petev 1988: aux pages 825sq; Wroblewski 1988: aux pages 847sq. Il est aussi utile de consulter l'ouvrage collectif dirigé par Perelman & Vander Elst 1984. Parmi les différentes contributions il faut signaler celle de Carbonnier 1984: aux pages 99sq. Pour le standard en droit communautaire, voir Bernard 2010. Sur le standard à l'aune de l'ordonnance n 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime générale et de la preuve des obligations en droit français voir Blanc 2016: aux pages 394sq et Sturlèse 2016: aux pages 398sq.

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dérive du vocabulaire anglais,³ apparaît en France au cours de la décennie 1920 dans un mouvement de réaction contre la méthode de l'École de l'Exégèse.⁴

Le renvoi au bon père de famille fut sans doute l'une des utilisations les plus célèbres de la technique du standard.⁵ La réforme du 4 août 2014 l'a effacé au profit des expressions "raisonnable" ou "raisonnablement". Le législateur a maintenu la technique du standard en changeant simplement la référence: la raison se substitue alors au modèle du bon père de famille⁶ qui est considéré comme incompatible avec la parité entre hommes et femmes.

D'aucuns, sans doute influencés par l'emploi récent du mot, ont pu affirmer le caractère contemporain de cette technique.⁷ Pourtant, l'origine romaine du bon père de famille révèle l'ancienneté du mécanisme du standard.⁸ Selon le tenant de cette théorie, la dérivation romaine du bon père de famille ne serait toutefois pas en contradiction avec cette hypothèse car les standards se seraient développés à Rome, à partir notamment de la période antonine et sévérienne.⁹ Le mécanisme du standard semble être considéré comme une sorte de corps étranger qui se serait greffé à l'époque tardive sur le tronc originaire du droit romain. En réalité, cette affirmation ne correspond pas aux données des sources. À titre d'exemple, l'on trouve une figure comparable au modèle du *bonus pater familias*¹⁰ dans l'œuvre de Quintus Mucius Scaevola – le célèbre pontife mort en 82 av J-C. Ce juriconsulte utilise en effet comme modèle l'homme diligent.¹¹ L'ancienneté de l'emploi de ce paramètre pour évaluer le comportement d'une personne, dans le cas d'espèce en matière extracontractuelle, ne fait pas de doutes.

- 3 Un rôle primordial a été joué par la réflexion de Roscoe Pound 1919. L'interprétation du mot *standard* en anglais et son opposition avec le concept de *rule* proposée par N Roscoe Pound a engendré des difficultés en doctrine. Elles sont liées à la traduction erronée de *rule* par règle juridique. Cela a emmené une partie de la doctrine à nier le caractère de règle juridique au standard. À propos de ce débat, voir Bernard 2010: aux pages 6sq.
- 4 Sur ce point, voir Rials 1980: aux pages 16sq.
- 5 À ce propos Viney 2013.
- 6 Sur le *reasonable man* du droit anglais, voir Dale 1988: aux pages 891sq. Voir aussi MacCormick 1984: aux pages 131sq.
- 7 Rials 1980: à la page 30. Cf Al-Sanhouri 1925: à la page 29; Stati 1927: aux pages 78sq; Josserand 1939²: aux pages 313sq.
- 8 Dans ce sens, Ouedraogo 2013: à la page 160 qui situe l'apparition de la technique du standard à l'époque classique. Il faut toutefois remarquer que l'apparition des standards remonte déjà à l'époque préclassique comme le témoigne, par exemple, l'inclusion de la clause *ex fide bona* dans les formules. Nous retournerons sur cette thématique dans les pages qui viennent.
- 9 Rials 1980: à la page 30.
- 10 Le *bonus* ou *diligens pater familias* a fait l'objet d'attaques de la part de la doctrine interpolationniste. Notamment, Kunkel 1925: aux pages 266sq qui, plus en général, critique le concept même de diligence. Cette reconstruction a été déjà réfutée par Buckland 1930: aux pages 85sq. La conception hypercriticiste de Kunkel est aujourd'hui abandonnée.
- 11 Paul 10 *Ad Sabinum* D 9 2 31: "Si putator ex arbore ramum cum deiceret vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat nec ille proclamavit, ut casus eius evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit. Secundum quam rationem non multum refert, per publicum an

En revanche, il paraît légitime de s'interroger sur l'opportunité méthodologique d'employer le terme "standard" pour décrire le droit romain. Ne s'agit-il pas d'un anachronisme conceptuel? Il est en effet évident que ce terme anglais ne trouve pas son origine dans les catégories juridiques romaines. Il convient donc de se demander si par l'emploi du concept de "standard" nous ne risquons pas de déformer la réalité du droit romain pour l'adapter aux catégories contemporaines. Le problème de l'application des notions contemporaines au droit romain a fait couler beaucoup d'encre. L'on peut penser à la querelle, désormais ancienne, qui a opposé Emilio Betti à Pietro De Francisci sur l'opportunité d'employer pour le droit romain le concept de *negozio giuridico* ou *Rechtsgeschäft*, qui avait été élaboré par abstraction par la Pandectistique allemande à partir des sources romaines.¹² Est-il donc légitime de parler de standard par rapport au droit romain alors que la *iurisprudentia* n'a jamais conceptualisé cette technique?

Il est d'abord nécessaire de donner une définition du standard pour comprendre si elle peut correspondre à ce qui ressort des sources romaines. Cela – nous l'avons déjà souligné – n'est pas une tâche simple. Le standard n'a pas été défini de manière unanime, si bien que cette recherche de définition a pu donner lieu à plusieurs débats doctrinaux.¹³

En dépit de ces importantes discussions sur la nature du standard, on retient la définition proposée par Stéphane Rials puisqu'elle paraît suffisamment neutre. Selon cet auteur, "le standard est un type de disposition indéterminée, plutôt utilisée par le juge, dont le caractère normatif est l'objet des contestations et qui met en jeu certaines valeurs fondamentales de normalité, de moralité ou de rationalité".¹⁴

per privatum iter fieret, cum plerumque per privata loca volgo iter fiat. Quod si nullum iter erit, dolum dumtaxat praestare debet, ne immittat in eum, quem viderit transeuntem: nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit." ("Si un élagueur en coupant une branche d'un arbre ou un ouvrier qui travaille sur un échafaudage tue un homme qui passe, il est ainsi responsable, s'il coupe en publique sans le signaler en criant de manière à ce que sa chute puisse être évitée. Mais Mucius [*sc* Quintus Mucius Scaevola] a dit aussi qu'on pouvait agir pour faute si la même chose arrive sur un terrain privé. En effet, la faute est ce que bien qu'aurait pu être prévu par un homme diligent, n'a pas été prévu ou a été signalé quand désormais le danger ne pouvait plus être évité. Pour cette raison il n'importe pas grande chose si cela arrive dans un terrain public ou privé, puisque souvent on passe couramment dans les terrains privés. Or s'il n'y a pas un chemin, il doit seulement être responsable pour le dol de manière à ce qu'il ne frappe pas celui qu'il voit passer. En effet, la [*sc* responsabilité pour] faute ne doit pas être exigée de lui car il n'aurait pas pu deviner si quelqu'un allait passer par ce lieu.")

12 Betti 1997²: à la page 75 affirmait qu'il était utile et légitime d'employer le concept de *negozio giuridico* car il permettait de mieux comprendre, sans pour autant les dénaturer, les sources romaines. Au contraire, De Francisci 1936: aux pages 16sq (=1997²: à la page 99) nie l'opportunité du recours à la dogmatique contemporaine. Pour un résumé de la querelle avec bibliographie, voir Scevola 2008: à la page 29 note 20.

13 Bernard 2010: aux pages 6sq.

14 Il s'agit de la définition que Rials 1980: à la page 3 utilise comme point de départ pour son analyse. Il donne une définition aboutie du standard à la page 120: "le standard est une technique de formulation de la règle du droit qui a pour effet une certaine indétermination *a priori* de celle-ci. Souvent d'origine jurisprudentielle, et en principe dénoté par l'utilisation de certaines formes, le standard vise à permettre la mesure de comportements et de situations en termes de normalité, dans la double acception de ce terme."

Cette définition, exception faite pour le passage relatif aux contestations sur le caractère normatif du standard, s'adapte aux données qui découlent des sources romaines,¹⁵ comme c'est le cas du fragment d'Ulpien 30 *Ad edictum* D 13 7 22 4:

Si creditor, cum venderet pignus, duplam promisit (nam usu hoc evenerat et conventus ob evictionem erat et condemnatus), an haberet regressum pigneraticiae contrariae actionis? Et potest dici esse regressum, si modo sine dolo et culpa sic vendidit et ut pater familias diligens id gessit: si vero nullum emolumentum talis venditio attulit, sed tanti venderet, quanto vendere potuit, etiamsi haec non promisit, regressum non habere.¹⁶

Ulpien examine le cas d'un créancier qui a vendu la chose gagée,¹⁷ après s'être engagé avec l'acheteur par une *stipulatio dupla* en cas d'éviction. Celle-ci a effectivement lieu: le créancier peut-il se retourner contre son débiteur par le biais de l'*actio pigneraticia contraria*? Le juriste sévérien répond de manière affirmative si le créancier s'est comporté sans dol, sans faute et comme l'aurait fait un père de famille diligent. Le *prudens pater familias* coïncide avec un standard, à savoir cette disposition indéterminée, qui met en œuvre certaines valeurs fondamentales de normalité, de moralité ou de rationalité. En effet, le père de famille prudent et diligent n'est rien d'autre qu'un modèle qui correspond à l'idée de comportement normal propre aux Romains. Grâce à son caractère indéterminé, le juge pourra apprécier les circonstances factuelles et décider si le vendeur s'est comporté d'une manière qui est conforme au modèle qu'il doit appliquer.

L'on relève d'autres exemples chez les juristes classiques, comme le fragment de Julien 2 *Ad Urseium Ferozem* D 45 1 61 relatif aux *boni mores*: "Stipulatio hoc modo concepta: 'si heredem me non feceris, tantum dare spondes' inutilis est, quia contra bonos mores est haec stipulatio."¹⁸

Tout comme le *bonus* ou le *diligens pater familias*, les bonnes mœurs sont un standard, un modèle qui trouve donc son fondement dans les valeurs profondes de la société et qui permet aux juges d'opérer un contrôle sur le contenu d'un acte juridique, en l'occurrence une stipulation.

15 Dans ce sens, voir aussi Delebecque 1988: à la page 873.

16 "Si le créancier, en vendant le gage, s'est engagé par une stipulation au double (en effet, cette éventualité s'est produite et il avait été assigné en justice pour éviction et condamné), peut-il se retourner <contre son débiteur> par l'action contraire du gage? Et il est possible de dire qu'il peut se retourner <contre son débiteur>, si seulement il a effectué la vente sans dol et sans faute et il s'est comporté comme un diligent père de famille. En revanche, si une telle vente n'a apporté aucun gain, mais il l'aurait vendu au prix auquel il aurait pu le vendre, même sans pronette cela, il n'a pas de retour."

17 Voci 1990: à la page 86 note 94 observe que le texte se référerait probablement à l'origine à la *fiducia*. À son avis, la référence au *diligens pater familias* constitue une interpolation pour mettre en adéquation le fragment d'Ulpien avec le nouveau contexte du gage. Néanmoins, il ne semble pas qu'il ait d'éléments suffisants pour prouver cet ajout. MacCormack 1972: aux pages 132, 165; et Cannata 1992: à la page 29 note 95 ne mentionnent pas d'interpolations.

18 "Une stipulation formulée de cette manière: 'si tu ne me nommes pas héritier, promets-tu de donner tant' est inutile puisque cette stipulation est contraire aux bonnes mœurs."

La catégorie du standard, tout en étant conceptualisée à une époque récente, trouve donc une correspondance en droit romain et semble pouvoir être appliquée pour l'étudier. L'on peut néanmoins se demander quelle est l'utilité d'employer ce terme, entièrement anachronique, pour décrire la réalité romaine. Or, il semble qu'une telle application se révèle profitable puisque elle permet de pallier l'absence de théorisation de la jurisprudence romaine. Le manque d'un terme latin qu'indique le standard peut cacher le fait que les juristes et le préteur avaient recours à des expressions qui répondaient toutes à une finalité analogue, à savoir d'attribuer au juge une marge d'appréciation plus large. En utilisant la catégorie du standard, l'on dispose d'un instrument qui permet de décrire de manière synthétique plusieurs expressions qui sont présentes dans les sources en cernant ainsi leur finalité qui est l'élargissement des pouvoirs du juge. L'emploi du mot standard dans l'étude du droit romain peut dès lors constituer un outil pour mieux comprendre les pouvoirs du juge et sa marge de discrétion dans l'interprétation des actes juridiques.

L'objectif de ce travail n'est pas de faire un catalogue systématique de différentes expressions que l'on peut assimiler aux standards en analysant les sources, mais plutôt de montrer le fonctionnement de cette catégorie juridique et les raisons qui ont amené les Romains à l'employer. En effet, tout comme en droit positif, l'on peut repérer dans les sources romaines plusieurs standards. L'on peut citer comme exemples le *bonus* ou *diligens pater familias*, les *boni mores* ou encore la *fides bona*, le *vir bonus* et le *bonum et aequum*. Or, il est possible de reconduire à une bipartition cette liste qu'à première vue peut paraître aléatoire. Tout standard fonctionne par la référence à un modèle qui, en reprenant l'expression de S Rials, "met en jeu certaines valeurs fondamentales de normalité, de moralité ou de rationalité".¹⁹ L'on remarque alors l'existence de deux typologies de modèles de référence auquel ces différents standards se rattachent. Dans un premier cas le standard se réfère à un concept abstrait comme la bonne foi, l'équité ou les bonnes mœurs. En revanche, dans la seconde hypothèse, il est incarné par un individu qui constitue un modèle de conduite. C'est le cas de l'homme de bien et du bon ou diligent père de famille. L'on peut dès lors parler de standard conceptuel (1) et de standard incarné (2) selon le différent modèle de référence. Cette bipartition permet de trouver un fil conducteur dans l'étude des exemples de standard que l'on trouve dans les sources romaines.

1 Le standard conceptuel

Le standard que l'on a défini comme conceptuel a pour modèle de référence une idée abstraite. L'on peut rattacher à cette catégorie la *fides bona*, le *bonum et aequum* et les *boni mores*.

19 Rials 1980: à la page 3.

1 1 La *fides bona*

En droit contemporain, la bonne foi ne peut être considérée, de manière générale, comme un standard. Elle ne pourrait en effet être ainsi qualifiée seulement dans une acception très particulière, à savoir la bonne foi objective.²⁰ Cette affirmation trouve un écho en droit romain qui envisage aussi la *fides bona* sous un double angle, objectif et subjectif.²¹

Dans son sens objectif, la bonne foi consiste dans un modèle sur la base duquel le juge doit apprécier le comportement des cocontractants et qui trouve son fondement dans la clause *ex fide bona*. Elle est insérée dans la formule de certaines actions qui sont ainsi dénommées les actions de bonne foi.

La procédure formulaire romaine se caractérise en effet par une opposition entre les actions de droit strict et de bonne foi.²² On ne dispose pas d'éléments précis qui permettent de dater avec certitude le moment de la création des formules de bonne foi, situées entre le III^e et le II^e siècle av J-C.²³ L'origine des actions de bonne foi est dès lors très controversée en doctrine. En revanche, l'analyse de leur structure permet de comprendre la raison de leur création : l'extension des pouvoirs du juge.

Dans le cas des actions de droit strict, le *iudex* est limité dans son pouvoir d'évaluation car il est lié à la lettre de la *formula*.²⁴ Il en va différemment pour les actions de bonne foi car la référence à la bonne foi est insérée dans leurs formules. L'inclusion de la formule *ex fide bona* permet donc d'élargir la faculté d'appréciation du *iudex* qui peut désormais prendre en compte de manière globale le comportement des parties, comme le montre le célèbre passage du *De officiis* 3 70 de Cicéron:²⁵

Nam quanti verba illa: UTI NE PROPTER TE FIDEMVE TUAM CAPTUS FRAUDATUSVE SIM! Quam illa aurea: UT INTER BONOS BENE AGIER OPORTET ET SINE FRAUDATIONE! Sed, qui sint "boni", et quid sit "bene agi", magna quaestio est. Q quidem Scaevola, pontifex maximus, summam vim²⁶ esse dicebat in omnibus iis arbitriis, in quibus adderetur EX FIDE BONA, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis,

20 *Idem* à la page 102.

21 Sur la *vexata quaestio* de la signification originaire de la *bona fides* voir avec bibliographie l'article de Fiori 2011a: aux pages 99sq.

22 Les romanistes ont discuté avec ardeur sur l'origine prétorienne ou civile des actions de bonne foi. Dans le passé la doctrine était plutôt en la faveur d'une origine prétorienne, aujourd'hui cela a été remis en question. Voir en ce sens: Fiori 1998-1999: aux pages 165sq; *idem* 2008: aux pages 248sq.

23 La mort en 82 av J-C de Quintus Mucius Scaevola le pontife, qui connaît les actions de bonne foi, constitue un *terminus ante quem*.

24 On verra toutefois comment par l'emploi du standard du *vir bonus*, le juge obtient une plus large latitude d'appréciation dans le domaine des stipulations prétorienne.

25 La bibliographie sur ce passage est immense. Voir les contributions récentes de Noordaven 1999: aux pages 302sq; Dunand 2000: aux pages 174sq; Cardilli 2010²: aux pages 29sq; Naumowicz 2011: aux pages 109sq; Bertoldi 2012: aux pages 25sq.

26 Sur les interprétations données à *summa vis*, voir Cardilli 2010²: à la page 35 note 65.

locatis, quibus vitae societas²⁷ contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oportere.²⁸

L'Arpinate relate dans ce passage la pensée de Quintus Mucius Scaevola. Il souligne l'importance de la *fides bona* et d'une catégorie plus générale, le *bonae fidei nomen*, qui regroupe un groupe d'actions analogues aux *actiones ex fide bona*, comme la *fiducia*.²⁹ La formule de cette action inclut en effet une référence à un standard analogue à la bonne foi, l'*ut inter bonos bene agier*. Les *arbitria bonae fidei* sont caractérisés par une grande force (*magna vis*) et le concept de bonne foi (*fidei bonae nomen*)³⁰ a une extension considérable (*manare latissime*) puisqu'il caractérise la tutelle, la société, le mandat, la vente et le louage. Le juge a un rôle essentiel pour déterminer les obligations des parties.³¹

L'insertion de la clause *ex fide bona* revêt une importance pratique remarquable. Quelques cas tirés de la jurisprudence permettent d'apprécier le rôle joué par la

27 Selon Naumowicz 2011: aux pages 102sq l'expression *societas vitae* doit être interprétée comme une notion d' "affinité sociale". Sur cette expression, voir avec bibliographie Falcone 2013b: 269sq.

28 "Mais nous n'avons aucune représentation solide et claire du vrai droit et de la pure justice, nous nous servons d'une image et des échos. Ah, si on suivait au moins celles-ci! En effet, elles sont révélées par des excellents exemples de la nature et de la vérité. Quelle importance ont ces célèbres mots: 'afin que je ne sois pas ni abusé ni trompé frauduleusement par toi et ta promesse' ou cette merveilleuse formule: 'ainsi qu'il convient agir parmi des hommes de bien'! Mais la grande question est de savoir qui sont les 'bons' et ce qu'est 'agir bien'. Q Scaevola, le grand pontife, disait qu'il y avait plus de force dans les jugements, dans lesquels il était ajouté 'sur la base de la bonne foi'. Il estimait que le concept de bonne foi a une très grande extension et qu'on le trouve dans les tutelles, les sociétés, les fiducies, les mandats, dans les affaires d'achat et de vente, de prise de bail et de location, actes qui impliquent une société de vie; dans ces contrats c'est un grand juge qui doit décider, notamment parce que dans la plupart des cas il y a des jugements contraires, ce que chacun doit à l'autre."

29 Cette affinité forte qui est perçue entre la *fiducia* et les actions de bonne foi débouchera sur son inclusion dans cette catégorie ainsi qu'il est montré par Gaius 4 62. Tout comme l'*ut inter bonos bene agier* de la *fiducia*, un autre standard analogue à la bonne foi est inséré dans la formule de l'*actio rei uxoriae*. Il s'agit de l'*aequius melius* qui est rappelé par Cicéron, *Topica* 17 66: "In omnibus igitur eis iudiciis, in quibus ex fide bona est additum, ubi vero etiam ut inter bonos bene agier oportet, in primisque in arbitrio rei uxoriae, in quo est quod eius aequius melius, parati eis esse debent. Illi dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui negotia aliena curasset ei cuius ea negotia fuissent, quid eum qui mandasset, eumve cui mandatum esset, alterum alteri praestare oporteret, quid virum uxori, quid uxorem viro tradiderunt" ("Dans tous ces jugements dans lesquels il est ajouté "sur la base de la bonne foi", ou aussi dans ceux "ainsi qu'il faut agir bien parmi des hommes de bien", et avant tout dans le jugement arbitral sur le patrimoine de la femme, dans lequel il faut suivre ce qui est le meilleur et le plus équitable, les juriconsultes doivent être prêts [sc avec leur conseil]. Ils ont établi en quoi consiste le dol, la bonne foi, le bon et l'équitable, les obligations réciproques des associés, de celui qui gère les affaires d'autrui envers la personne à qui sont les affaires, du mari à la femme, de la femme au mari.")

30 Cf Naumowicz 2011: aux pages 96sq.

31 Behrends 2002: à la page 218.

bonne foi dans l'interprétation des actes juridiques. On peut citer, à titre d'exemple, le fragment de Labéon 4 *Posteriores a Iavoleno epitomati* D 19 1 50:³²

Bona fides non patitur, ut, cum emptor alicuius legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compelletur et re sua careret. Possessione autem tradita futurum est, ut rem venditor aequè amitteret, utpote cum petenti eam rem <emptor exceptionem rei venditae et traditae opponere possit nec perinde sit, quasi eam rem>³³ petitor ei neque vendidisset neque tradidisset.³⁴

Le juriste augustéen se fonde sur le standard de la bonne foi pour nier que le vendeur soit obligé de remettre la chose vendue alors que l'acheteur, grâce à une certaine loi, n'est plus obligé de payer le prix. Les conséquences de l'application de la *fides bona* sont donc extrêmement importantes car par ce biais le juriste parvient à paralyser l'obligation du vendeur de remettre la chose. On peut même affirmer qu'en interprétant le contrat par le standard de la bonne foi, l'obligation de *rem tradere* n'existe pas: à cause de la promulgation de la loi, il n'y a plus un *oportere ex fide bona* à la charge du *venditor*.³⁵ En revanche, si la possession de la chose a été transférée, le vendeur ne peut pas la revendiquer. Une telle solution n'est pas contraire à la bonne foi. En effet, Labéon observe que la revendication du vendeur ne pourrait pas aboutir car l'acheteur pourrait toujours lui opposer à bon droit l'*exceptio rei venditae et traditae*.

Un passage de Scaevola 2 *Responsa* D 19 1 48 renferme une autre illustration de l'application du standard de la bonne foi:

Titius heres Sempronii fundum Septicio vendidit ita: "fundus Sempronianus, quidquid Sempronii iuris fuit, erit tibi emptus tot nummis" vacuumque possessionem tradidit neque fines eius demonstravit: quaeritur, an empti iudicio cogendus sit ostendere ex instrumentis hereditariis, quid iuris defunctus habuerit et fines ostendere. Respondi id ex ea scriptura

- 32 Il s'agit d'un texte très célèbre, sur lequel il existe une bibliographie extrêmement vaste. Voir *praecipue*: Talamanca 1997: aux pages 353sq; Gallo 2000: aux pages 1sq. Cf avec bibliographie Fiori 2011a: aux pages 161sq.
- 33 La version du texte relatée par les manuscrits "utpote cum petenti eam rem petitor ei neque vendidisset neque tradidisset" est incompréhensible. Nous suivons l'intégration proposée par Mommsen, *ad h l*. Dans ce sens Talamanca 1997: aux pages 372sq et de manière hypothétique Fiori 2011a: à la page 162 note 189. Cette reconstruction n'est pas accueillie par Gallo 2000: aux pages 1sq. L'auteur nie qu'on puisse attribuer à *aeque* la signification d' "également" en privilégiant celle "de manière équitable".
- 34 "La bonne foi ne tolère pas que le vendeur soit obligé de transmettre sa chose et qu'il en soit privé quand l'acheteur a cessé de devoir l'argent pour la chose vendue grâce à une certaine loi avant que la chose ne lui soit remise. En revanche, si la possession a été transmise il arrivera que le vendeur perdrait également sa chose vu que l'acheteur pourrait opposer à celui-ci, qui réclame sa chose, l'exception de la chose vendue et transmise et il ne serait pas comme si le demandeur ne lui avait pas vendu ou transmis cette chose."
- 35 Fiori 2011a: à la page 164.

praestandum, quod sensisse intelleguntur: quod si non appareat, debere venditorem et instrumenta fundi et fines ostendere: hoc etenim contractui bonae fidei consonat.³⁶

La question qui est posée à Scaevola porte sur le point de savoir quelles obligations s'imposent au vendeur sur la base d'un contrat de vente qui a comme objet un fonds reçu en héritage. En effet, l'héritier désigne de manière vague – *fundus Sempronianus, quidquid Sempronius iuris fuit* – l'objet de la vente. De surcroît, il ne montre pas quelles sont les bornes.³⁷ Il y a donc une ambiguïté sur la définition même de la chose vendue. Est-ce que cette incertitude implique que le vendeur doit révéler les documents relatifs au fonds vendu et montrer à l'acheteur les limites du domaine? La solution qui est proposée par Scaevola trouve son fondement dans la nature de bonne foi de l'*emptio venditio*. La *fides bona* guide le juriste dans l'interprétation du contrat: le vendeur sera contraint à *instrumenta fundi et fines ostendere* si la teneur du testament ne montre pas en quoi consiste le fonds à vendre.

Un mécanisme analogue à la *fides bona*, comme le montre son assimilation aux actions de bonne foi,³⁸ est représenté par la clause *quod eius melius aequius erit* qui est insérée dans la formule de l'*actio rei uxoriae*.³⁹ Dans ce cas, le renvoi au *bonum et aequum* peut être considéré comme un standard.

1 2 Le *bonum et aequum*

La clause *quod eius melius aequius erit* présente des éléments d'analogie avec la *bona fides*. Une différence importante doit cependant être soulignée. Dans les actions de bonne foi, la clause *ex fide bona* apparaît dans l'*intentio* de l'action, alors que la clause *quod eius melius aequius erit* est utilisée dans la *condemnatio*. Cela signifie que la bonne foi touche l'ensemble de l'acte juridique entre les parties, alors que le *melius aequius* ne concerne que le moment de la condamnation.

En cas de dissolution du mariage, la femme *sui iuris*⁴⁰ ou son père si elle est décédée, pour la *dos profecticia*,⁴¹ peut agir pour obtenir la restitution de la dot.

36 “Titius l'héritier de Sempronius a vendu le fonds à Septicius de cette manière: ‘Tu achèteras pour une certaine somme le fonds Sempronianus, tout ce qui était du droit de Sempronius’ et il a transmis la possession vacante et il n’a pas montré les limites de la propriété. Il est demandé si par le jugement d’achat <le vendeur> doit être obligé à montrer sur la base des documents relatifs à l’héritage ce sur quoi le défunt avait droit et montrer les limites. Il [sc Scaevola] a répondu qu’il faut donner sur la base de l’acte ce qu’ils avaient entendu; mais s’il n’apparaît pas, le vendeur doit montrer les documents relatifs au fonds et les limites. En effet, cela est en harmonie avec un contrat de bonne foi.”

37 Voci 1987: à la page 115 note 72 observe que le verbe “demonstrare” peut être considéré comme le terme technique en matière de *traditio*.

38 Gai 4 62.

39 Sur les problèmes de la reconstruction de la formule de l'*actio rei uxoriae*, voir Varvaro 2006.

40 Si la femme est *alieni iuris*, l'action en justice revient à son *pater familias*. Toutefois, l'accord de la femme est nécessaire (*Tituli ex corpore Ulpiani* 6 6).

41 La *dos profecticia* est celle qui a été constituée par le *pater familias* de la femme (*Tit ex corp Ulp* 6 3).

Puisque la formule de l'*actio rei uxoriae* mentionne le *quod eius melius aequius erit*, le juge n'est pas obligé de condamner le mari à restituer à la femme ou à son père l'intégralité de la dot.⁴² Ainsi, l'époux peut obtenir le *beneficium competentiae*.⁴³ En outre, le juge peut disposer des retenues en sa faveur, par exemple, s'il y a des enfants ou si la femme a eu une mauvaise conduite au cours du mariage.⁴⁴ Quelques passages des *Tituli ex corpore Ulpiani* attestent que dans ces hypothèses il existe des règles jurisprudentielles qui guident l'activité du juge et qui permettent de prévoir de manière forfaitaire la retenue à opérer sur la dot.⁴⁵

Le mari qui a dépensé de l'argent pour l'entretien des biens dotaux, aura droit à une retenue à cause d'impenses si ces frais sont utiles.⁴⁶ Si les impenses sont nécessaires,⁴⁷ elles sont déduites de plein droit de la dot.⁴⁸ Il revient alors au *iudex* sur la base de la clause *quod melius aequius erit* de calculer la dot une fois évaluées les impenses.⁴⁹ Il n'est dès lors pas étonnant que le titre du Digeste 25 1 soit consacré à l'analyse des différentes hypothèses d'impenses, ce qui permet de guider le *iudex* dans sa tâche.

La formule de l'*actio rei uxoriae* ne constitue pas un cas isolé car elle fait partie du groupe plus large des *actiones in bonum et aequum conceptae*.⁵⁰ Ce groupe d'actions, auquel appartiennent, par exemple, l'*actio iniuriarum* ou l'*actio sepulchri violati*, a fait l'objet des nombreux débats en doctrine.⁵¹ Les controverses portent par exemple sur le point de savoir si la formulation originaires de ces actions mentionnait le *bonum et aequum* ou seulement le *aequum*. De surcroît, les auteurs ne sont pas unanimes sur l'identification des actions qui à l'époque classique appartenaient au

42 En outre, le juge peut disposer en la faveur du mari des dilations dans les paiements.

43 Le *beneficium competentiae* signifie que le mari est condamné à restituer la dot en proportion avec ses capacités économiques. Sur le *beneficium competentiae*, voir De Loynes de Fumichon 2012: aux pages 495-522.

44 *Tit ex corp Ulp* 6 9: Retentiones ex dote fiunt aut propter liberos, aut propter mores, aut propter impensas, aut propter res donatas, aut propter res amotas. ("Les retenues de dot se font ou à cause des enfants ou à cause des mœurs ou à cause des dépenses ou à cause des choses qui ont été volées ou à cause des choses qui ont été détournées.")

45 *Tit ex corp Ulp* 6 4; 6 10; 6 12.

46 *Tit ex corp Ulp* 6 16: Utiles sunt, quibus non factis quidem deterior dos non fuerit, factis autem fructuosior effecta est, veluti si vineta et oliveta fecerit. ("Les impenses sont utiles quand, si elles ne sont pas faites, la dot ne sera pas ruinée, mais si elles sont faites la dot devient plus rentable, comme si des vignes ou des oliveries sont créées.")

47 *Tit ex corp Ulp* 6 15: Necessariae sunt impensae, quibus non factis dos deterior futura est, veluti si quis ruinosas aedes refecerit. ("Les impenses sont nécessaires quand, si elles ne sont pas faites, la dot sera ruinée, comme par exemple si quelqu'un refait un bâtiment qui tombe en ruine.")

48 *Cf Ulp* 36 *ad Sab D* 25 1 *5pr*.

49 Lévy 1937: aux pages 102-103.

50 L'expression *actiones in bonum et aequum conceptae* est employée une seule fois par Papinien 8 *quaest D* 47 12 10. Ulpien 57 *ad ed D* 47 10 11 1 y fait allusion de manière indirecte: *iniuriarum actio ex bono et aequo est*. *Cf* Paricio: 1986 à la page 7. Cet auteur, aux pages 97sq, nier l'appartenance de l'*actio rei uxoriae* au catalogue des *actiones in bonum et aequum conceptae*.

51 Voir avec bibliographie: Paricio 1986.

groupe des *actiones in bonum et aequum conceptae*.⁵² En revanche, la fonction de la condamnation *in quantum aequum videbitur* ne soulève pas de difficultés. Il apparaît en effet que, tout comme dans l'*actio rei uxoriae*, le but du renvoi au *bonum et aequum* est toujours d'attribuer une plus grande marge de discrétion au juge.⁵³ Un passage du livre 45 *Ad edictum* de Paul au Digeste 47 10 16 en matière d'*actio iniuriarum* confirme clairement notre propos: "Sed non esse aequum pro maiore parte, quam pro qua dominus est, damnationem fieri Pedius ait: et ideo officio iudicis portiones aestimandae erunt."⁵⁴

Le passage porte sur une hypothèse d'*iniuria* au détriment d'un esclave qui a plusieurs propriétaires. Le jurisconsulte Pedius, cité par Paul, affirme qu'il serait contraire à l'*aequum* de condamner le *reus* de manière disproportionnée à sa quote-part sur l'esclave. En revanche, la solution qui est conforme à l'*aequum* est de laisser le juge calculer les dommages et intérêts. L'inclusion de l'*aequum* dans la formule de l'*actio iniuriarum* augmente de manière manifeste les pouvoirs discrétionnaires du *iudex*. Une telle donnée ne peut être remise en question.

En revanche, l'interprétation qu'il convient de donner à la clause *in bonum et aequum* soulève une difficulté. Il en va de même de son rapport avec le concept d'*aequitas*.⁵⁵ Il s'agit d'un des problèmes les plus épineux de la doctrine romanistique. Et, à bien des égards, ces nombreuses dissensions justifient l'existence d'une littérature extrêmement vaste.⁵⁶ Pour quelle raison les jurisconsultes ont recours à l'*aequitas* pour l'interprétation des actes juridiques même en dehors du domaine des actions *in bonum et aequum conceptae*?

De manière générale, on peut considérer que le *bonum et aequum* est plus ancien que le renvoi à l'*aequitas*. En effet, alors que la première expression se trouve déjà dans le théâtre de Plaute,⁵⁷ la deuxième – un substantif abstrait – porte la marque d'une pensée postérieure, qui remonte probablement au 1^{er} siècle av J-C.⁵⁸ Il est donc envisageable que le recours à l'*aequitas* implique une certaine généralisation du *bonum et aequum*, ce qui lui confère un caractère plus abstrait dans la réflexion des jurisconsultes. Un tel phénomène ne peut qu'expliquer la raison pour laquelle l'*aequitas* n'apparaît plus exclusivement dans les *actiones in bonum et aequum conceptae*. Un témoignage pertinent est offert par un fragment du livre 3 *Ad edictum*

52 Paricio 1986: à la page 10.

53 Il faut néanmoins observer qu'il y a eu des controverses sur le point de savoir comment interpréter cette marge de manœuvre accrue du juge. Cf Paricio 1986: à la page 13.

54 "Mais Pedius affirme qu'il n'est pas équitable que la condamnation soit faite pour une partie plus grande par rapport à celle dont il [*sc* chaque demandeur] est propriétaire. Et donc il appartiendra à l'office du juge d'estimer les parties."

55 Cette expression a fait l'objet des critiques de la part de la doctrine interpolationniste. Cf Beseler 1925: aux pages 453sq.

56 Voir Pringsheim 1932: aux pages 78sq; Guarino 1960: aux pages 619sq; Maschi 1962: aux pages 428sq; Biscardi 1973: aux pages 137sq.

57 Pl *Men* v 580.

58 Cf Cic *Top* 28, 31, 90-91.

provinciale de Gaius qui est conservé au Digeste 3 3 46 6: “Litis impendia bona fide facta vel ab actoris procuratore vel a rei debere ei restitui aequitas suadet.”⁵⁹

Il est question des dépenses qui ont été faites de bonne foi par le procurateur. Si la bonne foi dont il est question doit être ici entendue en sens subjectif, il en va différemment pour l'*aequitas*. En effet, c'est sur cette base que le jurisconsulte motive son opinion alors qu'ici il ne s'agit pas d'une *actio in bonum et aequum concepta*. Il convient toutefois de nuancer l'analyse en considérant que la relation entre la partie au procès et le *procurator* est sanctionnée par une action de bonne foi.⁶⁰ Il est alors envisageable que le renvoi à l'équité trouve son fondement dans la nature de bonne foi de l'action.⁶¹

Toutefois, le fragment du livre 8 des *Disputationes* d'Ulpien 8 au Digeste 5 2 26 révèle le recours à l'*aequum* dans une matière en dehors du domaine de la bonne foi, comme celle de l'institution d'héritier: “Si sub hac condicione fuerit heres institutus ‘si Stichum manumiserit’ et manumisisset, et posteaquam manumisit inofficiosum vel iniustum testamentum pronuntietur: aequum est huic quoque succurri, ut servi pretium a manumisso accipiat, ne frustra servum perdat.”⁶² C'est donc l'*aequum* qui fonde la décision d'Ulpien. Dans plusieurs passages du Digeste il apparaît de manière claire que c'est sur cette base ou sur celle de l'*aequitas* que les jurisconsultes résolvent plusieurs questions. Souvent c'est même le préteur qui décide car une telle solution est *aequissima* ou car elle est imposée par l'*aequitas*. L'on peut dès lors lire des phrases comme *aequissimum praetori visum est*⁶³ ou *hoc edictum praetor naturalem aequitatem secutus proposuit*.⁶⁴

Il devient alors légitime de se demander s'il est correct de continuer à qualifier de standard l'équité quand elle devient le fondement, la *ratio* qui justifie une solution de la jurisprudence ou du préteur. Certes, l'équité met toujours en jeu les valeurs de normalité et d'honnêteté dans un système juridique. Toutefois, ses contours semblent s'estomper et, par conséquent, deviennent plus amples. L'*aequum bonum* n'est plus l'outil qui permet d'élargir les pouvoirs discrétionnaires du juge, mais il devient un instrument plus large de politique juridique dont se servent les *prudentes*, le *praetor*

59 “L'équité conseille que les dépenses pour le litige qui ont été faites en bonne foi par le procurateur du demandeur ou du défendeur lui doivent être restituées.”

60 En matière d'actions de bonne foi, on peut citer par exemple, Ulp 10 *ad ed D* 3 5 39 ou Id, 16 *ad ed D* 6 1 17*pr.*

61 La fonction du *procurator ad litem* trouve son origine dans le *iussum* ou *mandatum* du *dominus litis*. L'*actio mandati*, tout comme l'*actio negotiorum gestio*, est caractérisée par le renvoi à la bonne foi. Cf Gaius 4 84. Sur le *procurator ad litem* et sur son caractère classique, voir Miceli 2008: aux pages 219sq.

62 “L'héritier a été institué sous cette condition qu'il affranchisse Stichus et il l'a affranchi, mais après l'affranchissement le testament est prononcé inofficieux ou injuste. Il est équitable de lui venir aussi en aide de manière à ce qu'il reçoive le prix de l'esclave par l'affranchi afin qu'il ne perde pas l'esclave en vain.”

63 Ulp 79 *ad ed D* 7 9 1*pr.*

64 Ulp 11 *ad ed D* 4 4 1*pr.*

et même l'empereur.⁶⁵ Dans ce sens, il semble être analogue au recours à l'*humanitas* et à la *caritas* qui caractérise les décisions impériales d'époque sévérienne.⁶⁶ En effet, l'importance du *bonum et aequum* dans la réflexion de la jurisprudence classique est bien représentée par la célèbre définition de Celse du droit comme *ars boni et aequi*, relatée par Ulpien dans un passage du Digeste qui suscite d'innombrables commentaires.⁶⁷

La technique du standard met en jeu des valeurs essentielles d'une société donnée. Or, à Rome les *boni mores* en montrent une claire exemplification de l'emploi des standards.

1 3 Les *boni mores*

Le terme "mos" désigne la coutume ou l'usage. L'expression "mos maiorum" renvoie à la coutume des ancêtres, à savoir l'ensemble des traditions et des comportements qui constituaient le fondement même de la société romaine. Papinien dans un extrait du livre 16 des *Quaestiones* qui est conservé au Digeste 28 7 15 affirme dès lors que "quae facta laedunt pietatem existimationem verecundiam nostram, et generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum".⁶⁸

Sur la base des *boni mores* les jurisconsultes considèrent dès lors qu'il est possible d'apprécier le contenu des obligations, comme c'était le cas pour la stipulation dans le texte de Julien 2 *Ad Urseium Ferozem* D 45 1 61. Un autre exemple analogue dans le domaine testamentaire est rapporté par Paul dans son livre 45 *Ad edictum* qui a été transmis au Digeste 28 7 9: "Condiciones, quae contra bonos mores inseruntur, remittendae sunt, veluti 'si ab hostibus patrem suum non redemerit', 'si parentibus suis patronove alimenta non praestiterit'".⁶⁹

Le fragment de Paul donne quelques exemples de comportements jugés contraires aux bonnes mœurs, comme le fait de ne pas racheter le père qui est prisonnier chez les ennemis ou de ne pas prêter les aliments aux parents ou au patron. L'inclusion de ces clauses dans les dispositions *mortis causa* ne les rend pas nulles,⁷⁰ à la différence des stipulations. Une telle faveur s'explique par le principe du *favor testamenti* qui conduit les jurisconsultes à interpréter les actes de dernière volonté de manière à en garantir l'application. En effet, il est toujours possible de conclure une nouvelle

65 Par exemple: C I 1 26 2 (Alex Sev année 235); C I 2 1 3 (Sept Sev et Car année 202); C I 2 1 4 (Car année 212).

66 À ce propos, voir Palma 1992: *passim*.

67 Ulp 1 *instit* D 1 1 1 *pr*. Sur ce texte extrêmement connu, voir avec la bibliographie Mantello 2007: à la page 121 note 3.

68 "Il faut croire que nous ne pouvons pas accomplir les faits qui lésent notre piété, réputation ou pudeur et, comme nous dirions de manière générale, qui sont accomplis contre les bonnes mœurs."

69 "Les conditions qui sont insérées contre les bonnes mœurs doivent être abandonnées comme 'si tu n'as pas racheté ton père des ennemis' ou 'si tu n'as pas donné à tes parents ou au patron les aliments'."

70 À ce propos, voir Voci 1963: aux pages 610sq.

stipulation alors qu'un acte *mortis causa* ne pourra être modifié après la mort du disposant.

Il convient de remarquer que le standard des *boni mores* peut être employé avec celui la *fides bona*, ainsi que le montre le fragment du livre 28 des *Quaestiones* de Papinien au Digeste 22 1 5: “Generaliter observari convenit bonae fidei iudicium non recipere praestationem, quae contra bonos mores desideretur.”⁷¹

Un contrat qui est protégé par une action de bonne foi est donc incompatible avec une prestation qui est contraire aux bonnes mœurs. La lecture des passages relatifs aux *boni mores* révèle alors l'ample application du standard qui n'est donc pas exclusivement limité aux actes juridiques de droit strict qui sont dépourvus de l'inclusion dans la formule du critère herméneutique de la bonne foi.

L'analyse des exemples de standard conceptuel a révélé tout l'intérêt d'appliquer au droit romain cette catégorie, qui pourtant est anachronique. En analysant à l'aune du standard des concepts comme la bonne foi, l'équité ou les bonnes mœurs, l'on peut s'apercevoir des similarités qui les rapprochent au-delà des différences. Le lien qui unit ces trois clauses est constitué par l'élargissement des pouvoirs du juge. L'utilité des standards, hier comme aujourd'hui, consiste dans l'augmentation de la marge de discrétion dont jouit le juge. En droit romain, cet élargissement se fait au premier chef par l'insertion des clauses comme la *fides bona* ou le *bonum et aequum* dans la formule de l'action. Cette solution est très importante, comme l'atteste l'exemple de la bonne foi. Dans certaines hypothèses cependant l'augmentation des pouvoirs d'appréciation du juge est obtenue en dehors de la formule ainsi que le révèlent certains emplois du *bonum et aequum* ou les *boni mores*.

Dans les sources romaines le standard n'est pas seulement présent en tant que concept, mais il peut parfois être incarné par un modèle idéal d'individu. L'analyse des sources révélera que le standard incarné a des caractéristiques identiques, au-delà du modèle de référence, au standard conceptuel. En effet, ces standards, qu'ils soient insérés ou pas dans la formule de l'action ont aussi comme finalité l'élargissement de la marge d'appréciation du juge.

2 Le standard incarné

À la lecture des textes romains, l'on repère aisément deux concepts que l'on peut rattacher à la catégorie du standard incarné: le *vir bonus* et le *diligens* ou *bonus pater familias*. En dépit de leur proximité sémantique, il est nécessaire de distinguer ces deux concepts.

2 1 Le *vir bonus*

Dans les sources juridiques romaines, il y a plusieurs dizaines d'occurrences du *vir bonus*. Seulement dans le Digeste, nous en trouvons quatre-vingt-quatre. L'homme

71 “Il convient qu'il soit observé de manière générale que le jugement de bonne foi n'accepte pas la prestation qui est demandée contre les bonnes mœurs.”

de bien qui constitue un modèle de comportement, tout en renvoyant aussi dans certains cas à une personne concrète,⁷² peut être assimilé à un standard. Un passage de Paul 34 *Ad edictum* D 19 2 24^{pr}⁷³ mentionne la *bona fides* et le *vir bonus*:

Si in lege locationis comprehensum sit, ut arbitrato domini opus adprobetur, perinde habetur, ac si viri boni arbitrium comprehensum fuisset, idemque servatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigit, ut arbitrium tale praestetur, quale viro bono convenit. [...]⁷⁴

Ce texte⁷⁵ porte sur une hypothèse de *probatio operis*, à savoir un mécanisme dont la fonction est de vérifier la qualité et la conformité au contrat de louage d'ouvrage d'un *opus*. Une clause du contrat de *locatio conductio operis* prévoyait que ce contrôle de conformité devait être fait *arbitratu domini*, c'est-à-dire selon le jugement du maître de l'ouvrage. Or, Paul requalifie l'*arbitratu domini* en *arbitratu boni viri*. Partant, le juriste sévérien transforme l'*arbitratu* du maître en un standard objectif d'homme de bien. Paul justifie cette requalification en invoquant les exigences qui découlent de la nature du contrat de bonne foi. Le jugement personnel du *dominus* qui n'a rien d'une décision arbitraire,⁷⁶ contraste avec la *fides bona*. Cette incompatibilité s'explique probablement par le fait que la décision selon le jugement du maître de l'ouvrage ne répond pas à l'objectivité qui découle du standard de la bonne foi.

Tout comme la *fides bona*, l'*arbitratu boni viri* doit être regardé comme un modèle de comportement qui permet l'interprétation des actes juridiques. Ce standard présente un domaine d'application assez vaste et, comme la bonne foi, son emploi permet d'accroître les pouvoirs d'appréciation du juge. L'insertion du standard du jugement de l'homme de bien dans plusieurs formules des stipulations prétoriennes illustre parfaitement son utilité. La *stipulatio praetoria* est imposée par le préteur pour obliger une personne à tenir un certain comportement sous peine de sanctions.⁷⁷ Par exemple, en matière d'usufruit, le préteur exige que l'usufruitier prête la *cautio*

72 C'est par exemple le cas de Neratius 5 *ep* D 17 2 76, 78, 80.

73 Ce texte a fait l'objet de l'analyse radicale d'Albertario 1924: à la page 300, mais cette critique souffre des excès de la doctrine interpolationniste.

74 "Si dans une clause de louage, il est prévu que l'approbation de l'ouvrage sera faite conformément au jugement du maître de l'ouvrage, cette disposition devra être interprétée comme si elle prévoyait le jugement d'un homme de bien. Cela s'appliquera même dans l'hypothèse où la clause ferait référence à n'importe quelle autre personne: en effet, la bonne foi impose que le jugement rendu soit tel qu'il serait convenable pour un homme de bien. Et ce jugement concerne la qualité de l'ouvrage et non pas la faculté de proroger le laps de temps dans lequel il doit être achevé selon la clause, à moins que cela ne soit pas compris dans la clause. De cela découle que l'approbation caractérisée par le dol du maître d'œuvre est nulle et il est possible d'agir sur la base de l'action de louage."

75 Cannata 1969: à la page 197; Voci 1969: à la page 201; Gallo 1970: aux pages 496sq; Martin 1989: aux pages 109sq.

76 À ce propos, voir Labeo 5 *post a Iav epit* D 19 2 60 3.

77 Sur les stipulations prétoriennes, voir Palermo 1942; Mozzillo 1960; *idem* 1971: aux pages 450sq; Finkenauer 2010: aux pages 294sq.

fructuaria en s'engageant à restituer le bien à la fin de l'usufruit, à utiliser et à jouir de ce bien conformément au jugement d'un homme de bien et à s'abstenir de commettre un dol.⁷⁸ La création de la *cautio fructuaria* trouve son origine dans une lacune du *ius civile* qui ne sanctionnait pas les comportements négligents du *fructuarius*, comme c'est le cas de l'usufruitier qui ne taillait pas les vignes ou qui laissait aller en ruine l'aqueduc qui traversait le fonds.⁷⁹ Grâce à l'intervention du prêteur, le *fructurarius* peut désormais être assigné en justice sur la base de l'*actio ex stipulatu* qui découle de la *cautio fructuaria* par le nu-propriétaire qui lui reproche de ne pas *uti frui arbitrato boni viri*.

En dépit de l'opinion contraire d'une partie de la doctrine,⁸⁰ ce renvoi au jugement d'un homme de bien ne doit pas être compris dans un sens subjectif. Il ne s'agit pas d'un tiers qui est appelé en tant qu'arbitre à apprécier si le comportement de l'usufruitier est en accord avec la stipulation. En effet l'analyse des nombreuses sources relatives à la *cautio fructuaria* ne permet pas de déduire l'intervention d'un tiers. Dès lors, l'*arbitratus boni viri* correspond à un standard. Il reviendra au *iudex* de vérifier que l'usufruitier a respecté le modèle du jugement de l'homme de bien qui est inclus dans la formule de la stipulation prétorienne. Le renvoi au jugement de l'homme de bien a des conséquences pratiques extrêmement importantes car il permet d'augmenter les pouvoirs d'appréciation du juge.

La mention de l'*arbitratus boni viri* autorise le juge à examiner les circonstances factuelles de l'affaire ce qui rend l'*actio ex stipulatu*, qui est une action de droit strict, plus flexible. L'inclusion du jugement de l'homme de bien peut donc être comparée à la clause *ex fide bona*. Néanmoins, l'*actio ex stipulatu* qui découle de la *cautio fructuaria* ne change pas pour autant sa nature. Elle reste une action *stricti iuris*. Il ne s'agit pas d'une contradiction car la peine encourue par l'usufruitier est établie par la stipulation et que le juge n'a aucune marge discrétionnaire pour la moduler.⁸¹ L'*arbitratus boni viri* constitue donc un standard, un modèle objectif qui s'impose au juge en lui donnant ainsi un pouvoir discrétionnaire. En même temps, le renvoi au jugement de l'homme de bien, par son caractère objectif, implique que le juge ne peut pas décider en se basant sur ses propres critères personnels, mais il doit tenir compte du standard du *vir bonus* qui implique nécessairement une idée de bon sens et de modération.

78 Lenel 1927³: aux pages 538-539, qui est suivi par Mantovani 1999²: à la page 106, a ainsi reconstruit la formule de la *cautio fructuaria*: "Cuius rei usus fructus testamento Lucii Titii tibi legatus est, ea re boni viri arbitrato usurum fruiturum te et, cum usus fructus ad te pertinere desinet, id quod inde extabit restitutum iri dolumque malum abesse afuturumque esse spondesne? Spondeo." ("Promets-tu d'utiliser et de jouir de cette chose, qui t'a été laissée par legs dans le testament de Lucius Titius, conformément au jugement d'un homme de bien, et quand l'usufruit ne t'appartiendra plus, de restituer ce qui restera et de t'abstenir, même dans le futur, du dol? Je promets.").

79 Ulpian 18 *ad Sab D* 7 1 13 2.

80 Cannata 2001: aux pages 484-486; Santucci 2013: aux pages 139sq.

81 Dans ce sens, Betancourt 1973: à la page 381; Naumowicz 2011: à la page 603.

Le modèle de l'homme de bien, tout en étant présent dans des nombreux domaines du droit romain, ne devient pas une *ratio* qui motive une certaine solution juridique.⁸² Dans ce sens, il est nécessaire de le distinguer du *bonum et aequum* qui dans certaines hypothèses ne doit pas être assimilé à un standard.

S'agissant des stipulations prétoriennes, le renvoi au jugement de l'homme de bien apparaît à plusieurs reprises dans la formule. Mais parfois l'application du standard de l'*arbitratus boni viri* se fait en dehors de toute mention formulaire. L'analyse de plusieurs fragments relatifs aux successions révèle ainsi comment les juriconsultes ont recours à l'homme de bien pour compléter des dispositions à cause de mort. Il en va ainsi d'un célèbre passage de Celse 15 *Digesta* D 32 43:⁸³

Si filiae pater dotem arbitrato tutorum dari iussisset, Tubero perinde hoc habendum ait ac si viri boni arbitrato legatum sit. Labeo quaerit, quemadmodum apparet, quantam dotem cuiusque filiae boni viri arbitrato constitui oportet: ait id non esse difficile ex dignitate, ex facultatibus, ex numero liberorum testamentum facientis aestimare.⁸⁴

Dans une hypothèse de legs de dot dont le montant est indéterminé, Tubéron affirme que la somme doit être évaluée conformément au jugement d'un homme de bien. Cette solution est approuvée par Labéon qui l'approfondit en se demandant en quoi consiste exactement l'*arbitratus boni viri*. Ce dernier montre comment appliquer dans ce cas ce standard. Il s'agit de la prise en compte des données objectives, à savoir le rang et le patrimoine du testateur, le nombre d'enfants qu'il laisse.

Ce texte est tout à fait remarquable car il donne des exemples précis de paramètres que le *vir bonus* romain aurait pris en compte pour calculer la dot de sa fille. De surcroît, le testateur transmet la dot par le biais d'un legs. Or, le *legatum* à effets obligatoires est protégé par l'*actio ex testamenti* qui est une action de droit strict. En dépit de cela, les juriconsultes emploient le standard de l'homme de bien tout comme ils le font en matière de fidéicommiss – une institution qui comme l'indique sa dénomination même, a des liens extrêmement étroits avec la *fides*. Même si les textes qui portent sur les *fideicommissa* sont plus nombreux,⁸⁵ l'application par la jurisprudence du standard de l'homme de bien dans un acte juridique protégé par une action de droit strict montre l'ampleur pratique de la technique du standard. Il ne reste maintenant qu'à comprendre pour quelle raison les *prudentes* y ont recours.

82 Une intéressante exception est néanmoins constituée par Papinien 27 *quaest* D 18 7 6 1.

83 Astolfi 1964; Grosso 1966³: à la page 138; Voci 1963: à la page 882; *idem* 1969: à la page 221; Solinas: 1972 à la page 560; Gallo 1971: à la page 582; Stagl 2009: à la page 131.

84 “Si un père a laissé à sa fille une dot conformément au jugement des tuteurs, Tubéron dit qu'il faut considérer que la dot a été léguée conformément au jugement d'un homme de bien. Labéon demande comment déterminer le montant de la dot qui doit être constituée en faveur de la fille conformément au jugement d'un homme de bien. Il dit que cela n'est pas difficile à estimer sur la base de la position sociale, du patrimoine et du nombre d'enfants du testateur.”

85 Par exemple, Scaevola 4 *resp* D 33 1 13 1; Papinien 9 *resp* D 34 1 10 2; Modestin 11 *resp* D 34 1 5.

La disposition testamentaire mentionnée dans le fragment de Celse D 32 43 est indéterminée et, de la sorte, destinée à l'inefficacité. Or, seul l'interprète par son œuvre herméneutique peut reconstruire la volonté du *de cuius* en permettant ainsi l'application du legs. Pour atteindre ce résultat, le jurisconsulte emploie le modèle du *vir bonus*, en calculant le montant de la dot comme le ferait un homme de bien, une personne honnête.

Le *vir bonus* renvoie au modèle de l'homme honnête, ce qui, à première vue, pourrait sembler être proche de celui du *bonus* ou *diligens pater familias*. Toutefois, cette proximité est seulement apparente: il s'agit de deux standards distincts. En effet, le bon ou diligent père de famille est le standard qui permet exclusivement l'appréciation de la *culpa*.⁸⁶

2 2 Le *bonus* ou *diligens pater familias*

Une illustration de l'emploi du *bonus* ou *diligens pater familias* se trouve dans un passage de Labéon, extrait du livre 2 des *Pithana* épitomé par Paul au Digeste 19 1 54^{pr}:

Si servus quem vendideras iussu tuo aliquid fecit et ex eo crus fregit, ita demum ea res tuo periculo non est, si id imperasti, quod solebat ante venditionem facere, et si id imperasti, quod etiam non vendito servo imperaturus eras. Paulus: minime: nam si periculosam rem ante venditionem facere solitus est, culpa tua id factum esse videbitur: puta enim eum fuisse servum, qui per catadromum descendere aut in cloacam demitti solitus esset. Idem iuris erit, si eam rem imperare solitus fueris, quam prudens et diligens pater familias imperaturus ei servo non fuerit. Quid si hoc exceptum fuerit? Tamen potest ei servo novam rem imperare, quam imperaturus non fuisset, si non venisset: veluti si ei imperasti, ut ad emptorem iret, qui peregre esset: nam certe ea res tuo periculo esse non debet. Itaque tota ea res ad dolum malum dumtaxat et culpam venditoris dirigenda est.⁸⁷

Ce texte⁸⁸ porte sur une hypothèse spécifique de responsabilité dans la vente qui se pose quand le *venditor* n'a pas encore transmis la possession de l'esclave objet

86 Voir Cannata 1992: aux pages 28-29.

87 "Si l'esclave que tu as vendu sur ton ordre a fait quelque chose et à cause de cela il s'est cassé une jambe, cette chose n'est pas faite à ton péril seulement si tu as ordonné ce qu'il avait l'habitude de faire avant la vente, et si tu as ordonné ce que tu aurais ordonné à une esclave que tu n'avais pas vendu. Paulus: Pas du tout. En effet, s'il avait l'habitude de faire une chose dangereuse avant la vente, il semblera que cela a été fait de ta faute: imagine en effet un esclave qui a l'habitude de descendre à la corde ou qui se laisse baisser dans les égouts. La même règle de droit s'applique s'il avait l'habitude d'ordonner une chose qu'un prudent et diligent père de famille n'aurait pas ordonnée à cet esclave. Qu'est-ce qu'il arrive si cela a été excepté expressément? Il peut certes ordonner une nouvelle chose à cet esclave qu'il n'aurait pas ordonné s'il ne le vendait pas: par exemple, si tu lui as ordonné d'aller chez l'acheteur qui est à l'étranger. En effet, cela ne doit certainement pas être à ton péril. En effet, toute cette affaire doit être seulement déterminée sur la base du dol et de la faute du vendeur."

de la vente. Dans ce laps de temps avant la *traditio*, l'esclave se casse une jambe en exécutant une activité qui lui a été ordonnée par le vendeur. Partant, le vendeur est-il responsable de l'accident qui est survenu? Le texte présente deux solutions différentes.

Labéon exclut la *culpa* du vendeur si l'esclave s'est blessé en accomplissant une activité qu'il avait l'habitude de faire même avant la vente. Il est possible que le juriste augustéen utilise le modèle de la *diligentia quam suis*,⁸⁹ c'est-à-dire qu'il fasse référence à la diligence que le *pater familias* utilisait à l'égard de choses qui lui appartiennent. Le critère de la *diligentia quam suis* demeure difficilement identifiable à la technique du standard car les juristes apprécient la responsabilité sur la base du comportement qu'une personne adopte avec ses biens personnels. Il manque alors ce profil de l'indétermination, qui est typique du standard. En effet, s'il est bien question de normalité, c'est-à-dire la manière dans laquelle le *pater familias* a l'habitude de traiter ses biens, le profil de l'indétermination qui est typique de la technique du standard s'affaiblit fortement car les jurisconsultes prennent en considération l'homme dont il faut établir la *culpa*. Il s'agit dès lors de l'appréciation de la *culpa in concreto*.⁹⁰ C'est donc l'abstraction qui est propre au standard qui fait ici défaut.⁹¹

88 La partie finale du texte, à partir de *quod si exceptum fuerit*, a fait l'objet de soupçons d'interpolations. La tendance est aujourd'hui de considérer le contenu du fragment comme authentique. Voir Voci 2010: à la page 84; Cannata 1992: à la page 40.

89 Cannata 1992: à la page 40. Sulla *diligentia quam suis*, voir Maganzani 2006; Santucci 2008.

90 Le texte probablement plus célèbre qui porte sur une hypothèse de *diligentia quam suis* est un fragment du livre 11 des *Digesta* de Celse transmis au Digeste 16 3 32, qui a été connu à partir du Moyen Âge comme *lex quod Nerva*. Ce fragment est connu aussi pour l'assimilation entre la *culpa lata* et le dol opérée par Nerva. Sur ce texte voir notamment, Maganzani 2006: *passim*.

91 De manière analogue, il semble impossible d'assimiler à un standard la simple mention du *pater familias*, comme c'est le cas dans le fragment d'Ulpien 17 *Ad Sabinum* D 7 1 9 7: "Instrumenti autem fructum habere debet: vendendi tamen facultatem non habet. Nam et si fundi usus fructus fuerit legatus et sit ager, unde palo in fundum, cuius usus fructus legatus est, solebat pater familias uti, vel salice vel harundine, puto fructuarius hactenus uti posse, nec ex eo vendat, nisi forte salicti ei vel silvae palaris vel harundineti usus fructus sit legatus: tunc enim et vendere potest. Nam et Trebatius scribit silvam caeduam et harundinetum posse fructuarium caedere, sicut pater familias caedebat, et vendere, licet pater familias non solebat vendere, sed ipse uti: ad modum enim referendum est, non ad qualitatem utendi." ("L'usufruitier doit avoir le fruit de ce qui sert à l'exploitation du fonds, toutefois il n'a pas la faculté de le vendre. En effet, même si on laisse par legs l'usufruit d'un fonds et qu'il y ait un champ, où le père de famille avait l'habitude de prendre les pieux, les saules et les jones pour le fonds, dont on a laissé l'usufruit, je considère que l'usufruitier peut les utiliser, avec la limite qu'il ne peut rien en vendre, à moins qu'on ne lui ait laissé l'usufruit du bois des saules, du bois pour les pieux ou de la cannaie. Dans ce cas, il peut les vendre. En effet, Trebatius aussi écrit que l'usufruitier peut couper le bois taillis ou la cannaie, comme le couperait le père de famille, et vendre, même si le père de famille n'avait pas l'habitude de vendre, mais de les utiliser lui-même. Il faut en effet avoir égard à la façon de l'utilisation et non pas à sa qualité.") Dans cette hypothèse, le juriste fait référence aux habitudes du propriétaire du fonds pour déterminer l'ampleur de l'exploitation de l'usufruitier.

Pour déterminer l'existence d'une *culpa*, Paul applique en revanche un modèle objectif, celui du père de famille prudent et diligent. Les activités habituelles de l'esclave ne rentrent donc pas en ligne de compte pour apprécier la responsabilité du vendeur. Paul admet toutefois l'existence d'accords entre les deux parties qui peuvent moduler la responsabilité du vendeur. Dans ce cas, le vendeur pourra ordonner au *servus* d'accomplir des activités qu'il n'aurait jamais faites s'il n'avait pas été vendu.

Selon Paul la *culpa* s'apprécie sur la base du standard du *diligens et prudens pater familias*. Ce modèle correspond à celui du *bonus pater familias* car les jurisconsultes romains emploient de nombreuses expressions équivalentes pour renvoyer au même standard.⁹² Il faut en effet rappeler que si le Code civil français a choisi de faire référence au bon père de famille, cette formulation du modèle n'était probablement pas la plus répandue à Rome. Cela se déduit du fait que seules cinq occurrences du renvoi au bon père de famille dans le Digeste ont survécu.⁹³

Il reste à expliquer la signification du standard: quelle valeur peut-on attribuer à l'expression *bonus* ou *diligens pater familias*? Tout d'abord, il est nécessaire de souligner que le *pater familias* romain ne correspond pas au père de famille français. En effet, par le terme *pater familias* les Romains indiquent l'homme qui était *sui iuris*. Par conséquent, un homme qui n'est pas marié ou qui n'a pas d'enfants devient *pater familias* dès lors qu'il n'est pas *in potestate* d'un ascendant. Seuls les *sui iuris* jouissent de la capacité juridique en droit privé⁹⁴ et peuvent avoir un patrimoine. En ce qui concerne l'adjectif *diligens*, il s'agit de la personne qui se comporte avec soin et application. La *diligentia* est dès lors la caractéristique de la personne qui agit avec scrupule et zèle.⁹⁵ Le *diligens pater familias* est l'homme, doté de capacité juridique, qui se comporte avec vigilance et précaution. En revanche, le terme *bonus* a une signification bien plus large par rapport à *diligens*. Pour cette raison, il a fait l'objet d'interprétations très différentes de la part de la doctrine romanistique.⁹⁶ Sans entrer dans les détails de cette controverse, on peut se limiter à affirmer que *bonus* a un champ sémantique assez vaste,⁹⁷ mais de manière générale il renvoie à l'idée de diligence chez un homme et de valeur pour une chose.⁹⁸ Cette signification de *bonus*, proche du mot *diligens*, explique dès lors pour quelle raison les jurisconsultes emploient de manière équivalente le standard du bon et diligent père de famille.

92 Sur ce point, voir Cannata 1992: à la page 29 note 95.

93 Ulp 17 *ad Sab* D 7 1 9 2; Paul 3 *ad Sab* D 7 8 15 1; Gai 10 *ad ed prov* D 18 1 35 4; Paul 40 *ad ed* D 38 1 20 1 (*bonus et diligens*); Afr 9 *quaest* D 40 4 22.

94 Sur les conflits qu'une telle situation peut engendrer, voir Thomas 1982: aux pages 5sq.

95 Voir Ernout & Meillet 1967⁴: à la page 350.

96 On fait notamment allusion à la querelle qui a opposé récemment deux romanistes italiens, Giuseppe Falcone et Roberto Fiori. Voir notamment Falcone 2010-2011: aux pages 57sq [= *idem* 2013a: aux pages 39sq]; *idem* 2014: aux pages 258sq. Fiori 2011b; *idem* 2013a: aux pages 19sq; *idem* 2013b: aux pages 169sq.

97 Ernout & Meillet 1967⁴: à la page 73.

98 De Meo 1986²: à la page 212.

Une autre belle illustration de l'application de la technique du standard pour l'appréciation de la responsabilité se trouve dans un passage de Gaius, qui est extrait du livre 10 de son commentaire *Ad edictum provinciale*, au Digeste 19 2 25 7:

Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset. Idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduxerit: idemque etiam ad ceteras res transferri potest.⁹⁹

Ce texte de Gaius est très célèbre. Il a fait l'objet d'une attention considérable de la part de la doctrine¹⁰⁰ et a surtout donné lieu à de nombreuses critiques sur son éventuelle interpolation.¹⁰¹ Il est ici question d'une *locatio conductio* qui a pour objet le transport d'une colonne. Le *conductor* est-il responsable si la colonne se casse? La réponse de Gaius est claire: la responsabilité du transporteur peut être engagée seulement si une faute a été commise par lui ou par une personne qui travaille sous ses ordres.¹⁰² L'absence de *culpa* est dès lors définie par le juriconsulte comme le fait d'avoir accompli tout ce qu'aurait fait un homme très diligent ("si omnia facta sunt, quae diligentissimus quisque observaturus fuisset"). L'on constate que le standard est analogue au *bonus* ou *diligens pater familias*, mais il n'est pas identique car il est question d'un *diligentissimus quisque*. Faut-il attacher de l'importance à cette différence? L'emploi de l'adjectif au superlatif peut-il être considéré comme un indice d'interpolation?

Rien n'autorise cependant à penser que *diligentissimus quisque* est un ajout des compilateurs.¹⁰³ En dépit de cette différence dans la formulation, l'emploi du superlatif ne semble pas impliquer l'existence d'une différence conceptuelle. L'emploi de *diligentissimus* est simplement une expression particulière du modèle de l'homme diligent. Comme il a été souligné plus haut, les sources romaines ont recours à plusieurs formulations pour indiquer le standard qui permet l'appréciation

99 "La personne qui s'est engagé par un contrat de louage à transporter une colonne, si elle, pendant qu'il la soulève ou la transporte ou la replace, est cassée, cette personne est responsable pour le risque seulement si cela arrive pour sa propre faute ou pour la faute de ceux dont elle sert de l'œuvre. En revanche, il n'y a pas de faute si tout ce qu'observerait une personne très diligente a été fait. Évidemment, nous comprendrons de la même manière si quelqu'un s'est engagé par un contrat de louage à transporter des jarres ou une poutre. Et cette règle peut être aussi appliquée à d'autres situations."

100 On se limitera à citer quelques-unes des nombreuses contributions: Alzon 1966: à la page 328; MacCormack 1971: à la page 541; *idem* 1972: aux pages 137 et 170; Robaye 1987: *praecipue* à la page 206; Voci 1990: aux pages 38, 85, 106, 132; Cannata 1992: *praecipue* aux pages 38, 44.

101 À ce propos, voir Robaye 1987: aux pages 206sq.

102 Fercia 2008.

103 Cardilli 1995: à la page 500. Il existe des analogies avec deux autres passages (Gai 9 *ad ed prov* D 13 6 18pr; *idem*, 10 *ad ed prov* D 18 1 35 4), ce qui constitue une preuve importante du caractère classique de D 19 2 25 7.

de la *culpa*. En l'espèce, l'utilisation du superlatif s'explique probablement par la nécessité de caractériser la faute dont répond le débiteur.¹⁰⁴ *Quisque diligentissimus* serait donc une simple déclinaison du *bonus* ou *diligens pater familias*.

3 Conclusion

Le concept de standard est très récent puisqu'il a fait son apparition dans le langage juridique au début du xx^e siècle. En dépit du caractère contemporain du terme, il est possible d'analyser certaines clauses romaines sous l'angle de standard. En effet, l'analyse des sources juridiques romaines a révélé que si le concept de standard n'a pas été théorisé par la *iusprudentia*, il existe néanmoins plusieurs critères herméneutiques qui correspondent *de facto* à des standards, comme la *fides bona*, le *vir bonus* ou les *boni mores*. Tout en ayant conscience de l'anachronisme, il paraît fécond d'utiliser le terme standard pour analyser les sources romaines. Cette catégorie juridique constitue un outil très efficace pour appréhender les textes romains puisqu'il permet d'identifier des lignes de force et de comprendre pour quels raisons les romains ont utilisé ces expressions que l'on a identifié comme des standards.

Leur emploi a été de grande importance puisqu'il a permis d'élargir, même dans le domaine des actions de droit strict, le pouvoir d'appréciation du juge. Le standard est dès lors un outil fondamental qui permet, par le truchement du juge, d'adapter le droit aux exigences de la conscience sociale.

ABSTRACT

It is difficult to develop a definition of the legal concept of standard. In spite of this the term "standard" is often used in French law. For example, good faith (*bonne foi*), sound morals (*bonnes mœurs*) and *pater familias* (*bon père de famille*) are considered standards. We find the same concepts in Roman law. Moreover, it appears that the use of this kind of concepts is precocious: the action of the *fiducia*, which dates back at least to the second century BC, mentions the clause *ut inter bonos bene agier*. Yet, as is often the case, there is no general category that encompasses all these concepts. It is consequently tempting to classify them as "standards" to fill this void. Methodologically speaking, however, it is hard to establish if it is correct to use the term "standard". In fact, this classification raises a problem of coherence. The legal use of the term "standard", which is of Anglo-Saxon origin, is recent. It dates back to the 1920s. N Roscoe Pound probably used it first and had an important role in its success. French lawyers began to employ the concept of "standard" to achieve a more flexible interpretation of the statutory law. Is it pertinent to use a clearly anachronistic word to describe Roman reality? It would be reasonable to fear

104 Voir la réflexion de Cardilli 1995: aux pages 496sq sur le *diligentissimus pater familias* présent dans Gai, 9 *ad ed prov* D 13 6 18pr.

that the application of the term “standard” would result in a deformation of Roman law. Though, an analysis of the sources shows that it is possible and even fruitful to apply the contemporary concept of “standard” to Roman law. While it is true that it is anachronistic, using it seems to improve our understanding of Roman law.

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L'EMPLOI DES STANDARDS EN DROIT ROMAIN

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EXISTIMATIO AS “HUMAN DIGNITY” IN LATE-CLASSICAL ROMAN LAW

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1 Introduction

1.1 The contested historical origins of the notion of human dignity

The rise of the notion of “human dignity” as a basis for the modern conception of human rights is currently being hotly debated. As is the case with research into the historical roots of an idea of human rights in general, the origin of the notion is very much tied to its definition,¹ for how one defines something also determines what its origins are and *vice versa*. For human dignity, this means distinguishing it from dignity as such, even though the line between the two notions seems arbitrary at best.

1 As shown in the recent volume on *Revisiting the Origins of Human Rights* (Halme-Tuomisaari & Slotte (Cambridge) 2015), to which the author has contributed.

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In a recent work, Waldron has defined “human dignity” as “levelling-up”, indicating the process by which privileges that were previously tied to a certain status or rank now are accorded equally to everyone.² The advantage of this definition is that it is all-encompassing in the sense of taking into account its primary legal, political, theological and philosophical aspects. For instance, “levelling-up” covers both the legal definition of human dignity as it occurs in the constitutions of Germany and South-Africa³ as well as its formulation as a value by, for example, Kant.⁴ In this sense the debate between Whitman, who advocates at the very least a relatively law-based definition of the notion of “dignity”,⁵ and Moyn emphasising its pre-war Catholic roots,⁶ is a paradox if the idea of “levelling-up” is taken as the defining characteristic of human dignity. However, considering the relation between the definition and origin of a historical concept, by identifying human dignity with a general new-found independence from status or rank, is it possible to extend or otherwise argue for a specific historical origin for a notion of human dignity?

As such, the first historical text in which *dignitas* is used to a certain extent in the sense of “human dignity” is Cicero’s theory of the various *personae* in *De officiis* 1 105-107.⁷ One of these *personae* is the *persona* of reason, which all men share and which sets us apart from animals.⁸ However, the dignity man should embrace according to Cicero is not something that is to be protected against outside interference or violations, but rather consists of living properly in the Stoic sense, that is, in moderation and abstaining from all manner of luxury and overindulgence.⁹ In other words, even though Cicero relates the notions of *persona* and *dignitas* to one another, and indicates there is such a thing as a rational *persona* typical to all human beings, *dignitas* in Cicero’s *De officiis* is an obligation, not a right. In general, whereas *persona* in the Roman era gradually developed into a more inclusive notion,¹⁰ the connotation of *dignitas* remained one of social status or standing, not the dignity of “man as such”.¹¹ It was only in the late fifteenth century that *dignitas* would obtain the meaning of “dignity” in this latter sense. The literature then refers to works by Pico della Mirandola (1486) and Von Pufendorf (1672), still undoubtedly building

2 Waldron 2012: 21, 33-36 and *passim*.

3 *Idem* 18-19, 27-28 and 48-49, citing the first chapter of the South-African Constitution (1996) under 1: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms (...).”

4 *Idem* 2012: 23-26.

5 Whitman 2003: 243-266; Whitman 2004: 1151-1221.

6 Moyn 2014: 19-33; Moyn 2015: 25-64. Also, Waldron 2012: 27-28.

7 Gaudemet 1995: 110; Cancik 2002: 19-39; Cancik 2005: 94-96. See, also, Bloch 1977: 25-37; and for a more general view, Rist 1982: esp 145-152.

8 *Cic Off* 1 107; Cancik 2005: 96.

9 *Cic Off* 1 105; Cancik 2005: 95.

10 For example, Pessers 2005: 15-21; van Beers 2009: 53-67; and Stagl 2012: 89-109.

11 On the problem of the various meanings of “dignity”, see Waldron 2012: 15-19.

on Cicero and other ancient sources.¹² However, the problem remains whether the Romans themselves actually knew and acknowledged “human dignity”. The concept is not in any obvious way engrained in the notion of *dignitas*, whether understood in the sense of social status or moral obligation. This is made all the more uncomfortable by the relation between the notions of *persona* and *dignitas* in Cicero: How can the concept of *persona* have developed into a more inclusive notion, while *dignitas* was and remained concerned with social status and moral obligation instead of the dignity of “man as such”?

One answer to this question might be that for indicating “human dignity”, the Romans actually used a term different from *dignitas*. There is some reason to suppose this. In the legal writings of the sixteenth century “dignity” for the first time is conceived of – to some degree – as “human dignity” as a right instead of an obligation. The French humanist jurist Donellus (1527-1591) in his *Commentarii de iure civili* (1589) formulates an early theory of subjective rights one has on his own person, the *suum in persona ipsa*.¹³ These “personality rights” are the rights to life, body, liberty and dignity.¹⁴ The remarkable thing about these “personality rights” is their independence from concepts of status or social standing. According to Donellus everyone has these rights regardless of one’s position or role in society. As such, their formulation constitutes a breach with the earlier tradition of subjective rights as rights solely related to social class.¹⁵ Therefore, the catalogue is of major importance for the consecutive development of the notion of subjective rights. Moreover, it appears that Donellus refers to specific Roman legal texts in formulating these “personality rights”, which is not that strange considering that the *Commentarii de iure civili* is basically a systematisation of (received) Roman law.¹⁶ For instance, violations of these “personality rights” are punished by means of *actiones* derived from the Roman law of tort or delict, primarily the *actio iniuriarum*.¹⁷ They are even seen as a more or less logical corollary to the Roman order of *actiones* from delict, to the point that Donellus wonders why the *Digest* did not contain a similar catalogue of personality rights.¹⁸ Furthermore, in stating these personality rights, Donellus refers to several Roman legal sources directly. For instance, when discussing his “right to freedom” *libertas* is defined as *facere quae velimus*, derived from the famous text of Florentinus on *libertas* as a *facultas naturalis*.¹⁹ But with regard to his “right to dignity”, Donellus does something quite noteworthy: Instead of stating that a “right

12 Cancik 2005: 95-96.

13 Waider 1961.

14 *Idem* 60-61; eg in Donellus *Commentarii de iure civili* (1589) 2 8 3 at 229-230 of the 1762 *Opera omnia*-edition (Waider 1961: 52 n 1); Coing 1982: 253-258.

15 Waider 1961: 61.

16 *Idem* 54-58.

17 Coing 1982: 254.

18 Giltaij 2011: 26.

19 D 1 5 4; Waider 1961: 60 n 59. See, also, Schrage 1975.

to *dignitas*” is protected by the *actio iniuriarum* as would have made sense based – for instance – on D 47 10 1 2, he uses the term *existimatio* and refers to a text by a Roman jurist called Callistratus in D 50 13 5 1.²⁰

1 2 Research question

The reference is telling with regard to the role of personality rights such as dignity in the system Donellus creates. With the specific definition of *existimatio* as a “position of unimpaired *dignitas*, which is established by law and custom”, Donellus intends to formulate a right to dignity and consequently also to life, body and freedom with a, for lack of a better word, “natural” character, that is rights that every person has regardless of his legal status. But this appears to be only exemplary for the sixteenth century conception of the relation between individual and state based on the individual’s “inalienable” personality rights. To be clear, I am using the sixteenth-century jurist Donellus here as a tool to clarify a particular problem for Roman law, without suggesting whether he is of any value for the content of the Roman legal sources as such. But still, does the conception of Donellus say something about the content and meaning of the Roman legal text itself? Did the Roman jurists intend to formulate a “right to human dignity” relatively independent of social status or circumstance with the term *existimatio*, as Donellus would centuries later? And what is the exact relation between the terms *dignitas* and *existimatio* in the Roman sources?

2 EXISTIMATIO IN THE LATE REPUBLIC AND EARLY EMPIRE

If we look at the use of the term “*existimatio*” in the sources of the late Republic and early Empire, it designates exclusively something along the lines of “standing in society”.²¹ This standing, or perhaps rather “image” in modern terminology,²² could be violated by rumours and bad press or by an individual’s own misconduct.²³ As such, magistrates²⁴ and, later, emperors,²⁵ possessed *existimatio*, which could be violated *dictum factumve*, as Suetonius states. Various authors point to a close relation between *existimatio* and *infamia* as its negative counterpart.²⁶ With regard to the Roman legal sources, in his work on the place and role of *infamia* in Roman law,

20 Waider 1961: 60 n 60; Donellus *Commentarii de iure civili* (1589) 2 8 3 at 229.

21 Yavetz 1974: 39.

22 *Ibid.*

23 Yavetz 1974: 45; cf Cic *Planc* 6.

24 For example, Cic *Verr* 2 60; Yavetz 1974: 38-45.

25 Suet *Iul* 75; Suet *Tib* 58; Yavetz 1974: 47.

26 Yavetz 1974: 31 and *infra*.

Greenidge devoted a chapter to the meaning of the term *existimatio*. According to Greenidge, both *dignitas* and *existimatio* denote a concept of “civil honour”.²⁷ This can be seen, for instance, in Cicero *Pro Quinctio* 15, where Cicero states that when under the Edict of the *praetor* someone’s goods had been seized, also his *fama* and *existimatio* are taken away: thus, *infamia* could to a degree be seen as meaning *laesa existimatio*, though we cannot be certain whether this truly entailed a legal measure, a form of moral censure, or merely a Ciceronian rhetorical flourish.²⁸

In the sense of “civil honour” or “reputation”, the term often props up in the legal texts, mainly with regard to the *existimatio* of tutors²⁹ and witnesses.³⁰ Furthermore, at some point, the violation of *existimatio* as well as *dignitas* came to be punished by means of an *actio iniuriarum*. Kaser suggests this was done under the Edict rubric *ne quid infamandi causa fiat*,³¹ due to the connection between *existimatio* and *infamia*.³² In a concrete sense an individual’s *existimatio* could be violated by a *libellus famosus*, a verbal or written insult, which was punishable both under *iniuria* in the Edict as well as the *lex Cornelia de iniuriis*.³³ As such, *iniuria* as a delict sanctioning transgressions against someone else’s *existimatio* could be traced back as far as Labeo or even earlier in the late Republic.³⁴ A more direct connection between *iniuria* and *existimatio* can be seen in D 47 10 1 4 and D 47 10 1 6:³⁵

D 47 10 1 4 Ulpianus Libro 56 ad edictum: Et si forte cadaveri defuncti fit iniuria, cui heredes bonorumve possessores exstitimus, iniuriarum nostro nomine habemus actionem: spectat enim ad existimationem nostram, si qua ei fiat iniuria. Idemque et si fama eius, cui heredes exstitimus, lacesatur. (And if perchance the corpse should be contumeliously treated of a deceased to whom we are heirs or recipients of his estate, we have the action for insult in our own right; for it affects our own reputation, if any insult be directed at the corpse. The same applies if the good repute of one to whom we are heirs be damaged.³⁶)

D 47 10 16 Ulpianus Libro 56 ad edictum: Quotiens autem funeri testatoris vel cadaveri fit iniuria, si quidem post aditam hereditatem fiat, dicendum est heredi quodammodo factam (semper enim heredis interest defuncti existimationem purgare) ... (Now whenever there be any affront at the testator’s funeral or to his corpse, if it occurs after the inheritance has been accepted, it must be said that in a sense, the insult is to the heir [for it is always the heir’s obligation to vindicate the reputation of the deceased] ...)

27 Greenidge 1894: 2.

28 *Idem* 19.

29 *Idem* 5 n 2; *idem* 189ff; Brasiello 1937: 549; D 26 10 4 2.

30 Brasiello 1937: 552.

31 Lenel 1956: 323 n 193.

32 Kaser 1956: 222-223.

33 See the texts in Kaser 1956: 223 n 18 (*iniuria*) and n 19 (*lex Cornelia de iniuriis*).

34 Made explicit in various texts of post-classical jurists: Brasiello 1937: 547; Hagemann 1998: 137-138.

35 Kaser 1956: 231 n 58.

36 Translations from the Digest are by Watson.

The heirs to an estate may bring an *actio iniuriarum* under their own name when the body of the deceased has been violated, because this violation both concerns the *existimatio* of the deceased and the *existimatio* of the heirs. This concept of *existimatio* is close to the one argued by Greenidge, more “civil honour” than “human dignity”. But seeing the connection between *existimatio* and *infamia*, it goes to wonder whether a violation of *existimatio* is implied in other parts of the Edict rubric on *iniuria* or even with regard to other *actiones famosae*, carrying the punitive measure of *infamia*.³⁷ However, according to Kaser, *existimatio* in the context of the Edict is not used by the jurists in a technical legal sense.³⁸ The same goes for the notion of *existimatio* in D 50 13 5, the text referred to by Donellus some 1300 years later in his formulation of a personal right to dignity.³⁹

3 D 50 13 5 AND THE *LIBRI DE COGNITIONIBUS*

The late-classical jurist Callistratus⁴⁰ writes his text in the context of a larger manual on the *cognitio*-procedure.⁴¹ The text primarily regards a loose subdivision of the *genera* of the procedure based on the punishment the trial would lead to:

D 50 13 5 *pr Callistratus Libro primo de cognitionibus*: Cognitionum numerus cum ex variis causis descendat, in genera dividi facile non potest, nisi summatim dividatur. Numerus ergo cognitionum in quattuor fere genera dividi potest: aut enim de honoribus sive muneribus gerendis agitur, aut de re pecuniaria disceptatur, aut de existimatione alicuius cognoscitur, aut de capitali crimine quaeritur. (The number of judicial examinations, since it arises from various causes, cannot easily be divided into categories, unless this is done schematically. But the number of judicial examinations can perhaps be divided into four categories; for it is either a question of the undertaking of offices and munera, or of property, or of someone’s status, or of a capital offence.)

In the *principium*, the *cognitio*-trial is subdivided into four *genera*: Regarding the administration of offices, regarding pecuniary matters, regarding *existimatio* and concerning capital offences.⁴² Although the need for these kinds of manuals is easy to see in the context of a *cognitio*-trial after the degradation of the legal framework that existed in the late Republic and early Empire, the exact nature of the separation between trials regarding pecuniary matters, *existimatio* and capital offences remains *summatim*, as Callistratus himself describes it. For instance, following Cicero *Pro Quinctio* 15, a judgment based on the Edict could concern both a pecuniary matter as well as the *existimatio* of the condemned, even though Callistratus puts it under

37 Kaser 1956: 251; *cf.*, eg, D 50 17 104; Kaser 1956: 233 n 58.

38 *Idem* 231 n 58.

39 *Idem* 234, 264ff.

40 For biographical information on the jurist, see Bonini 1964: 11-21; Kunkel 1967: 235 no 61.

41 Lenel 1887-1889: vol I cols 80-94; Kaser 1956: 264-265; Bonini 1964: 29ff.

42 Brasiello 1937: 554-558; Bonini 1964: 32ff; Liebs 1966: 263.

the heading of trial regarding *existimatio* in D 50 13 5 3. Also, the relation between *infamia* in the Edict of the *praetor* and *infamia* as the result of committing a capital offence in any of the stages of development of Roman law hardly follows the neat distinction suggested by Callistratus.⁴³ In any case, the jurist goes on to treat the *cognitio*-trial regarding someone's *existimatio*:

D 50 13 5 1 *Callistratus Libro primo de cognitionibus*: Existimatio est dignitatis inlaesae status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut minuitur aut consumitur. (Status is a position of unimpaired standing, which is established by law and custom and under the authority of the laws may be reduced or removed by our delict.)

Thus we come to the definition of *existimatio* also referred to by Donellus in the construction of his right to human dignity in the sixteenth century. *Existimatio* is, in the Watson-translation, primarily defined as “a position of unimpaired standing, which is established by law and custom”. On the basis of this text, Greenidge draws a parallel between *existimatio* and *caput* in Roman law, where *existimatio* has a moral as well as a legal dimension.⁴⁴ However, as Kaser points out, the comparison is somewhat flawed because the diminution of *caput* or *capitis deminutio* is a proper legally subscribed sanction, contrary to *infamia* as it seems to be referred to in the latter part of the text.⁴⁵ As such, *infamia* as *laesa existimatio* has more in common with the Republican *nota censoria*, a punitive administrative measure issued by the *censor* on moral grounds,⁴⁶ only in this case applied by the magistrates in the *cognitio*-trial. Yet, the scope of this *laesa existimatio* is much greater than a mere moral sanction or even a moral punitive measure with legal consequences such as *infamia*. This becomes apparent from D 50 13 5 2-3:

Callistratus Libro primo de cognitionibus: (2) Minuitur existimatio, quotiens manente libertate circa statum dignitatis poena plectimur: sicuti cum relegatur quis vel cum ordine movetur vel cum prohibetur honoribus publicis fungi vel cum plebeius fustibus caeditur vel in opus publicum datur vel cum in eam causam quis incidit, quae edicto perpetuo infamiae causa enumeratur. (3) Consumitur vero, quotiens magna capitis minutio intervenit, id est cum libertas adimitur: veluti cum aqua et igni interdicatur, quae in persona deportatorum evenit, vel cum plebeius in opus metalli vel in metallum datur: nihil enim refert, nec diversa poena est operis et metalli, nisi quod refugae operis non morte, sed poena metalli subiciuntur. (2) Status is reduced if we are assigned a penalty which affects our standing, although liberty remains, as, for instance, if someone is banished or removed from the *ordo* or debarred from holding public office or if a plebeian is beaten with rods or assigned to forced labor or if anyone falls under any heading which is listed in the perpetual edict as bringing infamy. (3) Status is removed if *magna capitis deminutio* occurs, that is, if deprivation of liberty occurs, as, for instance, if someone is forbidden fire and water, which occurs when he is deported or

43 Mommsen 1899: 995 n 2; Greenidge 1894: 154-170; Kaser 1956: 254-263.

44 Greenidge 1894: 5-8.

45 Kaser 1956: 266 n 22.

46 Greenidge 1894: 41-112, esp 60-74; Giltaij 2011: 55-61.

if a plebeian is assigned mine work or to a mine; for it makes no difference, nor is there any distinction between a public work and a mine, except that those who escape from a public work are punished not by death, but by assignment to a mine.)

Based on the text, the diminution of *existimatio* in a *cognitio*-trial is synonymous with a panoply of penalties, such as exile, exclusion from certain magistracies, whipping, forced labour and praetorian *infamia*. Moreover, the complete loss of *existimatio* as well as *libertas* occurs when someone is sentenced by *aqua et ignis interdictio* to deportation or a plebeian to forced labour in the mines. Even though the character of the *laesa existimatio* and *capitis deminutio* may differ, it is telling that Callistratus calls the latter condition a *capitis deminutio magna*, by loss of factual liberty or possibly even the *status libertatis* encompassing both the legal *capitis deminutio media* and *maxima*.⁴⁷ When *existimatio* in the late Republic and the early Empire meant “civil honour”, it is clear that the notion of *existimatio* that Callistratus refers to in this text, namely the *existimatio* diminished or even lost by these sentences, goes far beyond “reputation”. Looking at the penalties, these range from losing civic privileges to corporal punishment and that which could easily be seen as punishments akin to the death penalty. Then the question is, what does this text say about the “positive” implications of the notion of *existimatio* in Roman law?

Kaser states that *existimatio* in this text is not simply an individual condition of being legally untouched by *infamia*, but rather human dignity in a general sense, transgressed upon by the catalogue of penalties.⁴⁸ If this is the case, *existimatio* would mean human dignity on a very basic level, entailing the integrity of life and limb as well as reputation, and relatively independent from rank compared to the notion of *dignitas*, seeing plebeians and possibly even slaves have an *existimatio* that is affected by the punishment.⁴⁹ Callistratus confirms this reading when he revisits the penalties regarding *existimatio* in the sixth book of his *Libri de cognitionibus* dealing with capital punishment:⁵⁰

D 8 19 28 1 *Callistratus Libro sexto de cognitionibus*: Ceterae poenae ad existimationem, non ad capitis periculum pertinent, veluti relegatio ad tempus, vel in perpetuum, vel in insulam, vel cum in opus quis publicum datur, vel cum fustium ictu subicitur. (The remaining

47 Kaser 1956: 265; cf Gai *Inst* 1 160 and 161.

48 Kaser 1956: 266: “Für unserer Zweck ist vielmehr nur wesentlich daß die *existimatio*, von der hier die Rede ist, nicht einfach die juristische Unbescholtenheit im Gegensatz zum Infamie ist, sondern in einem viel allgemeiner Sinn der Zustand unverletzten Menschenwürde, der durch alle aufgezählten Strafen von der Relegation bis zur Bergwerkstrafe geschmälert wird”; see, also, Bonini 1964: 37. Like Waldron 2012: 48-50, I use “human dignity” here in a very legal sense, meaning as a form of protection against degrading treatment as it occurs in various international treaties and constitutional documents nowadays.

49 This depends on reading D 49 19 28 2-5 as a single text, all dealing with punishments affecting *existimatio*. Slaves are referred to in D 49 19 28 4. Lenel (1887-1889) reads them as subsequent: vol 1 cols 91-92.

50 Lenel 1887-1889: vol 1 cols 91-94, col 91 no 42; Mommsen 1899: 908-909; Bonini 1964: 86-90.

punishments relate to a person's reputation, not to the risk of his *caput*, such as relegation, for a period or permanently, or to an island, or when someone is handed over to forced labor, or punished by beating with rods [tr Watson cs]).

Apart from D 50 13 5 and D 48 19 28, the function and content of the concept of *existimatio* in Callistratus remains rather unclear. Only one other text from the *libri de cognitionibus* appears to concern the loss of *existimatio* as a penalty specifically:⁵¹

D 48 19 26 *Callistratus Libro primo de cognitionibus*: Crimen vel poena paterna nullam maculam filio infligere potest: namque unusquisque ex suo admisso sorti subicitur nec alieni criminis successor constituitur, idque divi fratres Hierapolitanis rescripserunt. (The crime or punishment of the father cannot inflict any stain on the son; for each individual suffers his fate for his own crime, nor is he made the successor to the offence of another; as the deified brothers wrote in a rescript to the citizens of Hierapolis [tr Watson cs]).

However, contrary to what Bonini states,⁵² the text seems to regard the trials regarding *munera* rather than the trials concerning *existimatio*, both to be found in the first book of the *Libri de cognitionibus*.⁵³ The “stain” mentioned in the text would have been important as an impairment – whether in the guise of *infamia* or not – for the son to take office, and thus Callistratus and the *Divi Fratres* before him made it clear that a son does not inherit the crime his father committed.⁵⁴ In any case, even though the text is taken from the first book, it does not shed a great deal of light on the nature and function of the trials regarding the *existimatio* of the suspect.

4 THE NOTION OF *EXISTIMATIO* IN THE LATE-CLASSICAL ROMAN LEGAL SOURCES

4 1 The scope of *existimatio*

There are, however, plenty of examples of the *genus* of the trials regarding *existimatio* in later legal texts, primarily imperial constitutions.⁵⁵ According to Brasiello, late-classical jurists such as Callistratus had aimed to create a new genre of trial and punishment within the *cognitio*-procedure. These *poenae* or *iudicia existimationis* were to stand between pecuniary and capital punishment, and regarded any (*cognitio*-)trial in which the moral integrity of the accused was in question.⁵⁶ Ulpian, for example, uses the notion in the seventh book of his *De officio proconsulis* with regard to rescripts of Trajan to his provincial governors:⁵⁷

51 Lenel 1887-1889: vol 1 cols 84-85 nos 10-11; Von Lübtow 1948: 512-513; Bonini 1964: 51-52.

52 Bonini 1964: 52.

53 Lenel 1887-1889: vol 1 cols 81-85.

54 Greenidge 1894: 209-213.

55 Brasiello 1937: 561.

56 *Idem* 550; Cic *Q Rosc* 6 16. See, also, Yavetz 1974: 37-40.

57 Coenraad 2000: 134-141; Nogrady 2006: 112-125.

D 48 19 5pr *Ulpianus Libro septimo de officio proconsulis*: Absentem in criminibus damnari non debere divus Traianus Iulio Frontoni rescripsit. Sed nec de suspicionibus debere aliquem damnari divus Traianus Adsidio Severo rescripsit: satius enim esse impunitum relinqui facinus nocentis quam innocentem damnari. Adversus contumaces vero, qui neque denuntiationibus neque edictis praesidium obtemperassent, etiam absentes pronuntiari oportet secundum morem privatorum iudiciorum. Potest quis defendere haec non esse contraria. Quid igitur est? Melius statuatur in absentes pecuniarias quidem poenas vel eas, quae existimationem contingunt, si saepius admoniti per contumaciam desint, statui posse et usque ad relegationem procedi: verum si quid gravius irrogandum fuisset, puta in metallum vel capitis poenam, non esse absentibus irrogandam. (The deified Trajan wrote in a rescript to Julius Fronto that in criminal cases a person should not be condemned in his absence. He also wrote in a rescript to Adsidius Severus that neither ought a person to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned. However, judgment ought to be pronounced against contumacious persons who fail to comply with the summonses or edicts of the governors, even in their absence, after the manner of private actions. It is possible to maintain that these principles are not contradictory; what, then, is the answer? It will be better to lay down that penalties involving money or affecting a person’s reputation can be imposed on absent persons if, after frequent warnings, they fail [to appear] through contumacy, and this may go as far as relegation; but if there is any heavier penalty to be imposed, let us say condemnation to the mines or capital punishment, it must not be imposed on the absent [tr Watson cs]).

The subdivision made by Callistratus in trials regarding pecuniary matters, trials concerning *existimatio* and trials regarding capital offences is quite clearly present in this text. Pecuniary penalties or punishment regarding the *existimatio* of a suspect can be imposed even when the party is absent, while the presence of the accused is required when harsher measures are in order. It is interesting to note that while Callistratus classifies “hard labour” as a loss of *existimatio*, to Ulpian *metallum* is more akin to capital punishment.⁵⁸ Both jurists do, however, state relegation as a penalty affecting *existimatio*: Since the *Libri de cognitionibus* were probably composed around AD 197⁵⁹ and *De officio proconsulis* at least after AD 212,⁶⁰ it might be fair to say that Ulpian took his subdivision and concept of *existimatio* for the larger part from Callistratus.⁶¹ However, Liebs suggests a precursor in Venuleius Saturninus *De iudiciis publicis*.⁶² In any case, seeing that Callistratus devotes separate books to the discussion of the various kinds of trial, the seventh book of Ulpian’s *De officio proconsulis* may also have contained texts relevant specifically to the notion of *existimatio*.

Most of the texts in book 7 of *De officio proconsulis* appear to concern punishments and matters closely related to the penalty,⁶³ and the *persona* and

58 Coenraad 2000: 138-139 (meaning the death penalty).

59 Bonini 1964: 15; Liebs 1966: 257.

60 See, eg, Honoré 2002: 184.

61 Bonini 1964: 29-31; Liebs 1966: 262.

62 Liebs 1966: 262.

63 Lenel 1887-1889: vol 2 col 973 no 2180, col 977 no 2201; Nogrady 2006: 40-41.

dignitas of the accused are referred to explicitly in several texts, for instance in D 48 13 7(6) 2 regarding the punishment for the *crimen de peculatu*.⁶⁴ However, the term “*existimatio*” is not used in any of the other texts taken from the seventh book of *De officio proconsulis*. When Ulpian does use the term once again, he does so in his commentary on the *lex Iulia et Papia*:⁶⁵

D 50 16 131 1 *Ulpianus Libro tertio ad legem Iuliam et Papiam*: Inter “*multam*” autem et “*poenam*” multum interest, cum poena generale sit nomen omnium delictorum coercitio, multa specialis peccati, cuius animadversio hodie pecuniaria est: poena autem non tantum pecuniaria, verum capitis et existimationis irrogari solet. Et multa quidem ex arbitrio eius venit, qui multam dicit: poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic delicto imposita est: quin immo multa ibi dicitur, ubi specialis poena non est imposita. Item multam is dicere potest, cui iudicatio data est: magistratus solos et praesides provinciarum posse multam dicere mandatis permissum est. Poenam autem unusquisque inrogare potest, cui huius criminis sive delicti executio competit. (But there is a considerable difference between a “fine” and a “penalty”, since a penalty is a general name for the punishment of all delicts, a fine is tied to a misdemeanor, whose punishment today is in monetary form. But a penalty is not only of monetary form, but may be capital or involve status. And, indeed, a fine arises from the judgment of a man who pronounces the fine. A penalty is not imposed, except that which is laid down especially for the delict in question by each law or some other provision. So a fine is pronounced in cases where a special penalty is not laid down. Likewise, a man who possesses jurisdiction can pronounce fines. But anyone to whom the prosecution of the offence or delict in question falls can impose a penalty.)

Callistratus’s subdivision can be read in this text as well, although it is made subordinate to the difference between a *multa* and a *poena*, the former being a pecuniary penalty, the latter also affecting the *caput* and *existimatio* of the accused. The text appears to have a more theoretical character: According to Ulpian, a *poena* regarding the *existimatio* of the accused can only be imposed if this is prescribed by a law or some other authority, and furthermore, only those who possess *iurisdictio* may inflict such a penalty. As such, it appears penalties regarding *existimatio* were reserved for rather specific transgressions, even though as with D 50 13 5 and D 48 19 5 it remains unclear which transgressions Callistratus and Ulpian have in mind exactly. It stands to reason these are the transgressions to which previously *infamia* as a punitive measure had been appended. Important in listing these transgressions is emphasising that at least from the third century onwards, this measure could be appended somewhat equally to transgressions both in public and private criminal law.⁶⁶ This may have had something to do with the integration of various types of procedure into the *cognitio*-trial, but does not necessarily have to follow from it.⁶⁷

64 Nogrady 2006: 126-136, esp 133-134.

65 Also, Modestinus in D 50 16 103; Mommsen 1899: 907.

66 Macer in D 48 1 7; Mommsen 1899: 996-998; Kaser 1956: 269.

67 Mommsen 1899: 997; Liebs 1966: 258-263.

4 2 The possible origin of *existimatio*

Kaser provides a list of these transgressions,⁶⁸ among which violations of *tutela*, *fiducia* and *societas*⁶⁹ as well as *iniuria*⁷⁰ due to an earlier connection with the term *existimatio* catches the eye immediately. To this list we may add other various other non-capital *crimina* as Brasiello does.⁷¹ However, even though Callistratus and Ulpian may have had specific transgressions in mind, from the sources no direct connection stemming from the use of *infamia* as a punitive measure between the *iudicia existimationis* and specific transgressions either in the *Libri de cognitionibus*⁷² or book 7 of *De officio proconsulis* can be argued decisively. For instance, in the seventh book of *De officio proconsulis*, the *crimen laesio maiestatis* and the *crimen de sicariis et veneficiis* are stated. To these crimes, *infamia* was not in any obvious way attached, and should be seen on the whole as “capital” crimes.⁷³ In general, the problem in this regard is the measure in which *infamia* and *existimatio* in their “technical” meaning in the context of these transgressions in the *cognitio*-trial are related to “non-technical” *infamia* and *existimatio* as they occur in D 50 13 5 and its related texts.⁷⁴ With regard to the “non-technical” concept of *existimatio*, Kaser refers to an origin in rhetoric.⁷⁵ Perhaps we can see an early example of this rhetorical use of the term in Papinian:⁷⁶

D 28 7 15 *Papinianus Libro sexto decimo quaestionum*: Filius, qui fuit in potestate, sub condicione scriptus heres, quam senatus aut princeps improbant, testamentum infirmit patris, ac si condicio non esset in eius potestate: nam quae facta laedunt pietatem existimationem verecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est. (A son who was in parental power, appointed heir under a condition which the senate or the emperor disapproves, may upset his father’s will, as if the condition were one not in his power [to fulfill]; for any acts which offend our sense of duty, our reputation, or our sense of shame, and, if I might speak generally, which are done against sound morals, it is not to be accepted that we are even able to do.)

But apart from this text, the origin of the term *existimatio* as it is used by Callistratus in D 50 13 5 is not clear. Kaser refers mainly to Cicero *Pro Caecina* 100,⁷⁷ but the text does not contain the term *existimatio* as such. Moreover, we have already

68 Kaser 1956: 267 n 225.

69 Cicero, *Pro Q Roscio Comoedo* 6 16.

70 D 47 10 4 1/6.

71 Brasiello 1937: 547-561; Mommsen 1899: 996-998.

72 Lenel 1887-1889: vol 1 cols 90-91; Bonini 1964: 141-149.

73 Lenel 1887-1889: vol 2 cols 975-977.

74 Kaser 1956: 231 n 58.

75 *Idem* 267.

76 Babusiaux 2011: 236-238. See, also, Marcus Aurelius in Callistratus *Libro quinto de cognitionibus* D 48 7 7; Bonini 1964: 125-128.

77 Kaser 1956: 267.

seen that *existimatio* in the sources of the late Republic and early Empire means “reputation” or “civil honour” exclusively. This appears to be no different in the rhetorical treatises.⁷⁸ Therefore, there does not seem to be a logical precursor to the concept of *existimatio* as it is stated by Callistratus in the Latin texts.

It should, however, not be forgotten there is some reason to suppose an oriental, possibly Greek, background to Callistratus’s life and work.⁷⁹ Apart from quoting several rescripts in Greek to cities in the eastern provinces,⁸⁰ in his *Libri de cognitionibus* Callistratus provides a substantial reference to the Greek text of Plato’s *Politeia*, the only Plato-reference in the whole of the Digest.⁸¹ Even though this does not prove that Callistratus lived and worked in a predominantly Greek-speaking part of the Empire, it does show a rather profound interest in Greek culture. Moreover, it should be noted at this point that the penal theories of Plato had somewhat of a “Nachleben” in the second century AD Roman sources, for instance in a large discussion in Aulus Gellius.⁸² As such, Callistratus could have constructed his concept of *existimatio* and the *poenae existimationis* from Greek or oriental legal examples or even Greek philosophical texts. According to Yavetz, the Greek equivalents of *existimatio* are *axioma* (ἀξίωμα), *doxa* (δόξα) and *eudoxia* (εὐδοξία).⁸³ First of all, it is interesting to see all three Greek terms as they are used mainly in a philosophical context have the same double meaning of “opinion” and “reputation” *existimatio* has in the Latin legal and literary sources.⁸⁴ It is this double meaning of εὐδοξία that Socrates plays with in Plato’s *Meno*.⁸⁵ This platonic usage of δόξα/εὐδοξία has been adopted by the Stoics in particular.⁸⁶ In the Stoic sources, δόξα/εὐδοξία carries an ethical connotation as a (preferred) ἀδιάφορον or *indifferens*, those goods which are preferable to have but are not necessary to lead a “life according to nature”.⁸⁷

In the sense of an ἀδιάφορον, *existimatio* appears to occur in the Latin sources as well, for example in Seneca and later in Aulus Gellius.⁸⁸ Seeing then that various authors have argued a relation between the development of the notion of *persona* in Roman law and Stoic ethical doctrine, it is interesting to assess whether Callistratus perhaps made use of the ἀδιάφορον δόξα or εὐδοξία in the formulation of his concept of *existimatio*. From the era of Callistratus, that is to say the second century AD,

78 For example, Cic *De or* 2 184 and Sen *Controv* 2 7.

79 Bonini 1964: 12-13; Kunkel 1967: 235.

80 D 50 6 5; D 8 3 16; Bonini 1964: 70, 153-167.

81 D 50 11 2 from the *Politeia*; Lenel 1887-1889: vol 1 col 86 no 21; Bonini 1964: 75-76.

82 Gell *NA* 20 1; Robinson 2007: 179-195.

83 Yavetz 1974: 52 n 48.

84 For example, regarding ἀξίωμα SVF 2 5 no 13, SVF 2 60 no 186 and SVF 2 61 no 188; and Rist 1982: 145.

85 Pl *Meno* 99a-99b; Weiss 2001: 164.

86 Long & Sedley 1987b: 349-351.

87 Reesor 1951: 102-110; Pohlenz 1992: 120-123; Rist 1969: 102-105; Long 1974: 192-199; Long & Sedley 1987a: 354-359.

88 Sen *Ep* 95 58; Gell *NA* 18 1.

there are two texts from the *Stoicorum Veterum Fragmenta* dealing with δόξα as an ἀδιάφορον, which are both from neoplatonic sources hostile to Stoicism. In *De stoicorum repugnantis*, Plutarch refers to a remark made by Chrysippus, who may have argued for rhetoricians to pretend for political purposes matters such as wealth or δόξα are proper in the ethical sense.⁸⁹ Also, Sextus Empiricus in his diatribe *Adversus mathematicos* gives a rather detailed description of the Stoic doctrine of “preferred” indifferents, among which δόξα is mentioned.⁹⁰ Yet, the depth and complexity of Callistratus’s conception of *existimatio* as something that can be violated by a penalty handed out by a magistrate is carried by neither of these texts. Moreover, it is not clear whether δόξα or *existimatio* in the ethical doctrine of the Stoics in general could even be seen as something as fundamental as “human dignity”, and intends to state more than reputation or “civil honour”. On the other hand, notwithstanding their character and role as “indifferents”, the Stoic ἀδιάφορα also entail health and strength, matters pertaining to the condition of the human being as such.

5 CONCLUSION

So, where does the notion of *existimatio* as “human dignity” as formulated by Callistratus come from? Firstly, the possibility must be stated that Callistratus himself invented this notion and its procedural consequences in the Roman law of his time, and that this notion was taken over and adapted by the jurists Ulpian and Modestinus. This establishes Callistratus, of whom we know comparatively little, as a highly influential and original thinker, even though neither Ulpian nor Modestinus quotes him directly in any text. Since there is no logical precursor to Callistratus’s notion of *existimatio*, at least not in an obvious way present in the Roman legal or Greek philosophical sources, or, to my knowledge, Greek law or Christian theology, we have to assume he himself constructed this notion and the procedure surrounding it. Then, the remarkable conclusion to this article must be that, considering the Donellus-quotation, one of the first precursors of the idea of “human dignity” as a right is an otherwise almost completely unknown jurist from the second century AD, whose work we only know now inasmuch as we do due to historical circumstance upon historical accident.

There is, however, another possibility. Crifò has shown a prevalence of neo-platonic ideas in the works of Ulpian due to the influence of the circle of Julia Domna, the wife of the emperor Septimius Severus.⁹¹ Instead of Ulpian taking his cue from Callistratus, both Callistratus and Ulpian could have constructed the notion of *existimatio* as “human dignity” from the same source. Seeing the neo-platonic influence on Ulpian and the Plato-citation in Callistratus, this might very well be

89 Reesor 1951: 104; Plut *De stoicorum repugnantis* 1034b (SVF 3 175 no 698).

90 Sext Emp *Math* 11 59 (SVF 3 29 no 122).

91 Crifò 1976: 734-736ff; also, Honoré 2002: 80-82.

a source with a (neo-)platonian character. The possible character of *existimatio* as a Stoic ἀδιάφορον is then explained through the integration of Stoic notions in platonian thought in the late second century AD.⁹² In other words, the notion of *existimatio* as stated by Callistratus could be a combination or integration of the platonian theories of state and punishment and a Stoic conception of dignity or even “human dignity” as an ἀδιάφορον. For this, to my knowledge, a singular source in which these elements are combined before Callistratus is lacking, but all the elements separately are certainly present in one place, for instance in Aulus Gellius.

Finally, even without any absolute knowledge on the origin of the notion of *existimatio* in Callistratus, the context and the usage in and of itself have some fascinating implications. The construction of “human dignity” as something the Roman “state” may only violate by means of a punishment handed out in a trial, almost as if it were a right in the modern sense, is something we would expect in a seventeenth or eighteenth century political treatise, not in the works of a second century AD resident of the Roman empire. So how does the notion of *existimatio* in the late-classical legal sources fit into the modern debate on the origins of human dignity? With Waldron, for *existimatio* to qualify as a type of human dignity, we need to ask ourselves if a “levelling-up” has taken place, in the sense of privileges being accorded more equally than before the formulation of the notion. Although I would say there are definite similarities between *existimatio* as employed by Callistratus and “human dignity” as it occurs in the modern constitutions of Germany and South-Africa, particularly in its practical application in criminal law, we lack the historical detail to determine this with any kind of certainty.

The problem here is mainly the role *existimatio* has in the work of Callistratus, namely as a systematising notion rather than an ethical one. Still, even taking this purpose into account, the relative independency of *existimatio* from notions of rank and status is a noteworthy aspect of this definition, specifically compared to *dignitas* as it occurs in the Roman legal sources. Moreover, the conclusion must still be that the notion of *existimatio* as formulated by Callistratus speaks for the presence of ideas of state and individual already among the Roman jurists, if only to the point of there being a divide between the two. Whether or not this was a part of a larger theory on the *persona* in Roman law or whether or not this *persona* was comprised of Stoic ἀδιάφορα, Callistratus’s conception of *existimatio* tells us something about the way in which Roman jurists thought about what makes a person a person. For several Roman jurists, dignity consists of more than reputation, and in a way is more basic than that: It is also the absence of pain, suffering, humiliation and compulsion, and as such an equal part of every person, whatever his position in society might be.

92 In Plotinus and Porphyry: Wallis 1972: 82-84; Smith 1987: 762; Dombrowski 1987: 776-778 etc.

ABSTRACT

Even though there are similarities between the two notions, in antiquity the term *dignitas* generally speaking does not have the same meaning as our modern idea of “human dignity”. However, there is a possibility that for “human dignity” some Roman jurists actually used a term different from *dignitas*, namely *existimatio*. This article examines whether the term *existimatio* in the work of one Roman jurist in particular may be seen as akin to our modern conception of “human dignity”, and, if so, what the scope and origin of *existimatio* in the late-classical Roman legal sources were.

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EXISTIMATIO AS "HUMAN DIGNITY" IN LATE-CLASSICAL ROMAN LAW

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HUMAN RIGHTS IN THE EIGHTEENTH-CENTURY TRAVELOGUES OF FRANÇOIS LE VAILLANT

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Key words: Age of Enlightenment; Cape Town; civil rights; colonialism; critical thinking; Coetzee; Conrad; eighteenth century; France; freeburghers; free-roaming; Great Fish River; inalienable rights; indigenous peoples; Koina; land seizure; narrative writing; natural rights of man; Orange River; ornithology; Rousseau; settlers; social contract; Sonqua; Southern Africa; specimens; travelogues; Ubuntu; urbanised; VOC; Xhosa

1 Introduction

Human dignity and human rights, land restitution, inequality, development and the protection of the environment continue to dominate the political agenda in our post-colonial society. These issues are not new, however; they have been recognised ever

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** Quotations from the eighteenth-century travelogues retain the names for certain population groups such as Hottentots, Bushmen and Caffres as used in the original documents. The text of the article, however, replaces them by their present ethnographical terms, namely Koina, Sonqua and Xhosa respectively.

since the early days of colonisation when legal minds and philosophers identified them in their writings and explorers and travellers discussed them in their travelogues.

More than two hundred years ago, during the Age of Enlightenment, philosophers and legal thinkers such as John Locke in England, Jean-Jacques Rousseau, Mirabeau and Montesquieu in France and Thomas Jefferson in the United States stood up for civil liberties and human rights. Their views have been well summarised by Mirabeau in his *Adresse aux Bataves* where he refers to a number of political and civil rights, to religious freedom and a free press as “inalienable and imprescriptible rights without which it is impossible for humankind in any climate to preserve dignity, to secure development or to enjoy in tranquility the blessings of nature”.¹

Enlightened thinking on human rights paved the way for historic documents such as the Bill of Rights of 1689 in England, the Declaration of the Rights of Man in France and the American Bill of Rights, both of 1789, and, more recently, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples’ Rights of 1981 and even the adoption of a Bill of Rights in the South African Constitution of 1996. Mirabeau’s and Rousseau’s vision on human rights remains relevant today. This vision has been challenged, however, particularly in Africa, for its Eurocentric approach and its emphasis on the emancipation of the individual and on civil and political rights. Critics feel that not enough attention is given to second generation rights, namely economic and social rights and the right to development, and to third generation rights or group rights such as the right to culture, religion, language and a healthy environment. It is also often claimed that the Eurocentric vision on human rights misses the element of human interconnectedness as expressed in the African philosophy of Ubuntu, which is based on the social bond in society rather than on individual social contracts.² David Johnson refers to it as the “dissonance” between the values of Enlightenment thinkers, which are still reflected in the model of the modern Western state, and what could be described as the economic and social priorities in other parts of the world, including South Africa – a country which still struggles with decolonisation in the age of globalisation.³

Philosophers such as Locke and Rousseau inspired many liberals and free-spirits of their day. One such free-spirit was the Frenchman François Le Vaillant who, between 1781 and 1784, made two extensive journeys into the interior of Southern Africa. His first journey took him East, along the southern coast up to the Great Fish River. The second journey took him North, up the atlantic coast, to the area of the Orange River. Each journey was recorded and, upon his return to Europe, published as travelogues. The first travelogue, in two volumes, was published in 1790, first

1 See Robertson 1972: 3. He refers to Lh eritier (1951) *Mirabeau et nos Libert es* (Paris) for the English translation of a quotation from Mirabeau’s *Adresse aux Bataves* in *M moires biographiques, litt raires et politiques de Mirabeau  crits par lui-m me, par son p re, son oncle et son fils adoptif* (Paris, 1834).

2 See Donne 2012: 3.

3 See Johnson 2012.

in French and almost simultaneously in English. The second travelogue, in three volumes, was published in French in 1795 and in English in 1796.

In South-Africa, Le Vaillant is known for his water colors of birds, animals, insects and tribal life, several of which have illustrated his travelogues and are based on sketches made to scale⁴ during his travels in the field, “executed under my inspection, and engraved from my own design”.⁵

Le Vaillant is, however, also known for the giant, silk map of Southern Africa which documents his travels and which was drawn up in 1790 for French King Louis XVI. It was handcrafted on the basis of Le Vaillant’s instructions and elaborately annotated with names of places, mountains, rivers and camps, illustrating the topography, bio-diversity and animal and bird distribution in Southern Africa. According to Ian Glenn, it is the first map to record animals and birds as belonging to a particular habitat,⁶ a map with powers of imaginative transport, narrative supplement, discovery and private spectacle.⁷ Le Vaillant’s map is, however, also important from a historic and legal point of view as it documents the location of several indigenous populations groups such as the Koina communities of the Gonaqua, Namaqua, Kabobiqua, Koriqwa etc, marking the land of the Bushmen, the Sonqua, and placing the land of the Caffres, the Xhosa, to the East of the Great Fish River, still significant today to document restorative justice.

2 Le Vaillant’s historic relevance

Contrary to the detached style in travelogues by other eighteenth-century European travellers and explorers in Southern Africa, such as the Swedish naturalist Anders Sparrman and the Frenchman Abbé Nicolas de la Caille, Le Vaillant adopted a new, personalised style of travel writing. He wrote a narrative in which he became the main actor and in which he revealed his personal thoughts and feelings.

His style became a mixture of truth, imagination and exaggeration, of scientific observation and anecdotes, impressions and feelings, including the pastoral and the erotic, commenting on fauna, flora, colonial life and tribal customs, political and social criticism, exposing settler brutality and abuse of indigenous peoples. He made the reader part of events and kept the suspense going from one volume to another. According to James Augustus St John, Le Vaillant wrote in a graceful, natural, inspiring and engaging style, never done by a European before.⁸ And Ian Glenn is of the opinion that Le Vaillant was the first to turn a hunting trip into an important new genre – the safari, going, beyond shooting animals, into a new experience of

4 Le Vaillant 1795b: 302.

5 Le Vaillant 1790a: 230.

6 Glenn, Lauga Du Plessis & Farlam 2007a: liv.

7 Glenn 2007b: 37.

8 St John 1832: 262-326.

interacting and seeing the world differently, a media revolutionary, showing nature through all the media available.⁹

Le Vaillant was much appreciated by European readers of the late eighteenth century, curious and fascinated by the unknown and the exotic. Le Vaillant's travelogues were, therefore, highly popular and were translated into several languages, amongst which Dutch, Russian and Swedish. To a certain extent, Le Vaillant was the forerunner for later authors of political travel literature such as Joseph Conrad in *Heart of Darkness*¹⁰ and JM Coetzee, who used the form of the historic narrative to express social and political criticism in *The Narrative of Jacobus Coetzee in Dusklands*,¹¹ an intricate mix of reality and fiction in the rewriting of the journey¹² of eighteenth-century explorer and hunter Jacobus Coetsé.¹³ The difference between all three is that, to express criticism, Conrad used a fictional narrative and Coetzee used a historic narrative while Le Vaillant wrote his own travel account.

According to Vernon Forbes, Le Vaillant opened a window on a new land, playing a central role in everything he experienced, maybe superficial in the details but giving a broad picture that is accurate.¹⁴ Karel Schoeman is even more specific when he writes that Le Vaillant, through a spirited description of the Koina population of South Africa, or Hottentots as they were called at the time, may have contributed to widen eighteenth-century Europe's interest in travel and the exotic, which until then was mainly focused on Cook and Bougainville in the South Pacific.¹⁵ According to Schoeman, Le Vaillant wrote his criticism at a time when several Koina communities who had survived their contact with European settlers were losing their independence and were being reduced to a status little better than slavery.¹⁶ And Ian Glenn concludes that Le Vaillant's travelogues were the first lavishly illustrated account that used the freedom of wilderness to attack civilised conventions; the first highly critical account of Dutch colonialism and the brutality of settler expansion; and the first detailed ethnological account based on fieldwork.¹⁷

Le Vaillant's political and social critique was much appreciated during the Age of Enlightenment, within the liberal context of late eighteenth-century Europe, and his travelogues attracted the attention of the leadership in revolutionary France. A review by Chamfort in the *Mercure de France* in 1790 commended him for his critical analysis of colonisation and for denouncing colonial abuse in South Africa.¹⁸

9 Glenn 2008: 368-371.

10 Conrad 1995 (first published in 1902).

11 Coetzee 2004 (first published in 1974).

12 Kannemeyer 2012: 253.

13 Schoeman 2011: 296ff; Schoeman 2014: 33-34; Stewart 2016: 36.

14 Forbes 1973: 99.

15 Schoeman 2012: 1032.

16 *Ibid.*

17 Glenn, Lauga Du Plessis & Farlam 2007: dustcover.

18 *Idem* xlii.

His anthropological description of the Gonaqua Koina community, including their vocabulary, customs, dress, artifacts and musical instruments, became useful for establishing a guide for anthropologists¹⁹ when Le Vaillant joined, upon his return to France, the anthropology branch of the *Société des Observateurs des Droits de l'Homme*, the society of observers of human rights.

Le Vaillant became less popular, however, as the scramble for Africa and aggressive colonialism prevailed during the nineteenth and a large part of the twentieth century. As a result, Le Vaillant's travelogues were pushed into oblivion, certainly in the Anglo-Saxon world which had always looked upon the Frenchman with condescension for being too extravagant, flamboyant and careless with facts and figures. John Barrow, who lived in the Cape in the early nineteenth century, regarded Le Vaillant's work as "valuable matter and ingenious observations jumbled together with fiction and romance".²⁰ Jane Meiring, as late as 1973, states that exaggerations and embellishments in his writings raise contempt and incredulity and detract from the true value of his work. She, furthermore, considers his "jibes and witticisms" aimed at settlers and at officials of the Dutch East India Company (the *Verenigde Oostindische Compagnie*; hereinafter referred to as the VOC) to be mere attempts to ensure immortality.²¹ And Matthys Bokhorst was of the opinion that revolutionary France had exaggerated the role of Le Vaillant in exposing conditions at the Cape "which were common to colonies all over the world in the eighteenth century".²² These critics mainly focused on Le Vaillant's flamboyant style but failed or were unwilling to see his true contribution as a social critic.

According to David Lloyd, Le Vaillant's enlightened legacy only reemerged in South African literature with liberal writers such as William Plomer²³ and, later, Laurens van der Post and Alan Paton, when they addressed interracial relations. Lloyd notes, however, that, after a century of imperialism, there always remained, contrary to Le Vaillant, a barrier between Black and White hidden in their work.²⁴ Ian Glenn is further of the opinion that Le Vaillant had a powerful influence on the hunting narrative, which was to become an important literary product in South Africa.²⁵

In 1963, the South African Parliament purchased 165 of Le Vaillant's water colors at auction in London. They are housed in the Mendelssohn Africana Collection at the Library of the South African Parliament. According to the then Chief Librarian of Parliament, they are, from an artistic point of view, considered to be the most comprehensive collection of water colors left by an eighteenth-century traveller in

19 *Idem* liv.

20 Stewart 2016: 82.

21 Meiring 1973: 233-234.

22 Bokhorst 1973: 10.

23 Lloyd 2004: 53

24 *Idem* 61

25 Glenn 2007b: 34.

South Africa.²⁶ More recently, even wider prominence was given to his work in 2013 during a well-documented exhibition at the IZIKO Museum in Cape Town, showing water colors from the parliamentary collection as well as the giant map, which, until then, had been safeguarded in the *Bibliothèque Nationale*, the national library, in Paris. This renewed interest has been confirmed by the publication, in 2007, of the abovementioned new, edited English translation of Le Vaillant's first travelogue by Ian Glenn, with the assistance of Catherine Lauga Du Plessis and Ian Farlam.²⁷

3 Le Vaillant's background

Le Vaillant was destined to become an inquisitive traveller. He was born in 1753 to French expatriates in Dutch Guyana, now Surinam, where he spent the first ten years of his life before the family returned to France. From an early age, his parents instilled in him a true love of nature, a sense of discovery and an interest in collecting specimens of fauna and flora. He grew up in a multi-ethnic and multi-cultural environment, where he developed a taste for the exotic, “[e]ducated by enlightened parents, who endeavored to procure those valuable and interesting objects, which are dispersed throughout the country, I had continually before my eyes the fruits of their labor and I enjoyed at my ease the whole of their curious collection”.²⁸ And he continues as follows: “Being educated more than any other person in quite different principles, I always entertained a most ardent desire for travelling ... I crossed the seas, as I wished to survey other men, other productions, and other climates.”²⁹ Le Vaillant was a naturalist, a trained ornithologist, a collector of specimens and an excellent taxidermist who dreamed of “those parts of the globe which had never been explored”,³⁰ especially the interior parts of Africa, “a country as yet untouched by the naturalist”.³¹

At the age of twenty-seven, he went to Amsterdam where he met the Treasurer of the VOC, a collector of specimens, from whom he obtained passage on board a VOC ship to Cape Town with letters of introduction to VOC officials at the Cape and a commission to collect specimens in Southern Africa.

Being a naturalist, Le Vaillant's travelogues mainly focus on the observation of birds, and to a lesser extent on animals, insects, plants and trees. He was the first ornithologist to visit Southern Africa, collecting specimens which he forwarded to Amsterdam. Upon his return to France in 1784, Le Vaillant would mainly become known for his work in ornithology, especially for his publication *Histoire naturelle des Oiseaux d'Afrique*, considered to be the first comprehensive work on African birds.

26 Quinton & Robinson 1973: xvii.

27 Glenn, Lauga Du Plessis & Farlam 2007a.

28 Le Vaillant 1790a: 2.

29 *Idem* ix-x.

30 *Idem* 13.

31 *Ibid.*

He did not come to Southern Africa as a philosopher or as a human rights activist. He came as an ornithologist and a collector of specimens. However, his philosophical background, liberal upbringing and gregarious personality turned him into a committed and sensitive observer of man and nature and an important social critic of his time. He was not an explorer but a traveller; his journeys, even though in wild territory at times, remained largely on known paths and never far away from European settlement.

4 Le Vaillant's historic context in France

Le Vaillant grew up during the Age of Enlightenment, the years leading up to the French Revolution and the French Declaration of the Rights of Man, a time when social thinking was dominated by philosophers such as Mirabeau, Montesquieu and Rousseau. Like John Locke in England, Rousseau believed that man, in an idyllic natural society, is born free and inherently good, enjoying natural, inalienable rights such as the right to life, freedom and equality. As society becomes more intricate and structured, more corrupted, man is forced, according to these philosophers, to find harmony through a social contract with the state, the guarantor and protector of his rights.³² These philosophers laid the foundation for human rights as we know them today, still broadly defined as “God-given rights that are fundamental to human beings and are therefore inalienable”.³³

Le Vaillant's view on indigenous peoples reflects Rousseau's ideal of “the primitive self-contained community in which people live harmoniously together, satisfied in their contact with nature through their hard but contenting work and the simplicity of their life”.³⁴ Having been raised in the exotic environment of Dutch Guyana as an adventurous and self-confident youngster, Le Vaillant was a natural man, free and at ease in nature, because “[m]y first years were spent in the deserts and I was born almost savage ... Nature, therefore, was my earliest instructor, because it was towards her that my views were first directed”.³⁵

Le Vaillant was the very incarnation of Rousseau's ideal, a living example of Rousseau's “Emile”, as he grew up “free” in Dutch Guyana, with nature as his instructor, embodying Rousseau's model of a liberal education, developing man's innate goodness without the constraints of society.³⁶

He appreciated Rousseau and even named one of his sons after him, but he does not specifically refer to him in his travelogues. To the contrary, with a certain sense of self-importance, Le Vaillante deems that his own experience of man in the field is superior to “drawing room” philosophy as “the reader, in this plain narration, will

32 See, in this respect, Van der Vyver 1975: 5-6. See, further, Stoerig 1969: 109.

33 Heywood 2007: 77.

34 Friedmann 1967: 125-126.

35 Le Vaillant 1790a: 2-3.

36 Stoerig 1969: 109.

acquire juster ideas respecting the African savages, than from all the dissertations of philosophers”.³⁷

Enlightenment had brought a major change to European thinking as scientists and explorers started to discover and appreciate the exotic. For centuries, Europeans had vilified other societies and cultures as brutish, uncivilised, wild and dangerous, classifying people in categories of good and bad, noble and ignoble.³⁸ Le Vaillant, a man of the Enlightenment, wanted to educate the European mind by “turning my thoughts towards those parts of the globe which, having never been explored, might, by affording new knowledge, help to rectify that already acquired”.³⁹

Apart from being a child of nature, Le Vaillant, in the spirit of Rousseau, but not in accordance with the African philosophy of Ubuntu, strongly believed in the value of the individual in society, in the emancipation of every single man as “[b]y the freedom of my will ... and by my complete independence, I really perceived in man the monarch of all animated beings, the absolute despot of nature”.⁴⁰

This high sense of freedom, of leaving civilisation behind and to be the master of nature, is well expressed as Le Vaillant prepared for his first journey out of Cape Town: “I returned, as I may say, to the primitive state of man; and I breathed, for the first time in my life, the delicious and pure air of liberty.”⁴¹ As a result, he declined several offers from freeburghers, European immigrants, to accompany him because “I wished to set out alone, and to be absolute master of myself: I therefore kept firm to my purpose; and, rejecting all these offers, cut short every proposal of the kind that was made to me”.⁴² And he feels that “[i]f I deceived myself, I had only to reproach my own judgment”.⁴³ That same sense of being his own master also prompted Le Vaillant to refuse regularly hospitality of settlers along his journeys because “[p]roud of his origin, man thinks it an indignity that people should beforehand dare to number his steps. I have always avoided beaten tracks; and never thought myself completely free, but when surrounded by the rocks, forests and deserts of Africa”.⁴⁴

This love of nature, the sense of freedom and escape from civilised society explains Le Vaillant’s excitement at finding free-roaming communities of indigenous peoples and his unreserved assimilation with them.

5 Context of Le Vaillant’s travels in South Africa

Le Vaillant travelled through Southern Africa between 1781 and 1784, more than a century after the establishment, at the Cape, of a service station for the ships of

37 Le Vaillant 1790a: 375.

38 Lloyd 2004: 53-62.

39 Le Vaillant 1790a: 13.

40 *Idem* 150.

41 *Idem* 118.

42 *Ibid.*

43 Le Vaillant 1790b: 130.

44 Le Vaillant 1790a: 150.

the VOC in 1652 and only a few years before the first British occupation of the Cape in 1795 and the demise of the VOC in 1799. He arrived one year after the first Border War between European settlers and the Xhosa at the eastern frontier of the colony. It was a time of political unrest amongst the freeburghers and a weakening of VOC authority throughout the territory. The political climate at the time of Le Vaillant's visit has been illustrated by Dan Sleight in his novel *1795* in which the main character, a leading political figure, dreams of independence for the Cape after the example of the American Revolution.⁴⁵

Since servicing VOC ships was more demanding than anticipated,⁴⁶ the station had to expand continuously for food production beyond the immediate surroundings of Cape Town and into the hinterland. The territory, therefore, turned into a *de facto* colony.⁴⁷ The VOC had a policy to treat indigenous people well, to employ them and not enslave them.⁴⁸ This is documented, for example, in a Resolution of the Political Council dated 9 May 1662 which ordered the local garrison to treat the indigenous Hottentots well.⁴⁹ The VOC, however, never had a strong administration and, despite good intentions, this led to weak protection of the indigenous peoples against settler abuse. This brings Le Vaillant to observe that “the foreseeing eye of policy has been opened too late on those possessions which are at a distance, and which every day become more remote from the metropolis ... (and) the authority of the governor ... does not extend far enough ... to check ... irregularities ... in the interior parts of the country”.⁵⁰

When arriving at the Cape, Le Vaillant, first of all, encountered the population of European descent, the VOC officials but also the freeburghers, people either released from their contracts with the VOC or immigrants who settled in and around Cape Town as professionals, traders and farmers. Gradually these Europeans moved further into the hinterland, settling, during Le Vaillant's travels, already as far as the Great Fish River to the East and the Orange River to the North, many of them living in precarious conditions.

Secondly, Le Vaillant encountered the indigenous peoples of the Cape area, the Koina and the Sonqua, who lived deep into the Cape hinterland and whom Le Vaillant colloquially referred to as Hottentots and Bushmen. During his journeys, Le Vaillant almost exclusively interacted with the Koina. They were mainly herders who lived in roaming, structured communities⁵¹ all through the Cape area while the Sonqua, hunters and gatherers, lived in more remote areas.⁵² Tension between the

45 Sleight 2016: 21-22.

46 Schoeman 2012: 119.

47 Schoeman 2014: 62.

48 Schrire 2015: 17-18.

49 Suid-Afrikaanse Argiefstukke 1957a: 281.

50 Le Vaillant 1790a: 321.

51 See Le Vaillant 1790b: 38ff, 349ff and Le Vaillant 1795b: 170, 171, 398.

52 See Le Vaillant 1790b: 345ff.

VOC and the Koina and the Sonqua mainly arose as soon as freeburghers started to expand into the hinterland, encroaching on their grazing and hunting lands as well as on their water supplies.⁵³ Two wars broke Koina resistance and, further affected by several epidemics, they soon became diminished, uprooted and impoverished.

As a result, at the time of Le Vaillant's travels, many Koina had given up their traditional life in search of employment with the VOC or with the freeburghers.⁵⁴ They became impoverished and forfeited their identity, their customs.⁵⁵ Some regrouped in criminal bands of outlaws of different backgrounds, called the Bosjesmans.⁵⁶ Other Koina, deeper into the Cape hinterland, along the routes which Le Vaillant would follow, continued to live a tribal life, seemingly untouched by the arrival of the VOC and still preserving "all the purity of their primitive manners".⁵⁷ They, however, continuously had to move further away and Le Vaillant feared that soon all would be lost as "the planters endeavor to extend their possessions ... misery must be the portion of these happy and peaceful people; and every trace of liberty will be destroyed by massacres and invasions".⁵⁸

It is with these tribal Koina, living a traditional life in their natural habitat, that Le Vaillant became fascinated during his journeys. He must have encountered the last vestiges of Koina "freely moving around in those areas not given over as farming land to the Europeans, ... living in poor circumstances ... and their cultural identity almost completely abandoned".⁵⁹ According to a census of 1805, only *ca* 20 000 Koina had remained in total, most of them almost completely integrated into a Western life style.⁶⁰

Le Vaillant summarises his criticism of this situation as follows: "The Hottentots, thus confined, pressed, and harassed on all sides pursued plans entirely opposite. Those who were still interested in the preservation of their flocks, penetrated among the mountains towards the north and north-east; but these were the fewer number. The rest, ruined by a few glasses of brandy, and a few rolls of tobacco, impoverished and stripped of everything, did not think of quitting their country; but absolutely renouncing their manners, as well as their ancient and happy condition, of which they have no remembrance at present, they basely sold their services to the whites ..."⁶¹ He also warned that the indigenous people "will never forget the perfidies of the planters. Their resentment is so violent, that they have always the dreadful word *vengeance* in their mouths".⁶²

53 Schoeman 2012: 264.

54 Sleight 2004: 63ff.

55 Le Vaillant 1790a: 271ff.

56 See Le Vaillant 1790b: 343ff.

57 Le Vaillant 1790a: 275.

58 Le Vaillant 1790b: 100.

59 See De Jongh 2016: 31, who still uses a different name for the Koina, namely the Khoekhoen.

60 De Villiers 2012: 47.

61 Le Vaillant 1790a: 272-273.

62 Le Vaillant 1790b: 347.

A third group of people which Le Vaillant encountered during his travels are the Xhosa, Bantu-speaking populations living on the outside of the eastern frontier of VOC territory, which was established in 1775 at the Great Fish River.⁶³ Violations of the arrangement by both the European settlers and the Xhosa, led to violent clashes and Border Wars in 1779, 1793 and 1799.⁶⁴ This illustrates the unrest that prevailed when Le Vaillant reached that area.⁶⁵

Slaves were the fourth group which made up the population at the Cape. They were imported as a result of the VOCs high demand for labor. They came from several African countries such as Angola, Guinea and Madagascar but also from the Far East. Slaves worked for the VOC, for the freeburghers in and around Cape Town, as well as, to a lesser extent, for settlers on farms deep into the hinterland. Some of them had been freed by the time Le Vaillant visited and he found them occasionally in and around Cape Town but also on farms along his routes.⁶⁶ Although enlightened thinking during the eighteenth century somehow improved their living conditions, slaves at the Cape, as anywhere else in the world, lived a miserable life, without freedom and social status. Towards the end of the eighteenth century there were *ca* 26 000 slaves in service, both imported and born in slavery, compared to *ca* 20 000 freeburghers. Approximately 1700 slaves lived free.⁶⁷

6 Le Vaillant and the natural man

Nature is the scene of Le Vaillant's travelogues. He adores nature, wishes to build an altar to nature and saw it as his mission to increase his readers' knowledge of nature.⁶⁸ Nature means freedom and liberation from the confinements of civilisation. Contrary to other travellers and explorers who approached their journeys from a more academic point of view, Le Vaillant's travels into the interior of southern Africa are a spiritual experience. Nature, as a consequence, becomes the defining factor in his approach to man.

The glorification of the natural man – man not corrupted by civilisation, need and greed – runs like a red thread through Le Vaillant's travelogues. One is reminded, however, that these travelogues have been written from a European point of view when he writes that “[t]hus, amidst the deserts of Africa, I introduced the customs and polite manners of the most civilized nations of Europe”.⁶⁹

With respect to the natural state of man, several citations in his travelogues refer to the natural goodness of man, such as: “In an uncivilized state, man is naturally

63 Sleight 2004: 89.

64 De Villiers 2012: 56-57.

65 Le Vaillant 1790a: 309ff; Sleight 2004: 89.

66 Le Vaillant 1790b: 370.

67 Shell 2012: 70.

68 Le Vaillant 1795a: 13.

69 Le Vaillant 1790a: 261.

good.”⁷⁰ Other citations refer to the natural equality amongst men as “misery is a point of comparison of which he has no conception ... complete uniformity and the same resources, rendering the lot of all perfectly equal”,⁷¹ and still others refer to the issue of rank and authority, namely where there is no authority of one man over the other.⁷²

Civilisation, however, corrupts the natural man as “[i]n all countries wherever the savages are absolutely separated from civilised nations, and live sequestered, their manners are mild; but they change and become corrupt the nearer they approach them. When the Hottentots live amongst them, it is very rare that they do not become monsters”.⁷³

Because he recognized in the roaming Koina the ideal of the natural man, Le Vaillant became mesmerised with several of their communities such as the Gonaqua, the Namaqua, the Kabobiqua, the Koraqua, the Kaminouqua and other whom he met along his travels to the Great Fish River or up to the Orange River. He was captured by the roaming Koina in their natural environment and identified with them to such an extent that he let himself fall in love with a Gonaqua girl,⁷⁴ adding romance to his narrative and setting himself even more apart from scientific or academic travel writing.

It is interesting to note how Le Vaillant, unwillingly, makes a distinction between the free-roaming Koina and the urbanised Koina, namely those who had given up their natural state and who had integrated into the structures of the colony.⁷⁵ The urbanised Koina no longer correspond to the ideal of man within the context of Enlightenment. Le Vaillant does not glorify them as he does the free-roaming Koina because “too much intercourse with the whites has ruined and corrupted their manners; and of the truth of this assertion, the Hottentots of the colonies are a striking example”.⁷⁶ This does not mean that he did not like the urbanised Koina, especially those that were part of his travelling party, calling them “faithful companions of my enterprise ... I have the same confidence in you as I have in myself”,⁷⁷ or referring to them as those about whom “polished nations never speak but with horror or contempt ... the refuse of nature ... an African savage, a Caffre, a Hottentot”.⁷⁸ He also protected them with vigor and without hesitation against violations of their rights or against insults, especially from settlers crossing his path,⁷⁹ to such an extent that settlers in

70 Le Vaillant 1790b: 125.

71 *Idem* 133.

72 *Idem* 134.

73 Le Vaillant 1790a: 275-276.

74 *Idem* 378ff.

75 *Idem* 270ff.

76 Le Vaillant 1790b: 115.

77 Le Vaillant 1790a: 242.

78 *Idem* 228.

79 Le Vaillant 1795b: 248.

the hinterland started to question whether he had come to the continent in support of the Whites or of the indigenous peoples.

In the roaming Koina, as opposed to the urbanised Koina, Le Vaillant recognises that they “still preserve ... all the purity of their primitive manners”⁸⁰ along the general lines of Rousseau’s philosophy, namely freedom and equality as the basis of happiness, existing in primitive communities but lost in modern civilisation.⁸¹

Le Vaillant showed a similar fascination with the Xhosa. His relationship with the Xhosa had to grow, however, as he was at first prejudiced against them, under the influence of the Koina who feared the Xhosa, claiming at one point that “a numerous troop of Caffres ... carries fire and sword along with them; that nothing was seen everywhere around but disorder an pillage, fields ravaged and habitations laid waste and reduced to ashes”.⁸² He did, however, learn to appreciate the Xhosa who “informed me that the oppression and cruelty of the planters were the only cause of war, and that justice was on the side of the Caffres”.⁸³

The ideal of the natural state of man shaped his view on human rights and on related issues such as colonialism, race relations and slavery. This pre-disposition at times distorted his judgment as he would become fascinated with the natural state of living. He, consequently, would automatically accept tribal life at face value and not question certain customs, not even on general issues such as gender equality, the role of women or the structures of authority. On the contrary, he would criticise earlier travellers as incorrect and ill-informed for recalling, in their travelogues, certain tribal customs such as circumcision, incest or the killing of twin-babies, probably because this could place those communities in an unfavorable light amongst his European readers and, most likely, because it distorted his ideal of the natural man.

Le Vaillant’s sympathy for the point of view of the Xhosa in their conflict with the settlers and his lack of sincere interest in the settlers’ position raises a similar question of objectivity and lack of critical assessment when defending the rights of the natural man. This lack of evenhandedness does not diminish, however, his value as a social critic in his exposure of human rights abuses.

7 Le Vaillant and human rights

When Le Vaillant encountered the free-roaming communities of Koina, he no longer remained neutral in his observation, but became emotionally involved because he felt, as mentioned above, “that he returned to the primitive state of man”.⁸⁴ Confronted with the ideal of the natural man, he became a human rights activist, defending the right to dignity, development and the enjoyment of nature.

80 Le Vaillant 1790a: 275.

81 Friedmann 1967: 125-126.

82 Le Vaillant 1790a: 280-281.

83 *Idem* 303.

84 *Idem* 118.

Settler brutality against Koina, such as murder and robbery, was known to the VOC and is recorded in documents of the Political Council.⁸⁵ Le Vaillant's merit, therefore, does not lie in the fact that he made the VOC aware of it. His merit lies in the awareness which he raised internationally, through his travelogues, and the attention that he drew to the violations of inalienable or imprescriptible rights of indigenous peoples, namely "those rights which mankind inherits from nature".⁸⁶

According to Ian Glenn, it is significant that he used the language of human rights in a colonial context.⁸⁷ He took the glorification and protection of the natural man out of the orbit of romanticism into the legal sphere, not as a distant academic but as an eye-witness critic of VOC rule and of land seizure.

Le Vaillant describes the imprescriptible rights of the roaming Koina as follows: "[T]hese savages, the unlimited masters of all this part of Africa, did not perceive how many of their rights, and how much authority, repose and happiness, the guilty profanation deprived them of."⁸⁸ And he adds to this that "[f]rom that moment these unhappy savages bid adieu to their liberty and to that pride which is inspired by a sense of those rights which mankind inherit from nature".⁸⁹ The English translation of his travelogue uses the word "unlimited" where Le Vaillant, in the French original, uses "imprescriptible",⁹⁰ which is a better term to describe the rights which nature bestows on man.

Le Vaillant also addresses the inalienable rights of the Xhosa when, confronted with the possibility of several Xhosa tribes collaborating against the settlers in the Border Wars, he writes as follows: "[A]nd who knows what might be the consequence of such a confederation, formed for the purpose of defending inalienable rights, and of avenging ancient injuries."⁹¹ Le Vaillant here links inalienable rights with historic injustices, illustrating, again, his relevance with respect to present-day political issues such as land restitution and wider issues of racial discrimination.

For Le Vaillant, a first concern of imprescriptible rights is the unlimited land seizure, namely that "founded upon a logic which destroys the laws of property, so sacred and so respectable ... the Dutch seized indiscriminately at several times, and even without having occasion for them, all the lands which government, or individuals favored by government, thought proper or found convenient".⁹² In addition he wrote that the success of the colony "drew every day a number of new settlers ... the will of the stronger party was a sufficient title for it to extend its possessions".⁹³ In doing

85 For example Suid-Afrikaanse Argiefstukke 1957b: 131.

86 Le Vaillant 1790a: 271.

87 Glenn, Lauga Du Plessis & Farlam 2007: n 122.

88 Le Vaillant 1790a: 270-271.

89 *Idem* 271.

90 Le Vaillant 1791: 183.

91 Le Vaillant 1790a: 321.

92 *Idem* 272.

93 *Ibid.*

so, Le Vaillant considered – contrary to Rousseau’s thinking but in line with Locke – property as a natural right of man, the property of the indigenous people, destroyed by sheer power of the invading settler: thus illustrating the context for present-day claims to land restitution.

Imposing power, will and force, was a very sensitive issue for Rousseau who felt that power cannot give rights, only a social contract can do so, namely replacing the natural rights which had disappeared because of civilisation with civil rights based on a contract with the state.⁹⁴ Le Vaillant, when encountering communities of Koina and Xhosa, repeatedly stressed that one cannot succeed with people through intimidation and threats but that one must love them, show empathy and try to gain their trust.⁹⁵

A second concern of violations of imprescriptible rights is the use of power by the VOC, unregulated by a social contract as Rousseau would have envisaged it: “The colony insensibly increasing, and acquiring more strength, that formidable power which dictated laws to all this part of Africa ... and removed ... everything that attempted to oppose its eager ambition.”⁹⁶

His third criticism concerns the alleged unjust interference by the VOC in choosing the leaders of free-roaming Koina communities which, although not urbanised, had continued to live within the boundaries of VOC territory: “Thus, without any preliminary information, and even without any regard to justice, a helpless and feeble horde are obliged to receive laws from a man often incapable of commanding them.”⁹⁷

His fourth criticism concerns the lack of control by the VOC administration over the settlers whom he accuses of having committed the worst crimes during their violent confrontation with the Xhosa: “I have enough to show the character of the planters of this part of Africa, whom the inactivity of government suffers to go on in their excesses, and is even afraid of punishing.”⁹⁸ Le Vaillant accuses the settlers, for example, of plundering and destroying Xhosa lands, extermination of whole communities, destroying Xhosa villages, killing Xhosa prisoners just to amuse themselves etc, all under the pretext of reprisal for violating the border agreement and alleged theft of cattle. Le Vaillant claimed that the VOC administration was not only incapable but also unwilling to exercise strict control as the Company depended on the loyalty of the settlers to defend the territory against possible English invasion.⁹⁹ Ten years after Le Vaillant’s journeys, the British would take the Cape within the context of the Napoleonic wars.

94 Stoerig 1969: 109.

95 Le Vaillant 1790b: 32-33.

96 Le Vaillant 1790a: 272.

97 *Idem* 274.

98 *Idem* 318.

99 *Idem* 324.

8 Le Vaillant: The peace broker

During his first journey, arriving at the far end of VOC territory in the middle of violent conflict, only one year after the first Border War between the settlers and the Xhosa in 1779, Le Vaillant, in enlightened style, sees himself as a peacemaker: “As I was very desirous of being thoroughly informed respecting the motives and rise of these atrocious wars, which thus disturbed the tranquility of the most beautiful parts of Africa ...”¹⁰⁰

He first planned to meet the settlers “with the hopes of finding among them some well-disposed people, who approving of my plan of pacification with the Caffres ... would heartily join me ...”¹⁰¹ He failed, however, as “no one of them showed the least inclination to second me”¹⁰² and he felt that this “shows the character of the planters of Africa, whom the inactivity of government suffers to go on in their excesses, and is even afraid of punishing. In this place are committed all the cruelties that hell can invent”.¹⁰³

After his failure to convince the settlers he received a Xhosa delegation, listened to their complaints and then decided to meet them again on their ground. He agreed to their request to contact the authorities in the Cape and plead their case because “of the destitute condition into which they had been thrown by the atrocious injustice of their persecutors”.¹⁰⁴

9 Le Vaillant and race relations

The issue of racism is not relevant in Le Vaillant’s account, probably because it does not affect man in his natural environment directly. He did not really defend the Koina or the Xhosa against the VOC administration and the settlers on racial grounds. He only wished to protect their natural way of life against encroachment, both by land seizure and by civilisation, namely the European way of life imposed on them, in general.

He even, at times, made remarks, which, today, would be labeled as racist, such as claiming that the children of Europeans “are always suckled by female slaves, the familiarity which reigns between them has a great influence upon their manners and education”.¹⁰⁵ He also, for example, accepted without comment the separate warm baths for Whites and Blacks, built by the VOC close to the present town of Caledon.¹⁰⁶

100 *Idem* 303.

101 Le Vaillant 1790a: 309.

102 *Idem* 313.

103 *Idem* 318.

104 Le Vaillant 1790b: 272.

105 Le Vaillant 1790a: 31.

106 *Idem* 127.

10 Le Vaillant and slavery

Le Vaillant was also quite unconcerned about slavery as an institution, surprisingly so at a time of mounting international pressure for abolition, especially by philosophers such as Rousseau who condemned slavery as the final manifestation of the degrading principle of authority.¹⁰⁷

Writing about his youth in Surinam in the introduction to his first travelogue, Le Vaillant simply, in an unmoved manner, mentioned slaves as a normal asset of his household, at times assisting him with his collection. Later, at the Cape, he mentioned slavery as a natural aspect of daily life, an economic necessity. He never raised moral or legal arguments, not at the Cape or later when he met some freed slaves on smallholdings deep into the hinterland during his journeys. He even felt that “there is no country in the world where slaves are treated with so much humanity as at the Cape”,¹⁰⁸ referring to the conditions for freeing slaves or to the fact that slaves were not heavily punished for running away. His tone changed, however, when slavery was brought into the context of the natural man, when he warned the Koina against urbanisation with the advice to “[t]reat with contempt those people who reduce you to a state of slavery ... ”¹⁰⁹

11 Le Vaillant and colonialism

Le Vaillant did not really condemn colonialism as an institution. He was mainly concerned with the attitude of the VOC administration and with the behavior of the immigrant settlers when they encroached upon the natural habitat, the development and the happiness of the indigenous peoples. He condoned European colonial presence as long as it did not threaten the dignity and the well-being of the Koina and Xhosa.

He even claimed that it was never his intention to give a political connotation to his journeys through Southern Africa as “it was not part of my plan to enter into any detail respecting the manners and customs of the inhabitants of the Cape, much less respecting the political, civil, and military forms of its government ... I have my own reasons for acting with this reserve”.¹¹⁰ One of these reasons could indeed have been that, as an ornithologist and taxidermist, politics didn’t really interest him. Another reason could have been that he felt unwilling, at first, to criticise the VOC administration, taking into account that they had offered him passage to the Cape and that VOC officials had facilitated the preparations of his journeys. Moreover, while travelling, he continuously used the VOC to send collected specimens via Cape Town to Amsterdam.

107 Thomas 1997: 464.

108 Le Vaillant 1790a: 100ff.

109 *Idem* 154.

110 *Idem* 108-109.

Rather than criticising colonialism as a policy he occasionally offered advice to the VOC administration on how to improve economic growth with respect to economic production in general and agriculture, forestry and transport in particular. For example, he recommends port infrastructure as follows: “[T]he government ought to establish warehouses and repositories for timber ... it might be transported to the Cape ... draw a great number of intelligent planters ... the Company have nothing to do but to form here a proper establishment ... increase the happiness of a populous colony”.¹¹¹ He commented on the underutilisation of fertile land “which would produce corn in abundance: but the planters cultivate no more than what is necessary”.¹¹² He also gave some political advice when he warned against mixed races which, in his opinion, could in the long term destabilise the colony,¹¹³ and he advised the VOC administration on control over the settlers at the eastern border because “the authority of the governor ... does not extend far enough to check ... irregularities ... in the interior parts of the country”.¹¹⁴

Towards the freeburghers in and around Cape Town he had a somewhat condescending attitude although he treated them with sympathy and respect. He did, however, despise most settlers, especially those living deep into the hinterland whom he considered to be low-class immigrants.¹¹⁵ He did not really question their presence but condemned the loss of dignity and the loss of imprescriptible rights of the Koina and the Xhosa as a result of land seizure and abuse and, indirectly, as a result of colonisation in general.

Le Vaillant’s two journeys seemed to have been an eye-opener as he discovered, to a large extent unexpectedly, man in his natural state, or what was left of it. These journeys changed his view on conditions in the colony, well summarised when he returned at the end of his second journey. Crossing the border back into VOC territory, he allegedly sensed a loss of freedom because authority and oppression were taking over again, despite the fact that also the natural state had become less idyllic to him as a result of theft of land and the degradation of living conditions of the indigenous peoples.¹¹⁶

12 Le Vaillant’s relevance today

Le Vaillant remains relevant in our day and age, especially within the historic context of land claims, the allocation of natural resources and the restoration of injustices of the past.

111 *Idem* 209-212.

112 *Idem* 156.

113 Le Vaillant 1790b: 134ff.

114 Le Vaillant 1790a: 321.

115 Le Vaillant 1795c: 185.

116 *Idem* 461.

In 1790 already, Le Vaillant noted that the indigenous peoples of southern Africa were under threat, that they were dispersed and that they had lost their identity under pressure for land from the coloniser, referring, like Mirabeau, to imprescriptible rights: “These savages, the unlimited masters of this part of Africa, did not perceive how many of their rights, and how much authority, repose and happiness, this guilty profanation deprived them of ... From that moment these unhappy savages bid adieu to their liberty, and to that pride which is inspired by a sense of those rights which mankind inherit from nature.”¹¹⁷

He even launched a warning, pointing at the possible repercussions of colonialism and imperialism and mentioning the possibility of fanaticism as a reaction to abuse when he somehow predicted the refugee crisis in Europe today: “Should the savages of Africa or America take it into their heads, someday, that they live miserable, deprived of our arts, riches, and all the resources of our genius; and, uniting together in arms, should hasten to inundate Europe, and to drive us from our possessions, with what countenance could we receive these barbarians ... persecuted to a state of slavery ... blinded by interest or fanaticism ...”¹¹⁸

More than two centuries later, Virginia MacKenny, from the Michaelis School of Fine Arts at the University of Cape Town, recognised Le Vaillant’s relevance today when she included, in 2013, his giant map amongst important documents and works of art related to land issues, the exploitation of resources and the movement of peoples as part of a centenary exhibition commemorating the 1913 Land Act at the Iziko Museum in Cape Town. Le Vaillant’s detailed map illustrated, according to MacKenny, the link between cartography and colonialism, a marker of conquest and hegemony, the identification of resources of use to the coloniser, a representation of power over nature and indigenous peoples.¹¹⁹ The link between maps and land issues has also been highlighted by Michael Blanding in his book *The Map Thief*, when he refers to a court case in the United States in 2006 in which the British Library submitted a memorandum arguing the value of early British maps of North America as they “mark the rise of British dominance, the origins of a new nation and the demise of a native population”.¹²⁰

Le Vaillant’s map and his travelogues have a similar historic relevance for South Africa, documenting VOC dominance, the rise of a new nation and the demise of an indigenous population, especially when he writes that he “penetrated into some of the unknown deserts of Africa ... and conquered a small portion of the earth”.¹²¹

117 Le Vaillant 1790a: 271-272.

118 Le Vaillant 1790b: 125-126.

119 MacKenny 2013: 42.

120 Blanding 2014: 193.

121 Le Vaillant 1790a: ix-x.

13 Conclusion

If Jonathan Crewe, in a literary review in 1974, can claim that JM Coetzee's *Narrative of Jacobus Coetzee in Dusklands* is a South African *Heart of Darkness*,¹²² then the same could be said of the travelogues of François Le Vaillant, with this difference, however, that JM Coetzee uses the style figure of an historic narrative to express his criticism while Le Vaillant does it on the basis of own experience.

Le Vaillant may have provoked condescending criticism for his flamboyant and exaggerated style of writing, quite egocentric, placing himself at the middle of a narrative. He, however, widened the knowledge of southern Africa amongst the European reader public of his time and he drew their attention to the plight of indigenous peoples in the face of expansive colonialism. Several other travellers and writers did the same, to a certain extent at least. Le Vaillant, however, has the merit of introducing the concept of human rights, imprescriptible rights and inalienable rights of indigenous peoples into a colonial context. In doing so, his travel account remains relevant, today, as it is part of the historic context to address pressing contemporary issues around land restitution, human development, inequality, extraction of natural resources and environmental degradation.

Contrary to the general belief that the Enlightenment overemphasised political and civil rights, Le Vaillant, already in the eighteenth century, raised the issue of social, economic and cultural rights, today widely referred to as second and third generation rights. He placed the rights of indigenous people in the wider context of land, property and development, traditions, peace and happiness and the enjoyment of nature. He regularly pointed at abuse and at the sense of vengeance for injustices. In a remarkable manner, he drew the attention of his world to the risk of uncontrollable flows of refugees and the rise of fanaticism as a result of colonial policies, insults and violations of imprescriptible rights.

ABSTRACT

In seventeenth and eighteenth-century Europe, the Age of Enlightenment, eminent political and legal thinkers such as Locke and Rousseau defended the emancipation of the individual and the inalienable, natural rights of man such as the right to life, freedom and equality. They argued that every man is born free and inherently good but that he becomes corrupted by the constraints of society and civilisation. A certain harmony can be found again through a social contract with the state, the ultimate protector of man's inalienable rights. Within this philosophy, education is crucial to develop young people naturally without the negative impact of society. Only nature can elevate man. Enlightenment opened European minds to the exotic and the unknown and, as a consequence, broke with the prejudice of previous centuries against cultural difference.

122 Kannemeyer 2012: 265.

Enlightenment influenced many free-spirits of the day. One such free-spirit was the Frenchman François Le Vaillant who travelled through southern Africa between 1781 and 1784. He was not only influenced by the ideas of Rousseau but he was, because of his unusual and liberal education, the very incarnation of Rousseau's philosophy. As he travelled through Southern Africa, Le Vaillant became mesmerised with its indigenous peoples, especially the roaming Koina communities and the Xhosa, who, at that time, still lived a traditional and natural life. Even though he set off on his journeys as an ornithologist and a collector of specimens, Le Vaillant became, as he encountered the Koina and the Xhosa, a defender of the inalienable rights of the natural man. He became an emotional critic of encroachment by colonial settlers upon indigenous lands, forcing the Koina and the Xhosa into poverty, economic dependency, cultural alienation and loss of natural life.

Le Vaillant published two travel journals; he introduced a new style of travel writing and made the European reader familiar with southern Africa. In doing so, he played a significant role in the defense of human rights through his criticism of the effects of colonial rule on indigenous peoples, not from an academic point of view but from the heart, based on first-hand experience in the field.

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CUM DIGNITATE OTIUM. REMARKS ON CICERO'S SPEECH IN DEFENCE OF SESTIUS

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Key words: Cicero; *Pro Sestio*; *dignitas*; *otium*

1 Introduction

Cicero delivered his speech in March 56 BC in defence of Publius Sestius, who was charged on the grounds of the *lex Plautia de vi* with acts of violence offending public order/public tranquillity. He convincingly proved that they were measures required by the situation of lawful defence. We need to make it clear: the speech can be considered primarily a brilliantly 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. *Pro Sestio* is the first occasion on which Cicero, having returned from exile, was able to formulate his program of rethinking the idea of a *res publica* harrowed by civil strife and the preserving-renewing reorganisation of the state. In this speech Cicero clearly takes a stand for Sulla's "constitution", that

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is, for what he interpreted as Sulla's constitution: An argument for strengthening the position of the senate meant to govern the state. His defendant was acquitted, owing not only to the brilliant handling of the facts of the case, but most probably also to the political program presented in the speech with such exhaustive details: A captivating pathos that won his audience's approval.

2 Historical background of *Pro Sestio*

Cicero reached the zenith of his career, indisputably, in the year of his consulate, 63 BC. It was at that time when the *homo novus*, the man from the order of knights, whose ancestors did not hold *magistratus curules*,¹ ascended to the rank of the leaders of the state, *principes civitatis*. Having created the desired *concordia ordinum*² while exposing and suppressing Catilina's plot, he was confident that by his deed he had ensured for ever that his fellow citizens would be grateful to him and he would have a permanent and authoritative influence on public life.³ Cicero was disappointed in his hope sooner than he could have expected: Two of the tribunes who entered office on 10 December 63 BC, namely L Calpurnius Bestia and Q Caecilius Metellus, immediately started a fierce agitation against him. According to the tribunes, under the pretext that merely on the grounds of *senatus consultum ultimum* having been awarded to him as consul,⁴ he had – without judgment at law – five conspirators executed.⁵ Bestia and Metellus vetoed Cicero's wish to address a speech to the people on the last day of his office on 29 December 63. So, Cicero could merely take a public oath that by his measures he had saved the state.⁶ Soon, on 5 December 61 BC, he wrote to Atticus that the *concordia* created by him and the merits he had obtained would not provide him with proper protection.⁷

He hoped to find this protection at Pompey who, having significantly extended the territory of the republic and excellently arranged for the administration of the territories conquered, returned home to Italy at the end of 62 BC as the hero of great deeds⁸ after a campaign that had lasted six years. Although the senate acknowledged his claim for a triumph,⁹ it did not satisfy his other claims (approval of his measures taken in the East; and giving land to his veterans). The dissatisfaction of Pompey, who reconciled with Crassus, and Caesar's initiative created the so-called first triumvirate with the aim that no event, changes or measures could take place in public life that

1 Meier 1968: 62.

2 Materiale 2004: 147.

3 Krüger 1991: 187.

4 Bleicken 1975: 92f.

5 Uttschenko 1978: 121.

6 Cic *Fam* 5 2 7.

7 Cic *Att* 1 17 10.

8 Cic *Sest* 67.

9 Cic *Sest* 129.

might violate any of their interests.¹⁰ Pompey, who maintained a friendly relationship with Cicero, tried to win him over to this triple alliance. Cicero – although it was clear to him that accession to the triumvirate would provide protection against attacks against him due to his actions taken against Catilina's adherents – distanced himself from the triple alliance with little political vision and great moral conviction because he was not willing to make common cause with Caesar, whom he considered the manifestation of the archetypal populist politician in the first place. To produce greater pressure on Cicero, Caesar used P Clodius Pulcher, who passionately hated Cicero,¹¹ as a tool.¹²

Clodius,¹³ with the aim of taking revenge on Cicero for the injury he had suffered from him, decided to have himself elected a tribune. In 59 BC, with the approval of the *comitia curiata* through *arrogation* – and having changed his name from the patrician Claudius to Clodius – he had himself adopted by a plebeian, and thus he could be elected a tribune with the support of the triumvirs.¹⁴ After commencing his activity as a tribune on 10 December 59 BC, he carried through four bills that provided the grounds for his subversive activity. By abrogating the *lex Aelia et Fufia* he terminated the institution of *obnuntiatio*, that is, the possibility that holding the popular assembly and voting on bills could be adjourned in case of unfavourable *auspicia*.¹⁵ He also permitted setting up *collegia*, generally founded with political purposes and suitable for giving rise to public disturbances, which had been banned by law in 64 BC.¹⁶ In addition he deprived the censors of the ability to impose *infamia* by means of a reprimand and exclude citizens from their *classis* or *tribus* under their moral adjudication, except when a formal accusation was made and the accused was found guilty by both censors.¹⁷

Clodius concluded a bargain with the two consuls in office in 58 BC, Gabinius and Piso (Caesar's father-in-law), entailing that after their year in office, under proper military and financial conditions, they would get the provinces they wanted.¹⁸ At the end of 58 BC, he submitted the *lex Clodia de capite civium*, which set forth that everybody who had Roman citizens executed without court proceedings should be outlawed. This law (enacted with retroactive force!) did not mention Cicero by name, yet the aim of the legislation crushing the law was unambiguously clear to everybody. Cicero put on his mourning toga, and appeared before the popular

10 Suet *Caes* 20 1.

11 On the animosity between Clodius and Cicero see Rundell 1979: 301ff; Heinze 1925: 193ff; Spielvogel 1997: 56ff; Epstein 1986: 229ff.

12 Krüger 1991: 188f.

13 Gruen 1966: 120ff; Moreau 1982: 45-50 and 175-182.

14 Cic *Sest* 16.

15 Cic *Sest* 33 56.

16 Cic *Sest* 55.

17 *Ibid.*

18 Cic *Sest* 24 33.

assembly begging. Clodius and his gang instigated rioting. Thereupon, thousands of citizens – primarily members of the order of knights – went into mourning. A delegation appeared before the senate. Piso was absent from this meeting of the senate, and Gabinius refused to do anything in favour of Cicero. On the proposal of tribune L Ninius, the senate resolved to go into mourning as a whole.¹⁹ Gabinius summoned the *contio plebis* and declared that the senate had lost all its political significance. He also threatened the order of knights with bloody revenge because of the events on 5 December 63 BC, that is, the execution of Catilina’s accomplices by Cicero. In order to give greater emphasis to what he had said, he exiled L Aelius Lamia, who was working for Cicero, to two hundred miles from Rome.²⁰ Soon, the consuls gave a command to the senators to take off their mourning garb and wear their usual clothing.²¹ At *contiones* Clodius repeatedly stated that he acted with the agreement of Caesar, Pompey and Crassus,²² and although none of them expressed their opinion *coram publico*, Cicero hoped that Pompey would keep his promise to help that had been made earlier.²³

However, to flee from the embarrassing need to take a stand, Pompey withdrew to his estate in the countryside since the speech implied that his enemies had suggested to him that Cicero’s adherents wanted to take his life.²⁴ Clodius, to legitimate his acts, convened a popular assembly where he addressed a question to the consuls and Caesar regarding the executions that took place on 5 December of 63 BC.²⁵ Gabinius and Piso disapproved of Cicero’s action in terms of legality since Cicero, as consul, had some participants in Catilina’s plot executed without judgment and had denied the opportunity of *provocatio ad populum* which Roman citizens were entitled to.²⁶ At the same time, they “forgot about” the *senatus consultum ultimum* which vested consuls with additional rights. Caesar stated that he had been against the death penalty when it was passed,²⁷ but that he would consider it improper to apply the law with retroactive force.²⁸

Cicero thereafter went into voluntary exile.²⁹ Later on he explained this by stating that remaining in Rome would have triggered a civil war – since all decent citizens would have sided with him – and he could not assume liability for that.³⁰ Exile was not only a punishment but meant also a possibility to escape from punishment,

19 Cic *Sest* 25ff.

20 Cic *Sest* 28ff.

21 Cic *Sest* 32.

22 Cic *Sest* 39ff.

23 Cic *Sest* 15.

24 Cic *Sest* 41.

25 Drexler 1976: 124ff; Giebel 1977: 45.

26 Bleicken 1959: 324ff; Lintott 1972: 226ff; Martin 1970: 72ff.

27 Cf Sall *Cat* 51 1-43.

28 Caesar offered Cicero a legate’s position to enable him to leave Rome, but it is not clear whether this happened before (see Cic *Att* 2 18 3 and 2 19 5) or after Clodius was elected tribune (Dio Cass 38 15 2). However, Cicero did not leave immediately (see Cic *prov cons* 41-42).

29 Materiale 2004: 147.

which Roman citizens were entitled to (*ius exulandi*) before or after conclusion of the lawsuit.³¹ So, early in March 58 BC, Cicero went into exile and his house was robbed; the loot was shared by Clodius and the consuls, who sacrificed the good of the state for the provinces they longed for.³² By means of another law Clodius managed to have Cicero's full property confiscated, and the exile was banned from choosing a place of living closer than five hundred miles from Rome.³³

Clodius now thought that he had Rome under his control indeed, and with his armed hordes he strove to quash every opposition.³⁴ Not only did he provoke Pompey,³⁵ but he also helped Tigranes (who had been brought to Rome as prisoner by Pompey) to escape.³⁶ He furthermore sold the sanctuary that belonged – in accordance with Pompey's orders – to king Deiotarus's territory for a huge sum to Brogitarus to whom he arbitrarily also granted a royal title.³⁷ Brogitarus did not appear in public since he no longer felt secure.³⁸ Clodius did, however, also turn against Caesar – who had helped him to power – to such an extent that at the end of his tribuneship he questioned the validity of Caesar's laws and regulations. It was at that time that those who had helped Clodius to power realised that they had made a fatal error by supporting their protégé. Clodius was unsuitable as a political ally and at this point the *optimates* would have had the opportunity to forge political unity and get Pompey (by threatening him with violence) to side with them by separating him from Caesar who had brought Clodius to the tribune's office. The *optimates*, however, were worn out by petty-minded civil strifes,³⁹ and the one-time allies Pompey and Crassus could not come to an agreement either. Thus cliques of *optimates*, Pompey, Crassus, Cicero's adherents, Clodius and the mob all brooded over their own way to find a solution, not knowing that long-term political trends were being determined in Caesar's camp in Gaul.⁴⁰

Nevertheless, Clodius's "politics" resulted in the rehabilitation of Cicero actually being placed on the agenda: This happened on 1 January 57 BC at the senate session led by consul P Lentulus Spinther. The other consul, Metellus Nepos, who entertained hostile emotions against Cicero, putting aside his private injuries, voiced his agreement with the agenda. In addition the one-time consul, L Aurelius Cotta,

30 Cic *Sest* 43ff. See, also, Fuhrmann 1960: 496.

31 Zlinszky1991: 78.

32 Cic *Sest* 53ff.

33 Cic *Sest* 65 69. Following Cicero, another strong man of politics in the senate, Cato, was also sent away from Rome – however, in his case they took care of the appearance of fairness. Cf Meyer 2005: 10.

34 Krüger 1991: 192; Fuhrmann 2000: 281.

35 Materiale 2004: 147.

36 Cic *Att* 3 8 3.

37 Cic *Sest* 56.

38 Cic *Sest* 15 69.

39 Materiale 2004: 147.

40 Fuhrmann 2000: 282f.

believed that such a senate decree (*senatus consultum*) was sufficient for Cicero to return home since the applicable *lex Clodia* was invalid from the beginning.⁴¹ Pompey demanded a *lex* or a *plebiscitum*, reckoning that otherwise the people's party would organise rioting, and the senate agreed with this view. A tribune, namely Sex Atilius Serranus, requested one day to deliberate, and at the January sessions through his continuous *intercessio* he prevented a decision from being made.⁴² Then, eight tribunes loyal to Cicero, and led by Q Fabricius, seized the initiative and submitted a motion – to be put to the vote on 23 January – for calling the exile home. Under cover of night, however, Clodius, with armed slaves and gladiators of his brother, praetor App Claudius Pulcher, occupied the Forum and scattered the popular assembly. In the course of the action, Cicero's younger brother Quintus – among others – was assaulted, and during the following days Clodius and his horde subjected the streets of Rome to their rule. The senate and the consuls were powerless.⁴³

Milo, after he had made an unsuccessful attempt as tribune to bring a charge *de vi* against Clodius, decided to render Clodius's gangs harmless by his own troops.⁴⁴ Milo's example was followed by Sestius (also as a tribune) after Milo had almost fallen victim to a fatal attack.⁴⁵ The *militia* set up by Milo and Sestius – as it were in response to Clodius's gangs – soon gained ascendancy over them, and public order was partially restored in Rome.⁴⁶ At the beginning of July 57 BC, Lentulus again put the issue of calling Cicero home on the agenda of the senate, and Pompey read out his relevant proposal: The senate was now not willing to postpone the case anymore and resolved that if no decision was made on the issue in the popular assembly, then Cicero should by all means – albeit without the resolution of the popular assembly – return to Rome.⁴⁷ At the *contio* held on the Mars field, Lentulus and Pompey resolutely stood up for Cicero, and on 4 August the *comitia centuriata* accepted the proposal.⁴⁸ Cicero did not simply return to – but actually marched into – Rome in a triumphal procession as had never been seen before on such occasion.⁴⁹

Even then Clodius did not give up; he blamed Cicero for the price inflation that emerged in those days – thereby trying to instigate public disturbances – and chased away the labourers hired for rebuilding his house.⁵⁰ (Cicero attained invalidity of the irregular *consecration* of the plot on the Palatine executed by Clodius and its declaration by his speech registered under the title *De domo sua*.) Milo tried again to

41 Krüger 1991: 193.

42 Cic *Sest* 72ff.

43 Cic *Sest* 76ff, 85.

44 Cic *Sest* 86ff.

45 Cic *Sest* 79ff, 90ff.

46 Fuhrmann 2000: 282.

47 Cic *Sest* 129.

48 Cic *Sest* 109ff.

49 Cic *Sest* 131.

50 Krüger 1991: 194.

take action against Clodius by using the *quaestio de vi publica* but on the proposal of the senate he abandoned his intention to bring a charge.⁵¹ Simultaneously, Clodius made an attack on P Sestius who had resolutely fought for calling Cicero home, and on 10 February 56 BC he brought a charge of *ambitus* (electoral corruption) and *vis publica*⁵² on the grounds of the *lex Plautia de vi*⁵³ against him. This case was concluded on March 14 with the acquittal of Sestius.⁵⁴ (The state of facts set forth in the *lex Plautia de vi* was sanctioned later on by the *lex Pompeia de vi* adopted in 52 BC. Around the year 46 BC, Caesar probably also punished acts of violence by his *lex Iulia de vi*; later on, the most detailed laws, which now clearly distinguished *vis publica* from *vis privata*, were caused to be enacted by Augustus in 17BC.⁵⁵) The charge brought *de vi* – more precisely, the prosecutor, P Albinovanus⁵⁶ – reproached Sestius for recruiting and arming gladiators to achieve his political goals.⁵⁷ Clodius lined up L Aemilius Paulus, Gellius Publicola⁵⁸ and, among others, P Vatinius as witnesses.⁵⁹ The *quaestio* was chaired by *praetor* M Aemilius Scaurus, the defence was provided by Q Hortensius, M Crassus, L Licinius Calvus and – rising to speak as the last one as was his custom – by Cicero.⁶⁰

The orators who took part in the lawsuit constituted a politically quite heterogeneous group since they included one of the members of the triumvirate, Crassus, the conservative Hortensius, the people's party's Calvus and as a person standing in the middle, creating unity, Cicero. Among others, this group might have encouraged Cicero to define the role of those destined to govern the state of Rome and the fundamental principles of governance.⁶¹

3 *Cum dignitate otium* – Defining political values

Cicero's argument in the lawsuit is completely logical and clear. How could Sestius be convicted *de vi*? He had tolerated the raging of Clodius and his gang for so long, and only after he had been attacked by Clodius's gang on the Forum – and it was pure luck only that he did not die – did he set up guards to protect himself!⁶² Sestius used the tool of lawful defence only when the law did not provide him with proper

51 Cic *Sest* 95.

52 Boyancé 1941: 174. On *vis (publica)* see Zlinszky 1991: 114ff.

53 Fuhrmann 2000: 281.

54 Cic *Q. fr.* 2 4 1. Cf Fuhrmann 2000: 281.

55 Vitzthum 1966: *passim*.

56 Krüger 1991: 194.

57 Cic *Sest* 78, 84, 90, 92.

58 Cic *Sest* 110ff.

59 Cic *Sest* 132ff.

60 Cic *Sest* 3. Cf Fuhrmann 2000: 281.

61 Materiale 2004: 148.

62 Krüger 1991: 195.

protection.⁶³ Based on all that, Sestius did not commit a crime, but he rather used the principle of *vim vi* and *arma armis repellere cuique licet*.⁶⁴

The speech *prima facie* appears to be somewhat confused and “jam-packed”, and only a few passages of the speech actually deal with the accused.⁶⁵ Much more is written about the narrative of the orator’s own vicissitudes and triumph, that is, his exile and homecoming.⁶⁶ Cicero dwells on his notions on the state and the role of a statesman, which he commends to the attention of especially young people.⁶⁷ This is accompanied by the *prooemium*⁶⁸ and the invective against the incriminating witness, Vatinius, who spoke about the *optimates* in a contemptuous voice, insultingly⁶⁹ calling them *natio (natio optimatum)*.⁷⁰ Based thereon, the superficial spectator might agree with the opinions, voiced in antiquity already, that Cicero deviated far too much from the original subject of his speech, and might give credence to the presumption that *Pro Sestio* in the form it had been handed down to us has nothing to do with the speech as it was actually delivered.⁷¹ When studying the *oratio* more carefully, we can agree with Manfred Fuhrmann’s opinion that the speech constitutes a closed, well-edited and logical whole. As the orator expounds on the point-by-point refutation of the charges affecting Sestius by those who had spoken before him, there is nothing else left to do but praise Sestius’s conduct of life and activity as tribune against the detailed backdrop of the historical-political background.⁷² Accordingly, the speech after the *prooemium* can be divided into sections⁷³ with a historical⁷⁴ and programmatic character,⁷⁵ which are then concluded by the *peroratio* turning into a pathetic fortissimo stating that if Sestius was to go into exile, then the orator would not hesitate to follow him there since he could thank his return from his own exile to Sestius.⁷⁶

It is now worth analysing that part of the speech which may be considered a mere *excursus* – having an end in itself – containing Cicero’s political creed and the most precise definition of the role taken by the *optimates* in public life.⁷⁷ The paradigmatic nature of Sestius’s case enabled the orator to frame guidelines for

63 Cic *Sest* 79ff.

64 Ulp D 43 16 1 27. Cf Zlinszky 1991: 114f.

65 Cic *Sest* 6-14, 75-95, 144-147.

66 Cic *Sest* 15-74, 127-131.

67 Cic *Sest* 96-126, 136-143.

68 Cic *Sest* 1-5.

69 Wirszubski 1954: 7.

70 Cic *Sest* 132-135.

71 Meyer 1922: 135.

72 Fuhrmann 1991: 283; Materiale 2004: 149.

73 Fuhrmann 1991: 283.

74 Cic *Sest* 6-95.

75 Cic *Sest* 96-143.

76 Cic *Sest* 144-147.

77 Cic *Sest* 96ff.

the philosophy of state that would be more accessible in a public speech than in theoretical or philosophical works.⁷⁸ What might be superficially considered a mere *excursus* is a fully considered and well-founded argument: The definition of the concept of *optimates* is followed by the listing of the most important tasks of the state, and then, by determining the goals of persons who shape public life, the significance of *otium* and *dignitas*. The orator reconnects the seemingly extended theoretical train of thought with the stream of the oration.

To respond to the disparaging remark made by the prosecutor regarding the *optimates*, he develops his own *optimata* definition by *interpretatio extensiva* setting out from the *optimates* – *populares* opposition. The *optimates* and *populares*, as a matter of fact, did not indicate party affiliations, not even groups orienting themselves in terms of principles or slogans concerning political or public life, but primarily groups of specific politicians who achieved their goals relying on the senate (*optimates*) or the popular assembly (*populares*) respectively – in many cases the distinction covered difference in political style rather than content.⁷⁹ According to Cicero, the *optimates* are those who – contrary to the *populares* – do not seek applause and approval of the masses but try to earn acknowledgement by all decent citizens (*optimus quisque*).⁸⁰

The community of decent citizens comprises thoughtful, sober people living under balanced financial circumstances, irrespective of their class status – comprising even “well-meaning” slaves who had been set free. Consequently, the *optimus quisque* are all decent Roman citizens, people belonging to the highest orders, inhabitants of Roman cities and agricultural workers, traders, and liberated slaves who are by nature not depraved, not insane, and who do not enjoy civil strife. Thus, *optimates* are opposed to depraved adventurers, people who upset public life.⁸¹ And what is the common goal of this most diverse group of people? To unite all sober,

78 Fuhrmann 1960: 494.

79 Krüger 1991: 196.

80 Cic *Sest* 96; Boyancé 1941: 179ff; Fuhrmann 1960: 484; Meyer 2005: 27ff.

81 Cic *Sest* 97: “Quis ergo iste optimus quisque? Numero, si quaeris, innumerabiles, neque enim aliter stare possemus; sunt principes consili publici, sunt qui eorum sectam sequuntur, sunt maximorum ordinum homines, quibus patet curia, sunt municipales rusticique Romani, sunt negoti gerentes, sunt etiam libertini optimates. Numerus, ut dixi, huius generis late et varie diffusus est; sed genus universum, ut tollatur error, brevi circumscribi et definiri potest. Omnes optimates sunt qui neque nocentes sunt nec natura improbi nec furiosi nec malis domesticis impediti. esto igitur ut ii sint, quam tu ‘nationem’ appellasti, qui et integri sunt et sani et bene de rebus domesticis constituti. Horum qui voluntati, commodis, opinionibus in gubernanda re publica serviunt, defensores optimatium ipsique optimates gravissimi et clarissimi cives numerantur et principes civitatis.” (“Who then are they? Every good man. If you ask what are their numbers, they are innumerable. For if they were not, we could not stand. They are the chief men of the public council; they are those who follow their school; they are the men of the highest orders of the state to whom the senate house is open; they are the citizens of the municipal towns and Roman citizens who dwell in the country; they are men engaged in business; there are even some freedmen of the best party. The number, as I have said, of this party is widely scattered in various directions; but the entire body (to prevent all mistakes) can be described and defined in a few words. All men

honest citizens with orderly conduct of life, namely the preservation of tranquillity by maintaining dignity.⁸²

The political philosophy of the *optimates* is nothing else than “*cum dignitate otium*”.⁸³ *Dignitas* is appreciation, dignity obtained by individual merit or social background – that is, it is not a “civil right”. *Dignitas* is in every case a kind of award for an office fulfilled in public life, a service carried out for public good, efforts and peril undertaken for the sake of *maiestas imperii/rei publicae*, which raises the person who has become worthy out of the grey mass of average people.⁸⁴ This award, however, is not identical with the contents covered by *honos* and *laus* because they, too, can be attained by exemplary handling of a particular, given the historical and political situation. *Dignitas* is a greater and, above all, more permanent value: To a certain extent it can be related to the concept of nobility since it extends far beyond the glory of a year in office or a military expedition. It can be passed from generation to generation, and may also legitimise the influence or power in public life of descendants. It is only during the stormy periods of the state when this inherited *dignitas* can be attacked by subversive elements. The task of the *optimates* is therefore to protect this value – not primarily for their own sake, but to serve the public good and its stability.⁸⁵

Otium is, in a certain sense, the opposite of *negotium*, that is, every activity that can be carried out outside the field of public life. The word “otium” often goes together with the terms *pax*, *concordia*, *salus*, *quies* and *tranquillitas*, as it were as the opposite of *novae res*, *seditio*, *discordia* and *tumultus*. Thus, both *dignitas* and *otium* can be a trait of a single person,⁸⁶ a group⁸⁷ or a whole institution – for example, the empire or the state,⁸⁸ and can denote public tranquillity and public safety.⁸⁹

belong to the best party, who are not guilty of any crime, nor wicked by nature, nor madmen, nor men embarrassed by domestic difficulties. Let it be laid down, then, that these men (this race, as you call them) are all those who are honest and in their senses, and who are well off in their domestic circumstances. Those who are guided by their wishes, who consult their interests and opinions in the management of the republic, are the partisans of the best men, and are themselves accounted best men, most wise and most illustrious citizens, and chief men in the state.”) Source of the English translation: <http://perseus.uchicago.edu/perseus/cgi/citequery3.pl?dbname=LatinAugust2012&getid=1&query=Cic.%20Sest.%2097>.

82 Cic *Sest* 98: “Quid est igitur propositum his rei publicae gubernatoribus quod intueri et quo cursum suum derigere debeant? Id quod est praestantissimum maximeque optabile omnibus sanis et bonis et beatis, cum dignitate otium.” (“What then, is the object proposed to themselves by these directors of the republic, which they are bound to keep their eyes fixed upon, and towards which they ought to direct their course? That which is most excellent and most desirable to all men in their senses, and to all good and happy men, – ease conjoined with duty.”)

83 Cf Wirszubski 1954: 1ff; Rémy 1928: 113ff. See, also, Pérez 1995: 57ff.

84 Fuhrmann 1960: 486; Wirszubski 1954: 12. Cf, also, Büchner 1957: 322ff.

85 Fuhrmann 1960: 487f.

86 Cic *Sest* 125, 128f; *Off* 3 1.

87 Cic *Sest* 104; *Fam* 1 8 4.

88 Cic *Sest* 1.

89 Cic *Sest* 15 46 104. Cf Fuhrmann 1960: 488ff; Wirszubski 1954: 4ff.

The question arises naturally whether the concepts of *otium* and *dignitas* cover contents that refer to public or private conditions.⁹⁰ According to Rémy the use of these concepts referring to the collective and the individual must be strictly separated from each other.⁹¹ Furthermore, these two keywords in *Pro Sestio* are meant to reflect idealised and desirable conditions of public life, in which *dignitas* denotes enforcement of the rule of the *ordo senatorius* considered “traditional”, that is destined to exercise power in Sulla’s constitution, and *otium* denotes public tranquillity arising from this *status quo*.⁹² In other cases Cicero often used the concept of *dignitas* to name the influence of the individual, more specifically, the senator and his power exercised in the senate, and *otium* to describe the deservedly earned tranquillity enjoyed after leaving office.⁹³ The strict distinction set up by Rémy was replaced by a somewhat subtler interpretation in the works of others. Pierre Boyancé, for example, increasingly emphasised that in Cicero’s works *dignitas* may be found both in the private sphere and in public life. He wanted to deduce this Ciceronian concept from Greek, primarily peripatetic, philosophy.⁹⁴ The literature – for example Chaim Wirszubski – considered the excessive nearing of *dignitas* to the private sphere exaggerated and as a demonstration of Greek philosophical roots problematic.⁹⁵ Chaim Wirszubski, however, also somewhat overshot the mark, and interpreted the idea of *dignitas* as a category that excludes political, philosophical and ethical connotations.⁹⁶

With his habitual ability to see the essence in synthesis, Manfred Fuhrmann declared that both Pierre Boyancé’s approach of taking only Greek philosophical bases into account and Chaim Wirszubski’s approach of ignoring other factors outside of Roman *realpolitik* are one-sided and therefore not correct. Fuhrmann integrates the two contradicting theories by claiming that the results of Greek philosophy served as tools for Cicero to formulate individual thoughts regarding Roman public life.⁹⁷

Thus, in *Pro Sestio* Cicero applies the phrase *cum dignitate otium* both to the entirety of public life and the leaders of the state. However, in this respect, due to the fundamental characteristics of Roman public thinking we cannot charge the orator-statesman with *mala fide* mingling of *in rem* and personal components, which are to be strictly separated nowadays, as it is done by Chaim Wirszubski.⁹⁸ It is only Cicero’s *res publica* definition that makes it justified and self-explanatory to mention

90 Cf Cic *fam* 1 7 7ff.

91 Rémy 1928: 113ff.

92 See, also, Heinze 1924: 73ff.

93 Fuhrmann 1960: 482.

94 Boyancé 1941: 172ff, 186ff.

95 Wirszubski 1954: 1ff.

96 Wirszubski 1950: 91ff; Wirszubski 1954: 3ff.

97 Fuhrmann 1960: 483.

98 Wirszubski 1954: 7ff.

“*in rem*” and “personal” elements of the state, that is abstract power and the elite exercising it.⁹⁹

The state of *otium* can be realised only if the State is governed by the *optimates* and the people of Rome acknowledges their *dignitas*, by which they can guarantee *otium* and *dignitas* of the *res publica*, that is, the stability of religion, state organisation, administration of justice, foreign relations and military administration.¹⁰⁰ This fragile balance is threatened by dangers from two sides. On the one hand, by subversive elements, anarchists, depraved political adventurers similar to Clodius;¹⁰¹ and on the other hand, by the citizens who either strive for *dignitas* and neglecting *otium*, or are willing to give up *dignitas* only to gain (or regain) *otium*. The latter group assumes an especially high risk because while chasing the false illusion of safety they fail to notice that, by giving up *dignitas*, *otium* will be endangered too.¹⁰²

After that, he enumerates examples from the rows of *propugnatores rei publicae*, who had protected the state, while facing trouble and danger, against subversive activity of the *populares*, which formerly involved significant peril as in those days the politics of the *populares* pleased the people.¹⁰³ Taking it to refer to the time when the speech was delivered, the orator, however, makes it clear that the ambitions of the *populares* evoke aversion also in the *verus populus*,¹⁰⁴ the people who approve of the politics of the *optimates* and long for *otium*, and that people like Clodius can

99 Fuhrmann 1960: 483.

100 Cic *Sest* 98: “Huius autem otiosae dignitatis haec fundamenta sunt, haec membra, quae tuenda principibus et vel capitis periculo defendenda sunt: religiones, auspicia, potestates magistratum, senatus auctoritas, leges, mos maiorum, iudicia, iuris dictio, fides, provinciae, socii, imperi laus, res militaris, aerarium.” (“And of this easy dignity these are the foundations, these are the component parts, which ought to be upheld by the chief men, and to be defended even at the hazard of their lives: religious observances, the auspices, the civil power of magistrates, the authority of the senate, the laws, the usages of one’s ancestors, the courts of justice, the jurisdiction of the judges, good faith, the provinces, the allies, the glory of the empire, the whole affairs of the army, the treasury.”) Cf Krüger 1991: 197f; Fuhrmann 2000: 285; *Materiale* 2004:151; Meyer 2005: 38ff.

101 Cf Alföldi 1985: 128.

102 Cic *Sest* 100: “Maioribus praesidiis et copiis oppugnatur res publica quam defenditur, propterea quod audaces homines et perditu nutu impelluntur et ipsi etiam sponte sua contra rem publicam incitantur, boni nescio quo modo tardiores sunt et principiis rerum neglectis ad extremum ipsa denique necessitate excitantur, ita ut non numquam cunctatione ac tarditate, dum otium volunt etiam sine dignitate retinere, ipsi utrumque amittant.” (“The republic is attacked by greater forces and more numerous bodies than those by which it is defended because audacious and abandoned men are impelled on by a nod, and are even of their own accord excited by nature to be enemies to the republic. And somehow or other good men are slower in action, and overlooking the first beginnings of things, are at last aroused by necessity itself so that some times through their very delays and tardiness of movement while they wish to retain their ease even without dignity, they, of their own accord, lose both.”) Cf Fuhrmann 1960: 485f; Boyancé 1941: 184ff.

103 Cic *Sest* 101ff. Cf Fuhrmann 1960: 485; Fuhrmann 2000: 286.

104 Cic *Sest* 108 114.

only expect applause from the hired, heckled mob.¹⁰⁵ He resolutely calls citizens of Rome – who, except for hostile elements, all enrich the rows of the *optimates*, according to this extended definition – to follow the example of the enumerated men who long for and indeed attain authority, acknowledgement and glory, and who will be remembered for ever; at the same time, he does not deny that the task to be undertaken is difficult and involves troubles and perils.¹⁰⁶

The leaders of the *optimates*, namely the *principes civitatis* who follow the senate, which guarantees the good of the state, and the freedom, tranquillity and dignity of the people, must face their enemies (*audaces, improbi*), who sometimes come from influential circles (*potentes*). However, examples drawn from history show that these subversive elements, who tried to impress the mob, were, in most of the cases, badly defeated.¹⁰⁷ At this point, Cicero warns the youth – for, as he said, the definition of the concept of the *optimates* also served this¹⁰⁸ – to keep *dignitas* and *gloria* attainable through activities carried out for the sake of *res publica* in view¹⁰⁹ because he is afraid that, threatened by recent events and calamities suffered by them, there will be no citizens left willing to undertake duties and obligations in public life.¹¹⁰ Therefore, he does not omit to stress that – just as the *optimates* are quite often the vanguards of politics – he was exiled; yet, he was soon called to return home and was reinstated in his former *dignitas*.¹¹¹

105 Cic *Sest* 104: “Nunc iam nihil est quod populus a delectis principibusque dissentiat: nec flagitat rem ullam neque novarum rerum est cupidus et otio suo et dignitate optimi cuiusque et universae rei publicae gloria delectatur. Itaque homines seditiosi ac turbulenti, quia nulla iam largitione populum Romanum concitare possunt, quod plebes perfuncta gravissimis seditionibus ac discordiis otium amplexatur, conductas habent contiones, neque id agunt ut ea dicant aut ferant quae illi velint audire qui in contione sunt, sed pretio ac mercede perficiunt ut, quicquid dicant, id illi velle audire videantur.” (“At present there is no subject on which the people need disagree with its chosen magistrates and with the nobles; it is not demanding anything, nor is it eager for a revolution, and it is fond of its own tranquillity, and pleased with the dignity and worth of every eminent man, and with the glory of the whole republic. Therefore seditious and turbulent men, because they cannot at present stir up the Roman people by any bribery, since the common people, having gone through some most violent seditious and discords, appear for the most for ease and tranquillity, now hold packed assemblies, and do not concern themselves about saying or proposing what those men who are present in the assembly may like to hear, but they contrive by bribery and corruption that whatever they say may appear to be what those men wish to hear.”)

106 Cic *Sest* 102: “Haec imitami, per deos immortalis, qui dignitatem, qui laudem, qui gloriam quaeritis! Haec ampla sunt, haec divina, haec immortalia; haec fama celebrantur, monumentis annalium mandantur, posteritati propagantur. Est labor, non nego; pericula magna, fateor.” (“Imitate those men, I beg you in the name of the immortal gods, you who seek for dignity, and praise, and glory. These examples are honourable; these are godlike; these are immortal; these are celebrated in fame, and are committed to the eternal recollection of our annals, and are handed down to posterity. It is a labour, I do not deny it.”) Cf *Materiale* 2004: 152.

107 Cic *Sest* 136-143. Cf Krüger 1991: 198f; Meyer 2005: 33ff.

108 *Materiale* 2004: 149.

109 Cic *Sest* 51, 96, 102, 119, 136.

110 Cic *Sest* 1, 49, 93, 95.

111 Cic *Sest* 51, 140.

4 Conclusion

The analysis of the situation and role in public life of the *optimates* far exceeded the extent required by the success of Sestius's case. It is, however, organically connected with other elements of the speech, as the orator points it out too.¹¹² Despite rhetorical exaggerations we can agree with Cicero.¹¹³ Sestius takes the part of the *optimates*, that is, every decent citizen (*quisque optimus*) as it is proven by his entire conduct in life and his political activity:¹¹⁴ He had not only stood up for Cicero, who had done so much for saving the state, but also represented the interests of the senate, of Italy entirely, and in general of the *res publica*¹¹⁵ against fanatic, subversive and traitorous political adventurers, who are deservedly referred to with scathing irony by the orator.¹¹⁶ (If we put the portrait of Gabinius and Piso in the scales of history, then Cicero undoubtedly drew a grotesque caricature of them; if, however, we wish to judge the description in terms of its literary value, then we regard them as masterpieces of Ciceronian irony.¹¹⁷) What was at stake in the fight of Milo, Sestius and the citizens who allied with them (the senate, the citizens and the whole of Italy)¹¹⁸ against Clodius, Gabinius, Piso and the heckled-hired scum of society¹¹⁹ out for the destruction of the state, was not calling Cicero home, but primarily *otiose dignitas*.¹²⁰

In the formulation of the pair of opposites of *ius* and *vis*¹²¹ Cicero could look back on earlier examples like, among others, Ennius.¹²² For the poet the figures of the soldier who uses violence and the orator who uses the weapon of persuasion represent two entirely different spheres: The key characteristic of the *orator* is *bonus*, his tools are *sapientia* and *ius*; opposed to him stands the *horridus miles*, whose main tools are *vis* and *ferrum*. Both figures grow beyond themselves through their symbolism as they provide us with two possible archetypes of settling disputed issues, representing the procedural orders of peace and war. Cicero emphatically uses the pair of opposites of *vis* – *ius* elsewhere too:¹²³ that is, it can be established

112 Cic *Sest* 96.

113 Materiale 2004: 150.

114 Cic *Sest* 6-14.

115 Cic *Sest* 15, 83, 87ff.

116 Cic *Sest* 18ff.

117 Fuhrmann 2000: 284.

118 Cic *Sest* 32, 36, 53, 72.

119 Cic *Sest* 25.

120 Fuhrmann 2000: 285; Cic *Sest* 98.

121 Fuhrmann 1960: 495.

122 Enn *Ann* 8 269-274: “Pellitur e medio sapientia, vi geritur res, / spernitur orator bonus, horridus miles amatur, / haut doctis dictis certantes nec maledictis / miscent inter sese inimicitiam agitantes, / non ex iure manum consertum, sed magis ferro / rem repetunt regnumque petunt, vadunt solida vi.”

123 Cic *Mur* 30.

that by that time this duality as a literary topos had been deeply rooted in Roman thinking.

The basic principle “*cum dignitate otium*”, which, beside creating *consensus/concordia ordinum* – that is the unity of the order of senators and the order of knights¹²⁴ – and *omnium bonorum*,¹²⁵ as one of the fundamental goals of Cicero’s activity as a consul too, did not fail to produce its impact during delivery of the speech either since the judges acquitted Sestius without any votes against it. According to Cicero this was a result difficult to overestimate politically.¹²⁶ *Pro Sestio* was delivered just at the right time and provided Cicero with the opportunity to expound his program of the theory of the state embedded in a rhetorical situation: For this brief moment a relative balance of forces developed in Rome between interest groups working against each other, and Caesar, who was able to turn the scales in his favour, was far away and did not directly intervene in the course of events.¹²⁷

Unfortunately, as is well-known, in the long run Cicero did not have the proper instruments available to him to enforce the goals and basic principles articulated in his speech *Pro Sestio*. Late republican Rome was no longer the place of making morally-based political decisions, but only interest-driven decisions. Caesar soon met Crassus, then Pompey, and they renewed the triumvirate of 60 BC. On the “proposal” of the senate, Cicero had to give up the legal debate regarding the settlement of Caesar’s soldiers, which was placed on the agenda for 15 May 56 BC. Thus, *otium* had been preserved but *dignitas* had been lost. Furthermore, the politics of the *populares*, which were again headed by Caesar, were, according to indications, followed not only by the mob of the city but also by the lower classes, presented as *optimates* in *Pro Sestio* by Cicero.¹²⁸

Nevertheless, in *Pro Sestio* Cicero gives a brilliant model how an orator-statesman can make the community aware of the danger of chaos in a crisis situation threatening the fundamental institutions of human co-existence, and in addition, how he can try to induce hesitating people to be guided by principles and values that the Roman state and public life had been based on.¹²⁹ The fortunate harmony of *dignitas*¹³⁰ and *otium*, that is, of idealistic basic values and material interests, and the formulation of the requirement to realise it even at the expense of sacrifices, deservedly raises *Pro Sestio* among Cicero’s best speeches.

Rhetoric virtuosity, contemporary politics and philosophy of the state – all of these are exemplarily combined in *Pro Sestio*. It is guide for the responsibly-thinking elite and the citizens of Rome on preserving and restoring the stability of the *res*

124 See, also, Bleicken: 1975 *passim*.

125 Materiale 2004: 147; Wirszubski 1954: 8. See, further, Strasburger 1931: *passim*.

126 Cic *Qfr* 2 4 1.

127 Fuhrmann 1960: 497.

128 Fuhrmann 2000: 288.

129 *Ibid.*

130 Cf Caes *Civ* 1 9 2.

publica. Moreover, the oration provides guidance for redefining classical values; an alternative to the value-destroying irresponsibility of people like Clodius. At that moment the orator-statesman could not know – but might have wished for – what occurred two years later: Clodius, who wanted to bring about the downfall of Cicero, died in a street fight provoked by him; and Milo, who killed Clodius and thereby did a great service to the public, would be defended by Cicero – unfortunately, with no success.

ABSTRACT

In this paper, first, we analysed the historical-legal background of the speech, which provided an insight into the events that evoked and followed Cicero's exile and calling him home. After that, it was worth paying attention to the thought of philosophy of the state articulated in *Pro Sestio* as Cicero determines the notion of *optimates* destined to govern the state by taking an individual approach – adjusting to the rhetorical situation but being true to his political conviction. In this respect, Cicero defined the goal that guides decent citizens (*optimus quisque*) in public life as *cum dignitate otium*, which crystallises in two keywords: *dignitas*, expressing moral values, firmness of mind, strength of character and dignity, and *otium*, the interest in material well-being, security (in law) and public tranquillity.

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TO BE OR NOT TO BE OF GOOD FAME, THAT IS THE QUESTION

David Pugsley*

Key words: Duels; Breach of the Peace; Justices of the Peace Act, 1361; to be or not to be

A good conference has interesting papers, followed by a lively discussion, stimulating new ideas and theories. The 2015 conference of the Southern African Society of Legal Historians was a good conference. My own paper is being published elsewhere, but the discussion at that conference about the law of duelling stimulated the following thoughts.

Duel comes from the Latin, *duellum*, a variant of *bellum*, war. A duel is a private war. Duelling was (and still is) illegal. It is a breach of the peace. And anyone caught about to fight a duel might be taken before the magistrates and bound over to keep the peace, normally for one year. The security required was sometimes very high. In 1798 when Lieut Bromley, of the Marines, and Mr Palmer, of Ayre street, Piccadilly, were caught planning a duel near Upnor Castle, Kent, Palmer was required to give security of £2,000 (£1,000 himself, and two sureties of £500 each), because he would not give his word of honour that the matter would not be pursued. Bromley was bound over in the sum of £500 and two sureties of £250 each. (Palmer had horsewhipped Bromley for sending a very impertinent letter to his wife.¹)

1 *The Times*, 7 Sep 1798.

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In 1806 Francis Jefferies, of Edinburgh, and Thomas Moore, of Bury Street, St James, were caught in the act of fighting a duel near Chalk Farm (near the modern underground station on the Northern line). The principals were bound over in the sum of £400 each and two sureties of £200 each, and the seconds were bound over in the sum of £200 each. The pistols were confiscated and it was found later that neither of them had been loaded with ball, so that no harm could have been done if they had fired. (The cause of the duel is not recorded.²) These are enormous sums for that period.

It was a misdemeanour for one man to challenge another to fight a duel. Between 1800 and 1805 there were at least eight convictions for this offence, leading to terms of imprisonment between three weeks and twelve months, and fines up to 400 guineas.³ In 1823 Edward Divett, for many years one of the MPs for Exeter, received a challenge from someone he had never met (perhaps a dissatisfied elector) and prosecuted him. His challenger was fined £20, sent to prison for six months, and bound over to keep the peace for two years afterwards in the sum of £200 and two sureties of £100 each.⁴

The magistrates' power to bind people over to keep the peace and to be of good behaviour is derived from the Justices of the Peace Act 1361.⁵ It is a celebrated statute which may or may not contain the vital word "not".⁶ It gives the magistrates power to bind over "all them that be of good fame", or perhaps "all them that be not of good fame". None of the duellists who were bound over raised the issue. It was not raised until 1913. George Lansbury,⁷ a future leader of the Labour Party in the 1930s, was elected as MP for Bow and Bromley in the second general election in 1910. He was a strong supporter of the suffragette movement. On 25 June 1912 he caused a scene in the House of Commons on their behalf and was ordered by the Speaker to leave the House. He resigned his seat and immediately fought a by-election for it on the issue of women's rights, but lost. He continued to campaign and address meetings on their behalf. On 10 April 1913 he addressed a meeting in the Albert Hall and called on his audience to stand shoulder to shoulder with the militant women. Let them burn and destroy! He was prosecuted under the 1361 statute and bound over by the magistrate to be of good behaviour in the sum of £1,000 himself and two sureties of £500 each, or to serve three months in prison. He appealed to the Divisional Court,⁸ where he was represented by Montague Shearman KC, a brilliant

2 *The Times*, 12 Aug 1806.

3 Banks 2010: 154-155.

4 *Exeter Flying Post*, 22 Jan 1824. He was released from prison on 14 Jun with a royal pardon for the unexpired portion of his sentence (only two weeks).

5 34 Edward III, cap 1.

6 Megarry 1955: 340.

7 See Postgate 1951: esp at 130-131.

8 *Lansbury v Riley* [1914] 3 KB 229.

scholar and keen antiquarian.⁹ He went back to the original Statute Roll, which did not contain the word “not”, and argued that it was confined to “pillors and robbers” from across the seas: those who were of good fame might simply be bound over, the others¹⁰ duly punished. The statute clearly had no application to the case of the defendant. The court did not call on the Attorney General to reply and rejected the appeal out of hand: whatever was the original intention of the statute, and whether or not it contained the word “not”, the modern cases were clear and it was much too late to go behind them to look at the original text, though Lush J did say that “there was great force in Mr Shearman’s contention as to the true meaning of this obscure statute”. (Lansbury refused to be bound over and was sent to prison. He immediately went on a hunger-and-thirst strike and was quickly released.)

If Shearman had thought of it he might have addressed the court as follows: “To be, or not to be. That is the question. Whether the power to bind over applies to all them that be of good fame, or to all them that be not of good fame.” There is a precedent for “To be or not to be, that is the question” in Hamlet’s famous soliloquy in Act III, scene 1. It is traditionally said to be a suicide speech, and it may be far too late to convince anyone to the contrary, but a careful study of the text itself leads to a different conclusion.

What would any unbiased person think who heard the speech for the first time, with no prior knowledge of it? It would be very difficult to find any such person. What would an intelligent visitor from Mars make of it? At the words “To be or not to be” would his reaction be: the speaker is thinking of committing suicide? Or would it be: to be or not to be what? And wait for the next two lines which give the answer: “to be or not to be noble-minded?” And the choice is set out expressly and clearly: **either to suffer** the slings and arrows of outrageous fortune (the pacifist option), **or to take arms** against a sea of troubles and by opposing end them (the bellicose option).¹¹ Suicide is not an option in this speech.

9 For example, at the nomination ceremony for High Sheriffs in November 1905 he represented Edward Carter, of Ryde, Isle of Wight, who wished to be struck off the list. Shearman tracked down in the Privy Council archives a charter of Charles I, dated 15 Aug 1626 and addressed to Lord Conway, Captain of our Isle of Wight, exempting the inhabitants of the island from service as High Sheriffs of Hampshire. The charter had been forgotten for years, if not centuries, but a transcription was produced in court on the morning of the ceremony. However, the court decided to leave Carter’s name on the list. See *The Times*, 14 Nov 1905. (The charter is now in the National Archives, PC 8/617.) When Shearman came as an assize judge on the Western Circuit in 1925 he contributed an article on “The Western Circuit in the 16th Century” in *The Dorset Year-book*, 1925 at 24-26.

10 Modern versions of the statute have “the other duly to punish”, but the text clearly has “les aut’s” (plural).

11 This is very strange. Not even King Canute’s courtiers suggested that he should take arms against the sea. A more understandable choice would be: to take arms against the slings and arrows of outrageous fortune, or to suffer from a sea of troubles (overwhelmed, drowned). Is there a touch of madness here?

There is nothing about suicide in this speech. Hamlet had considered suicide in Act I, scene 2, after the marriage between his mother and his uncle and before his meeting with his father's ghost, and immediately rejected the idea: "Oh that the Everlasting had not fixed his canon 'gainst self-slaughter." But he had fixed it; it was forbidden. That was recognised by Imogen in *Cymbeline*, Act III, scene 4: "[A]gainst self-slaughter there is a prohibition so divine that cravens my weak hand." She had a way round it. She asked Pisanio to do it for her; but he refused. Hamlet could have asked Horatio, but he was not present during the soliloquy.

After Hamlet's meeting with his father's ghost in Act I, scene 5, there is no longer any question of self-slaughter. (Suicide was not in Shakespeare's vocabulary and does not appear in English for another half century.¹²) The choice is now between suffering in silence and taking revenge: "If thou didst ever thy dear father love, revenge his foul and most unnatural murder."

For the rest of the play Hamlet vacillates between cowardice and action. He is worried that if he takes revenge and kills the new king, Claudius, he may have to pay for it in the next life. "There's the rub; for in that sleep of death what dreams may come, when we have shuffled off this mortal coil, must give us pause." There is nothing about suicide here. The question is not: "to shuffle off this mortal coil", or "not to shuffle off this mortal coil"; but simply what happens after death. His father's ghost had already done enough to frighten him, without giving him any actual details. "The dread of something after death ... puzzles the will." Macbeth faced a similar concern but arrived at a different conclusion: if he killed the king, Duncan, he might have to pay for it in the next life, but if success was assured "We'd jump the life to come" (Act I, scene 7).

The theme of action or inaction runs throughout the speech. "Who would bear ... the law's delay ... when he himself might his quietus make with a bare bodkin?"¹³ This does not mean: "Who would put up with the law's delay when he could commit self-slaughter?" It means: "Who would put up with the law's delay when he could dispose of the matter himself, by self-help, by fighting back?"¹⁴ The bare bodkin

12 I remember having lunch in All Souls with David Daube in 1966 when he was talking about his ideas on suicide which became his article on "The Linguistics of Suicide" in *Philosophy and Public Affairs*.

13 Who could dispose of serious problems with a bare, that is a simple, bodkin? Answer: the monarch, when he pricked the roll of High Sheriffs with a bodkin to dispose of, or to avoid, disputes arising from tampering with the roll. The practice is said to have started with Elizabeth I. The lawyers in the audience would have understood the point. Quietus is also found in the contest of sheriffs. They had to present their accounts in the Court of Exchequer at the end of their year of office. The Quietus Roll would be annotated at the end: *et quietus est*, the account is settled. See the Quietus Roll of John Cotton, High Sheriff of Cambridgeshire, 1591-1592, in Strazicker 2007: 6, where there is also a photo on the front cover of the bare bodkin now used by the Queen in the pricking ceremony.

14 Should the relatives and friends of the victims of the Hillsborough disaster in 1989 have suffered in silence, or committed suicide, or fought back? They fought back.

follows the reference to taking arms at the beginning of the speech, not for self-slaughter, but against a sea of troubles, to end them. Like the dagger which Macbeth saw before him the bare bodkin was to kill the king, not himself.

“Who would bear ... the pangs of despised love ... when he himself might his quietus make with a bare bodkin?” This does not mean: “If your girl-friend says ‘No’, why put up with it when you could commit suicide?” That would be a quite excessive reaction, with nothing noble-minded about it at all. Remember the beginning of the speech: “the slings and arrows of outrageous fortune.” If your girl-friend says “no”, that is a disappointment, but it is not an outrage; but if your uncle murders your father, marries your mother and becomes king in your place, that is an outrage. And look at the words here: “despised love.” Hamlet’s love may have been rejected – Polonius says repulsed – but there is no evidence that it was despised. Nor is there any evidence that he was suffering any pangs as a result. Polonius says that he was, but Polonius had not met the ghost of Hamlet’s father. *We* know, because Hamlet told us so in his soliloquy in Act I, scene 2, that his mood was caused by the precipitate marriage between his mother and his uncle. “Oh, most wicked speed, to post with such dexterity to incestuous sheets!” Incestuous appears four times in the play (and only once elsewhere in Shakespeare, in *King Lear*). This is the despised love, the love that Hamlet despises. “But break, my heart, for I must hold my tongue.” This is the heart-ache, these are the pangs of despised love. Who would bear them, when he could bring them to an end by killing the “incestuous, murderous, damned Dane” (Act V, scene 2).¹⁵

The speech ends with a reference to “enterprises of great pith and moment” which “lose the name of action”. Suicide is not an enterprise of great pith and moment, but revenge, killing the king, might be.

Hamlet does not make up his mind. His train of thought is interrupted when he sees Ophelia, who has been on stage quietly reading a book all the time. Like many indecisive men, he puts off the decision until he has more evidence; and he organises the play within the play, the Mouse-trap.

During the soliloquy Claudius and Polonius were standing and listening in the wings. Claudius did not think that the speech was like madness or about love. He saw in it a threat to himself, some danger, and took a quick determination, unlike Hamlet’s resolution which was “sicklied o’er with the pale cast of thought”, to send him to England. And, like King Herod, he had two reasons: publically to collect danegeld; privately to have him killed. Of all the films of the soliloquy the best version is by Kenneth Branagh in 1996. It has a quick glimpse of the two men watching in the wings before the soliloquy starts. When Hamlet reaches the bare bodkin, he holds it away from himself, menacingly, and there is a quick shot of Claudius’ reaction: he knew what this was all about – not suicide, but revenge.

15 Cf D 9 2 30*pr*. Hamlet’s father’s ghost actually calls Claudius “that incestuous, that adulterate beast” (Act I, scene 5).

Polonius, who knew nothing about the murder, still thought that the speech was a consequence of neglected love, but he said nothing about it being about suicide.

Ophelia had been on stage throughout the speech, pretending to read a book, but listening to Hamlet's every word. She picked up, twice, his reference to a noble mind. She made her feelings for him very clear in a short soliloquy after he had left the stage. She clearly did not despise him; and during the previous dialogue she had cried out: "Oh, help him, you sweet heavens." If she had thought that he was contemplating suicide, she would surely have intervened; but she did not.

This is not a suicide speech. It is not about self-slaughter; it is about self-help. The difficulty arises from the first six words. No-one thinking of committing suicide speaks like that.¹⁶ How are we to explain them? Shakespeare knew that duelling was a breach of the peace (Titus Andronicus, Act II, scene 1, Aaron interrupting a duel between Demetrius and Chiron: "these lovers will not keep the peace"). The Justices of the Peace Act might apply. Is it possible that there had been a recent case involving the wording and interpretation of the statute; that counsel had referred to the variant manuscript readings, with and without "not", and said "To be or not to be, that is the question"; and that those words in Hamlet are a little legal in-joke?¹⁷

ABSTRACT

Duels are a breach of the peace, punished for centuries under the Justices of the Peace Act, 1361, which however may or may not contain the word *not*. This may be the background to Hamlet's soliloquy, *To be or not to be*, which is not a suicide speech: Hamlet knew that self-slaughter was forbidden, and none of the three actors listening to him, Ophelia, Claudius and Polonius, interpreted it as a suicide speech.

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- 16 We might use those words if we received a dinner invitation with a reply slip: "We shall be/shall not be coming to the dinner. Delete as appropriate." We might then say: "To be or not to be, that is, the question whether we shall be coming or not."
 17 The beginning of the speech is curious, in particular the words "No more." No more what? No more sleep? But sleep is a consummation devoutly to be wished. I think that the answer is that Hamlet came in reading, as he had in Act II, scene 2. When he came to "To sleep" he turned over the document to see if there was any more on the back. There was not. So he said so, and turned it over again, and went back to the last words, "To die. To sleep." The question is: what was he reading when he said "To be or not to be, that is the question"?

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CONSTITUTIONAL SCAPEGOAT: THE DIALECTIC BETWEEN HAPPINESS AND APARTHEID IN SOUTH AFRICA

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Key words: South Africa; Apartheid; institutionalised sadism; Africa; right to happiness; human dignity; Constitution

1 INTRODUCTION

The consequences of South Africa's apartheid era are still visible in terms of their effects on the South African economy, and in terms of the racism which has eroded various human rights. Apartheid may be seen to be the result of arrogant and racially discriminant economic development by the white minority, which resulted in

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inequality and injustice. The implementation of public economic policies, where the end justifies the means, creates the opportunity to use scapegoats in order to justify economic injustices to the public.

In order to demonstrate how the South African apartheid leaders could manipulate justice and equality in order to enforce their own will, this paper addresses the history of the misuse of “right to happiness”¹ during the apartheid era. This paper aims to illustrate how political and legal manipulation are used to turn Constitutional values into scapegoats; as the apartheid regime used happiness as the perfect scapegoat to justify white supremacy. This conduct is also evident in other African countries where their Constitutions repudiate economic exploitation under the mantle of the right to happiness.

This demonstration shows that, by denying rights, obstructing democratic channels, neglecting the assumed commitment to socio-economic rights, and corrupting the sense of human dignity, authoritarian political regimes do nothing in favour of the people’s happiness, in spite of their hypocritical claims to the contrary.

2 HAPPINESS AS SCAPEGOAT: APARTHEID AND ITS MOTIVATIONS

Some political speeches announce tragedies. In South Africa, the tragedy was announced during a radio broadcast on 17 March 1961, when the people heard the following statement: “The policy of separate development is designed for happiness, security, and stability (...) for the Bantu as well as the whites.” It was the first phrase proclaimed by the Prime Minister of the Union of South Africa, Hendrik Verwoerd, in the introduction of his Address to the Nation. The policy of separate development would prove to be a scandalous euphemism. Verwoerd continued to promise that “we shall provide all our races with happiness and prosperity”.² Verwoerd would become known as “the architect of apartheid”.

The South African Governor-General was Supreme Chief in the Transvaal up until 1956. At that time, Cape Africans were considered too advanced to be treated as an underclass. Elizabeth Landis, an American expert on Southern Africa affairs, explains that the government had to change this consideration, with the explanation that “if we want to bring peace and happiness to the Native population (...) then we

1 In the eighteenth century, the Enlightenment philosophy gained importance in the United States, led by Jeremy Bentham. According to him all laws should produce as much happiness as possible so that citizens and society as a whole could be happy. In any public or private decision consideration was required to be given to how it would result in the happiness of all people concerned, each and every one being regarded as equal. This is the “Greatest Happiness Principle”. Bentham, James Mill and John Stuart Mill became utilitarians. They conducted studies geared towards measuring quantitative hedonism’s capacity to address ethical issues by quantifying pleasure to be generated through the implementation of one or another policy.

2 Verwoerd 1961.

cannot do otherwise than to apply this principle, which has worked so effectively in the other three provinces, to the Native population of the Cape as well (...)”.³ Happiness therefore becomes a scapegoat.

The unprecedented consequences of apartheid followed swiftly. As Otto Friedrich remembers:

By 1965, apartheid had become so obsessively established that a white taxi driver refused to let a blind white girl and her colored nurse ride together in his cab; that white and colored children were forbidden to appear together in a Red Cross pageant.⁴

The appalling events did not cease. Friedrich explains that “Cabinet ministers refused to attend any receptions where blacks or coloureds might be present”, and that “the Afrikaner poet Breyten Breytenbach was denied permission to bring his Vietnamese wife into the country to meet his parents; that a black workman could hold two wires for a white electrician but was not allowed to join them together”.⁵

Separating citizens according to skin color is a shameful economic policy, regardless of the promised happiness. The arrest of an innocent man must not be tolerated, even if the prisoner claims to be happy with the jail. Immoral practices, such as slavery, cannot be justified under the argument that the majority feels comfortable with such a disgrace. There are values other than happiness which refute certain decisions, irrespective of their effects on the feelings of the affected persons.⁶ In this regard, Steve Biko noted that apartheid constitutes a form of “sadism”. While this term is generally used with reference to sexual conduct, Biko interpreted it in terms of the relationship between the state and its citizens. This interpretation is applicable because apartheid was not a form of individualist sadism, but an institutionalised set of sadistic practices imposed by the figure of the state, its organs, and authorities. Biko develops this argument through the example of the author, Barnett Potter, who took pleasure in blaming the black communities for the alien economic exploitation which they suffered. Biko explains that “we can listen to the Barnett Potters concluding with apparent glee and with a sense of sadistic triumph that the fault with the black man is to be found in his genes (...)”.⁷ Potter’s argument had been that black individuals deserve their unhappiness and their struggles because they do not contribute to the sum of human happiness.

This is an example of the misuse of a doctrine in order to deny citizens their rights. It is a way to engender blame and an inferiority complex. The South African government created the impression that the continent was being looted by external economic interests and that the fault belonged to the black community. This irrational impression is evidence of the state’s behavior as a form of sadistic pleasure.

3 Landis 1962: 34.

4 Friedrich 2001.

5 *Ibid.*

6 Bok 2010: 56.

7 Biko 2015: 78.

Potter referred to the black community as follows: “They stay alive thanks to grants-in-aid, loans and various forms of subvention, but they contribute little, if anything, to the sum of human happiness and welfare and less to the total of human knowledge and goodness. They are the burden of our time.”⁸

Biko exposes the effects of apartheid through explaining that “all in all the black man has become a shell, a shadow of man, completely defeated, drawing in his own misery, a slave, an ox bearing the yoke of oppression with sheepish timidity”.⁹ Biko’s explanation of apartheid represents it as a means to violate crucial human feelings, such as fulfilment, self-confidence, self-esteem, and self-respect. There was a total loss of dignity.

There is no right to sadistic pleasures when the people are affected, directly or indirectly, by institutionalised practices of discrimination. If happiness is correctly interpreted, it becomes a value that encompasses a strong commitment to the realisation of other values, such as democracy, freedom, objective well-being, subjective well-being, and human dignity. Happiness should not, and cannot, be used as justification for prejudice and cruelty, as the apartheid regime attempted to do.

3 SUPREMACY AS SADISTIC PLEASURE

Apartheid may be interpreted as being based on a form of sadism, a harmful sentiment much appreciated in nationalistic regimes which prevailed, for instance, during World War II.¹⁰ Its mechanisms of control and its ideology are based on the premise that it is possible to feel pleasure due to the infliction of pain on others. In this regard, persistent and intentional prejudice is a perverse form of pain. Sadistic pleasures may be derived from a sense of superiority, as well as from the enactment of revenge. Sadistic pleasure encompasses a sentiment of ecstasy felt by inflicting harm to others, and may be regarded as a moral aberration. It is not relevant whether this pleasure is felt by a white man or by a black man. In its application to the apartheid regime, it is a representation of the exacerbation of a moral failure.

Hannah Arendt recounts the horrors experienced in Nazi Germany by the Jewish people in the concentration camps during World War II. Arendt explains that torture was “an essential feature of the whole totalitarian police and judiciary apparatus; it ... was used every day to make people talk”.¹¹ Torture and prejudice may be interpreted in the same light, inasmuch as neither is excusable as a means to an end.

8 “White’s book about Blacks controversial” 17 May 1971 *Utica NY Daily Press* available at <http://www.fultonhistory.com/Process%20small/Newspapers/Utica%20NY%20Daily%20Press/Utica%20NY%20Daily%20Press%201971.pdf/Utica%20NY%20Daily%20Press%201971%20-%203501.pdf> (accessed 1 Mar 2016).

9 Biko 2015: 31.

10 Arendt 1951: 448 n 144 recommends the perusal of the testimony of Mrs Buber-Neumann (former wife of the German Communist Heinz Neumann), who survived Soviet and German concentration camps: “The Russians never ... evinced the sadistic streak of the Nazis ... Our Russian guards were decent men and not sadists, but they faithfully fulfilled the requirements of the inhuman system.”

Arendt also highlights the connection between Nazi concentration camps and sadistic pleasures: “To this rationally conducted torture another, irrational, sadistic type was added in the first Nazi concentration camps and in the cellars of the Gestapo.”¹² She explains that the theoretical basis of the Nazi Party is based on the works of the Marquis de Sade, from whom the term “sadism” stems. Arendt states that “to them, violence, power, cruelty, were the supreme capacities of men who had definitely lost their place in the universe and were much too proud to long for a power theory that would safely bring them back and reintegrate them into the world”.¹³

Every project of absolute power carries the possibility of being based on actions which tolerate the suffering of others. Megalomania brings about the capacity of being insensitive to another’s pain, provided that the ultimate goals are achieved. Apartheid may be interpreted to be a megalomaniac project because its supporters believed that only a part of society deserved happiness, and that members of society could be used in order to further the happiness of others, an example of which is slavery. Apartheid thus ignored and disrespected the human dignity principle, which led to the corruption of the idea of happiness.

The use of happiness to deny basic human rights may be explained in terms of the *Plessy v Ferguson* case, which was heard by the US Supreme Court.¹⁴ In this instance, James Walker stated that “the real evil lies not in the colour of the skin but in the relation the coloured person sustains to the white. If he is a dependent, it may be endured: if he is not, his presence is insufferable”. Furthermore, “instead of being intended to promote the general comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class”.¹⁵ This is not happiness; it is the infliction of misery fabricated by a sense of superiority that intentionally inflicts pain on others.

Walker’s argument coincides with Biko’s, inasmuch as “while we progressively lose ourselves in a world of colourlessness and amorphous common humanity”, the heads of apartheid and those who enjoy the advantages of an unfair system “are deriving pleasure and security”.¹⁶

Far from revealing any facet of happiness, regimes based on racism, such as apartheid, are a pure form of ideology sustained by the commitment to exacerbation of sadistic pleasure, precisely because their sense of superiority mirrors a perception

11 *Idem* at 144: Arendt recommends the perusal of the testimony of Mrs Buber-Neumann (former wife of the German Communist Heinz Neumann), who survived Soviet and German concentration camps: “The Russians never ... evinced the sadistic streak of the Nazis ... Our Russian guards were decent men and not sadists, but they faithfully fulfilled the requirements of the inhuman system.”

12 *Idem* at 453.

13 *Idem* at 330-331.

14 *Plessy v Ferguson* 163 US 537 (1896) at 539.

15 Junior, Higginbotha & Ngcobo 1990: 809 n 198.

16 Biko 2015: 55.

of the other as being inferior, and therefore less deserving of consideration and respect. It presents itself as a school of thought which becomes threatened when the others' projects of happiness are successfully implemented; and, as previously stated, this constitutes a form of sadism inasmuch as it aims to diminish the other socially, morally, and intellectually.

4 PERVERSE PLEASURES

The word "sadism" dates back to 1834. Psychiatrist Krafft-Ebing used the term medically, in terms of psychopathology in 1891, explaining that sadism is a component of "lust-murder and violation of corpses ... in which injury of the victim of lust and sight of the victim's blood are a delight and pleasure". He also noted that "the notorious Marquis de Sade, after whom this combination of lust and cruelty has been named, was such a monster".¹⁷ Sadism comprises any pleasure experienced through the infliction of suffering. The sadistic pleasures derive from the humiliation of another party, their domination, subjugation, or even infliction of pain.

David Bilchitz explains the controversy of the concept of "triumphant pain". He points out that "pain involves a particular type of phenomenological experience, one that can be regarded as having a particular descriptive content". For him, "it is also a state which all beings with subjective conscious experience find unpleasant". He adds that "to experience pain is to have an experience of something that is of disvalue to a being".¹⁸ Bilchitz explains that the universal trait of pain is that "each individual can be asked to evaluate whether this claim is true", and, by the same token, "the linguistic and non-linguistic behaviour of beings that accompany painful experiences can provide evidence as to how they regard those experiences".¹⁹

Sadistic pleasures could thus never be integrated into the formula of the right to happiness. This contribution is crucial in terms of this paper's illustration of the integration of prohibiting sadistic pleasures under the umbrella of human dignity.

The British colonial writer, Richard Burton, wrote that slaves taken from their ancestral lands in Africa lived a life of paradise and in a land of happiness on white-owned slave plantations in the United States and in the colonial West Indies.²⁰ Is this perverse pleasure a genuine form of happiness? Should society support a collective project of happiness based on the suffering and deprivation of the others?

Stuart Mill uses Aristotle's argument to differentiate the qualities of pleasures, in terms of intensity and quality. While he does not indicate whether a pleasure is noble or perverse, the differences between the qualities of pleasure create a matrix against which one may examine the principle of human dignity as a limitative factor, a line

17 Von Kraft-Ebing 1939: 105.

18 Bilchitz 2015: 24.

19 *Idem* at 25.

20 Kaplan 1996: *passim*.

whereby we can prevent the excess of the utilitarianism or an abusive utilisation of the discourse of the right to happiness,²¹ which happened in South Africa during apartheid.

Mill stresses that men have greater pleasure in subordinating women, because this makes them feel superior. However, when assessing the gains for the society that sexual equality would provide, Mill does not consider the possible pain that men could experience due to the revocation of their privileges. Such pleasure would not be beneficial for social well-being.

Bilchitz expands upon this approach, distinguishing the qualities of pleasure and pain. He explains that “pain involves not only having a particular phenomenological experience, but that such an experience also involves a particular qualitative state that has either positive or negative value for that being”.²² Bilchitz continues to argue that the intrinsic trait of being a bad experience, regardless of the sadist’s opinion thereof, is that “there are in fact certain experiences – such as pain and starvation – that are negative for all beings that experience them. It does not require us to believe that pain in certain instances is ‘good’”.²³ He continues to state that “for most individuals, living in a continual state of pain would be a miserable existence, having little value”.²⁴

This paper demonstrates that pleasures can be identified as noble and perverse. There are sadistic pleasures which corrupt fundamental moral agreements and rights, and the apartheid regime was supported by individuals who were inclined to indulge in perverse pleasures.

5 ECONOMIC TRAUMA TRANSLATED INTO CONSTITUTIONAL PROVISIONS

The study of happiness comprises the examination of the implementation of public policies which focus on objective and subjective well-being. In this regard, Biko argues that “there is no doubt that the colour question in South African politics was originally introduced for economic reasons”.²⁵ From this perspective, apartheid, despite being a system that worked as a powerful instrument of enrichment for some, is not considered to be a good model, precisely because it embraced sadistic pleasures. The result of such a model is evidenced by the South African economy, despite alleged economic development, which was not separated from concerns relative to subjective well-being.

21 Varennes 2008: 47-76.

22 Bilchitz 2015: 25.

23 *Idem* at 35.

24 *Idem* at 35-36.

25 Biko 2015: 96.

Due to this intense economic side effect, Constitutions of African countries highlighted a multitude of concerns about external economic exploitation and have inserted provisions driving economic development towards a deeper purpose comprising freedom, prosperity, and people's happiness in response to the collective trauma.

To illustrate, article 1 of the Constitution of Liberia, 1986, proclaims that all free governments are instituted by the people's authority, and for their benefit, and they have the right to alter and reform the same when their safety and "happiness" so require.²⁶ In Egypt, the 2014 Constitution provides "a place of common happiness for its people". The Namibian Constitution, 1990, assures the right "to the pursuit of happiness"; this provision means a reaction against racism.

The right to the pursuit of happiness means the right to be a free man, someone whose fate is not in the hands of those who believe in a world where rights depend on skin colour. It is the right to live a life free of oppression, free from the yoke imposed by the strangulation of projects of happiness.

In this regard, Frederick Fourie argues that the preamble of the Namibian Constitution is coloured by the struggle against colonialism and racism. He explains that "this is built around the denial of the 'right of the individual life, liberty, and the pursuit of happiness' by colonialism, racism, and apartheid".²⁷ In other words, colonialism, racism, and the apartheid economic policy caused human structures to collapse by denying singular aspects of any project of happiness, such as popular participation and freedom.

Namibia is not alone in its efforts to assure the right to happiness for its citizens. Article 36(1) of the Constitution of Ghana, 1992, assures that the State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom, and "happiness" of every citizen.²⁸ Similarly, article 16(1)(b) of the Nigerian Constitution, 1999, assures that the State shall control the national economy in such manner as to secure the maximum welfare, freedom, and "happiness" of every citizen on the basis of social justice and equality of status and opportunity.²⁹ This provision is also present in the Nigerian Constitution of 1979.³⁰

26 See ch I (Structure of the State) of the Constitution.

27 Fourie 1990: 363.

28 See ch VI of the Constitution (The Directive Principles of State Policy) which provides economic objectives.

29 See ch II of the Constitution (Fundamental Objectives and Directive) which establishes the principles of State policy.

30 Read 1979: 171. The author explains that article 16(i) of the 1979 Nigerian Constitution states that "[t]he State shall, within the context of the ideals and objectives for which provisions are made in this Constitution (a) control the national economy in such manner as to secure the maximum welfare, freedom, and happiness of every citizen on the basis of social justice and equality of status and opportunity".

The preamble of the Constitution of Swaziland, 2005, envisages guaranteeing peace, order, good government, and the “happiness” and welfare of all Swazi people. It then presents practically the same provision of the Constitutions of Ghana and Nigeria. Article 59(1) states that “the State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom, and happiness of every person in Swaziland and to provide adequate means of livelihood and suitable employment and public assistance to the needy”.³¹

The South African Freedom Charter, which resembles a Declaration of Independence, provides the same concern about the strength of money in relation to national goods. Instead of using the word “happiness”, as other African Constitutions do, the document contains the phrase “well-being” for the sake of legislation. It provides that “all other industry and trade shall be controlled to assist the well-being of the people”.

It seems to be evident that the colonisation of African countries left a heritage of an ingrained sense of repulsion against any form of economic exploitation, or what Biko calls “capitalistic exploitative tendencies”.³² Constitutions of relevant countries, including that of an economic giant like Nigeria, and the South African Freedom Charter, have inserted constitutional provisions which expel the overwhelming power of money and, simultaneously, associate economic development with welfare, happiness, and freedom. These Constitutional provisions represent the reaction to the collective trauma that these countries experienced due to latent economic exploitation maintained throughout African history. It is a way to say “never again”.

6 THE CONSTITUTIONAL BARRIER AGAINST SADISTIC PLEASURES

The Constitution of South Africa built a barrier trying to minimise the inevitable presence of pain in people’s life, as well as to avoid the exhortation of sadistic

31 See Maseko 2008: 317-318. Maseko shares a critical point of view in terms of the constitution-making process in Swaziland, asking, “Who are the people? Who is the nation?” He then explains that “this is precipitated by the fact that, more often than not, African leaders refer to and purport to do things for and on behalf of their ‘people’ or the ‘nation’, even if the decisions they take are detrimental to the very people they lead. This is significant in the context of Swaziland because, when the 1968 Independence Constitution was repealed, the King supposedly acted for and with the full consent of the Swazi people: [T]hat I and my people heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a Constitution created by ourselves for ourselves in complete liberty without outside pressures; as a nation we desire to march forward progressively under our own Constitution guaranteeing peace, order and good government and the happiness and welfare of all our people”. See also ch V (Directive Principles of State Policy and Duties of the Citizen) of the Constitution, disciplining the economic objectives.

32 Biko 2015: 107.

pleasures as being a natural part of happiness. The National Anthem urges that South Africans “stop wars and tribulations”, showing the collective trauma historically faced by the country. This recognition is emphasised by the preamble to the Constitution which states that “we, the people of South Africa, recognize the injustices of our past; honour those who suffered for justice and freedom in our land (...)”.

The Constitution houses concern about suffering, and challenges different forms of sadistic pleasures. Section 1 founds the values of the Republic of South Africa, including “non-racialism and non-sexism”. Section 6(2) recognises the historically diminished use and status of the indigenous languages of the South African people. Section 9 disciplines commitments in terms of “equality”, highlighting unfair discrimination in the areas of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

Section 12(1) shows its commitment to the avoidance of any form of sadistic pleasure. According to this section, “everyone has the right to freedom and security of the person, which includes the right (c) to be free from all forms of violence from either public, or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman, or degrading way”. These provisions establish an unalterable commitment to the avoidance of any form of sadistic pleasure. This provision is complemented by section 13, which establishes that “no one may be subjected to slavery, servitude, or forced labour”.

The Constitution did not neglect its necessary attention to an environment that is not harmful to society. Section 24(1)(a) assures that everyone has the right to an environment that is not harmful to their health or well-being.

The Constitution of South Africa contains various provisions which protect its citizens from a painful existence. With regard to children, for instance, section 28(1) (d) states that every child has the right to be protected from maltreatment, neglect, abuse, or degradation. Even the oath of the President and acting President brings a duty of protecting people against any form of pain: “I solemnly and sincerely promise that I will always promote all that will advance the Republic, and oppose all that may harm it.”

Finally, section 198(a) states that national security must reflect the resolve of South Africans, as individuals and as a nation, “to be free from fear and want and to seek a better life.”

These constitutional provisions are designed to prevent any form of “apartheid flash-back”, which would mean the return to a time where happiness was promised and pain was delivered.

7 HUMAN DIGNITY AS A LIMITATIVE FACTOR

The human dignity principle is able to establish a boundary against any excess derived from the misuse of the right to happiness. It is a belief in the human being’s

capability of being content. Biko affirms that “I’ve got no doubt in my mind that people – and I know people in terms of my own background, where I stay – are not necessarily revengeful, nor are they sadistic in outlook”.³³

While there are various definitions of human dignity, for the purpose of this paper, the most fitting definition of human dignity comes from Steve Biko’s “African Cultural Concepts”. Biko explains human dignity as follows:

We believe in the inherent goodness of man. We enjoy man for himself. We regard our living together not as an unfortunate mishap warranting endless competition among us but as a deliberate act of God to make us a community of brothers and sisters jointly involved in the quest for a composite answer to the varied problems of life. Hence in all we do we always place Man first and hence all our action is usually joint community oriented action rather than the individualism which is the hallmark of the capitalism approach. We always refrain from using people as stepping stones. Instead we are prepared to have a much slower progress in an effort to make sure that all of us are marching to the same tune.³⁴

Biko attributes an intrinsic value to human beings, thus seeing the human being as an end, not as a means to an end. For Biko, the human being has self-value, an indispensable and inalienable right. This equates to human dignity. Biko’s concept has been embodied by the South African Constitution.

Section 1(a) establishes the fundamental values of the Republic of South Africa, including “human dignity”. Section 7(1) reaffirms the democratic value of human dignity. Section 10 proclaims that everyone has inherent dignity, and the right to have their dignity respected and protected. Section 35(2)(e) states that everyone who is detained has the right to conditions of detention that are consistent with human dignity. Section 39(1)(a) assures that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.

The protection of human dignity is the most precise mechanism to prevent the appeal for happiness to become an exhortation of sadistic pleasures. Therefore it is essential to recognise that human dignity is the foundation of the major part of the Constitutional texts.

Human dignity is the constitutional vector that prevents the right to happiness from converting itself into grounds for cruel practices, based on sadistic pleasures, which, instead of enhancing civilizing expeditions, destabilises constitutional conquests.

Human dignity also has a crucial limitative effect on the excess of the principle of utility. Consequently, it is a boundary to the misuse of the right to happiness. It is not possible to justify a harmful action based on the convenient argument that the action causes the actor happiness. There is no right to happiness in hurting others.

33 *Idem* at 170.

34 *Idem* at 46.

This is a sadistic pleasure which must be curbed by the human dignity principle. As the right to happiness counts everyone equally, the damage caused even to one person has undeniable value and weight.

8 CONCLUSION

Hendrik Verwoerd was wrong. Happiness cannot flourish in a land without popular participation; in soil where freedom was just a remote idea; in a place where inconceivable inequality prevailed; where there was no regard for subjective well-being; where an institutionalised brutality eroded any sense of human dignity. Verwoerd's argument was echoed by Judge Ruffin, of the Supreme Court of the United States, in the case of *State v Mann*, for whom "the slave did not deserve any happiness or personal comforts, while white people did".³⁵

It is a question of principle. Steve Biko correctly stated that "apartheid – both petty and grand – is obviously evil".³⁶ There is no happiness under the oppression of one over another, regardless of skin colour. The prohibition of sadistic pleasures is a fundamental dimension of the right to happiness.

This dimension of the right to happiness may be interpreted to be the foundation of the causes and values enshrined in the South African Constitution, which is designed to remind future generations of South Africans of the pitfalls of the sense of superiority, prejudice, and disregard for others' pain as a means of dominance.

ABSTRACT

South African history is intrinsically linked to the apartheid era and its inevitable and persistent consequences. These consequences show that in some extreme political situations, leaders try to impose their ideology, and, in doing so, use either Constitutional rights or moral values as rhetorical scapegoats in order to dismantle our deepest commitment to ourselves in terms of our pursuit of happiness. In light of the historical documents that preceded the inauguration of the apartheid era, it is possible to identify that happiness appeared as a pivotal value under which the apartheid order would be erected. This paper aims to investigate the relation between apartheid and the misuse of happiness as a core value, addressing the idea of sadistic pleasure as a deformation of the ideal of human rights. Finally, the paper shows how the Constitution of South Africa, as well as other African Constitutions, has instituted the right to happiness in order to overcome the collective trauma generated by racism.

35 *State v Mann* at 843.

36 Biko 2015: 26.

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THE LIFE AND TIMES OF CAPE ADVOCATE DIRK GYSBERT REITZ: A BIOGRAPHICAL NOTE

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Key words: Reitz family; Cape bar and bench in the 1820s; Batavian legal and judicial history; Orphan Chamber

1 Introduction

While trawling for material on the (Cape) Vice-Admiralty Court recently, I came across a reference to the following entry in the Tuesday 28 February 1854 number of the *South African Commercial Advertiser and Cape Town Mail*:

DIED, at Sea, near the Straits of BANKA, on the 7th July, 1853, (on a voyage from JAVA to JAPAN), DIRK GYSBERT REITZ, Knight of the Order of the Netherland's Lion, formerly Advocate of the Court of Justice in this Colony, afterwards Member of the High Court of Justice, and judge of the Admiralty Court at Batavia, and latterly President of the Orphan Chamber at Batavia, aged FIFTY SEVEN YEARS.¹

- 1 The reference was in transcriptions made by Sue Mackay from the Jan-Mar 1854 *South African Commercial Advertiser* and posted at <http://www.eggssa.org/newspapers/index.php> (accessed 16 Mar 2016). The announcement itself is hidden away at the bottom of the far-right-hand column on the front page of the paper, an original copy of which I traced in the National Archives (Kew), CO 53/11.

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Although the reference to the Batavian Admiralty Court turned out to be incorrect, I realised that there was a story behind this announcement. This is it.

Emigration, banishment and exile from South Africa have been recurring themes in this country's often sad history. Locally-born lawyers, too, have been involved. Some of them attained high judicial office elsewhere, to the loss of the administration of justice here. Examples of such judicial or legal transplants in our own life-time are numerous and well known, but the phenomenon goes back to earlier times of change: to the time of the Boer Republics,² and even further, to the British take-over of the Cape at the beginning of the nineteenth century. Dirk Gysbert (Gijsbert) Reitz is one rather obscure – but, as will appear, not the only – instance of a legal transplant from the Cape to Batavia.

2 The Reitz family: Ascendants

Dirk Gysbert Reitz – who was called Dirk³ – was a member of one of the several famous Cape families⁴ which had, from the late eighteenth century, exercised a considerable influence in local social, economic and political affairs through their land- (and slave-) ownership, commercial and agricultural enterprise, strategic intermarriage, and fortuitous inheritance. He was one of the Cape gentry.⁵ It should not come as any great surprise, further, that the Reitz family was one littered with lawyers.⁶

Dirk was the eldest son of Jan Frederik Reitz and Barbara Jacoba van Reenen.

His father, Jan Frederik, was born in Utrecht in the Netherlands in June 1761. He made a career as an officer in the Dutch Navy. After having fought against the English in the naval battle at Dogger's Bank in August 1781 during the Fourth Anglo-Dutch War (1780-1784),⁷ he came to the Cape (which he had visited before) on recuperative leave in 1794. Here he married a local girl and his anti-Batavian

2 See, eg, Schulze 2010 on Jacobus Petrus de Wet (1838-1900), who was Chief Justice of the Transvaal May 1880 to Aug 1881 and subsequently Acting Chief Justice of Ceylon May 1882 to May 1883.

3 His younger brother was called Gysbert (see at n 20 *infra*).

4 Other influential Cape “blue bloods” included the Cloete, De Villiers, De Wet, Eksteen, Joubert, Melck, and, importantly, the Van Reenen families.

5 See, generally, Ross 1983: 207; Dooling 2005; and Williams 2013, who points out the nebulousness of the term “gentry”.

6 A rich source of information on the European and South African branches of the Reitz family is “Genealogy” *sv* “family bosch reitz”, available at <http://www.kloek-genealogie.nl/Reitz.htm> (accessed Nov 2015-Jan 2016). See, also, Reitz 1964; *South African Genealogies* 2003: 250-253.

7 In the castle at Keukenhof in the Netherlands, there is a series of three coloured engravings (“gravures”) by Mathias de Sallie, done after drawings – described as neat and accurate – by Jan Frederik Reitz, of the naval action at Dogger's Bank in 1781. They were published in Amsterdam in 1781 and 1782 and are reproduced in Brand 2010: 25-26.

8 Jan Frederik was one of three founding fathers of the South African branch of the Reitz family

sentiments caused him to stay on after the First British Occupation in 1795.⁸ He successfully pursued sheep farming, with his father-in-law Dirk Gysbert van Reenen in the Overberg, and whaling ventures, in partnership with Pieter Lourens Cloete whose wife was Van Reenen's niece.⁹ In December 1816 he was appointed the local vendue master after having served as deputy to the incumbent Francois Willem Fagel¹⁰ for seven years.¹¹ Jan Frederik requested and was granted citizenship of the colony only in 1817, no doubt in response to governor Somerset's Proclamation of 2 May 1817 by which foreigners resident locally for five or more years were granted citizenship on application and swearing an oath of allegiance to the Crown.¹² Jan Frederik died intestate¹³ in April 1824.¹⁴

(see Pama 1983: 266).

- 9 See, eg, CA (Cape Archives), CO 3864/427/1 (1807) for his application for the grant of two islands to start a sealing industry; and CO 3866/533A/1 (1807) for his application, with PL Cloete and Wm Anderson, to continue their whale fishery in Kalk Bay.
- 10 Fagel (1768-1856), a naval officer, had like his friend Van Reenen taken part in the battle off the Dogger's Bank, after which he emigrated to the Cape. He was vendue master at the Cape from 1808 (see *In re Insolvent Estate of Brink. Vendue-Commissaries v Brink* (1828) 1 Menzies 434) and a member of the Court of Justice until 1814, when he returned to Holland. See, further, Schutte 1977.
- 11 See Theal 1897-1905 vol 11: 218-220 and 245-247. The *African Court Calendar* for 1818-1824 lists "Reitz, Johan [*sic*] Frederik, Commissioner of Vendues, 3 Heerengracht". For the appointments of Fagel, then Reitz, and then, in 1824, Sir Charles August Fitzroy (1796-1858, who was later governor in several colonies, including New South Wales in 1846, and then governor-general of Australia in 1850) and Egbert Andries Buyskes jointly as vendue commissioners, see *In re Insolvent Estate of Brink. Vendue-Commissaries v Brink* (1828) 1 Menzies 434. And for litigation concerning Jan Frederik Reitz in his capacity as vendue commissioner at the Cape, see *MacDonald & Another v Bell* (1840) 3 Moore 315, 13 ER 129 (PC), a case on appeal against the judgment of the Cape Supreme Court delivered in 1836. Reitz had in 1817 borrowed money from the colonial government, but died in 1824 not having repaid the loan. At issue was the legal liability of Alexander MacDonald and Michael van Breda as sureties for this debt under Roman-Dutch civil law. See, also, *Colonial Government v Fitzroy* (1830) 1 Menzies 492 for the liability of the joint commissaries Fitzroy and Buyskes for the debt incurred by their predecessor Reitz.
- 12 See CA, CO 3908/213 (1817); Hoge 1960.
- 13 See CA, MOOC 8/41/53. The inventory, dated 20 and 22 Apr 1824 and drawn up under the auspices of the local Orphan Chamber, contains a detailed list of his possessions. Several items would, if their description is anything to go by, today have a considerable value as antiques. Of interest – and showing father Jan Frederik's pro-British sentiments – are two paintings of Lord Nelson, one of William Pitt, and two of naval battles. His estate also included several slaves, including the twenty-seven-year old "Adonis van de Kaap", a domestic slave who was described as spoken for to DG Reitz ("die ... aan DG Reitz ... is bespookten") for Rds1100 of which Rds300 had to be paid to his brother JJ (James), and another slave, "Hester van Mosambique", spoken for to GJ Reitz for Rds800 who in turn had to account to JJ Reitz for an amount of Rds200. For Jan Frederik's estate accounts, see, further, CA, NCD 1/1/32/1 (1795), MOOC 7/1/94/73 (1795), and MOOC 7/1/94/73 (1795). For one of his slave dealings, see CA, NCD 1/40/385/1 (1799).
- 14 His death resulted in a rearrangement of the office of, as it had become known, the commissary of vendues: see Theal 1897-1905 vol 17: 267.
- 15 The University was established in 1636 and was preceded by the Hieronymusschool (1474-1578)

But Dirk's earlier ascendants were no less illustrious. A line of them had served in the University of Utrecht:¹⁵ Johan Friedrich (Joannes Fredericus) Reitz, his great-grandfather, a medical doctor and professor in history, oratory and poetry, later became deputy rector from 1725 to 1728 and rector from 1728 to 1748;¹⁶ and his grandfather, Gysbert (Gijsbertus) Reitz (1731-1809), was at first an advocate and later a merchant in Utrecht.

Jan Frederik Reitz married Barbara van Reenen (1777-1818) in Cape Town in March 1795. She was the eldest child of Dirk Gysbert van Reenen (1754-1828), a prominent landowner, merchant and pioneering farmer at the Cape.¹⁷ Like the Reitzes, the Van Reenen family played a central, if not always uncontentious,¹⁸ role in Cape political and economic affairs at the end of the eighteenth and beginning of the nineteenth centuries.¹⁹

3 The Reitz family: Descendants

Jan Frederik and Barbara Reitz had six children.

Dirk Gysbert was the eldest. More about him shortly.

Next came Gysbert Jan Carel (1797-1859). After returning to the Cape from his ten-year-long education in the Netherlands, Gysbert occupied several minor government posts as a clerk and sworn translator²⁰ before he commenced practising

and the Hoogeschool (1578-1636).

- 16 Other relations with a connection to the University included Joannes Henricus Reitz, who was deputy rector (1737-1748) and rector (1748-1769), and Jan Frederik Reitz, who was a tutor (1757-1769) and rector (1769-1801). See, further, Ekker 1864 *Deel 2*: 31-39 for a description of their terms of office; De Vries 1786: iii, xiii, xvi.
- 17 See, eg, Blommaert & Wiid 1937, concerning the travels into the interior undertaken in that year by governor Janssens whom Van Reenen accompanied; it is observed at 5 that "die lotgevalle en wedervaringe van hierdie familie gedurende ongeveer die jare 1775-1825 is 'n mikrokosmos van die Kaapse geskiedenis van daardie tyd".
- 18 Barbara's grandfather, Jacobus van Reenen (bap May 1727, d Aug 1793), was the senior member of the Cape Patriot delegation of four sent to the Netherlands in 1779 to complain to the Lords Seventeen about the Company rule at the Cape. See, generally, Beyers 1967: 27-28 and 113-115.
- 19 On other prominent members of the Van Reenen family, see Wagenaar 1976: esp 1-15. The journal kept by Jacobus van Reenen (1755-1806, the brother of Dirk Gysbert) on the expedition in search of the wreck of the *Grosvenor* was published as *Jacob van Reenen and the Grosvenor Expedition of 1790-1791* (Cape Town, 1927) and translated and annotated by PR Kirby as *The Wreck of the Grosvenor* (Johannesburg, 1958). See, further, on the Van Reenen clan, Burrows nd: 291-292; Burrows 1994: 123-125 (containing genealogical tables and further information illustrating the kinship between the Van Reenen, Reitz, Barry and Van Breda families); and on the founding father, Jacob (d 1764), see George 2011: 52-55.
- 20 For his request to act as a sworn translator, see CA, CO 3916/531 (1819). He is mentioned in the *African Court Calendar* as one of the sworn translators for the periods 1820-1825 and 1827.
- 21 For advertisements concerning his legal practice, see, eg, 7 Feb 1824 and 8 Jul 1825 *Cape Town*

as an attorney and notary.²¹ In 1830, after the unexpected premature death of his first wife and his remarriage,²² he returned to Holland and enrolled as a theology student at Leiden. After graduating, he moved to Heidelberg in Germany for the education of his children.²³ He returned to the Cape in 1848 and settled in Stellenbosch. Although qualified as a *dominee*, he was never appointed to a congregation.²⁴

Their third child was daughter Aletta (Letje) Catharina (1798-1871). In April 1820 she married Cape advocate Joshua Andries Joubert (1793-1830) in a double wedding ceremony also involving her brother Gysbert and Joubert's sister Hester.²⁵

Jacobus Johannes (anglicised to James John) Reitz (1801-1824) was the fourth child. Like his father, James chose a naval career, albeit in the Royal Navy. In 1824, while employed on a naval survey of the east coast of Africa and in operations against Arab slavers operating there, lieutenant James Reitz, then also appointed civil governor of Mombasa,²⁶ died of a malignant fever, probably malaria. He was still a bachelor.²⁷ The administration of his deceased estate subsequently became the subject of litigation in England.²⁸

Gazette. He may have been the Reitz involved in *Reitz v Kock* (1828) 1 Menzies 38 and 56.

22 He had married Gesina (Geesje) Wilhelmina Karnspek (1802-1828), the great granddaughter of Pieter van Rheede van Oudtshoorn, appointee governor of the Cape, in Apr 1820. His second wife was Hester Susanna Joubert (1797-1884), younger sister of his brother-in-law, advocate JA Joubert (about whom more at n 48 below), whom he married in Dec 1829.

23 His son, Jan Frederik (1821-1896), became a *dominee* in Somerset West (1848-1890) and married Martha Jacoba Catharina Hester Maria van Ryneveld, the daughter of Cape advocate HR van Ryneveld (about whom more at n 46 below), in 1847; another son, Jan Daniel Karnspek (1822-1892), became a Cape Town attorney and notary; his daughter, Johanna Catharina Henrietta (1828-1865) married Aegidius Benedictus Watermeyer (1824-1867), later to become a judge on the Cape Bench, in Dec 1848; and another son, Gysbert (1832-1910), became an attorney in Riversdal.

24 See, further, George 2011: 52.

25 See n 22 *supra*. After Joshua's death, Aletta, in Mar 1834, married the widower reverend Tobias Johannes Herold (1788-1857), a *dominee* in Stellenbosch.

26 After his death, the inland harbour of Port Reitz at Mombasa and Point Reitz at Kilindini harbour were named after him by naval surveyors in his squadron.

27 On James Reitz, see, further, Gregg (1952); Burrows (1959).

28 See *In the Goods of John Reitz* (1831) 3 Hagg Ecc 766, 162 ER 1337, from which it appears that although he had left three brothers and a sister behind, (only) two of his next of kin were still at the Cape in the latter half of 1825 and they were involved in placing his affairs under the management of the local Orphan Chamber. (Brother Dirk was then no longer at the Cape, (see, further, at n 81f below) for otherwise he would, by reason of his qualifications, certainly have been involved.) James had made a will (which is in the National Archives, Kew, PROB 11/1796/119 (will of John James Reitz (1832)) bequeathing his estate in England – property worth some £220 – to a “miss Stanley” of whom nothing is known. The legal dispute arose because James had failed to appoint an executor for his estate. When Capt Owen, his commanding officer, passed through Cape Town in 1825 on his way back to England, James's elder brother (probably Gysbert and not Dirk) and his sister authorised him, through the mediation of the Orphan Chamber, to collect his property, settle his debts to his [naval?] agent, one Stilwell, and pay over the balance to Miss Stanley. The Prerogative Court in London refused to allow this, for strictly legal reasons, and eventually James's agent was granted the administration and, presumably, Miss Stanley received her inheritance.

29 He was named after Francois Willem Fagel, his father's predecessor as vendue master (see again n

The fifth child Pieter Lourens (1805-1806) died young.

The last child of Jan Frederik and Barbara Reitz was Francis (Frank) William²⁹ (1810-1881).³⁰ A polyglot, pioneering farmer (with his father) and agriculturalist (he imported the first Merino sheep to the Cape and wrote a pamphlet *Observations on the Merino* in 1834), and politician (a member of parliament for Swellendam in 1869, Usher of the Black Rod in the Cape Parliament), Frank was by far the most prominent of the Reitz children. In March 1832, he married Cornelia Magdalena Deneys (1813-1893), the granddaughter of Johanna Catharina Deneys who had married and was the second wife of Dirk Gysbert van Reenen. The couple had twelve children. Their seventh child, and third son, was Francis William (1844-1934), Cape advocate (1868-1874), Chief Justice (1875-1888) and later President (1889-1896) of the Orange Free State, judge of the Transvaal High Court (1898), State Secretary of the Zuid-Afrikaansche Republiek (1898-1902), and ultimately, after a period of voluntary exile, first President of the Union Senate (1910-1920).³¹

4 Early years and study

Dirk Gysbert Reitz was born in Cape Town on 29 January 1796, a few months after the British had taken over the settlement from the Dutch East India Company. Like so many other children of the local landed gentry, he was destined to be educated in the Netherlands. As a nine-year old boy, Dirk and his younger brother Gysbert were taken by their father to Europe for that purpose. His sojourn in northern climes was prolonged, for Dirk only returned to the Cape as a twenty-three-year old, in 1819.³²

Not surprisingly, given the family connections and the fact that several other Cape natives had studied there,³³ the boys went to Utrecht where Dirk ended up studying law.

10 *supra*) who was likewise a former Dutch naval officer, and was further also a one-time member of the Court of Justice.

30 On him, see JCM 1972; George 2011: 53-55.

31 On FW Reitz jnr, see Kitchin 1916; Moll 1978; and JCM 1972. President Reitz, too, had some notable offspring, the best known of whom was probably his third son, Deneys Reitz (1882-1944), soldier, attorney, politician and author of the autobiographical trilogy *Commando: A Boer Journal of the Boer War* (published in 1929), *Trekking On* (1933), and *No Outspan* (1943). On him, see AL-S 1968.

32 See George 2011: 52. In *South African Genealogies* 2003: 250 it is observed that while studying abroad, Dirk served in “die Nederlandse ruitery tydens die Napoleontiese oorlog”.

33 Cape predecessors of Reitz at Utrecht who had studied law include (with the titles of their theses) Daniel Petrus de Mauregnault *Dissertatio juridica inauguralis de poena cogitationis ad L XVIII D de poenis* (1762); Jaques le S(e)uer *Dissertatio juris publici Belgici inauguralis de jure indemnitis* (1757); Jacobus Petrus Deneys *Disputatio juridica inauguralis de cadaveribus punitorum* (1762); and (also under Herman Arntzenius: see n 35 below), Johannes Carolus Leseuer *Dissertatio juridica inauguralis continens quasdam juris civilis quaestiones* (1796). This information comes from the online *Digitaal album promotorum Universiteit Utrecht* (accessed 14 Jan 2016) *passim*.

At the time, Dirk's lecturer and promoter³⁴ was Herman (Hermannus) Arntzenius (1765-1842), a professor in law at the University of Utrecht.³⁵ Youngest son of the now better known Hendrik Jan (Henricus Johannes) Arntzenius (1734-1797),³⁶ he graduated at Groningen in 1798 and was appointed to the professorial chair at Utrecht in July 1800, a post he occupied until November 1815, after which he became a "gewoon hoogleraar" until his retirement in February 1835. He lectured in Roman law, Dutch civil law (*ius hodiernum*), and public law.³⁷

Dirk Reitz – referred to in the University's academic graduation records as "Reitz, Didericus Gysbertius", "natus in Promontorio Bonae Spei" – graduated on 11 October 1817 under the supervision of professor Herman Arntzenius.³⁸ He did so not on the basis of a thesis, but on "stellingen" alone.³⁹

After graduation, Dirk Reitz returned to the Cape.⁴⁰

5 Reitz at the Cape bar

Reitz practiced as advocate at the Cape from sometime in 1819 until the early part of 1824, a period of no longer than five years.⁴¹ The local bar was small, its numbers

- 34 Other law lecturers at Utrecht during Dirk Reitz's time there, were Cornelis Willem de Rhoer (professor 1797-1822) and JR de Brueyns (professor 1815-1848). Van den Bergh, Spruit & Van de Vrugt 1986: 9 explain that until 1830, the Utrecht law faculty, which was established in 1636, as rule had two or three professors at a time.
- 35 On the University of Utrecht, its faculty of law and the Arntzeniuses, see Van den Bergh, Spruit & Van de Vrugt 1986: *passim*, esp 9, 16-17, 19 and 220 (pointing out (at 19) that between its establishment in 1636 and 1814, on average of twenty-five jurists graduated annually at Utrecht and that there had only been 133 law professors in 350 years); Ahsmann 1993: 55-63.
- 36 Hendrik Arntzenius was first professor in Groningen, and then taught Roman law and later international law in Utrecht (1788-1797). He was the author of *Institutiones juris Belgici civilis de conditione hominum*, 3 vols (1783, 1788, 1798), which was translated by FP (Toon) van den Heever in 1963 as *Introduction to the Civil Law of the Netherlands*. The view of Roberts 1942: 39 that the posthumous vol 3 was prepared for publication by his eldest son, Hendrik Jan jnr (1763-1830), who was also a lawyer, is doubted in the preface to the translation, but is supported by Ahsmann 1993: 60.
- 37 See, further, Van den Bergh, Spruit & Van de Vrugt 1986: 12, 220. There is a reproduction of his likeness in *Digitaal album promotorum Universiteit Utrecht* (accessed 14 Jan 2016).
- 38 See *Digitaal album promotorum Universiteit Utrecht* (accessed 14 Jan 2016) sv "Reitz".
- 39 Van den Bergh, Spruit & Van de Vrugt 1986: 9 explain that in the eighteenth century at Utrecht, the main examination ("meestersproef") for a doctorate still consisted of delivering a lecture ("een proefcollege") on two texts. Teaching by means of public lectures (*lectiones*) had fallen out of favour by the beginning of the nineteenth century, and was largely replaced by private instruction and tuition at the home of a professor (*collegia*) and by weekly (student-presented) disputations (*disputationes*) on topics prescribed by the professor (*idem* at 16). The latter prepared students for the formal, public (in the senate hall) defence of their *disputatio pro gradu* by which the doctorate was obtained (*idem* at 17).
- 40 The permission mentioned in Theal 1897-1905 vol 9: 496 that was given in Apr 1814 in London for a "Mr Reitz" to proceed to the Cape was probably not for him.
- 41 He is mentioned as a member of the bar in the *African Court Calendars* of 1820-1824. As these annual volumes were compiled shortly before and published at the beginning of each year, it means that he commenced practice before the beginning of 1820, but had left before the end of

growing from six to eleven members during this period. At the time, and in fact since the Batavian period and until the British legal reforms of 1828, persons who had been born in the colony or who had a right of residence there, and had graduated in law at one of the universities or gymnasia in Holland, were qualified to be admitted to practice as an advocate.⁴² A contemporaneous account of the Cape described them as “Cape-born, the sons of gentlemen from Holland, or Germany, settled in the colony, who have been educated in Holland. There are amongst them, men of attention and talents”.⁴³

So, who were Reitz’s colleagues practicing before the Cape Court of Justice?

The most senior advocate when he joined the bar was Dr Hendrik (Henry) Cloete (1792-1870).⁴⁴ A member of a leading Cape family,⁴⁵ with a doctorate from Leiden in 1811, under Van der Keessel no less, Cloete was admitted to the English bar in 1812. He commenced practising at the Cape in 1814 after he had been the deputy secretary of the Court of Justice since 1813. He remained a member of the bar until 1843. In that year he was appointed special commissioner for Natal. After the annexation of that territory in 1845, he was appointed Recorder and sole Judge of Natal, a post he occupied for a little more than ten years. Thereafter he became a puisne judge in the Cape from 1855 until 1866.

Next in line of seniority was Helperus Ritzema van Ryneveld (van Rijneveld), an advocate from 1815, likewise with a Dutch doctorate.⁴⁶ He remained in practice after the reforms of 1828. Then came Michiel Adriaan Smuts who practiced from 1815 until 1827 and was also a notary from 1815.⁴⁷ In 1828, he was admitted as an attorney.⁴⁸

1824. He is mentioned in the directory of the *Calendars* (as “Dirk Gysbert Reitz, advocate, at 3 Kerkplein”), but only in 1820 and 1821.

42 On the Cape bar, see, further, generally Botha 1924; Visagie 1969: 48-52 (up to 1795) and 106-108 (legal practitioners during the Batavian period); Farlam 1988; Van Huyssteen 1989; Erasmus 2015: 221-223, for the period before 1828. Further information on the individual members of both the bar and the bench were gathered from the relevant volumes of the *African Court Calendar*.

43 Bird 1823: 11.

44 On Cloete, see Roberts 1942: 353; Cloete 1934; AFH 1968b.

45 He was the son of Pieter Lourens Cloete (see n 9 *supra*), vice-president of the Orphan Chamber, and grandson of Hendrik Cloete, the owner of the farm “Constantia” from 1778.

46 He has to be distinguished from Willem Stephanus van Ryneveld (1765-1812), a Company official, fiscal, and member and later, from 1809, president of the Court of Justice until his suicide in 1812 (see HBG 1972b), and from Daniel Johannes van Ryneveld, a member of the Court in 1814.

47 See the *Inventory of the Notarial Archives of the Cape of Good Hope, 1790-1879*, inventory no 1/7/1 item U. There was also a notary in 1814-1815 called Johannes Joachim Lodewyk Smuts: *idem*, inventory no 1/7/1 item T.

48 Botha 1924: 259, 261 points out that although notionally separate professions, advocates and attorneys could also practice as notaries, at least until 1806. However, that changed in 1812 when the professions were separated and in 1817 an application to the governor to be admitted as a notary was refused on grounds that the applicant was already an advocate. See, further, Wildenboer 2010.

Josua Andries Joubert (1793-1830), who had graduated in Leiden, was an advocate from 1817 and remained on as such after 1828. He married Reitz's sister Aletta Catharina in 1820, in double wedding ceremony in which their brother, Gysbert Jan Carel, married Joubert's younger sister, Hester Susanna. Joubert was another of the old advocates who stayed on after 1828. Also at the bar was Oloff Marthinus Bergh, an advocate from 1817, likewise a notary⁴⁹ and member of a leading Cape family.⁵⁰ The last of the six advocates in practice when Reitz joined was Johannes Jacobus Lind, another Dutch doctor of law, who had also been in practice from 1817.⁵¹

During Reitz's attachment to the Cape bar, only five more advocates joined.

First, in 1820, was Abraham Faure (1795-1868), a doctor in law and member of the illustrious Faure family.⁵² In the next year Christoffel Joseph Brand (1797-1875) joined. Of all Reitz's fellow advocates, Brand was destined to have the most prominent legal career. The son of the legally unqualified Johannes Hendrikus Brand, who was a member of the Court of Justice from 1825 to 1827,⁵³ he was called Joseph after his godfather, sir Joseph Banks, who visited the Cape with captain Cook in 1771 and became a good friend of the family. With doctorates in law⁵⁴ and literature obtained from Leiden in 1820, and having been admitted to the English bar, Brand soon rose to prominence as one of the leading practitioners at the local bar. He had a long and illustrious legal career, and was also intermittently active as a journalist (he was editor of *De Zuid-Afrikaan*) and politician (he became the first speaker of the Legislative Assembly of the Cape in 1854).⁵⁵

Two further members joined in 1823. The one was Johannes A de Wet, also a Leiden graduate,⁵⁶ father of Maria Margaretha (Marie) Koopmans-De Wet (1834-

49 *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item AP.

50 He was possibly the son of Marthinus Adrianus Bergh (1747-1806), a Company official, one of the Cape Patriot movement, and *landdrost* of the Stellenbosch and Drakenstein districts from 1773 to 1778, and the grandson of Olof Martin(i) Bergh (1722-1795): see, further, JP 1968.

51 He should be distinguished from his brother Franciscus Xaverius Lind, a notary from 1817 to 1824 (see *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item Z), and Christian Michael Lind, a notary from 1822 to 1843 (*idem*, inventory no 1/7/1 item AE).

52 He was the cousin of his namesake Abraham Faure (1795-1875), a *dominee*. Advocate Abraham's son was *dominee* DP Faure: see HAH 1968; one Pieter Hendrik Faure was a notary from 1793 to 1795: see *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item B.

53 Brand's grandfather Christoffel (1738-1815) was, like his father Johannes Hendrikus (1771-1835), also a member of the Court of Justice: see AEB 1968.

54 With a thesis entitled *Dissertatio politico-juridica de iure colonarium ...*

55 His eldest son, JH Brand, who was also an advocate, became fourth president of the Orange Free State. On Brand snr, see HCB 1968.

56 His doctoral thesis of 1821 was entitled *De usucapionne et praescriptione secundum principia juris Romani*. He should be distinguished from Olof Godlieb de Wet (1739-1811), a member of the Court of Justice from 1778 to 1803 and again from 1807 to 1809 (see M Po 1972), and from Jacobus Petrus de Wet, likewise a Leiden graduate and a local advocate from 1804 and notary from 1807.

1906),⁵⁷ related by marriage to several other Cape legal luminaries,⁵⁸ journalist and businessman,⁵⁹ and later a member and in 1857 president of the Cape Legislative Council.⁶⁰ The other was JH Hofmeyr, another Leiden graduate. Finally, in 1824, AC Mom Faure joined the bar, although he may have done so after Reitz had already left.

What of the Court of Justice, before which these men practised?

As is generally known, this body's nine members were not required to be legally qualified, a defect seen to justify severe criticism and even derision from the British authorities and those advocating the reform of the local administration of Dutch justice.⁶¹ A familiar problem, even then, was that not many practicing lawyers, including advocates, were willing to be appointed as members of the bench as that inevitably involved a loss of income. Nevertheless, legal experience was not totally

57 See Vollgraaff 2004: 132.

58 His sisters had married Judge John Truter (see n 63 *infra*), advocate (and later judge) Johannes Neethling (see n 67 below), and advocate Daniël Denyssen (Denijssen). The latter (1777-1855), also a Leiden doctor in law, was a judge during the Batavian period, and an advocate during the British regime. In 1812, when fiscal Truter was appointed to preside over the Court of Justice, Denyssen was appointed in his place and was the last person to occupy the contentious position of fiscal (crown prosecutor), which he continued to do until his retirement in 1828, after which he resumed practice before the Supreme Court. See, further, Kotzé 1977. His son, Petrus Johannes Denyssen (1811-1883), also an LLD from Leiden, was admitted as an advocate at the Cape in 1837 and later became a judge in the Eastern Districts and the Cape. See, further, Anon 1903; Quinton 1987.

59 He founded *De Zuid-Afrikaan* with fellow advocate CJ Brand and Judge JH Neethling and managed it for a few years. He gradually paid less attention to his legal practice and increasingly devoted his attention to the affairs of the Association for the Administration of Estates which he had founded in 1836.

60 On De Wet, see RFMI 1968.

61 For contemporaneous criticism of the Cape legal system and administration, see, eg, Bird 1823: 9-14, stressing the lack of judicial independence from the government, mainly the result of the peculiarities of the inherited office of the fiscal, and the absence of a jury system. The lack of legal training and the general incompetence of local lawyers, too, were a problem: Bird observed that the local advocates, although better trained, were more (but not as much as the local attorneys!) interested in financial gain than in the administration of justice. Additional objectionable features were the anachronous fact that Dutch law and procedures were applied by Dutchmen to Englishmen in what was now, after all, "their colony", and that the use of Dutch was still prevalent in judicial proceedings. Bird concluded (at 13) that even if Dutch law was to continue to be the applicable law for the time being, "there cannot be a doubt in any man's mind, now that the colony is British, that decisions of the court of justice, and the arguments of the advocates, ought to be carried on in the English language at a very early day; and that the advocates and chief justice, on any future admission, should be barristers of an English court". These criticisms were reflected in later reports that lead to the judicial reforms of 1828, most pertinently in the report and recommendations in 1823 of the Commission of Eastern Enquiry under Bigge and Colebrook that resulted in fundamental changes to the Cape judicial system in 1828. See further, eg, Cowen 1959: 2-5, referring to the criticisms of contemporary, invariably British, commentators (administrators, inhabitants, settlers or travellers) on the administration of justice at the Cape prior to 1828.

lacking and some of the thirteen members who served during Reitz's time at the bar were in fact trained lawyers.⁶²

President Johannes Andreas (later Sir John Andrew) Truter had a Dutch doctorate,⁶³ as had members Willem (William) Hiddingh,⁶⁴ Daniel Frederik Berrangé,⁶⁵ Walter Bentinck,⁶⁶ and Johannes Henoch Neethling.⁶⁷

62 See Van Huyssteen 1994: 359 who observes that "most legal practitioners at the time were (probably) trained in Roman-Dutch law, as well as [were] most of the members of the Court of Justice".

63 He graduated from Leiden in 1787 with a thesis entitled *De regula civilis juris hereditarii: a semet ipso non legatur*. Truter's father, Hendrik Andreas (Andries) Truter (1737-1814), was likewise a member of the Court of Justice, including at a time when Truter *filis* was its secretary from 1793 to 1803. Truter jnr was subsequently secretary of the Council of Policy during the Batavian period from 1803 to 1806, then practised as an advocate from 1806 to 1809, and was then appointed as fiscal (prosecutor) from 1809 to 1812. In Aug 1812, Truter became president of the Court (as the Council had become known) of Justice. Sir John (he received his knighthood in 1820, the first native to be honoured in this way) retired on pension in 1828. He married one of the sisters of advocate Johannes de Wet and one of their sons, Johannes Andreas Truter, also obtained his doctorate at Leiden. On Truter, see, further, Roberts 1942: 379; Botha 1918; BB 1968; Heese 1981a. On Truter's son, Oloff Johannes Truter (1797-1867), who, after an early career as a civil servant, became an attorney (he was admitted in 1828) and notary, see Nilant & Potgieter 1981 and *cf Orphan Chamber v Truter, Attorney* (1830) 1 Menzies 452.

64 Born in the Netherlands, Hiddingh (1773-1839) obtained a doctorate from the University of Groningen in 1794. After a stint in practice, he emigrated to the Cape during the Batavian period where he became a member of the Court of Justice in Mar 1803, serving until its demise in Dec 1827. He married Anna Margaretha, a daughter of Cornelis van der Poel (1734-1804) who was a member of the Council of Policy from 1777 to 1780. Willem Hiddingh's namesake father (1730-1788) likewise held a doctorate in law and was a practising advocate in the Netherlands, while two of Willem's sons were also lawyers, both Groningen doctors: Cornelis (1809-1871) was a jurist in the Netherlands and later consul-general there of the Orange Free State (a bibliophile, Cornelis and his co-benefactor Sir Donald Currie are commemorated in the Hiddingh-Currie Publication Fund, established at Unisa), while Willem jnr practised at the Cape bar from 1833 after a period in practice in Scotland. See, further, JCV 1968; Heese 1981b; FJUJS 1968.

65 Berrangé (1775-1845), who returned to the Cape with a Dutch doctorate in 1802, occupied several judicial or semi-judicial posts at the Cape: deputy fiscal (in 1806), member (in 1813) and later secretary of the Court of Justice (1819-1827), president of the Orphan Chamber (in 1828), and master of the Supreme Court (1833-1834). An expert on the Dutch legal system, and a champion of Afrikaans, Berrangé was co-responsible for the "codification" of all existing Cape statutes. He was the younger brother of Jan Christoffel Berrangé (1769-1827), a Cape minister of religion and moderator of the first Dutch Reformed Church synod. Their mother, Elizabeth Fleck, was the sister of the reverend Christiaan Fleck and Judge Abraham Fleck. See, further, Potgieter 1981 and HCH 1968. Berrangé's predecessor as secretary of the Court, from 1806 to 1817, Jonkheer Gerard (Gerrit) Beelaerts van Blokland (1772-1844), was also an LLD: see, further, FGEN 1968.

66 He was a member of the Court from 1814 to 1825.

67 Neethling (1770-1838) graduated at Leiden in 1791 and then returned to the Cape. He was said to have considered a legal career in Batavia, a plan scuppered by the death of his father at the Cape and his own illness on the voyage home. He was appointed deputy fiscal at the Cape in 1793, practiced as an advocate and notary from 1795 to 1803, was a member of the Council of Justice during the Batavian interregnum 1803 to 1806, returned to practice as advocate and notary from 1806 to 1815, and was then persuaded to once again becoming a member of the Court of Justice, which position he held until the end of 1827. These occupational shifts were all politically motivated. In 1828, when the Supreme Court replaced the Court of Justice, he again returned to practice, one of the few not to retire but to bridge both eras. Related to advocate Denysen and Judge Truter (all three married sisters of advocate JA de Wet: see again n 58 *supra*), Neethling was

Members of the Court while Reitz practised before it who were not qualified or trained lawyers, were Clement Matthiessen,⁶⁸ William David Jennings,⁶⁹ Frans Reinhard Bresler,⁷⁰ Johannes Christiaan Fleck,⁷¹ Petrus Stephanus Buissinné,⁷² Petrus Johannes Truter,⁷³ Petrus Borchardus Borchers,⁷⁴ and Ralph Rogerson.⁷⁵ But even so, some of them had no doubt gained considerable practical judicial experience under the tutelage of their qualified brethren and they naturally had the benefit of the learned arguments of the legally qualified advocates appearing before them. It should also be remembered that the quorum of the Court (five members in civil and seven in criminal appeals) meant that in practice it was seldom if ever comprised solely of unqualified members.

While the newly established Supreme Court was manned by four imported, English-trained judges, none of whom could be reckoned amongst the leading legal lights of their time,⁷⁶ of the nine who were in January 1828 admitted to practise as

a co-founder (with De Wet and advocates CJ and PA Brand) of *De Zuid-Afrikaan*. See, further, Kotzé 1981a.

68 Who was a member from 1806 to 1823.

69 Who was a member from 1813 to 1819.

70 Bresler (1766-1825) was a member of the Court from 1815 to 1825. He had been the *landdrost* at Graaff-Reinet, from 1795, and deputy receiver-general from 1804 to 1815. He committed suicide in Mar 1825 when a commission of inquiry discovered that money he had received in 1814 while receiver-general had never been paid over to the treasury. See, further, HBG 1972a.

71 A son of Cape *dominee* Christiaan Fleck (1756-1820), JC was a member of the Court from 1817 to 1827. See, further, Kitshoff 1977. There was also a notary called Johannes Christoffel Fleck from 1815 to 1855: see the *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item V.

72 He was a member from 1819 to 1823, when he was accused of fraud: see, further, at n 79 *infra*.

73 A Dutch-qualified medical doctor, and after a stint as chief customs officer in Simon's Town, Truter (1775-1867) was a member of the Court from 1819 to 1827. He was the second son of civil servant Petrus Johannes Truter snr (1747-1825). His sister Anna Maria was married to the traveller and writer John Barrow and Chief Justice JA Truter was a cousin. See, further, Kotzé 1981b.

74 Borchers (1786-1871) was a member of the Court from 1823 to 1827 after earlier quasi-judicial and civil appointments (clerk to the Court from 1803, district secretary of Stellenbosch from 1809, deputy fiscal from 1812). After the reforms of 1828, he continued to occupy various public offices (superintendent of police, first resident magistrate of the new Cape district and, from 1834, civil commissioner of the Cape division too). See, further, HCH 1972.

75 Who was a member from 1823 to 1827.

76 As Sachs 1973: 38 observes, each probably had strong personal motives for taking up a relatively lucrative appointment at the remote but climatically healthy Cape Colony: Menzies had allegedly killed a man in a duel; Wylde was probably trying to get away from his wife whom he had left behind in New South Wales – she only arrived at the Cape in 1835, ten years after the couple had last seen one another, accompanied by a six-year-old daughter; soon after they were divorced: see *Wylde v Wylde* (1835) 1 Menzies 269 – and was also allegedly involved in an incestuous relationship with his eldest daughter, Jane Elizabeth (see, further, McKenzie 1999); Burton was a wandering sailor turned lawyer whose globetrotting eventually took him to five continents: he was transferred to New South Wales in 1832; and Kekewich of the local Vice-Admiralty Court had earlier in his capacity as an assessor on the local Court of Appeals for Criminal Cases essentially been a legal advisor to the colonial government in the person of that Court's presiding officer, the governor.

advocates before it, seven had practised before or were members of the old Court of Justice: Neethling, Cloete, Van Ryneveld, Joubert, Brand, De Wet, and Hofmeyr.⁷⁷ Also then admitted were the former fiscal Denysen and the newly arrived Englishman Saxe Bannister.⁷⁸ Their colleagues Bergh and Faure were admitted in February and March of the same year. Clearly the link with the previous regime remained, despite the concerted efforts at renewal and reform. And, it may be thought, that was at least in part the case because those involved were more than qualified to practice as advocates, even before a revamped and anglicised Supreme Court.

Be that as it may, even in Reitz's time at the Cape bar, local legal practice was far from one being dominated and run by unqualified amateurs. Take one example, in which Reitz was involved in November 1823 as the advocate defending Petrus Stephanus Buisinné. Until recently a member of the Court of Justice,⁷⁹ Buisinné was accused of fraudulent dealings involving the embezzlement of public funds during his earlier tenure as the receiver of land revenue. In addition to Reitz, the prosecuting fiscal (Denysen), three of the members of the Court (Truter, Hiddingh, and Neethling), and its secretary (Berrangé) were all doctors of law!⁸⁰

6 Leaving the Cape

Dirk Reitz left the Cape for Batavia in 1824. In the *Cape Town Gazette and African Advertiser* of Saturday 5 June 1824, "being on the eve of leaving the Colony", advocate Reitz placed an advertisement requesting that all claims against him should be sent to his agent G(ysbert) Reitz.⁸¹ Certificates were issued by various local

77 See Phillips 1980: five for the list of ten advocates and eleven attorneys who were in practice in 1829. The attorneys were PJ Truter, PA Poupart, OJ Truter, JP de Wet (LLD), MA Smuts, R Beck, JS Merrington, C Whitcomb, G Cadogan, J Sturgis, and L Whitham.

78 Bannister (1790-1877), formerly attorney-general of New South Wales, arrived in 1827 and was an advocate at the Cape only until Jul 1829: see AFH 1968a.

79 See n 72 *supra*.

80 For the proceedings, see Theal 1897-1905 vol 31: 476-518. Buisinné was found guilty of embezzlement, with the aggravation of perjury, and banished from the colony for seven years. Reitz noted an appeal to the Court of Appeal for Criminal Cases, which confirmed the guilty verdict, but found no proof of perjury. Buisinné's estate was sequestrated in Oct 1823 and was the subject of subsequent litigation: see *In re Insolvent Estate of Buisinné. Van der Byl & Meyer v Sequestrator and Attorney-General* (1828) 1 Menzies 318 and *In re Insolvent Estate of Buisinné. Croeser v Sequestrator and Attorney-General* (1829) 1 Menzies 330. Both judgements involved a detailed analysis of the relevant Roman-Dutch authorities, and for which the Court was no doubt deeply indebted to the appellants' advocates, Joubert and Cloete.

81 Many sources have it that he left in, or only in, 1829: "Genealogy" *sv* "family bosch reitz" available at <http://www.kloek-genealogie.nl/Reitz.htm> (accessed Nov 2015-Jan 2016) has 13 Jun 1829; in *Digitaal album promotorum Universiteit Utrecht* (accessed 14 Jan 2016) *sv* "Reitz" it is mentioned that after graduation he became an advocate at the Cape and then emigrated to Batavia in 1829. FW Reitz in his *Outobiografie* (Moll 1978: 5) has 1822, which appears clearly wrong. It is possible that he may have left in 1824, returned to the Cape briefly afterwards, and then again returned for good to Batavia, possibly in 1829. I could find no firm evidence of this. The archival reference to the record of proceedings in litigation involving Michiel van Breda, Josua Andreas Joubert, Gysbert Jan Carel Reits and Dirk Gysbert Reitz as plaintiffs and Muller, Badendorst, Crouse & Louwrens as defendants in 1829 (CA, CSC 2/1/1/10 ref 54 (1829)) is not proof of Dirk's presence, let alone his residence, at the Cape at the time.

officials concerning the departure of “DG Reitz, Esq, LLD” from the colony, all dated in June 1824:⁸² by the fiscal, that Reitz had undertaken not to take unstamped letters with him; and by the secretary to the Court of Appeals, by the secretary to the Court of Justice, by the Sequestrator’s Office, by the Burgher Senate, and by the Vendue Office, all stating that there were no legal objections on their part to Reitz’s being permitted to leave the colony by the *Dageraad*. His local affairs were being wound down.⁸³

The Dutch frigate *Dageraad*, captained by WA van der Hart, which had sailed from Texel in November 1823, from Flushing in January 1824, and from Elmina, on the coast of Guinea, in March, arrived in Simon’s Bay on 30 April.⁸⁴ She left again on 13 June, bound for Batavia.⁸⁵ She arrived there on 27 July, in a badly deteriorated condition, after what turned out to be her last voyage. On board was Dirk Reitz.⁸⁶

Why, then, did Reitz decide to leave the Cape?

Although there may have been other, or additional, reasons,⁸⁷ several sources suggest that the colonial policy of anglicisation may have been the main factor leading to his decision to emigrate.⁸⁸

The initial periods of uncertainty⁸⁹ about the future role of Britain at the Cape ended in 1814. British rule was formally recognised when the Cape was permanently ceded to Britain by the Anglo-Dutch treaty (also known as the London Convention) of 13 August of that year.⁹⁰ Then the mainly strategic settlement became a colony

82 For the permits to leave the colony issued for Reitz, see CA, CO 6062/101 (1824).

83 In Oct 1824, advertisements appeared for the sale of a male slave named David of the Cape, aged ten years, on Thurs 14 Oct 1824, at Worcester by the sequestrator’s agent there, on account of J Beesler, in execution of a sentence in favour of DG Reitz: see 2 Oct 1824 and 9 Oct 1824 *Cape Town Gazette and African Advertiser*.

84 See 8 May 1824 *Cape Town Gazette and African Advertiser*.

85 See 19 Jun 1824 *Cape Town Gazette and African Advertiser*.

86 Also on board the *Dageraad* was Jan van Speijk (1802-1831), a Dutch naval officer who subsequently became a hero in the Netherlands for his fatal opposition, in Feb 1831, to the Belgian revolution when, rather than taking down the Dutch flag as ordered, he set his own gunboat alight in the port of Antwerp. Van Speijk served a tour of duty in the Dutch East Indies from 1823 to 1825, having been assigned to the *Dageraad* in May 1823. In Jan 1824, she sailed for the East Indies, via the Cape of Good Hope. En route, the *Dageraad* started leaking and continuous pumping was required to keep her afloat. On her arrival in the Batavian roadstead, an inspection revealed that her condition was so bad that she was no longer fit for sea service and she was then used only as a watchship. See, further, Koning 1832: 21-22.

87 Such as the fact that Reitz did not make headway in practice; however, there is no concrete published evidence of this and further archival research would be required to ascertain this.

88 See, eg, George 2011: 52, suggesting that Reitz possibly forsook the Cape as result of the anglicisation measures of Lord Charles Somerset.

89 That is, the period of the First British Occupation from 1795 to 1803 and the period after the Second British Occupation in 1806.

90 In terms of this treaty, colonial possessions in the Americas, Africa and Asia as they were in Jan 1803 at the outbreak of the Napoleonic Wars, were returned by Britain to the Dutch, with the exception of the Cape of Good Hope and a few other South American territories (that were later consolidated as British Guiana) where the Dutch retained trading rights.

to be exploited economically⁹¹ and more permanent, long-term policies could be devised for its assimilation and incorporation into the British empire by a process of anglicisation. Such anglicisation took place on several fronts, and both formally and informally. For present purposes it is only necessary to refer to changes that had occurred or were projected in the legal administration⁹² and in the language policy by the time Reitz must have decided to leave.

Although the main changes were to the existing legal administration and not to the applicable legal system, advocates and other legal practitioners must have been well aware that in addition to those few changes that had occurred, further and greater reforms were on the cards, including, ultimately, the possible assimilation of the imperial British law into the existing Roman-Dutch colonial law.⁹³ Reforms were often propagated and supported under the guise of modernisation rather than full-scale anglicisation.⁹⁴

A first and fundamental step towards anglicisation in all its forms and in all areas, also in that of legal administration, was language reform. The lack of acquaintance with the English language by both trained and untrained Dutch lawyers was problematic and considered detrimental to British commercial and other interests in the colony.

After repeated suggestions and proposals that English should be, or become, the exclusive language of use in local courts, language reform, in anticipation of the reform of the administration of justice, came in the form of a Proclamation of 5 July 1822. It envisaged the adoption, on a future date, set at 1 January 1827,⁹⁵ of

91 Until 1814, the value of the Cape was seen more in keeping it out of enemy control for the defence and protection of India and the territory was of more commercial value to the monopolistic East India Company than to Britain herself: see McAleer 2013: esp 299-300. For the changed British attitude towards the Cape, see, also, Freund 1989: 325-256; Peires 1989: 474.

92 See Sturgis 1983 for an attempt at classification. Other areas in which (formal) anglicisation had an effect included education, religion, the civil service and local government. The process was also made all the more visible with the arrival of some 4 000 British settlers from 1820, at a time when the total European, mainly Dutch population, was a little more than 40 000: see Bird 1823: 107. See, further, Bickford-Smith 2003; and also generally Dubow 2009: 4 who points out that “[b]y comparison with the other white dominions it [South Africa] was the least thoroughly anglicised and undoubtedly the most troublesome”.

93 McKenzie 2015: 792 points out that even prior to the report in 1823 of the Commission of Eastern Enquiry under Colebrook and Bigge that resulted in fundamental changes to the Cape judicial system in 1828, change had been in the air and that it was “common knowledge that a new judiciary was only a matter of time”.

94 Objections were levelled, for instance, at inadequately trained judicial officers, the lack of a jury system, the harsh punishments provided for by the criminal justice system, and the supposed backwardness of Roman-Dutch commercial and procedural law.

95 The envisaged date of 1 Jan 1827 was subsequently postponed pending the restructuring of the courts, which only took effect at the beginning of 1828: see Ord 71 of 1826, entitled Exclusive Adoption of the English Language Postponed.

English as the exclusive judicial language in all courts in the colony – it referred to the exclusive use of English “in all Judicial Acts and Proceedings”.⁹⁶

Although some members of the Cape judiciary and bar at the time were certainly bilingual, if not multilingual, it is not certain whether Reitz was one of those for whom English was Greek.⁹⁷ His reaction to the process of judicial anglicisation, as presaged by the language proclamation,⁹⁸ if such it was, was in any event stronger than that of any of his colleagues:⁹⁹ he chose exile.¹⁰⁰

Even if the reasons for Reitz’s departure from Cape Town are not absolutely certain, it is probably safer to speculate on why he chose to go to Batavia.

Unlike the Cape, former East Indian territories, including Batavia, had in 1814 been returned to the Dutch. Accordingly there the application of Roman-Dutch law and the use of the Dutch language were not under threat. Also, as will appear in due

96 It further provided that all official acts and documents, excluding judicial documents and records, had to be in English only as from 1 Jan 1825. See, further, Van Niekerk 2015: 379-383.

97 McKenzie 2015: 792, pointing out that although several key members of the Cape judiciary were bilingual (eg, Truter CJ and fiscal Denysen), “others, however, were not”. FW Reitz in his *Outobiografie* (Moll 1978: 5-6) opined that Dirk had departed for Java in 1822 “waarskynlik omdat in dié jaar Hollands uit die geregshowe verban is en hy slegs dié taal magtig was”.

98 Linguistic colonialism remained a bone of contention in the Reitz family. For instance, descendant FW Reitz 1900: 9-10, in his *A Century of Wrong* – described as “perhaps the most famous Afrikaner anti-imperialist polemic of the late nineteenth century” in Crais & McClendon 2013: 169 – wrote as follows: “When the Cape was transferred to England in 1806, their language was guaranteed to the Dutch inhabitants. This guarantee was, however, soon to meet the same fate as the treaties and conventions which were concluded by England with our people at later periods. The violator of treaties fulfilled its obligation by decreeing in 1825 that all documents were for the future to be written in English. Petitions in the language of the country and complaints about bitter grievances were not even acknowledged. The Boers were excluded from the juries because their knowledge of English was too faulty, and their causes and actions had to be determined by Englishmen, with whom they had nothing in common.”

99 They all remained at the Cape and continued practising. Although some (eg, Truter) appear if not to have accepted then at least not to have opposed anglicisation, others did raise their displeasure. Neethling, eg, was the only member of the replaced Court of Justice to protest in writing against the compulsory pensioning off of its members and he returned to practise as an advocate before the new Supreme Court: see n 67 *supra*. Some even openly fought for the Dutch cause. For instance, CJ Brand was one of a group of Afrikaner patriots, including lawyers Neethling and JA de Wet, involved with *De Zuid-Afrikaan* in 1830 and later became its editor. He was strongly opposed to the progressive anglicisation and its influence on the Dutch language in the 1820s and clashed with Wylde CJ in 1828 about the requirement that an understanding of English was a requirement for jury service.

100 Exile may already then have been in the Reitz family blood. After the English War, FW Reitz, like his uncle before him, preferred exile to swearing allegiance to Britain. He tried emigrating to Texas (where he had gone on a lecture tour) and also investigated settling in Europe and Madagascar; his son, Deneys Reitz, went into exile, mainly on Madagascar, for a period of three years after that war. Their bitterness after the war is readily apparent from FW’s piece “Is it peace?” that appeared in (Nov 1902) 175 no 552 *The North American Review* 607-612. See, also, Moll 1977.

course, Reitz was not the first lawyer to exchange the “Tavern of the Seas”¹⁰¹ for the “Queen City of the East”.¹⁰²

7 Batavia: Background

With shared imperial links to the Dutch fatherland, there was a long history of the movement of not only goods but also people to and from Cape Town and Batavia.¹⁰³

Batavia¹⁰⁴ was the capital city¹⁰⁵ and main port and cultural centre of the Dutch East Indies. Located on the north-west coast of the island of Java,¹⁰⁶ it was the eastern headquarters of the Dutch East India Company’s administrative and commercial operations in the far east.¹⁰⁷ In 1800, the former Company-controlled territories were

101 A description frequently taken over in book titles: see, eg, PW Laidler *A Tavern of the Seas* (1926, Cape Town); Lawrence Green *Cape Town: Tavern of the Seas* (1984, Cape Town).

102 See, eg, GG van der Kop *Batavia: Queen City of the East* (1925, Batavia). But then names can be misleading. Batavia was in fact, especially later in the nineteenth century, a rather unsavoury settlement, with stagnant and smelly canals, and a tropical Europeans’ graveyard: see Blussé 1985; Pols 2011; Van der Brug 1997. Further, when Reitz arrived, the Dutch colony, although still wealthy, was nevertheless already in steady economic decline: see Adams 1996.

103 Not only the transfer of Company officials, but also emigration and “forced migration” in the form of slave trading, political exile and penal banishment (see, further, Ward 2009), meant that the residents of one city were not only aware of but also familiar with their counterparts in the other. Returning travellers to and from the East of necessity touched at the Cape, while even after the return of the British, many Dutch ships replenished here en route to and from the Dutch East Indies.

104 “Batavia” was also the ancient Latin name for the region – today part of the Netherlands – inhabited by the Germanic Batavian people during the Roman Empire and from whence not only the name of the Dutch East Indian town (there is also a Batavia in Suriname in the West Indies) but also that of the Batavian Republic from 1795 to 1806. So, Simon van Leeuwen’s *Batavia Illustrata, ofte Verhandelingen vanden Oorsprong, Voortgang, Zeden, Eere, Staat en Godtsdienst van oud Batavien ...* did not concern the Dutch East Indies. And then, of course, Leiden was formerly known as Lugduni Batavorum.

105 Other cities on the island of Java include Bantam (also on the north-west coast, west of Batavia; now Banten), Samarang (on the north coast, west of Batavia; now Semarang), Soerabaija (on the north-east coast; now Surabaya), and Banjoewangi (on the north-east coast; now Banyuwangi).

106 Other islands in the Dutch East Indies include the island of Sumatra (north-west of Java, with its main towns of Padang and Palembang), and the islands of Borneo (north-east of Java), Bali (east of Java), Timor, Ambon, Celebes, Lombok, Ternate, and Tidore. For a description of the journeys undertaken by two visiting clerics (“kerkvisitators”) at the time when Reitz arrived there, and from which some sense of the geography of (and the state of conversions to Christianity in) the mainly outlying parts of the empire, including the activities of slave traders and head-hunters (“koppensnellers”), may be gained, see Knappert 1927.

107 Previously called Jayakarta or Jaccatra, the Dutch had in 1609 established a fort at Batavia: Kasteel Batavia, which was demolished between 1808 and 1811. From 1619 it was the seat of the governor-general of the East Indies and it remained the entrepôt of the Dutch eastern trade until the end of the eighteenth century. Today it is (again) called Jakarta and it and the island of Java form part of Indonesia. On the background to the Dutch colonial administration of the East Indies, see, eg, Niemeijer 2007.

nationalised and came under the administration of the Dutch government. In 1819, after the British interregnum (1811-1816) had ended and the piecemeal return of her former eastern territories to the Netherlands in terms of the London Convention of 1814, Batavia became the colonial capital of the Dutch empire in the east. In 1825, shortly after Reitz's arrival, the city had a population of some 40 000 inhabitants: around 3 000 Europeans, 30 000 natives, 17 000 Chinese, 1 000 Arabs, and 5 000 slaves.¹⁰⁸ Less than a hundred Dutch-born and educated officials administered the colony¹⁰⁹ under a governor-general. The governor-general¹¹⁰ of the East Indies governed in conjunction with the advisory Council of (Dutch) India and exercised executive and legislative power from Batavia.

As far as the law applicable in the East Indies was concerned,¹¹¹ Dutch law, including its customs, was, in principle, the subsidiary common law applicable in the East Indian colonies until 1848. The principle of concordance applied in the Dutch East Indies: colonial law had to concur as much as possible with that in the Netherlands. In addition, a local compilation known as the (old) Statutes of Batavia of 1642, later replaced by the New Statutes of Batavia of 1766, provided supplementary regulation by rendering certain Dutch statutes applicable locally. Further, traditional Indonesian law and customs or *adat*, only recognised in 1766, governed the legal position of the indigenous, non-Christian population.

In 1848, the existing laws (both Roman-Dutch law and the Statutes) were largely supplanted with the introduction of a code – the Dutch East Indian Civil Code, *Nederlands-Indisch Burgerlijk Wetboek* – based on the new Dutch legal codes of 1838 on commercial, civil and procedural law, but with adaptations to suit local conditions. This was accompanied, as we will see shortly, by a general reorganisation of the colonial legal administration.

By the time of his arrival in Batavia, then, the default law applicable in practice was Roman-Dutch law, *oud-Hollands recht*, a system with which Reitz was more

108 See Van Dissel 2015: 46-47. See, further, Taylor 2009, with useful maps at 199-204; Kehoe 2015, with many illustrations and maps.

109 For a description of the colonial career and living conditions of a civil servant, Johan Pieter Cornets de Groot van Kraaijenburg (1808-1878), a lineal descendant of Hugo Grotius, in Java from 1816 to 1840, when he rose from second custom house clerk to the position of acting general secretary (to the governor-general), and again from 1848 to 1851, when he was a member of the Council of India there, see Reinsma 1966.

110 The first joint commissioners-general (as they were then called) appointed in Sep 1814, but only arriving in the East in Apr 1816 and only taking over from the British in Aug of that year, were Cornelis Theodorus Ekhout, Godert Alexander Gerard Philip van der Capellen, and Arnold Adrian Buyskes. The latter had an interesting Cape connection and will feature again in due course (see nn 132 and 136 *infra*). For a list of the governors-general from 1610 to 1811, the (British) lieutenant-governors of Java from 1811 to 1816, and the governors-general from 1816 to 1888, see Van der Kloot 1891: 286-287.

111 See, further, Visagie 1969: 24-36; Salverda 2009: *passim*; Lev 1985: 62, referring to the competing legal regimes as creating a “legal maze”; Gall 1996a.

than familiar. And, as before, “Batavia was then the summit for a lawyer in the east”.¹¹²

8 Reitz at the Batavian bar

Both advocates and attorneys practised in the East Indies, with an attorney ordinarily instructing an advocate who, according to Dutch law, had the sole right of appearance in the higher courts. Both professions were regulated in detail.¹¹³

Some notion of Dirk Reitz’s¹¹⁴ early years in legal practice in Batavia may be gained from various reports and advertisements that appeared in local and some Dutch newspapers.¹¹⁵

Reitz was admitted to practice as an advocate in Batavia on 4 September 1824.¹¹⁶ In September and October of that year there appeared announcements, in Dutch and English, that the office of advocate Mr DG Reitz was in “Koestraat, Batavia”.¹¹⁷ Shortly thereafter he moved his office to Molenvliet.¹¹⁸

112 De Smidt 1996: 176.

113 The instructions for attorneys were issued in 1625 and both professions were regulated from 1735 and also in the Statutes of Batavia and in the New Statutes of Batavia. The rules of conduct included: the provision of security against malpractice and the prohibition of bare-headed pleading, contingency fees, verbose pleadings, chasing clients, and taking on excessive work. See, further, Ball 1982: 26-27.

114 Dirk Gysbert Reitz should be distinguished from two other Dutch colonial personages. First there was Gysbert Christiaan Bosch Reitz (1792-1866), an Amsterdam shipowner (see, eg, 4 Jun 1849 *Nieuwe Rotterdamsche courant* for an advertisement of the imminent departure for Batavia of the “Snelzeilend Gekoperd Tweedeks Fregatschip” *Prins Maurits*, of which GC Bosch Reitz was the owner) and merchant on and landowner in Surinam: see, further, <http://www.kloek-genealogie.nl/BoschReitzGen.htm> (accessed Nov 2015-Jan 2016). Secondly there was Carel Jan Riesz (not Reitz), a general in the military in Soerabaija in 1837: see Vreede-De Stuurs 1996: 86 and 105; there is a reference to a former resident of Samarang, general-major CJ Riesz in Groot 2009: 310; see, also, 19 Sep 1835 *Javasche courant* where he is mentioned as the “Generaal Majoor, waarnemend Resident van Sourabaija”.

115 The local newspapers consulted were the official *Bataviasche courant* (1816-1828), which became the *Javasche courant* (1828-1849); and the *Bataviaasch advertentieblad*, which became the *Java-Bode; Nieuws, handels- en advertentieblad voor Nederlandsch-Indie* (1852-1897). For a list of Indonesian colonial newspapers, see <https://www.kb.nl/organisatie>, and for digital versions of the newspapers consulted and referred to here, see <http://www.delpher.nl> (both sites accessed during Mar 2016). The Dutch newspapers consulted were the official *Nederlandsche staats-courant*, the *Leydse courant*, the *Opregte Haarlemsche courant*, the *Rotterdamsche courant*, the *Algemeen handelsblad*, and the *Nieuwe Rotterdamsche courant*.

116 In the 7 Jan 1825 *Leydse courant* it was reported that on that date the governor-general in Batavia had appointed Reitz as advocate before the High Court and the Council of Justice there.

117 See 18 and 25 Sep and 2 Oct 1824 *Bataviasche courant*.

118 See 9 and 16 Mar 1825 *Bataviasche courant*.

Notices also began appearing in connection with Reitz's acting as the executor of deceased estates¹¹⁹ or of insolvent estates,¹²⁰ or as the representative of absent persons,¹²¹ or in judicial sales on behalf of the Batavian College of Orphan Masters¹²² or the local Vendue Office¹²³ and others.¹²⁴ Occasionally, something more interesting came his way.¹²⁵

In December 1827 he gave notice of his intention to leave the island of Java for an undetermined time, appointing a representative to act for him while he was away,¹²⁶ but by the end of April 1828 he was back in practice, sharing offices with another lawyer.¹²⁷ By September 1829 he had moved offices to "buiten Nieuwpoortstraat" in the district of Kramat in Batavia,¹²⁸ and by October 1830 he had moved offices again, to "binnen Nieuwpoortstraat", and gave notice of that and of his office hours.¹²⁹

Reitz quickly became part of the local European community, acquiring membership of the Batavian Society of Arts and Sciences and other civic organisations.¹³⁰

- 119 See 4 Dec 1824 *Bataviasche courant* (*Tweede bijvoegsel*) for an advertisement, dated 25 Nov 1824 by JN Olijve and DG Reitz that those who had claims against or debts owing to the deceased estate of one WA van der Hart (could he have been the captain of the *Dageraad* which had brought Reitz to Batavia a little more than two years before?: see at n 84 *supra*), were to give notice of it or make payment of it to them within six weeks. See also, eg, 9 Mar 1825 *Bataviasche courant*, in connection with the estate of W Spangenberg.
- 120 See 13 Dec 1825 and 21 Mar 1826 *Bataviasche courant*, announcing that advocate Reitz was administering the estates of certain insolvent persons on the instructions of the Council of Justice at Batavia after an application to the local Estates Chamber. See also, eg, 21 Mar, 3 and 26 Apr, 17 Jul, 13 and 15 Sep 1827 *Bataviasche courant* concerning his administration of insolvent estates.
- 121 See 6 Jul 1825 *Bataviasche courant* for an announcement that PA Heeger, departing to Benkoelen, had appointed Reitz and another person as his representatives ("gemagtigden").
- 122 See 17 and 28 Jul 1827 *Bataviasche courant*, advertising the judicial sale of goods on behalf of advocate Reitz as authorised representative of the College.
- 123 See 27 Oct and 1 Nov 1831 *Javasche courant*.
- 124 See 22 Mar 1830 *Javasche courant*, advertising the judicial sale of goods on behalf of advocate Reitz, "voor en van wegen de heeren Robert Wise & Co". See also, eg, the advertisements in 25 Jan, 26 Mar and 20 Dec 1831 *Javasche courant* for his involvement in other judicial sales and auctions.
- 125 See 29 Mar and 3 Nov 1831 *Javasche courant* for his involvement in tontine claims.
- 126 See 6 and 8 Dec 1827 *Bataviasche courant*, notifying his intention to "verlaat voor eenigen tijd" the island of Java and his appointment of HJ Meijnderts as his authorised representative.
- 127 See 1 and 3 May 1828 *Javasche courant*, notifying that Reitz, himself "weder in de praktijk begevende", would retain his office at the premises of attorney Van Gent, next to that of notary K Heijnis. I could not establish whether Reitz visited the Cape during this period of absence from Batavia.
- 128 See 26 and 29 Sep 1829 *Javasche courant*.
- 129 See 28 and 30 Oct 1830 *Javasche courant* for a notice, in Dutch and English, that advocate Reitz had moved his office to the corner of "binnen Nieuwpoortstraat", where he could be consulted every day of the week from 9 am to 2 pm, except Wednesdays and Thursdays, and on those days from 11 am to 2 pm (1 pm in the English advertisement!), and that every Friday morning from 10 am to 1 pm he would devote his time to the settlement of accounts and the receipt and payment of monies.
- 130 See (1825) 10 *Verhandelingen van het Bataviaansche Genootschap van Kunsten en Wetenschappen* at lxxi, where Reitz, "Advokaat te Batavia", is mentioned as one of its members; see, also, (1826) 11 *Verhandelingen van het Bataviaansche Genootschap van Kunsten en Wetenschappen* at xxx.

9 Reitz and Gerrit Buyskes

In September 1829 there appeared a most interesting advertisement, giving a brief and tantalising hint of Reitz's relationship with another expatriate Cape advocate. The advertisement¹³¹ invited parents and guardians desiring to let their children and pupils take lessons in drawing, to the house of "mr G Buyskes, op Kramat, dan wel ten kantore van den advokaat Dirk Gysbert Reitz in de buiten Nieuwpoortstraat".

Gerrit Buyskes (Buyskes) (1765-1832)¹³² was the secretary of the Cape Court of Justice from 1803 to 1806¹³³ and a member of the Cape bar from 1806 to 1818; he had therefore left before Reitz joined. He was also admitted as a notary in 1806.¹³⁴ The reason why Buyskes went to Batavia¹³⁵ is not difficult to find. His brother, admiral Arnold Adriaan Buyskes (1771-1738), was one of the joint commissioners-general sent to Batavia in 1816.¹³⁶ Gerrit arrived there in 1819 and was appointed a first-class

He remained a life-long member of this organisation: see Buddingh 1850: Appendix. The 13 Sep 1828 *Javasche courant* lists Reitz as one of the members of the Waterloo Society who had made a voluntary contribution to the erection of a monument.

131 See 26 and again 29 Sep 1829 *Javasche courant*.

132 Buyskes was born in Enkhuizen in the Netherlands on 2 Nov 1765, the eldest son of Pieter Buyskes (1739-1779), the mayor of the town. He graduated at Harderwijk in 1785, and occupied various minor offices until he went in exile to Flanders in 1789. He was then active as a merchant in Bergen until 1791 and returned to Holland in 1795. After pursuing a brief political career, he practised as an advocate and notary in Amsterdam. In 1802 he was nominated as the secretary ("griffier") of the Court of Justice at the Cape and emigrated there. He resigned in 1806, when he was admitted and practised as an advocate at the local bar. He left the Cape for Batavia in 1819. His son Egbert Andries (1789-1865), one of eight children, remained behind in Cape Town where he practised as a notary and became joint vendue commissioner (see at n 11 *supra*). See, further, on Buyskes and his family, *Nieuw Nederlandsch biografisch woordenboek* vol 1 available at <http://www.dbnl.org> (accessed 16 Mar 2016) *sv* "Buyskes, Arnold Adrian" at 527-529; Van der Aa 1854: *sv* "Buyskes, Gerrit" at 1673-1674. For his will, see CA, MOOC 7/1/64 item 45 (1806).

133 See CA, CO 3857/263/1 (1806) for a memorial received from G Buyskes with an application to be relieved from his position as secretary of the Court.

134 See the *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item L. See, further, CA, CO 3891/722/1 (1812) for a memorial received from Buyskes concerning his practice as advocate and notary; CA, CO 3895/301/1 (1813) for a memorial from him with a request for permission to act as notary with the liberty to practice as an advocate; and CA, CO 3902/12/1 (1815) for a memorial from him resigning as notary. As noted, his son, Egbert Andries Buyskes, was also a notary: see the *Inventory of the Notarial Archives of the CoGH, 1790-1879*, inventory no 1/7/1 item AY; CA, CO 3891/723/1 (1812) and CA, CO 3902/28/1 (1815) for memorials received from Egbert Andries requesting to be permitted to practice as notary; and CA, CO 3908/214/1 (1817) for a memorial received from him requesting citizenship of the colony.

135 See CA, CO 3897/49/1 (1814) for a memorial received from Buyskes requesting that one of his sons be permitted to go to Batavia; CA, CO 3904/84/1 (1816) for a memorial from him requesting permission to depart for Batavia himself; and CA, CO 3917/156/1 (1820) for a memorial received from him requesting to take a Negro to Batavia.

136 See n 110 *supra*. Arnold Adriaan was a naval officer, served in the East Indies from 1789 to 1793 and again from 1803 to 1804, was promoted to admiral and placed in charge of Dutch naval forces in the East Indies in 1807, and became vice-president of the Council of (Dutch) India in 1808. In 1814, he was appointed joint commissioner-general of the Dutch East Indies where he arrived in 1816. He served as such from Aug 1816 to Jan 1819, after which one of the other joint commissioners-general, Van Capellen, became (sole) governor-general until Jan 1826. His

official of the East India Company and served as vice-president of the Supreme Court from 1820 to 1826 and again from 1828 to 1832.¹³⁷ He died in Batavia in April 1832.

Apart from the fact that both had immigrated from the Cape and that both had, albeit at different times, practised at the bar there, Reitz and Buyskes may have had more in common than merely a Cape background and their legal careers; there is a distinct possibility that they may have shared a love of the arts.¹³⁸

10 Reitz's judicial career

At the time when Reitz practiced as advocate in Batavia, there were several courts of justice in the Dutch East Indies.¹³⁹ They were located in the main centres on Java, such as in Samarang, Soerabaija, and Batavia, and also elsewhere in colonial territories in the East. They exercised criminal and civil jurisdiction over local Europeans – a separate system of courts existed for the indigenous population – and also an appellate jurisdiction over cases heard in the local lower courts, including the local College of Aldermen (“Schepenbank”).

The Court of Justice in Batavia, already established in 1620 and comprised of a president and eight (later nine) members, additionally had appellate jurisdiction over cases heard in the other, outlying courts of justice, including the Court of Justice at the Cape. Like their Cape equivalent, the courts of justice were, until the late seventeenth century, generally not comprised of trained lawyers. Gradually, though, professional lawyers with Dutch law degrees came to be appointed as members and a greater but by no means complete independence of the Court from the High Government resulted.

In 1809, the Court of Justice in Batavia was abolished and replaced by the High Court of Justice (“Hooggerechtshof”). It was the highest judicial body in the East Indian colonies and in addition to its original jurisdiction, and an exclusive jurisdiction in some matters (for instance, piracy, crimes committed in places where no court had been established, or on board ships bound there), it retained its appellate jurisdiction, hearing not only appeals from and reviews of decisions by lower local

son Pieter (1794-1863) was a Leiden graduate in 1818, practised as an advocate in The Hague and Haarlem, and assumed judicial office in 1826, eventually becoming vice-president of the provincial Court of South Holland in 1849. His grandson Arnold Adriaan (1837-1915) likewise obtained a Leiden doctorate in 1861 with a thesis – aptly relevant to our man Reitz – entitled *De Weeskamer en het collegie van boedelmeesteren te Batavia*; he followed a colonial career in Batavia. See, further, Van der Aa 1854: sv “Buyskes, Arnold Adrian” at 1674-1676.

137 See Briët 2015: 59, 105-106, 214, 242, 326. On his death, the office of vice-president of the Court was not filled again until 1839.

138 I came across a reference in Diehl 1990: 285 and 440 who mentions DG Reitz as a “music-master” and “musician”, but, apart from his membership of the local society of arts and sciences (see n 130 *supra*) could find no further information on this aspect of Reitz's life (but see, also, n 191 *infra*).

139 On the court structures in the Dutch East Indies, see La Bree (nd); Toe Water 1882; Immink 1882; Stapel 1932; Ball 1982; and, in particular, Briët 2015.

courts, but also from and by courts established elsewhere. There was no further appeal to any court in the Netherlands.

Further reforms were effected in 1819. The High Court of Justice in Batavia was replaced by the High Court of Justice of Dutch India (“Hoog Gerechtshof van Nederlands-Indië”). It was regulated more closely¹⁴⁰ by instructions issued in 1819 which were renewed in 1827, 1830, and 1836. It continued exercising both instance and also, as highest court in the East Indies, appellate, review and oversight jurisdiction, both now more precisely circumscribed. It, or rather its president, also gave legal opinions to the colonial government.¹⁴¹ The president¹⁴² and its quorum of eight members (“Raden”)¹⁴³ – reduced to five in 1827¹⁴⁴ – had to be Dutch, older than twenty-five years of age, and graduates in law. Although the members were still appointed by the governor-general, from 1827 the Court’s president (as also the procurator-general) were appointed by the Crown. Otherwise than in the Netherlands where judges were appointed for life, colonial judges were appointed for an undetermined period and could be removed, transferred or suspended by the governor-general or the Crown. Unlike members of the courts of justice, judges of the High Court could not hold any other offices.

In July 1833, the governor-general of the Dutch East Indies appointed advocate Dirk Reitz as a member of the Court of Justice at Samarang, a town west of Batavia on the island of Java.¹⁴⁵ A few months later, in April 1834, he was made a member of the Court of Justice in Batavia.¹⁴⁶ In September 1835, he was appointed as fiscal at the Court of Justice in Soerabaija, another town on the island of Java.¹⁴⁷

140 As were the outlying courts of justice.

141 For instance, on matters pertaining to the administration of justice, legal matters (including, eg, questions of prize) and new legislation: see Briët 2015: 237-246. It also performed special tasks such as announcing legislation, controlling seals (“stempeling van kleinzegel”), and executing and passing deeds.

142 See *idem* at 246-259, 326. The highest ranking member acted in his place when the president was absent. Unofficially there was a vice-president (in reality, merely an ordinary member with that title) only intermittently. Gerrit Buyskes served in that capacity (see n 137 *supra*), but the office disappeared with his death in 1832 and only returned in 1839 in order to lighten the workload of the president: see *idem* at 214-216.

143 In addition to ordinary members, extraordinary and acting members were also appointed to the Court as circumstances demanded: see *idem* at 216-217.

144 See *idem* at 217-219, 259-269.

145 See 27 Jul 1833 *Javasche courant*; see, also, 26 Dec 1833 *Rotterdamsche courant* and 31 Dec 1833 *Nederlandsche staats-courant*.

146 See 26 Apr 1834 *Javasche courant*. Later in the year he was assigned specified functions (eg, the “folieren en parapheren” of official documents) in the Court for the year 1835: see 27 Sep 1834 *Javasche courant*. A year later the assignment was repeated with another member being appointed alongside him to fulfil those official functions on behalf of the Court: see 16 Sep 1835 *Javasche courant*.

147 See 9 Sep 1835 *Javasche courant*; see, also, 4 Jan 1836 *Nederlandsche staats-courant* and 4 Jan 1836 *Algemeen handelsblad*.

Then, after all that,¹⁴⁸ in March 1836 the governor-general appointed Reitz¹⁴⁹ as one of the five members of the High Court (“Raadsheer van den Hoog Gerechtshof”), seated in Batavia.¹⁵⁰

Reitz occupied this position for eleven years, until 1847.¹⁵¹ During the period of the Court’s existence, from 1819 to 1848, the High Court had, apart from five presidents,¹⁵² a total of thirty-two members who officiated as judges.¹⁵³ Some had been presidents or members of one of the courts of justice on Java or elsewhere in the East Indies, some fiscals, while others had been sent out from the Netherlands.¹⁵⁴ Dirk Gysbert Reitz was the twenty-seventh appointee.¹⁵⁵

In September 1837, the five ordinary members of the High Court – JA Verploegh, LH du Bus, C Visscher, C Hultman, and DG Reitz – sent a memorial to the governor-general in which they complained about their salaries.¹⁵⁶ They pointed out that with the Court’s president being sent out from the Netherlands rather than being appointed from its incumbent members, their only avenue of promotion and an increase in remuneration was to be appointed as its (better salaried) procurator-

148 These various appointments naturally necessitated translocation and no doubt caused great inconvenience to Reitz and his family. The *Javasche courant* of 7 Oct 1835 announced the arrival at Samarang on 30 Sep of Reitz and his family with the Dutch brig *Harriet*, and their departure for Soerabaja on 1 Oct; they arrived there on 7 Oct: see 14 Oct 1835 *Javasche courant*. On 25 May 1836, the same paper announced the departure of Reitz and his family on 14 May with the Dutch ship *Dortenaar* from Soerabaja to Batavia and his arrival there on 22 May. On 12 Apr 1837, the *Javasche courant* published an announcement of the public sale of goods scheduled for the following month, including a “zeker huis en erve, staande en gelegen op Rijswijk, verhuurd tot f160 zilvergeld per maand en bewoond door den heer DG Reitz”.

149 See 30 Mar 1836 *Javasche courant*; see, also, 16 Aug 1836 *Rotterdamsche courant* and 17 Aug 1836 *Leydse courant*. He was appointed as the replacement of BG Rinia van Nauta who had been appointed as circuit-court judge (“omomegaand regter”) in Samarang.

150 Initially located in the Town Hall (“Stadhuis”) in Batavia, in 1828 the Court moved to the Daendels Palace on Waterlooplein, in the Batavian district of Weltevreden. From 1848 it was housed in its own new building next to the Palace on the same square.

151 His name is listed as member of the High Court in the various editions of the annual *Jaarboekje van de Regterlijke Magt in het Koninkrijk der Nederlanden*. See, also, the *Almanak en naamregister van Nederlandsch-Indie voor 1847* (Batavia, 1847) at 9.

152 The presidents were: Pieter Simon Maurisse, president (1819-1828), a Company official and president of the former Batavian High Court of Justice (1807-1809) and fiscal (1803-1807); Pieter Merkus, president (1828-1829), formerly the procurator-general in 1819 and later a member of the Council of India and eventually the governor-general; Georg Cornelis Hageman, president (1831-1837); Christian Jacobus Scholten van Oud Haarlem, president (1837-1845); and Hendrik Ludolf Wichers, president (1846-1849). The last three were lawyers specially sent from the Netherlands to fill the office as there were no suitable locals. See, further, Briët 2015: 246-259, 326.

153 Seven of them were extraordinary or acting members, the rest were ordinary, appointed and thus sworn in.

154 See, further, Briët 2015: 259-269.

155 *Idem* at 327.

156 For this, see *idem* at 226-233.

general.¹⁵⁷ Their salaries were much lower than that of many other officials, some of whom were subject to the authority of the Court.¹⁵⁸ The Council of India agreed and, stressing the importance of continuity on the bench, advised the governor-general to recommend to the government in the Netherlands that an improvement in their salary structure was necessary. The president of the Court, Christian Jacobus Scholten van Oud Haarlem, also supported their memorial. Although the governor-general recommended improved salaries for the members of the High Court, the ultimate response from the Netherlands, in December 1838, was negative, unfavourable economic conditions being proffered as the reason.

In January 1839 Reitz was additionally appointed as a member of the Military High Court (“Hoog Militair Gerechtshof”).¹⁵⁹ It exercised jurisdiction over members of the military and naval forces in the East Indies.¹⁶⁰ The president of the civilian High Court was also the president of the Military High Court and two members of the High Court were appointed also to serve on this tribunal.¹⁶¹

In 1848, with the introduction of a new civil law in the Dutch East Indies, the court structure too was reorganised. Although most serving members of the retained High Court were reappointed,¹⁶² Reitz no longer held judicial office, his appointments having come to an end the year before. However, he continued in public office in Batavia.

157 The procurators-general during Reitz’s time were: Pieter Merkus (1819-1821); Pieter Hendrik Esser (1821-1825), who became a member of the Court in 1821; Gerard Theodoor Blom (1825-1828), after he had been a member from 1819 to 1822; Joan Hendrik Spiering (1828-1838), who had been a member from 1822 to 1825 and again in 1838; and Carl Hultman (1838-1848), who had been a member in 1835 and 1836. See, further, Briët 2015: 269-282, 327.

158 For instance, the resident on Java (in the Company era, a resident was an official below the rank of commander, director and governor, but above that of factory head) at the time earned a monthly income of f1250, apart from additional fringe benefits, while a member of the High Court earned only f1000 per month. Members’ salaries were also lower than those of a fiscal with one of the courts of justice. See *idem* at 226-233.

159 See 2 Jan 1839 *Javasche courant*; see, also, 25 May 1839 *Rotterdamsche courant*, 25 May 1839 *Opregte Haarlemsche courant*. He was appointed in the place of JA Verploegh, who departed on leave to the Netherlands. Reitz was therefore referred to as a member of both Dutch Indian courts (“Raad in de beide Gerechtshoven van Nederlandsch Indië”): see, eg, (1842) 18 *Verhandelingen van het Bataviaansche Genootschap van Kunsten en Wetenschappen* at 42. Possibly this court was mistaken for a maritime or Admiralty court: see at n 1 *supra*.

160 The *Jaarboekje van de regterlijke magt in het koninkrijk der Nederlanden voor 1846* (Gorinchem, 1846) at 234-235 described its jurisdiction as being over “alle Militairen en andere tot de Koloniale Land- en Zeemagt behoorende personen” in so far as their wrongs did not concern “s lands lasten en middelen”.

161 Apart from the High Court’s president and two of its members, its registrar and procurator-general likewise served in the Military Court and these were the only legally qualified members on it; none of them received any additional remuneration. See, further, Briët 2015: 216, 236-237.

162 *Idem* 308-314.

11 President of the Batavian Orphan Chamber

In the course of 1847, Dirk Reitz was appointed as president of the Orphan Chamber in Batavia,¹⁶³ an office he occupied until his death sixteen years later.¹⁶⁴

Orphan chambers (“weeskamers”)¹⁶⁵ existed in many Dutch towns, also in the colonies. There were such chambers in Batavia¹⁶⁶ and also in Samarang and Soerabaija and elsewhere in the East Indies, as also in Cape Town.¹⁶⁷ The main functions of these chambers were to administer the legacies and other capital and property of orphans and to act as curators on behalf of minors where one or both of their parents had died (so-called full or half orphans¹⁶⁸) for the protection of their financial, material, physical, and educational interests until they themselves got married or reached majority. They also performed several minor, ancillary functions.¹⁶⁹

The Orphan Chamber in Batavia had been established in 1624. In addition, and established subsequently in the course of the seventeenth century, there were in Batavia, as in many locations elsewhere, two other comparable subsidiary bodies: an Estate Chamber (“Boedelkamer”) which administered the estates of persons who had died without heirs or whose heirs were absent, or who had died intestate,¹⁷⁰ as well

163 See 27 Mar 1847 *Nederlandsche staats-courant* and the *Almanak en naamregister van Nederlandsch-Indie voor 1847* (Batavia, 1847) mentioning at 395 Reitz’s appointment as one of changes that had occurred (after printing) up to 15 Feb 1847.

164 He is mentioned as holding that office in the various annual editions of the *Almanak en naamregister van Nederlandsch-Indie*; see, also, eg, *Nederlandsche residentie- en ‘s Gravenhaagsche stads-almanak voor 1850* (The Hague, 1850) at 350.

165 An orphan chamber or chamber of wards is also referred to as an orphan board (“college van weesmeesters” or “weesheren”).

166 On the Orphan Chamber in Batavia, see the doctoral thesis of Arnold Adriaan Buyskes (who was the son of the governor-general and the nephew of Gerrit: see n 136 *supra*) *Weeskamer en collegie van boedelmeesteren te Batavia* (Leiden, 1861) and also the doctoral thesis of Pieter Paulus *De collegiis pupillaribus (Weeskamers) ...* (Leiden, 1832); Gall 1996b. For the Chamber’s archive, see Kortlang 2007.

167 On the Cape Orphan Chamber, see, eg, Botha 1962: 113-135; Visagie 1969: 56-60 and 110-111; and Ehlers 2000: 178-179. The Cape body was established in 1673, consisting of five elected members: two Company officials (one of whom was president) and three burghers. Membership increased to six from 1699, with the addition of a vice-president. From 1803 to 1806, the posts of president and vice-president were filled permanently. An Estate Chamber was established at the Cape in 1803. During the British period from 1806 to 1828, the president of the Court of Justice also acted as the president of these chambers. They were abolished by Ordinance 104 of 1833 and their functions transferred to the Supreme Court. Litigation involving the Orphan Chamber continued right up to its abolition: see, eg, *Orphan Chamber v Sertyn & Others* (1831) 1 Menzies 25; *Loedolff v The Present Orphan Chamber and the Surviving Members of the Former Orphan Chamber* (1830) 1 Menzies 486; *In re Durr: Orphan Chamber qq Minor Heirs in re Durr v Van Reenen* (1832) 1 Menzies 565.

168 The protection of a half orphan was especially called for if the surviving parent remarried.

169 For instance, the registration of the wills of deceased persons; and keeping a death register or record of persons who had died in its area of jurisdiction.

170 So-called “unclaimed estates” (“desolate boedels” or “onbeheerde nalatenschappen”). Instances of absent heirs occurred frequently in the colonial setting.

as insolvent estates; and an Estate Chamber for Non-Christian (or non-European) Foreigners.¹⁷¹ Although these different chambers were in most East Indian locations joined and regulated together at the beginning of the nineteenth century, the Batavian Orphan Chamber and the Estate Chamber continued to operate separately and were only merged in 1885.

Orphan chambers were also important in another respect. As their administration of legacies and the liquidation of property gave them control over the accumulated capital involved, they were important financial institutions and providers of credit at a time when banks were few and far between. A large part of their business involved making (government guaranteed) loans of money to local merchants and businesses at interest and on security in the form of bonds over immovable property. Although by the end of the seventeenth century, it had become common to exclude these chambers from any management of the capital bequeathed in a will,¹⁷² they retained their importance as guarantors of the fact that testamentary depositions and legacies would be settled. Naturally, they retained their importance for the welfare of minor orphans.

The Batavian Orphan Chamber was further significant in that it supervised and received regular reports from like chambers established elsewhere in the Dutch colonial empire and also exercised jurisdiction over legacies and estates in places where there was no local chamber.

Reitz's appointment as president of the Orphan Chamber in Batavia in 1847 was therefore a prestigious and influential one.¹⁷³ Some indication of his stature in the East Indies is the fact that in 1844, when still on the High Court bench, the University of Utrecht conferred an honorary doctorate on him.¹⁷⁴ In December 1851

171 "Onchristelijke Boedelkamer", "Boedelkamer voor Vreemde Oosterlinge", or "College van Boedelmeeesters van Chinese en Andere Onchristen Sterfhuizen". This body was necessary as the Orphan Chamber and the Estate Chamber dealt only with the estates of Europeans.

172 For an English case involving the exclusion of the Batavian Orphan Chamber, see *Phillips v Thornton* (1831) 3 Hagg Ecc 752, 162 ER 1332; see also, generally, *Cockerell v Dickens* (1840) 3 Moore 99, 13 ER 45 and (1840) 2 Moore Ind App 353, 18 ER 343.

173 Interestingly, he was not the first Cape-connected person to hold the presidency. Dutch-born Johannes Cornelis D'Ablaing (1663-1721), who had been second in command and then acting governor at the Cape (May 1707-Feb 1708, in the place of the recalled WA van der Stel, to whom he was related), was president of the Orphan Chamber in Batavia from 1718 to 1721: see *Nederlands adelsboek 1906* (The Hague, 1906) at 2. Reitz further had an indirect connection to the Cape Chamber. For litigation involving it and also one of Reitz's relations on his mother's side, see [*President and Members of the Orphan Board v [Johannes Gysbertus] Van Reenen & Bayley* (1829) 1 Knapp 82, 12 ER 252, on appeal from the Cape where the Chamber was described (at 86-87, 254) as "a corporation, instituted at the Cape, as well as in most of the other Dutch colonies, for the purpose of administering the property of orphans".

174 See *Digitaal album promotorum Universiteit Utrecht* (accessed 14 Jan 2016) sv 'Reitz' where it is mentioned that Didericus Gysbertius Reitz, "supremae curiae in India Batavia senator", received an honorary doctorate on 23 Nov 1843. The 16 Oct 1844 *Nederlandsche staats-courant* (and also the 18 Oct 1844 *Leydse courant*) announced that a gathering of alumni ("oud-studentenfeest") of Dutch universities ("vaderlandsche Hoogeschoolen") was planned in Batavia on 2 Aug, an invitation to attend being extended to them by a committee of which Reitz was listed as a member.

Reitz was created a Knight in the Order of the Netherlands Lion (“Ridder der Orde van den Nederlandschen Leeuw”),¹⁷⁵ a Dutch order of chivalry founded in 1815.¹⁷⁶

12 The Reitz family in Batavia¹⁷⁷

Dirk Reitz spent his first few years in Batavia as a bachelor. On 22 September 1831, he married Miss Geertruida Leonora Liesart.¹⁷⁸ Sadly the union did not last long as only four months later, on 22 January 1832, his newly-wed wife passed away.¹⁷⁹

A little more than three years later, widower Reitz found love again. On 19 February 1835, the thirty-nine-year old Reitz married the twenty-two-year old Miss Louisa Johanna van de Poel.¹⁸⁰ The couple had three children.

The eldest, Frederik Geerte Adolph, was born on 17 November 1840 in Batavia.¹⁸¹ Like his father he studied law in the Netherlands, at Leiden, graduating *M Juris* in 1859. Returning to Batavia in 1877, he pursued an illustrious legal and, from 1882, judicial career in the East Indies, culminating in his holding the appointment

175 The royal announcement appeared in the *Almanak en naam-register van Nederlandsch-Indie voor 1851* (Batavia, 1851) at 201 where Reitz’s name appears as one of a large number of such knights. See, also, 6 Dec 1847 *Nederlandsche staats-courant* and 7 Dec 1847 *Rotterdamsche courant*.

176 He is not the only South African-born to be honoured in this way: Paul Kruger and Jan Smuts were subsequently created Knights Grand Cross – a higher rank, awarded only to members of the Dutch and foreign royal families and to foreign heads of state – in the same order.

177 For most of what follows, see <http://www.genealogieonline.nl> (consulted several times in Jan 2016).

178 See 24 and, also, 27 Sep 1831 *Javasche courant*.

179 See 24 and, also, 26 Jan 1832 *Javasche courant*, announcing the death of his “tedergeliefde echtgenoot” in Batavia.

180 See 25 and, also, 28 Feb 1835 *Javasche courant*. She was born 12 Sep 1812 in Batavia, and died Apr 1883 in The Hague (see (1883) 1 *De Nederlandsche Leeuw* 39-40 noting her death; see, also, *South African Genealogies* 2003: 250, which incorrectly gives the date of marriage as “c 1832”). The bride was a daughter from the second marriage of Pieter van de(r) Poel (1786-1833), a civil servant and governor of various regions in the Dutch East Indies. See, eg, (1860) 9 *Tijdschrift voor Indische taal-, land- en volkenkunde (IIIe Serie)* at 76, mentioning Van de Poel as “resident” of the “gewestelijk bestuur van Tagal” in 1833; Knight 2014: 121 n 228, mentioning Van de Poel as local governor (“resident”) of Tegal from 1824 to 1833. She may have had a sister: see 6 and 17 Jul 1839 *Javasche courant*, referring to the departure from Batavia and arrival in Samarang with the Dutch steamer *Van der Capellen* of the passengers Mrs Reitz and “de jonge jufvrouw S van de Poel”.

181 See 21 Nov 1840 *Javasche courant*, announcing the “voorspoedig bevallen van eenen zoon, LJ van de Poel, geliefde echtgenoot van mr DG Reitz”, on 17 Nov. On Frederik, see <http://www.MyHeritage.com> (accessed 13 Jan 2016) sv “Frederik Reitz”; George 2011: 52.

of president of the Court of Justice in Padang from 1897 to 1899.¹⁸² Also a legal author,¹⁸³ Frederik Reitz returned to Europe and died in Paris in 1910.

The couple also had a second son and a daughter, both of whom died young¹⁸⁴ and predeceased their father.

13 The death of Dirk Reitz

After more than thirty years in the tropics, it should probably not come as a surprise that Dirk Reitz too succumbed to disease. In June 1853 he was granted six months' leave to go on a voyage to Japan because of illness, "en zulks met behoud van zijne betrekking".¹⁸⁵ He departed from Batavia at the beginning of July on the Dutch merchantman *Hendrika*,¹⁸⁶ bound for Japan,¹⁸⁷ and in the company of some other local worthies.¹⁸⁸

- 182 Some of his judicial appointments are announced in 15 Sep 1893 *Java-bode*, 15 Sep 1893 *Bataviaasch nieuwsblad*, 15 Sep 1893 *De Locomotief: Samarangsch handels- en advertentieblad*, and 19 Sep 1893 *Soerabaiasch handelsblad* (as vice-president of the Court of Justice in Semarang); 6 Aug 1898 *De Locomotief: Samarangsch handels- en advertentieblad* (as "president van den raad van justitie te Padang"). There is clearly some confusion between father and son in many sources, including JCM 1972, who describes Dirk as having been Chief Justice of Padang.
- 183 Named as Fredericus Georgius Arnoldus Reitz, he was co-compiler, with Louis Antoine de Filliettaz-Bousquet, of a further edition of *De Nederlandsch-Indische wetboeken, benewens de grondwet voor het koninkrijk der Nederlanden zooals zij tot op 9 December 1881 zijn gewijzigd en aangevuld* (The Hague, 1882).
- 184 The son was Bernardus Ferdinandus Franciscus, b Jan 1843, d 28 Mar 1846 (see 14 and, also, 18 Jan 1843 *Javasche courant*, announcing the "bevallen van eenen zoon, de geliefde echtgenoot van mr DG Reitz"); the daughter was Henrietta Laetitia, b Jan 1844, d Jan 1850 (see *Almanak en naam-register van Nederlandsch-Indie voor 1851* (Batavia, 1851) at 425).
- 185 See 18 Jun 1853 *Java-Bode*; 15 Aug 1853 *Algemeen handelsblad*; 16 Aug 1853 *Nederlandsche staats-courant*.
- 186 An 860-ton wooden frigate with copper-sheathing, the *Hendrika* (as to which see <http://www.scheepsindex.nl> and <http://www.marhisdata.nl> (both accessed 8 Feb 2016)), was launched in 1836 in Rotterdam. Plying the Europe-Batavia route for many years (eg, in 1839 the then president of the High Court, Scholten (see n 152 *supra*), returned with her to the Netherlands on sick leave: see Briët 2015: 251-252), she had departed for Batavia from Hellevoetsluis on 23 Nov 1852 (see 29 Nov 1852 *Utrechtsche Provinciale en Stads-courant*), bound for the East Indies and under the command of Capt P Admiraal. Her voyage to Batavia and Japan turned out to be her last, for on 4 Dec 1854 she was lost with all eighty-two souls on board near De Banjaard, a sandbank off the coast of Zeeland.
- 187 The Dutch in the East Indies had been trading on – and clashing with – Japan and operating a factory or trading post there for many decades, from the beginning of the seventeenth century: see Clulow 2014; Boot 2015: 179-202.
- 188 On board were the "pakhuismeester, boekhouder ende scriba" of the Dutch trade mission in Japan, PJ Lange. Also on board were a civil servant R (or K) Graafland; a medical doctor, JK van den Broek; the "pachter van den Kambang handel", AJJ de Wolff; a pensioned official, JR Lange; and a member "der algemene rekenkamer", JH Vemer. The latter, and Reitz, were travelling "tot herstel hunner gezondheid". See 6 Jul 1853 *Java-Bode*; 30 Aug 1853 *Algemeen handelsblad*; 30 Sep 1853 *Rotterdamsche courant*; 2 Sep 1853 *Leydse courant*.

On 7 July, a few days after leaving the Batavian roadstead and while nearing the Banda islands,¹⁸⁹ Dirk Reitz passed away, virtually on the other side of the world from where he was born.¹⁹⁰

Dirk Reitz must have anticipated and feared the worst, for soon after his departure, on 30 July 1853, the *Java-Bode* advertised the upcoming auction, on Monday 1 August, by Vaupel en Co, in front of the residence of the “weledelgestrengen” Mr Reitz, at Rijswijk, of “wagens, en dezelfs goed geconserveerden inboedel, alsmede een Pianino van Herce et Mainé, te Parijs, voor dit klimaat vervaardigd”.¹⁹¹ Sadly, like so many other Europeans, and unlike his musical instrument, Reitz was not made for the local climate.

ABSTRACT

Dirk Gysbert Reitz was born in Cape Town in 1796 and died in the East Indies in 1853. An advocate at the Cape bar in the early 1820s, he emigrated to Batavia where he pursued a successful legal and judicial career. Through his life, we are afforded a snapshot of the state of law and legal administration and practice in two Roman-Dutch jurisdictions, the one by then a British and the other still a Dutch colony.

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189 East of Java, the Banda islands (including Great Banda, Run and Neira), together with the Moluccas and Amboyna, form the Spice Islands. They were occupied by the Dutch in an infamous incident in 1621 after a prolonged Anglo-Dutch rivalry: see Van Ittersum 2016; for a popular account of the events leading up to the Dutch atrocities during their brutal and genocidal conquest of Banda, see Giles Milton’s bestselling *Nathaniel’s Nutmeg: How One Man’s Courage Changed the Course of History*.

190 See 21 and, also, 24 Dec 1853 *Java-Bode* (notice by Louisa Reitz of the death “aan boord van de *Hendrika*, in bestemming naar Japan, van mijn geliefde echtgenoot mr DG Reitz, in leven President van de Weeskamer te Batavia”); see, also, 15 Feb 1854 *Algemeen handelsblad*; 17 Feb 1854 *Leydse courant* (from which it appears that news of his death only became known in Batavia on 15 Dec when the *Hendrika* returned from Japan). Louisa Reitz and her son, Frederik, returned to the Netherlands in 1855 (see 4 Jun 1855 *Nieuwe Rotterdamshe courant*: most coincidentally also on board, after an uninterrupted thirty-nine-year stay in the East Indies, was L Steitz, the pensioned former president of the Orphan Chamber at Batavia and predecessor of Reitz).

191 Cf, again, n 138 *supra*.

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- Wylde v Wylde* (1835) 1 Menzies 269

JP VAN NIEKERK



This overexposed photograph, uncaptioned but presumably of Dirck Gysbert Reitz, is reproduced next to the text describing his career in the genealogical website <http://www.kloek-genealogie.nl/Reitz.htm> (accessed 3 Nov 2015).

JUDICIAL ADMINISTRATION BEYOND THE ORANGE RIVER FROM 1838 TO 1843

Liezl Wildenboer*

Key words: Early administration of justice, Natal; nineteenth century; courts; *landdrost* and *heemraden*; 1838 Regulations; 1841 Regulations; messenger of the court; *schutmeester*; *onder-schout*; *wykmeester*; *venduaflager*; *markmeester*; law agents; Volksraad; Roman-Dutch law; Janssens

Introduction

In Southern Africa a movement known as the Great Trek commenced in 1836. It entailed that groups of people with their families (generally known as the Voortrekkers or simply the Boers) left the Cape Colony and migrated north beyond the Orange River with the purpose of establishing an independent state free from British rule. After the battles at Marikwa in November 1837 and Blood River in December 1838, the main Voortrekker movement split into two with some Boers settling in the area east of the Drakensberg (later Natal) and others settling in the area west of the Drakensberg where they established the towns of Potchefstroom and Winburg (in what would later become the Zuid-Afrikaansche Republiek – or ZAR for short – and the Orange Free State respectively). No longer a nation on the move, the needs of society changed; it now required more than mobile or emergency institutions.

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As a result, more attention was now lavished on the establishment and regulation of governmental structures, such as the Natal Volksraad in 1838. From 16 October 1840 the areas east and west of the Drakensberg were theoretically governed as one territory with an adjunct council appointed for Potchefstroom in February 1841. This adjunct council functioned as a part of the Natal Volksraad and its decisions were considered valid only after confirmation by the Natal Volksraad.¹ This article takes a look at the administration of justice beyond the Orange River in the years after the Great Trek until the adjunct council at Potchefstroom declared itself independent from Natal in August 1843 following the British annexation of Natal.²

2 The 1838 Regulations

The oldest surviving document from this period that deals exclusively with judicial administration is an undated one, with the title *Regulations and Instructions for the Judge or Magistrate and the Ways of Judicial Administration for the Common Good of Port Natal and Environs* (hereafter referred to as the 1838 Regulations).³ These regulations were probably drafted simultaneously with a new, also undated, document (the *Rules and Regulations for the Board of Representatives of the People at Port*

- 1 The adjunct council consisted of twelve members and a sitting required the presence of eight members. The appointment of the council at Potchefstroom is described in the minutes of the Volksraad of 2 Feb 1841 and is published in Preller 1924: 101-108 and in *Volksraadsnotule Natal*: 81-85. The subordinate position of the Potchefstroom council met with resistance and caused considerable debate: see Art 2 of the minutes of the Natal Volksraad of 11 Oct 1841 published in Preller 1924: 155-158 and in *Volksraadsnotule Natal*: 119-121.
- 2 On 15 Jul 1842 a Boer deputation signed a treaty submitting to British authority in Natal: see *Volksraadsnotule Natal*: appendix 14/1842 at 418-419. In a Proclamation dated 12 May 1843, the governor of the Cape Colony, Sir George Napier, declared Natal to be a British colony: see *Volksraadsnotule Natal*: appendix 4/1843 at 435-438. On 7 Aug 1843 the Natal Volksraad assembled at Pietermaritzburg to ratify the treaty and to decide whether or not to adhere to the Proclamation: see the minutes of the Natal Volksraad of 7 Aug 1843 in *Volksraadsnotule Natal*: 177-178. After the members of the Volksraad were sworn in, all the members representing the adjunct council withdrew without casting any vote. Nevertheless, the assembly continued and the Volksraad ratified the treaty and acquiesced to the Proclamation with only one dissenting vote. On 3 Oct 1843 Andries Potgieter wrote a letter to the British authorities in Natal stating that the territory west of the Drakensberg was not considered to be part of the annexed territory and would remain independent: see *Volksraadsnotule Deel I*: xxiii-xxiv. The Burgerraad, meeting at Potchefstroom, and in a letter dated 10 Apr 1844, subsequently declared their independence and confirmed that they did not ratify the treaty of 1842; moreover, they stated that they did not want to negotiate with British authorities at all and expressed the desire to be left unhindered to manage their own affairs: see *Volksraadsnotule Natal*: appendix 5/1844 at 468-469. Britain officially annexed Natal in terms of the Letters Patent dated 31 May 1844: see Eybers 1918: doc 109 at 182-183. Natal became a separate British colony a year later: see the Letters Patent dated 30 Apr 1845 in Eybers 1918: doc 111 at 184-186.
- 3 A copy (and an English translation) of the 1838 Regulations was published as an addendum to the 21 Jun 1839 edition of *De Zuid-Afrikaan*; reprints are also available in *Volksraadsnotule Natal*: appendix 14/1838 at 287-288; Preller 1924: xiii-xvi; Preller 1920: 301-307; and in Preller 1938: 79-84.

Natal and surrounding Country) that provided for a council of twenty-four members who would act as the representatives of the general assembly and would constitute the new legislative body as a predecessor to the Volksraad.⁴ Although most scholars⁵ agree that both these documents were drafted only in October 1838, it is possible that they were drafted as early as May 1838 by a committee under leadership of Jacobus Boshoff⁶ between 25 May and 4 June 1838.⁷ This early date is first supported by the contemporary diary entries of Erasmus Smit who accompanied the Voortrekkers during the Great Trek as a preacher.⁸ Smit mentions that Boshoff and others drafted the instructions for all the officials (“burgerambtenaren”). Boshoff indeed visited the camp of Gerhard Maritz at that time.⁹ Secondly, in a letter published in the *Graham’s*

- 4 This document was published in *De Zuid-Afrikaan* of 21 Jun 1839 (including an English translation) and reprinted in *Volksraadsnotule Natal*: appendix 13/1838 at 285-286. Nieuwoudt 1964: 54 explains that the Volksraad and the Board of Representatives referred to the same organ of state, and that the name “Volksraad” gradually replaced the latter title.
- 5 See Preller 1924: iv; Van der Westhuizen & Van der Merwe 1976: 264; and De Wet 1958: 241-242.
- 6 Jacobus Nicolaas Boshoff was born in Swellendam in 1808. He was educated and later worked in the office of the civil commissioner at Graaff-Reinet for fourteen years. He moved to Natal in 1839 where he assumed various important positions, including that of member (and later chairman) of the Natal Volksraad and as magistrate for Pietermaritzburg: see art 6(a) of the minutes of the Natal Volksraad of 19 Jan 1841 published in *Volksraadsnotule Natal*: 76-77; art 9 of the minutes of the Natal Volksraad of 4 Aug 1841 published in *Volksraadsnotule Natal*: 109-110. As chairman of the Natal Volksraad he had to negotiate with Britain on the surrendering of Natal and was blamed by many of the inhabitants for this. After the British annexation of Natal, Boshoff remained in Natal and was appointed in various positions, including that of registrar, master of the Supreme Court, municipal councillor and member of the land commission. He was nominated as a candidate in the first presidential election of the Orange Free State in 1854 but received very few votes. In 1855 he was elected as the second president of the Orange Free State and served in this capacity until his resignation in 1859. Although his administration has been praised for its excellent and efficient civil service and internal administration, his external policies have received much criticism. He was criticised by pro-British groups for resisting Sir George Grey’s federation plans, and by pro-Boer groups for refusing unification with the ZAR. He died at Pietermaritzburg in 1881. For more on Boshoff’s life, see Anonymous 1968: 104-107. Boshoff was considered to be a “very capable administrator” and “excellent at law-making and routine work”: see Nathan 1937: 238, 247. Although Boshoff’s surname is more commonly spelled using only one “f”, I have chosen to use the double “ff” spelling throughout because that was the spelling used by himself in his letter to the *De Zuid-Afrikaan* (see n 10 *infra*).
- 7 See, also, *Volksraadsnotule Natal*: xlv-xlv where it is argued that the Board of Representatives existed and functioned by 12 Jun 1838. This argument is based on the diary entry by Erasmus Smit where he mentions that Boshoff was elected as president of the Board on that day. See Preller 1988: 142, entry of Tues 12 Jun 1838. The editors of *Volksraadsnotule Natal* point out, however, that it is possible that the Board had been constituted as early as Feb 1838, and that the document setting out its duties and responsibilities was drafted only later. The first written evidence of meetings of the Natal Volksraad dates to Mar 1839.
- 8 For Smit’s diary entries at the time, see Preller 1988: 139, entry of Friday 25 May 1838, and 141, entry of Monday 4 Jun 1838. Erasmus Smit was married to Susanna Catharina, the sister of the Voortrekker leader Gerrit (Gerhardus Marthinus) Maritz.

Town Journal of 23 August 1838¹⁰ – and therefore prior to the traditionally believed date of the drafting of the 1838 Regulations – Boshoff’s description of the judicial administration at the time of his visit corresponds largely to the position in terms of the (until now assumed, later drafted) 1838 Regulations.¹¹ Thirdly, in his description of the case of a young Zulu warrior who was convicted of murder in August 1838, Smit’s diary refers to the Board of Representatives (“Raad van 24 Leden”). This means that the Board acted in an official capacity at least two months before the document outlining its duties and responsibilities was supposed to be drafted.¹² When read together, these three factors indicate that the 1838 Regulations and the document regarding the Board of Representatives were drafted not in October, but in May 1838.

The 1838 Regulations provided for separate civil and criminal jurisdiction and dealt with various related judicial matters. These are now briefly discussed.

Civil disputes regarding claims for not more than twenty *rijksdaalders*¹³ as well as all disputes between landlords and tenants were heard by a magistrate and no appeals were possible. No written testimonies were permitted in such matters.

- 9 As is evident from his letter to *De Zuid-Afrikaan* (see n 10 *infra*). See, also, Theal 1915: 376.
- 10 The letter was reprinted in 7 Sep 1838 *De Zuid-Afrikaan* and is also available in Preller 1938: 28-34.
- 11 Boshoff’s general description stated that Maritz had the same authority and duties as the civil commissioners of the Cape and that the magistrates had jurisdiction in minor civil and criminal matters. Further, six *heemraden* had to assist the magistrate in civil matters concerning amounts of more than £7 10s and in criminal matters with possible penalties of more than £5 or one month imprisonment. No appeals were possible in the latter cases, although appeal was possible in cases concerning higher amounts and with more severe penalties. The death penalty had to be confirmed by the Board of Representatives (Boshoff referred to the *Volksraad* – which is also the term used in the 1838 Regulations), which also had jurisdiction to hear appeals and to remit sentences. The only discrepancy according to Boshoff’s description stated that in criminal cases involving possible exile, corporal punishment, hard labour of more than six months or the death penalty, the magistrate of that district would preside as judge along with a jury of twelve men, and therefore without the six *heemraden* as additionally required by the 1838 Regulations. Also, Boshoff viewed the Board’s authority to review or confirm sentences as an indication of the right to appeal in all criminal matters. Art 19 of the 1838 Regulations indeed provided that the Board (*Volksraad*) had to confirm all criminal sentences but did not refer to a general right of appeal in those cases.
- 12 See Smit’s description of the case in Preller 1988: 153, entry of Thursday 16 Aug 1838 and 157-160, entry of Friday 31 Aug 1838. The Board requested Smit to provide religious counselling to the warrior after they confirmed the accused’s death sentence.
- 13 “Rds” or *rijksdaalder*(s) (English: rix-dollar) refers to the Dutch currency unit introduced to the Cape by the Dutch East India Company at the end of the seventeenth century. Due to a shortage of coins in circulation, a paper version of the *rijksdaalder* was issued in 1782. These notes were hand-written and hand-stamped and were valued at forty-eight *stuivers* each. Due to the continuous shortage of minted money, the paper money remained in circulation even after the British occupations of the Cape of 1795 and 1806. In 1810 more *rijksdaalders* were issued with a Britannia stamp. The value of the *rijksdaalder* steadily declined until it was fixed at one shilling and sixpence from 1 Jan 1826. In 1831 it was decided to replace *rijksdaalders* with sterling promissory notes and the last date for exchanging money was 31 Mar 1841. Despite these steps, *rijksdaalders* remained in circulation after this date and was also used by the Voortrekkers. During

It is not clear whether appeals in these minor cases were prohibited to discourage litigious parties from occupying the court rolls for matters seen as trivial, or whether the nature of such cases inherently excluded appeal. Civil disputes regarding claims for more than twenty *rijksdaalders* were heard by a magistrate and six (or at least four – see below) *heemraden* within one year. Appeals were heard by a magistrate and twelve jury members, in which case consensus among two thirds of the jury was required. Magistrates had to issue and sign all summonses¹⁴ and they had to keep a record of all cases heard.

The jurisdiction with regard to criminal cases was also stipulated. Cases regarding offences demanding fines of no more than ten *rijksdaalders* or imprisonment of no longer than eight days were heard by a magistrate only. More serious offences were heard by a magistrate and six¹⁵ (or at least four – see below) *heemraden* who could impose sentences involving fines of up to £5 or imprisonment of one month. Those cases which could result in a sentence imposing exile or the death penalty had to be heard by a full panel consisting of a magistrate, the *heemraden* and twelve jury members. In such a case the sentence was imposed by the magistrate and the *heemraden* only if the members of the jury had unanimously found the accused guilty. All sentences had to be confirmed by the Volksraad and the Volksraad could commute or remit sentences.¹⁶

The 1838 Regulations also dealt with other matters concerning the administration of justice such as the appointment of magistrates, *heemraden* and other officials to assist the magistrate with administrative duties. *Heemraden* were appointed for a period of one year. It was not unheard of for *heemraden* to be unable, for whatever reason, to fulfil their duties. However, the only valid excuse for non-fulfilment

the early years of the ZAR, the *rijksdaalder*, as well as the British sterling system, was used until 1868 when the sterling system became the exclusive currency of the Republic. See Shaw 1956: 4-19. For purposes of this article, all references to amounts expressed in *rijksdaalders* will be written out (except in direct quotes) as the abbreviation, Rds, is not well known.

14 For an example of a summons signed by the magistrate of Pietermaritzburg, see Pretorius, Kruger & Beyers 1937: R91g/42 dated 9 Mar 1842 at 156.

15 The 1838 Regulations does not specify the number of *heemraden* required for a criminal trial, but merely stipulates that all criminal cases, where a fine of up to £5 or imprisonment of up to one month can be imposed, will be decided by the magistrate together with his *heemraden* in the same way as in civil disputes. As mentioned above, the number of *heemraden* presiding with a magistrate in civil disputes was six. One can therefore assume that the presence of all six *heemraden* were required for a criminal trial.

16 Although the Volksraad could commute or remit sentences, an exception was made in cases where the accused was a member of the Volksraad. This is illustrated by a complaint of one FM Wolluter against CV Buchner, a member of the Volksraad. The court *a quo* had convicted Buchner of assault and had ordered him to pay a fine of 10 shillings or “Rds. 6:5:2”. The original document outlining the complaint has not survived and it is therefore unclear what the basis of the complaint was. Wolluter was probably dissatisfied with the amount of the fine and deemed the original fine too lenient. The Volksraad referred the case to a jury of twenty-four members: see art 9 of the minutes of the Volksraad of 12 Aug 1840 in *Volksraadnotule Natal*: 56-57 esp n 75. There are no further references to this case and it is unclear what the jury’s decision was.

of such duties was when a person with *heemraden* status moved to another area outside the jurisdiction of the court; for all other circumstances a heavy fine of fifty *rijksdaalders* could be imposed. Nevertheless, such absences could not be allowed to interfere with or delay the execution of justice and that is why, under special circumstances, in both civil disputes and criminal hearings, the required number of six *heemraden* could be reduced to four. More importantly, the view of the majority then represented the final decision of the court.

A magistrate could appoint or dismiss persons to assist him in his duties. The official who was, arguably, of the greatest value to a magistrate in the execution of his duties, was the clerk or messenger of the court. In June 1839 the Volksraad issued instructions to H Maartens regarding his duties as messenger of the Volksraad and simultaneously as a provisional messenger for the Pietermaritzburg magistrate's court.¹⁷ Six months later a (presumably permanent) messenger for the same court was appointed, although his identity is uncertain.¹⁸ The remuneration of the messenger of the court was fixed at twenty-five *rijksdaalders* per month.¹⁹ When a messenger of the court was threatened, assaulted or in any other way prevented from performing his duties, he could request military assistance from the nearest field-cornet. In those cases the culprits could be arrested and brought before the nearest court and could be released on bail of 1000 *rijksdaalders* until their appearance at the next court hearing. However, a messenger of the court who requested the assistance of the field-cornet unnecessarily or due to cowardice could be fined up to 100 *rijksdaalders* or even be dismissed at the discretion of the court.²⁰

Other officials that were appointed included a pound keeper (*schutmeester*),²¹ an *onder-schout* who was responsible for prisoners,²² as well as a ward master (*wykmeester*),²³ an auctioneer (*venduafslager*)²⁴ and a market master (*markmeester*).²⁵ Although all these appointments had to be confirmed by the Volksraad, the magistrate usually played a role in recommending suitable persons, supervising the officials or

17 Art 13 of the minutes of the Volksraad of 29 Jun 1839 in *Volksraadsnotule Natal*: 12-14.

18 Art 13 of the minutes of the Volksraad of 3 Jan 1840 in *Volksraadsnotule Natal*: 26-28. It is not clear from the documentation if the person appointed on this occasion was IP Hammes or J Gouws.

19 Art 8 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34.

20 Arts 4 and 5 of the minutes of the Volksraad of 13 Mar 1843 in *Volksraadsnotule Natal*: 172-173.

21 Art 13 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177.

22 HJ Martens was appointed as *onder-schout* for Pietermaritzburg in 1840 upon request of magistrate Zietsman. See art 7 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34 and appendix 9/1840 in *Volksraadsnotule Natal*: 323.

23 Art 5 of the minutes of the Volksraad of 20 Feb 1843 in *Volksraadsnotule Natal*: 171-172. Regarding the instructions for ward masters, see appendix 3/1843 in *Volksraadsnotule Natal*: 434-435.

24 Art 1 of the minutes of the Volksraad in *Volksraadsnotule Natal*: 22-23.

25 Art 3 of the minutes of the Volksraad of 13 Mar 1843 in *Volksraadsnotule Natal*: 172-173. Regarding the instructions for market masters, see appendix 22/1842 and appendix 29/1843 in *Volksraadsnotule Natal*: 431 and 465 respectively.

in drafting the instructions for the various offices. In October 1842 the Volksraad also appointed J Bodenstein as the first public prosecutor with an annual salary of 1000 *rijksdaalders* plus a quarter of all fines imposed by the courts.²⁶ The Regulations further defined the duties of field-cornets, who assisted the magistrate in executing court decisions in both civil and criminal matters. A field-cornet who did not perform his duties could be fined twenty-five *rijksdaalders* per journey.

The 1838 Regulations further provided for the appointment of jury members in certain cases, namely in appeals in civil disputes, and in criminal matters involving serious offences with the possibility of a sentence of exile or the death penalty. All citizens (“burgers”) between the ages of twenty-one and sixty without physical disabilities such as blindness or deafness were obliged to make themselves available for jury duty. Although not stated explicitly, it is assumed that “citizens” included men only as the evidence suggests that women were not allowed to vote and could not perform official duties. A magistrate had to compile an annual list of all the eligible jury members within his jurisdiction and from this list had to subpoena twenty-four persons for each court sitting that required jury members, taking into account the health and possible absence of individual members. This latter provision implies a close-knit society in which the magistrate was acquainted with the personal circumstances of the members of his local community. Refusal to comply with jury duty carried a fine of twenty-five *rijksdaalders* for each summons. A person was prohibited from sitting as a member of the jury in cases in which he had any interest or where any of the parties in a civil dispute, or the accused in a criminal case, was related to him. In addition, any of the parties in a civil dispute or the prosecutor in a criminal case could request that a maximum of three persons subpoenaed for jury duty be dismissed without giving any reasons.

The 1838 Regulations also provided for fixed charges regarding legal costs. The magistrate and the *heemraden* had to draft a tariff for legal costs, subject to approval by the Volksraad. The costs were payable by the parties to a dispute. In February 1841 the Volksraad approved such a tariff drafted by magistrate Jacob de Klerk.²⁷ The fixed tariff concerned those costs due to court officials in civil proceedings and included amounts in respect of citations, copies of documents, the recording of testimonies, judgements handed down, letters of execution and costs incurred by the messenger of the court, such as the renting of horses with regard to criminal proceedings. In another bill of costs dated January 1842, fees included those for the issuing of summons, the messenger of the court, and those incurred by four witnesses.²⁸

26 On the appointment of the public prosecutor, see art 2 of the minutes of the Volksraad of 4-6 Oct 1842 in *Volksraadsnotule Natal*: 160-165. See, also, n 44 *infra*.

27 Art 13 of the minutes of the Volksraad of 2 Feb 1841 in *Volksraadsnotule Natal*: 81-85. On that occasion, the Volksraad gave permission for the messenger of the court to claim, in addition to his monthly allowance of twenty-five *rijksdaalders*, for any expenses incurred when renting horses in the course of his duties with regard to criminal proceedings.

28 Pretorius, Kruger & Beyers 1937: R91b/42 dated 18 Jan 1842 at 153.

Anybody who prevented a magistrate or any other official from exercising his judicial duties or who threatened or resisted such an official, could be arrested and was liable for a fine or imprisonment. In addition, anybody who insulted a magistrate or the court by way of word, deed, threat or attitude was liable for a spot fine of ten *rijksdaalders* for each transgression. Refusal to pay the fine could lead to imprisonment for a period of eight days per transgression.²⁹

Lastly, emphasis was placed on the impartiality and good behaviour of magistrates. A magistrate was required to take an oath upon appointment. He could not preside at or sit in on civil or criminal cases where his private interests were at stake or where the parties involved were related to him. In the event of such conflict of interests one of the *heemraden* had to preside. Further, the Volksraad could dismiss a magistrate from service and charge him accordingly by way of the normal judicial processes if convinced of his intentional partiality or abuse of authority in the performance of his duties if he behaved disgracefully or committed an offense. This is illustrated by a dispute between then magistrate Zietsman of Pietermaritzburg and PJ Hames in August 1840. The Volksraad referred the dispute to a jury of twenty-four members with one of the members of the Volksraad presiding. Zietsman was suspended until the matter was finalised.³⁰ Unfortunately the outcome of the dispute is uncertain. Zietsman resigned shortly thereafter, although the circumstances suggest that he was still respected as a judicial official. He was not only officially thanked by the Volksraad for fulfilling his duties as magistrate, but also re-appointed three years later.³¹

3 The 1841 Regulations

On 8 October 1841, the Volksraad approved and accepted a document with the (translated) title *Regulations and Instructions for the Magistrates and Heemraden of the Various Divisions or Districts in the Republic of Natal* (hereafter the 1841 Regulations). Although the 1841 Regulations to a large extent confirmed the position set out in the 1838 Regulations, a few changes were incorporated.³²

In civil disputes, appeals against judgements of the court of magistrate and *heemraden* were no longer heard by a magistrate and a jury, but in future would be

29 See, also, art 1 of the minutes of the Volksraad of 8-10 Aug 1842 in *Volksraadsnotule Natal*: 157-159 which provided that persons posing bodily danger to the magistrate or other court officials could be physically restrained or arrested or, in certain circumstances, threatened, injured or killed.

30 Regarding the dispute between Zietsman and Hames, see arts 1 and 2 of the minutes of the Volksraad of 11 Aug 1840 in *Volksraadsnotule Natal*: 55.

31 Art 1 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177.

32 See art 2 of the minutes of the Volksraad of 8 Oct 1841 in *Volksraadsnotule Natal*: 115-116. A Dutch copy of the 1841 Regulations was published as appendix 22/1841 in *Volksraadsnotule Natal*: 380-381. I referred only to this copy and the translation of the title is therefore my own.

heard either by the Volksraad or by a court of appeal appointed by the Volksraad. This clearly impacted on the independence of the judiciary as the legislature could now interfere with decisions of the courts at the highest level.³³ Also, in criminal cases, appeals were no longer possible for minor offences with a maximum fine of £5 or imprisonment of up to one month. These minor offences now also included complaints by employers against their employees. A new category of punishment, namely corporal punishment for “heathens” and persons of colour, was added to these minor offences. However, an appeal was possible in the case of more serious crimes involving larger fines or longer terms of imprisonment. Although the Volksraad no longer had to confirm all sentences (with the exception of the death penalty), it still had the authority to commute or remit a sentence. Also, the minimum members of the *heemraden* for a court sitting was reduced from four to three, and the majority decision carried. In the event of a split decision, the magistrate had the determining vote. In those cases where the magistrate was unable to take part in the proceedings due to a conflict of interests or illness, one of the members of the *heemraden* would preside.

Other smaller changes meant that the tariffs of costs would in future be determined by the Volksraad and no longer by the magistrate. An interesting addition provided that any person, who, through inappropriate behaviour or in any other way, disrupted court proceedings, was now liable for a fine or imprisonment. This latter addition implies that incidents of disruptive behaviour in the courts were not unknown.³⁴

As indicated by its title, the 1841 Regulations applied to all the magisterial districts of Natal at that time, namely Pietermaritzburg, Port Natal and Weenen.³⁵ Nevertheless, there were differences and discrepancies in the administration of justice in civil proceedings in the various districts as is evident from a suggestion made to, and the subsequent discussion thereof, in the Volksraad in January 1842. After debating the matter, the Volksraad decided that it was in favour of a uniform approach.³⁶

33 See, also, 4 5 and 4 6 *infra*.

34 In Sep 1840 the Volksraad instructed the commandant-general to place a guard of ten men with a supervising official at each general assembly and at sittings of the court of magistrate and *heemraden* due to the occurrence from time to time of irregularities and confusion at such events. See art 25 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65.

35 It appears that, if not all, then at least some of the 1838 Regulations (and probably the 1841 Regulations) applied also to the territory west of the Drakensberg. Articles 1-15 of an undated document containing instructions for the magistrate and *heemraden* at Potchefstroom were similar to the first fifteen articles of the 1838 Regulations: see *Volksraadsnotule Natal*: 287 n 20. This supports the view that the districts of Potchefstroom and Winburg, together forming the territory west of the Drakensberg, were subject to the same regulations regarding the administration of justice as the magisterial districts in Natal.

36 Art 4 of the minutes of the Volksraad of 7 Jan 1842 in *Volksraadsnotule Natal*: 130-132.

4 Other prescriptions regarding judicial administration

4 1 The procedure in *Pretorius v Maritz*

A letter of instruction³⁷ – dated 12 March 1840 by the acting clerk of the Volksraad to the magistrate of Pietermaritzburg – provides some insight into the court procedure of that time. The magistrate received instructions for the procedure to be followed in the case between the well-known leader Andries Pretorius³⁸ and Johannes Stephanus Maritz (the elder brother of Gerrit Maritz, another well-known Voortrekker leader who had died two years earlier in September 1838).³⁹ The prescribed procedure differed from that laid down in the 1838 Regulations. The reason for the deviation in the procedure was probably the important governmental positions of both parties. At the time, Pretorius was the commandant-general (or military leader) of the Boers and Maritz was the chairperson of the Volksraad. The dispute between Maritz and Pretorius was seen as a matter of national importance and therefore required additional measures to insure impartiality, transparency and good governance. Despite these additional measures implemented in this case, which will be pointed out below, the letter still sheds some light on the court procedure adhered to during this period and is therefore worth mentioning here.

Although the dispute was officially presented as a case of libel brought by Pretorius against Maritz,⁴⁰ it has been argued that the origin of the dispute was political in nature and concerned the position of Pretorius as commandant-general.⁴¹

37 See appendix 16/1840 in *Volksraadsnotule Natal*: 342-343.

38 Pretorius, after an earlier reconnaissance expedition to Natal, officially joined the Voortrekkers there in Nov 1838 when he was appointed as the military leader. It was under his command that the battle at Blood River took place a month later. Pretorius, however, also acted as representative of the Voortrekkers in later negotiations with the British, among which the Sand River Convention of 1852 in which the ZAR was declared an independent state by Britain. Pretorius died shortly after in 1853. For more on Pretorius, see Liebenberg 1972: 559-567; Nathan 1937: 45.

39 Johannes Maritz later resigned from his position as chair of the Volksraad in Mar 1840, but he remained a member of it until 1845. After the British annexation he was involved in the drafting of a constitution for Natal. He also served as magistrate for Port Natal from Apr 1841 to Mar 1842. For more on him, see Leverton 1977: 581-582. His brother, Gerrit Maritz, had been elected as the first Voortrekker leader and judge at a general assembly on 2 Dec 1836 and had been the most important judicial official during the Great Trek until his death. For more on Gerrit Maritz's life, see Thom 1947: *passim*; Thom 1976: 509-513; and Nathan 1937: 43-44. For more on Maritz's judicial career during the Great Trek, see my unpublished article on the administration of justice beyond the Orange River during the Great Trek.

40 In his statement, Pretorius accused Maritz of damaging his (Pretorius') honour and character by making the following statement in the presence of third parties: "Pretoris: Die Beeste-dief, Valschaart, onderduimsche, Hy is nu in geleegenheid gesteld om alle menschen om te haalen &c." (Pretorius: The cattle thief, deceiver, underhanded, has now been given the opportunity to convince all people etc.) Pretorius claimed an amount of £200 in damages. See appendix 17/1840 in *Volksraadsnotule Natal*: 343.

41 For more detail on the alleged facts of the dispute, see Liebenberg 1972: 559-567.

As a result, the Volksraad instructed the magistrate of Pietermaritzburg to summon a total of twenty-four “wise” persons from *all* the districts for possible appointment as jury members, of which twelve could be rejected by the parties. The magistrate had to send a letter to the parties (not a summons) requesting them to appear before him, the *heemraden*, the elected twelve jury members and the Volksraad on a specified date. Both parties would be given the opportunity to put their case to the court and to present witnesses. After all the proceedings had been carefully investigated and recorded, each party would have the opportunity to speak in his own defence. The jury then had to reach a verdict. Thereafter the magistrate had to submit the complaint of each party as well as the verdict of the jury to the Volksraad. At this point the parties, the magistrate, the *heemraden* and the jury had to leave the room while the Volksraad determined the sentence. The matter was set to be heard on 1 April 1840, but was eventually postponed indefinitely and presumably settled out of court as no further documentation on this matter could be found. Nevertheless, this dispute serves to illustrate that in special circumstances the Volksraad intervened in the judicial process and established a special court with adapted court procedures. In this case the adaptations included a prescribed procedure that differed with regard to the constitution of the jury, the requesting rather than summoning of the parties to the hearing and, importantly, the sentencing by the Volksraad rather than by the magistrate and *heemraden*.⁴²

4 2 Instituting criminal proceedings

Until 1842 criminal proceedings apparently commenced with charges in writing submitted, supposedly by any individual, to the local magistrate. This is implied in a response⁴³ of the Volksraad in 1840 to the magistrate of Pietermaritzburg who had enquired on the process to be followed with regard to certain individuals sent to him by the chief commandant (*hoofdcommandant*, the title of the military commander at that time), but without the required written charges. The Volksraad responded that the individuals should be brought before the court of magistrate and *heemraden* and that witnesses should be invited to testify. Further instructions provided that those accused against whom no testimony was received, should be released.

In September 1842 the procedure of written charges by any individual was replaced when a public prosecutor was appointed for all criminal hearings in the court of magistrate and *heemraden* (in other words for all offences with the possibility of a fine of more than ten *rijksdaalders* or imprisonment of more than eight days). The person appointed at the time was J Bodenstein, who was simultaneously also

42 See art 2 of the minutes of the Volksraad of 1 Apr 1840 in *Volksraadsnotule Natal*: 38-39 esp 38 n *; art 11 of the minutes of the Volksraad of 4 Apr 1840 in *Volksraadsnotule Natal*: 41-42; and art 26 of the minutes of the Volksraad of 17 Nov 1840 in *Volksraadsnotule Natal*: 68-70.

43 Art 1 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34.

appointed as temporary secretary of the Volksraad.⁴⁴ His duties as public prosecutor included the drafting of contracts between servants and masters as well as the apprenticing of orphans. Bodenstern remained the public prosecutor until September 1844 when he was succeeded by JP Muller.⁴⁵

4 3 Conditions for sale in execution

In April 1843 it was resolved that in cases involving amounts of more than 100 *rijksdaalders*, sale in execution could not take place before three months after a decision of the court had passed.⁴⁶

4 4 The review of sentences

As already stated, both the 1838 and the 1841 Regulations provided that the Volksraad could commute or remit sentences. There are a number of such cases reported in the minutes of the Volksraad between 1838 and 1843 where persons convicted of crimes applied to have their sentences mitigated or set aside. Although the minutes do not provide any detail on the deliberation process or the reasons for final decisions, it is clear from the variety of these decisions that the Volksraad took into account the personal circumstances of each applicant and based its decision on the merits of a case. These wide-ranging decisions included postponement of a sentence,⁴⁷ commuting of a sentence to six months with additional public work,⁴⁸ commuting of a sentence to one month imprisonment,⁴⁹ setting aside of a sentence,⁵⁰ reducing a fine⁵¹ and commuting a sentence subject to the provision of guarantees.⁵²

44 Art 2 of the minutes of the committee of the Volksraad of 10 Sep 1842 in *Volksraadsnotule Natal*: 159-160. See, also, n 26 *supra*.

45 Art 7 of the minutes of the Volksraad of 3 Sep 1844 in *Volksraadsnotule Natal*: 190-191.

46 Art 2 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177. It is submitted that this provision applied to civil claims, as fines in criminal proceedings were apparently rare. Most of the cases mentioned in the minutes of the Volksraad involved punishments such as shackling, imprisonment or hard labour. Moreover, it seems improbable that execution of sale would apply to criminal fines. See, also, the minutes of the Volksraad of 17 Jan 1842 in *Volksraadsnotule Natal*: 137-138 where the Volksraad granted a suspension of a planned execution of sale subject to certain conditions.

47 Art 2 of the minutes of the Volksraad of 7 Nov 1839 in *Volksraadsnotule Natal*: 20.

48 Art 14 of the minutes of the Volksraad of 2 Jan 1840 in *Volksraadsnotule Natal*: 25-26.

49 Art 11 of the minutes of the Volksraad of 7 Oct 1841 in *Volksraadsnotule Natal*: 113-115.

50 Art 10 of the minutes of the Volksraad of 3 Jan 1840 in *Volksraadsnotule Natal*: 26-28.

51 Art 23 of the minutes of the Volksraad of 4-6 Oct 1842 in *Volksraadsnotule Natal*: 160-165.

52 Arts 4 and 5 of the minutes of the Volksraad of 4 Oct 1841 in *Volksraadsnotule Natal*: 111. The Volksraad decided on 6 Oct 1841 that the applicants had to provide two guarantees of £100 each before 14h00 the next day. In the case of non-compliance, the sentences of the court *a quo* would stand. See art 1 of the minutes of 6 Oct 1841 in *Volksraadsnotule Natal*: 112-113. Despite the magistrate's reservations about finding persons willing to sign such guarantees, this decision was confirmed two days later: see art 1 of the minutes of the Volksraad of 8 Oct 1841 in *Volksraadsnotule Natal*: 115-116.

4 5 A court of appeal

As already mentioned, the 1841 Regulations amended the 1838 Regulations with regard to civil appeals in cases regarding claims of more than twenty *rijksdaalders*. Such cases would no longer be heard by a court of appeal consisting of a magistrate and twelve jury members, but by the Volksraad or by a court of appeal appointed by it. The reason for this change is not clear.⁵³

As early as September 1840 the magistrate of Pietermaritzburg petitioned the Volksraad to establish a court of appeal consisting of five members of the Volksraad.⁵⁴ In April of the next year, and before the promulgation of the 1841 Regulations, it was decided that until further notice, all appeals would be heard by the Volksraad.⁵⁵ The first recorded civil appeal case was heard by the Volksraad two months later⁵⁶ and at least one more was minuted during this period.⁵⁷ All civil appeals had to be submitted to the Volksraad by the relevant magistrate and non-compliance resulted in dismissal.⁵⁸

4 6 Independence of the courts

It is clear that the Volksraad indeed had certain judicial responsibilities. These included to sit as or to establish a court of appeal and to commute or remit sentences passed by a court *a quo*. Nevertheless, apart from these stipulated judicial responsibilities, the Volksraad appears reluctant to have interfered with the courts. Responding to a public petition against the taking of an oath in civil proceedings, the Volksraad for example stated that it had no jurisdiction to prescribe to the courts when declarations

53 Possible reasons for this change could have included the difficulty in arranging for a panel of twelve jury members for each sitting of the court of appeal, the reluctance of the jury members to travel such great distances and the general inconvenience jury duty caused.

54 See art 13 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65. The Volksraad was not averse to the petition and requested the magistrate of Pietermaritzburg (Zietsman), the former magistrate of Port Natal (Roos) and the secretary of the Volksraad (Burger) to submit a proposal at the next sitting of the Volksraad.

55 Art 8 of the minutes of the Volksraad of 13 Apr 1841 in *Volksraadsnotule Natal*: 94-95.

56 Art 1 of the minutes of the Volksraad of 14 Jun 1841 in *Volksraadsnotule Natal*: 95-96. This case concerned a dispute over a farm between Philip Raath and Jurgen Potgieter.

57 Art 22 of the minutes of the Volksraad of 2-4 Jan 1843 in *Volksraadsnotule Natal*: 167-170. This case was an appeal by HC Vermaas against a Potchefstroom court order instructing him to pay an amount plus costs to Hans Grobler. The Volksraad overturned the court order and instructed the magistrate of Pietermaritzburg to send the tariff of costs to the magistrate of Potchefstroom.

58 The matter of non-compliance is illustrated by the following case. Despite being one of the highest ranking officials at the time, Andries Pretorius's request for an appeal was summarily dismissed by the Volksraad because the appeal had not been lodged by the relevant magistrate and due process had not been followed. Pretorius was, however, given permission to appeal at the next sitting of the Volksraad should it be found that the magistrate in the original case was to be blamed. See art 19 of the minutes of the Volksraad of 2-4 Jan 1843 in *Volksraadsnotule Natal*: 167-170.

had to be taken under oath.⁵⁹ Indeed, the Volksraad viewed the independence of the courts and the rule of law of sufficient importance to request that an officer and ten guards be assigned to keep order at each sitting of the court of magistrate and *heemraden*.⁶⁰

4.7 Legal representation

No mention is made of attorneys or advocates during this period. The only legal representatives active at this time were the law agents who functioned as a lower branch of the legal profession.⁶¹ Persons travelling without their families were not permitted to appear as law agents in the courts.⁶² The purpose of this provision was probably to encourage law agents to settle within the area they wished to work in, rather than travelling to and from, for example, the Cape. The tariff of fees of law agents was approved only in March 1844⁶³ and it seems that law agents could charge whatever they had wanted before that time.

5 The law applied

During this period, Roman-Dutch law applied. Article 12 of the 1838 Regulations and article 9 of the 1841 Regulations provided that the law applicable would be Dutch civil and criminal law but only in those cases where local regulations and legislation were silent.⁶⁴

The 1841 Regulations further provided that the judicial administration in both civil and criminal cases, unless otherwise prescribed, should follow the forms and practices used by the Cape courts, but only in so far as the local circumstances permitted. It is possible that the reference to these Cape forms and practices may have included regulations passed by the Dutch authorities while the Cape had still been under Batavian rule. A cursory comparison between, for example, the 1805 provisions issued by governor Janssens and what little is known about the

59 Art 18 of the minutes of the Volksraad of 2 Feb 1841 in *Volksraadsnotule Natal*: 81-85. The Volksraad was, however, adamant that no person should be compelled to take an oath if he or she did not understand the full effect thereof.

60 Art 25 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65.

61 In the days before railways, telegraphs or a rigid legal education, and particularly in those areas with insufficient numbers of legal practitioners, persons with an interest in the law could practise as law agents without any required legal training and for a nominal fee. Whereas attorneys were required in terms of the 1829 Cape Rules of Court to serve five years of articles, no similar requirement was set for prospective law agents.

62 Art 14 of the minutes of the Volksraad of 17 Nov 1840 in *Volksraadsnotule Natal*: 68-70.

63 Art 2 of the minutes of the Volksraad of 4 Mar 1844 in *Volksraadsnotule Natal*: 183-185.

64 This was again emphasised in the Apr 1842 deed of cession in favour of the king of the Netherlands that was signed by the president and members of the Volksraad: see appendix 5/1842 in *Volksraadsnotule Natal*: 408-410. Nothing ever came of this deed of cession and Natal was shortly thereafter annexed by Britain. For an example of the direct application of Dutch law, see art 9 of the minutes of the Volksraad of 2 Jan 1840 in *Volksraadsnotule Natal*: 25-26 which provided that persons resisting a Volksraad instruction would be regarded as *oproermaakers* (seditionists or agitators) in accordance with Dutch law.

administration of justice beyond the Orange River before 1843 certainly suggests that the latter showed more than a passing resemblance to the former.⁶⁵

Interestingly, the Volksraad was in possession of “de wet boek van de Vereenigde Staaten van America”, presumably a copy of the 1787 Constitution of the United States of America. The document was a gift from one “docter Tjampion” and was officially presented to the Volksraad by a Mr Croot in August 1840.⁶⁶ Scholars have suggested that this document influenced the constitutional development in the ZAR

65 See *Volksraadsnotule Natal*: 15 n 20 where mention is made by the editors of an 1838 instruction to similar effect referring to the ordinance of “gouverneur Janssen”: see, also, Wypkema 1939: 202 n 3. However, no such instruction has ever been found. The ordinance mentioned here referred to the provisions and instructions for the management of the outlying districts of the Cape of Good Hope issued by Governor Janssens on 23 Oct 1805 as instructed by General De Mist. Janssens had issued these instructions when the Cape was under Batavian rule, albeit a mere three months before the British arrived at the Cape for the second occupation in early Jan 1806. These instructions were very extensive (containing 328 in total) and included instructions to the magistrate, the colleges, secretaries, field-cornets, messengers and other minor officials. The instructions divided the outlying districts of the Cape of Good Hope into five districts, namely Stellenbosch, Zwelldam, Graaff-Reinet, Uitenhage and Tulbagh and established a *Kollegie van Landdrost en Heemraden* for each district. Each “Kollegie” (or college) would consist of a *landdrost* and six notable inhabitants as *heemraden*. In general, the colleges were responsible for education, the protection of property, for matters concerning the indigenous peoples and for the improvement of agriculture and stock-breeding. The colleges further had judicial authority and were subordinate to the *Raad van Justitie*. It had limited civil jurisdiction but no criminal jurisdiction. All criminal matters and appeals were heard by the *Raad van Justitie*. All court proceedings before the colleges were heard and deliberated *de plano* (extrajudicially) and orally and had to be finalised within six weeks: see Visagie 1969: 107 n 28. The instructions further provided that the *landdrost* would be appointed by the governor-general and would represent the government. The *landdrost* was subordinate to the attorney-general in all criminal matters. The *landdrost* was responsible for the welfare of his district and for that reason had to be familiar with the persons living in his district. Other duties of the *landdrost* included encouraging education; sending out military commando’s; keeping a register of all farms and plots; assisting with receiving of revenue; reporting ship wrecks; reporting and prosecuting all criminal matters that took place in his district before the *Raad van Justitie*, although he was allowed to delegate the latter duty to an advocate; seeing to the welfare of slaves; ensuring peaceful religious gatherings; and taking an official oath. Duties of the colleges included receiving revenue; approving payments from district funds; officiating as members of the marriage council; obtaining evidence on behalf of the *Raad van Justitie*; assisting at inquests; building, repairing and maintaining public roads; ensuring that measuring scales be in accordance with prescribed regulations; issuing *keuren* and ordinances regarding bakeries and butcheries; ensuring measures for fire prevention; ensuring the good treatment of persons in custody; and taking an official oath. Wypkema 1939: 201-202 is of the opinion that, in general, these instructions of Janssens were used to a great extent in Natal before 1845. For a copy of the provisions, see Eybers 1922: 81-178. For a discussion of the 1805 instructions, see Venter 1940: 29-31; Visagie 1969: 108-110; Van der Merwe 1926: 145-152. For more on Janssens, see Spies 1977: 453-455 and Van der Merwe 1926: 51-61; and on De Mist, see Murray 1972: 174-179 and Van der Merwe 1926: 7ff.

66 Art 2 of the minutes of the Volksraad of 6 Aug 1840 in *Volksraadsnotule Natal*: 49-50.

and especially the Orange Free State in later years; however, it is an open question whether it had any impact on the early Natal constitutional documents.⁶⁷

6 Conclusion

During the period between 1838 and 1843, the administration of justice in the area beyond the Orange River was by no means sophisticated. Although the administration of justice was regulated to a certain extent, the detail of the legal processes remains unknown. It appears that the court proceedings followed certain formal requirements, but because no written law reports of the period remains, it is unclear how the courts formulated their arguments or what the reasons for their judgements were. However, the law that was applied was the law of the Cape as the people had known it during the Batavian rule and in the years thereafter. Also, both the 1838 and the 1841 Regulations stipulated that Roman-Dutch law applied, albeit always subject to local regulations and legislation.

ABSTRACT

This article looks at the early administration of justice beyond the Orange River for the period from 1838 to 1843. During this time the areas east and west of the Drakensberg were administered as one by the Volksraad seated at Pietermaritzburg (east) and the adjunct council seated at Potchefstroom (west). Since no law reports for this period exist, not much is known about the administration of justice at the time. However, the 1838 and 1841 Regulations give some indication of the basic judicial structures and jurisdiction of the courts. Further deductions can be made from the minutes of the Volksraad during this period as well as a few additional documents that have survived. Lastly, this paper also considers the law that was applied during this period.

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67 It has been argued that the 1854 and 1858 Constitutions of the Orange Free State and the ZAR had both been influenced by the constitutions of not only the United States of America, but also that of the Netherlands and France. According to Scholtz 1937: 21-27 the 1854 Constitution of the Orange Free State, in particular, showed striking resemblances to the American Constitution. See, further, Verloren van Themaat 1954: 145-150; Thompson 1954: 52, 57-59.

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Roberto de Ruggiero, Salvatore Riccobono & Filippo Vassalli
*Lezioni 1930 – 1932. Scuola di Diritto Romano e Diritti Orientali
 raccolte da Károly Visky*

(A cura di Gábor Hamza; introduzione di Oliviero Diliberto; trascrizione e note al testo di Livia Migliardi Zingale; Pubblicazioni del Dipartimento di Scienze Giuridiche, Università degli Studi di Roma “La Sapienza”, vol 101, Jovene Editore, Napoli, 2015, 161pp)

1 This book was recently published, in Italian, by the Faculty of Law of the University La Sapienza of Rome. It was edited by Professor Gábor Hamza (Professor at the Eötvös Loránd University, Budapest) and presented (in 2015) at the prestigious Casa Editrice Jovene di Napoli. It is based on lectures presented during the early 1930s by outstanding Italian Romanists (Vassalli, De Ruggiero and Riccobono) in the frame of the *Scuola di diritto romano e diritti orientali* – the *Scuola* can be regarded as an institution at the highest level of postgraduate studies of Roman law. The book, containing the materials of these lectures (courses), is based on the manuscript of Károly Visky, whose scientific *œuvre* made him one of the internationally most esteemed Hungarian Romanists.

The introduction of the book is written by Oliviero Diliberto, Professor of the University “La Sapienza” and Director of the *Scuola*. The scientific achievements of Visky are reviewed by Professor Hamza.¹ The volume also contains the master’s degree work of Károly Visky.

1 Gábor Hamza has several times reviewed the *œuvre* of Károly Visky. See G Hamza *In memoriam Károly Visky, Index* 12 (1983-1984) 307-316; *idem, Károly Visky* (1908-1984) *RIDA* 31 (1984), 17-26; *idem, Visky Károly* (1908-1984) *Jogtudományi Közlöny* 39 (1984), 287ff; *idem, In memoriam Károly Visky, Annales Budapest* 27 (1985) 307-316; *idem, Visky Károly* (1908-1984) in *idem* (ed) *Magyar Jogtudósok, II, (Hungarian Jurists, II)* Budapest (2001) 169-176.

2 This book can, for various reasons, be regarded as a real “treasure-house”. On the one hand, the lectures of the *Scuola di diritto romano e diritti orientali* (even in a summarised form) now – for the very first time – became available for the international community of Roman law specialists. On the other hand, the reader can become acquainted with the materials of these courses through the notes of Károly Visky, who completed the *Scuola* between 1930 and 1932,² and who is one of the most qualified and productive Hungarian Romanists of the twentieth century.³ Despite his international academic reputation, Visky could unfortunately (due to political reasons) not participate in the academic life after 1949 and had to practice as a lawyer.⁴ In 1973, he became the President of a panel of the (Hungarian) Supreme Court. In 1978 Gábor Hamza succeeded in obtaining permission for Károly Visky to present courses at the Faculty of Law of the Eötvös Loránd University. Two years later, in 1980, he received the title of Honorary Professor from the same University.⁵

3 In the Introduction of the book Professor Oliviero Diliberto, beside the appraisal of the scientific *œuvre* of Károly Visky, presents a brief history of the *Scuola di diritto romano e diritti orientali* and its role in Roman law advanced studies (1-7). As Diliberto points out, the *Scuola* commenced its work in the academic year of 1919-1920. The course later became known as *Scuola* (then *Corso di Perfezionamento in Diritto Romano e Diritti dell’Oriente Mediterraneo*). Since 2002 it has been called *Corso di Alta Formazione in Diritto Romano*.⁶ During the time when Visky followed the course, it was divided into three scientific and structural parts: 1) *Diritto romano*; 2) *Diritti orientali*; and 3) *Diritto romano e diritti orientali*. In addition to passing several exams in order to get the degree, students had to write and defend a thesis “*fondata su ricerche originali*”. The course also required the knowledge of one of the following languages: Arabic, Syrian, or Hebrew (beside the self-evident knowledge of Latin and classical Greek). The list of subjects and their

2 Károly Visky was a scholar of the *Scuola* for two years. We would like to refer here to Róbert Brósz, the legendary professor of the Faculty of Law in Budapest, and who completed during the academic year of 1940-1941 the course which was then known as *Scuola di Perfezionamento in Diritto Romano* (see A Földi, *Brósz Róbert*, in G Hamza (ed), *Magyar Jogtudósok 1 (Hungarian Jurists 1)*, Budapest (1999) 170). He could, however, only spend one year in Rome since he had to do military service. He returned to Hungary “as a perfect Romanist” (see A Földi (ed) *Flosculi professori Roberto Brósz oblati*, Budapest (1990) at 59). As to the present-day Hungarian Romanists, Orsolya Péter (in 1989, for four months) and Béla Szabó (in 1994, also for four months) participated in the advanced studies course of the University “La Sapienza”.

3 From his – also internationally well-known – scientific *œuvre*, we only refer now to his two excellent German language monographies, namely K Visky *Geistige Arbeit und die “artes liberales” in den Quellen des römischen Rechts*, Budapest (1977); *idem*, *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*, Budapest-Bonn (1983).

4 See A Földi & G Hamza *A római jog története és intézményei (History and Institutes of Roman Law)*, Budapest (2015²⁰) 147.

5 See A Földi, I Sándor & I Siklósi (eds) *Ad geographiam historico-iuridicam ope iuris Romani colendam. Studia in Honorem Gábor Hamza*, Budapest (2015) at 11.

6 We use mainly the denomination of “*Scuola*” henceforth.

leading professors is impressive: besides the general Roman law subjects, students also had to study the *ius commune*, legal epigraphy, legal papyrology, Muslim law and comparative legal studies. Students could obtain this knowledge from famous professors (beside the “authors” of this book) such as Vittorio Scialoja, Pietro De Francisci, Pietro Bonfante and Emilio Albertario (who later also taught Róbert Brószell⁷); they are without exception of the greatest Italian Romanists of all time.

4 Following the introductory thoughts of Diliberto (which also could be regarded as a proper study), Gábor Hamza presents, analyses, and interprets the multiple scientific *œuvre* of Károly Visky (9-15). As has been mentioned, Visky completed the *Scuola* during four semesters between 1930 and 1932 and obtained his degree in 1932. His works cannot now be discussed in detail, but he may be regarded as a “*perfectus consultus iuris Romani*” (Hamza).

5 In the central part, the reader can browse through the lectures of the three above-mentioned Italian Romanists: Filippo Vassalli, Roberto De Ruggiero and Salvatore Riccobono as contained in the manuscript notes of Károly Visky and edited with great diligence by Gábor Hamza and Livia Migliardi Zingale. The transliteration and (when it was possible) the indication of relevant sources is largely the work of Livia Migliardi Zingale.

The course called *Diritto Greco-Romano (Bizantino)* was presented by Professor Vassalli in the academic year of 1930-1931. The relevant part of the book (pp 17-36) gives an excellent example of the educational methods and approaches of the *Scuola*: the general overview of sources was assured by the first part of the course (“external historical approach”), which was followed by the special part (“*parte speciale*”) of the course, citing and analysing principally the texts of Justinian’s *Novels* (“internal historical approach”).

De Ruggiero presented the course entitled “*Papirologia giuridica*” in the academic year of 1931-1932 (pp 37-73). At this time, legal papyrological research played an important role in postgraduate Roman law. As a scientific starting-point, De Ruggiero refers to Ludwig Mitteis and his classification of *Reichsrecht* and *Volksrecht*. Thereafter, he examines certain kinds of contracts, emphasising as a proposition that the ancient Egyptians and Greeks had not known such a definition of “contract” as had been developed by the Romans, Byzantines, and later the modern jurists. According to De Ruggiero, the Greeks had classified legal transactions from a “formal point of view”, that is from an external and not a substantial aspect.

Among the jurists appearing in this book, Riccobono – one of the greatest Italian Romanists of all time – is probably the best-known among modern scholars, since the results of his scientific research are still of great importance for modern-day Romanists. In the academic year of 1931-1932 Riccobono presented the course dealing with the exegesis of Roman law sources, which is of basic importance for

7 Professor Brósz learned the interpolation-critical method from Albertario, and used it later with great efficiency: see Földi *Brósz Róbert (cit)* 170.

all Romanists. Visky's notes based on the lectures of Riccobono constitute the most voluminous part of the book (pp 75-134). The essence of Riccobono's commentaries can briefly be summarised: The short methodological overview is followed by a survey of the different periods of Roman law. Riccobono divided the history of Roman law into three periods: 1) "*ab urbe condita*" until the Punic Wars ("*diritto nazionale*"); 2) from the Punic Wars until Diocletian ("*jus gentium*"); and 3) from Constantine to Justinian, which can be regarded, according to Riccobono, as a period of decadence and codification ("*decadenza, codificazioni*"), and he names this period "Christian Roman law" ("*Diritto romano-cristiano*"). Riccobono provides exegeses of a number of sources of Roman private law, examining the texts from an interpolation-critical and text-critical point of view, which scientific method fundamentally determined Roman law research in his time. He accurately analyses some important problems of the *lex Aquilia* and its application. Nowadays, we have to interpret the sources of classical Roman law in their original context, applying the so-called "presumption of interpolation-freeness" (an expressive phrase of András Földi⁸) and, therefore, in modern Roman law research the „textual criticism" ("*Textkritik*") can only be used as an "*ultima ratio*".⁹ Nevertheless, the construction of Riccobono's lectures, as well as his method of source-analysis (always keeping in mind the *status quaestionis*) can be regarded as a good example for Roman law education even today.

6 In the appendix of the book, Károly Visky's dissertation – written under the supervision of Professor Vassalli – can be read. In his imposing thesis entitled "*Il Cristianesimo e il regolamento del divorzio nel diritto delle Novelle*" Visky investigates the relation of Christianity and the Justinian regulation concerning the dissolution of marriage by *divortium*. The dissertation consists of – following the overview of the history of *divortium* and of the examination of the Christian approach of it – the detailed analysis of the relevant *Novels* (22, 117 and 124). As a result, he emphasises that the *Novels* of Justinian did not substantially change the content, that is the classical approach of marriage. The marriage had always been, according to Visky, a state of facts ("*stato di fatto*"),¹⁰ based on the *affectio maritalis*;

8 A Földi *Kereskedelmi jogintézmények a római jogban (Commercial Legal Institutions in Roman Law)* Budapest (1997) 28.

9 "Textkritik ist heute nicht das erste, sondern das letzte Mittel bei der Textauslegung": cf W Kunkel & MJ Schermaier *Römische Rechtsgeschichte*, Köln-Weimar-Wien (2001¹⁴) 309. This is the paradigm of modern text-critical researches. See, in addition, M Kaser *Zur Methodologie der römischen Rechtsquellenforschung*, Wien (1972); R Knütel „Nicht leichter, aber um so reizvoller. Zum methodologischen Vermächtnis Max Kasers" in *Zeitschrift der Savigny-Stiftung* (Rom Abt) 115 (1998) 33ff.

10 It is well-known that (according to the theory developed in the relevant Italian literature) the Roman approach to marriage had not been a legal relationship, but rather a social state, that is a state of facts (cf the expressions *stato di fatto* and *soziale Tatsache*). Regarding this proper nature of marriage, Savigny did not use the word "*Rechtsinstitut*" but "*Rechtsinstitution*" to describe the essence of marriage; see G Hamza, *Jogösszehasonlítás és az antik jogrendszerek (Comparative Law and Legal Systems of the Antiquity)* Budapest (1998) 189. It also deserves mention that the

however, the new restrictions on *divortium*, established by Justinian, prepared the way for Christian ideas which triumphed later in canon law.

7 Although the book is primarily of interest to Romanists, it is also of relevance, *inter alia*, for legal papyrologists. The book presents, for the very first time, the essence of the materials of the eminent postgraduate Roman law course, *Scuola di diritto romano e diritti orientali* as it was taught in the 1930s. It is of particular significance for Hungarian Romanists since it was Karoly Visky's lecture notes that made it possible.

Although the commentaries in this book describe the scientific environment of the 1930s, and, therefore, the authors' explications are, first and foremost, relevant from the point of view of the history of science, they can also be useful nowadays. The lecture materials of Riccobono are especially worth considering regarding several important questions even today. In addition, the method of the education in the frame of the *Scuola* can also serve as a great example for those experts who teach Roman law in the twenty first century.

We are grateful for the compilation and publication of this book, for the contributions of Gábor Hamza, Oliviero Diliberto and Livia Migliardi Zingale, and especially, for Károly Visky, whose notes made it possible to gain insight and knowledge of the high standard of post-graduate Roman law education of the 1930s in Rome which remains one of the centres and citadels of Roman law research.

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great German romanist, Ludwig Mitteis, in his famous book entitled *Römisches Privatrecht bis auf die Zeit Diokletians I. Grundbegriffe und Lehre von den juristischen Personen* Leipzig (1908) at 131), described marriage as a "verwirklichte Lebensgemeinschaft". Furthermore, see eg. A Bürge *Römisches Privatrecht. Rechtsdenken und gesellschaftliche Verankerung* Darmstadt (1999) 161.