

# CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA: WHAT DOES HISTORY TELL US ABOUT THE REVERSE ONUS PROVISION?

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## ABSTRACT

An inevitable outcome of the coming into being of the Constitution in South Africa was the existence of a number of statutes or provisions within statutes that infringed some of the constitutionally entrenched rights. This led to the Constitutional Court finding itself faced with the responsibility of determining whether such provisions

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were in line with the Constitution or not. Many matters of this nature were heard during the period immediately after the promulgation of the Constitution. In South Africa corporate criminal liability is regulated by section 332 of the Criminal Procedure Act 1977. With regard to corporate criminal liability, the Constitutional Court heard a matter in which a reverse onus provision contained in section 332(5) of the Criminal Procedure Act was successfully challenged and declared invalid as it infringed the accused person's right to presumed innocent until proven guilty. Twenty years later, section 332 of the Criminal Procedure Act continues to exist with a sub-section that contains wording that is analogous to the invalidated section 332(5). In section 332(7) the reverse onus provision exists, albeit against members of associations that do not have legal personality. The sub-section has not been constitutionally challenged. However, the Constitutional Court, shortly after the coming into existence of the Constitution, heard several cases in which the validity of reverse onus provisions that infringed upon the right to be presumed innocent were successfully challenged. This article will examine some of these decisions in an attempt to show that history shows us that section 332(7) does not belong to the era we are in and if it was to be constitutionally challenged it is unlikely that it would survive. Emphasis will be put on the fact that we should not wait for a court challenge, but rather, the legislature should make a move towards the reform of corporate criminal liability and in so doing, eliminate reverse onus provisions that infringe upon the presumption of innocence.

**Keywords:** Corporate criminal liability; criminal liability of members of associations; constitutional right to be presumed innocent; reverse onus; common law regulation of criminal liability of directors

## 1 Introduction

Certain provisions in South African statutes that existed before the Constitution conflict with constitutional provisions and this has resulted in constitutional challenges of such provisions. Langa J made it clear that the responsibility of making the necessary amendments to such provisions so as to ensure that they are in line with the Constitution lies with the legislature.<sup>1</sup> This, however, does not always happen, hence the continued existence of some outdated provisions that are clearly in conflict with the Constitution.<sup>2</sup> With specific regard to corporate criminal liability a provision that was not in line with the Constitution was challenged in *S v Coetzee* and had to be resolved by the judiciary instead of the legislature.<sup>3</sup> It is in that specific matter that

- 1 "Important provisions of old legislation, and in particular the (Criminal Procedure) Act, are being struck down because they are inconsistent with the Constitution, leaving gaps in the law which only the legislature can fill. It is primarily the task of the legislature, and not the courts to bring old legislation into line with the Constitution". See *S v Coetzee* at 442I.
- 2 For instance, the Riotous Assemblies Act 17 of 1956 contains some provisions that will unlikely survive constitutional challenges.

the statement above was made by Langa J. In that case the court had to determine, among other issues, whether the reverse onus provision that was contained in section 332(5) of the Criminal Procedure Act 51 of 1977<sup>4</sup> was in line with the Constitution or not. This was thoroughly deliberated on and in the majority judgement it was made clear that the reverse onus provision as found in section 332(5) of the Criminal Procedure Act is unacceptable under the current South African Constitution.<sup>5</sup> The judgement is a profound development in corporate criminal liability in South Africa.<sup>6</sup>

It is twenty years since Langa J delivered that important judgement on behalf of the majority. However, section 332 of the Criminal Procedure Act still contains a reverse onus provision that is valid and which operates in the same manner as the rejected reverse onus that was found in section 332(5). This reverse onus provision is contained in section 332(7) of the Criminal Procedure Act. The purpose of this article is to ascertain the continued validity of the reverse onus provision as contained in section 332(7) and to determine whether it is likely or unlikely to survive the test of constitutionality. Section 332(7) and its effects will now be discussed. This will be followed by a discussion of how section 332(5) was declared unconstitutional. In the following discussion it will be shown how loathe the Constitutional Court is towards reverse onus provisions. And, in conclusion, it will be made clear that the likelihood of the reverse onus provision in section 332(7) withstanding constitutional scrutiny is very little.

## 2 Section 332(7) and the reverse onus provision

Corporate criminal liability refers to the holding of a corporation criminally liable for crimes it has committed or for crimes that have been committed in endeavouring to pursue the interests of the corporation.<sup>7</sup> In the same way that crimes can be committed by corporations, they may also be committed in furthering or endeavouring to further interests of associations that do not have juristic personality. In such circumstances corporate criminal liability is also relevant and applicable. Unfortunately, corporate

3 *S v Coetzee* at 379.

4 According to sec 332(5) “(w)here an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporation or apart therefrom, and shall on conviction be personally liable to punishment therefor”.

5 For a discussion of some of the judgements in the case see Schwikkard 1999: 148-150 and Farisani 2010: 254-258.

6 *Idem* at 251-264.

7 For an overview of corporate criminal liability in South Africa see Burchell 2013: 448-460; Kunst, Delpoort & Vorster 2011: Appx 5-14; and Farisani 2012: 252-265.

criminal liability is one of the areas of South African law which has experienced very little development, in spite of the drastic increase of corporations that has been accompanied by an increase in corporate criminality between the time the 1977 Act became operational and now. An example of the lack of development is that while there are jurisdictions that have developed to the extent that they have separate statutes for specific crimes that may be committed by corporations,<sup>8</sup> in South Africa the provision refers to crime generally,<sup>9</sup> regardless of the type of crime that has been committed. There has been an outcry over the lack of development in corporate criminal liability and commentators have called for the reform of that area of South African law.<sup>10</sup>

Section 332(7) of the Criminal Procedure Act allows for the criminal liability of members of associations, such as partnerships,<sup>11</sup> that lack juristic personality. The inclusion of the criminal liability of members of associations in the provision dealing with corporate criminal liability has been done since the first statutory provision regulating corporate criminal liability in South Africa, namely section 384 of the Criminal Procedure and Evidence Act.<sup>12</sup> It shows the acceptance of the principle that whether an entity is incorporated or not when crimes have been committed, criminal liability should be imposed. Section 384 of the Criminal Procedure and Evidence Act was subsequently amended by section 117 of the Companies Amendment Act,<sup>13</sup> and its heading was “The prosecution of corporations and members of associations”.

This section is the one that clearly pointed out the inclusion of unincorporated entities. Section 381 of the Criminal Procedure Act, 1955<sup>14</sup> replaced the previous provision and it retained the heading “Prosecution of corporations and members of associations”. This section was repealed and replaced by the current statutory regulation, section 332, which has retained the same heading but fails to give adequate attention to the criminal liability of members and managers of those entities that do not have legal personality. Only sub-sections seven, eight and nine focus specifically on the liability of members of associations and they do so very briefly. The current position in section 332 is lacking when compared with the position in other foreign jurisdictions such as the United Kingdom<sup>15</sup> where the relevant statute gives adequate focus to both incorporated and unincorporated entities.

8 For instance the United Kingdom’s Corporate Manslaughter and Corporate Homicide Act 2007.

9 Section 332(1) states that a corporation may be held liable for “any offence”.

10 Nana 2011: 81-104; Borg-Jorgensen & Van der Linde (part 1) 2011: 452-465; Borg-Jorgensen & Van der Linde (part 2) 2011: 684-702; Farisani 2009: 210-226.

11 It was confirmed that partnerships form part of associations that fall under the ambit of sec 384 of the Criminal Procedure and Evidence Act 31 of 1917 (now sec 332) in *R v Levy* at 320-321.

12 Section 384 of the Criminal Procedure and Evidence Act 31 of 1917.

13 Companies Amendment Act 23 of 1939.

14 Criminal Procedure Act 56 of 1955.

15 The Corporate Manslaughter and Corporate Homicide Act specifies that a partnership, trade union or employers’ association fall under the ambit of the Act and detailed attention is given to the prosecution of those entities.

The wording of section 332(7) is exactly the same as the wording used in the invalidated section 332(5).<sup>16</sup> It provides that any person who was a member of an association of persons<sup>17</sup> when a crime was committed by the “association”, will be convicted of that crime unless such person discharges the onus of proving that he or she did not take part in the commission of the offence and that he or she could not have prevented it. The effect of section 332(7) is that the accused’s right to be presumed innocent is infringed upon<sup>18</sup> and as Schwikkard and Van der Merwe<sup>19</sup> point out, “[t]he presumption of innocence both at common law and as a constitutional right places a burden on the prosecution to prove the guilt of an accused person beyond reasonable doubt”. Firstly, section 332(7) places the burden on the defence and not on the prosecution. Secondly, as the burden to disprove guilt is on a balance of probabilities, it is possible for the accused to be convicted in spite of the presence of reasonable doubt.<sup>20</sup> Section 332(5) had the same effect.

The difference between section 332(5) and section 332(7) is that the former deals with the criminal liability of individuals (servants and directors) in corporations (entities with juristic personalities) while the latter refers to individuals (members) in associations that do not have juristic personality. A reading of section 332(5) and of section 332(7) shows that both sections make provision for a reverse onus in the same way. As with section 332(5) the criticism against section 332(7)<sup>21</sup> is that the reverse onus provision that is found in the sub-section is a direct infringement of the presumption of innocence which is constitutionally entrenched.<sup>22</sup>

Both provisions were also found to be making use of the same test to determine liability. The court in *S v Kloppe*<sup>23</sup> found that in terms of sub-section five and seven

16 For the wording of sec 332(5) see n 4 *supra*. Section 332(7) states that “[w]hen a member of an association of persons, other than a corporate body, has, in carrying on the business affairs of that association or in furthering or endeavouring to further its interests, committed an offence, whether by the performance of any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this sub-section shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body”.

17 In this context the term “association of persons” refers to an entity that lacks juristic personality.

18 Section 332(7) creates a mandatory presumption. Mandatory presumptions make it possible to have a “conviction in the absence of proof beyond a reasonable doubt”. See Morton & Hutchison 1987: 109.

19 2009: 514.

20 “There is clear authority for the view that the presumption of innocence will be infringed whenever there is a possibility of a conviction despite the existence of a reasonable doubt”: Schwikkard & Van der Merwe 2009: 514.

21 “Whether these provisions of sec 332(7) are compatible with the Constitution, is very doubtful”: see Snyman 2014: 248.

22 See sec 35(3)(h) of the Constitution of the Republic of South Africa 108 of 1996.

23 *S v Kloppe* 1975 (4) SA 773 (A) at 774.

of the predecessor of section 332 of the Criminal Procedure Act, namely section 381 of the Criminal Procedure Act 1955, a subjective test is applied to determine liability.<sup>24</sup> It is noteworthy that in spite of the similarities between section 332(5) and section 332(7), the latter remains valid while the former has been invalidated by the Constitutional Court. Over the years failure to discharge the reverse onus has led to the conviction of members of associations that do not have juristic personality. An example is *R v Kekane*<sup>25</sup> in which a conviction was upheld as the appeal court confirmed the lower court's conclusion that the members of the association had failed to discharge the onus of proving that, firstly, they had not taken part in the offence and, secondly, that they could not have reasonably prevented the offence.<sup>26</sup>

In comparison to section 332(5) it is evident that in enacting section 332(7), the legislature was more lenient to a member of an association of persons than it was to a director of a corporation because, unlike section 332(5), section 332(7) contains a proviso that in the event that the governance of the association is through a committee or governing body, if that member did not belong to that committee or governing body at the time of the commission of the crime, he or she would escape liability. Section 332(5) did not contain such a proviso. It may be that the rationale behind such a proviso is that it is the governing body that is the actual decision-making body of the association and if one belongs to that body, one should not be allowed to escape liability; however, where one does not belong to that body it makes sense to give such a person the benefit of the doubt. Moreover, it can be argued that where a person who is a member of a governing body claims that he or she is unaware of the fact that a crime was being committed, such a person is justifiably punished for his/her negligence.

The existence of this proviso is important as it raises the question as to whether it has anything to do with the continued validity of section 332(7) or rather, the reluctance to challenge the constitutionality of section 332(7). It is indeed a possibility that it is the proviso in section 332(7) that has kept the section from being constitutionally challenged, however this may be fallacious reasoning. Kunst, Delpont & Vorster<sup>27</sup> correctly points out that the proviso

contains only exempting provisions, i.e. it exempts from the deeming (main) provisions of the sub-section, if the business or affairs of the association are governed or controlled by a committee or other similar governing body, any member of the association who was not a member of such committee or other body at the time of the commission of the offence.

24 “Sub-section 5 (and also sub-sec 7) of sec 381 does not lend support to an argument that only an objective interpretation would give meaning to the second proviso – even a subjective interpretation establishes criminal liability which did not exist under the common law”: see *S v Kloppe* at 774.

25 378 & 384.

26 *Ibid.*

It is submitted that the existence of an exemption in section 332(7) does not provide justification for the continued existence or validity of this sub-section.

In *S v Ismail*,<sup>28</sup> one of the cases in which sub-section 7 was dealt with, instead of a governing body there was a “regional command” which the court did not regard as a committee or governing body as it turned out to be a self-appointed body which existed although some of the members objected to it.<sup>29</sup> This begs the question whether in the absence of a formally recognised governing or controlling body the effect of section 332(7) is not harsher than that of the invalidated section 332(5) since where the proviso is not applicable it is the ordinary members of the associations who will be subjected to the effects of section 332(7). Whereas section 332(5) refers to servants and directors, history has shown that it has mainly affected servants in decision-making positions as well as those individuals who had been given the mandate to lead the corporations as directors.<sup>30</sup> The same cannot be said about ordinary members of associations lacking criminal liability. Section 332(7) makes it clear that when there is no formal governing or controlling arrangement, those who are presumed guilty are the members of such associations. Kruger<sup>31</sup> correctly submits that “if there is no elected management, the members severally will, in fact, be liable”. This refers to ordinary members of such associations, including those who may not be involved in decision-making processes. It is submitted that this is a serious violation of the right of such ordinary members of associations to be presumed innocent as they are presumed guilty in spite of their lack of involvement and possibly even inability to be involved in the commission of the crime due to the minimal role they may be playing in the association. The violation of this right is caused by section 332(7) which appears to have far-reaching consequences when compared to section 332(5). In addition Kruger<sup>32</sup> observes that “the objections to sub-section five apply to an even greater extent to sub-section seven and the latter will probably not survive constitutional scrutiny”.

Although the legislature has not acted in accordance with Langa J’s suggestion that it should take responsibility for ensuring that old provisions are in line with the Constitution, it is rather strange that, to date, the provision has not been constitutionally challenged. Apart from Kruger, several commentators have pointed out that if it were to be constitutionally challenged, section 332(7) would not withstand such a

27 2011: App 13-14.

28 1965 (1) SA 452 (N) at 459.

29 “The regional command was in no way representative of the members, nor were they leaders which the members had appointed or approved or in some cases even knew of. I take the view, then, that sec 381(7) does not apply”: *S v Ismail* at 459.

30 In line with the system followed in South Africa there are certain people within the corporation whose actions are imputed to the corporation in order for the corporation to be held liable and these are usually directors and employees in senior positions.

31 2008: 33-38.

32 *Idem* at 33-37.

challenge.<sup>33</sup> Snyman,<sup>34</sup> for example, avers that the decision in *S v Coetzee* creates doubt as to whether the provisions of section 332(7) are in line with the Constitution.

Section 332(7) also allows for the criminal liability of members of associations that were formed for unlawful purposes.<sup>35</sup> This was held by Milne J in *S v Ismail* and it is a decision agreeing with the company law principle of piercing the corporate veil. If this was not the case, individuals would form such associations and freely act unlawfully in the name of the association. According to Milne J where an accused chooses to become a member of an association which has been formed in order to act unlawfully, such a member has no one to blame but himself or herself.<sup>36</sup>

It must be noted that in *R v Limbada*, which was based on the same provision in section 381 of the Criminal Procedure Act, 1955, a suspended sentence was meted out to one of the appellants on the basis that “her guilt arises from the provisions of section 381(7) and is presumptive rather than positively established”.<sup>37</sup> The question that arises is whether this reverse onus provision has room to exist in our Constitutional sphere.

### 3 The reverse onus provision in section 332(5) and *S v Coetzee*

As already stated above, *S v Coetzee* was a Constitutional Court case that dealt with, among others, whether section 332(5) of the Criminal Procedure Act, 1977 was constitutional or not. In this particular case the challenge in the Constitutional Court was based on the aversion that it infringed upon the constitutional right to be presumed innocent as provided by the then section 25(3)(c) of the Interim Constitution.<sup>38</sup> The matter was brought to court by persons who were being charged with, *inter alia*, fraud in the Witwatersrand Local Division. A request was made by these persons to challenge the constitutionality of two sections of the Criminal Procedure Act and the trial was consequently suspended to allow for the challenge of those provisions, one of which was section 332(5).<sup>39</sup> As stated above, section

33 Snyman 2014: 248; Burchell 2013: 458; Farisani 2012: 263; Kemp 2015: 244.

34 2014: 248.

35 “It would be anomalous, indeed, if it were held that members of a lawful association could be made liable under this sub-section in the absence of proof of non-participation and inability to prevent the crime though committed by another and that members of an association formed for unlawful purposes should be better off. The fact that the burden of showing that he could not have prevented the crime would be virtually impossible to discharge is not a sufficient reason for holding that the sub-section does not apply to unlawful organizations”: *S v Ismail* at 459.

36 *S v Ismail* at 458.

37 *R v Limbada* at 490.

38 *S v Coetzee* at 447D-E. This refers to sec 25(3)(c) of the Constitution of South Africa Act 200 of 1993. A more detailed discussion of this case may be found in Farisani 2016: 141-149.

39 *S v Coetzee* at 443B.



332(5) provided a reverse onus provision which required the accused to disprove his or her guilt. This contradicts the presumption of innocence and moves the onus from the prosecution (the state) to the defence, resulting in a state of affairs that is in contravention of the Constitution.

In essence, with regard to section 332(5), the Constitutional Court had to determine whether the constitutionally-entrenched and fundamental right of an accused person to be presumed innocent until proven guilty was infringed by section 332(5) or was not infringed by section 332(5). Basically, section 332(5) made it possible for a presumption of guilt, as opposed to the presumption of innocence, to be made against a servant or director of the accused corporation. This means that where a corporation has been found guilty of having committed a crime, its director or servant is automatically presumed to be guilty of that crime. In order to avoid liability, that director or servant would be required to provide the court with proof, albeit on a balance of probabilities, that he or she did not take part in the offence and that he or she could not have done anything to prevent the crime from being committed. Section 332(5) therefore effectively made it possible for a director or a servant to be convicted without the prosecution having established guilt on the part of that director or servant.

It was argued that section 332(5) was a violation of the constitutionally guaranteed right to be presumed innocent and it made it possible for an accused to be convicted even though there could be reasonable doubt that the director or servant is actually guilty.<sup>40</sup>

After careful consideration, the Constitutional Court declared section 332(5) to be unconstitutional and therefore invalid. However, the decision was not unanimous. In passing judgment the judges made observations and relevant statements regarding section 332(5) as well as the Constitution. In delivering the majority judgment, Langa J stated that it is not the judiciary, but rather the legislature which ought to carry the responsibility of bringing old provisions, contravening the Constitution, in line with the Constitution.<sup>41</sup> He referred to the constant challenges, in court, of outdated provisions that have been carried over from the pre-Constitution regime.<sup>42</sup> With regard to the Criminal Procedure Act he pointed out its relevance, but emphasised that it is legislation that came from “a different constitutional era in which the legal validity of its provisions could not be questioned”.<sup>43</sup> Prior to the coming into being of the Constitution where section 332(5) was at issue, the courts, even though they may have felt the need to challenge its validity, were bound to enforce the law as it was.

40 *S v Coetzee* at 445D.

41 See n 1 *supra*. For summaries of Langa J’s judgement on behalf of the majority, see Farisani 2010: 257 and Schwikkard 1999: 47-48, 114 & 148.

42 *S v Coetzee* at 442G.

43 *Ibid.*

Langa J thereupon mentioned section 384(5) (the origin of section 332[5]) of the Criminal Procedure and Evidence Act.<sup>44</sup> He traced the development of the section from its original form to the current wording of section 332(5) and showed the minimal change in its form from that time until the coming into being of section 332(5) of the Criminal Procedure Act. Langa pointed out that the bone of contention, which has led to the constitutional challenge, is the “reverse onus” that section 332(5) placed on accused persons.<sup>45</sup> An argument brought before the court was to the effect that, in practice, the reverse onus in section 332(5) was a justifiable limitation,<sup>46</sup> because in spite of the reverse onus, the onus of proving that the accused was aware of the commission of the crime was still borne by the prosecution. In making this contention cases such as *Limbada* and *Klopper* were relied on.

In response to this argument, Langa J averred that section 332(5) did not place the onus of proof on the prosecution.<sup>47</sup> He looked at the “plain meaning”<sup>48</sup> of section 332(5) and stated that section 332(5) simply provided for the conviction of an accused, who – at the time of the commission of the crime – was a director or servant of the company, as soon as the prosecution discharged the onus of proving that a crime was committed by a corporation. In terms of the plain meaning of section 332(5) such accused director or servant was obliged to prove that he or she did not take part in the offence and could not have done anything to prevent it, so as to escape conviction. Langa J referred to the cases that the state had relied on<sup>49</sup> and showed that instead of providing support for their argument,<sup>50</sup> those cases were actually in support of how he found the plain meaning to be. He clarifies what the relevant passages in those cases mean.

Regarding the constitutionality of the reverse onus provision, Langa J examined previous cases of the Constitutional Court and stated that the “Court has left open the question of the effect which a provision, which requires the accused to prove an exemption, exception or defence, has on the presumption of innocence”.<sup>51</sup> Since the applicants together with the Government relied heavily on Canadian decisions in their

44 *S v Coetzee* at 446G and 447A, B & C.

45 “It was argued that the onus cast upon the accused relates to an essential element of the offence created by the section and that the reversal of the onus meant that the accused could be convicted despite the existence of a reasonable doubt with regard to his or her guilt. This reverse onus was therefore said to violate the right to be presumed innocent as enshrined in sec 25(3)(c) of the Constitution as well as the ‘cluster of rights associated with it’”: *S v Coetzee* at 447D & E.

46 *S v Coetzee* at 448A.

47 *S v Coetzee* at 448B.

48 “[T]he plain meaning of the words is that once the prosecution proves that an offence has been committed by a corporate body of which the accused was a director or servant at the time of commission, the latter can escape conviction only by proving that he or she did not take part in and could also not have prevented the commission of the offence”: see *S v Coetzee* at 448B & C.

49 *R v Limbada* at 481; *S v Klopper* at 773.

50 *S v Coetzee* at 449B.

51 *Idem* at 451A & B.

arguments, Langa J examined the Canadian courts' handling of the constitutionality of a reverse onus. He mentioned that in terms of the Canadian Charter of Rights and Freedoms there was a presumption of innocence until the accused person was proven guilty.<sup>52</sup> In examining the specific cases that were relied on, he pointed out that in those cases the accused were not at risk of being found guilty while there was reasonable doubt regarding their guilt.<sup>53</sup>

He concluded that section 332(5) is an infringement of the constitutional right to be presumed innocent and – among other things – averred that “the objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused”.<sup>54</sup> Langa J further stated that section 332(5) was not aimed at creating liability without fault on the part of the accused.<sup>55</sup> Its aim was to ensure the conviction of directors who took part in the commission of crimes or who were in a position to prevent the commission of a crime, but failed to do so.<sup>56</sup> Fault was therefore an important element of section 332(5) and it was an element that had to be proven.<sup>57</sup>

On whether the infringement of the presumption of innocence by section 332(5) was a justifiable limitation in terms of section 33(1) of the Interim Constitution, Langa J recognised the importance of protecting society and corporations from directors who failed to prevent the commission of crimes. He stated that it is possible to achieve that without resorting to the reverse onus and proposed alternative means that could be relied on to fulfil the intention of section 332(5).<sup>58</sup> This was reiterated by Mokgoro J who stated that even though she is concerned about what

52 Section 11(d) of the Canadian Charter of Rights and Freedoms of 1982 states as follows: “11. Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”: see *S v Coetzee* at 451G.

53 Langa J showed that the provisions in the Canadian cases that the State had relied on to support the validity of the reverse onus “did not impose a reverse onus and that there was no danger that the accused could be convicted despite the existence of a reasonable doubt”: *S v Coetzee* at 454A. See, also, Farisani 2016: 144-146 for a more detailed discussion.

54 *S v Coetzee* at 454F & G.

55 *Idem* at 456C.

56 *Idem* at 456C & D.

57 Langa goes on to state that “what causes the provision to fall foul of the presumption of innocence here is the effect of merely changing the form of the provision to require the accused, rather than the prosecution, to prove elements which are essential to his or her guilt or innocence. There is manifest unfairness where the legislature, having created an offence potentially entailing very grave penalties, goes on to subvert an important constitutionally protected right by requiring crucial elements of the offence to be proved or disproved by the accused on pain of conviction should the onus not be discharged”: *S v Coetzee* (n 1) 456G & H.

58 “I can see no reason, however, why the State could not, for example, impose appropriate statutory duties on directors and other persons associated with the corporate body, aimed at ensuring that its affairs are honestly conducted and that it is itself protected against dishonest conduct. This could be done in a variety of ways by means of appropriate legislative provisions which might, for instance, impose the duties of disclosure and reporting on the corporate body, its directors, servants and other persons involved with its affairs. There has been no suggestion that such measures,

she termed “the dangers of corporate activity”,<sup>59</sup> the infringement of the presumption of innocence remains unjustifiable. The majority judgment was that section 332(5) was unconstitutional.<sup>60</sup>

Although recommendations of saving the provision through the severing of words or phrases that made it unconstitutional were made, these were not supported by the majority. In her judgement, O’Regan J recommended saving section 332(5) through severing the bad parts, such as the word “servant” and the phrase “it is proved that he did not take part in the commission of the offence”,<sup>61</sup> while maintaining the parts of section 332(5) that are good.<sup>62</sup> Mokgoro J agreed with O’Regan J with regard to saving the provision by means of severance.<sup>63</sup>

Madala J, in his minority judgment, did not find section 332(5) to be unconstitutional.<sup>64</sup> Although he recognised the importance of the presumption of innocence he averred that it is not an absolute right.<sup>65</sup> In contrast, Sachs J concurred with the majority, however he gave a separate judgment in which he addressed several issues, including the history and rationale of section 332(5). He explained the fact that there was a view that a fine as a sanction for corporations that committed crimes was an inadequate way of addressing such crimes.<sup>66</sup> He emphasised the need to punish the individuals within the company, as companies committed crimes through such individuals.<sup>67</sup>

enforced through appropriate sanctions, could not accomplish as effectively the ends sought to be achieved by sec 332(5) of the Act. It has further not been contended that such objectives could not be achieved without placing an onus on the accused to prove any aspect of his or her innocence in a criminal prosecution for a breach of such duty. I am accordingly not persuaded that the reverse onus provisions in sec 332(5) are necessary ...”: *S v Coetzee* at 457H-458A.

59 *S v Coetzee* at 497A.

60 Langa J, Chaskalson P, Mahomed DP, Kriegler J, Sachs J, Ackermann J & Didcott J.

61 *S v Coetzee* at 516.

62 *Ibid.*

63 “As regards the order in this case, I concur with O’Regan J that severance of certain words from sec 332(5), so that the legal burden of proof is removed from the accused, is an appropriate remedy in this case”: *S v Coetzee* at 497C. Also see discussion in Schwikkard 1999: 159-162.

64 He states that “the mere fact that a section provides that an accused person may be convicted in circumstances in which there is a reasonable doubt is not in itself a sufficient reason for regarding such sections as unconstitutional. There may be circumstances in which the reverse onus provision is necessary and justifiable”: see *S v Coetzee* at 491H.

65 “I have no doubt in my mind that the presumption of innocence is a fundamental right which plays a pivotal role in our criminal justice system. However, in my view, like all other rights and freedoms guaranteed by the Constitution, this right is not absolute, but that its value and weight will differ according to a variety of factors and circumstances against which it is pitted on the scales”: see *S v Coetzee* at 493H-I.

66 *S v Coetzee* at 516D-F.

67 Sachs notes that “as the eyes, ears and spokesperson of the corporation ... it would not be unreasonable to hold them personally to account for the misdeeds of those obliged to do their bidding, provided that this was done by penalizing them for culpable lack of concern for keeping the company on the straight and narrow, rather than by attributing equal guilt when such could not be proven in the ordinary way”: see *S v Coetzee* at 518A-B.

The judgments in *Coetzee* provide an explanation of the intended objective of section 332(5) and they emphasise the harshness of its operation, notably on innocent directors who fail to provide the required proof. The judges took into account foreign law and also considered how the Constitutional Court had handled the presumption of innocence on previous occasions. The matter was not lightly taken and various factors in balancing the competing rights were taken into account.

As a result of the judgement, the common law position currently applies, namely that corporations are criminally liable for crimes committed by their servants and/or directors and such servants or directors may be held liable for offences committed by the corporation if a specific servant or director satisfies the requirements for the common law offence of being an accomplice,<sup>68</sup> namely “only if he took part in that other’s crime, or on the basis of vicarious liability or agency”.<sup>69</sup>

Where the director is held liable on the basis of being an accomplice the elements that must be proven are unlawful conduct and *mens rea* (culpability).<sup>70</sup> It must be noted, however, that “apart from his own act and culpability there must have been an unlawful act committed by someone else which corresponded with the definitional elements of the relevant crime and was accompanied by the required culpability”.<sup>71</sup> It must be proven that the director “furthered or assisted” in the commission of a crime.<sup>72</sup> Burchell<sup>73</sup> points out that furthering or assisting in the commission of a crime can occur in various ways, including, commanding the commission of the crime and encouraging the commission of a crime.

The liability of a director based on vicarious liability in terms of the common law “concerns the liability of an accused who has not personally committed the prohibited act in question”<sup>74</sup> and the elements that must be proven are unlawful conduct and fault<sup>75</sup> on the part of the accused director.<sup>76</sup> Although it is pointed out

68 “The judgment was given on 6 March 1997 but no amendment has been forthcoming. Presumably the government accepts that the liability of directors and employees for offences of their companies is determined in accordance with the common law principles of vicarious liability”: see Kruger 2008: 33-37; and: “In my view there would be a duty on the director to act to prevent the commission of acts which would render the company to criminal prosecution and his intentional failure to prevent the commission of these acts, if he were in a position to do so, would render him criminally liable as a *socius criminis*”: Ackermann J in *S v Coetzee* at 464B. See, also, Burchell 2013: 478-479.

69 *Idem* at 567. See, further, Kemp 2015: 244: “Therefore as matters stand at present, it is only the corporate entity that can be held liable for crimes committed by its directors or employees. The directors and employees cannot be held liable unless they actively associated themselves with the commission of the crime.”

70 Burchell 2013: 496. See, also, Kemp 2015: 274-275.

71 Snyman 2014: 267.

72 *Ibid.*

73 2013: 496.

74 Kemp 2015: 238.

75 Burchell 2013: 442.

76 “As far as common law crimes are concerned, one can never be liable for a crime committed by another to which one was not a party and in respect of which one had no culpability. Vicarious liability is possible only in statutory crimes”: Snyman 2014: 242.

that when it comes to vicarious liability there is uncertainty as to whether fault is a pre-requisite or not,<sup>77</sup> corporate criminal liability in terms of section 332 will only be applicable if there is the presence of fault / *mens rea* on the part of a director or servant that can be imputed to the corporation.<sup>78</sup>

Even though section 332(5) is being substituted by the common law while we wait for the legislature to reform the law, the criminal liability of a director for actions of the corporation committed by fellow directors or for having “actively associated themselves with the commission of the crime”<sup>79</sup> should not be confused with the fact that generally South Africa’s approach to corporate criminal liability is the derivative approach, which entails the imputation of the guilt of the director to the corporation. As Burchell<sup>80</sup> confirms: “[T]he criminal liability of a corporate body in South Africa went wider than that of the vicarious liability of natural persons; and it rested upon the imputation to the corporation of the crimes of persons acting on their behalf, rather than upon vicarious liability.”

## 4 The Constitutional Court’s antipathy towards the reverse onus

As seen from the discussion above, *S v Coetzee* serves as an illustration of the fact that the Constitutional Court is loathe to allow for reverse onus provisions to continue to exist in South African law. Apart from *S v Coetzee*, there are a number of Constitutional Court cases that demonstrate the Constitutional Court’s strong aversion against reverse onus provisions. These cases will be discussed below, as a way of showing that should section 332(7) be challenged, the Constitutional Court is likely to invalidate it, as it has done with other similar provisions. The cases referred to below were heard just before or around the same time as *S v Coetzee*. Logically, the Constitution had just come into effect and it was mainly during that time that provisions that appeared to infringe the Constitution were challenged in the then newly established Constitutional Court.

In the 1995 case of *S v Zuma*,<sup>81</sup> which was heard prior to *S v Coetzee*, the section in question was section 217(b)(ii) of the Criminal Procedure Act which created a reverse onus. The court found the section to be invalid and in passing judgement<sup>82</sup> Kentridge JA pointed out that the reverse onus in that section “seriously compromised

77 Burchell 2013: 445.

78 *Idem* at 563.

79 Kemp 2015: 244.

80 2013: 563.

81 1995 (4) BCLR 401 (CC) at par 46.

82 “Accordingly sec 217(b)(ii) does not meet the criteria laid down in sec 33(1) of the Constitution. It is inconsistent with the Constitution and in terms of sec 98(5) of the Constitution it must be declared invalid”: *S v Zuma* (n 81) par 39.

and undermined”<sup>83</sup> the rights in question. Those compromised and undermined rights are “the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself”.<sup>84</sup>

Also, prior to *S v Coetzee*, the Constitutional Court in *S v Bhulwana; S v Gwadiso*<sup>85</sup> declared that section 21(1)(a)(i) of the Drugs and Drug Trafficking Act<sup>86</sup> was unconstitutional and therefore invalid, due to its reverse onus provision. In finding that the reverse onus provision was not consistent with the Constitution, O’Regan J referred to the risk of a conviction in spite of reasonable doubt as to the guilt of the accused.<sup>87</sup> Such a risk should be avoided as it negates the basic duty of the prosecution to provide proof of guilt beyond reasonable doubt before a conviction can be made in a criminal case. Also in 1996 section 40(1) of the Arms and Ammunition Act<sup>88</sup> was challenged in *S v Mbatha; S v Prinsloo*<sup>89</sup> for creating a reverse onus through its presumption of possession. The presumption arose simply due to the fact that the item in question had at some point been on the premises. As with section 332(5) in *S v Coetzee*, Langa J declared that the provision infringed upon the presumption of innocence. He further stated that “it would be undesirable for the courts to continue applying a provision which is not only manifestly unconstitutional, but which also results in grave consequences for potentially innocent persons in view of the serious penalties prescribed”.<sup>90</sup> This statement by Langa J is a clear indication that the Constitutional Court does not take kindly to provisions such as section 332(7) that allow for a reverse onus and by so doing, infringe upon the right to be presumed innocent until proven guilty.

Another case, also heard in 1996, is *S v Julies*,<sup>91</sup> in which section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act was successfully challenged and declared invalid<sup>92</sup> by the Constitutional Court. According to that section there was a presumption of dealing if there is proof that the accused had been in possession of “undesirable dependence-producing substance other than dagga”.<sup>93</sup> This effectively was a reverse onus provision which the Constitutional Court correctly found to be inconsistent with the Constitution. *S v Bhulwana S v Gwadiso*<sup>94</sup> was cited in the decision in *S v Julies*.

83 *Idem* par 33.

84 *Ibid.*

85 [1996] 1 All SA 11 (CC) par 30 & 31.

86 Drugs and Drug Trafficking Act 140 of 1992.

87 “[T]here is a risk that a person may be convicted of dealing in dagga despite the existence of a reasonable doubt as to his or her guilt”: see *S v Bhulwana; S v Gwadiso* (fn 85) at par 30.

88 Arms and Ammunition Act 75 of 1969.

89 1996 (3) BCLR 293 (CC) par 30.

90 *Ibid.*

91 1996 (7) BCLR 899 (CC).

92 *Idem* at par 5.

93 *Idem* at 899.

94 See (n 89) par 34.

In *S v Mello*,<sup>95</sup> also involving the Drugs and Drug Trafficking Act,<sup>96</sup> section 20 of the Act, which contained a presumption of guilt,<sup>97</sup> was challenged successfully in the Constitutional Court. In passing judgement, Mokgoro J cited *S v Mbatha*; *S v Prinsloo*<sup>98</sup> and made the important observation that “similar to the presumption embodied in section 40(1) of the Arms and Ammunition Act, the effect of the presumption in section 20 of the Act is that it shifts the onus to the accused to prove his or her innocence”.<sup>99</sup> Section 20 was therefore declared invalid. In *Van Nell v S*<sup>100</sup> a challenge was also brought against section 20 of the Drugs and Drug Trafficking Act, but it was referred back to the court *a quo* to make a ruling in accordance with the decision in *S v Mello*.<sup>101</sup>

The cases above provide a few examples of cases in which the Constitutional Court has declared that a provision containing a reverse onus provision that infringes upon the accused’s right to be presumed innocent is inconsistent with the South African Constitution and, for that reason, invalid. It must be noted that there may be circumstances where a reverse onus is justifiable.<sup>102</sup> However, the Constitutional Court is clearly against the notion of the infringement of the right to be presumed innocent,<sup>103</sup> and section 332(7) “creates a reverse onus which violates the presumption of innocence and this presumption may not be justifiable in terms of the limitation clause”.<sup>104</sup> It is therefore highly unlikely that section 332(7) of the Criminal Procedure Act, which does infringe the accused’s right to be presumed innocent, will survive a constitutional challenge.<sup>105</sup>

95 1998 (7) BCLR 908 (CC).

96 See (n 86) sec 20.

97 Presumption relating to possession of drugs: “If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug”: sec 20 Drugs and Drug Trafficking Act (n 86).

98 See (n 90) par 34 1.

99 *S v Mello* at par 5.

100 1998 (8) BCLR 943 (CC) at par 2.

101 *S v Mello* had been decided by the Constitutional Court earlier that day and Mokgoro J (with the other judges concurring) referred the matter in *Van Nell v S* back to the court *a quo* to decide in accordance with the ruling in *S v Mello* in which sec 20 was declared invalid, namely *Van Nell v S* at par 2.

102 Schwikkard & Van Der Merwe 2014: 517 note that “(a)lthough the Constitutional Court has made it clear that there may well be instances where a reverse onus provision is justified, it has been remarkably consistent in refusing to find justification for an infringement of the presumption of innocence”.

103 *Ibid.*

104 Snyman 2013: 248.

105 This view is supported by several commentators as seen above, including Kemp who states that even though the section has not yet been constitutionally challenged “it would no doubt be found unconstitutional too for the same reasons as in *S v Coetzee*”: see Kemp 2015: 244.



## 5 Conclusion

It is important to note that section 332(5) had been inherited from a pre-Constitution era when the legislature made laws and such laws could not be freely challenged. The time and the context of the promulgation of the Criminal Procedure Act are important as it was prior to the existence of the Constitution in South Africa; hence the existence of elements that are typical of a pre-Constitution piece of legislation. In *S v Coetzee* the reverse onus presumption was successfully challenged in the Constitutional Court and as explained above, Langa J made it clear in that case that the duty to bring old provisions in line with the Constitution is the duty of the legislature. This has, however, not happened. As a result well in the twenty first century we still have section 332(7), a reverse onus provision, in section 332 of the Criminal Procedure Act. This begs the question whether such a provision should continue to form part of our law under the current constitutional dispensation.

The implications as well as the effect of section 332(5) and its predecessors operated in such a way that innocent directors, who were not aware that their colleagues were committing offences, were held criminally liable despite their innocence, if they were unable to disprove the presumption of guilt against them. The examples of *S v Coetzee* and of the other cases in which the Constitutional Court declared reverse onus provisions invalid, are a clear indication that a provision that allows for a reverse onus, may lead to conviction in spite of a reasonable doubt regarding the guilt of the accused and this is highly undesirable in a constitutional state.

Section 332(7) shifts the onus from the prosecution to the accused, thus making it possible for the accused to be found guilty even if there is reasonable doubt, while in South African law all accused persons are presumed innocent until proven guilty. This is a violation of the accused's right to be presumed innocent as it allows for the accused to be found guilty without proof of guilt beyond reasonable doubt. Moreover, as illustrated above the effects of section 332(7) may in certain circumstances be even more severe than those of section 332(5). This is an unsatisfactory state of affairs and history shows us, as seen from the Constitutional Court's approach to reverse onus provisions that infringe upon the presumption of innocence, that section 332(7) does not have a place in this era and it is unlikely to survive a constitutional challenge.

The time has come to reform the law pertaining to corporate criminal liability instead of waiting for the constitutionality of section 332(7) to be challenged in court. When that is done, it must be ensured that provisions such a section 332(7) that allow for a reverse onus as well as provisions that may have the effect of allowing for a conviction even though there is a reasonable doubt as to the guilt of the accused are not included.

The principle in section 332(7) of ensuring that members of associations that do not have legal personality are held criminally liable for crimes committed in

the furtherance of the interests of such associations is commendable; however, in reforming corporate criminal liability in South Africa, it would be advisable to have separate statutory provisions that deal with specific crimes that may be committed by incorporated and unincorporated entities. Such statutory provisions must, however, be all-inclusive with regard to the offenders and should refer to the criminal liability of corporations and directors thereof as well as to the criminal liability of members and managers of associations. Moreover, they must be worded in such a way that they do not contain reverse onus provisions that infringe upon the presumption of innocence.

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# TRACING THE ROOTS OF FORFEITURE AND THE LOSS OF PROPERTY IN ENGLISH AND AMERICAN LAW

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## ABSTRACT

Restriction of the freedom and rights of an owner to do with his property as he pleases is not a new phenomenon in legal jurisprudence, but restrictions are limited by legislative provisions and regulations. Interference with private property rights by state authorities may have dire consequences for an owner, and could give rise to forfeiture procedures when the property was used in violation of a law or for illegal purposes. The controversy is further exacerbated by the distinction between forfeitures *in rem* without prior conviction, which is a civil action directed against the so-called guilty property, and an action *in personam* or a criminal forfeiture, which forms part of the sentencing process after conviction and is directed against the owner personally.

Asset forfeiture has an ancient history and tradition and the roots may be traced back to biblical justifications as a form of punishment. *In rem* forfeiture originated from the English common law concept of deodands. An inanimate object or animal that caused the death of a person was accused as the offender, and its value was forfeited to the king. Unlike deodands, forfeiture for felonies or treason is an ancient Saxon and early English common-law doctrine where *in personam* forfeiture was recognised. Upon conviction, all of a person's land and property – real or personal – were forfeited to the Crown. This resulted in the corruption of blood, with the

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consequences that the bloodline of any person convicted and attained became stained or blackened and his descendants or family were prohibited from inheriting.

The English common-law concept of deodand did not become part of the legal tradition in colonial America, and forfeiture for felony was almost never recognised. *In rem* forfeiture appeared for the first time in the United States' admiralty cases which were adapted from the English Navigation Acts of the seventeenth century. Any ship or vessel involved in piracy or slave trafficking was seized and forfeited, based on the guilty property fiction. The thing was considered as the offender, irrespective of the guilt of the owner. Civil and criminal forfeiture of the instruments of crime have survived constitutional scrutiny for many years, and are still applicable today, but are expanded to include a much broader variety of crimes. In conclusion the implications of these common law developments for South Africa are discussed.

**Keywords:** Forfeiture; deodands; *in rem* forfeiture; *in personam* forfeiture; statutory forfeiture; ownership; loss of property; felonies; organised crime

## 1 Introduction

The evolution of asset forfeiture law is aptly described by Casella<sup>1</sup> as

a tale of constant expansion and adaptation. Like a rare species of plant that has been plucked from the biological niche where it first evolved, adapted to new uses and new environments, and disseminated across the globe to serve new purposes that humans find useful, the practice of asset forfeiture has been lifted from the remote corner of admiralty and customs law where it was conceived, applied to an ever-growing set of new crimes and circumstances, and has become a powerful tool of law enforcement routinely applied in tens of thousands of criminal cases.

The imposition of limitations on an owner's right to do with his property as he pleases is not a new phenomenon in legal jurisprudence.<sup>2</sup> The roots of forfeiture of tainted property may be traced back to Biblical notions of punishment, where a provision in the Old Testament stipulates that an ox that gores and kills a person must

- 1 Cassella 2009: 50. The law of forfeiture and its procedures are arcane and reminiscent of ancient concepts and admiralty practices; see, also, Pimentel 2012: 3. The word "forfeiture" is derived from two Latin words, namely *foris*, which means "outside", and *facere*, which means "to do"; Van Jaarsveld 2006: 140. See Hausner 2015: 1921 who defines the term as "the taking of property derived from a crime, or which makes a crime easier to commit or harder to detect".
- 2 See *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) par 28 where the court warned that property owners "cannot be supine", encouraging them to refrain from illegal activities where property is implicated in the ambit of crime. The SCA held in *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) par 18 that the law must take its course when property owners use their property to conduct criminal activities.

be stoned irrespective of its owner's negligence, and its flesh shall not be eaten.<sup>3</sup> Forfeiture, therefore, rendered the property guilty of wrongdoing, and not the person. This doctrine had been developed as a legal concept in early English common law.<sup>4</sup> Blackstone,<sup>5</sup> when analysing the Laws of England in 1758, described forfeiture as a punishment "annexed by law to some illegal act, or negligence of the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein".

Although ownership was regarded as the most comprehensive of all real rights in early Roman law, it was limited by certain prohibitions. Principles of morality, ethics, religion and public law required the *censores* to prevent the misuse of property in conflict with the general interest by the promulgation of applicable legislation.<sup>6</sup> Van Jaarsveld<sup>7</sup> noted that forfeiture procedures had their origins in Roman law, which was received into English law when England became a Roman province after the invasion of Britain by Julius Caesar in AD 43. Goods that were confiscated as punishment for capital crimes were dedicated to the gods and then destroyed. Forfeiture actions like these were established practice during the imperial period,<sup>8</sup> when the confiscated goods were first delegated to the temple and then forfeited to the state treasury.

Coming from a rich English experience and liberty is the maxim "every man's home is his castle"<sup>9</sup> which derives directly from the *Magna Carta* of 1215.<sup>10</sup> The popularity of this expression was evident in a civil case during 1604. In *Semayne's Case*<sup>11</sup> the right of a homeowner to protect his house against unlawful entry also applied to the King's agents. However, recognition was given to authoritative officers to enter after proper notice to execute the King's process of attachment and forfeiture of property.

3 Exodus 21:38. The references are voluminous, but see Slavinskiy 2014: 1624; Van den Berg 2015: 921; Cassella 2009: 24.

4 Slavinskiy 2014: 1624.

5 Blackstone 1765-1769: 269; Van Jaarsveld 2006: 139.

6 See Van Zyl 1983: 133-134.

7 Van Jaarsveld 2006: 141.

8 27 BC-AD 565. See Van Zyl 1983: 8-9, where the author refers to the emperor Justinian who made a substantial contribution to the conservation of Roman law.

9 Fraenkel 1921: 361.

10 *Ibid*; Greek 2016: *passim*. According to Greek the Crown signed the *Magna Carta* as part of an agreement to return forfeited land which escheated to the Crown after a year and a day. A clause furthermore stipulated that the Crown would renounce any claim to forfeiture on the ground of felony, and that forfeited land should be returned to the rightful heirs only after the death of the offender. In *CJ Hendry co v Moore* 318 US 133 (1943) 137-138 an American court explained that feudal governments during the reign of King Hendry I profited from the forfeiture of property and thereby manipulated the harvesting of benefits. See, also, Van Jaarsveld 2006: 143.

11 *Semayne's Case* (1604) 5 Co Rep 91 a 77 ER 194 (KB) (i).

This article focuses on the historical development in – and distinction between – English and American law of forfeitures *in personam* (criminal), which forms part of the sentencing process after conviction, and *in rem* (civil) where tainted property is forfeited to the state without prior conviction. The controversy is further exacerbated by the application of civil forfeiture procedures which are still applicable in today's legal discourse. The analysis of the English origins of forfeiture law may have permeated to South Africa's Prevention of Organised Crime Act<sup>12</sup> (POCA) promulgated to combat the growing phenomenon of organised crime.

Three kinds of forfeiture were established in English and American law, namely deodands; forfeiture for felony or treason upon conviction (attainder); and statutory forfeiture.<sup>13</sup> These will now be discussed separately.

## 2 Deodand forfeiture

Traditionally, asset forfeiture dates back to the eleventh century English common law where the law of deodands was zealously applied throughout England.<sup>14</sup> It

12 Act 121 of 1998. This was emphasised by the court in *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) par 26. POCA is based on the American Racketeer Influenced and Corruption Organizations Act of 1970 (RICO), which derived from the ancient English doctrine that the property in question is guilty of the offence. See Van Jaarsveld 2006: 138. It was underscored by the US Supreme Court in *United States v Ursery* 518 US 267 (1996) 275, where the court held that *in rem* forfeitures means “that it is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned”. In criminal forfeiture “it is the wrongdoer in person who is proceeded against, convicted, and punished”. This was also emphasised by the US court in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684 where it was held that a proceeding *in rem* is independent of and wholly unaffected by a proceeding *in personam*. The question has been posed whether *in rem* forfeitures are not merely “criminal forfeiture dressed up in sheep's clothing”. See, further, Young 2009: 4. Criticism by Young suggests that the same objectives are achieved by civil forfeiture when compared to criminal forfeiture, but without the procedural safeguard and the protection of human rights applicable to criminal forfeiture. Interestingly, during the period from 335 to 322 BC Aristotle observed that criminal conduct does not originate from a desire to fulfil shortcomings, but “to fulfil a craving for superfluities with a view to painless delight”. See, also, Kruger 2008: 2.

13 *Austin v United States* 509 US 602 (1993) 610.

14 This is perceived in leading case law where asset forfeiture laws were traced back to the enforcement of English statutes and common law by colonies long before the adoption of the US Constitution. See *Austin v United States* 509 US 602 (1993) 611-613; *United States v Bajakajian* 524 US 321 (1998) 340-341; *United States v Ursery* 518 US 267 (1996) 274. Greek 2016: 2 remarked that during the period from 1066 to 1087 William the Conqueror instituted a land tenure system which bestowed absolute ownership and title of all land to the Crown. However, large portions of land were given to William's supporters who became lords of these estates. The lords were allowed to appropriate parcels of land to sub-vassals where obligations needed to be fulfilled, and free peasants worked the land and paid rent. Feudalism in England was consequently abolished in 1660.

was finally abolished by Parliament in 1846 because the system was thought to be irrational.<sup>15</sup>

*Deodand* originated from the Latin phrase *deo dandum*, meaning “to be given to God”. An important rule of this law was *omnia quae movent ad mortem sunt dedanda* which prescribed that any movement of an animal or object which caused, directly or indirectly, an immediate fatal accident of a King’s subject was regarded as a deodand and was then confiscated and forfeited to the Crown.<sup>16</sup> In the *Calero-Toledo*<sup>17</sup> case the Supreme Court observed that the origins of deodand are traceable to biblical and pre-Judeo-Christian practices, where the instrument of death was accused and religious expiation was required.<sup>18</sup> Van den Berg<sup>19</sup> observed that deodand was a transformation of an earlier action called noxal surrender where property was surrendered to the wronged party, rather than to the state. This action had developed during the ninth century laws of Alfred the Great.

Deodands were unknown in parts of the United States or of little use when applied. During the American Revolution, the colonies promulgated laws justifying the *in personam* forfeiture of the estate of any person convicted of loyalty to the king of England.<sup>20</sup> After the Revolution and the adoption of the Constitution the use of common-law forfeiture was restricted to treason cases and statutory provisions enacted by Congress for other crimes. A form of civil forfeiture was passed into law by Congress during 1789, authorising the seizure and forfeiture of ships in violation of customs regulations, and ships that were engaged in piracy and slave trafficking.<sup>21</sup>

15 Pervukhin 2005: 237; Grossman 1991: 682. Hadaway 2000: 84 notes that the deodand doctrine was used to endorse the concept that the sovereign could take legal action based on the guilt of the *res* or thing, irrespective of the culpability of its owner.

16 *Austin v United States* 509 US 602 (1993) 610; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 681; see Greek 2016: 8, who explains that the object was forfeited to the king or local lord based on the legal fiction that it was capable of future harm and should be destroyed; Festekjian 1996: 714; Schwarcz & Rothman 1993: 290; Slavinskiy 2014: 1624. See, further, Pervukhin 2005: 237-238 who indicated that a distinction was drawn between circumstances where the thing or chattel that caused the death was in motion or not. A moving object would not be regarded as a deodand if it was a fixture. The author, at 255, explains that the “fixture rule” appeared for the first time in 1664, and that a fixture is any real property when physically fastened to the land or building to enhance its utility. Church bells, for example, were regarded as fixtures “because the bell is *already* given to God and to the church”.

17 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 663.

18 *Ibid.* See, further, *Austin v United States* 509 US 602 (1993) 610; Grossman 1991: 681; Ross 2000-2001: 261; Schwarcz & Rothman 1993: 290; and Berman 1999: 10, 24 who explain that the biblical treatment of an ox indicated that the actions against non-human transgressors were envisaged as crimes against the community. The punishment of stoning was reserved for only a few types of crimes, and the offended community served as the common executioner. See n 3 above with reference to *Exodus* 21:38.

19 Van den Berg 2015: 873.

20 Grossman 1991: 682-683; Van Jaarsveld 2006: 144; Doyle 2016: 2; Van den Berg 2015: 873-874.

21 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 663, 683; Doyle 2016: 2; Ross 2000-2001: 261; Grossman 1991: 683; Simser 2009: 16; Cassella 2001: 665; Cassella 2009: 24.



The doctrine behind this theory was primarily that an inanimate object or the instrument of death was accused and characterised as the offender and not the owner. Therefore it was an established principle that “[w]here a man killeth another with the sword of John at Stile, the sword shall forfeit as deodand, and yet no default is in the owner”.<sup>22</sup> The king could take forfeiture action, justified by the theory of taint or the guilt of the deodand.<sup>23</sup> Generally, deodands were not taken away from their owners, but the value of the accused offending object or animal was established by coroners’ inquests and grand juries. The owner was entitled to the recovery thereof once a fine, an amount equal to the value of the deodand, was paid to the Crown. The proceeds of these funds were applied to religious uses and were often distributed among the poor or used to compensate the victim’s family.<sup>24</sup> However, Pervukhin<sup>25</sup> emphasises that deodand adjudications were not often challenged in an open court as no clear evidence existed that the common law was conscientiously applied by coroners’ juries. Jurists and judges tended to imitate their predecessors, and deodand rules were transferred from treatise to treatise, and from century to century, which ultimately determined how deodands were interpreted.

It is clear that deodand forfeitures were *in rem* procedures, where actions were instituted against the offending object itself, and not against the owner. Although the archaic nature of deodand survived in England until 1846, it did not become part of the common-law tradition of South Africa.<sup>26</sup>

### 3 Forfeiture for felonies

Felonies or “attainder”<sup>27</sup> were the largest category of forfeitures in English law.<sup>28</sup> The roots of forfeiture stemmed from the word “felony” and were perceived in ancient Saxon and Scandinavian legal thought, which survived the Norman invasion of 1066, and put into practice in the legal system of feudal England. Felony originated from the Saxon words *fee* or landholding, and *lon* or price. When combined, the meaning may

22 Festekjian 1996: 714.

23 Berman 1999: 2; Van Jaarsveld 2006: 144; Hadaway 2000: 84; Whatley 1997: 1286-1287; Winters 1987: 458; Reed 1994: 259-260.

24 Campbell 2010: 18; Doyle 2016: 1-2; Pervukhin 2005: 237, who also notes that the money, more often than not, went directly into the royal coffers where it intermingled with other sources of revenue. At 245 he further observes that the practice of deodand was applied on a regular basis throughout the sixteenth and seventeenth centuries. For example, in 1524 a woman was killed when thrown off her horse, and the coroners’ jury found that the mare had murdered her. From the sixteenth to the eighteenth century boats, carts, animals and trees were declared deodands and forfeited to the Crown.

25 Pervukhin 2005: 239.

26 Boudreaux & Pritchard 1996: 602.

27 This word is derived from the Latin word *attinctus* which means “stained” or “blackened”.

28 Boudreaux & Pritchard 1996: 602.

be defined as an act or omission that could result in the loss of property.<sup>29</sup> However, Kesselring<sup>30</sup> noted that while the word designated a certain type of offence, forfeiture constituted and defined the legal effect of felony.

Unlike deodands, the focus was on the human offender where early English common law also recognised criminal or *in personam* forfeiture upon conviction of a person for felony or treason. All land and property were directly forfeited to the Crown as an established penalty for treason and a convicted felon escheated<sup>31</sup> his land to the lord, and his chattels to the king. A convicted traitor forfeited all of his property, real and personal, to the Crown.<sup>32</sup> The distinction between real and personal property was important. It was also complex. The forfeiture of real property for felony was land held in “fee simple”, whereas personal property included “chattels real”, such as leases on land, and “chattels incorporeal” or “choses-in-action” such as shares or intangibles that could be “reduced into possession”.<sup>33</sup> The *circa* 1187-1189 classic legal treatise known as *Glanvill* endorsed the doctrine that “from traitors, all lands and chattels to the king, and from felons, all chattels to the king and all lands to the lord after the king’s year and a day”, which was also enshrined as a rule in the Magna Carta and the *Prerogativa Regis*.<sup>34</sup>

The justification for these forfeitures was based on the theory that all land and property were held by the Crown as part of an allegiance pact between the king and society. Any breach of a criminal law was esteemed an offence against the king’s peace, and property rights were accordingly denied.<sup>35</sup>

29 Simser 2009: 15.

30 See Kesselring 2009: 203, who also noted that the word is Frankish in origin, initially earmarked as a disloyalty between “lord and vassel or a violation of the feudal bond”.

31 According to Winters 1987: 459 escheat is “an obstruction in the normal course of the descent of property whereby the property reverts back to the original grantor”. Greek 2016: 2 points out that “escheat” has French, rather than Saxon, origins, and distinguished two types of escheats. Firstly, the *propter defectum sanguinis* was regarded as a form of civil escheat when there was no heir to inherit the property and the land reverted back to the lord. Secondly, the use of *escheat propter delictum tenentis* was based on the feudal principle that all land would revert to the lord as a result of a failure on the part of a vassal to perform his duty to the lord, such as the commission of a felony.

32 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682; *Austin v United States* 509 US 602 (1993) 610. See, also, Greek 2016: 3; Doyle 2016: 2; Winters 1987: 458; Simser 2009: 15; Boudreaux & Pritchard 1996: 602-603.

33 Kesselring 2009: 204.

34 *Ibid*; Greek 2016: 3.

35 See Winters 1987: 457. Van Jaarsveld 2006: 142-144 notes that the concept “felon” was initially created by the courts to serve as punishment for tenants who failed to meet their obligations. This method of punishment was further developed to include criminal offences such as murder, rape, arson and robbery, where the offender’s property was forfeited to the Crown. The belief was that the privilege of ownership is lost once the rules of society were broken.

With even more draconian consequences, escheat and forfeiture procedures resulted in the corruption of blood, which may have permeated to the legacy of the feudal system. Any person convicted and attainted for treason or a felony forfeited all of his lands and personal property to the Crown.<sup>36</sup> Criminal forfeiture in combination with corruption of blood was referred to as forfeiture of estate or common law forfeiture because of its total deprivation of property and all property rights.<sup>37</sup> Corruption of blood meant that a convicted criminal's bloodline, for generations to come, was corrupted and could neither inherit lands, or any other heritage from his ancestor, nor transmit them by descent to any heir, nor retain property he already had.<sup>38</sup> Forfeiture and corruption of blood was only possible following both a conviction by a jury and attainder. Attainder was a judicial declaration of a person's civil death, and corruption of blood occurred as a consequence of a sentence to death for high treason or felony.<sup>39</sup> Attainder consolidated the power of the Crown where "children are pledges to the prince of the father's disobedience".<sup>40</sup>

The notion that a convicted felon's blood became corrupted, resulting in his property no longer being heritable had dire consequences for his family and creditors. Not only did this become part of the explanation for the loss of land, but also the reason why the widow of a felon received no inheritance in the land.<sup>41</sup> She lost all rights she might have had to her so-called reasonable parts of his personal property. The same applied to leases or other chattels held jointly. Outstanding debts due to a felon became due to the Crown, but if the felon owed debts, these now died with him. All interested parties and victims lost their claim to property that might, in different circumstances, have been rightfully considered theirs.<sup>42</sup>

These far-reaching consequences, according to Greek,<sup>43</sup> were based on the religious justification stemming from the biblical concept that the sins of the fathers

36 Doyle 2016: 2; Greek 2016: 3; Winters 1987: 457; Pimentel 2012: 8; Shaw 1990: 171.

37 *Austin v United States* 509 US 602 (1993) 613; Pimentel 2012: 8; Doyle 2016: 2; Greek 2016: 3; Shaw 1990: 171. See Kesselring 2009: 205 who distinguishes between treason cases where all of the offender's property were forfeited to the Crown, and felony cases where "real estate technically *escheated*, whereas the personal property and the year, day, and waste of the land were forfeit". The law provided that lands escheated to lords in cases where tenants died without heirs, irrespective of how many children an attainted felon might have had.

38 Pimentel 2012: 8; Doyle 2016: 2; Greek 2016: 3; Shaw 1990: 171; Berman 1999: 24; Kesselring 2010: 115.

39 Doyle 2016: 2; Greek 2016: 4. See, too, Winters 1987: 457 who observes that the punishment of the felon as well as his ancestors and heirs would serve as a more effective deterrent measure in comparison to personal punishment.

40 Boudreaux & Pritchard 1996: 604.

41 Kesselring 2009: 205. According to Greek 2016: 3 loss of a widow's dower usually consisted of one-third of her husband's lands. An attainted felon and his wife's dower rights could only be avoided when a crime was statutorily exempted by Parliament.

42 Kesselring 2009: 208.

43 Greek 2016: 4, 9. Forfeiture and the corruption of blood were eventually nullified in England, but only decades after it had been rejected by the American colonists.

would be visited upon their sons. Attainder forfeitures, however, were justified as “an appropriate sanction for the property owner’s violation of the social compact”.<sup>44</sup> The noxious effects of corruption of blood survived without impediment until 1814 when England repealed this doctrine. It was only applied to the crimes of murder and treason.<sup>45</sup>

## 4 Statutory forfeiture

The founders of the American Republic had a different interpretation of the nature of property and the limitations of property rights by government. Property was regarded as a natural right which formed the cornerstone of individual liberty.<sup>46</sup> The deodand concept in English common law did not become part of the legal tradition in colonial America,<sup>47</sup> and forfeiture of estate was a rare phenomenon. After the Revolution, forfeiture of estate was viewed as being so abhorrent that the framers of the Constitution declared unconstitutional those extreme punishments upon conviction for treason. Article 3, paragraph 3, of the Constitution provides that “Congress shall have the power to declare the punishment of treason, but no attainder to treason shall work the corruption of blood, or forfeiture except during the life of the person attainted”.<sup>48</sup> The First Congress of 1787 promulgated the Act of 30 April 1790 which restricted the use of forfeitures of estate in other crimes or felonies.<sup>49</sup> Another predominant antecedent of modern forfeiture featured in the revenue section of the Exchequer in pre-colonial England, and was later used quite

44 Boudreaux & Pritchard 1996: 603.

45 *Idem* 604; Kesselring 2009: 223.

46 Boudreaux & Pritchard 1996: 604.

47 Brodey 1997: 694; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682; Doyle 2016: 2; Winters 1987: 457. See, also, Greek 2016: 10 who emphasises the important reason leading to the rejection of the English system as a whole by the American colonists referred to the manner in which American courts had been created. The authority to establish courts in England rested with the king whilst the power to create courts in the American colonies relied on/was based on several sources, namely: first, “through powers granted by the King in charters; second, through the exercise of the royal prerogative; third, through the creation of certain subordinate governmental organizations; and fourth, through creation of legislation”. This resulted from the difference in origin of the various colonies, such as royal colonies which were under the direct control of the Crown, chartered colonies with vested governing rights and proprietary colonies where vast authority was granted to a single owner.

48 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682-683; Pimental 2012: 8; Winters 1987: 458; Boudreaux & Pritchard 1996: 604.

49 This Act expired on 1 Nov 1986. See Winters 1987: 458; Reed 1994: 256; Pimental 2012: 8. This was underpinned in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 682-683 where the court stated that forfeitures, as a consequence of a federal criminal conviction, have not been permitted. Forfeiture of estate resulting from a conviction for treason has been constitutionally prescribed by Art III § 3 “though forfeitures of estate for the lifetime of a traitor have been sanctioned”.

extensively in the American colonies against smuggling, the enforcement of tax laws and other revenue evasive schemes. According to Doyle,<sup>50</sup> contemporary American forfeitures are clearly a descendant of English statutory or commercial forfeiture.

## 4 1 Admiralty cases

The concept of *in rem* forfeiture first appeared in the United States' admiralty cases which were adapted from the British Navigation Acts of the seventeenth century.<sup>51</sup> The Navigation Act, 1651, which was applied for two centuries, was regarded as the most important piece of legislation in this regard and consisted of the basic formula for civil forfeiture. The American colonies were seen as "residents of England" under the Navigation Act. After 1660 it was illegal to import and export goods from the colonies unless British ships with three-fourths English crew members were used.<sup>52</sup> The Act of 3 March 1819 was enacted by the First Congress authorising the forfeiture of any ship or vessel engaged in slave trafficking and from which any "piratical aggression"<sup>53</sup> was attempted.<sup>54</sup>

The most distinctive rationale for *in rem* forfeitures was that it was typified as the personification theory, where inanimate objects were stigmatised with a tainted or criminal personality and held accountable for the violation of federal laws.<sup>55</sup> This was described by the Supreme Court in *Goldsmith, Jr-Grant*<sup>56</sup> as a legal fiction "ascribing to the property a certain personality, a power of complicity and guilt in the wrong". The distinction between civil and criminal forfeiture was formulated in 1827 by the Supreme Court in its first notorious piracy decision, namely *The Palmyra*.<sup>57</sup> Story J held that "the thing is here primarily considered as the offender, or rather the offence

50 Doyle 2016: 3. See, also, *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) at 682 where the court points out that after the adoption of the Constitution, ships and cargoes involved in customs offences were subject to forfeiture under federal law; *Austin v United States* 509 US 602 (1993) 613; Hadaway 2000: 84 who describes that the Act of 31 Jul 1789 applied to protect the fiscal position of the US by the seizure and forfeiture of ships involved in customs violations. Van Jaarsveld 2006: 145 notes that the Court of Exchequer found its roots during the time of King Hendry I where it fulfilled a treasury accounting function.

51 Winters 1987: 459; Boudreaux & Pritchard 1996: 605-606; Reed 1994: 258; Pimental 2012: 7; Hadaway 2000: 84. However, Van Jaarsveld 2006: 143 observes that the Crown, under the Navigation Acts, either had the option to institute an action *in personam* against the owner of the illicit cargo whereby the cargo was forfeited to the Crown after conviction, or an action *in rem* against the cargo without the owner being criminally prosecuted.

52 Greek 2016: 15; Reed 1994: 258.

53 Cassella 2003: 315; Cassella 2009: 24; Simser 2009: 16.

54 Cassella 2001: 656.

55 Reed 1994: 258-259.

56 *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510; Winters 1987: 460.

57 *The Palmyra* 25 US (12 Wheat) 1 (1827). The *Palmyra*, an armed vessel worth \$10 228 and chartered by the king of Spain, was seized and forfeited on suspicion of piracy. The captain contested the forfeiture based on the premise that the king was not culpable, and that the crew was never convicted of any crime. See Hadaway 2000: 84; Simser 2009: 16; Whatley 1997: 1278.

is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*". Accordingly, *in rem* proceedings stood independent of, and as a whole unaffected by, any *in personam* proceedings.<sup>58</sup>

Seventeen years later, the Supreme Court decided a similar admiralty case in *Harmony v United States*.<sup>59</sup> Tort principles were invoked and the forfeiture of the ship was upheld for acts of piracy by its crew, without any reference to the innocence, conduct or character of the owner.<sup>60</sup> The court, in justifying the forfeiture of an innocent owner's ship, ruled that it was "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party". In support of the ruling, the court reasoned that the ship was guided by its crew and master, and that their actions affected the ship.<sup>61</sup> In similar vein, during the Civil War, Congress enacted powerful forfeiture proceedings in terms of the commonly known Confiscation Act of July 17 1862. This Act authorised drastic *in rem* forfeitures of any property owned by Confederate soldiers and sympathisers, and the forfeited property was used in support of the cause of the Union during the time of war. In *Miller v United States*,<sup>62</sup> the first United States case in which a court ruled on the

58 *The Palmyra* 25 US (12 Wheat) 1 (1827) 14-15; *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684; *Bennis v Michigan* 516 US 442 (1996) 447; Boudreaux & Pritchard 1996: 597; Cassella 2009: 24; Winters 1987: 459; Van den Berg 2015: 867; Festekjian 1996: 716. See Pimental 2012: 9 who emphasises that this procedure was draconian. Vicarious liability not only attached to a sailor's single act in violation of express instructions by the owner, but an entire ship could be forfeited. Brodey 1997: 694 observes that the guilty property fiction used in admiralty cases was developed for practical reasons, rather than a belief that the property itself was guilty of criminal conduct. In *Austin v United States* 509 US 602 (1993) 615 the reason for *in rem* forfeitures was justified as a result of the lack of *in personam* jurisdiction over the owner of the property. Cassella 2009: 25 explains that admiralty *in rem* forfeitures was a matter of necessity in circumstances where a ship might be found within the jurisdiction of the US, but where the owner could not be found. Primarily, the reach of the courts was expanded to facilitate some source of compensation under these circumstances. This was confirmed by Lord Reid in *The Atlantic Star v Bona Spes* [1973] 2 WLR 795 where the court held that the right to arrest a ship is an ancient and necessary right, especially when difficulties are encountered to establish jurisdiction in an appropriate case, but "the arrest gives the arrester what may be a very necessary security".

59 43 US (2 How) 210 (1844), also referred to as *United States v The Brig Malek Adhel*. See, further, Brodey 1997: 695. This decision involved the forfeiture of an armed ship whose captain became mentally unbalanced and fired on other ships that it encountered.

60 *Harmony v United States* 43 US (2 How) 210 (1844) 233; Berman 1999: 8; Festekjian 1996: 717; Winters 1987: 459; Pimental 2012: 9.

61 *Harmony v United States* 43 US (2 How) 210 (1844) 238; Cupp 1997: 586; Pimental 2012: 9; Cassella 2003: 316, 323. See Winters 1987: 459-460; Brodey 1997: 695-696; Whatley 1997: 1287-1288.

62 *Miller v United States* 78 US (11 Wall) 268 (1870) 269. Reed 1994: 259-261 observes that this was the first decision where the court analysed the distinction between civil and criminal forfeiture, and held that the purpose of the Confiscation Act, 1862, was to delegate the legitimate exercise of Congress's war power authority. According to Kochan 2016: 3 President Lincoln objected during his lifetime to the provision of the Act which regulated the deprivation of property without prior conviction, and believed that confiscation should only be used as a temporary emergency measure. He argued that all property so seized should be restored to those from whom it was taken after the war.

application of the Confiscation Act after the Civil War, it was held that this was “an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes”.

## 4 2 Extended forfeiture procedures and applicable case law

Between 1879 and 1920 Congress extended the application of forfeiture legislation beyond admiralty cases, although the Supreme Court consistently relied on the legal fiction that the property was guilty of the wrongdoing, with no regard for the innocence of the owner. In *Dobbin's Distillery*<sup>63</sup> the court upheld the forfeiture of a landlord's property and buildings where the tenant had operated a tax delinquent distillery, arguing that the offence attached to the property irrespective of the innocence of the owner.<sup>64</sup> Further, in 1921 and 1926 the court upheld the forfeiture of automobiles used to illegally transport untaxed liquor by persons other than the owner.<sup>65</sup> With reference to *The Palmyra*,<sup>66</sup> the court in *Goldsmith*<sup>67</sup> justified the anomalous forfeiture as a need to protect federal revenue, as well as the doctrine of the common law deodand “by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited”. The court reiterated that the fiction was a curious one, because goods cannot offend, forfeit or pay duties, “but men whose goods they are can”.<sup>68</sup> It was emphasised in *Austin*<sup>69</sup> that forfeiture as punishment runs through case law rejecting the innocent owner defence as a common law defence to forfeiture.<sup>70</sup> The forfeiture in these decisions was based on two theories, namely that the property is guilty of the offence, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. These theories embodied the notion that the owner was negligent when allowing his property to be misused, and must be punished.

63 *Dobbin's Distillery v United States* 96 US 395 (1877).

64 *Dobbin's Distillery v United States* 96 US 395 (1877) 396-397; Berman 1999: 9; Cassella 2009: 26; Festekjian 1996: 717-718; Cassella 2003: 317; Boudreaux & Pritchard 1996: 597.

65 See *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921); *Van Oster v Kansas* 272 US 465 (1926). In *Van Oster* the plaintiff had bought a car from a dealership and agreed that an associate could use it for business. The car was, however, used to illegally transport liquor, without the knowledge of the owner. The court argued that the innocence of the owner is irrelevant because certain uses of property were undesirable and the property must be removed as a preventative measure against such uses. See Cupp 1997: 587; Festekjian 1996: 718-719; Cassella 2003: 317.

66 *The Palmyra* 25 US (12 Wheat) 1 (1827).

67 *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510-511; Reed 1994: 263; Berman 1999: 10.

68 In *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921) 510-511 the court held that this fiction is “firmly fixed” in American case law; Winters 1987: 460.

69 *Austin v United States* 509 US 602 (1993) 613.

70 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974); *JW Goldsmith, Jr-Grant Co v United States* 254 US 505 (1921); *Dobbin's Distillery v United States* 96 US 395 (1877); *Harmony v United States* 43 US (2 How) 210 (1844); *The Palmyra* 25 US (12 Wheat) 1 (1827).

According to Cassella<sup>71</sup> it was increasingly clear that tainted property was subject to forfeiture because it was instrumental in the commission of the offence. Furthermore, it was necessary to confiscate such property to remove it from circulation, and those taxes or other payments could be recovered to which the government was entitled. Drastic changes were introduced in 1978 and 1984 when Congress amended the drug forfeiture legislation, allowing the forfeiture of the proceeds of crime, as well as property used to facilitate it.<sup>72</sup>

The English common-law notion of criminal forfeiture was revisited in 1990 and applied to a wide variety of other crimes. In *Bajakajian*<sup>73</sup> the court observed that the English common law of criminal or punitive forfeiture was resurrected by Congress as part of the Racketeer Influenced and Corruption Organizations Act of 1970 [hereafter RICO] to combat organised crime and drug trafficking.

## 5 The relevance of forfeiture procedures in South Africa

The concepts and issues with which the United States has struggled is surprisingly familiar in South Africa which has also adopted civil and criminal forfeiture as a measure to combat organised crime in terms of the Prevention of Organised Crime Act 121 of 1998 [hereafter POCA]. The drafters of POCA consulted legislation of the United States, considered to be an omnibus of measures including criminal and civil forfeiture.<sup>74</sup> Although section 35(1)(b) of the Criminal Procedure Act 51 of 1977 provides for the forfeiture of any weapon or instrument used by a convicted offender to commit an offence, the legislative objectives of POCA are also clearly stipulated in its preamble. Firstly, measures are introduced to combat the rapid growth of organised crime, money laundering, criminal gang activities and racketeering, which present a danger to public order and safety, economic stability and sustainable growth, and with the potential to inflict social damage. Secondly, the South African common and statutory law have failed to deal adequately with organised crime and to keep pace with international developments. Therefore legislation was needed for the legalisation of the seizure and forfeiture of property concerned, or suspected to be concerned, in the commission of an offence. To achieve this objective, provision was made for a civil remedy; the restraint, seizure and confiscation of property; or

71 Cassella 2009: 26-27.

72 *Idem* 27; Cassella 2003: 318.

73 *United States v Bajakajian* 524 US 321 (1998) 332; Cassella 2003: 320.

74 See n 12 *supra* where it is noted that POCA was inspired by the guidelines formulated in the RICO statute. Chapter 5 of POCA regulates criminal or *in personam* forfeiture after conviction, which is directed at the proceeds of crime and the property of the defendant. Civil or *in rem* forfeiture, on the other hand, and without prior conviction, is regulated by ch 6, which is based on the so-called guilty property fiction, in accordance with the *dictum* of the court in *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 684.



the benefits derived from unlawful activities. POCA further provides that no person shall benefit from the fruits of their unlawful activities or that they may use their property to commit crime.<sup>75</sup>

POCA is derived from transnational criminal law which refers to a body of law developed out of the need for international measures, such as treaties and conventions, to implement legislation in order to combat organised crime.<sup>76</sup> South Africa was one of the signatories to the United Nations Convention against Transnational Organised Crime (the Palermo Convention) on 14 December 2000 and 20 February 2004.<sup>77</sup> Some of the offences provided for in the Convention include the participation in serious crime (Art 2), participation in an organised criminal group (Art 5), as well as laundering the proceeds of crime (Art 6) and corruption (Art 8).<sup>78</sup> The court underscored in *National Director of Public Prosecutions v Prophet*<sup>79</sup> that civil forfeiture is largely based on statutory provisions of the United States, based on the English fiction that the property is rendered guilty of the offence. Forfeiture is designed to confiscate the offending property and to “require disgorgement of the fruits of illegal conduct”.<sup>80</sup> Willis J in *National Director of Public Prosecutions v Cole*<sup>81</sup> quoted several judgments from the United States in which property was used to commit drug related offences, which rendered it an instrumentality of the offence. The court held as follows: “I shall dwell briefly upon the cases ... because they provide some contextual colour to the issues with which the South African Courts are having to grapple in dealing with the interpretation and application of the Act.”<sup>82</sup> Furthermore, the court held that forfeiture orders can easily become not a weapon of justice, but a weapon of terror.<sup>83</sup> Nevertheless, the court made it clear that history demonstrates that these measures address the lawless nature of drug trafficking and

75 *Mohunram v National Director of Public Prosecutions* 2007 (2) SACR 145 (CC) par 146; *Prophet v National Director of Public Prosecutions* [2007] 2 BCLR 140 (CC) par 59; *National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) par 14; *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) par 26; *Falk v National Director of Public Prosecutions* [2011] 11 BCLR 1134 (CC) par 10; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 166.

76 For examples of international co-operation, see *Falk v National Director of Public Prosecutions* [2011] 11 BCLR 1134 (CC) par 1 read with n 1 *supra*.

77 Kruger 2008: 4.

78 Egan 2011: 170.

79 [2003] 8 BCLR 906 (C) par 22.

80 *National Director of Public Prosecutions v Prophet* [2003] 8 BCLR 906 (C) par [22]. The court underscored that the US in particular has extensive experience with civil forfeiture and may be usefully studied comparatively. See *United States v Ursery* 518 US 267 (1996) 69; Van Jaarsveld 2006: 138-139.

81 2005 (2) SACR 553 (W).

82 *National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W). *Idem* par 9, where reference is made, amongst others, to *Austin v United States* 509 US 602 (1993).

83 *National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) par 14.

the widespread devastation it causes. This has resulted in international consensus that forfeiture is a necessary tool in fighting a “seriously harmful evil”<sup>84</sup> in society.

Moseneke DCJ and Cameron J of the Constitutional Court strongly emphasise that corruption and organised crime “threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order”, and that when it flourishes, “sustainable development and economic growth are stunted ... and stability and security of society is put at risk”.<sup>85</sup> In *National Director of Public Prosecutions v Mohamed*<sup>86</sup> the court noted that conventional criminal penalties are inadequate as measures of deterrence, as the leaders of groups engaged in organised crime benefit from and retain their criminal income, even when brought to justice and convicted. The importance of forfeiture procedures was further underscored by Van Heerden J in *Mohunram*,<sup>87</sup> when he stated that the need to combat criminal activities by depriving the perpetrators of their property which was obtained or used in the commission of crimes. The primary objective of POCA is not to punish the offender, but to remove the incentives and instruments to commit further crimes.<sup>88</sup> This was confirmed by Nkabinde J in *Prophet*<sup>89</sup> where the Constitutional Court held that the property is rendered guilty of contravening the law and not the owner. According to Cassella “[f]orfeiture ... gives the criminal his just desserts”.<sup>90</sup>

## 6 Conclusion

The development, adaptation and applicability of these ancient forfeiture procedures to modern versions were best described as follows by the court in *Calero-Toledo*:<sup>91</sup>

The customs, beliefs, or needs of primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it

84 Van Jaarsveld 2006: 139.

85 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 166.

86 2003 (4) SA 1 (CC) par 15; *Falk v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2011] 11 BCLR 1134 (CC).

87 *Mohunram v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) 2007 (2) SACR 145 (CC).

88 *Mohunram v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2007] 2 SACR 145 (CC) par 28; *Mazibuko v National Director of Public Prosecutions* [2009] 3 All SA 548 (SCA) [2009] 3 All SA 548 (SCA) par 26.

89 *Prophet v National Director of Public Prosecutions v Cole* [2005] 2 SACR 553 (W) [2007] 2 BCLR 140 (CC) par 58.

90 Cassella 2009: 32.

91 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) 681; see, also, Cassella 2003: 320; Cassella 2009: 29. Van den Berg 2015: 876 emphasises that this decision is still applicable and provides much of the backbone in support of the modern understanding and justification of this doctrine.

is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

The *in rem* forfeiture of pirate ships and other instruments of crime not only survived constitutional scrutiny for two hundred years, but have remarkably expanded in modern times to include a much broader variety of property such as the forfeiture of vehicles, houses, bank accounts and all serious offences including money laundering, white collar crimes, child pornography and car-jacking where property was used to commit or facilitate a crime.<sup>92</sup>

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# STATUTORY REGULATION OF HOUSEBREAKING AND INTRUSION IN SOUTH AFRICA – AN HISTORICAL PERSPECTIVE

**Shannon Hocto<sup>\*</sup>**

## ABSTRACT

This article discusses the statutory offences which regulated the unlawful conduct of housebreaking and intrusion in association with the common-law crime of housebreaking, taking account of antecedent and analogous provisions in the English law, as well as the developments in respect of these offences, prior to their repeal. The utility of these offences is thus considered, prior to an assessment of the reasons for their repeal.

**Keywords:** Housebreaking offences; housebreaking implements; breaking; entering; dwelling; premises; night; lawful excuse

## 1 Introduction

Prior to the inception of the Union of South Africa in 1910, each of the four provincial legislatures had enacted statutory forms of the crime of housebreaking. These were not intended to override the common-law version of the crime, but rather to supplement it. In so doing these offences provided an alternative basis of criminal

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liability in terms of the prohibited conduct which overlapped with the ambit of the common-law crime, as well as extending the scope of the prohibited conduct as such, by, for example, criminalising the possession of housebreaking implements. Aspects of these provincial offences remained in force until 1993, when in terms of section 82 of the General Law Third Amendment Act<sup>1</sup> the new statutory offence of “failure to give a satisfactory account of the possession of an implement or object” was created. This offence replaces the provincial housebreaking offences relating to possession of housebreaking implements, creating a uniform national crime in this regard. The creation of a single national crime of trespass<sup>2</sup> also played a role in the gradual phasing out of aspects of these offences. However, these offences, founded on pre-Union legislation, have played a significant part in the control of this area of criminal activity for over a hundred years, and will be examined below.

First, it should be noted that, in accordance with the uncertain status of the common-law housebreaking crime in Roman-Dutch law,<sup>3</sup> these statutory offences have English law antecedents.<sup>4</sup> The relevant English legislation directly preceding the pre-Union statutes was the Larceny Act 1861.<sup>5</sup> Section 58 of this statute provided as follows:

- 1 General Law Third Amendment Act 129 of 1993. Section 82 provides as follows: “Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor-vehicle or to gain unlawful entry into a motor-vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence.” On this offence, see Hكتور 1999b: 225-239. In terms of s 84 of this Act, the following laws were repealed: the unrepealed provisions of the Police Offences Act 27 of 1882 (C); the Native Territories Penal Code (Act 24 of 1886 (C)); s 6(2)(c) of the Criminal Law Amendment Act of 1910 (N); s 26(1) of the Police Offences Ordinance 21 of 1902 (O); and s 7(b) of the Crimes Ordinance 26 of 1904 (T).
- 2 In terms of s 1 of the Trespass Act 6 of 1959.
- 3 Whilst the prevailing wisdom among South African writers is that in Roman-Dutch law housebreaking with intent to steal and theft was treated as an aggravated form of theft, and that the offence as such was unknown in Roman-Dutch law (Milton 1996: 794; Snyman 2014: 543; Pittman 1950: 158; Gie 1941: 96; Anders & Ellson 1915: 142; De Wet 1985: 362; Burchell 2016: 767); the authorities appear to be somewhat contradictory. Voet (see Gane 1955) in one passage merely treats housebreaking as aggravated theft (47 2 9), and in another (47 18 1) as a substantive offence (as pointed out by the court in *R v Fourie/Louw* 1907 ORC 58 and *S v Maunatlala* 1982 (1) SA 877 (T)). Similarly, Matthaeus (see Hewett & Stoop 1987) seems to regard housebreaking as aggravated theft at one point in his treatise (47 1 3 9 & 47 1 3 12) and as a substantive offence at another (47 2 1 1) (see *R v Thompson* 1905 ORC 27; *S v Jecha* 1984 (1) SA 215 (Z)). Gardiner JP in *R v Mososa* 1931 CPD 348 states that housebreaking was indeed a substantive offence in Roman-Dutch law, citing Carpzovius, Boehmer, Leyser, Barel, Voet and Menochius in support of this position. On the other hand, authorities such as Van Leeuwen 1720: 4 38 3 and Van der Linden 1806: 2 6 2 state that housebreaking constitutes aggravated theft.
- 4 On the history of the housebreaking crime, see Hكتور 1999a: 97-103.
- 5 24 & 25 Vict Cap 96.



Whosoever shall be found by night armed with any dangerous and offensive weapon, or instrument whatsoever, with intent to break and enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanour ...

It is evident that this omnibus provision essentially contains inchoate or anticipatory offences, with the common denominator that the accused must “be found by night”, allowing the police to arrest the accused on the basis of such indicators of nefarious intent as possession of a weapon, or possession of an implement used for breaking into a premises, or being in disguise, or being present in a premises with intent to commit a felony therein. Such offences thus serve as a means to punish an actor before the envisaged harm has been completed.<sup>6</sup> The Larceny Act of 1861 was repealed and replaced by the Larceny Act 1916, although the offences contained in the 1861 Act were essentially repeated in section 28 of the new legislation.<sup>7</sup> As will be evident from the discussion that follows, these provisions were influential in the framing and interpretation of the analogous South African offences.

## 2 Transvaal

Part A of the Crimes Ordinance 26 of 1904 created the following forms of statutory housebreaking:<sup>8</sup> (i) breaking and entering any premises in the night with intent to

- 6 In terms of Husak’s categorisation, these offences are referred to as “simple” inchoate crimes, as opposed to “complex” inchoate crimes, such as attempt, conspiracy or incitement (or “solicitation” in US law) (Husak 1998: 602-604).
- 7 The text of s 28 of the Larceny Act 1916 (c 50) reads as follows:  
28 Being found by night armed or in possession of housebreaking implements –  
Every person who shall be found by night (1) armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any building and to commit any felony therein; or (2) having in his possession without lawful excuse (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit, or other implement of housebreaking; or (3) having his face blackened or disguised with intent to commit any felony; or (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanor ...  
This provision will be compared with the pre-Union provisions in the discussion that follows.
- 8 Although the words “shall be guilty of an offence” are absent from these provisions, it was pointed out in *R v Feelanders* 1926 TPD 157 at 159 that “it is perfectly clear from the contents of the Ordinance that many of the sections framed in this way were intended not merely to prescribe punishments for common law offences but to create offences ...”. The principle of *nullum crimen sine lege* is thus satisfied. In so far as the breaking and entering offences are concerned, it was held in *R v Shlabaaan* 1910 TS 646, which was followed in *R v Marema* 1913 TPD 200, that the offences in the Ordinance did not apply to a case where, the premises having been broken into, an offence (usually theft) was actually committed. However, in *R v Molette* 1913 TPD 572 it was held that the accused was rightly convicted where he had been charged under the Ordinance, despite the

commit an offence in such premises;<sup>9</sup> (ii) breaking and entering a dwelling at night with that intent;<sup>10</sup> (iii) entering dwelling or premises at night with that intent;<sup>11</sup> (iv) being found by night armed with any dangerous or offensive weapon or instrument with intent to commit any offence mentioned in (i), (ii) or (iii); having in possession without lawful excuse any pick lock, key, crow, jack, jemmy, or other implement of housebreaking; or having the face or person disguised with intent to commit any offence mentioned in (i), (ii) or (iii);<sup>12</sup> (v) breaking and entering any premises

actual commission of the offence intended, along with the breaking and entering. None of these offences included theft, and where theft followed, a common-law charge ought to follow, although a statutory charge (without the theft) could be brought: *R v Molete* (*ibid*).

- 9 In terms of s 4 of the Ordinance, criminal liability was incurred by “[a]ny person who shall break and enter any premises in the night with intent to commit an offence therein”. This provision was repealed by s 1 of the Pre-Union Statute Laws Revision Act 24 of 1979.
- 10 In terms of s 5 of the Ordinance, criminal liability was incurred by “[a]ny person who shall break and enter any dwelling in the night with intent to commit an offence therein”. This provision was repealed by s 1 of the Pre-Union Statute Law Revision Act 43 of 1977. It was held in *R v John Cumoya* 1905 TS 402 that the indictment in a charge under this section must allege an intent to commit some particular offence. This approach was followed in *R v Mdoda* (1907) 28 NLR 337.
- 11 Section 6 of the Ordinance criminalised such unlawful entry: “Any person who shall enter any dwelling or premises in the night with intent to commit an offence therein [commits an offence].” In *R v Schonken* 1929 AD 36, it was held (at 43-44) that the owner or lawful occupier of the premises or persons lawfully upon the premises could not contravene s 6; the court accepted the argument of defence counsel that serious anomalies would result if the section included owner or lawful occupier: “If an owner goes into the street and then enters his dwelling with the intention of gambling therein he would be hit by sec. 6, whereas he would not fall under the section if he remained inside and received his fellow gamblers in his house. The same would apply if he entered with intent to commit any other offence.” On the facts, however, the accused was not held to be lawfully present on the premises, having been invited to enter for immoral purposes by a female servant without the consent of the owner. Moreover, it was held in *R v Depapa* 1927 TPD 833 at 835 that once a person is lawfully inside any structure used as a dwelling, he could not be convicted of having entered the dwelling where he moves from one part of the structure to another.
- 12 Section 7 of the Ordinance provided that an offence was committed by “[a]ny person who shall be found by night: (a) armed with any dangerous or offensive weapon or instrument with intent to commit any offence mentioned in the preceding sections; or (b) having in his possession without lawful excuse (the proof of which excuse shall lie upon such person) any pick lock, key, crow, jack, jemmy, or other implement of housebreaking; or (c) having his face stained or disguised or his person dressed or otherwise disguised with intent to commit any offence mentioned in the preceding sections ...”. In terms of s 3 of the General Law Further Amendment Act 93 of 1962, the qualification that the offence be committed by night was removed from the offence contained in s 7(b). This provision was partly repealed in terms of s 2 the Prohibition of Disguises Act 16 of 1969, which repealed s 7(c), and was further partly repealed in terms of s 1 of the Pre-Union Statute Law Revision Act 43 of 1977, in terms of which s 7(a) was repealed. Section 7(b), the sub-section dealing with housebreaking implements, was repealed in terms of s 84 of the General Law Third Amendment Act 129 of 1993. In terms of an earlier provision, s 1 of Law 2 of 1891 (T), the wearing of any disguise on a public road or in a public place was forbidden – see *S v Kola* 1966 (4) SA 322 (A). As regards the criminalization of disguise, see Hكتور 2013: 316-321.

or dwelling in the day-time with that intent;<sup>13</sup> (vi) entering upon any premises or dwelling or enclosed piece of land attached to or used in connection therewith, and wrongfully and unlawfully refusing to leave;<sup>14</sup> and (vii) putting anyone in bodily fear by the use of threats or conduct in or upon premises, or its ground, unlawfully broken, entered or remained upon.<sup>15</sup>

A number of essential elements are common to the above offences, and these will be briefly examined below.<sup>16</sup> To avoid unnecessary duplication, the approach which will be taken is to analyse the elements of the Transvaal provisions in detail, and then to set out the analogous provisions in the other jurisdictions, adverting to relevant case law and developments.

## 2 1 Essential elements of these offences

### 2 1 1 Breaking

The Ordinance defined “break” as “the obtaining of entrance into or exit from any building by means of force, threat, fraud, stealth or trick or by the unfastening or opening of any door or window or by the removal of anything used to cover any opening into or within or from such building.”<sup>17</sup> As Hunt points out, this definition contained a definition of breaking which incorporated the English doctrine of

- 13 Section 8 of the Ordinance, which provided that “[a]ny person who shall break and enter any premises or dwelling in the day time with intent therein to commit an offence” contravened this section.
- 14 In terms of s 9 of the Ordinance, an offence is committed by “[a]ny person who shall enter upon any premises or dwelling or enclosed piece of land attached to or used in connection therewith and shall wrongfully and unlawfully remain therein or thereon after request by the occupier or person for the time being in charge thereof to immediately depart therefrom”. It was held in *R v Flemming* 1939 TPD 260 that this provision only applied to premises physically occupied or in charge of some person, and thus there could be no liability where no request to depart had been made by the occupier or person in charge of the premises. This provision was repealed by s 3 of the Trespass Act 6 of 1959.
- 15 Section 10 of the Ordinance, which stated that “[a]ny person who having unlawfully broken into or entered upon or remained upon any premises or dwelling or enclosed piece of ground attached to or used in connection with such premises [who] shall by any threat or conduct put any one therein or thereon in bodily fear [commits an offence]”. In *R v Phalane* 1953 (4) SA 562 (T), it was held that the words “entered upon” relate only to premises or dwellings and that in so far as enclosed pieces of land are concerned s 10 can only be contravened where they have been unlawfully “remained upon”. It was pointed out (per Ramsbottom J) in *R v De Beer* 1954 (3) SA 82 (T) that s 10 contained two distinct offences: putting a person in bodily fear after having entered unlawfully, and putting a person in bodily fear having entered lawfully.
- 16 I have adopted the useful layout – which does not claim to be exhaustive – utilized in the discussion of these offences by Hunt 1970: 676-682. See, also, De Wet & Swanepoel 1960: 392-393. Owing to the similarity between the South African statutory housebreaking offences and the analogous English provisions, found in the old Larceny Act of 1916, these will be compared.
- 17 Section 3.

“constructive breaking”<sup>18</sup> and included the notion of “breaking out”.<sup>19</sup> As a result of the repeal of the definition section of the Ordinance by the Pre-Union Statute Law Revision Act,<sup>20</sup> the common-law concept of breaking was applied to all cases decided after this Act came into operation.<sup>21</sup>

## 2 1 2 Entering

The definition in the Ordinance circumscribed the term “enter” for the purposes of criminal liability as follows: “[T]he insertion of any part of the body of a person or any part of an instrument used by such person within a building.”<sup>22</sup> This definition reflects the “well known common law meaning” of the term.<sup>23</sup> De Villiers J in *R v Brand* opined that the word “within” should be read as “into”.<sup>24</sup> It is submitted that this is a correct interpretation, it being essential insofar as the act of “housebreaking” is concerned to link the entry with the breaking. After the passage of the Pre-Union Statute Law Revision Act, the definition of entering contained in the Ordinance was repealed,<sup>25</sup> and, as was the case with breaking, the common-law definition<sup>26</sup> was applied in the courts.

## 2 1 3 Dwelling

The term “dwelling”<sup>27</sup> was defined in the Ordinance as

a building or structure or any part thereof which is for the time being kept by the owner or occupier thereof for the residence therein of himself, his family or servants or any of them and whether or not such building or structure be from time to time uninhabited.

- 18 See *R v Boyle* [1954] 2 All ER 721, where the accused gained entry to the premises by pretending to be a BBC employee on official business. See, further, *R v Johnson and Jones* (1841) Car & M 218, where it was held that there would be an attempt if the accused is admitted by someone who is aware of his intent, and is seeking to trap him. For a discussion of the notion of constructive breaking, see Bhamjee & Hكتور 2005: 726-733.
- 19 Hunt 1970: 677. In respect of the common-law crime of housebreaking, the prevailing view appears to be that a breaking out after an unlawful entry does not constitute the crime – *S v Maunatlatla* 1982 (1) SA 877 (T) at 879. Hunt further points out (1970: 677) that this definition appears to incorporate the former English rule that there is no breaking if the accused further opens an open door or window unless this entails “tampering with some fastening device”.
- 20 In terms of s 1 of Act 43 of 1977.
- 21 For discussion of “breaking” with regard to the common-law crime of housebreaking, see Hكتور 1998a: 201-229.
- 22 Section 3. This definition apparently excludes the pre-1968 English rule that the insertion of an instrument is not an entry if it is inserted simply to facilitate the entry itself (Hunt 1970: 677).
- 23 *R v Depapa* 1927 TPD 833 at 835.
- 24 *R v Brand* 1952 (2) SA 131 (T) at 133.
- 25 In terms of s 1 of Act 43 of 1977.
- 26 For discussion of the common-law concept of “entering” in the context of the housebreaking crime, see Hكتور 2007: 45-63.
- 27 Section 3. This definition was repealed by s 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

The term “part thereof” was held to refer to “a building or structure or a part of the building or structure used as an entity, that is as a dwelling by the complainant and his family.”<sup>28</sup>

## 2 1 4 Premises

The term “premises”<sup>29</sup> was defined in the Ordinance as

any building or structure or part thereof (not being a dwelling) habitually used as a shop, warehouse, storehouse, bank, office, school or for divine worship or any outbuilding occupied in connection with a dwelling or premises as herein defined.

As was the case in respect of the analogous English provision,<sup>30</sup> the listing of specific types of “premises” in this definition created problems and anomalous exclusions.<sup>31</sup> This was evident in the case of *R v Simon and Mansin*<sup>32</sup> where a dance hall was excluded from the ambit of the Ordinance. The facile type of reasoning which it was incumbent on the court to employ is evident in a quote from the judgment: “The dance hall was not habitually used as a shop, warehouse, storehouse, bank, office, school or for divine worship. It was used for the purpose of dancing”. Despite the fact that the dance hall had offices leading out of it, the court was obliged to hold that it did not fall within the definition of the offence. It was further held that a fowl-run made of iron tubes and wire netting could not be regarded as “premises”.<sup>33</sup> Nor, it was held, could land constitute “premises”, even though enclosed on all sides with a sufficient fence,<sup>34</sup> or a wall,<sup>35</sup> unless it is established that it is “part” of a “structure” used as a “storehouse”.<sup>36</sup>

28 *R v Depapa* 1927 TPD 833 at 835. As a result the accused, who was a servant who had lawfully entered the dwelling, could not be convicted of “entering a dwelling” (in contravention of s 6 of the Ordinance) where he had entered another room in the structure.

29 Section 3.

30 The definition employed in s 26 of the Larceny Act 1916 listed the types of premises included in the offence as follows: “[A]ny dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty, or to any government department, or to any municipal or other public authority.”

31 See Hunt 1970: 678. In respect of the English provision, Smith & Hogan 1965: 401 commented that it was unfortunate that this section did not use some comprehensive formula, because although the list given was extensive, it was possible to envisage buildings which did not come within the list (such as unoccupied houses), or only doubtfully came within the list (such as cinemas, dance-halls, unless they contain wares and can be accounted warehouses).

32 *R v Simon and Mansin* 1936 (1) PH K9 (T).

33 *R v Charlie* 1916 TPD 367.

34 *R v Mohagi* 1949 (2) SA 309 (T); *R v Ngema* 1960 (1) SA 517 (T) at 520; *R v Molefi* 1960 (3) SA 704 (T) at 705.

35 *R v Jacobs* 1960 (4) SA 683 (T) at 684-685.

36 See *R v Setlogelo* 1934 TPD 73, where the yard in question was both enclosed and locked. In *R v Captain* (JC 1910, 27) (discussed in the *Setlogelo* case at 75) it was held that a yard enclosed by a fence was neither a dwelling nor a premises. However, the court in *Setlogelo* (at 75) noted that the pertinent question was as to the nature of the yard, and “the nature of the enclosure and the relation of the enclosure to the building to which it is annexed”.

As with breaking and entry, the definition was statutorily repealed in 1977,<sup>37</sup> and consequently it has been suggested that the term then took on its “ordinary meaning”, which may be defined as “a house or building with its grounds or other appurtenances.”<sup>38</sup> It seems that the notion of “premises” for the purposes of the statutory offence would be defined somewhat more broadly than the common-law equivalent.<sup>39</sup>

## 2 1 5 Night

Night was defined as “the period between sunset and sunrise” in the Ordinance.<sup>40</sup> Although the original definition section was repealed by the Pre-Union Statute Law Revision Act,<sup>41</sup> it seems that this remained the appropriate working definition of “night”.<sup>42</sup> It appears that all the necessary elements were required to take place during the period of “night”.<sup>43</sup> A “breaking” on one night and “entry” on another was sufficient for the purposes of liability, according to some English authority.<sup>44</sup>

37 In terms of s 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

38 Hunt 1990: 719 (by Milton). This definition has been extracted from the *Oxford English Dictionary*, and was cited by counsel in *R v Lushaba* 1956 (4) SA 370 (N), where it was accepted by the court.

39 The notion of “premises” in common law is loosely equivalent to the statutory notion of a “dwelling”, and can thus be distinguished from the statutory notion of “premises”, even as “dwelling” and “premises” were distinct statutory concepts. For discussion of the common-law notion of “premises”, see Hكتور 1998a: 127-133.

40 Section 3 of the Ordinance. Concomitantly, “day time” was defined as the period between sunrise and sunset.

41 Act 43 of 1977.

42 Hunt 1990: 719 n 162 states that there is “ample authority” in South African law for this proposition. In the definition section of the Criminal Procedure Act (s 1 of Act 51 of 1977), night is defined as “the space of time between sunset and sunrise”. (The means of determining the time of sunset and sunrise has been laid down at s 229 of the Criminal Procedure Act.)

43 For example, the breaking, entering and intent in s 4, and the possession in the case of s 7(b): *R v Davis and Harris* (1924) 18 Cr App Rep 157 at 159. Although this was doubted by Turner 1964: 814, this seems to have been the position in former English law (Smith & Hogan 1965: 397-8).

44 See *R v Smith* (1820) Russ and Ry 417 (accused broke glass of complainant’s side door on the Friday night, with intent to enter at a future time, and actually entered on the Sunday night – the court held this to be burglary, as both breaking and entering took at place at night). Hale 1736: 551 states: “But if they break a hole in the house one night and commit felony, and accordingly they come at another night and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night; and it shall be supposed they broke and entered the night when they entered, for the breaking makes not the burglary till the entry.” Turner 1964: 815 remarks – concerning Hale’s statement – as follows: “which reasoning, if applied to a breaking in the daytime, and entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering also a burglary”.

## 2 1 6 With intent to commit an offence

The word “offence” was held to include “any act punishable by law”, and was not limited to offences against the person or property of the owner or occupier.<sup>45</sup> It was necessary to prove beyond reasonable doubt that the accused’s intention was not benign but was to commit an offence; this is proven by means of a process of inferential reasoning.<sup>46</sup>

## 2 1 7 Being found

The word “found” was held not to indicate an element of surprise, in other words, that it was feasible to regard even an accused caught in a prearranged trap as having been “found”.<sup>47</sup> Thus the term “found” was held to mean discovered, perceived,<sup>48</sup> or come across.<sup>49</sup>

## 2 1 8 In possession

Hunt argues that the accused had to be found in “direct control” of the implement.<sup>50</sup> Thus the accused had to be caught *in flagrante delicto* with the implement in

45 See *R v Schonken* 1929 AD 36 at 46: “Whether the *illicita causa* of our common law embraces every unlawful cause or is confined to a criminal intention need not be considered; it certainly includes the intent to commit any crime or offence.” Hunt 1970: 678 n 172 also points out that it thus included an intent to trespass in contravention of the Trespass Act 6 of 1959, to contravene the Sexual Offences Act 23 of 1957, or to commit an *injuria* of some other sort (“unlawful entry with an illicit purpose, whether it be to steal, to commit *stuprum*, adultery or for any other unlawful purpose, is an *injuria* in the sense of *contumelia* to the owner or occupier punishable by law”: see *R v Schonken* 1929 AD 36 at 45).

46 For example, in *R v Bavukukula* 1927 TPD 579 at 581, the accused was acquitted because it was not proven that the accused had any intention accompanying his entry of the premises than “merely for the purpose of sleeping there”.

47 Beadle J in the Rhodesian case of *R v West and Wild* 1953 (2) SA 675 (SR) at 680, commented, with regard to a discussion of a charge of “being found by night without lawful excuse”, that this “does not mean that there must be some element of surprise in the detection. I consider, therefore, that the offence can be committed even where the occupier of the premises has full knowledge of the accused’s entry”. In the earlier Rhodesian case of *R v Farukayi* 1951 SR 235, the court seems to indicate that prior to a conviction of “being found”, the accused’s entry upon the premises must be secretive, or at least without the knowledge of the occupier of the premises. The above view, reflected in *West and Wild* is to be preferred however – see Hunt 1970: 679. As regards the English law position, under the Larceny Act of 1916, see Smith & Hogan 1965: 402-403.

48 In *R v West and Wild* 1953 (2) SA 675 (SR) at 680 the court approved the approach taken in *R v Bresky* 1921 EDL 254 at 258 where the court held that in the particular circumstances of the case “found” meant “to be seen”: “The use of the word ‘found’ amounts, in my opinion, to no more than saying ‘seen by some reliable witness in the bar’”. It has been suggested by Williams (1955: 72-3) that to satisfy the “being found” requirement, perception through any of the senses would suffice (as, for instance, where the accused is heard inside a building).

49 Smith & Hogan 1965: 402, Williams 1955: 72-73.

50 Hunt 1970: 679. Since the new statutory offence relating to possession of housebreaking implements (s 82 of Act 129 of 1993) consists of merely “possessing”, rather than “being found in possession” (as per s 7(b) of the Ordinance) it seems that “constructive possession” will suffice (Hoctor 1999a: 232).

question.<sup>51</sup> The implement therefore was required to be found either on the accused or to be immediately accessible to the accused, although what this means is somewhat questionable.<sup>52</sup> Whether one could be “in possession” by means of another is doubtful; it seems that a common purpose between the parties was required.<sup>53</sup>

## 2 1 9 Housebreaking implements

As far as the listed housebreaking implements are concerned, “pick lock key” was somewhat confusing. In fact, the Ordinance referred to “pick-lock key”, that is, a skeleton key.<sup>54</sup> The terms “crow”, “jack” and “jemmy” all had a specialist meaning in the context of housebreaking and were not problematic.<sup>55</sup> On the other hand, the courts had had cause to consider the catch-all phrase “or other implement of

51 *R v Davis and Harris* (1924) 18 Cr App R 157; *R v Lester and Byast* (1955) 39 Cr App R 157, (1955) Crim LR 648 – in which it was decided that the mere fact that the accused was a passenger in a car containing housebreaking implements is insufficient to prove that he was in possession of them, even if the driver of the car has been held to be in possession of the implements. (The court could, however, convict the accused on these facts if a common purpose to break into houses was proven.) In the commentary on *Lester and Byast* in the *Criminal Law Review* (at 648), Stephen’s definition of “possession” is cited (contained in his *Digest*, 9ed at 304): “A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.” See Smith & Hogan 1965: 403-404, for a discussion of the position in English law under the 1916 Larceny Act. Compare the discussion of the element of “possession” as contemplated in the offence outlined in s 36 of Act 62 of 1955 (discussed in Milton, Cowling & Hكتور 1988: ch J6).

52 While it is patent that if the implements are found on the person of the accused he will be found “in possession” (as the first accused was in *R v Lester and Byast* (1955) 39 Cr App R 157), there are a number of possible borderline cases, outlined by Smith & Hogan 1965: 403-404. Were the implements found at the home of the accused, the authors submit that the guilt of the accused would turn on the nature of his possession: if he was found to leave the house with a jemmy in his pocket, this would suffice for liability, whereas if the implements were simply found somewhere in the house, this would not suffice. Further, if the implements were found in the car of the accused while he was on a housebreaking expedition, this would suffice for liability. A more difficult problem would arise where the accused, fearing capture, threw the implements away. If the implements had been abandoned by accused, it seems that there would have been no liability, whereas if the accused had simply hidden them temporarily, having seen a police officer approach, he would have remained in possession throughout, as the implements “continue to be at hand to him for his purposes”. The distinction is rather difficult to draw.

53 *R v Thompson* (1869) 11 Cox CC 362.

54 *R v Dhlamini* 1950 (2) SA 175 (T), where De Wet AJ (at 176) pointed out that the paragraph is devoid of punctuation, and if one takes into account that in other provincial ordinances (such as that of the Orange Free State) there is a hyphen between “pick” and “lock”, and that a lock cannot be regarded as a housebreaking implement, it was clear that the legislative intent was simply to refer to a “pick-lock key”. This decision was followed in *S v Mdluli* 1978 (3) SA 425 (T). Curiously, both these cases referred to *R v Makala* 1949 (2) SA 494 (T) as authority on the point (as does Hunt 1970: 679 n 182), although this point does not arise at all in *Makala*.

55 In *R v Makala* 1949 (2) SA 494 (T) at 495, Ramsbottom J said of these implements: “Those that are specified are obviously and unambiguously implements of housebreaking”. These implements are all species of crowbar, adapted for use by housebreakers.



housebreaking”,<sup>56</sup> and decided (in the circumstances) that a key,<sup>57</sup> a hook,<sup>58</sup> a torch,<sup>59</sup> a screwdriver<sup>60</sup> and a chopper and iron spike<sup>61</sup> (amongst others<sup>62</sup>) did not qualify to be included in the category of housebreaking implements. Where the implement was either one of those specifically set out in the provision, or one whose nature unambiguously identifies it as a housebreaking implement, the onus of proving

- 56 Ramsbottom J in *R v Makala* 1949 (2) SA 494 (T) at 495 remarked: “[O]ther implements may be implements of housebreaking – whether they are or not depends on the circumstances. But whatever the circumstances may be the article must be such as is capable of use for the purpose of housebreaking.”
- 57 In *R v Dhlamini* 1950 (2) SA 175 (T) it was held that a bunch of keys could not be considered to be housebreaking implements; in *S v Mdluli* 1978 (3) SA 425 (T) a door key and two “flat” keys were not considered to be implements – in both cases the circumstantial evidence was held not to indicate such a possibility on the facts. However, Preiss J in *Mdluli* (at 427b-c) went further in his rejection, raising the spectre of indeterminate liability: “Indien dit aanvaar word dat die sleutels in hierdie saak huisbraakimplemente is, sou dit beteken dat enige persoon wat sleutels in sy besit het waarvan sommige die deure van ander persone kan oopsluit, aan die misdryf skuldig is. Ek is oortuig dat dit nooit die bedoeling van die Wetgewer kon gewees het nie.” (See also the cases of *R v Jan* (1883) 3 EDC 331; *R v Tshabalala* 1936 TPD 36 at 38, where the same concerns were raised.) The learned judge then asserted that the implements and the circumstances had to be objectively assessed (at 427c). As is apparent in the judgments in both *Dhlamini* and *Mdluli*, the possibility of an ordinary key being held to be an implement could not be altogether excluded. See also *R v Kahla* 1919 SR 29 in this regard.
- 58 Ramsbottom J in *R v Makala* 1949 (2) SA 494 (T) rejected the possibility of a hook “in itself and by itself” being an instrument of housebreaking, and pointed out that it could only be used for this purpose if it were attached to a stick (at 496).
- 59 A torch was held in the circumstances in *R v Makala* 1949 (2) SA 494 (T) not to be proven to be an implement of housebreaking (at 496). In the Rhodesian case of *R v Stephen* 1968 (4) SA 267 (R) at 269, the court held that although a torch may be indicative of a criminal purpose, and is useful to a successful housebreaker in that it helps him to see his way around once inside the house, it cannot be regarded as an implement of housebreaking. Lewis J stated at 269 that “[t]heir [torches and a mask] mere possession, in the circumstances of the present case, is as consistent with an intention to waylay and rob someone on the highway or to steal a car, as with an intention to break into a house”.
- 60 In the case of *R v Poza* 1954 (4) SA 137 (T), it was held that the mere fact that a screwdriver could be used as a housebreaking implement did not automatically make it a housebreaking implement. Similar reasoning was applied (with similar results) in *R v Magadusa* 1950 (1) PH K42 (C) and *R v Alick* 1953 (4) SA 473 (SR). A screwdriver was regarded as a housebreaking implement in appropriate circumstances however – see, eg, the English case of *R v Patterson* [1962] *Crim LR* 167.
- 61 In *R v Tshabalala* 1936 TPD 36 the court held that it had not been proven that these items, found in the possession of the accused, should be regarded as housebreaking implements.
- 62 Examples of items found in the possession of suspected offenders which were not considered to be housebreaking implements (in the circumstances) include: (1) a pair of pliers (*R v Tshabalala* 1936 TPD 36); (2) socks (*R v Poza* 1954 (4) SA 137 (T)) – although the court noted that it is known that socks are used to avoid the creation of fingerprints (at 137); (3) a mask (*R v Stephen* 1968 (4) SA 267 (R)) – although the court acknowledged that a mask may be useful to someone who has succeeded in gaining unlawful entry to a house at night by helping to conceal his identity (at 269)).

“lawful excuse” for such possession fell on the accused.<sup>63</sup> On the other hand, where the article could not intrinsically be identified as an implement of housebreaking, the burden of proof was on the State to prove the intent to use it for the purpose of housebreaking.<sup>64</sup>

It seems that lessons were learned in the drafting of the new offence criminalising the possession of housebreaking (or vehicle-breaking) implements. Instead of an attempt to list notorious housebreaking implements, along with a catch-all category, “any implement or object” which is possessed, in respect of which there is a reasonable suspicion that it may be used for housebreaking, and in terms of which no satisfactory account of such possession can be given, suffices for liability.<sup>65</sup> There is thus a concession that legislators cannot realistically expect to know and specify every one of a myriad of implements, instruments and objects that are utilised in present-day housebreaking.

## 2 1 10 Lawful excuse

As to the meaning of “lawful excuse”, it seems that a breach of the criminal law should not be contemplated.<sup>66</sup> It is submitted that Smith and Hogan are correct when they suggest that the “possession of housebreaking implements is not unlawful as such, but becomes unlawful where D [the accused] intends to put them to a criminal use”.<sup>67</sup> Thus the accused could avoid liability under the section if he could show that it was not his intention to use the implement at all, or that his intention was merely to display it in his museum, or to only use it in the course of his lawful occupation.<sup>68</sup>

63 Hunt 1970: 679; *R v Tshabalala* 1936 TPD 36 at 38, deriving support from the English case of *R v Oldham* (1852) 21 LJ (NS) MC 134 (cited at 39). The *Tshabalala* decision was followed in *R v Mathlakoe* 1939 TPD 352.

64 *R v Tshabalala* 1936 TPD 36 at 38. The English courts adopted an approach which was much more onerous for the accused, as outlined in *R v Patterson* [1962] *Crim LR* 167 at 168: “The proper approach was this: in the first instance the prosecution had to prove that the prisoner was found in possession by night of either an implement which could properly be described as one of those named in the section [s 28(2) of the Larceny Act 1916] or of an implement capable in fact of being used as a housebreaking implement from its common though not exclusive use for that purpose, or from the particular circumstances of the case in question. Once possession of such an implement had been shown, the burden shifted on to the prisoner to prove on the balance of probabilities that there was lawful excuse for his possession of the implement at the time and place in question.” See Smith & Hogan 1965: 406.

65 Section 82 of the General Law Amendment Act 129 of 1993.

66 Smith & Hogan 1965: 406. The accused would not be held responsible in law therefore if he intended to break into and enter his own house or room, having misplaced his key. Further, it seems that the intent to break and enter for an immoral purpose would not suffice.

67 Smith & Hogan 1965: 406. The authors suggest that it may be enough if the accused is found in possession of housebreaking implements, which he intends to use on some future occasion, and not on the night when he is found.

68 Hunt 1970: 680. Once possession of such an implement had been shown, and a *prima facie* case had thus been established, the onus shifted to the accused to prove a lawful excuse for his possession, on a balance of probabilities.

In contrast to the Transvaal ordinance, where the phrase “without lawful excuse” appeared in the other provincial housebreaking statutes<sup>69</sup> in the context of a form of trespass, it has been argued that the accused does not necessarily escape by showing absence of intent to commit a crime.<sup>70</sup> Hunt opines that the accused probably could only escape if he could show that he “was engaged in innocent pursuits and having no reason to anticipate objection on the part of the owner or occupier”.<sup>71</sup>

### 3 Natal

The statutory offences relating to housebreaking and intrusion were contained in section 6(2) of the Criminal Law Amendment Act of 1910.<sup>72</sup> These offences may be listed as follows: (a) Housebreaking with intent to commit some crime, whether the particular crime be known or not;<sup>73</sup> (b) Entering a house or premises with intent to commit some crime, whether the particular crime be known or not;<sup>74</sup> (c) Being in possession without lawful excuse (the proof of which excuse shall be upon the accused), and between the hours of sunset and sunrise, of a picklock, key, crow,

69 Section 6(2)(d) of Act 10 of 1910 (N); s 8(3) of Act 27 of 1882 (C); s 129(3) of Act 24 of 1886 (C); s 26(3) of Ordinance 21 of 1902 (O).

70 This was decided in *R v Botha* 1919 EDL 144 and *R v Matsinya* 1937 EDL 358 – thus it seems that the accused would be guilty if he had reason to anticipate that his presence would be objected to. The court in *R v Joseph Andrews* (1883) 3 EDC 221 and *R v Booyse* (1907) 27 EDC 275 required proof of a criminal intent, presumably to commit some offence other than the trespass itself. In *R v Renton* 1937 EDL 14, as regards the presence in premises of domestic servants “without lawful excuse”, the court adopted the reasoning applied in the Rhodesian case of *R v Tokoli* 1918 SR 169.

71 Per Van den Heever J in *R v Jacob Jakwane* 1944 OPD 139 at 143. See, further, the Rhodesian cases of *R v Ulexi* 1916 SR 33 and *R v Tokoli* 1918 SR 169.

72 It was held in *R v Mtetwa* 1930 NPD 285 that this subsection did not merely confer jurisdiction on the courts, but created statutory offences.

73 Section 6(2)(a). This provision overturned the precedent established in *R v Mdoda* (1907) 28 NLR 337, where it was held (at 340) that a charge of “wrongfully entering a bedroom with unlawful intent, to wit, with intent to commit some crime to the prosecutor unknown” was an embarrassment to all the parties in the court proceedings. This charge was subsequently enabled at a national level by s 132(11) of the Criminal Procedure Act 31 of 1917, and it was repeated in the succeeding Criminal Procedure Acts 56 of 1955 (s 320(11)) and 51 of 1977 (s 95(12)). For further discussion of the crime of housebreaking with the intent to commit a crime to the prosecutor unknown, see Hoctor 1996: 160-167. See *R v Ntuli* 1957 (4) SA 42 (N) at 46-47, where the accused’s intention was not established, in the view of the court. This subsection was repealed by s 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

74 In *R v Dunlop* 1954 (1) PH H13 (N), the court held that a charge under s 6(2)(b) cannot be combined with a charge of theft, as is possible with regard to the common-law crime of housebreaking with intent, because this is not sanctioned under the statute. Thus in circumstances which admit of a possible theft conviction as well as a conviction under s 6(2)(b), it is open to the court to convict either of entering premises with intent to steal or of theft. The position is apparently the same with regard to s 6 of the Transvaal ordinance (Part A of the Crimes Ordinance of 1904), according to Hunt 1970: 680 n 193).

or other implement of housebreaking;<sup>75</sup> (d) Being without lawful excuse (the proof of which excuse shall be upon the accused), and between the hours of sunset and sunrise, in or upon any dwelling house, warehouse, coach house, stable, cellar, or outhouse, or in any enclosed yard, garden or area;<sup>76</sup> and (e) (In the case of a male person) being found dressed as a woman in circumstances indicating a probable intention of availing himself of such disguise in order to commit a crime, whether such intended crime be known or not.<sup>77</sup>

### 3 1 Essential elements<sup>78</sup>

Although there are no definitions contained in Act 10 of 1910 (N), the courts have had occasion to discuss the ambit of certain terms: (i) “housebreaking” – In *S v Xulu*,<sup>79</sup> the court held that where the Legislature referred to “housebreaking” in section 6 of Act 10 of 1910 (N), it intended that the term should have the same meaning as it had at common law, namely that of “breaking into premises”. Thus, with regard to a charge under section 6(2)(a), it was insufficient merely to allege and prove a breaking in the sense of damage to and displacement of some portion of the premises; the averment and proof of an entry into the premises was required.<sup>80</sup>

75 See the discussion *re* “lawful excuse” and the question of *onus supra* (at 2 1 10). Hunt 1970: 680 n 195 notes that there are important distinctions to be observed between s 6(2)(c) and the corresponding s 7(b) of the Transvaal ordinance. First, the crime is “being in possession”, not “being found in possession” – this seems to indicate that the accused need not be caught red-handed (ie in direct control) with the implement. To use the terminology favoured by English writers such as Smith & Hogan, the accused’s possession can be “constructive”, it need not be “actual”. Secondly, there is a comma between “picklock” and “key”, raising the possibility of a differing approach in Natal to the approach adopted in the Transvaal, whereby only skeleton keys were held to be unambiguous implements of housebreaking (see 2 1 9 *supra*). It is Hunt’s submission however that because the contrary interpretation would lead to absurdity, “key” must be interpreted *eiusdem generis* to mean “key such as housebreakers normally use”, ie “skeleton key”. Thirdly, the terms “jack” and “jemmy” have been omitted in the Natal statute. Hunt suggests that this is because they were regarded as unambiguously “implements of housebreaking”.

76 In order to obtain a conviction under this subsection (s 6(2)(d)), it was not necessary to prove that the accused was there with intent to commit an offence (*R v Sitole* 1957 (4) SA 168 (N)), it was sufficient if he was there without lawful excuse.

77 In both *R v Mkize* 1940 NPD 374 and *R v Zulu* 1947 (1) SA 241 (N) it was held that there could be no conviction of the accused simply on the basis of being dressed as a woman, but that it was essential to adduce evidence indicating the probable existence of an intention to commit a crime while so disguised. This subsection (s 6(2)(e)) was repealed by s 2 of the Prohibition of Disguises Act 16 of 1969, which created a national offence of “being in disguise in suspicious circumstances” (s 1). For discussion of criminality and disguises, see Hكتور 2013: 316-321.

78 See the above discussion of the essential elements of the offences under the Transvaal ordinance *supra*.

79 *S v Xulu* 1961 (4) SA 72 (N) *per* Wessels J.

80 *S v Xulu* 1961 (4) SA 72 (N) at 74.

(ii) “premises” – This term, in the context of section 6(2)(b), has been held to mean “a house or building with its grounds or other appurtenances”.<sup>81</sup> It therefore includes breaking into the yard of a house,<sup>82</sup> and into the cabin of a ship,<sup>83</sup> but not on to a ship “*qua* ship and the open deck of a ship”.

## 4 Cape, Transkei, Orange Free State

The provisions of section 8 of the Police Offences Act 27 of 1882 (C), section 129 of the Transkeian Penal Code of 1886 (Act 24 of 1886 (C)) and section 26 of the Police Offences Ordinance 21 of 1902 (O) were virtually identical, establishing the following statutory offences: (a) Having custody or possession without lawful excuse (the proof of which is on the accused) of “any pick-lock, key, crow or other implement of housebreaking”;<sup>84</sup> (b) Being found by night with blackened face or wearing felt or other slippers, or being dressed or otherwise disguised with criminal intent;<sup>85</sup> (c) Being found by night without lawful excuse (proof of which is on the accused) “in or upon any dwelling-house, warehouse, coach-house, stable, cellar, or outhouse, or in any enclosed yard, garden, or area, or in or on board any ship or other

81 This is the meaning of “premises” contained in the *Oxford Dictionary*, cited in *R v Lushaba* 1956 (4) SA 370 (N) at 370-371, and followed in *R v Smith* 1959 (4) SA 524 (N) at 526. As Hunt observes (1970: 681 n 202), this usage may be contrasted with the common-law meaning of “premises”, which may apply to s 6(2)(a) in accordance with *S v Xulu* 1961 (4) SA 72 (N).

82 *R v Lushaba* 1956 (4) SA 370 (N); Hunt 1970: 681.

83 *R v Abraham* 1953 (1) PH H50 (N).

84 Section 8(1)(C), s 129(1) (Transkei), s 26(1)(O). Hunt notes 1970: 682 n 208) that in the Orange Free State provision there was no comma between “pick-lock” and “key”, and that in *R v Dhlamini* 1950 (2) SA 175 (T) at 176 it was stated *obiter* of this provision that the words “pick-lock” and “key” must be read together to mean “skeleton key”. It seems that the position in the Cape and Transkei was similar to that under the Natal ordinance, that is, to avoid problematic and contrary distinctions, “key” was required to be interpreted to mean “skeleton key”. It was held in *R v Jan* (1883) 3 EDC 331 that mere possession of door keys does not amount to the offence. Similarly, in the Orange Free State case of *R v Nqutsbenar* 1941 OPD 246, it was held that possession of a bunch of keys could not give rise to liability without proof of intent to use for the purposes of housebreaking. It seems, too, that the notion of “possession” (as in the Natal ordinance) had a wider ambit of application, that is, that “constructive” possession would suffice for liability. (See *supra* discussion of the differences between the position in Natal and Transvaal at n 75). In *S v Smith* 1965 (4) SA 166 (C), it was held that where both the physical and mental elements constituting custody and possession have been established, and where the enactment consists of an unqualified prohibition and does not in express terms require *mens rea* to be established (as in the offence contained in s 8(1)), the *onus* of negating *mens rea* rested on the accused. The State would however have to prove that the accused had actual knowledge of the implements if he were to be arrested and charged along with another party who was carrying the implements in question (*R v Savage* (1903) 13 CTR 459).

85 This provision was repealed in the Cape, Transkei and the Orange Free State by the Pre-Union Statute Law Revision Act (43 of 1977). For further discussion, see Hoctor 2013: 316-321.

vessel when lying or being in any port, harbour, or place”;<sup>86</sup> and (d) Being found by night armed with a criminal intent or, being thereto required, being unable to assign a satisfactory reason for being so armed.<sup>87</sup>

A further type of statutory housebreaking was created for the Transkei by section 215 of the Transkeian Penal Code: breaking and entering a building with intent to commit any offence thereon, or breaking out of such building either after committing or after having entered to commit such offence therein. The incorporation of a person breaking out of the building within the ambit of the offence clearly extends the scope of housebreaking liability beyond the reach of the common-law crime.

86 In *R v Botha* 1919 EDL 144 at 148 it was held that the object of this provision was to protect “the enclosed portions of private and occupied property against encroachments by night”. Note regarding this (collective) provision that in terms of s 129(3) (Transkei) liability ensued if the accused is found “loitering in the neighbourhood of” such premises or enclosed area “or in any kraal”. In *R v Nambu* 1917 EDL 126 it was held that this offence was not committed where the charge was that the accused was “in the neighbourhood” of a kraal. The Orange Free State provision (s 26(3)) omitted any mention of ships (understandably). See s 8(3)(C) for the Cape version of the offence. In *R v Swiegers* 1929 GWLD 52 at 55 it was held that the expression “found by night” implies that the offender had come there “secretly or without the knowledge of the occupants of the house”, and thus did not apply where, as in the case at hand, the accused knocked at the door and thereafter entered. In an earlier case, *R v Harris* 1931 EDL 58 at 61, Nathan AJ opined as follows as regards the use of the word “found” in a charge: “All that it means is that the person was seen to be there. It does not appear to be necessary that the accused should be suddenly discovered or encountered or caught in the place in question.” The period of “night” was not defined in the statutes, and in the case of *R v Shagala* 1920 CPD 266, Gardiner J adopted the test favoured in English law, that the central enquiry was whether “the countenance of a person might be discerned”. However, in *R v Kolela* 1922 EDL 125, the court held (per Graham JP) that the objectivized test “the period between sunset and sunrise” was to be preferred, to avoid “grave difficulties in practice”: “In these latitudes our twilight is of brief duration. Darkness frequently follows sunset without any interval. Moreover, much would depend on the nature of the weather, whether the sky was clear or clouded, and the definition would lead to a difficult and sometimes prolonged investigation into the meteorological conditions of the locality where the offence was alleged to have been committed (at 130).” The court in *Kolela* (per Graham JP) further distinguished the case of *Shagala* in observing that “in the case referred to [*Shagala*] there was evidence that it was ‘quite light’ at the time the accused were apprehended, whereas in the case under consideration the witnesses speak to the offence being committed ‘at night’ ...” (at 128). The *Kolela* view, formally introduced into South African law by way of the Criminal Procedure Act as early as 1917 (Act 31 of 1917), has been accepted as the correct view. The argument which was rejected in *Kolela*, then favoured in English law, held that “night” meant one hour after sunset and one hour before sunrise, the rationale apparently being “to prevent darkness being used as a cover for the preparation for crime” (at 126). As regards the notion of “an enclosed yard, garden or area”, it was held in *R v Jallie* 1930 CPD 154 that a lane enclosed on three sides but with the fourth open is not an enclosed area. In *R v Pieterse* 1911 OPD 3 it was held that where no provision has been made for closing the openings in the surrounding wall, a yard cannot be regarded as enclosed.

87 De Villiers J in *R v Cuttings* 1946 CPD 187 observed that this section contained two nocturnal offences; being found carrying a weapon and with a criminal intent (which requires proof of intent), and being found carrying a weapon in the absence of a good reason (at 188). This section was repealed by s 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

## 5 Conclusion

It is evident that the pre-Union statutes regulating housebreaking and intrusion provided a very useful basis for allowing law enforcement authorities to intervene at an even earlier stage than the common-law housebreaking crime allows, in order to deal with threatening conduct. However, these provisions have been replaced by more modern statutory provisions, which in combination with the common-law housebreaking crime are able to efficiently deal with the challenges which the pre-Union statutes sought to combat.

Thus, the “breaking and entering”<sup>88</sup> offences are adequately subsumed in the protection offered by the common-law crime; the “unlawful entry” and “unlawful remaining” offences<sup>89</sup> have been replaced by the statutory offence of trespass<sup>90</sup>; the “possession of housebreaking implements” offences<sup>91</sup> have been replaced by the statutory offence of “failure to give a satisfactory account of possession of an implement or object”;<sup>92</sup> the offence of “putting anyone in bodily fear”<sup>93</sup> is no longer required in the light of the offence of intimidation;<sup>94</sup> and the offences criminalising being in disguise in suspicious circumstances<sup>95</sup> have been replaced by a single national offence.<sup>96</sup> The usefulness of the pre-Union offences were also further undermined by developments in respect of the common-law housebreaking crime. The acceptance that attempted housebreaking to commit a crime is a valid charge and basis for conviction<sup>97</sup> allowed for some of the acts targeted by the offences to be dealt with as an attempt to commit the common-law crime.<sup>98</sup> The extension of

88 Section 4, s 5 and s 8 of the Crimes Ordinance 26 of 1904 (T); s 6(2)(a) of the Criminal Law Amendment Act 1910 (N); s 215 of the Transkei Penal Code Act 24 of 1886 (C).

89 Section 6 and s 9 of the Crimes Ordinance 26 of 1904 (T); s 6(2)(b) and s 6(2)(d) of the Criminal Law Amendment Act 1910 (N); s 8(3) of the Police Offences Act 27 of 1882 (C); s 129(3) of the Transkei Penal Code Act 24 of 1886 (C); s 26(3) of the Police Offences Ordinance 21 of 1902 (O).

90 Section 1 of the Trespass Act 6 of 1959.

91 Section 7(b) of the Crimes Ordinance 26 of 1904 (T); s 6(2)(c) of the Criminal Law Amendment Act 1910 (N); s 8(1) of the Police Offences Act 27 of 1882 (C); s 129(1) of the Transkei Penal Code Act 24 of 1886 (C); s 26(1) of the Police Offences Ordinance 21 of 1902 (O).

92 Section 82 of the General Law Third Amendment Act 129 of 1993.

93 Section 10 of the Crimes Ordinance 26 of 1904 (T).

94 Section 1(1) of the Intimidation Act 72 of 1982.

95 Section 7(c) of the Crimes Ordinance 26 of 1904 (T); s 6(2)(e) of the Criminal Law Amendment Act 1910 (N); s 8(2) of the Police Offences Act 27 of 1882 (C); s 129(2) of the Transkei Penal Code Act 24 of 1886 (C); s 26(2) of the Police Offences Ordinance 21 of 1902 (O).

96 Section 1 of the Prohibition of Disguises Act 16 of 1969.

97 On this development, see Hoorntje 2007: 600-606.

98 Such acts could include the offences which targeted persons being found by night armed with a dangerous weapon or instrument with a criminal intent (specified as relating to breaking and entry, or entry, in the Transvaal legislation): s 7(a) of the Crimes Ordinance 26 of 1904 (T); s 8(4) of the Police Offences Act 27 of 1882 (C); s 129(4) of the Transkei Penal Code Act 24 of 1886 (C); s 26(4) of the Police Offences Ordinance 21 of 1902 (O).

housebreaking liability to include housebreaking with the intent to commit a crime to the prosecutor unknown<sup>99</sup> has done away with the need for an offence to deal with the intruder who is on the premises, but who has not yet revealed which crime he is contemplating. The use of a reverse onus in some of the pre-Union offences<sup>100</sup> would also not be acceptable today, in the light of the constitutionally protected presumption of innocence.<sup>101</sup>

Nevertheless, the pre-Union offences, and the case law flowing from the application of these provisions, still provide a useful reference point for the regulation of housebreaking and intrusion, and provide an interesting perspective on the legal development in this particular area of the criminal law, relating to the basic need to be secure in one's own dwelling or premises.

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99 See discussion at n 73 *supra*.

100 See, eg, s 7(b) of the Crimes Ordinance 26 of 1904 (T); s 6(2)(c) and s 6(2)(d) of the Criminal Law Amendment Act 1910 (N); s 8(1) and s 8(3) of the Police Offences Act 27 of 1882 (C); s 129(1); s 129(3) of the Transkei Penal Code Act 24 of 1886 (C); s 26(1) and s 26(3) of the Police Offences Ordinance 21 of 1902 (O).

101 Section 35(3)(h) of the Constitution of the Republic of South Africa, 1996. The approach of the Constitutional Court is reflected in the statement by Kentridge AJ in the case of *S v Zuma* 1995 (1) SACR 568 (CC) at 583h: "The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. Where that possibility exists, there is a breach of the presumption of innocence."



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# PHYSICIANS, PATIENTS AND TREATMENTS IN EARLY MEDIEVAL GERMAN (ESPECIALLY BAVARIAN) LEGISLATION

**Tamás Nótári\***

## ABSTRACT

This study analyses the provisions of some early medieval “German” legislation concerning medical issues, such as healing, diseases and injuries. After a brief introduction, the study discusses the *sedes materiae* and the issue of dating those German codes (*Volksrechte*) that constitute the basis of comparison here, namely Bavarian, Visigothic, Langobardic and Alemannian law. Within the context of medical treatment during the early Middle Ages, a brief description is given of early medieval medicine and the physician’s legal status as set out in legal and non-legal sources. This is followed by the analysis of the regulation of diseases, miscarriage, bodily injury and other injuries in the *lex Baiuvariorum*, that is then compared with the provisions of the above mentioned German codes. The study thereafter examines the legal consequences of diseases that influenced the legal capacity and the capability to participate in legal proceedings as well as the position with regard to abortion, the involvement of the physician and the treatment applied by him within the context of the law and folk language terminology regarding bodily injury and injuries.

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**Keywords:** Early medieval medical law; *Volksrechte*; *lex Baiuvariorum*; leprosy; abortion; *lex Visigothorum*; *sedes materiae*; *lex Alamannorum*; *Codex Euricianus*; *Edictus Rothari*

## 1 Introduction

It should be stated at the outset that in the light of German folk laws as *sedes materiae*, all the questions that have primary importance concerning either modern or Roman medical law – more specifically the aspects regarding the physician’s liability – are addressed in these laws. Knowing the conditions of law in this period, it cannot be expected from these laws, and such an approach would be considered highly unhistorical. On the other hand, owing to the fact that the medical law aspect cannot be grasped in its complexity, it is not possible for the legal historian/philologist to exclude the analysis of folk laws when studying legal history. In addition, the legal nature of the source base clearly makes it the task of the legal historian to carry out extensive research of these *leges*, making use of the results of the history of language as well as public and social history (in our case, the history of medicine) in order to make these findings available to the aforesaid sciences (the auxiliary sciences for the legal historian).

It is necessary to outline the applied philological method. The objective of the study is primarily legal historical in nature; however, regarding the applied method, philology *stricto sensu* appears with at least as much weight. “Alle mittelalterliche Forschung ist Philologie”, Hermann Heimpel wrote in his foreword to Heinz Quirin’s manual,<sup>1</sup> and we tried to focus on this basic principle, namely the criteria of source analysis and respect for sources.<sup>2</sup>

German folk laws abounded in both anatomical terms and phrases that denoted injuries, their consequences and concomitant symptoms as well as terms that specified diseases, medical equipment and therapeutic methods. Yet the relation between the physician and the patient in *ex asse* legal aspects was thematised only by Visigothic laws that showed a strong Roman law influence. In the analysis of medical law texts of folk laws, priority should be given to pregnancy and abortion since these texts devoted ample space to the issues that cannot be neglected in terms of law and medicine. Although codes of law provide relatively little information on pathographies themselves, it provides ample details on surgical intervention and damage to health that might have influenced the patient’s capability of working, fighting and participation in legal processes.

From among works dealing with German elements of folk laws and the appearance of the terminology of medicine in *Volksrechte*, the works of Wilhelm

1 Quirin 1950: 4.

2 See, also, Schott 1979: 31; Mitteis & Lieberich 1966: 73.

Eduard Wilda,<sup>3</sup> Jacob Grimm,<sup>4</sup> Arthur B Schmidt,<sup>5</sup> Rudolf His,<sup>6</sup> Sigfrid von Schwanenflügel,<sup>7</sup> Georg Baesecke,<sup>8</sup> Dietrich von Kralik,<sup>9</sup> Ruth Schmidt-Wiegand<sup>10</sup> and Annette Niederhellmann<sup>11</sup> should be highlighted.

## 2 The *sedes materiae*

The date of creation of the *lex Baiuvariorum*<sup>12</sup> between 737 and 743 – as suggested by Heinz Löwe and Peter Landau – is supported by ecclesiastical influence far exceeding the impact of German folk laws. It is quite clear from the text of the law that its compiler set out from a knowledge of canon law rules and a clearly circumscribed church organisation. Furthermore, the fact that the compilers of the *lex Baiuvariorum* also used the *lex Alamannorum*,<sup>13</sup> further supports the dating to be between 737 and 743.<sup>14</sup> Regarding the place of creation of the *lex Baiuvariorum*, we can accept Peter Landau's hypothesis that this work relation between the monks and the duke's court must have been much closer if we accept that the compilers of the *lex Baiuvariorum* were the monks of the St Emmeram monastery located at the duke's seat in Regensburg.<sup>15</sup>

*Leges Visigothorum* is a general name for records of Visigothic law that have survived in various forms. The oldest source left to us is the Visigothic *Codex Euricianus*, which is attributed by tradition to king Eurich and was created sometime between 469 and 476.<sup>16</sup> It survived in a sixth century palimpsest *codex* from Paris in fragments from *caput* 276 to *caput* 336. The *Codex Euricianus* was strongly influenced by Roman law as well, and would arguably later have the greatest impact on other German folk laws. King Leovigild supplemented/corrected the *Codex Euricianus* at several points, which was then renamed the *Codex revisus*. This source has, however, not survived.<sup>17</sup> One of the successors of Leovigild, namely King Reccesvind, published two legal compilations in 654, in which he marked three hundred and nineteen provisions as *antiqua* and traced them back to Leovigild.<sup>18</sup>

3 Wilda 1842 *passim*.

4 Grimm 1922 *passim*.

5 Schmidt 1866 *passim*.

6 His 1920: 75-126 and 1928 *passim*.

7 Schwanenflügel 1950 *passim*.

8 Baesecke 1935: 1-101.

9 Kralik 1913: 1-132.

10 Schmidt-Wiegand 1979: 56-87; Schmidt-Wiegand 1978: 9-37.

11 Niederhellmann 1983 *passim* and 1981: 74-90.

12 See, also, Nótári 2010 *passim* and 2014 *passim*.

13 Landau 2004 *passim*.

14 Schott 1978: 1879-1886; Jahn 1991 *passim*.

15 Landau 2004: 50.

16 Nehlsen 1982: 143-203.

17 Babják 2005: 15.

18 Savigny 1986: 7.

Reccesvind's compilation is referred to in the literature under different names: *Lex Visigothorum*,<sup>19</sup> *Lex Visigothorum Reccesvindiana*,<sup>20</sup> *Forum Iudicum*<sup>21</sup> and *Liber Iudiciorum*.<sup>22</sup>

Regarding the Langobardic law material it should be noted that, contrary to most of the German folk laws that grouped rules in terms of subject, Langobardic laws sequenced legal rules in the chronological order of their rulers.<sup>23</sup> In Langobardic laws – which were created with the assistance of a popular assembly<sup>24</sup> – several German legal terms enriched the Latin text. Although the Langobards had already been in Italy for seventy-five years, their customary law was only recorded by King Rothari in 643.<sup>25</sup> This code, the *Edictus Rothari*, was confirmed by him<sup>26</sup> with the consent of his peers and the people in a symbolic form of contract (*speergedinge per gairethinx*).<sup>27</sup> The *Edictus Rothari* consisted of short provisions, which can be understood with the help of Langobardic folk language terms. Contrary to Visigothic, Ostrogothic and Burgundian law material, the *Edictus Rothari* to a lesser extent shows a close relation with Roman law.<sup>28</sup> We can agree with Babják<sup>29</sup> that a part of the *Edictus Rothari* expressly contained old Longobardic customary law and that the remaining part summarised the king's legal reforms.

Alemannian folk law has been left to us in two versions: Among scholars the older version is generally referred to as the *Pactus Alamannorum* (hereafter *Pactus*) and the more recent one is known as the *lex Alamannorum*. The introductory sentence of the *Pactus* (left to us only fragmentary in one single manuscript) mentions King Chlothar from the Merovingian dynasty<sup>30</sup> as lawmaker. Opinions in literature are, however, divided on whether this ruler refers to King Chlothar I (511-561), II (584-629) or IV (717-719). Most probably King Chlothar II was the author of the *Pactus*, because the language of this law is similar to that of the *lex Ribuarica* and the later versions of the *lex Salica*, whereas the *lex Alamannorum* may be attributed to Lantfrid's lawmaking activity.<sup>31</sup> The authorship of King Chlothar II also seems to be supported by the fact that in September 626 or 627 forty bishops, one abbot and one deacon (the latter as agent) were also present at the Council of Clichy, and this number of participants showed a similar order of magnitude to the description

19 Nehlsen 1978: 1966-1979.

20 Conrad 1962: 59.

21 Tate 2004: 513.

22 Babják 2005: 19.

23 Brunner 1906: 530.

24 Schröder 1907: 255.

25 Zoepfl 1871: 70.

26 Brunner 1906: 531; Schröder 1907: 255.

27 Ebel & Thielmann 2003: 126.

28 Lenel 1915: 392.

29 Babják 2005: 171.

30 *Lex Alamannorum, Prologus*.

31 Schott 1993: 16.



provided in the *Pactus*.<sup>32</sup> The *lex Alamannorum* makes it clear that compilers further developed the rules of the *Pactus* in content as well.<sup>33</sup> This version was probably created sometime between 712 and 725.

### 3 Medicine and the physician in the early Middle Ages

#### 3.1 Early medieval medicine

In the early medieval art of therapeutics we can distinguish two main branches, namely (i) the medicine exercised at royal (ducal) courts and monasteries, considerably influenced by the ancient traditions of Hippocrates and Galenos and the reception of their texts, and (ii) folk medicine fundamentally based on oral tradition and related to German traditions.<sup>34</sup>

In the therapeutics of the period, the centres of the Mediterranean, more specifically that of the Byzantine Empire, were considered the best developed because ancient tradition had survived most strongly in Alexandria. From among the persons who mastered scholarly medicine the names of Oreibasios,<sup>35</sup> Aetios of Amida,<sup>36</sup> Alexandros of Tralles and Paulus of Aigina<sup>37</sup> should be highlighted, since they saved this body of knowledge by making abstracts of ancient works of medical science for the Middle Ages.<sup>38</sup> Several of their compilations were translated into Latin quite early, and these Latin translations later constituted the basis of scholarly medicine in the western part of Europe. These works showed little originality compared to ancient sources and may mostly be considered as simplified abstracts of the ancient tradition.<sup>39</sup> (Later, these compilations were also translated into Arabic and thus became the basis of Arabic medicine, which began to develop significantly from the eighth century and produced an impact from the eleventh century in southern Europe, primarily in Hispania and later also in southern Italy.<sup>40</sup>)

Folk medicine was originally based on German religious concepts, and in time the effect of classical (ancient) therapeutics could be observed in this branch of medicine. For example, in Gaul medical prescription books were written as early as in the fifth and sixth centuries. Amongst these the work of Marcellus Empiricus is worth highlighting.<sup>41</sup> However, the following prescription collections should also be

32 Fastrich & Sutti 2001: 85.

33 Schott 1993: 12.

34 Niederhellmann 1981: 74.

35 Diepgen 1949: 164; Lichtenthaler 1974: 227.

36 Diepgen 1949: 164; Lichtenthaler 1974: 229.

37 Diepgen 1949: 165.

38 Benedek 1990: 71.

39 Niederhellmann 1983: 39.

40 Baader 1973: 275-296.

41 Niederhellmann 1981: 74; Sigerist 1923: 186.

mentioned: the *Codex Sangallensis* (nr 44) (containing scattered German terms) and the eighth/ninth century *Codex Bambergensis*.<sup>42</sup> The Old English *Leechbooks* created from the ninth century onwards were considerably affected by the approach of folk medicine influenced by German religious concepts.<sup>43</sup> As a result of the Catholic Church doctrine that tried to take firm action against such so-called heathen religious notions, it is hard to find any text in these sources that communicate exclusively German folk belief and folk medicine to us.<sup>44</sup> Despite these notions magical rites survived in Christianised form in folk medicine and were included in prescription books.<sup>45</sup>

Church doctrine was greatly influenced by medical thinking and terminology, especially in the works of the early church fathers. For example, Tertullianus called baptismal water *aqua medicinalis*, that is “medicinal water” or “water restoring health”.<sup>46</sup> Other old Christian authors, such as Irnaerius, Ignatius and Iustinus referred to repentance as *vera de satisfactione medicina* and to the Eucharist as the *pharmakon* of immortality.<sup>47</sup> In line with Christian dogma church medicine often considered to be the cause of disease, and so considered repentance as a kind of cure; the ecclesiastic person carrying out the healing imitating Christ as the Redeemer and physician of the soul.<sup>48</sup> In contrast to early Christian thinking, a viewpoint less refusing of the body and its diseases became observable in the Catholic Church from the fourth to the fifth centuries.<sup>49</sup>

The scenes of so-called scientific healing – which was, first of all, based on the simplified teaching of Hippocrates and Galenos – were primarily monasteries where monks were provided with medical training within the framework of *quadrivium*.<sup>50</sup> As, in theory, the works of ancient medical science were available to these clerics, they often used a peculiar mixture of scientific and theurgical methods. In Vivarium in southern Italy – founded by Cassiodorus (485-580), the Chancellor of Theoderich – copies and translations of several works of ancient medical science were made.<sup>51</sup> Isidorus Hispalensis (570-636) devoted two of the twenty books of *Etymologiae* to medicine.<sup>52</sup> Walahfridus Strabo, who wrote his works at the monastery of Reichenau, in his instructive poem entitled *De cultura hortorum* consisting of four hundred and

42 Jörimann 1925: 5-77.

43 Rubin 1974: 43.

44 Hansen 1900: 36.

45 Cockayne 1965: vol 1 384, vol 3 286; Grendon 1909: 105-237; Brie 1906: 1-36; Eis 1964 *passim*.

46 Harnack 1892: 132.

47 Lichtenthaler 1974: 269; Harnack 1892: 133.

48 Siebenthal 1950: 7; Diepgen 1922: 52; Schadewaldt 1964: 150; Arbesmann 1954: 1-28; Roths Schuh 1978: 49.

49 Schadewaldt 1964: 150; Siebenthal 1950: 50; Harnack 1892: 65; Diepgen 1922: 7; Lichtenthaler 1974: 242; Niederhellmann 1983: 42.

50 Wolter 1976: 55; Diepgen 1958: 7; Niederhellmann 1981: 76.

51 Cassiodorus *Institutiones* 1 31 1; Diepgen 1922: 192.

52 Wolter 1976: 50.

forty-four hexameters, wrote at length on the curative effect of twenty-three plants and the ground-plan of the latter monastery reveals that the building included an *infirmarium* consisting of a pharmacy as well as medical, patient and treatment rooms.<sup>53</sup> Our sources on physicians who lived in non-ecclesiastical or rulers's courts – and who were sometimes granted the title *comes archiotorum*, that is “head physician” – are highly imperfect, and we know almost nothing of simple *medici* attending the common people.<sup>54</sup> Physicians who attended the ruling class often made a fortune. However, if the treatment applied by them brought no result, inefficiency quite frequently cost them their lives.<sup>55</sup> On the other hand, surgery was not included in scientific works of that period since it was literally considered to be *kheir-ourgia*, namely “handi-craft”, and as such did not belong to the field of medicine considered as *ars* or *scientia*.<sup>56</sup>

### 3 2 Legal status of physicians in the early Middle Ages

Unfortunately the *lex Baiuvariorum* did not contain any reference to physicians' legal standing and social status. Nevertheless, physicians enjoyed great social prestige, as is clear from the Alemannian law when compared to the Bavarian *lex*.<sup>57</sup> Accordingly, a physician, whose oath was worth as much as the oath of three laymen, had to take his oath on his medical instruments which symbolised his vocation and high position in society. The quoted text determined the process of deciding disputes concerning the *compositio* to be paid for the injury caused; in other words, in this case the physician acted as an expert.<sup>58</sup>

The following Alemannian *locus* also informs us about the fact that the testimony of physicians was of greater weight than that of common people.<sup>59</sup> The source stated that if a physician had lost the piece of bone from the skull/*calvarium* that would serve as proof before court, the physician either had to take an oath that he had lost it, or two eyewitnesses had to take an oath that it was really a piece of bone that was “knocked out” of the *calvarium* when committing bodily injury – it is difficult to explain or identify the phrase medically. Here the therapist therefore acted also as an expert in court. We can only presume that becoming an expert was subject to complying with specific conditions, determined at least by customary law. In other words, a physician probably had to prove his expertise, as is clear from the Old Norse *Manhælingsbalker*<sup>60</sup> which stated that persons who proved that they

53 Niederhellmann 1983: 44.

54 Diepgen 1922: 199; Niederhellmann 1983: 45.

55 Baader 1979: 179.

56 MacKinney 1957: 395; Diepgen 1958: 16.

57 *Pactus legis Alamannorum* 1 2.

58 Niederhellmann 1983: 66.

59 *Lex Alamannorum* 57 5.

60 Reier 1976: 672.

were able to heal wounds, bone fractures, injuries in the chest and abdomen caused by weapons, the stump of cut-off limbs and stab wounds could become “forensic medical experts”.<sup>61</sup>

Visigothic law devoted an independent *titulus* to the regulation of the legal position of physicians and patients (*De medicis et egrotis*),<sup>62</sup> which sufficiently proves the important social role of physicians.<sup>63</sup> In Visigothic law, the relation between a physician and a patient was regulated by a contract guaranteeing mutual security (*placitum*).<sup>64</sup> On the basis of the contract entered into between the physician and the patient, the physician was obliged to heal the patient – that is, quite peculiarly, the physician contracted for an obligation of result rather than an obligation of care – and the patient was obliged to pay the fee for healing by giving security (*cautio*) for it when concluding the contract. The law also regulated the case of unsuccessful treatment.<sup>65</sup> If the patient died while being treated, that meant that the physician could not heal him or her, or, put differently, he was unable to fulfil his obligation assumed in the contract; as a result he could not lay claim to the fee agreed upon. The patient’s family, however, could not lay a charge of homicide against the physician.<sup>66</sup>

However, to ensure the safety of the physician, Visigothic law provided the physician-patient relationship with further guarantees.<sup>67</sup> Accordingly, (also indicating physicians’ high social standing) physicians could not be taken into custody without interrogation, except in the case of homicide. Here homicide referred to voluntary homicide and not *exitus* that could not be imputed to the physician – in this case he had to provide a guarantor to the value of the *compositio* to be paid for *homicidium*. The relationship between physicians and their students was also regulated by law.<sup>68</sup> In return for training – carried out not in an organised form but in terms of an individually concluded contract within the framework of the master/student relationship based on personal trust – a physician could claim payment of twelve *solidi* from his student.

61 Niederhellmann 1983: 67.

62 *Lex Visigothorum* 11 1-8.

63 Niederhellmann 1983: 67.

64 *Lex Visigothorum* 11 1 3.

65 *Idem* 11 1 4.

66 Amundsen 1971: 559; Diepgen 1922: 198.

67 *Lex Visigothorum* 11 1 8.

68 *Idem* 11 1 7.

## 4 Regulation and terminology of diseases, miscarriage and injury in the *lex Baiuvariorum*

### 4 1 Diseases influencing legal capacity and capability of proceeding under the law in the *lex Baiuvariorum*

How did the terms “patient” and “disease” appear in the Bavarian *Volksrecht*? As these were legal texts, diseases were mentioned only when they influenced a person’s capability of participating in legal processes changing his legal status (specifically leprosy and mental illness) or when they had an effect on the person’s capacity to work (such as blindness and *hernia*, namely an inguinal hernia). Before analysing *loci* of the *lex Baiuvariorum*, it is worth surveying the relevant passage of the *Edictus Rothari* which provided a broader view of social judgement and legal regulation of diseases influencing the capability of proceeding under the law and status than the Bavarian source.

According to the *Edictus Rothari*, the cause of mental illness should be looked for in sin.<sup>69</sup> The *Edictus Rothari* clearly fits in with the Christian tradition stating that mental illness is a consequence of sin – even if this thought was not alien to the notions of other religions.<sup>70</sup> Although the basis of this thought cannot be found in either the Old or New Testament of the Bible, the church fathers derived it from a passage in the gospel according to John, where Christ warned people to avoid sin in order to avoid greater trouble.<sup>71</sup> Congenital and hereditary diseases were attributed to original sin, and this notion was strangely mixed with a belief in demons at the time of early Christianity.<sup>72</sup> Origenes connected specific illnesses with particular demons, whilst Augustinus, Tertullianus, Minucius Felix and Cyprianus formulated similar ideas.<sup>73</sup>

Accordingly, the quoted *locus* of the *Edictus Rothari* called the patient a *rabiosus* or *demoniacus*. It should be added that in Middle Latin *rabies* denoted rabies spread by the bite of infected animals.<sup>74</sup> This was mostly considered a synonym of *hydrophobia*,<sup>75</sup> which could be regarded as a typical symptom of rabies since a strong sense of thirst, accompanied by difficulties in swallowing and dread of fluids, appeared in the patient.<sup>76</sup> Other symptoms of this illness included rage, somniphobia and foam at the mouth. However, in Langobardic texts “rabies” was set out arguably as

69 *Edictus Rothari* 323.

70 Rothschuh 1972: 3-17; Rothschuh 1978: 47.

71 *Evangelium secundum Iohannem* 5 14.

72 Siebenthal 1950: 43; Hempel 1965: 271; Harnack 1892: 133; Schadewaldt 1964: 151; Rothschuh 1978: 31.

73 Harnack 1892: 133; Niederhellmann 1983: 48.

74 Du Cange 1883-1887: vol 7 2.

75 Isidorus *Etymologiae* 4 6 15.

76 Beek 1969: 124.

the general name of all diseases involving fits of rage.<sup>77</sup> The phrase *demoniacus* most certainly can be traced back to the notion that the patient was possessed by demons – although, in Middle Latin this term (even if not as an exclusive phrase) was reserved for epilepsy, which is mentioned in the Hippocratic works as a sacred disease.<sup>78</sup> Hippocratic doctrine, however, expounded that the opinion on the supernatural cause of this illness was untenable.<sup>79</sup> At the same time, several sources gave evidence that in the Middle Ages epilepsy was no longer traced back to supernatural causes in every case, but that changes in the brain were suspected.

One of these sources is the *lex Baiuvariorum* which was recorded a century after the *Edictus Rothari*. It is worth quoting its *locus* – without discussing here its aspects of implied warranty – together with the glosses of the eleventh century manuscript marked by Gw.<sup>80</sup> It is quite clear that in the twelfth century manuscript the glosses replaced the two phrases to be explained, namely that the term “hirniuotic” must belong to “cadivus”, that is, epileptic, and the term “holoht” should belong to *herniosus*, namely “person suffering from inguinal hernia”.<sup>81</sup> The etymology of the term “hirniuotic” to be examined here is sufficiently clear: it was generated as the *compositum* of the Old High German and Middle High German phrase *hirn(i)* having the meaning “brain” and the Old High German *wuotīg* and Middle High German *wuotic* – arising from the Indo-European root *\*uāt*, *\*uōt* – meaning “furious, raging”.<sup>82</sup> This phrase showed close relation with the Old Irish word “faith”, meaning “seer”, the Gothic word *wōde*, meaning “possessed” and the Old English word *wōd*, meaning “insane”.<sup>83</sup> This etymological reasoning makes it obvious that in case of epilepsy the cause of illness was presumed to be changes in the brain as nothing implied a supernatural cause in the term *hirniuotic*.<sup>84</sup>

The provision of the *Edictus Rothari* unambiguously stated that the capacity to participate in the legal processes of persons suffering from this illness was limited: they lacked criminal capacity. As a result, culpability lacked in damages caused by *rabiosus* and *demoniacus*, and crimes committed by them shall not be punished, meaning that they did not have to pay *compositio* usually required. The patient’s relatives could not be held responsible for their acts and no compensation could be claimed from them. At the same time, the relatives could not claim *compositio* if somebody killed the patient by negligence (*sine culpa*). In other words, the

77 Niederhellmann 1983: 49.

78 Du Cange 1883-1887: vol 3 2; Niederhellmann 1983: 49.

79 Beek 1969: 85.

80 *Lex Baiuvariorum* 16 9: *id est aut cecum aut herniosum (Gw. hoc est hirniuotic) aut cadicum (Gw. cativo id est holoht) aut leprosum.*

81 Schade 1882: vol 1 414; Niederhellmann 1983: 50.

82 Schade 1882: vol 1 402, vol 2 1216; Lexer 1872-1878: vol 2 1303, vol 3 385; Pokorny 1959: vol 1 1113.

83 Pokorny 1959: vol 1 1113.

84 Niederhellmann 1983: 51.

patient was governed by the same rules that exempted the keeper of an animal from compensation for damages caused by a rabid animal and deprived him from the right to claim compensation.<sup>85</sup> (With regard to mentally retarded and insane persons, the Visigothic law applied the rule of Roman law: only statements made in their own cases and during possible periods of their *lucida intervalla* were valid, otherwise their manifestations of will were invalid. Furthermore they could not act as witnesses in court, and if they had nevertheless furnished evidence, their testimony could not be taken into account.<sup>86</sup>) According to the *Edictus Rothari*, when a buyer noticed – after having entered into a contract of purchase and sale – that the slave was a leper or an epileptic, he could reclaim the purchase price while returning the slave; the seller could defend by a cleansing oath that he had not known of the slave's illness at the time of delivery.<sup>87</sup> This provision was basically in line with the above-quoted Bavarian passage which in turn was most probably influenced by the Langobardic law.<sup>88</sup>

Pursuant to the *Edictus Rothari*, a concluded engagement could be contested, in other words, the fiancé could reclaim the wedding present and could not be obliged to enter into marriage if it appeared later that the fiancée was a leper, blind in both eyes or an epileptic.<sup>89</sup> In addition to the above two cases (purchase and sale and contesting an engagement), in the case of leprosy, the law also linked further legal consequences to concealing the illnesses.<sup>90</sup> The law considered leprous patients to be legally dead and expelled them from the community. If the fact of the illness was unambiguously proved to the judge and the people, the patient had to leave his house in the city and had to live alone outside the community; he could not sell or pledge his assets; he lost his right of inheritance; and could not use legal assistance. At the same time, the relatives were obliged to care for the outcast from the assets left behind by him. This latter provision was not free from contradiction since the lawmaker imposed on the bereaved the obligation to care for a *de jure* dead person. The only novelty in Langobardic legislation was that it qualified the leprous patient as dead and a legal outcast since persons suffering from this infectious, incurable disease involving frightening symptoms had already *de facto* been separated in antiquity.<sup>91</sup> Nevertheless, the question now is what illnesses were considered as leprosy in early medieval sources? Most probably not only illnesses that can be diagnosed as leprosy today (although modern medical science describes three types of it), but also numerous other skin diseases, including, for example, certain kinds of *psoriasis* or *pellagra*.

85 *Edictus Rothari* 324.

86 *Lex Visigothorum* 2 5 11.

87 *Edictus Rothari* 230.

88 Dilcher 1978: 1611.

89 *Edictus Rothari* 180.

90 *Idem* 176.

91 Singer 1928: 86; Niederhellmann 1983: 55.

The viewpoint of the Church played an important part in the legal judgement of leprosy. On the one hand it was of the view that several *loci* in the Bible proved that leprosy was a punishment inflicted for breaching divine law, and further instructed people to expel the patient from the community.<sup>92</sup> On the other hand, the Church strove to care for lepers. For example, Gregorius Turonensis asserted that bishop Agricola of Châlon (535-580) set up an *exsinodochium leprososrum* outside the city;<sup>93</sup> the Fifth Council of Orleans in 549 obliged bishops to care for lepers;<sup>94</sup> and the Third Council of Lyon in 583 imposed the obligation on bishops to comply with the provision that forbade lepers to go to the territory of other bishoprics in order to prevent the illness from spreading.<sup>95</sup> (It may be deduced from this latter source that lepers wandered about in groups in the province to beg for money and food necessary for subsistence.<sup>96</sup>) The biography written by Walahfridus Strabo, abbot of Reichenau, on Otmar, the abbot of St Gallen, states that Otmar had set up a *hospitium* for lepers not far from the monastery but outside its walls.<sup>97</sup> However, since leprosy was incurable in those days, the purpose of this institute most probably was the separation of patients only and it is unlikely that any healing was done there.<sup>98</sup> The prohibition against lepers wandering around could not have been effective since Charlemagne ordered in his *edictum* of 789 that lepers should be separated.<sup>99</sup> Although efforts were taken to separate lepers and expel them from the community even prior to Langobardic legislation, the *Edictus Rothari* was the first legal source that enacted their separation and *de jure* death.<sup>100</sup>

## 4.2 Aspects of abortion in the *lex Baiuvariorum*

With regard to the crime of abortion the *lex Baiuvariorum* provided as follows: If a female slave administered medicine that served or caused a pregnant woman to abort, she would be whipped two hundred times, and if the perpetrator was a woman in free status, she would lose her freedom and would become the slave of the person to whom the duke assigned her.<sup>101</sup> Compared to the rules of the *lex Visigothorum* (discussed below) it becomes clear that whereas Visigothic law involved the pregnant woman in the scope of perpetrators and provided that the person who administered or delivered the medicine could be a man or a woman, Bavarian law did not state whether the woman taking the medicine was required to have intended to cause

92 *Leviticus* 13, 45; *Numeri* 5 2 12 10; *Cronicae* 2 26 19.

93 Gregorius Turonensis *Liber in gloria confessorum* 85.

94 *Concilium Aurelianense* 21.

95 *Concilium Lugdunense* 6.

96 Niederhellmann 1983: 57.

97 Duft 1959: 26.

98 Steynitz 1970: 19.

99 *Duplex legationis edictum* 36; 44.

100 Niederhellmann 1983: 57.

101 *Lex Baiuvariorum* 8 18.



abortion or was merely unaware of the effect of the medicine taken or administered. The similarity of the sanction – namely being whipped two hundred times and the loss of free status – and the punishment differentiated in terms of personal status allow us to regard it as probable that the two laws may be traced back to the same source, namely the *Codex Euricianus*.<sup>102</sup>

Killing a pregnant woman by beating was punished by death in terms of the *lex Baiuvariorum*. However, if only the foetus died, the perpetrator had to pay twenty *solidi conpositio*, but if the foetus had already “lived”, in other words if pregnancy had reached a more developed stage, the *conpositio* rose to one hundred and sixty *solidi*.<sup>103</sup> Visigothic law required payment of one hundred *solidi conpositio* in the case of causing death of the foetus and one hundred and fifty *solidi conpositio* in the case of causing the death of a foetus that “has assumed human form”.<sup>104</sup> It may be deduced from the sanction differentiated in accordance with the development of the foetus that in this case the source of both laws had again been the *Codex Euricianus*.<sup>105</sup>

The viewpoint of the Church is reflected in two passages in the *lex Baiuvariorum*.<sup>106</sup> In the case of abortion, in addition to *conpositio* to be paid in one amount, the perpetrator and his descendants were obliged to pay one *solidus* annually to the seventh generation. The law justified this highly stringent rule by stating that the soul deprived of the possibility of birth also “suffers long-lasting punishment” since it descended to hell without the sacrament of baptism. It is remarkable that this passage begins with the same words as another passage preceding it, where the same facts and sanction were discussed. It is absolutely clear that whereas the other abortion-related *loci* in the *lex Baiuvariorum* reflects the German legal approach, these two show the impact of Christianity, which proves – when analysed with regard to the creation and editing of the *lex Baiuvariorum* – the joint existence of different layers of the text.<sup>107</sup>

The crime of abortion carried out by a woman on herself and abortion carried out at the woman’s request cannot be found in Frisian, Salian Frankish, Ripuarian Frankish and Langobardic law or in the *Pactus legis Alamannorum*.<sup>108</sup> The Saxon, Thuringian and Burgundian law do not discuss abortion in any form whatsoever, that is, they do not even consider the case where abortion is caused by a violent act of the perpetrator as an independent crime. This suggests that, in contrast to the Frisian, Salian Frankish, Ripuarian Frankish and Langobardic laws as well as the *Pactus legis Alamannorum*, where abortion carried out by somebody else at the woman’s request

102 Fastrich-Sutty 2001: 161.

103 *Lex Baiuvariorum* 8 19.

104 *Lex Visigothorum* 6 3 2.

105 Fastrich-Sutty 2001: 161.

106 *Lex Baiuvariorum* 8 20-21.

107 Schwind 1908: 634; Morsak 1977: 201; Niederhellmann 1983: 137.

108 Niederhellmann 1983: 129.

or by the woman herself, these peoples (under ecclesiastical influence) considered any form of killing of the foetus as homicide and sanctioned it as such.<sup>109</sup>

Visigothic law, greatly influenced by Christian doctrine, discussed the issue of abortion/pregnancy at length under the title *De excutientibus hominum partum*.<sup>110</sup> First, the law regulated abortion carried out by an abortive drug.<sup>111</sup> When the punishment of the person who had administered/delivered the abortive drug was dead and it was the woman who had requested an abortive drug and the administration thereof, the regulation included the woman as a perpetrator: If she was a slave, her punishment was to be whipped two hundred times and if she was a person of free status, she lost her freedom. Furthermore, the law determined the sanction for miscarriage caused by a free man assaulting a pregnant woman of free status.<sup>112</sup> Accordingly, if a free man had caused a miscarriage by assaulting a free woman and the woman died, he would be punished on the basis of homicide; however, in the case of causing the death of the foetus only, one hundred, and in case of a foetus that “had assumed human form” one hundred and fifty *solidi conpositio* were to be paid.

In these provisions, German and Roman law elements are intermingled in an interesting form since amounts of *conpositio* may be traced back to the impact of the German law elements, whereas other punishments, such as whipping, the death sentence or loss of free status, may be tracked back to Roman law elements.<sup>113</sup> It is worth mentioning that the sanction for miscarriage caused by an abortive drug was more stringent than the sanction for miscarriage caused by bodily injury; the reason for this may probably be found in the fact that abortive drugs were classified as “magic potions” and that medicines of magic were considered to be highly dangerous.<sup>114</sup> This seems to be supported by the fact that even Burchard of Worms viewed the interruption of pregnancy by abortive drugs as witchcraft.<sup>115</sup> This viewpoint somewhat corresponds to the Roman law regulation that punished the use of abortive drugs similarly to the use of aphrodisiacs.<sup>116</sup> The oldest layer of Visigothic regulations most probably borrowed from Sulla’s regulations<sup>117</sup> which did not punish the woman who had carried out an abortion on herself, but punished the person who had administered the abortive drug.<sup>118</sup> (Roman law sanctioned abortion only from the period of the Severi. Women were punished not simply for killing the foetus, but also for depriving the father from a child who would be under his power

109 *Idem* 130.

110 *Lex Visigothorum* 6 3 1-7.

111 *Idem* 6 3 1.

112 *Idem* 6 3 2.

113 Nehlsen 1978: 1976; Nehlsen 1972: 233.

114 Niederhellmann 1983: 131.

115 Burchardus Vormatiensis *Decreta* 972.

116 Paul D 48 19 38 5.

117 D 25 4 1 1; 35 2 9 1.

118 Nehlsen 1972: 234.

in the future – this is illustrated by the fact that only married and divorced women were threatened by this sanction, whilst unmarried mothers were not.<sup>119</sup> We may presume that the mentality of Visigothic regulations was rooted in canon law rather than in Roman law.<sup>120</sup> King Chindasvint made the sanctions for abortion even more stringent.<sup>121</sup> He regarded abortion and attempted abortion as a crime against *pietas* and ordered perpetrators to be punished by death or blinding, even in the case where a woman did it with the consent of or on the orders of her husband – in the latter case, the husband was to be punished as well.

The *lex Alamannorum* determined the sanction for abortion according to the gender of the foetus.<sup>122</sup> The *conpositio* of a foetus showing female attributes was double that of the *conpositio* of a male foetus; however, if it was not yet possible to determine its gender, that is if the human form had not yet developed, the required *conpositio* was similar to that of the male foetus.

It is clear that the *leges* differentiated in determining the rate of *conpositio* for causing miscarriage in terms of the gender of the foetus and – as the provisions of the *lex Visigothorum* and the *lex Baiuvariorum* show – the stage of development and whether the foetus was alive. This differentiation may be traced back to several ancient and early Christian authors. Aristotle dated commencement of the motion of a male foetus to the fortieth day, and of the female foetus to the ninetieth day after conception. Following the Hippocratic tradition, which Galénos joined as well, a male foetus assumed its human form after the third month and a female foetus only after the fourth month.<sup>123</sup> Contrary to the views of antiquity, Christian tradition took the date of the soul moving in rather than the date of assuming human form as the basis of its stance on abortion. This tradition can be traced back to an erroneous *Septuaginta* translation of a *locus* of the book of *Exodus*,<sup>124</sup> which speaks about the soul moving into the body of the foetus, and was not included in the *Vulgata* translation, but – influenced by the thoughts of Aristotle and Hippocrates – returned repeatedly in the works of the church fathers. The basic question concerned which date following conception abortion was to be considered homicide. Quite interestingly, certain councils did not pay regard to the issue of the date at all.<sup>125</sup> However, certain authoritative authors such as Augustinus and Hieronymus considered abortion to be homicide only from a given point of time. They argued that the soul could only move into the body once the body reached a certain level of development; they did not view abortion before this level of development as homicide.<sup>126</sup>

119 D 47 11 4; 48 8 3; 48 8 8; 48 19 39. See, also, Morsak 1977: 202.

120 Niederhellmann 1983: 132.

121 *Lex Visigothorum* 6 3 7.

122 *Lex Alamannorum* 88 1-2.

123 Niederhellmann 1983: 134.

124 *Exodus* 21 22-23.

125 *Lex Visigothorum* 6 3 7.

126 Niederhellmann 1983: 135.

### 4 3 Involvement of the physician and treatment in the *lex Baiuvariorum*

Although folk laws determined different *compositio* for various forms of bodily injury, they set *compositio* for certain injuries, although subject to the need for and the type of medical help. When involvement of the physician was necessary, the *lex Baiuvariorum* raised the amount of *compositio* to one and a half *solidi* if hitting or stabbing resulted in the injuring of a vein or exposing the bone of the skull.<sup>127</sup> The regulation of the *Edictus Rothari* usually made it possible to claim the physician's fee, in addition to the amount of *compositio*, from the perpetrator.<sup>128</sup> Furthermore, a general rule pronounced that the perpetrator was obliged to arrange for a physician for the injured party – failing which, the injured party or, in the case of slaves, their owner could call a doctor – and pay his fee as determined by experts.<sup>129</sup>

We may learn much about surgical treatment applied in the case of skull injuries from two passages of the *lex Alamannorum*. One of the *loci* described the case where the brain became visible as a result of skull injury.<sup>130</sup> Regarding its treatment the text described that the physician touched the brain with an instrument called *pinn(a)* or *fano(ne)*. In terms of the history of language, the word *pinn* declined in a Latin form may probably be related to the Old English word *pinn*, meaning “small piece of wood/metal ending in a cylinder”; to the Old High German and Middle High German word *pin(ne)*, meaning “little arrow”; or possibly to the Latin word *penna*, meaning *stalk (of straw)* or to the Middle Latin word *pen*, meaning “arrow stem”. Anyway, it denoted a pointed probelike instrument,<sup>131</sup> which was also suitable for removing bone chips. The term *fano* indicates a relation to the Old High German and Old Saxon word *fano* as well as the Anglo-Saxon and Gothic word *fana* meaning “scarf”,<sup>132</sup> and it probably denoted the bandage put on the wounds.<sup>133</sup>

The other *locus* discussed the case where the *cerebrum* became not only visible, but partly protruded from the skull cavity.<sup>134</sup> Medical intervention, namely placing

127 *Lex Baiuvariorum* 5 3: Si manus inicerit et ita plagaverit, ut medicum inquirat, vel si venam percusserit. Si in eum contra legem manus iniecerit, quod infanc dicitur, vel si in eum plagaverit, ut propter hoc medicum inquirat, vel sic ut in capite testa appareat vel vena percussa fuerit, cum solido et semi componat.

128 *Edictus Rothari* 78-79; 82-84; 87; 89; 94; 96; 101-103; 107; 110-112; 118; 125.

129 *Edictus Rothari* 128: De eo qui plagas fecerit, ipse querat medicum, et si neclexerit, tunc ille qui plagatus est aut dominus eius inveniatur medicum. Et ille qui caput rumpit aut suprascriptas plagas fecit, et operas reddat et mercedes medici persolvat, quantum per doctos homines arbitratum fuerit.

130 *Lex Alamannorum* 57 (59) 6: Si autem testa (id est kebul) transcapulata fuerit, ita ut cervella appareat, ut medicus cum pinna aut cum fanone cervella tetigit, cum XII solidis componat.

131 Pokorny 1959: vol 1 97; 830; Du Cange 1883-1887: vol 5 327; vol 6 257.

132 Kluge 1899: 180; Schützeichel 1974: 47; Schade 1882: vol 1 160.

133 Niederhellmann 1983: 78.

134 *Lex Alamannorum* 57 (59) 7: Si autem ex ipsa plaga cervella exierit, sicut solet contingere, ut medicus cum medicamento aut sirico stupavit (id est virscoppot), et postea sanavit, et hoc probatum fuerit, quod verum est, cum XL solidis componat.

the brain back into the skull cavity was denoted by the word *virscoppot* in the text. Etymologically, this phrase may be explained as follows: The Old High German verb *stopfōn/scoppon* means “patching”;<sup>135</sup> the prefix is related to the Old High German prefix *far-*, *fir-* (cf New High German *ver-*) and the suffix *-ot* added to verbs ending in *ōn* making the phrase a noun.<sup>136</sup> The circumstances of the intervention described in folk language by the text makes it probable that it was applied not only by physicians who studied at monasteries and pursued medicine on a scientific basis, but also by people who practised folk medicine. In the text, *siricum*, meaning “silk”, was used for the sewing up of wounds, and was used in Old Norse therapeutics (*silkipræði*) for this purpose.<sup>137</sup> The Old English *Leechbooks* provided more extensive information on how to carry out the operation, such as what material the support bandage should be made of and how bone chips may be successfully removed from the brain.<sup>138</sup> The interventions described here and similar ones have been proved by archaeological finds, like the graves explored in Allach, Chamünster, Greding and Aidenbach. From these finds it may be deduced that in certain cases the operation was performed successfully since fractures of the skull were found to have healed apparently as a result of a medical intervention.<sup>139</sup>

*Cauterisatio*, meaning “burning of the wound” and thus closing of the veins in order to stop bleeding, is evident from a *locus* in the *lex Baiuvariorum*.<sup>140</sup> The *lex Alamannorum* also contains two passages on a similar procedure.<sup>141</sup> In the text of the *lex Alamannorum*, the folk language phrase *zi virstreddene* may be connected with the Old High German verb *stredan* meaning “to glow” or “to become hot” – the gloss attached to the Alemannian law already shows signs of the Middle High German “Lautverschiebung”<sup>142</sup> – and is used as the gloss for *fervere* in the *Murbach Hymns*, which were also, like the *lex Alamannorum*, recorded on the Isle of Reichenau.<sup>143</sup> The form used here is a *praesens participium*, to which the above-mentioned Old High German *praefixum vir-* (cf New High German *ver-*) was added,<sup>144</sup> and was preceded by the *praepositio zi* (cf New High German *zu*), and could therefore be rendered

135 Kluge 1899: 753; Schade 1882: vol 2 875.

136 Niederhellmann 1983: 79.

137 Reier 1976: 592; Rubin 1974: 137.

138 Cockayne 1965: vol 2 114.

139 Niederhellmann 1983: 80.

140 *Lex Baiuvariorum* 4 4: Si in eum vena percusserit, ut sine igne stangnare non possit, quod adarcrați dicunt, vel in capite testa appareant, quod kepolsцени vocant, et si ossa fregit et pelle non fregit, quod palcprust dicunt, et si talis plaga ei fuerit, quod tumens sit: si aliquid de istis contigerit, cum VI solidis componat.

141 *Lex Alamannorum* 65 5-6: Si manum transpunxerit, ita ut focus non intret ad coquendum venae vel sanguinem stagnandum id est zi virstreddene, solidum unum et semmis componat. Si autem ferrum calidum intraverit ad stagnandum sanguinem, cum III solidis componat.

142 Lexer 1872-1878: vol 2 1229.

143 Schmidt-Wiegand 1978: 31; Schützeichel 1974: 185.

144 Schützeichel 1974: 246.

most aptly by the translation *zu verglühende*.<sup>145</sup> Burning the wound to stop bleeding had been a basic duty of a surgeon since antiquity, and it is not by chance that the phrase *cauterio aut ferro* is included as a closely related term in the text of the Council of Châlon in 813.<sup>146</sup> The Old English *Leechbooks* and the Old Norse *sagas* reveal that burning was also used to remove a tumor growing out of the wound after the operation.<sup>147</sup>

#### 4 4 German terminology of injury in the *lex Baiuvariorum*

As the *terminus technicus* used by the Bavarian *lex* for various forms of bodily injury and injuries is always defined in folk language as well, we shall discuss these phrases below.

The word *hrevavunt* occurs three times in the text of the *lex Baiuvariorum*.<sup>148</sup> The *lex Alamannorum* uses the term *hrevovunt* to denote (probably less serious<sup>149</sup>) injuries to internal organs.<sup>150</sup> In contrast, the *lex Baiuvariorum* uses the phrase *hrevavunt* not only for injuries to internal organs, but also for head injuries where the brain was exposed and for bodily injuries leaving the injured party in a half-dead state. The *lex Baiuvariorum* imposes the same *compositio* as for *hrevavunt* in the narrower sense in accordance with the Alemannian law.<sup>151</sup> Etymologically, the first morpheme does not derive from the Old High German word *hrêo*, namely “dead body” (*cadaver*), but instead is related to the Old High German word *href* or *ref*, the Anglo-Saxon word *hrif* and the Old Frisian word (*med*)*ref* meaning “body” or “lower parts of the body”,<sup>152</sup> which are etymologically related to the Latin word *corpus*.<sup>153</sup> It is possible to draw this conclusion from copying errors of certain manuscripts. Some of the medieval copiers associated the Bavarian phrase with the word *cadaver*, as implied by the Middle High German phrase *ferchwunt (todtund)*.<sup>154</sup> The error might have occurred because they transcribed the last letter of the Old High German *href* with an “u” or “v”.<sup>155</sup> Similarly, in certain manuscripts the way of writing of *refvunt* and *refauunt* clearly shows the proper etymology of the word since *interiora membra* in the text may be taken as the equivalent of the meaning

145 Niederhellmann 1983: 82.

146 *Concilium Cabillonense* 280.

147 Rubin 1974: 133; Cockayne 1965: vol 2 1 & 35.

148 *Lex Baiuvariorum* 4 6: Si cervella in capite appareat, vel in interiora membra plagatus fuerit, quod hrevavunt dicunt ...; and 5 5 6 5.

149 Niederhellmann 1983: 247.

150 *Lex Alamannorum* 57 55: Si autem interiora membra vulneratus fuerit, quod hrevovunt dicunt, cum XII solidis componat.

151 Niederhellmann 1983: 248.

152 Du Cange 1883-1887: vol 4 256; Graff 1834-1842: vol 4 1153.

153 Walde & Hofmann 1954: vol 1 194.

154 Lexer 1872-1878: vol 3 89.

155 Kralik 1913: 87.

of the word *href* (*corpus*) rather than that of *hrêo* (cadaver).<sup>156</sup> It is worth comparing the relevant *loci* of the *lex Baiuvariorum* with the *loci* of the *Pactus Alamannorum* where the word *revo* was used in the text, in addition to *latus* (meaning “side”), when referring to *placatus in revo* (meaning “internal part” in the sense of “injury to internal organs”).<sup>157</sup> Here *placatus in revo* cannot mean “mortal injury” related to the word *hrêo* as its etymological base since the amount to be paid for it should be much higher. The second morpheme of the word, namely *vunt* (*uunt*) should be interpreted as *participium*, that is, in the sense of being “injured in his internal parts”.<sup>158</sup> The word *hrevavunti* is closely related to this phrase, which also occurs three times in the legal text.<sup>159</sup> Contrary to the above-mentioned form, *hrevavunti* is the *dativus* of the feminine noun, its formation corresponding to the name of several scenarios in the *lex Baiuvariorum* (*cf* *lidiscarti*, *adarcra*ti); in other words, it denoted “injury to internal parts”.<sup>160</sup>

The term *lidiscart(i)* appears in the *lex Baiuvariorum* in connection with the cutting off of the ear as mutilation, distorting the outward appearance.<sup>161</sup> The *lex Alamannorum* uses the phrase (*or*)*scardi* with regard to cutting off one of the ears.<sup>162</sup> The regulations of the Bavarian *lex* differentiate varieties of injuries caused to the ears: It imposes different *compositio* for piercing the ear and cutting off the auricle of the ear and for where the latter injury resulted in complete deafness.<sup>163</sup> *Lidiscart(i)* is typically a South-German legal term<sup>164</sup> which occurred in the Middle High German period in numerous legal texts in the form *lideschart*, *liderscharte* or *lideschertic*, meaning “to partially mutilate”.<sup>165</sup> Etymologically, the first morpheme of the phrase is connected with the Old High German noun *gilid*, the Old English *lip*, the Gothic *lipus* and the Indo-European root *\*elēi*, *\*lēi*, meaning “member” or “part of the body”.<sup>166</sup> The second morpheme of the compound is related to the Middle High German verb *schart(e)*, the Old English *sceard* and the Old Norse *skard*, meaning “to cut” or “to hit”. The latter derived from the Indo-European root *\*(s)krē* where the word-form itself was created by the formative *-i* affixed to the relevant adjective (*cf* Old High German *scart*, Middle High German *schart*, Old English *sceard*).<sup>167</sup> Regarding the phrase *lidiscarti*, it is possible to clearly describe how the word originally denoting

156 *Idem* 88.

157 *Pactus Alamannorum* 11: Si quis in revo placatus fuerit aut in latus; and 12: Si quis in latus alium transpunxerit, sic ut in revo placatus non sit.

158 Kralik 1913: 88.

159 *Lex Baiuvariorum* 1 6: Et quanti homines ibi intus fuerint et inlaesi de incendio evaserint, unique cum sua ‘hrevavunti’ componat; and 10 1 4.

160 Kralik 1913: 89.

161 *Lex Baiuvariorum* 4 14: Si aurem maculaverit, ut exinde turpis appareat, quod lidiscart vocant.

162 *Lex Alamannorum* 57 10: Si enim medietatem auri abscederit quod (or)scardi Alamanni dicunt.

163 *Lex Baiuvariorum* 4 14.

164 Kralik 1913: 89.

165 *Lexer* 1872-1878: vol 1 1901; *His* 1920: 112.

166 Kluge 1899: 261; Pokorný 1959: vol 1 307.

167 Kluge 1899: 637, 643; Bosworth & Toller 1972: 824; *Lexer* 1872-1878: vol 2 709; Vries 1962: 490.

wounding/damage to health became a legal term. An abstraction was created from the adjective developed from the *participium praeteritum* of the verb denoting the conduct of committing the act in order to name the injury, which served to determine *compositio* more accurately in legal texts.<sup>168</sup>

In the *lex Baiuvariorum*, *marchzand* appears as the synonym of *dens maxillaris*, that is “jaw tooth”, and refers to a molar.<sup>169</sup> It is referred to in the *lex Alamannorum* where it has the same meaning.<sup>170</sup> In both *leges* this is the only tooth that is also named in folk language, and this may be attributed to the fact that, in comparison to other teeth, a higher amount of *compositio* had to be paid as compensation for knocking it out or breaking it off. Two explanations present themselves for the etymology of the first morpheme of the word. The first one asserts that the morpheme *marc(h)* is related to the Old High German word *mar(a)g*, the Middle High German *marc*, the Anglo-Saxon *marg*, the German *\*mazga* and the Indo-European *\*moz-g-o*, *\*moz-g-en* and *\*mos-k-o*, meaning “(bone) marrow”.<sup>171</sup> According to the other etymology, the word *marc(h)a*, meaning “border” appears in this word.<sup>172</sup> It should be noted that *marc(h)a* is actually not a medical term, but a legal or political one. The second morpheme of the word, *zand*, meaning “tooth” is a generally-used word in German languages and it is the *praesens participium* of the Indo-European root *\*ed*, meaning “to eat” – the Indo-European forms *\*(e)dont* and *\*d̥nt* appears in the form *zand* in Old High German; *tand* in Old Saxon and New Dutch; *tōth* in Old Frisian; *top* in Old English; and *zan* in Middle High German.<sup>173</sup> So *marc(h)zand*, in literal translation, means “border tooth” or “corner tooth”,<sup>174</sup> which corresponds with the Middle High German phrase *marczan* meaning “grinding tooth”.<sup>175</sup>

*Palcprust* means a “fracture of bone” that is not open and where the bone end does not injure or pierce the skin.<sup>176</sup> The *locus* shows a remarkable connection with the *lex Alamannorum*.<sup>177</sup> In the interpretation of the first morpheme of the phrase it is essential to take account of the Old High German word *balg*, meaning “skin”, the Gothic word *balgs* and the Old English word *belg*, meaning “leather case”.<sup>178</sup> The second morpheme is related to the Old High German phrase *brust*, meaning

168 Niederhellmann 1983: 285.

169 *Lex Baiuvariorum* 4 16: Si quis alicui dentem maxillarem, quod marchzand vocant, excusserit; and 6 10.

170 *Lex Alamannorum* 67 22: Si autem dentem abscederit, quod marczan dicunt Alamanni.

171 Kluge 1899: 462; Pokorny 1959: vol 1 750; Schmidt-Wiegand 1978: 25; Baesecke 1935: 18.

172 Graff 1834-1842: vol 5 683; Kralik 1913: 92.

173 Kluge 1899: 872; Pokorny 1959: vol 1 287; Niederhellmann 1983: 166.

174 Graff 1834-1842: vol 5 683; Kralik 1913: 92.

175 Lexer 1872-1878: vol 1 2044.

176 *Lex Baiuvariorum* 4 4: et si ossa fregit et pelle non fregit, quod palcprust dicunt, et si talis plaga ei fuerit, quod tumens sit.

177 *Lex Alamannorum* 67: Si enim brachium fregerit, ita ut pellem non rumpit, quod Alamanni balcbrust ante cubitum dicunt.

178 Pokorny 1959: vol 1 125; Schützeichel 1974: 12; Schade 1882: vol 2 37; Kluge 1899: 46; Schmidt-Wiegand 1978: 27.



“fracture, scission”;<sup>179</sup> the Old High German and Old Saxon verbs *brestan*, the Old Norse *bresta* and the Old English *berstan* all meaning “to break, to tear up” as well as the Old High German noun *brestī* and the Old English *byrst*, meaning “damage”,<sup>180</sup> which derived from the Indo-European root *\*bhres* and have also survived in the New High German verb *bersten*.<sup>181</sup> Nevertheless, it is remarkable that *palcprust* simply means “skin injury” (Latin: *pellis fractio*), whereas the Latin text specifically states that it refers to a fracture of bone that has occurred during the injury, but where the bone has not pierced the skin – in other words, not an open fracture. The *locus* shows an interesting analogy in its reference to *hraopant*.<sup>182</sup> In both cases the German *terminus technicus* accompanies the negation of the given state of facts. All this makes it probable that the Bavarians and the Alemanns defined an independent state of facts, namely a *palcprust/balcbrust*, which is further supported by the mention of *expressis verbis* in the *lex Visigothorum*,<sup>183</sup> albeit without including the folk language name of the injury. The symptoms of the injury showing capillary rupture (*libor*, *tumor* etc) can be found in the *Edictus Rothari* too.<sup>184</sup> However, as the *locus* is somewhat confusing and difficult to interpret, it can be argued that the phrase *palcprust* belonged to the ancient layer of German law passed on orally and that, as a result, this passage of the *lex Baiuvariorum* makes a former (more archaic) formulation appear in the final version left to us.<sup>185</sup>

In the *lex Baiuvariorum* the word *pulislac* denotes the scenario where somebody hits a free man out of anger or sudden passion (here the cause or motivation of the blow is not important with respect to the content of the folk language phrase), but where the injury does not result in an open wound (the latter denoted by *plotruns*).<sup>186</sup> This phrase is also found in the *lex Alamannorum* where it has an identical meaning.<sup>187</sup> In the *lex Ribuaria* it occurs in the form *bulislege* where it is mentioned in the context of abusing a slave; however, in this case the hitting does not cause bleeding.<sup>188</sup> In the *Edictus Rothari* the phrase also denotes the hitting of a slave, but there a wound results from it.<sup>189</sup> Etymologically, the first morpheme of the phrase may be related to

179 Graff 1834-1842: vol 3 106, 275.

180 Schützeichel 1974: 21; Kluge 1899: 68; Pokorny 1959: vol 1 169; Bosworth & Toller 1972: 89.

181 Pokorny 1959: vol 1 169; Kluge 1899: 68.

182 *Lex Baiuvariorum* 4 8.

183 *Lex Visigothorum* 6 4 1: Si quis ingenuum quolibet hictu in capite percusserit, pro libore det solidos V, pro cute rupta solidos X, pro plaga usque ad ossum solidos XX, pro osso fracto solidos C.

184 *Edictus Rothari* 46: ut cutica tantum rumpatur, quod capilli cooperint.

185 Schmidt-Wiegand 1978: 27.

186 *Lex Baiuvariorum* 4 1: Si quis liberum per iram percusserit, quod pulislac vocant; and 5 1.

187 *Lex Alamannorum* 67: Si quis alium per iram percusserit, quod Alamanni pulislac vocant.

188 *Lex Ribuaria* 19: Si ingenuus servum ictu percusserit ut sanguis non exeat usque ternos colpos, quod nos dicimus bunislege.

189 *Edictus Rothari* 125: Si quis servum alienum rusticanum percusserit pro unam feritam, id est pulslahi, si vulnus aut libor apparuerit.

the Old High German words *puilla* and *pūlla*,<sup>190</sup> the Middle High German *biule*, the Old English *bȳle*, the Old Saxon *būlia*, the Old Frisian *bēl*, *bēle*, *beil* and the Indo-European root *\*b(h)(e)u*, meaning “swelling”.<sup>191</sup> The second morpheme of the phrase is associated with the Old High German word *slac*, the Old Saxon noun *slegi*, the Anglo-Saxon *slag(r)* and the Gothic *slahs*, meaning “blow”, which derived from the relevant verbs (the Old High German *slahan*, the Old Saxon *slēan*, the Gothic *slahan*, the Old Frisian *slagia* and the Indo-European *\*slak*).<sup>192</sup> In Middle High German the word occurs in the form *būlslac*, both in legal and non-legal sources.<sup>193</sup> The injury may be defined as a blow which does not cause the handicaps or – as a general rule – bleeding, but results in swelling (*cf* *Beulenschlag*).<sup>194</sup>

The phrase *taudregil* (*taudragil*) occurs twice in the *lex Baiuvariorum*. In the first *locus* it is accompanied by a Latin explanation, namely a form of gait defect caused by bodily injury when the relevant person’s “foot touches dew”, meaning where “he drags his foot”.<sup>195</sup> This phrase in the same sense and with the same explanation is also found in the *lex Alamannorum*.<sup>196</sup> The etymology of the first morpheme of the word is quite clear: it is connected with the Old High German word *tau*, meaning “dew”.<sup>197</sup> As pointed out by Grimm, the morpheme *dregil/dragil* may be related to the Gothic verb *þragian*, meaning “to run”, as it has been pointed out by Grimm already.<sup>198</sup> However, the analysed phrase most probably contains a more ancient meaning of the verb, more closely related to the German root *\*þrag* *\*þrêg*<sup>199</sup>: “to drag” (*trahere*).<sup>200</sup>

The phrase *adarcraiti* is accompanied by “*dicunt*” as predicate without the subject *Baiuvarii*, but it is quite certain that it is a Bavarian phrase.<sup>201</sup> The *locus* refers to an injury (stabbing, cutting) to the vein where bleeding may be stopped only by burning.<sup>202</sup> The first morpheme of the phrase may be connected with the Old High German word *ād(a)ra* or *adar*, the Middle High German *āder(e)*, the Old English *ædre*, the Old Norse *æðr* and the Indo-European root *\*ēter*, meaning “vein”

190 Graff 1834-1842: vol 3 96.

191 Kluge 1899: 71; Pokorny 1959: vol 1 98; Schade 1882: 90; Bosworth & Toller 1972: 137.

192 Graff 1834-1842: vol 6 771; Baesecke 1935: 19, 23, 61 & 78; Schützeichel 1974: 174; Pokorny 1959: vol 1 959; Kluge 1899: 652; Schmidt-Wiegand 1978: 26.

193 Lexer 1872-1878: vol 1 381; His 1920: 101, 125.

194 Brunner 1906: 636; Kralik 1913: 98; Niederhellmann 1983: 219.

195 *Lex Baiuvariorum* 4 27: Si quis aliquem plagaverit, ut exinde claudus fiat, sic ut pedes eius ros tangit, quod taudregil vocant; and 6 11.

196 *Lex Alamannorum* 57 62: Si quis autem alium in genuculo placaverit, ita ut claudus permaneat, ut pes eius ros tangat, quod Alamanni taudragil dicunt.

197 Graff 1834-1842: vol 5 346.

198 *Idem*: vol 2 187.

199 Fick 1890-1909: vol 3 190.

200 Kralik 1913: 111.

201 *Lex Baiuvariorum* 4 4: Si in eum vena percusserit, ut sine igne stangnare non possit, quod adarcraiti dicunt.

202 Niederhellmann 1983: 234.

or “sinew”.<sup>203</sup> However, the second morpheme cannot be compared directly with other *loci*, although it can certainly be stated that grammatically it is an abstract feminine noun with formation identical to the phrase *marchifalli*.<sup>204</sup> It cannot be ruled out that the morpheme *-crati* could be related to the German word *\*gra* or *\*grê* (*sharp, rough*), which can be associated with the Indo-European root *\*ghrē* or *\*ghra*, meaning “to rub” or “to graze heavily”.<sup>205</sup> That is where the Middle High German *grât* (*hill, splinter*),<sup>206</sup> and, possibly, the Old High German *crâti* and *crâtian*, meaning “pricking” and “to prick” come from; accordingly, *adarcrati* means *venae percussio*.<sup>207</sup>

The phrase *kepolsceni* refers to an injury where the bone of the skull becomes visible.<sup>208</sup> The first morpheme of the phrase is probably related to the Old High German *gebal/kebul*<sup>209</sup> and the Middle High German *gebel*, meaning “skull”.<sup>210</sup> The second morpheme may be linked to the Old High German *skînan* or *skein*, meaning “to appear, to become visible”;<sup>211</sup> accordingly, the phrase may be translated as *apparitio testae* (*Schädelschein*).<sup>212</sup> (The first morpheme of the phrase *kepolsceni* also appears independently in the *lex Alamannorum* in the *locus* concerning the medical instruments called *pinn* and *fano*.<sup>213</sup>

In the *lex Baiuvariorum*, *plotruns* means nothing else than “bleeding wound” or “flow of blood”.<sup>214</sup> Yet, the law separates it from deeper injury to a major blood-vessel, that is, *adarcrati*.<sup>215</sup> The scenario itself is defined in almost all folk laws;<sup>216</sup> the *lex Ribuaria*,<sup>217</sup> the *lex Alamannorum*<sup>218</sup> and the *Pactus legis Salicae*<sup>219</sup> even emphasise that this outcome may be established when blood drips to the ground. However, the folk language term is found only in the Bavarian *lex*. The *lex Visigothorum* also distinguishes injury that results in bleeding (*sanguis vel libor apparet*) from injury where it does not (*sine sanguine*).<sup>220</sup> Etymologically, the first morpheme of the

203 Graff 1834-1842: vol 1 156; Pokorny 1959: vol 1 344; Bosworth & Toller 1972: 9.

204 Kralik 1913: 48.

205 Fick 1890-1909: vol 3 138.

206 Lexer 1872-1878: vol 1 1073; Pokorny 1959: vol 1 440.

207 Kralik 1913: 48.

208 *Lex Baiuvariorum* 4, 4: Vel in capite testa appareant, quod kepolsceni vocant.

209 Graff 1834-1842: vol 4 127; Schade 1882: vol 1 281; Schützeichel 1974: 66.

210 Lexer 1872-1878: vol 1 749.

211 Graff 1834-1842: vol 6 499.

212 Kralik 1913: 91.

213 *Lex Alamannorum* 57 6: Si autem testa id est kebul transcapulata fuerit, ita ut cervella apparet.

214 *Lex Baiuvariorum* 4 2: Si in eum sanguinem fuderit, quod plotruns dicunt.

215 Niederhellmann 1983: 229.

216 *Pactus legis Salicae* 17 8-9; *Lex Salica* 23 1-2; *Pactus Alamannorum* 2 7; *Lex Ribuaria* 21 1; *Leges Saxonum* 3; *Lex Thuringorum* 6-7; *Lex Frisonum* 22 4; *Lex Francorum Chamavorum* 18.

217 *Lex Ribuaria* 2.

218 *Lex Alamannorum* 57 2.

219 *Pactus legis Salicae* 17 3.

220 *Lex Visigothorum* 6 4 3.

compound is related to the Old and Middle High German word *blôt* or *bluot*,<sup>221</sup> the Old Saxon, Old Frisian and Old English *blōd*, the Old Norse *blōð* and the Gothic *blōþ*, meaning “blood”.<sup>222</sup> The second morpheme of the compound is probably taken from the Old High German, Old Saxon, Old English and Gothic verb *rinnan*, meaning “to flow”<sup>223</sup> from which the Old High German word *runs(a)*, meaning “flow” or “stream” originated.<sup>224</sup> In Middle High German the word appears in the form *bluotruns* and *blōtruns*.<sup>225</sup> Furthermore, it is possible to discover connections with the Middle Dutch *blotrunn/blotrenn*,<sup>226</sup> the Old Frisian *blodrene* and *blodrinse*,<sup>227</sup> the Anglo-Saxon *blōdryne*<sup>228</sup> and the Old Norse *blōðrás*; that is, it denotes a wound where blood flows but it does not result in a limitation of movement.<sup>229</sup>

In certain expressions in the *lex Baiuvariorum* the active predicate in the first person *pluralis* reveals that the Bavarians assisting in making the law inserted them in relevant passages as words of their own folk language. Other phrases were accompanied by the active predicate in the third person plural and the passive predicate in the third person singular or plural. These either named Bavarians as the subject or not where the text made it clear that these words were used by Bavarians to express the given meaning. We cannot find such terms among the phrases that constitute the subject of the examination of this paper. In the text of the Bavarian law it is possible to read several – not necessarily Bavarian but certainly – South German expressions as well. They may be found in identical or similar form in the *lex Alamannorum* and were (quoting the Bavarian form) *hrevawunt*, *lidiscart(i)*, *marchzand*, *palcprust*, *pulislac* and *taudregil*. Consequently, these words were borrowed from the *lex Alamannorum*, more specifically its earlier version, the *Chlothariana*. The text of the law contains other phrases that may be only presumed to be of Bavarian origin, namely *adarcrati*, *kepolsceni* and *plotruns*.

## 5 Conclusion

This paper examined aspects regarding the appearance of healing, the physician, the patient as well as diseases in early medieval German legislation. The first part dwelt upon the issue of dating the *sedes materiae* in the German *Volksrechte* by comparing the Bavarian, Visigothic, Langobardic and Alemannian *leges*.

The second part provided a brief discussion of the issue of early medieval healing, more specifically the legal status of medicine and the physician and their

221 Graff 1834-1842: vol 3 252.

222 Kluge 1899: 87; Grimm 1922: vol 2 185; Kralik 1913: 98.

223 Pokorný 1959: vol 1 326.

224 Graff 1834-1842: vol 2 519; Schützeichel 1974: 155; Feist 1939: 401.

225 Lexer 1872-1878: vol 1 318; His 1920: 105.

226 Lübken 1888: vol 1 365.

227 Richthoven 1840: 655.

228 Bosworth & Toller 1972: 112.

229 Brunner 1906: 636; Kralik 1913: 98.

appearance in legal and non-legal sources. In order to set them in the context of early medieval regulation, we had to look at how ancient medicine further developed in the Middle Ages and how healing and the medical profession were judged by the Church since the latter had a considerable influence on how the role of medicine was set out in legal sources.

The third part of the paper discussed the issue referred to in the title, namely regulation of the physician, healing, diseases, bodily injuries and injuries in general in Bavarian folk law. The sources specified four diseases that influenced capability of participating in legal proceedings and the patient's legal status in general: leprosy, various forms of mental illnesses, blindness and hernia. Here the study touched on the considerable ecclesiastical motivations for the regulation of these diseases. Similarly, in order to demonstrate the view of the various folk laws, it was unavoidable to take into account the Christian doctrine (partly rooted in ancient philosophy) regarding bodily injury causing abortion and miscarriage although these folk laws differed due to the reason for and age of their recordings.

The next part provided a brief survey of the passages of the law that (1) *expressis verbis* set forth the necessity of involvement of a physician in case of certain injuries, and (2) – to enable determination of the seriousness of the injury and the rate of *compositio* to redress it – provide information with regard to the nature of the treatment or therapeutic method used by the physician.

Finally, using the results of German rather than Latin philology, we analysed the usual folk language, namely the German (Bavarian) names of pathographies since these terms were remains dating from a time long before the law was recorded. This analysis provided security for the application of the law in that period by imposing sanctions since the compilers deemed it safer to describe the scenarios in Latin with the addition of German terminology. This detailed microphilological analysis revealed several terms that corresponded to, overlapped with and were borrowed from scenarios in other German folk laws – primarily, but not exclusively, the *lex Alamannorum*, *lex Visigothorum* and the *Edictus Rothari* – and provided information on the further development of these medical legal terms.

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# COLONIAL JUDGES, ADMINISTRATIVE OFFICERS AND THE BUSHE COMMISSION IN INTERWAR KENYA AND TANGANYIKA

**Paul Swanepoel\***

## ABSTRACT

By focussing on a colonial commission of inquiry into the administration of justice in East Africa, this article outlines the major themes that dominated East Africa's legal "world" during the interwar period. The most important of these was the doctrine of indirect rule, which was the prevailing administrative policy during the period. Ultimately, there were two opposing views during this period. The traditional view, held by the judiciary, was that Africans must be "civilised" and integrated into a system of British courts. The opposing view, advocated by administrative officers, held that Africans must be protected against the harmful consequences of any contact with foreign law. One of the central tenets of the doctrine was placing customary courts under the supervision of administrative officers rather than under judges. Directly linked to the resulting legal problems were disagreements between the two sides as to the applicability of English law and customary law. More widely, this detailed study of the Bushe Commission provides an opportunity to view the administration of justice from the perspective of the Colonial Office as well as the colonial state.

**Keywords:** Colonial commissions of inquiry; East African legal history; indirect rule; administrative justice; colonial judiciary

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## 1 Introduction

There have been multiple jurisdictional conflicts throughout the British Empire to the extent that they may be described as a structural feature of the colonial legal world. This article is focused on a particular legal conflict and how it changed the legal order in East Africa. Different kinds of colonial legal texts from various parts of the Empire – such as penal codes, colonial statutes and reported cases – interacted with each other, and this article examines a particular kind of legal text, namely the commission of inquiry. In this case it was known as the Bushe Commission, which conducted an investigation into the administration of justice in Kenya, Uganda and Tanganyika in 1933. Its remit was to investigate why the existing machinery of justice was not performing to the satisfaction of the East African governments and the Colonial Office. During the period when the commissioners were producing their report, however, the governors of the three East African territories wrote to the secretary of state for the colonies, requesting that most of the recommendations not be implemented. Their requests were duly granted, effectively rendering the Commission's report a nullity. Although in many respects the events surrounding the Commission involved a war of ideas rather than the realities on the ground, they are an excellent example of the attempts of the colonial state to manage conflicting interests, in this case those of the administration and the judiciary.

## 2 Commissions of inquiry

The commission of inquiry as a feature of colonialism has scarcely been dealt with by historians. Once a commission of inquiry had been appointed, whether in Britain or in the colonies, it was independent of all departments except for the fiscal control of the Treasury. Although service on commissions meant a significant sacrifice of time and energy, members of a commission were normally unpaid and were only given a small allowance for travelling expenses. There were seven categories of commission in respect of the following areas: public administration; social services; regulation of public morals; changes in private law; colonial administration; economic questions; and political questions. In Britain, public demand for commissions of inquiry was sometimes the result of prolonged public discussion of the subject. Through complaints made to the department in question, questions asked by members of parliament in Parliament, and letters written to the press, the demand for an investigation gradually grew.<sup>1</sup>

The varied problems of colonial administration resulted in the appointment of many commissions throughout the Empire, especially in India where commissions enjoyed a prestige that made them a popular form of investigation. Factors that gave rise to this included numerous instances of unrest, complaints by civil servants,

1 Gosnell 1934: 84-91.

members of parliament's questions in Westminster and requests by the viceroy. Other parts of the Empire (especially the West Indies) also welcomed the appointment of commissions. A commission could comprise a small body of supposedly impartial persons or experts, or a large body that was representative of all the main interests. Most commissions comprised between ten and twenty-three members.<sup>2</sup>

In the case of the Bushe Commission, it was characterised by its small size, comprising only six members. H Grattan Bushe was appointed as the chairman, and the remaining four members were ADA MacGregor, Kenya's attorney-general; CE Law, a judge from Uganda; Phillip Mitchell, Secretary for Native Affairs in Tanganyika; and W MacLennan Wilson, a prominent member of Kenya's settler community. The secretary of a commission played an important role and was normally a permanent official of the administrative class assigned by his department. The secretary for the Bushe Commission, JB Griffin, was the registrar of the High Court of Uganda.

The key to the success of a commission often depended on the character of the chairman. The aim was therefore to secure a distinguished civil servant who was willing to sacrifice his time and energy.<sup>3</sup> Sir William Dale, legal assistant in the Colonial Office, described Bushe as being of "Irish extraction, a penetrating lawyer, he hit hard at humbug and could be sarcastic, not to say cynical. [He] fought to secure for the law and for the Colonial Legal Service its rightful place in the government of the empire".<sup>4</sup> He had a reputation for supporting the views of the colonial judiciary. This is borne out by the writings of Gilchrist Alexander, a judge who served in Tanganyika between 1920 and 1925. He wrote of his gratefulness that the legal department at the Colonial Office supported the judges against the "popular 'new despotism' favoured by most colonial governors" in his book, *Tanganyika Memories: A Judge in the Red Kanzu*.<sup>5</sup> In particular, he praised Bushe for combating this trend. Although Alexander expressed this view eight years before the Bushe Commission began its investigations, his book was published in 1936, two years after the Commission had published its findings, and he emphasised his support for the Commission's recommendations.

The success of British commissions of inquiry was a consequence of the input of the ablest public administrators; the requirement of careful written statements as the basis for testimony; the willingness of men to serve as commissioners or witnesses; the use of experts; and an impartial view of the facts.<sup>6</sup> Colonial Office officials who were ordinarily stationed in London were able to gain first-hand experience of the Empire by being part of commissions of inquiry.<sup>7</sup> Within the limits of their prescribed functions, commissions had absolute powers to regulate their own proceedings and to

2 *Idem* at 92-94.

3 Gosnell 1934: 97.

4 Morris & Read 1972: 113.

5 Alexander 1936: 18.

admit or exclude persons from appearing before them. During preliminary meetings commissions had to interpret their terms of reference, and decide on holding open or private hearings. If the commission was investigating a matter of public interest, there was wide coverage in the press.<sup>8</sup> The basis on which a commission based its findings was oral evidence given before it. The majority of commissioners were, however, not experienced in the challenging task of interviewing witnesses. In addition, their choice of witnesses was sometimes called into question, the lack of formality resulted in a wide range of possibilities of error and there were no methods of verifying the data.<sup>9</sup>

Sometimes, governors requested the Colonial Office for the appointment of a commission of inquiry. With reference to a possible commission of inquiry relating to the West Indies, reference is made to the “time-honoured device of a commission of inquiry to investigate policy options and thus obviate the requirement for immediate action”.<sup>10</sup> The West Indian labour disturbances between 1934 and 1939 led to a new approach to colonial development. Commissions of inquiry there established the causes of the protests and colonial governments successfully responded to the disturbances with coercion and concession.<sup>11</sup>

The Kenya Native Labour Commission that sat between 1911 and 1912 is an example of commissions of inquiry in East Africa. Evidence before this Commission made known that settlers believed violence to be integral to labour relations.<sup>12</sup> Sometime after the Commission had presented its findings, members of the Kenya Native Punishment Commission noted the widespread use of violence by white landowners.<sup>13</sup> In 1925 the Kenyan government appointed a Native Punishment Commission to inquire into the punishment of minors. Many of the offenders had been convicted in terms of legislation concerning legislation, hut and poll tax, pass laws, or for negligence and desertion.<sup>14</sup>

### 3 The doctrine of indirect rule

During the 1920s and 1930s there was growing dissatisfaction in administrative circles in Kenya and Tanganyika with the supervision of customary courts. They were technically under the control of the judiciary, even though in practice supervision was carried out by district officers. The administration also claimed that the High

6 Gosnell 1934: 118.

7 Kirk-Greene 2000: 44.

8 Gosnell 1934: 99-100.

9 *Idem* at 90-103.

10 Thomas 2008: 9-11.

11 Johnson 2001: 319.

12 Shadle 2012: 66.

13 *Idem* at 67.

14 Clayton & Savage 1974: 125.

Court did not have knowledge of, or even an interest in, customary law. Accordingly, the administration wished to gain exclusive and direct control over customary courts in order to develop them according to the principles of indirect rule. The fact that administrative officers were laymen was considered to be an advantage, as they were able to determine cases without the intrusion of legal complexities. Lawyers, who were mostly trained in England, were barred from appearing in native courts.<sup>15</sup>

As far as was practicable, a district officer was on tour in each district at any particular time. During visits to county chiefs' headquarters, officers would inspect various records including native court records. Some matters were considered by administrative officers as appeals, and others were selected by them for re-consideration under their powers of revisional jurisdiction. The officer's supervisory powers included inspecting the court records in the presence of the court members, where complaints could be dealt with by revisional orders. Decisions were either made on the spot or matters were deferred for final consideration on return to headquarters.<sup>16</sup>

Administrative officers' notions of what constituted a fair trial were far removed from those of their judicial counterparts. In particular, judges expected presiding chiefs to maintain English procedural and evidentiary law. The judges' justification for this expectation was that this body of English common and statutory law had evolved with the purpose of protecting the rights of the accused person – without which it was impossible to conduct a fair trial as understood by lawyers.<sup>17</sup> In sum, chiefs and the administrative officers who oversaw them offered simple and quick justice. The lawyers, however, believed in transplanting English criminal law and procedure.<sup>18</sup>

During the first years under the British mandate, the government of Tanganyika was in a period of transition between the pioneering conditions of early conquest and the "public debate of post-war trusteeship ideology".<sup>19</sup> In the 1920s, Sir Horace Byatt, the first governor, undertook a programme of reform designed to enlarge the role of chiefs within the provincial administrative system. This involved establishing native courts and promulgating native authority ordinances.<sup>20</sup>

Sir Donald Cameron was the first governor to fully endorse the new policy. The main controversy around the transformation arose as a result of Cameron's decision, adopted from Nigeria, to remove the High Court's power to review decisions from native courts, and to grant that right exclusively to provincial commissioners. Cameron feared that revisions by the High Court could "shake a native administration

15 Ghai & McAuslan 1970: 143.

16 Morris & Read 1972: 20.

17 Ghai & McAuslan 1970: 143.

18 Chanock 1985: 50.

19 Austen 1967: 583.

20 *Idem* at 582.

to its very foundations".<sup>21</sup> His fears were partly based on the Byatt period, when the Chief Justice, Sir William Morris Carter, had regularly interfered in native policy.

However, no such accusation could be made against his successor, Sir Alison Russell, who cooperated with the government in the implementation of indirect rule. Nevertheless, Russell believed that the High Court's revisional jurisdiction was an important part of the doctrine of indirect rule; when these powers were removed, he interpreted the government's action as an "unjustified return to a 'pioneer stage of administration'".<sup>22</sup> His protests, and those of the unofficial members of the legislative council, merely delayed the implementation of Cameron's policy and he eventually resigned over the issue.<sup>23</sup>

Parallels may be drawn with other parts of the Empire during the interwar period. For instance, in Malaya there was often ill feeling between Malayan Civil Service officers and members of the Colonial Legal Service, especially at state and federal headquarters. One officer, who transferred from the Administrative Service to the Legal Service in 1938, observed that legal officers often resented the fact that

administrators were at the top of the heap, taking precedence over everyone regardless of professional qualifications. For his part the officer whose pet schemes had to be vetted by a member of the bar would understandably bridle at legalisms that frustrated his plans.<sup>24</sup>

Indirect rule, first applied by Frederick Lugard in Uganda and Northern Nigeria, was not merely a practical means of administration, but also a wider, philosophical concept developed by his successors and admirers in other parts of Africa.<sup>25</sup> Donald Cameron had previously served under Lugard in Nigeria and he defined the principle of indirect rule as

adapting for the purposes of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of the British Officers) and by the general advice and control of those officers.<sup>26</sup>

Cameron firmly believed he had successfully introduced a new system of administration into East Africa, although it is doubtful whether his policies were entirely new to the region. Lugard would certainly not have credited Cameron with having initiated the policy of indirect rule in the region, as he believed he had introduced it in Uganda many years before.<sup>27</sup> With regard to legal matters, Cameron stated, in 1926, that

21 *Idem* at 589.

22 *Ibid.*

23 *Ibid.*

24 Heussler 1981: 295.

25 Iliffe 1979: 320.

26 Morris & Read 1972: 3.

27 *Ibid.*

[i]t is not the intention and is not the policy to impose upon the tribes a judicial system for them by ourselves and founded upon our idea of law and law courts, but to legalise and regulate the activities of whatever judicial machinery existed in the customs of the people.<sup>28</sup>

The doctrine of indirect rule consisted of four “pillars”: native treasuries, native authorities, native courts, and supervision of native affairs by district officers.<sup>29</sup> The reasons for installing traditional authority were set out in a circular issued by Cameron in 1925:

Everyone, whatever his opinion may be in regard to direct or indirect rule, will agree, I think, that it is our duty to do everything in our power to develop the native on lines which will not Westernize him and turn him into a bad imitation of a European – our whole education policy is directed to that end. We want to make a good African and we will not achieve this if we destroy all the institutions, all the traditions, all the habits of the people, super-imposing upon them what we consider to be better administrative methods, better principles; destroying everything that made our administration really in touch with the customs and thoughts of the people. We must not, in fact, destroy the African atmosphere, the African mind, the whole foundation of his race, and we shall certainly do this if we sweep away all his tribal organizations, and in doing so tear up all the roots that bind him to the people from whom he has sprung.<sup>30</sup>

## 4 The administration

The outlook of administrative officers serving during this period was moulded by their background and education, and it may be argued that they promoted the spirit and practice of indirect rule as much as their superiors. The structure of the administration allowed for the development of individualistic policy in the districts, with little interference from provincial commissioners or the secretariat. The outlook and methods of district administration were essentially paternalistic, and although it was widely accepted that Africans would assume responsibility for running their own territories, no officer expected to see this materialise in his own lifetime.<sup>31</sup>

Unlike administrative officers who served during the period prior to the First World War, officers in the 1920s and 1930s began to question the wisdom of colonial officials and missionaries imposing an alien civilisation on African peoples. They also began to take a keen interest in social anthropology and in studying indigenous African culture.<sup>32</sup> Administrative officers tended to romanticise the tribal past and emphasised the virtues of traditional institutions such as native councils and courts.

28 Allott 1976: 368.

29 Pearce 1978: 10.

30 Buell 1928: 451-452.

31 Morris & Read 1972: 11-13.

32 This was encouraged by the Colonial Service and anthropology was included in the courses of instruction given to administrative cadets before they left for East Africa.

The prevailing sympathetic view of traditional African society was the foundation of the policy of indirect rule as understood in Tanganyika. Accordingly, indigenous institutions were seen as the only desirable organs through which the development of Africans might be advanced. Rather than the aspiring mission-educated urban African, the ideal became the traditional chief or elder whose authority was rooted in indigenous institutions and who administered justice according to customary law.<sup>33</sup>

Essentially, administrative officers sought to protect Africans from professional lawyers, who were mostly resident magistrates and judges, and they were able to do this more effectively than were the missionaries. They saw lawyers as being overly legalistic and as having the blind belief that English law and practice were as appropriate in all its detail in an African society, as they were in England.<sup>34</sup>

## 5 The background to the Commission

By the early 1930s, public attention was drawn to the issue of the administration of justice in East Africa. This was after several cases had led to uneasiness in the Colonial Office as to the methods of criminal procedure that had been adopted. Chief among these was the Bagishu trial in Kenya, in which four men were convicted of murder and sentenced to death.<sup>35</sup>

The facts of the case were that the body of an African man was found on the farm of a certain Oswald Bentley, near Kitale in Kenya's Western Province. As a result of statements made to a European police officer, Assistant Inspector Joseph Dale, by two African constables who had been left on the farm, two employees of Bentley were arrested. A further two men were subsequently arrested and all four were charged with the murder. Under Kenyan colonial law in force at the time, police officers without a warrant from a resident magistrate were not permitted to keep suspects in custody for longer than twenty-four hours, exclusive of the time necessary for the journey to the resident magistrate's court. The farm was only seven miles from the court, and yet the men were detained for longer than twenty-four hours. This was but the first in a long series of abuses and blunders by the police. Other Africans on the farm, including a woman and child, were taken into custody and were subjected to intimidation and ill-treatment by African constables under the supervision of Dale. A man employed as a tractor driver by Bentley, one Busiko, was intimidated by the police into making a statement, which afterwards formed the principal basis of the charge framed against the four accused persons.<sup>36</sup>

The case was tried by the Supreme Court of Kenya at Kitale before Judge John Stephens, and Busiko was selected as the main witness for the prosecution. Stephens

33 Stibbs 1978: iv.

34 Morris & Read 1972: 16.

35 *Bagishu Murder Trial: Report of the Commission of Inquiry* (Nairobi, 1931). The Bagishu are an ethnic group who inhabit the district of Kitale in the Western Province of Kenya.

36 *Idem* at 6.



convicted the four accused men of murder and sentenced them to death.<sup>37</sup> A key piece of the evidence was that the accused persons had killed and eaten a chicken after the alleged murder, which the court accepted as a local custom. Although no evidence was led on this point, the administration used this as an example of the judiciary's incompetence.<sup>38</sup> The convicted men were granted leave to appeal within a month, and, as a result of Bentley's efforts, it was discovered that the conviction was based on statements to the police that had been obtained under duress.

A commission of inquiry chaired by the chief native commissioner, GV Maxwell, was set up to investigate the circumstances leading up to the trial. This led to the Colonial Office setting up a further commission under the direction of Bushe to investigate the administration of criminal justice in East Africa.<sup>39</sup>

## 6 The Bushe Commission

The remit of the newly-appointed commissioners was to investigate why the existing machinery of justice was not performing to the satisfaction of both the East African governments and the Colonial Office. During the course of their investigations, which occurred between late March and early May 1933, the commissioners travelled 2,200 miles, visiting nine places. Eighty-five witnesses testified, including four judges, two resident magistrates, three registrars, and six legal officers.<sup>40</sup> The Commission's report, published in 1934, stated that the legal system in East Africa was unworkable and recommended major changes. These included reducing the judicial powers of administrative officers and transferring all serious criminal cases to the High Court. Accordingly, it suggested increasing the number of judges. During the period when the commissioners were producing their report, however, the governors of the three East African territories wrote to the secretary of state for the Colonies, requesting that most of the recommendations be not implemented. Their requests were duly granted effectively rendering the Commission's report a nullity.<sup>41</sup> The Colonial Office agreed with the governors' view that administrative officers should not be stripped of their magisterial functions. Apart from the reality that financial constraints required minimal administrative expenditure, it was officially recognised that administrative officers had experience that was essential in determining such questions as motive, extenuation and the credibility of evidence in the native courts. As a consequence it was acknowledged that until the post-war period, the cheapest and most effective

37 *Idem* at 7.

38 Read 1999: 112.

39 Morris & Read 1972: 88-96.

40 Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters, Command Paper 4623 (London, 1934) Appendices I and II.

41 Morris & Read 1972: 318

method of administering justice in rural districts would continue to be through the non-professional magistrate.<sup>42</sup>

## 7 Recommendations

The Commission made forty-seven main recommendations that are listed at the end of its report, a small selection of which are discussed below. These do not include numerous small points of detail referred to in the text. In their report to the Colonial Office after the investigation had been completed, the commissioners expressed their dissatisfaction with the existing framework for the administration of justice:

It is no exaggeration to say that the machinery for the administration of justice, as apparently set up by law in these territories, does not work and as at present constituted cannot work. This is a grave statement but is fully supported by the evidence which we have heard. No machinery, however perfect it may be in itself, can perform its primary function of meting out justice to the people unless it takes justice to the people and administers it with despatch, with independence, with certainty and with skill.<sup>43</sup>

They identified a number of problematic areas, recognising that although there were different conditions in each territory, the main problems were common to all of them.

### 7 1 Extended jurisdiction

In areas that were not covered by high courts, extended jurisdiction was sometimes conferred on magistrates. The Commission resolved that this practice should, where possible, cease. Extended jurisdiction generally occurred in outlying districts in Kenya and Uganda that were not served by a high court, granting magistrates the power to try any criminal case. In Uganda, extended jurisdiction had been implemented in thirteen of the eighteen districts. The Commission recommended that extended jurisdiction should apply only in the two most isolated districts. The situation was different in Tanganyika as magistrates' sentencing powers were in general restricted to a period of two years.<sup>44</sup>

### 7 2 Court procedure

Apart from the issue of extended jurisdiction, other matters were raised by the administration, such as the argument that English criminal procedure was beyond the comprehension of accused persons, who were normally uneducated and unrepresented by counsel, and could not speak English. Practical matters were set out in the report

42 Report of the Commission of Inquiry at para 156.

43 *Idem* at para 18.

44 Morris & Read 1972: 99.

such as that measures should be adopted to provide a reliable body of interpreters.<sup>45</sup> Similarly, district officers were instructed to keep a list of suitable assessors.<sup>46</sup> As in Kenya, stenographers were to be appointed in the other two territories.<sup>47</sup>

### 7 3 Revision and confirmation by the High Courts

Until the mid-1930s high courts in the three territories had full powers of revision, confirmation and appeal over resident magistrates' courts, district courts and native courts. Courts were able to revise the convictions or sentences of requested cases. In addition, the convictions and sentences of certain classes of matters were required to be sent to a High Court judge. During this period, most customary-law cases reached the superior courts only on appeal from native courts and only a handful were heard by the high courts sitting as courts of first instance. This was in stark contrast with the situation in West Africa where family and land matters were frequently heard by the high courts. This was arguably because the region had been under colonial administration for a much longer period; in addition, there were substantially more African lawyers there than in East Africa.<sup>48</sup> During the interwar period in East Africa, the right of the High Court to alter sentences passed by administrative officers was disputed. To the relief of the judges, the Commission recommended that confirmation and revision would continue.<sup>49</sup>

### 7 4 "Reconciliation"

Following a tradition of borrowing provisions from elsewhere in the Empire, the Commission recommended that the East African governments adopt a provision from the Nigerian Supreme Court Ordinance regarding "reconciliation".<sup>50</sup> This Ordinance allowed courts to facilitate settlement in an amicable fashion regarding proceedings for common assault or offences not amounting to a felony by means of payment of compensation or other terms approved by the Court.<sup>51</sup>

## 8 The judicial perspective

As far as the judges were concerned, the only change necessary was to increase the size of the judiciary. Sir Robert Hamilton expressed this point of view as follows:

45 Report of the Commission of Inquiry at para 131.

46 *Ibid.*

47 *Ibid.*

48 Morris & Read 1972: 174.

49 Report of the Commission of Inquiry at para 157.

50 *Idem* at para 184.

51 *Ibid.*

Though the limits of a District Officer's jurisdiction are still in question, where a sufficient number of judges is not available and extended jurisdiction has consequently to be conferred upon lay magistrates, the state of affairs might not be inaptly described as one of "necessity having no law"; but is it in fact one of necessity if the difficulty can be largely overcome by the extension of the judicial staff? This is the line taken by the Report, in the course of which the old controversy as between the District Officer with knowledge of the Natives and the judge with knowledge of the law is carefully analysed.<sup>52</sup>

As a consequence, Kenya was assigned an extra judge, and two extra judges were appointed in Tanganyika. This then led to a debate about the decentralisation of the judiciary in Tanganyika. The Commission recommended that one of the two new judges should be posted to Tanga and the Northern Province. However, in the opinion of the Chief Justice, Sir Joseph Sheridan, it was best if both judges were stationed in Dar-es-Salaam. He did not believe in decentralisation unless there were good reasons for it:

It is recognised that a High Court with some of its members stationed away from headquarters is not as strong as when all the Judges reside at headquarters, and if the circuits can be held as expeditiously and effectually by sending out Judges from Dar es Salaam, as I am satisfied they can, in the case of Tanga and Northern Province, there is no need for any decentralisation in so far as that part of the Territory is concerned.<sup>53</sup>

Sheridan could not accept there was sufficient work for a resident judge in the region, adding that stationing a judge in the Northern Province would necessitate the building of an expensive library. By keeping the judges at Dar-es-Salaam, there would be no extra expense for subordinate staff, in particular a crown counsel in Tanga. Nevertheless, he conceded that the town of Mwanza, on Lake Victoria, required a permanent judge, given its long distance from the coast. He also favoured the extension of jurisdiction of resident magistrates to "relieve district officers from their magisterial duties for their administrative duties".<sup>54</sup> Sheridan's concerns echoed similar fears in other branches of the Colonial Service. For example, a report for the Committee for Colonial Agricultural, Animal Health, and Forestry Research in 1948 concluded that the isolation in which many officers served was a "serious bar to efficiency":<sup>55</sup> the report recommended a policy of grouping officers together, instead of scattering them at many territorial stations.<sup>56</sup>

52 Hamilton 1935: 10.

53 Tanzania National Archives (TNA) DSA 21429/II, Sir Joseph Sheridan's response to the Commission's Report, 1 Sep 1933.

54 TNA DSA 21429/II, Sir Joseph Sheridan's response to the Commission's Report, 1 Sep 1933.

55 "Report by Committee for Colonial Agricultural, Animal Health, and Forestry Research" *Recommendations for the Organization of Colonial Research in Agriculture, Animal Health and Forestry* Col No 219 (London, 1948) at 7.

56 *Ibid.*

Sheridan also believed that new judges should be paid the same as existing ones, and under no circumstances should a judge be paid less than a provincial commissioner, the highest rank of administrative officer. His Kenyan counterpart, Sir Jacob Barth, also supported these views.<sup>57</sup> Judges were second in rank to the governor in both Kenya and Tanganyika, and the chief justice was normally the second highest paid officer. Sheridan was anxious to preserve the judiciary's place in this hierarchy commenting that "[h]owever erroneous it may be there is no doubt that the public judges the prestige of an office by the emoluments paid to the holder".<sup>58</sup> Echoing concerns by recruitment officials in the Colonial Office, he also feared that a salary less than that of the present judges would not attract the best recruits.<sup>59</sup>

In connection with the exercise of the judiciary's revisionary powers, Haythorne Reed, Tanganyika's acting chief justice in the late 1920s, complained to the governor that there were a number of cases where administrative officers had broken procedural rules. He tried to uphold them wherever he could, but commented that such judgments would have been rejected in jurisdictions such as India, Zanzibar, England and South Africa.<sup>60</sup> The procedural errors he referred to included administrative officers submitting as court evidence long reports written by themselves to their superior officers on the facts of a case; accused being charged with previous convictions before the end of a case; accused being cross-examined by the court instead of merely being examined; and administrative officers incorrectly grouping charges together.<sup>62</sup> Reed stressed that "[e]veryone concerned with the administration of justice knows that when form goes, justice goes with it, and decisions are given in accordance with what the court thinks the law ought to be, instead of in concordance with what it knows the law to be".<sup>62</sup> The derisory response of Sir Phillip Mitchell, the Native Commissioner, was couched in the following terms:

Livingstone under his mango tree probably got a great deal nearer to the truth, and to justice, than a judge on a bench; and I wish Your Excellency could see some of the 'well kept records' to which His Honour refers! But in view of an already existing divergence of opinion on the subject of Native Courts it will I think be wise not to antagonise His Honour in a matter which is peculiarly his province: though why having swallowed 'Native law' (undefined of course) he should balk at 'Native Procedure' is beyond my comprehension.<sup>63</sup>

57 Report of the Commission of Inquiry at para 110.

58 TNA DSA 21429/II, Sir Joseph Sheridan's response to the Commission's Report, 1 Sep 1933.

59 *Ibid.*

60 TNA AB 305, Haythorne Reed, Acting Chief Justice, Tanganyika to Governor, Tanganyika, 3 May 1926.

61 *Ibid.*

62 *Ibid.*

63 TNA AB 305, Phillip Mitchell, Commissioner for Native Affairs, Tanganyika to Governor, Tanganyika, 9 Apr 1926.

Mitchell believed Africans' perceptions of judges were based on their knowledge of local conditions:

The Native idea is of a kindly judge, with complete and often privately acquired knowledge of local personnel and circumstances, asking and being given corroborating information in the vernacular, and delivering judgment *coram populo* [in the presence of the people]; execution following immediately.<sup>64</sup>

Twelve years after the Bushe Report was published, Mark Wilson, who served as a judge in Tanganyika between 1936 and 1948, compiled a report in 1945 on the administration of justice in that country.<sup>65</sup> This stated that the size of the judiciary had increased from two to five during the interwar period. The circuit system had also expanded, and by the end of the Second World War, the entire territory, apart from the Southern Province, was covered. The increased size of the judiciary was accompanied by an increased professional magistracy.<sup>66</sup> In 1945, when the policy of indirect rule was beginning to be seen as outdated, he wrote of the lack of nexus between the two court systems. He reiterated the standard judicial view that the High Court should have remained the final court of appeal from the African courts. This was a reference to Donald Cameron's success in removing, in the face of fierce resistance by the judges, the right of the High Court to hear appeals from customary courts.<sup>67</sup>

## 9 The administration's perspective

The following paragraphs detail the views of four administrative officers in Tanganyika. These views were expressed to their respective provincial commissioners, who then passed them on to members of the Commission. This was seen as an opportunity to air their grievances about the administration of justice in their areas. To add weight to their views, administrative officers often gathered "evidence" from Africans in their districts, to support their position. For most, the overriding concern was that the powers of the High Court of Tanganyika to supervise African courts should be removed.<sup>68</sup> The High Court came under more adverse criticism than any other judicial institution, and judges were widely criticised for passing sentences on accused persons in the rural areas, from their headquarters in Dar-es-Salaam. As a result, sentences were often not handed down for long periods of time, and, as a result, they lost much of their deterrent value. One person who had been persuaded

64 TNA DSA 21429/I, Phillip Mitchell, Minute, 17 Mar 1932.

65 TNA DSA 33058, Proposals for Post-War Developments and Improvements in the Administration of Justice in the Tanganyika Territory, 26 May 1945.

66 TNA DSA 33058, Mark Wilson, Internal Memorandum, 25 May 1945.

67 *Ibid.*

68 TNA DSA 26002, District Officer, Shinyanga, to Provincial Commissioner, Tabora, 12 Feb 1932.

by the district officer at Shinyanga to provide “evidence” stated that Africans often asked how the “Big Judges” could understand and weigh cases when they heard them so far away and knew nothing of the tribe or the district.<sup>69</sup>

One district officer compared the system of professional magistrates and judges in Tanganyika to the system that would have resulted had the Allies lost the First World War. Englishmen would have had to stand trial in London before German judges: the proceedings would have been in German, the judges would have had no knowledge of English law and customs, and the accused would have had no knowledge of German:

I consider that the present system of “professional” magistrates and judges should be abandoned. The conception that because a man has passed Bar examinations and has eaten a number of dinners in one of the Inns of Court he is fit to be a Magistrate is, in my opinion, fallacious. It is a relic of the old English guild system, the modern development of which in more humble occupations is the trade union. Much more than the elemental knowledge of English law required by Bar examinations is necessary to fit a man to administer justice in native territories. A knowledge of the languages, habits, customs, and psychology of the people is necessary and this can never be acquired by sitting in Court. A knowledge of the laws which he is called upon to administer should certainly be possessed by every Government officer and Administrative Officers, whose whole functions are based on the laws, probably possess a more comprehensive familiarity with them than any other official.<sup>70</sup>

Severe delays between arrest and trial were one of the major issues that came before the Commission.<sup>71</sup> For instance, the district officer in Singida, Tanganyika, reported a delay of nine months and there were an average of seven months in several other cases.<sup>72</sup> In describing a typical witness, one judge commented that

[t]heir vague ideas as to time, their habit of mixing up what they have been told with what they have themselves, seen or heard, their vivid imaginations, and their loose manner of thought and speech all combine to mislead and mystify anyone trying to find out what really did happen.<sup>73</sup>

He also advised that evidence should only be taken once. Under the system at the time, however, an accused person was required to give evidence before a magistrate in a preliminary hearing, and then again in the High Court.<sup>74</sup> Another officer wrote of an instance when a person was found dead on the side of a main road. No one reported it, fearing that they would have to appear as witnesses in the High Court in Tabora, Tanganyika – thus being forced to spend weeks away from their lands. There

69 *Ibid.*

70 TNA DSA 26002, WH Scupham, District Officer, Mwanza, to Provincial Commissioner, Mwanza, 29 Feb 1932.

71 TNA DSA 26006, District Officer, Singida, 12 Mar 1932.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

were even cases where people had attempted to conceal crimes in order to avoid the risk of being called as witnesses.<sup>75</sup>

An account by one of the district officers of a murder case illustrates the many disadvantages of the legal system in the early 1930s. The case was first heard in Lindi, Tanganyika, by a provincial commissioner, under extended jurisdiction.<sup>76</sup> The crime had taken place over 100 miles away, and the witnesses – some of them so old that they had to be carried – were brought in at the height of the rainy season. The two accused persons were found guilty and the Commissioner's finding was confirmed by the High Court. On appeal, it was discovered that a certain defence witness had not been called, and a retrial was ordered. At the retrial in Masasi, Tanganyika, about twenty witnesses testified – including the witness who was not present at the original trial – and the Court came to the same conclusion and convicted the accused. During the period between the first and second trials, however, the High Court held that the case should have been tried under the new Criminal Procedure Code of 1930, instead of under the Indian Penal Code of 1860.<sup>77</sup> The High Court then heard the case at Lindi almost a year after the first hearing, and acquitted the two accused persons. The judge admitted that some of the witnesses told him a completely different story to that they had told to the provincial commissioner, and that there were serious discrepancies. Not surprisingly, the local population was astounded at the result.<sup>78</sup> The case illustrates the farcical nature of many court cases in colonial Tanganyika. The material cost of testifying was usually enormous, as witnesses would be forced to leave their lands and wait for weeks or even months at the courthouse while the wheels of justice gradually turned. Witnesses therefore developed evasive methods, such as avoiding crime scenes or disappearing into the bush for the duration of the trial.<sup>79</sup>

## 10 Confessions

The most contentious legal issue concerned the law relating to confessions. The Commission recommended altering the law relating to confessions in Kenya and Tanganyika to that prevailing in Uganda. Among other things, this meant that

75 TNA DSA 26002, District Officer, Shinyanga, to Provincial Commissioner, Tabora, 12 Feb 1932.

76 Extended jurisdiction was governed by the Extended Jurisdiction Order of 1930. The High Court was able to direct that each case was to be heard by an "efficient" officer. Not every officer was deemed fit to exercise extended jurisdiction, and judges were able to decide this from records kept in the High Court. TNA DSA 21429/II, Sir Joseph Sheridan's response to the Commission's Report, 1 Sep 1933.

77 Regarding Indian laws, these were introduced to East Africa as a result of close ties between Zanzibar and British-ruled India. As a result, English law was supplemented by Indian codes that mainly governed aspects of criminal law and procedure. See Ghai & McAuslan 1970: 4-6.

78 TNA DSA 26006, District Officer, Memorandum, Singida, 12 Mar 1932.

79 *Ibid.*



confessions made to police officers would be admissible in court, whereas the law in Kenya and Tanganyika stipulated that only confessions made to resident magistrates would be admissible. This was to increase the likelihood that such confessions would not be made under duress. Sheridan's view was that the law of evidence on the subject of confessions made to police officers should not be altered, and this represented the views of the majority of judges in the region.<sup>80</sup>

The only judge on the Commission, CE Law from Uganda, requested that the section of the Indian Evidence Act of 1872 excluding confessions made to police officers should be retained.<sup>81</sup> Later, a judge from Kenya, John Lucie-Smith, stated that "persuasion" in various forms was frequently applied before a suspect was asked to give a confession.<sup>82</sup> Similarly, in *Surumbu s/o Singana & Three Others*, the appellants were convicted of murder in the High Court of Tanganyika.<sup>83</sup> On appeal, Sheridan CJ concluded that the evidence on which the first two appellants were convicted could not stand.<sup>84</sup> In addition there was evidence that the other two appellants had made their confessions to the local district officer. The defence submitted that this evidence was inadmissible on the grounds that the district officer was deemed to be a police officer under the statutory law then in force.<sup>85</sup> The relevant section of the Indian Evidence Act rendered inadmissible any confession made to a police officer. A series of Court of Appeal decisions had established that the words "police officer" included district officers who were in charge of the police in their districts, provided they were acting in that capacity at the time the statement was taken. In *Surumbu*, the district officer was on tour when he met the two appellants who were under arrest. He then ordered a policeman to bring them to him individually and asked each of the appellants in turn if they wished to say anything, or give him any general information, or if they wanted to tell him about the murder and what had happened. He told the appellants that "I am investigating the matter. I have nothing to do with it. When I have finished I will send it to the *bwana* Judge".<sup>86</sup> The Court of Appeal ruled that it was not part of the duties of a magistrate to call suspects before him with the purpose of questioning them about their movements, and that the district officer was in fact acting as an investigating officer on this occasion. The Court established the principle that district officers needed to carefully distinguish their functions, and make it plain when recording the confessions of suspects in police custody that they

80 Sir Jacob Barth, Sidney Abrahams, John McDougall and Horace Hearne agreed with Sheridan on this point.

81 Kenya National Archives (KNA) AP/1/1660, Sir Joseph Sheridan to Acting Governor, Kenya, 11 Jun 1935.

82 KNA AP/1/1660, Sir John Lucie-Smith, Internal Correspondence, 9 Apr 1943.

83 1940 (7) *East African Court of Appeal (EACA)* 55. S/o denotes "son of".

84 Webb & Francis (Uganda) concurred.

85 Section 25 of the Indian Evidence Act and s 7 (3) of the Tanganyika Police Ordinance of 1937, cited in 1940 (7) *EACA* 55 at 56. The legislation was cited in the judgment.

86 1940 (7) *EACA* 55 at 56.

were not themselves taking part in the investigation, and were acting as magistrates. The appeal was accordingly allowed.<sup>87</sup>

In the experience of Mark Wilson, a judge in Tanganyika, it was only in a tiny minority of cases that any accused person volunteered to make a confession without some form of prompting or persuasion by those holding him in custody. He disagreed with the idea that there was a widespread desire to confess.<sup>88</sup> There was also disagreement within the judiciary on the issue, with some willing to allow confessions to police.<sup>89</sup> Another complication arose from the fact that there were over a hundred dialects in Tanganyika, and in most cases confessions to European officers had their origins in a statement to an African police officer or interpreter acting as a medium.<sup>90</sup>

Rather than making broad policy statements when responding to the Report, judges preferred to focus on specific points. For instance, Sir Alison Russell raised the question of guilty pleas.<sup>91</sup> Often, owing to the problems of interpreting from Swahili into English, interpreters would ask accused persons leading questions such as “do you admit doing this?” or “is it true that you struck him”? Accused persons would often answer “*nilikosa*”, which can be translated as “I have done wrong”. Such guilty pleas would not have been accepted in England, as it would not have been clear to the Court whether the accused person had admitted to committing every element of the offence. For example, on a charge of murder, it must have been clear to an English Court that the accused person had the requisite capacity to commit the offence, that he intended to execute it, and that he had no lawful excuse. Russell referred to his *Handbook for Magistrates*,<sup>92</sup> which recommended that magistrates should not accept as a plea of guilty anything that fell short of a full acknowledgement of responsibility for all the elements of an offence. In addition, the statement of the accused person was to be in his own words rather than a simple “yes” or “no”.<sup>93</sup>

The issue of confirmation and revision was central to the debate, and the Commission recommended that all sentences of over six months’ imprisonment, whippings of over twelve strokes, and fines over £50 would be subject to revision and confirmation by the High Court.<sup>94</sup> Administrative officers in Kenya felt these restrictions served no useful purpose and were a cause of embarrassment to the lower courts. This was mainly because judges frequently overturned verdicts and sentences

87 *Ibid.*

88 Kenya National Archives (KNA) AP/1/1660, Mark Wilson, Internal Correspondence, Apr 1943.

89 KNA AP/1/1660, Lancelot Lloyd-Blood, Internal Correspondence, Apr 1943.

90 TNA DSA 21429/II, Joseph Sheridan’s Response to the Commission’s Report, 1 Sep 1933.

91 Report of the Commission of Inquiry at para 104.

92 Cited in para 104 of the Report.

93 *Ibid.*

94 *Idem* at para 154.

passed by district commissioners.<sup>95</sup> Characteristically, Sir Jacob Barth, one of Kenya's chief justices, believed that many district courts were staffed by unqualified people. This was because the administration tended to appoint officers as second-class magistrates shortly after they had passed the basic Kenyan law examination. In his view, it was essential that officers were supervised by a higher authority.<sup>96</sup> Significantly, his opinion was supported by some Africans who testified before the Commission that the Supreme Court's intervention was helpful in pointing out mistakes and giving guidance to district commissioners.<sup>97</sup>

Later in the Report, Barth referred to a confirmation case in Kenya, where Judge Samuel Thomas had criticised administrative officers' insensitivity to the rights of Africans.<sup>98</sup> Thomas made reference to the appendix of the first volume of the Kenya Law Reports<sup>99</sup> which stated that justice in Kenya should not be administered in the "rough and ready style of which some affect to think highly, but which is generally the sign of lack of experience or of sympathy and patience and not infrequently results in what is in reality rough and ready injustice".<sup>100</sup> He claimed that administrative officers often used this style to excuse errors in the proper conduct of trials.

## 11 Wider recommendations

Although the commissioners acknowledged that the bulk of magisterial work would have to be performed by administrative officers for a considerable period of time to come, they recommended that judicial work should gradually be taken over by professional magistrates from the Legal Service.<sup>101</sup> The Commission rejected the suggestion that administrative officers be given enhanced powers, and recommended that additional judges be appointed.<sup>102</sup> More specifically it acknowledged that judges were often at a disadvantage compared to administrative officers, as they knew little about the district where the crime was committed, and often did not have the opportunity to hear witnesses. Their powers of confirmation and revision, however, were judged by the commissioners to be justified, given the wide jurisdiction and sentencing powers granted to district commissioners.<sup>103</sup>

Although a number of the Commission's recommendations were accepted by the East African governments, its broader findings were unfavourably received. The governors refused to accept that the administration of justice by administrative officers

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Idem* at para 156.

<sup>99</sup> I have, unfortunately, not had access to this volume.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Idem* at para 66.

<sup>102</sup> *Idem* at paras 55, 60-61, 63.

<sup>103</sup> (TNA) DSA 21429/III, Secretary of State, to Governor, Kenya, 12 Nov 1924.

was in principle undesirable, that their powers should be reduced, and that they would eventually be superseded by professional magistrates. The recommendations that the governors disagreed with were referred to the East Africa Governors' Conference of 1934, following which the Secretary of State for the Colonies, Sir Phillip Cunliffe-Lister, decided in favour of the governors.<sup>104</sup>

Although the wider recommendations of the Report were successfully opposed by the governors, the inquiry marks a watershed in East Africa's legal history. The administration's success was a limited one and they failed to reform the judiciary in the years leading up to 1939. After the Second World War, administrative officers accepted that the doctrine of indirect rule was unsuitable and were increasingly content to leave judicial work to professional magistrates. Once administrative officers had accepted the progressive elimination of their magisterial powers, the controversies between the judiciary and the administration receded. Moreover, as the prospect of independence became clear, many administrative officers worried that the British institutions would be rapidly dismantled. Accordingly, they strongly supported the judiciary in maintaining the English legal system in its purest form: as the strongest safeguard against the supposed autocratic tendencies of the leaders of the liberation or the eroding of individual rights. After the war, English law and procedure were applied with increased rigidity, Indian statutory law continued to be replaced, and increased attention was given to English precedent.<sup>105</sup>

## 12 Conclusion

A study of the Bushe Commission provides an opportunity to view the administration of justice from the perspective of the Colonial Office as well as the colonial state. The differences of opinion over the essential requirements of justice were largely confined to areas of the legal system where the judicial and administrative circles came into direct conflict in areas such as control of customary courts, the determination of officers' judicial powers, and the level of adherence to court procedure. Ultimately, there were two opposed views during this period. One was that Africans must be "civilised" and integrated into a system of "British courts", while the other held the view that Africans must be protected from the harmful consequences of contact with foreign law. The history of the courts and the law during the interwar period is the history of the struggle between these two ideas.<sup>106</sup> The events of this period reveal the relatively weak and vulnerable position of the judiciary within the colonial state

104 The governors in question were Sir Joseph Byrne (Kenya), Sir H MacMichael (Tanganyika), and Sir BH Bourdillon (Uganda). *Colonial Office List* (London, 1934).

105 Morris & Read 1972: 102-108. See, also, n 77.

106 Allott (1976): 368.

and, at the same time, the critical role of the judges with regard to the day-to-day administration of justice.

The appointment of a commission was an attempt to resolve a legal conflict in a colonial territory from “outside”. Its findings exposed divisions both within the Colonial Office and the colonial state. In some respects, however, the judiciary was able to claim victory. Additional judges were appointed, which enabled the judiciary to increase the number of circuits and to reach more remote areas than had previously been possible. The high courts in the three territories also retained their powers of revision, confirmation and appeal in respect of the resident magistrates’ courts, and after the Second World War the animosity between the two branches largely disappeared as the administration became increasingly willing to leave judicial matters to professional magistrates.

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# *BROWN V LEYDS NO (1897) 4 OR 17: A CONSTITUTIONAL DRAMA IN FOUR ACTS. ACT ONE: THE 1858 CONSTITUTION OF THE ZUID-AFRIKAANSCH REPUBLIEK\**

**Derek van der Merwe\*\***

## ABSTRACT

This is the first of a series of articles on the historical and jurisprudential background to the well-known judgement of Chief Justice John Kotzé in *Brown v Leyds NO (1897) 4 OR 17*. Central to the *Brown* judgement was the liberal interpretation Chief Justice Kotzé attached to the 1858 Constitution (the *Grondwet*) of the South African Republic (the *Zuid-Afrikaansche Republiek*). The article traces the jurisprudential history of the *Grondwet*, from the earliest conceptions of statehood adopted by the *Voortrekkers* of the Great Trek, to the first feeble forms of Republican government adopted by the *Boers*. It then describes the different ideological conceptions within the *Boer* society of the trans-Vaal region that came to be attached to the notion of the “*volkstem*” (the voice of the people) as an expression of the “*volkswil*” (the will of the people). These different ideological conceptions were best captured as responses to the question “*Wie heeft de Koningstem?*” (“Who has the King’s voice?”). These ideological differences gave rise to political differences that inhibited the framing of a proper constitution for the territory for six years. Various attempts

\* This article, and subsequent articles, are based on and contain many extracts from my book entitled *Brown v Leyds: Who has the King’s Voice?* which will be published by Lexis Nexis in 2017.

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at drafting a constitution are described, as are the compromises that were reached and the distinctions that were drawn in order to reach a position where, in February 1858, a Constitution that carried the approval of all the people was finally adopted. This history, in which Paul Kruger, the later State President, played an integral part, is important for a proper understanding of why the judgment adopted by Kotzé in *Brown* was untenable, laudable though his motives were.

**KEYWORDS:** Constitution; *Zuid-Afrikaansche Republiek* (South African Republic); Dutch/Cape Patriots; *Boers*; *volk* (the people); *volkstem* (voice of the people); *vox populi vox Dei*; the King's voice; governance; *hoogste gezag* (highest authority); *Volksraad* (council of the people); *eenhoofdig bestierder* (autocratic leader); *maatschappij* (society)

## 1 Introduction

On 22 January 1897, 120 years ago, Chief Justice John Kotzé handed down a judgement in the Supreme Court of the old South African (Transvaal) Republic (*Zuid-Afrikaansche Republiek*) in the matter of *Brown v Leyds NO*.<sup>1</sup> It was a momentous decision with far-reaching consequences, as South African constitutional lawyers and legal historians well know. In his judgement (supported by Judge Ameshoff in a separate judgement, but dissented from by Judge Morice, also in a separate judgement) Kotzé introduced and applied the doctrine of judicial review of executive and legislative action by “testing” the validity of such action against the provisions of the Republican Constitution. In doing so he was a century ahead of his time, seeking, as he did, to apply American (and Dutch) jurisprudence to a constitution wholly unsuited to serve as his doctrinal foundation and in a political climate wholly unreceptive to such a jurisprudence. The result was that he was dismissed from his position as Chief Justice – the first and only time a judge has been “impeached” in South Africa. This extraordinary act on the part of State President Paul Kruger and his executive council contributed in no small measure to the agitation by British High Commissioner Alfred Milner and like-minded imperialists for Great Britain to take over the affairs of a Transvaal State deemed incapable of governing itself properly and to protect the (primarily commercial) interests of British and other foreign inhabitants. It became an important secondary cause of the Anglo-Boer War that broke out some eighteen months after the dismissal of Kotzé by Paul Kruger.

Scholars of international law will also know that the *Brown* judgement had international repercussions too. Robert Brown, an American citizen, whose demand, in July 1895, to be allowed to work the gold claims he had pegged off on a newly proclaimed public digging on the western edges of the Witwatersrand, had been

1 (1897) 4 OR 17. Judgements were handed down by Kotze (CJ, Ameshoff J and Morice J. Biographical details on each of these judges will be provided in Part 2 (Kotze) and Part 3 (Ameshoff and Morice) of this series of articles.



approved in *Brown*, struggled in vain to exercise his right to work the claims after Kotzé's dismissal. He finally sought the assistance of the United States government to demand from Great Britain redress for the injustice he had suffered before and after the Anglo-Boer War. The matter became the subject of an international arbitration. An international arbitral tribunal heard the matter only in 1923, twenty one years after Brown's early death. It decided that Great Britain had no obligation in international law to provide redress for an injustice suffered by an individual at the hands of a conquered state.<sup>2</sup>

This and subsequent articles seek to provide historical and jurisprudential flesh to the famous judgement of *Brown v Leyds NO*.

Context is crucial, in law as in life. The *Brown* judgement was based on a particular interpretation of the 1858 *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek* ("ZAR"). It was an interpretation that flew in the face of the intent of the original framers of the constitution, an interpretation that Kotzé did not originally hold and an interpretation that Paul Kruger publicly denounced as the principle of the Devil, proclaimed by one who must be mentally unbalanced. The *Grondwet*, therefore, was the centrepiece around which battles political, jurisprudential and commercial were fought. The first of the articles investigates the ideological origins of the *Grondwet* and the various stages of the formulation of the relevant sections in the *Grondwet*, until its final conflict-ridden, compromise-driven approval by the *volk* (the people) at Rustenburg in January 1858.

A subsequent article will firstly analyse case law from the 1880s and early 1890s which reflect the initial views expressed by Kotzé (and other judges) on the right which the judiciary could or should arrogate to itself to "test", by means of judicial review, the validity of executive action and legislative enactments by reference to apposite provisions in the *Grondwet*. The analysis will highlight the social and political influences on Kotzé that brought about in him a jurisprudential about-turn and made him such a zealous and – as it turned out – hopelessly premature proponent of constitutional supremacy. Secondly, the case of *Brown v Leyds NO* will receive dedicated attention: The events that gave rise to Brown's claim against the state; the political background against which Kotzé and his co-judges prepared their judgements; the judgement of Kotzé and also of the Hollander, Ameshoff, and the Scotsman, Morice; the political repercussions of the judgement; and Kotzé's dismissal, reactions to and consequences of the dismissal.

A final article will describe the attempts made by Robert E Brown to exercise his rights in the shadow of a hostile administration and a supreme court with a very different personnel from the Kotzé court; his futile efforts to convince the post-war British colonial administration to secure his rights; the eventual resort to international arbitration between the United States and Great Britain; and the limp-wristed findings

2 *Robert E Brown (United States) v Great Britain* Reports of the International Arbitral Awards (RIAA) VI 120.

of the arbitral panel in 1923 that brought an end to the Brown saga a quarter of a century later. Hitherto un-researched archival material in the United States National Archives in Washington, DC, provided a fertile source of information on Brown's valiant efforts to secure justice for himself and his descendants in the international arena.

## 2 *Wie heeft de Koningstem?* ("Who has the King's voice?"): The politics of Constitution-making among the trans-Vaal *Boers* of the mid-nineteenth century

### 2 1 Conceptions of statehood among the *Voortrekkers* (1836-1843)

*"[We will] walk out by the Draaksberg barefooted, to die in freedom, as death [is] dearer to [us] than the loss of liberty": Susanna Smit, a voortrekker woman*<sup>3</sup>

#### 2 1 1 Introduction

Sixty years before Robert E Brown launched his fateful action against the government of the ZAR the Dutch-speaking inhabitants of the Eastern Districts of the Cape Colony (in what is today the north-western region of the Eastern Cape) prepared for a mass exodus from the Cape Colony into the northern and eastern hinterland of southern Africa. This mass exodus came to be called the "Great Trek" and the participants were called the *Voortrekkers* (pioneers).<sup>4</sup> These pastoralists and hunters, called *Boers* (farmers – although the appellation came to denote a cultural class more than it did a designated occupation), had long been disaffected with the British administration of the eastern districts of the colony. Dissension and disaffection with authority came naturally to them. Already in the early seventeenth century their forebears had trekked away from the autocratic rule of the Dutch East India Company and established themselves in the eastern districts. There they engaged in pastoral farming and in hunting, and sought to lead leisurely, isolated, self-regulated lives, subservient only to the dictates of the Bible and of the severe Calvinist theology they espoused. They regarded with suspicion any attempts by the Cape authorities to

3 As reported by Henry Cloete, British Commissioner for Natal, whom she was addressing at a rowdy meeting in Pietermaritzburg on 9 Aug 1843: see Schoeman 1995: 150.

4 Writings on the Great Trek and on the origins and consequences of the Great Trek are legion. I used primarily the following recent sources for this section: Du Toit & Giliomee 1983: esp at 10-18; Giliomee 2003: chs 3-6; Binckes 2013: *passim*. The latter work is useful because it references many of the vast number of sources on this topic, although it does contain inaccuracies and is aimed at a popular rather than a scholarly readership. Walker 1934: *passim*, the first comprehensive lone-standing work on the Great Trek, remains a useful source of information.

exercise control over them, particularly in so far as relationships with the indigenous inhabitants of the region were concerned and in the manner in which they resolved the inevitable conflict between them and the indigenous Xhosa, Khoikhoi and Khoisan. Even the advent of the more democratically-inclined government exercised over the Cape of Good Hope by the short-lived Batavian Republic from 1795-1803 had little impact on the deep-seated desire of these eastern districts *Boers* to cultivate their own independent, largely pastoral, lifestyles.

With the advent of permanent British rule over the Cape of Good Hope in 1803 and the formal cession by the Netherlands of the Cape to Great Britain in 1814, when it became a British colony, these attitudes, predictably, hardened. With the Cape Dutch they at least shared the same language, the same (Dutch Reformed) religion, the same antecedents. They had very little in common with the British colonial administrators and resented their attempts to impose British law and order. They resented even more liberal British attitudes towards the indigenous inhabitants and the adoption of the policy of egalitarianism implemented by the British authorities.

Gradually, but inexorably, the British imposed their authority on the eastern districts. By the 1820s they had established a measure of stability and order over a region where law had hitherto ruled but precariously. Beyond concerted (and often brutal) military action against the Xhosas, various reform instruments were introduced. The system of land tenure was changed; the administration of justice was reformed; laws were passed for the better and more liberal regulation of master and servant relationships and for a steadier and more secure supply of labour; institutions of government were Anglicised; and principles of free trade were introduced. Underpinning much of the reforms was a concerted effort, one in which the likes of John Philip and other members of the London Missionary Society played no small part, to ensure not only equality before the law between White and Black but also a social equality between the races. These reform measures reached their apogee with the passing of Ordinance 50 of 1828. This law gave to “Hottentots and other free persons of colour” the same rights and privileges as those enjoyed by white colonists and removed all restrictions on full equality in respect of personal liberty and security of property.<sup>5</sup>

The frontier farmers deeply resented these reforms. They had no desire to experience the British-style Progress of the Enlightenment Era. The reforms introduced into their society notions of equality between White and Black that offended their sense of the divinely-inspired natural order of things. They were passed on the strength of a humanitarian theology that was the antithesis of the theology of racial superiority adopted by the *Boers*. The laws were poorly administered in the sparsely-populated eastern districts by a British administration in no way adequately resourced to properly implement the changes. The reform measures were imposed on them, there was no consultation with them and they had no means to have their views

5 The text of the ordinance is published in Eybers 1918: 26-28.

appropriately represented in British decision-making fora. The British officials, with some exceptions, and the missionaries, also with some exceptions, could scarcely contain their contempt for the backwardness, indolence and cruelty of many of the frontier farmers towards the African inhabitants. The frontiersmen, for their part, were convinced that the patronising and supercilious British officials understood little of frontier life and society, imposed foreign rules and practices on them that bore little relation to the realities of their precarious existence and did more harm than good. And through it all, conflict between White and Black raged unabated on the eastern frontier of the colony.

The turmoil of the 1820s persisted into the 1830s. William Wilberforce's movement for the abolition of slavery gathered pace worldwide in these years. The movement triumphed when an Act was passed by the British Parliament in August 1833 to abolish slavery in its colonies. In the Cape of Good Hope the 39 000 slaves in the colony were freed on 1 December 1834 and fully emancipated on 1 December 1838. The institution of slavery had been an essential feature of the way *boer* society ordered itself and its abolition was an attack on its very core. Increasingly the Dutch-speaking inhabitants of the eastern districts found themselves to be mere fringe participants, in and at times even mere spectators in a frontier society in which their interests were subsumed within a swirling interplay of British interests, political, agrarian, commercial, military, religious and social. The long-simmering tensions between Xhosa and colonist on the eastern frontier erupted into the brutal and bloody Sixth Frontier War in December 1834. *Boers* fought side by side with the British in this conflict. At the conclusion of the conflict little had been achieved by either side. The *Boers* still did not have enough land, they had little security of tenure over the land they occupied, payment of compensation they had been promised for damages they had suffered as a result of the war was mired in red-tape and wholly inadequate. To add insult to their sense of injury, the liberal (Whig) Secretary of State for War and the Colonies under Prime Minister Grey, the combative Lord Glenelg, assumed office in April 1835. In July he arranged for the establishment of a *Select Committee on Aborigines*. Its purpose was to investigate abuses perpetrated by colonists on indigenous peoples in British colonies. Glenelg was strongly influenced by the evidence provided to this committee on the ill-treatment of the Africans and other indigenous inhabitants by colonists in the eastern districts of the Cape Colony (Philip and his co-missionaries being in full voice on this topic). He concluded that the Xhosas had been justified in instigating war against the colonists. He nullified any land gains the colonists had achieved. Once again the *Boers* felt that their interests had been sacrificed to a cause they neither believed in nor were consulted on.

Disillusioned, insecure and alienated, their cherished freedom severely constrained, the eastern districts *Boers* had been agitating among themselves for some time already to leave the colony and trek into the southern African hinterland. Buoyed by positive reports from three scouting parties dispatched to all parts of the

hinterland in 1834, their leaders decided amongst themselves that it was time to leave the colony permanently. The first trek parties (led by Tregardt – the surname would later morph into the modern form “Trichardt” – and Van Rensburg), some one hundred persons in total, left in the summer of 1835-1836. Their avowed aim was to trek as far north as possible, as far away from British influence as possible, to live their lives as they saw fit, free from British interference, trading with the Portuguese and using their port at Delagoa Bay. In early 1836 many hundreds more began the laborious trek north. One of the trek parties was led by Hendrik Potgieter, a member of the strictly orthodox and fundamentalist Dopper sect of the Dutch Reformed religion. He would become one of the most influential, if most troublesome, of the trekker leaders. He was joined on his way north by the Kruger clan, themselves Doppers, among whom numbered ten-year old Paul Kruger. By the spring of 1837 an estimated 2 000 *Boer* men, women and children, with their servants and livestock had trekked north. They established *laagers* (defensive camps) beyond the Orange River, in the area today called the Free State Province, where the good life, the just life and the self-determined life beckoned.<sup>6</sup> By 1840 some 6 000-8 000 *Voortrekkers* had trekked over the colonial borders (around 20% of the white population of the eastern districts) and by 1845 the numbers had swollen to some 20 000 men, women, children and accompanying servants, occupying huge swathes of territory in the northern and eastern parts of southern Africa.

The famous “Manifesto” of Piet Retief, published in the *Grahamstown Journal* on 2 February 1837, provided a summary of the political motives for the trek of these *Boers* (styled the “emigrant farmers”) into the interior (for many their motives would have been not so much political as rather the desire for adventure or to rid themselves of poverty or the unwanted attentions of the British authorities).<sup>7</sup> In a word, they were fed up. Fed up with the administrators, with the missionaries, with the Africans, with the constant struggle for survival in an environment both physically and socially inhospitable, with the felt affronts to their cherished independence, with their treatment by the British as a social underclass. All wished to start a new life beyond the colonial borders where they could be rid of British authority. All were bound by an overwhelming desire to be rid of the British, to be free and independent, to govern themselves, to practise their religious beliefs and engage in “proper” relations with the heathen races unhindered by the missionary-influenced authorities. These motives and desires dominated the *trekker* psyche, were perpetuated by their descendants and governed the political, social and economic dispensations they crafted for themselves in the decades ahead.

The British authorities did not take kindly to this Great Trek of emigrant farmers, British subjects all, over the borders of the Cape Colony. They had a very real fear that the settlement of these *trekkers* on land occupied by the indigenous inhabitants

6 See Giliomee 2003: 162.

7 An English translation of Retief’s manifesto is published in Eybers 1918: 144-145.

would cause conflict and that such conflict would spill over into the Colony, to British detriment. In August 1836 the British Parliament passed a law, *An Act for the Prevention and Punishment of Offences Committed by His Majesty's Subjects within Certain Territories Adjacent to the Colony of the Cape of Good Hope*.<sup>8</sup> It confirmed the *trekkers* as British subjects even beyond colonial boundaries and even though they openly rejected their British citizenship. The criminal laws in force in the Colony would apply to all British subjects who committed crimes against inhabitants of territories to the south of the twenty fifth degree of south latitude. The line, only vaguely comprehended in those years, runs roughly through present-day Zeerust, Soshanguve, Mbombela (Nelspruit), Malelane and Xai-Xai (in Mozambique). The line was meant to delimit the sphere of influence Britain arrogated to itself in the southern African region. The rationale for the passing of the law was to protect those who were “in an uncivilised state” in these territories and against whom crimes were often committed with impunity by British subjects (read: the *Boers*). They would be prosecuted and punished as if their crimes had been committed within the Colony. This law, though poorly executed, would exercise no little influence on future *trekker* movements and their activities.

It was not only the British authorities that condemned the actions of the *Voortrekkers*. The Cape Synod of the Dutch Reformed Church, spiritual home to the deeply religious *trekkers*, also distanced itself from them and tellingly did not provide for an ordained minister to accompany them. Their trek into heathen lands, it declared, away from the spiritual influence of the established church and away from, indeed in flagrant disobedience of the political authority ordained by God, placed their immortal souls in danger.<sup>9</sup> The Church at the time was under the authority of the State.

By December 1836 some 1 800 *Voortrekkers* were encamped in laagers at or in the vicinity of Thaba ‘Nchu, some sixty kilometres east of present-day Bloemfontein, at the foot of the Drakensberg Mountains. It was also where a Methodist mission station had been established in 1833 under the guidance of an English missionary, James Archbell. Some of the more enterprising among them occupied lands further north and west, between the Orange and the Vaal Rivers. Some even ventured beyond the Vaal River. They were able to do so largely as a result of the series of bloody upheavals, called the *Mfecane* or *Difaquane* that had taken place in the southern African interior in the 1820s. One consequence of these tribal wars was that large swathes of territory between the Orange and Vaal Rivers had been denuded of African occupants.

The *Voortrekkers*’ sense of freedom and of well-being did not last long. What the British had feared would happen, indeed happened. Conflict broke out between the *Voortrekkers* and the Ndebele and a major battle ensued in October 1836. Though

8 The text of the law appears in Eybers 1918: 146-148.

9 See Walker 1934: 129; Giliomee 2003: 162.

the *Voortrekkers* managed to repel the Ndebele army, they were badly shaken and only the arrival of a large contingent of *Voortrekkers* under Gert Maritz prevented the collapse of the enterprise.

Their leaders recognised the necessity for them to organise themselves to ensure not only their protection but also some form of rudimentary governance.

## 2 1 2 The first instruments of *Voortrekker* government

Gert Maritz provided the impetus. He was well-read and had been a man of influence in his home-town of Graaff-Reinet. He was the only *Voortrekker* to take with him a library of sorts, containing a number of legal and theological works.<sup>10</sup> Self-assured, he called for a meeting of the people (the *volk*) at Thaba 'Nchu soon after his arrival.

Undoubtedly Maritz and the other leaders (or at least the better read and therefore more informed among them) were influenced by a political consciousness that had developed among a group of Cape burghers and among rebels in Graaff-Reinet and Swellendam in the eastern districts in the last two decades of the eighteenth century. This consciousness retained its potency for the next generation. These early burghers had styled themselves Cape Patriots after the Dutch Patriots who had influenced the establishment (and later also the fall) of the Batavian Republic in the Netherlands from 1795 to 1806. The Dutch Patriots in turn had been influenced by the American Patriots who had instigated the American Revolution in the years 1765 to 1783. The Cape Patriots proclaimed the values of freedom, independence, democracy and equality in a republic. Like their Dutch counterparts they rejected the monarchy and the European class system. These concepts were employed by the Cape Patriots largely as slogans to address local concerns and advance local interests, rather than as revolutionary principles. The Cape Patriot movement fizzled out in the mid-1780s when the Dutch Patriot movement in the Netherlands was suppressed. Their ideals and the concepts they used infused the language of the short-lived rebel movements of Graaff-Reinet and Swellendam on the eastern frontier in and around 1795.<sup>11</sup> Succeeding generations, influenced too by the more liberal attitudes of the Batavian Republic that held sway in the Cape of Good Hope from 1803-1806, adopted these ideals and concepts. Among them were the frontier farmers of the 1830s. They had naturally been strongly influenced by the demands of the eastern frontier rebels for representative government.

The core of their political beliefs was the supremacy of the will of the people – the *volkswil*. This found expression in the voice of the people – the *volkstem*. The *volkstem* was therefore sovereign at all times in all affairs of state, not only during elections. The *volkstem*, as a metaphysical concept, had an air of majesty to it. It

10 On Maritz see Thom 1947: *passim*, and on his library holdings on trek see at 116-118.

11 See Giliomee 2003: 72-79. On the Cape Patriot movement see Beyers 1929: *passim*.

was, in fact, the shibboleth of the Patriot movement<sup>12</sup> and would retain its potency for later generations. The descendants of those rebels lived among the disaffected frontier farmers and stoked the fires of resentment. Their fervent desire was to be as free and independent as the Americans were, as the French were – or had briefly been – and as the Dutch had briefly been during the Batavian interlude; to be governed by themselves in accordance with a Rousseau-ean social compact between the governors and the governed; to do so in a *maatschappij* (a political society) where no class distinctions existed and where the welfare of the *volk* (the people) was the dominant motif. At the heart of this social compact was an understanding that those who governed were given the right to do so on condition that they exercised their powers for the mutual and coordinated benefit of the governed and were allowed to do so only as long as they exercised their powers beneficially. This became embedded in the consciousness of those whom they influenced, however loosely and dimly understood were the means to translate these desires into effective mechanisms of politics and government.<sup>13</sup>

“The people” – probably some 200 of the men – gathered on 2 December 1836. The minutes of the meeting have been preserved.<sup>14</sup> Those present, exercising *een algemene volkstem* (a general voice of the people) elected seven among them to be *rechters* (judges, that is arbitrators of disputes and makers of rules) in a *Collegie*<sup>15</sup> of *Lichaam* (council). Their election to a governing body obliged them (by swearing an oath to do so) to conform strictly to the laws and rules made from time to time by a general assembly of the people. For their part the *Gemeene Mannen, uitmakende het Volk* (the commonality of men<sup>16</sup> – the electorate – comprising the People) solemnly swore to submit faithfully and peacefully to the judgments and commands of the elected *rechters*. Maritz was elected *President* and Potgieter *Legerkommandant* (ie, military commander).<sup>17</sup>

This rudimentary governance arrangement, judging by later events, had little lasting impact. Nevertheless, faint echoes of the political consciousness that was the legacy of the Cape Patriots and the Graaff-Reinet/Swellendam rebels resonate in these rude minutes. Maritz, the man in all likelihood responsible for the first

12 See Beyers 1929: 163, 197-199.

13 See, in general, Wypkema 1949: 38-42; Wypkema 1939: 48-49; Du Toit & Giliomee 1983: 231-242; and Strauss 2008: 64-65. See, too, Giliomee 2003: 54-56.

14 The minutes were first published by Preller 1918: 297-298. See, too, HS Pretorius & DW Krüger (eds) 1937: 13-14.

15 “Collegie” was a term used in Dutch politics for a governing body, especially in judicial matters. A number of such “colleges” existed in the Cape during the Dutch East India Company period. The use of the term is an indication of a desire among the *Voortrekker* leaders to distance themselves from British institutions and to return to the Dutch institutions and terminology of the DEIC period.

16 See Preller 1918: 297-298. See, too, Pretorius & Krüger 1937: 13-14.

17 Thom 1947: 104-106.



governance arrangement of the *trekkers*,<sup>18</sup> was a native of Graaff-Reinet and certainly well-versed in the rebels' cause and the simmering subsequent discontent.

It reflects the first documented use by the *trekkers* of the notion of a *volk*<sup>19</sup> – a people – in respect of this collective of disaffected pastoralists, who shared farming and hunting interests, a particular lifestyle and cultural habits, the same religion, an aversion for things British and a burning desire to be free and independent. It also reflected the democratic election of representatives of the people to a single governing council. This was an important exhibition of democratic decision-making to replace the non-representative government they had left behind. No separation was (yet) required between the different powers of government. The electoral process was the exercise of the *volkstem* (the voice of the people). This notion of the *vox populi* had been adopted by the *Voortrekkers* from the politics of the Cape Patriots and their political descendants.<sup>20</sup> Many of the leaders cherished for the collective of *trekkers* the ideal of a free and just government as it had existed in Holland (and nominally in the Cape) during the period of the Batavian Republic.

The notion of the *volkstem*, how it was exercised and from whence it derived its authority would become central to constitutional debates in the nascent *Boer* Republics, in the South African Republic in particular.<sup>21</sup> The echoes of the debate would still resonate loudly in the 1850s when the debate on the nature and content of a constitution for the Republic raged and would still resonate in the chambers of Paul Kruger's *Volksraad* and of Chief Justice Kotzé's Supreme Court in the 1890s as the saga around Robert Brown's challenge to the authority of the *Volksraad* unfolded.

The minutes also provide evidence of a rudimentary social compact. In terms of this compact the people made the laws and expected their elected governors to faithfully apply them; the people in turn solemnly vowed to uphold the judgments of the governors and not to challenge the manner in which they executed the laws.<sup>22</sup> Conceivably (although it is perhaps improper to attach such subtlety of political distinction to the arrangement) the assemblage of persons wished, through the exercise of their *volkstem*, to vest sovereign authority for law-making in the *volk* and executive authority in the governing council (later to be called the *Volksraad*).<sup>23</sup>

This social compact would, in later years, give rise to much debate as to who had ultimate, that is, the highest, authority in a state, the *volk* (the people) or the *Volksraad* (the council of the people, the government). The question later posed and variously answered was, *Wie heeft de Koningstem?* (Who has the King's voice?).<sup>24</sup>

18 *Idem* 119-120.

19 The term *volk* to designate the collective was borrowed from the Patriot movement of the late eighteenth century: see Beyers 1929: 60-61.

20 See Wypkema 1939: 49; Strauss 2008: 65.

21 On the *volkstem* and its influence on democratic movements in America, in Europe and in South Africa, see Beyers 1929: 196-201; Wypkema 1939: 38-40, 210-212, 282-317. See, too, Gey van Pittius 1941: 9-13.

22 See, further, Walker 1934: 127; Du Toit & Giliomee 1983: 244.

23 See, eg, the view expressed by Gey van Pittius 1941: 13.

24 See Wypkema 1939: 49-501; Strauss 2008: 65-66.

Sixty years later Paul Kruger, in his inaugural address in May 1898 as the fourth State President of the *Zuid-Afrikaansche Republiek*, singled out this democratic election of a seven-man council at Thaba ‘Nchu in December 1836 (his father would have been an active participant) as the birth of the *volkstaat* (people’s state) he so vigorously, if vainly, defended until the very outbreak of war in 1899.<sup>25</sup> It was this same *volkstaat* concept that Chief Justice Kotzé sought, as vigorously and as vainly, to transform into a species of modern enlightened constitutional democracy, into a *Rechtstaat*, foreign to the political conceptions of the *volk*.

The niceties of democratic governance were soon subsumed under the far more pressing necessity to defend themselves against the Ndebele and to survive in the harsh living conditions they had chosen for themselves. A decisive military victory was achieved over the Ndebele in early 1837. Soon, though, schism reared its head. Maritz and Potgieter were very different personalities, had very different ideas of how the fledgling society should be governed, and differed also on matters of religious doctrine. Also, they did not much like each other. Typically in such nascent communities, people chose personalities over principles and soon there were Potgieter and Maritz factions. The Potgieter group, desiring to trek as far north as they could, settled in what is today the northern Free State, around the little hamlet of Winburg. Maritz and his followers remained in the Thaba ‘Nchu region and prepared to trek east over the Drakensberg into their Promised Land, Natal. Charismatic, educated, born-to-lead Piet Retief and a large group of his followers joined the *Voortrekkers* at Thaba ‘Nchu in April 1837. Immediately upon his arrival elections for the governing council (now called a *burgerraad* – citizens’ council) were held. Retief was elected “Governor”, in place of the recalcitrant Potgieter, and Maritz as “President Judge” (ie, head of the council). In his acceptance speech Retief said that in his election through the exercise of the *volkstem* he recognised the voice of God. This sentiment was clearly inspired by the notion of *vox populi vox Dei* (the voice of the people is the Voice of God). The actual aphorism is traceable at least to the time of Charlemagne, the sentiment as far back as Homer. It was an aphorism that the Dutch Calvinists had appropriated for themselves in the eighteenth and nineteenth centuries, as had the Dutch Patriots.<sup>26</sup> Given its combined Calvinist and Patriot lineage it is small wonder that the *Voortrekkers* and their descendants would appropriate this political concept for themselves as a cornerstone of their governance arrangements.

An attempt was made to patch up differences among the *Voortrekkers* in June. At a meeting at Winburg on the banks of the Vet River (in Potgieter territory) “Nine Resolutions” were approved by the *burgerraad*.<sup>27</sup> In its preamble the *burgerraad* was enjoined to comply with and to execute the resolutions passed by the people (and to swear to do so). The community of *Voortrekkers* was now referred to as a

25 See, eg, Van Oordt 1898: 855-856.

26 See Beyers 1929: 199-201; Wypkema 1939: 50-53, 381-382.

27 The text is published in Preller 1918: 300-301. See, too, Pretorius & Krüger 1937: 14-16. An English translation of these resolutions appears in Du Toit & Giliomee 1983: 282-283.

*maatschappij* (a society), denoting a developing political sensibility. (The Dutch term *maatschappij*, as employed in that period, meant a community with shared interests, such as the citizenry of a state or the inhabitants of a civic community.) In terms of the second resolution, directives issued and decisions made by the *rechters* (ie, the council members) in the exercise of their duties and by other civil and religious functionaries appointed either by the *volkstem* or by the *burgerraad* had to be obeyed by all upon pain of punishment. Reflected here is the abstract concept of the *volkstem* (voice of the people) to which all owe obeisance.

The tone of consensus and democratic decision-making through the *volkstem* embodied in the Nine Resolutions became discordant almost immediately. Retief had too much authority, it was said. He was exercising an arbitrary authority, without reference to the elected leaders of the *burgerraad*. Maritz warned that they would soon become victims of the same sort of overbearing autocracy that drove them from the Cape Colony in the first place. Not all of the *trekkers* had had an opportunity to express their opinion, the newcomers complained. Why not wait until the final destination had been reached (Natal, of course, not Potgieter's inhospitable north)? Then only will true freedom and true democracy as practised in the United States of America be achieved. Then only can a true general assembly gather to elect leaders and to frame appropriate laws.<sup>28</sup>

### 2 1 3 The Republic of Natalia (1839-1843)

In the summer of 1837-1838 a dispersion of *Voortrekkers* took place. Some remained where they had initially occupied land, in what is today the southern and eastern Free State; many, with Potgieter, trekked yet further north and, after a decisive victory against the Ndebele in November, settled on the Highveld, on land vacated by the fleeing Ndebele, in what is today the northern Free State and the trans-Vaal area. Among them was the Kruger clan, which included ten-year old Paul Kruger. This would be Potgieter territory and would be ruled by Potgieter and his lieutenants as his Dopper-dominated theocratic fiefdom. Most (joined by yet more recent emigrants from the Cape Colony) trekked with Retief and Maritz over the Drakensberg Mountains to Natal, the land of the Zulus, where they hoped to establish representative, democratic government, living on land they hoped to gain from the Zulu King, Dingane. This dispersion of *Voortrekkers* was not only a geographical phenomenon – it had political undercurrents too. Those who remained, for example, chose to live in close proximity to the Cape Colony and did not therefore actively disassociate from the Colony. Those who trekked north were the hardliners, almost fanatical in their desire to get as far away from the British as possible. Those who trekked east were, by and large, concerned to establish a republican form of

28 See the (English translation of) texts published in Du Toit & Giliomee 1983: 184-185.

government, independent of Britain, but yet close enough to engage with the Colony as an equal partner.

In February 1838 Retief and some one hundred other men were killed at Dingane's kraal at Umgungundhlovu, where Retief signed a treaty with Dingane that they hoped would release land to the *Voortrekkers*. It ushered in a period of brutal hostilities between the Zulus and the *Voortrekkers*. When Maritz died in September, the *trekkers* were without a recognised leader. In the survival mode they found themselves in, there was little inclination to establish republican governance. The tide turned militarily in their favour with the arrival from Graaff-Reinet of Andries Pretorius and a group of fighting men, who had heeded the pleas for military help from the Natal *trekkers*. A man of wealth and substance and an imposing figure, he was immediately appointed Commandant-General. He organised the Natal *Boers* (which is how they now came to be styled) into fighting units and, at the Battle of Blood River in December 1838, decisively defeated Dingane, to break the military might of the Zulu nation.

By the end of 1838, the Natal *Boers* numbered some 3 500-4 000 men, women and children. Their largest settlement was Pietermaritzburg and it would become the seat of their government. In June of that year they established an annually-elected 24-man *Volksraad* (council of the people), nominally the successor to the *burgerraad* established at Winburg a year previously. In October 1838 this *Volksraad* approved a code of governance. Entitled *Regulatiën en Instructiën*<sup>29</sup> ("Regulations and Instructions"), it was loosely based on the Instructions drafted by Governor de Mist for the *Raad van Justitie* in the Batavian period (1803-1806).<sup>30</sup> Indeed all of the institutions of government the Natal *trekkers* established over time took their cue from rules and institutions put in place by Governor De Mist and his officials, copies of which Maritz had brought with him on his trek.<sup>31</sup> It provided in some detail for the governance arrangements of the fledgling society. Significantly, though a separation was recognised between the judicial powers (exercised by *landdrosts* (magistrates) and *heemraden* (assessors)) and the legislative powers of the state, no provision was made for executive power. In fact, no provision at all was made for a "president" or a "governor" as head of state. A chairman was elected for each *Volksraad* meeting, who, significantly, held office only for that meeting.<sup>32</sup> The prevailing egalitarian spirit seemingly denied any hierarchical form of government, hence there was no need for a second chamber of government or for an executive head.<sup>33</sup> The assumption seems to have been that a President, if and when elected (Maritz had occupied the enigmatic position of "President Judge"), would see to the execution of the decisions

29 The text is published, *inter alia*, in Preller 1918: 303-304.

30 See Preller 1918: 302; Wichmann 1941: 18; Du Toit & Giliomee 1983: 245.

31 Thom 1947: 118-119; Wypkema 1939: 155, 201-214.

32 See Gey van Pittius 1941: 17.

33 *Ibid.*

of the *Volksraad* and exercise an authority inherent in his person rather than in the position.

Clearly, the authority vested in the Natal *Volksraad* resided in the fact that its members were representatives of the *volk* chosen annually by the *volk*. It patently did not reside in authority exercised on behalf of an absent sovereign. The notion of a social compact no longer featured, not even implicitly.

The Natal *Volksraad*, which began to meet regularly in Pietermaritzburg from 1839 onwards, had a thankless and a hopeless task. Its members (none more so than the hard-working secretary, JJ Burger) were anxious to impose civilised standards of law and order on a collective of individuals who for the most part resented any such impositions on their farming, hunting and commando activities. But the authority it was able to exert over a society as raw and unsettled as were the Natal *Boers*, with only a fraction of the resources required to imbue their legislative, administrative and executive endeavours with legitimacy, was always limp-wristed at best. Also, Andries Pretorius, the popular hero of Blood River, the supreme military commander, saw himself, and was seen by many, as the *de facto* leader of the *Boers*, often paying mere lip service to the authority of the *Volksraad*. The soil was yet too barren for true democracy to flourish. The populist *volkstem*, readily swayed by the most voluble malcontent, often drowned out the voice of reason in the *Volksraad* and would continue to do so for a long time.

The result was a society in which might often trumped right, unable to create the law and order required to ensure peaceful co-existence with a Zulu nation that had seen large swathes of its territory come into the possession of small numbers of *Boers*. The constant friction between *Boer* and Zulu, the constant state of violent turmoil in one or other region of Natal since the arrival of the *Boers*, did not go unnoticed in the Cape Colony. The British authorities would not tolerate the establishment of an independent *Boer* entity on its doorstep, especially not one as poorly governed as the “Republic of Natalia”, populated by people they still regarded as British citizens and, quite frankly, as inferior. Overtures from the Natal *Boers* to the colonial authorities for assistance and cooperation fell on deaf ears. If there was to be an European settlement among the Zulus of Natal it would be in accordance with civilised British values, government and laws and British standards of peace-keeping, or not at all.

So Britain slowly increased its military presence in Natal and gradually tightened the political screws on the Natal *Boers*. By June 1842 it had asserted its military authority in Natal and was mulling a form of self-government for the *Boers* under British sovereignty. Many among the *Boers*, tired of the incessant turmoil, were willing to submit. Many, self-styled “patriots”, were not. They were buoyed by suggestions planted among them by Dutch traders that the Dutch government could be persuaded to intervene – which of course was never the case. Famously, in August 1843, when the new British Commissioner, Henry Cloete, had gone to Pietermaritzburg to try to pacify the *Boers*, one of the leading *Boer* women, Susanna

Smit, stout of heart and stout of limb, famously shouted at him that the *Boers* were ready to cross the Drakensberg barefooted and die in liberty, as death was dearer to them than the loss of their freedom.<sup>34</sup> Finally things came to a head in August 1843. The *Volksraad* reached a self-governing settlement with Great Britain. Natal was proclaimed a British Protectorate (it was formally annexed as a British Colony in August 1845) in that same month. The *Volksraad* became a lame duck and finally ceased to function in 1845.

The *Boers* had been given the assurance that the British had no immediate designs on the lands in the north, beyond the Drakensberg Mountains, where Hendrik Potgieter held sway. And so again they trekked over the Drakensberg Mountains. Some returned to the Cape Colony, some remained in Natal (Andries Pretorius among them), and some settled in the trans-Orange area, close to the colonial borders. None of these groups was averse to British protection and arm's length oversight. Most, though, trekked to the deep north, to the lands beyond the Vet and the Vaal Rivers, where the towns of Winburg (in the north of today's Free State Province) and Potchefstroom (on the northern banks of the Vaal River) had been established. There they hoped to strengthen their contacts with Dutch traders and philanthropists operating out of the Portuguese harbour at Delagoa Bay.

## 2 2 Governance in the trans-Vaal territory (1844-1852)

*"L'etat, c'est moi"*: Louis XIV of France (attributed)<sup>35</sup>

### 2 2 1 Introduction

The *trekkers* who arrived in the lands beyond the Vet and the Vaal Rivers in 1843 and 1844 settled among *Boers* who had been living there for some years and who owed fidelity to Hendrik Potgieter. The bond with the Natalians was but tenuous. To be sure, the Natal *Volksraad*, in a vain attempt to create unity among all members of the *trekker maatschappij*, had asserted its authority over the lands in the north. Pretorius and Potgieter had declared themselves desirous of such unity. An *Adjunkraad* (Adjunct Council), a sort of subsidiary of the Natal *Volksraad*, had been established in Potchefstroom in 1840, whose decisions had to be ratified by the *Volksraad* in Pietermaritzburg. It was an enterprise doomed to fail, and fail it did, within a year.<sup>36</sup> Governance arrangements, such as they were, were attended to by a *burgerraad* headed and totally dominated by Hendrik Potgieter. In 1842 Potgieter pointedly rejected any actions by the *Volksraad* that could be interpreted as rapprochement

34 See n 3 *supra*.

35 "The state, it is I": attributed to Louis XIV during his address to the Parliament of Paris on 13 April 1655. See Dulaure 1834: 298.

36 On the Adjunct Council and its relationship to the Natal *Volksraad* see Wichmann 1941: 23-31, 35-36.

between it and the British and warned them that any adverse decisions taken on their behalf would be repudiated.

While the Natalians were still trying to integrate into the Potgieter society in the far north, the influx of large numbers of Natal *trekkers* into the trans-Orange region in 1843-1844, on the colonial doorstep, caused inevitable hostility with the indigenous inhabitants (the Basothos, the Griquas and the Korannas) and threatened the fragile peace that Britain had cultivated with them. Britain intervened and in doing so extended its sphere of influence ever deeper into the northern hinterland.

Hendrik Potgieter recognised the threat to their sacred independence that this extension of British influence posed to *Boer* independence and the readiness of many *Boers* to submit to British authority. In April 1844, therefore, he made some important governance arrangements.

He got the *burgerraad* to declare all burghers of the *maatschappij* inhabiting land up to the banks of the Orange River (an estimated 12 000) to be free and independent. They repudiated the settlement reached between the Natal *Volksraad* and Britain in August 1843 and proclaimed that they would not negotiate with Great Britain and would manage their own affairs freely and independently and without hindrance to anyone. Land disputes between them and the indigenous tribes would be settled among themselves.

Also in April 1844 they drafted a set of thirty-three articles to regulate judicial proceedings, what counted as justiciable crimes, the administration of justice and incidental matters in what they called their “Republic”. It was called the *Drie en Dertig Artikelen, zijnde Algemeene Bepalingen en Wetten voor de Teregtzittingen* (Thirty-Three Articles, being General Provisions and Laws for Judicial Proceedings).<sup>37</sup> The narrow focus on matters judicial rather than administrative or political probably stemmed from an understanding prevalent at the December 1836 Thaba ‘Nchu meeting, where the elected councillors were called *rechters*. This indicated a concentration of effort by the council (councillors were elected annually) on dispute settlement and the issuing of directives rather than on policy-making or administration. The custom of the burghers to submit to the *Volksraad* petitions and memorials regularly and in large numbers, on issues big and small, for resolution and decision had already become entrenched. This rude document, based on no Cape precedent and no constitution in any sense of the term,<sup>38</sup> was an attempt by the *Boers* to regulate their affairs in a civilised manner and to establish a semblance of law and order. In those very early years this attempt would have been as difficult to execute as were the attempts of the Natal *Volksraad* to enforce law and order in Natal. The long

37 The text is published in Jeppe & Kotzé 1887: 1-6. On the Thirty-Three Articles see, *inter alia*, Van der Merwe 1994: *passim* and, most recently, Wildenboer 2015: *passim*. The reference to a Republic is contained in art 9.

38 See Wildenboer 2015: 458-459.

arm of the law would have struggled to penetrate the vast, sparsely-populated regions of the trans-Vaal where patronage, self-interest and heavy-handedness towards the African inhabitants of the “Republic” would have been a common feature of the society.

Potgieter also recognised the necessity to consolidate his power base to the north and north-east. He visited Delagoa Bay (present-day Maputo) in 1844 (not for the first time), where he met with Dutch traders and sympathisers and with the Portuguese authorities. He took their advice for him to move his seat of operations closer to Delagoa Bay, far away from the British and their sphere of influence and into the Portuguese hinterland. And so it happened that by the end of 1844 a number of *Boers* established the tiny hamlet of Andries Ohrigstad, 500 kilometres north-east of Potchefstroom, in the fertile, game-rich western foothills of the trans-Vaal Drakensberg. Portugal claimed for itself jurisdiction in the territory north of the twenty sixth degree of south latitude, which line of latitude runs through present-day Midrand in Gauteng and just south of eMalahleni (Witbank). Delagoa Bay lies just north of the twenty sixth degree. As the British claimed criminal jurisdiction in the territory south of the twenty fifth degree of south latitude, British and Portuguese claims to jurisdiction overlapped in a large swathe of territory between the two degrees of latitude. The Portuguese, eager to trade with the *Boers*, readily granted permission to Potgieter to establish the new location of his government to the west of the hinterland of Delagoa Bay, north of the twenty sixth degree. To be on the safe side they made sure the town was established north of the twenty fifth degree of latitude.<sup>39</sup>

Soon after, in April 1845, conflict erupted in the trans-Orange region of the southern Free State. *Boer* combatants suffered a humiliating defeat at the hands of combined Griqua and British forces. Much of the southern Free State, as far as Bloemfontein, was now under British control. Many of the *Boers* there took the oath of allegiance to the British crown. Others trekked north, to the Winburg region and beyond. Britain made it clear that all of the “emigrant farmers” who lived on lands south of the twenty fifth degree of south latitude were deemed to be British citizens and therefore subject to the 1836 Cape of Good Hope Punishment Act.<sup>40</sup>

Potgieter saw the writing on the wall and in the winter of 1845 he and large numbers of supporters joined the earlier settlers in the Orighstad region, conveniently just beyond the twenty fifth degree of south latitude. It would become the new seat of government of the northern *trekkers* who had already declared their independence in 1844. Also in train were a large group of the Natal *Boers*, under the leadership of JJ Burger, secretary of the Natal *Volksraad*, who trekked with them from Potchefstroom to Orighstad.

39 See Wichmann 1941: 45.

40 See n 8 *supra*.



## 2 2 2 New governance arrangements in Orighstad

Just prior to the trek north-east to Andries Ohrigstad, on 6 May 1845, more than one hundred burghers, including Burger and other ex-Natalians, met at Potchefstroom and signed a governance document.<sup>41</sup> In the document all committed to recognise Hendrik Potgieter as their Commandant-General and *Bestierder* (Manager/Leader) “for as long as it is deemed necessary”. He would, they stated, always have a seat in the *Volksraad*, to which burghers would be appointed from time to time to govern in accordance with the laws and with his guidance. All who came from elsewhere and enjoyed positions of influence there would submit to Potgieter’s authority.

On 30 July of the same year a *Volksraad* was constituted. It would govern in accordance with the regulations and instructions that had been adopted by the Natal *Volksraad* (with some revisions as required by the changed circumstances). For Burger and his supporters it was in effect the same *Volksraad* of the whole *Boer maatschappij*, originally established in Pietermaritzburg and now transplanted to the more congenial soil of Orighstad.<sup>42</sup> Now that settled state had been reached, far from the British and close to a harbour and to Dutch support, his leadership was no longer required. As a recognition of past services and of being the only remaining member of the original *burgerraad* elected at Thaba ‘Nchu in 1836, he would remain Commandant-General and be a permanent (non-elected) member of the *Volksraad*. Since the ultimate authority (the *hoogste gezag*) in the *maatschappij* vested in a *Volksraad* of elected representatives and nowhere else, Potgieter could no longer lay claim to be the *Bestierder* of the *maatschappij*.<sup>43</sup> The style of democratic governance favoured by the *trekkers* did not provide for a leader (a “President” or a “Governor”). Such leaders, like Retief, Andries Pretorius and, by all accounts, Potgieter himself, arrogated to themselves (and were too readily allowed by a credulous populace) autocratic powers. The notion of *hoogste gezag* (highest authority) and who in fact exercised it would inform much of the later constitutional debate, re-cast in the form: *Wie heeft de Koningstem?* (Who has the King’s voice?). Potgieter accepted, not with good grace, the arrangement and chaired the *Volksraad* for upwards of a year.

Down in Natal Andries Pretorius, who had chosen to remain in the newly established Colony to manage his substantial farming and business interests, soon became disillusioned with the generally inept and poorly resourced colonial government. In fact, the complaints of the colonists (*Boer* and British alike) had the familiar eastern districts ring to them. In August 1847 he went to Grahamstown to meet with the new Governor of the Cape Colony, Henry Pottinger. He first went to the northern Free State, where he knew the *Boers* there found themselves in a political no-man’s land, to drum up support for his confrontation with Pottinger.

41 See Pretorius & Krüger 1937: 182-184. See, too, Wichmann 1941: 44.

42 See Wichmann 1941: 53-54.

43 See Pretorius & Krüger 1937: 186-188; Wichmann 1941: 47-49.

Pottinger snubbed Pretorius and would not even grant him an interview. This high-handedness ignited in Pretorius and others all of the old *Boer* prejudices against the British. He determined to foment resistance to British rule beyond the borders of the Cape Colony. The spirit of revolution burned brightly in Europe, he said on his campaign trail in the early part of 1848. He had by then re-located to the Magaliesberg, west of modern Tshwane, where Paul Kruger and his family had established themselves a number of years earlier. People everywhere, he told the *Boers*, were rising up and seeking to break the shackles of the monarchy and of non-representative government. The *Boers* must do likewise and become revolutionaries like their equally downtrodden European brethren. Rather face Britain head-on than adopt Potgieter's tactic of simply trekking ever further north and proclaiming independence. Potgieter, wisely, kept his distance in the far north.

Pretorius over-estimated the *Boers'* willingness to fight (current *Boer* governance was not inspirational enough to die for) and under-estimated British military strength. When Harry Smith, Pottinger's successor as Governor of the Cape Colony, proclaimed all of the land between the Vaal and the Orange Rivers to be under the authority of the British crown, war was inevitable. At the Battle of Boomplaats in August 1848 (near where the modern town of Trompsburg lies) Pretorius and his less than enthusiastic *Boers* were routed in the battle and the Free State Sovereignty was established. Smith placed a price of £2 000 on Pretorius's head. Some of the Free State *Boers* trekked beyond the Vaal River, to swell the ranks of the *Boer* population under the nominal governance of the Orighstad *Volksraad* to around 8 000 men, women and children by the end of 1848.<sup>44</sup>

Pretorius established himself on a farm in the Magaliesberg. He continued to cultivate the political support of many in the western and south-western parts of the trans-Vaal region for his crusade for freedom from the British. In a letter written in April 1849 addressed to "true countrymen and friends" he wrote of the hope for freedom which he cherished, that freedom "that surges over the whole world like a sea, but which is dearly bought, as nobody can ever be born without disaster and freedom is a great treasure".<sup>45</sup> Smith, again, promised not to bother the *Boers* north of the Vaal too much as long as they behaved as the British citizens they were still considered to be. They could be free, as long as they did not mistake their freedom for independence.<sup>46</sup> The *hoogste gezag*, he might have said, belonged to Queen Victoria.

In 1846 the fragile peace that existed between the Potgieter and the Burger-led *Volksraad* factions was shattered. Potgieter continued to assert himself and to exercise authority (under the guise of military necessity) without seeking the *Volksraad's* consent. In June 1846 a substantial charge-sheet against him was drafted (conjecturally by Burger), and presented to the *Volksraad*. The gist of it was that

44 See Binckes 2013: 511.

45 See Pretorius & Krüger 1937: 381.

46 See Wichmann 1941: 81-83.

Potgieter had acted like an *eenhoofdig bestierder* (a one-headed autocratic leader). He and his supporters could be forgiven for many sins (chief among them being cruel treatment of Africans), but any assertion of autocratic government would be unequivocally rejected.<sup>47</sup> The end result was that, by the end of 1846, amid much acrimony and threats, two “governments” existed side by side at Ohrigstad, JJ Burger’s *Volksraad* and Hendrik Potgieter’s Military Council.<sup>48</sup> The latter functioned on the basis that in an unsettled frontier society the highest authority had to reside in a strong, no-nonsense leader with military support, rather than in an annually-elected collective of law-makers with no military backing.

Potgieter’s “might-is-right” approach and the continued maltreatment of Africans by his followers lost him much support.<sup>49</sup> The *Volksraad* gained numerical superiority and was recognised as the sole legitimate (if decidedly feeble) authority for the *maatschappij*. In the autumn of 1848 he and his supporters left Orighstad and settled in the Soutpansberg region, in the far north, south of the Limpopo River.

In that same year the Orighstad settlement was abandoned. Disease, constant hostility between *Boer* and African and the dashed hopes of substantial Dutch material, political and cultural assistance had taken its toll. They re-located to Lydenburg (present-day Mashining), some fifty kilometres to the south. Indicative of the state of governance at the time, although the *Volksraad* thought they had chosen wisely and settled well beyond the dreaded twenty fifth degree of south latitude, they had in fact established the town within the dreaded line, if only just.<sup>50</sup>

## 2 2 3 Governance in the trans-Vaal region prior to the 1852 Sand River Convention: The *Volksraad* struggles to assert its authority

At the beginning of 1849, then, there were three spheres of political influence in the trans-Vaal area. In the deep north, Hendrik Potgieter and his followers held sway, where might was right, the hunting was good and mere lip service was paid to democratic decision-making. In the north-east, in the newly-established Lydenburg region, the *Volksraad* carried the torch for democratic, representative governance. Nominally the government of the entire *maatschappij*, their real influence did not extend much beyond the north-eastern region. The majority of the *Boers* had settled in the south and south-east, in the Potchefstroom and Magaliesberg regions, closest to civilisation and where the threat of African attack was moderate. It was also the region most under threat from British intervention. Here Andries Pretorius began

47 The charge-sheet is published in Pretorius & Krüger 1937: 225-228. See, too, at 230, 238, 239 & 265.

48 On the Potgieter Council see Wichmann 1941: 59.

49 See Giliomee 2003: 170-171.

50 *Idem* at 43 n 14.

to exercise increasing political influence and to preach the mantra of independence from Britain the loudest.

None of these separate spheres of political influence could claim to exercise the sort of government authority on which substantive law and order was based. The British were following events closely (as were the missionaries of the London Missionary Society, prominent among whom was David Livingstone) and they were not impressed.

A general meeting of the people (the *volk*) took place in the Magaliesberg in February 1849. Both Pretorius and Potgieter were present, as were representatives of the Orighstad/Lydenburg *Volksraad*. Harry Smith had proposed to the *Boers* that they accept British sovereignty over the area and British citizenship, in exchange for freedom from British interference. This was rejected. The meeting served as a rallying call for the *Boers* to re-assert their independence from the British and to start behaving as a unified, peace-loving, civilised, properly governed people who deserved to be recognised as independent.

A subsequent meeting of the *volk* was arranged for March 1849 east of present-day Tshwane. Burger and his *Volksraad* absented themselves, firm in their conviction that the *maatschappij* should be established north of the twenty sixth degree of south latitude, in “Portuguese territory”, and seek their salvation through Dutch trade and Dutch cultural influence via Delagoa Bay. The meeting took the important decision, approved by all (even Potgieter) that a *Volksraad* would be the highest authority in the land, to which all would be subject. It would never be permitted that any one or more persons would exercise authority higher than that of the *Volksraad*. These governance gains were severely undermined as a result of personal animosities boiling over. Potgieter felt himself slighted at the meeting, withdrew his consent to a unified *Volksraad* and returned to the Soutpansberg.

Despite this setback the rest of the leaders persevered and the people agreed to again assemble in May just north of present-day Tshwane, at Derdepoort. The Orighstad/Lydenburg *Volksraad* was persuaded to participate in unification discussions. Burger died just before the meeting, no doubt deeply disillusioned at the inability of the *Volksraad* to establish itself, first in Pietermaritzburg and later in Orighstad, as the legitimate highest authority in the *Boer maatschappij*. In the absence of Potgieter and his people, the meeting made remarkable progress under the chairmanship of Andries Pretorius.<sup>51</sup> They established a *Vereenigde Bond van het geheel maatschappij aan deze zyde de Vaalrivier* (United Bond of the Entire Society on This Side of the Vaal River). A *Volksraad* was constituted comprising six members from Orighstad/Lydenburg and fourteen from other regions with Andries Pretorius as chairman. It would meet three times per year, and a *commissieraad* (executive council) would attend to matters between meetings of the *Volksraad*. There was no position of head of state. The Thirty-Three Articles drafted at Potchefstroom in 1844

51 The minutes of the meeting are published in *Volksraadsnotule I* at 99-101.

was approved as a set of generally-applicable laws by the *Volksraad* and landdrosts in the different regions were enjoined to distribute copies to government officials such as the field-cornets and commandants.<sup>52</sup> At the meeting Pretorius, from the chair, made an impassioned plea for unity to the people gathered to witness the proceedings of the *Volksraad* and to see democracy in action. He pleaded for an end to the constant bickering and factionalism among them and to the insults, slander and penchant for litigation among characters who were remarkably temperamental and vexatious in a society that professed a deep piety and was deeply dependent on one another.<sup>53</sup>

The newly constituted *Volksraad* met in September near where Lydenburg was soon to be established. Potgieter did not present himself. They ordered him to appear at the next meeting, otherwise he would suffer a blockade of the Soutpansberg region. They applied themselves diligently to the business of government, approving among others the establishment of the town of Lydenburg. Careful to confirm the supreme authority of the *Volksraad*, the position of Commandant-General (the position held by Potgieter) was abolished during peace-time and landdrosts were ordered to make sure that no agitation for such a position took place in their regions.<sup>54</sup>

Despite the establishment of a functioning *Volksraad* for the “Entire Society on this Side of the Vaal River” tensions remained. The *Volksraad* obstinately persisted in the fiction that the border of the “United Bond” should be, not the more obvious Vaal River, but the twenty sixth degree of south latitude (without in fact knowing exactly where the line ran). This caused uncertainty for many living in the south and south-west of the trans-Vaal territory. The refusal to countenance the appointment of an executive head of the society was problematic, because it left the society with no individual who could fulfil the important and necessary function of constant engagement with the British authorities on their doorstep. Also, personal animosities ran deep. Pretorius and Potgieter were barely civil to each other. Since the death of Burger, one Hendrik Bührmann, a competent but abrasive young Hollander who had settled among the Orighstad *Boers* in 1848, had assumed the ideological leadership of the “*Volksraad* faction”, and had antagonised both leaders in his insistence that there would never be *eenhoofdig bestier* (autocratic leadership). Absurdly, Bührmann and Pretorius even challenged each other to a duel.<sup>55</sup> Also, the perennial problem of African tribes hostile to the *Boers* in their midst and the constant need to arrange for commando’s to subdue the tribes exacted a heavy toll on the *Volksraad* and its precarious resources.

The brittleness of the constitutional fabric began to show. A government of twelve annually-elected good men and true, with a rotating chair, no one more

52 See Pretorius & Krüger 1937: 388-390.

53 *Idem* at 385-387.

54 See the minutes of the meeting as published in *Volksraadsnotule I* at 101-109.

55 See Swart 1963: 32, 41. Duelling was a common enough occurrence for the *Volksraad* to issue a Government Notice in 1863 prohibiting duelling challenges: see Jeppe & Kotzé 1887: 147.

important than the other, serving the best interests of a people who actively involved themselves in popular government through annual elections, boisterous attendance of *Volksraad* debates and the drafting of a plethora of petitions to the *Volksraad* on affairs local and regional by an engaged *volk*, was struggling to assert its authority. The *volk* lived off the land, they were constantly fearful of attack, they lived by their wits rather than their minds. They struggled to fully appreciate that in that vast territory their self-interest could be beneficially served by such transcendent abstractions as statehood, nationhood and republican democracy. They needed a leader – one like Andries Pretorius, the Hero of Blood River.

In a letter to Pretorius in December 1849 a group of fifty seven *Boers* from the Winburg region in the northern Free State pleaded with him, the *kooning der Emigranten* (king of the emigrants), wearer of the crown, to come to their aid against the Basothos and the British.<sup>56</sup> Pretorius heeded their call, despite the monarchical language. He had unfinished business: This was namely to unite all of the “emigrants” into one free and independent Republic, not only those beyond the Vaal River and certainly not only those who lived beyond the questionable twenty sixth degree of south latitude.

The letter to Pretorius from *Boers* in the Sovereignty preceded a petition to the *Volksraad* in early 1850 signed by 168 burgers asking for Pretorius to be instated as Commandant-General to quell the tribal uprisings. At the meeting in Potchefstroom in January the *Volksraad* called for a plebiscite to determine the appetite of the *volk* for Pretorius to be appointed Commandant-General. Pretorius resigned his membership of the *Volksraad* at this meeting, intent on pursuing his calling to lead “his” people (all of his people) to independence.<sup>57</sup>

The plebiscite was instructive: The majority (75%) had no stomach for a permanent commandant-general, certainly not one intent on interfering in the affairs of the Free State Sovereignty. The authoritarian nature of the position and the potential for dissent it embodied featured as the most pressing concerns (Paul Kruger was a signatory to one of the petitions).<sup>58</sup>

One Adriaan Stander, an ardent Pretorius supporter, one of the four who had been outlawed by Smith after Boomplaats and who had fled the Sovereignty to the Marico district, wrote to Pretorius in August 1850, expressing the views of many.<sup>59</sup> How could the *Volksraad*, he asked, decide not to appoint a commandant-general? How could they appoint *de Hollander* (Bühmann) as secretary of the *Volksraad*? Clearly, he wrote, the public was *geen kooning meer* (no longer the king), that is, the *volkstem* counted for naught and the *Volksraad* called the shots. He was wrong, of

56 The letter to him appears in Pretorius & Krüger 1937: 401-403. See, too, Wichmann 1941: 94.

57 See the minutes published in *Volksraadsnotule I* at 115-120.

58 Many of the petitions (both for and against the question posed in the plebiscite) are published in *Volksraadsnotule I* at 297-315.

59 See Pretorius & Krüger 1937: 34.

course: The *volkstem* had definitively spoken and the *Volksraad* had given effect to its expression of will. Not, to be sure, the will of the whole of the *volk*, in Rousseau's conception of the *volonté générale*, but of a significant majority.

Pretorius would have been well pleased with unfolding events. The burghers of the Sovereignty called him their *kooning* in December 1849. Eight months later the good burghers of Marico were bemoaning the fact that the public, who dearly wished him to be the Commandant-General, were no longer *kooning*, seemingly usurped by an ineffective *Volksraad*.

The coming months would see the *Volksraad* yield considerable ground. There was much to-ing and fro-ing on the issue of the commandant-generalship. The issue was causing serious division and disharmony.<sup>60</sup> In January 1851 the *Volksraad* chose to appoint four regional commandants-general, rather than to appoint Pretorius as Acting Commandant-General for the whole territory – he would undoubtedly undermine *Volksraad* authority if given free rein. He was appointed for the Potchefstroom/Magaliesberg region (Hendrik Potgieter was appointed for the Soutpansberg region). All were subject to *Volksraad* authority and regulation.<sup>61</sup>

As with most political compromises, the decision to regionalise the position of commandant-general and thereby limit Pretorius's powerbase, meant to pacify competing factions, satisfied no-one and had unintended long-term consequences. It confirmed a trend that had been developing for more than a year. This was namely that the regions in which the *Volksraad* meetings took place were only well attended by those who lived in the region. Correspondingly, they were poorly attended by those who had to travel vast distances over difficult terrain from the other regions. The issues each *Volksraad* dealt with then tended to be peculiar to the region. When a commandant-general for each region was approved, the region-specificity of government intensified.

The *volk*, apathetic and in survival mode for the most part, increasingly questioned the efficacy and legitimacy of a *de facto* regionalised *Volksraad*. It didn't help either that the *Volksraad* (under Bührmann's influence) continued to insist that the southern boundary of the territory was the twenty sixth degree of south latitude and that the more obvious choice of boundary, the Vaal River, was a practical line of demarcation only, until the boundary line could be determined with precision. Insistence on the line of latitude in fact cut off a large swathe of territory that included Potchefstroom and Heidelberg, long established towns of the trans-Vaal region. Pretorius was frustrated not only by this obduracy. The regulations for the commandant-generalship (drafted by Bührmann) imposed a straitjacket on the position, requiring *Volksraad* approval before military action could be undertaken. With no little hubris, Pretorius likened his position to that of the Duke of Wellington (he was the *Boer* Wellington, was

60 See arts 2-4 of the minutes published in *Volksraadsnotule I* at 146-147.

61 See *Volksraadsnotule II* at 4-5 & 279-281. See, too, Swart 1963: 41-42.

he not?) who had once complained that he could not conduct a military campaign if all and sundry were giving him orders.<sup>62</sup> Competing political ideologies further prevented any real unity among the trans-Vaal *Boers*.

The Lydenburg *Volksraad*, increasingly making decisions that had legitimacy in the north-eastern region only, remained convinced that the route to their salvation as an independent nation lay with the Netherlands. Their conceptions of statehood were deeply influenced by the constitutional doctrines of the Dutch Patriots of the late eighteenth century (who in turn influenced the Cape Patriots). In particular they attached fundamental importance to the need to give full force and effect to the *volkstem*, and to the liberal democratic ideals of representative government contained in the Dutch Constitution of 1848. This could never be achieved if Britain held any sway over them. Their commercial welfare, they believed, lay through the good offices of the Portuguese at Delagoa Bay to the Netherlands and other continental European countries and not through the British-controlled harbours of Durban and Cape Town. They wished to shed the English-influenced lifestyle and culture of the Cape Colony and sought instead to attract ministers of religion, teachers and craftsmen from the Netherlands. They presented themselves as Dutch by lineage, by Calvinist religious persuasion, by linguistic relationship and by choice, who happened to live in the southern African interior. Their approach towards the British was therefore to keep the peace with them, steer clear of them as far as possible, not to trust them and to avoid doing anything to antagonize them.<sup>63</sup> Their problem was that, despite well-intentioned efforts from a number of Hollanders located particularly in Amsterdam, Dutch interest in and enthusiasm for their poor African cousins remained a minority undertaking. Even sympathy was not really widespread. Many among the pious Dutch were unimpressed by reports from the missionary societies about the particularly harsh brand of Calvinist piety practised towards Africans by many of the *Boers*.

Andries Pretorius and his supporters, on the other hand, practised a *Realpolitik*. The British were a formidable presence right on their doorstep and it was essential to come to an understanding with them. The politics of engagement was important. Their military might was undoubtedly superior to that of the *Boers*. But the British had their problems. The Eighth Frontier War on the eastern boundaries of the Cape Colony was in full swing and the brutal and drawn-out hostilities placed a heavy burden on limited British resources. In the Sovereignty the British Resident, Warden, had his hands full. Moeshoesoe's Basothos were restless and hostile, towards the British, the *Boers* and other African tribes. In mid-1851 Warden sent a force to suppress them and was roundly beaten. The entire region was as unstable and

62 See the letter written by Pretorius to the *Volksraad* in February 1851, the reply from the commission council at Lydenburg in the same month and a letter to Pretorius written by Bührmann in May 1851: all published in *Volksraadsnotule II* at 21-22, 202-204 & 246-252.

63 See Swart 1963: 43, quoting from a letter written by Bührmann to Pretorius in May 1851.



insecure as once Natal had been. In London, too, southern African foreign policy changed in 1851. Whereas a desire to extend British sovereignty beyond the Vaal River was still present at the end of 1850, the turmoil of 1851 on the eastern colonial frontier and in the Sovereignty changed things. There really was no need to expend unnecessary resources on maintaining British sovereignty over a region that had little commercial value for them and in respect of people – *Boer*, African and Griqua alike – who, frankly, had even less value for them. Harry Smith's inability to quell the uprisings led to his recall by the Colonial Secretary, Lord Grey, and George Cathcart became the new Governor at the Cape. The policy was now one of appeasement. Two Assistant Commissioners, William Hogge and Charles Owen, were sent to the Sovereignty to report on conditions there.<sup>64</sup>

Hendrik Potgieter and his Soutpansberg supporters were simply contrary. They opposed Pretorius and his designs, because they shared the Lydenburgers' desire to make peace with the British and not to antagonise them and to seek salvation through Delagoa Bay and the Netherlands. They also opposed him because they saw Pretorius as a vain usurper who was claiming authority over territory that Potgieter had opened up with blood and guts and could legitimately claim as his own vast fiefdom, to be dispensed with as he (and not Pretorius) deemed fit.<sup>65</sup>

By the latter half of 1851 the time appeared ripe to engage with Britain. Circumstances adverse to British assertion of supremacy locally and abroad meant that it was propitious for a hard push towards a long-term arrangement with them. The power base had now shifted significantly to the Potchefstroom/Magaliesberg region, at the expense of the other regions. Pretorius, who had campaigned successfully against hostile African tribes in the region, was increasingly treated as a proto-head of state, an *eenhoofdig bestierder*. He called *Volksraad* meetings where decisions were taken (in the absence of representatives from Lydenburg and Soutpansberg) to confirm the Vaal River as the southern border of the "United Bond", to approve further military action by Pretorius and to begin formal engagements with the British representatives in the Free State. In fact, acting in direct contravention of previous *Volksraad* decisions, the September meeting, attended by twenty six-year old Paul Kruger of the Magaliesberg region, was no less than a *coup d'état*.<sup>66</sup> Because of the absence of representatives from Lydenburg and Soutpansberg the meeting was inquorate. They therefore, with the consent of the public present, constituted themselves as a military council under the chairmanship of Pretorius. Lydenburg and Soutpansberg were enjoined to explain their absence to a judicial tribunal constituted for this purpose. Until such time the public present relieved the *Volksraad* of its duties and vested its functions in Pretorius's military council. Pretorius was also authorised to negotiate with British representatives on behalf of the *Boer maatschappij*.

64 See Wichmann 1941: 104.

65 See, in general, Binckes 2013: 512-517; Giliomee 2003: 170-171.

66 The minutes of the meeting are published in *Volksraadnotule II* at 232-237.

It was a personal triumph for Pretorius, achieved through strength of personality and military prowess. Not through respect for the rule of law or for the institutions of representative governance, so pivotal to the conceptions of government of the early pioneers. In this respect he received a pointed note from a government official, a field-cornet, some three weeks after the meeting.<sup>67</sup> In it he was berated for his presumption in issuing directives to the *Volksraad*. Who are you to issue such directives, the writer asks? *Is dat die kooningstem?* (Do you presume to have the King's voice?). If you believe the King's voice belongs to *die Kreygsraats en tegenhoordieg pebliek* (the military council and public present) at the meeting of 8 September, then I say to you, they do not have it. I prefer to stay true to the laws made by the *Volksraad*, for in so doing I will be free. He promptly resigned as field-cornet. Not for nothing did Sir Harry Smith call Pretorius a man of great ability, but lacking in scruples.<sup>68</sup>

To Pretorius's credit, when it became clear that the British were willing to engage with him, he wrote to the Lydenburgers more than once, inviting them to put aside differences in order to present a united front to the British. Paul Kruger, then a field-cornet in Magaliesberg, had also written a letter to the Lydenburg *Volksraad* (calling it *myne Volkraad*). He urged them to put aside differences and to re-assert their authority by participating in a preparatory meeting scheduled for January 1852.<sup>69</sup>

The overtures from the likes of Pretorius and Kruger had an effect. A group of delegates from Lydenburg and Potchefstroom met in January in Potchefstroom to help Pretorius prepare for his important engagement with the British representatives, Hogge and Owen (Soutpansberg remained conspicuously absent, Potgieter in any event being incapacitated through injury). Such was the spirit of reconciliation that at this meeting it was agreed that the duly-constituted *Volksraad* (not Pretorius, not some military council) would remain the *hoogst gezag en regerings vorm* (highest government authority) in the territory.<sup>70</sup>

Pretorius and his party, with the blessing of the *hoogste gezag*, negotiated successfully with the British representatives Hogge and Owen on the banks of the Sand River near Winburg. The Sand River Convention was signed on 17 January 1852.<sup>71</sup> It guaranteed to the *Boers* north of the Vaal River the right to manage their own affairs and to govern themselves according to their own laws. The threat of the *Cape of Good Hope Punishment Act* had thus been finally removed, as had been the threat of annexation by Britain.

The Sand River Convention was ratified by the *Volksraad* at a gathering of the *volk* at Rustenburg on 16 March 1852. It was, in the words of John Kotzé, the "birth certificate" of the *Zuid-Afrikaansche Republiek*.<sup>72</sup> At this gathering there was also

67 Published in Krynauw & Pretorius 1949: 119.

68 See Wichmann 1941: 106.

69 The letter is published in *Volksraadsnotule II* at 241-242.

70 The minutes are published in *Volksraadsnotule II* at 51-52.

71 The text appears in Eybers 1918: 358-359.

72 See Kotzé 1894: 7.

reconciliation between Pretorius and Potgieter and the *Volksraad* was re-confirmed as the highest authority in the land. For Pretorius, though the victory was sweet, it was incomplete. His legacy was to have been a unification of *all* the “emigrant farmers” into a free and independent republic. But Britain would not forego its sovereignty over the area between the Vet and the Vaal Rivers (the Winburg region), fearing loss of British prestige if it were to do so. And Moshoeshoe, the Basotho King, had not been invited to the discussions, despite Pretorius’s entreaties that he be invited. Everlasting peace between *Boer*, Brit and African in a vast territory independently governed by the *Boers* had been within his grasp. It was not to be. Britain belatedly granted the Orange River Sovereignty its independence through the Bloemfontein Convention of 23 February 1854. The Sovereignty had clearly become a liability to Great Britain and with the onset of the Crimean War in October 1853 such liabilities could not be afforded.<sup>73</sup> By then, however, *Kooning* Andries Pretorius had died.

The Convention had not changed the social, economic and political conditions in the trans-Vaal region – there was no new dawn. Dutch commerce, aid and political protection had proven to be a chimera. The deep suspicion against the British remained ingrained. And, internally, little had changed politically.

## 2 3 The drafting of a Constitution for the *Zuid-Afrikaansche Republiek* (1852-1858): The people have spoken

*“Wy vernemen dat daar gezegt is dat de publiek de Konengstem is, maar wy vragen of dat zoo is wanneer het publiek eischt om onregt te doen ...”*: Petition to *Volksraad*

11 September 1854<sup>74</sup>

### 2 3 1 Introduction

The Sand River Convention had brought freedom from British interference, but it had not brought independence. The trans-Vaal *Boer* society of 1852 (some 15 000-20 000 men, women and children) was still as divided as ever (despite emotional protestations of conciliation); the leaders remained barely civil to one another and few hatchets were buried (in fact, Pretorius and Bührmann loathed one another); the economic conditions of the country had not improved (had deteriorated, if anything: there was a debilitating drought and widespread disease in 1852); the African tribes in and around the *Boer* territory remained as hostile as ever; British missionaries openly and repeatedly condemned the *Boers*, particularly those in the far north (Soutpansberg) and far west (Marico) of the territory, for their ill-treatment of and

<sup>73</sup> The text of this convention is published in Eybers 1918: 282-285.

<sup>74</sup> “We hear that it is said that the public is the King’s voice, but we ask if that is the case if the public demands that injustice be done.” The petition is published in *Volksraadsnotule III* at 228-230.

trafficking in Africans; and government institutions were still under-resourced and barely legitimate.

What was needed, the *Boer* leaders recognised, was a new beginning. New beginnings for the pretender republic were best executed within the framework of a Constitution for the State. Andries Pretorius knew this better than most. Within a week after the Sand River Convention had been signed, he had written to Andries Stockenström, former Lieutenant-Governor of the Eastern Districts, with whom Pretorius had maintained a regular correspondence. He sought his advice on, among other things, how to set about drafting a constitution for the territory. Move slowly, was Stockenström's sound advice: Get all of the people involved, consider many alternatives and seek the counsel of someone disinterested and well-versed in these matters to assist in the drafting process.<sup>75</sup>

Wise counsel, no doubt, but socio-economic conditions were not propitious. Hostile African tribes were threatening the safety of the *Boers* everywhere and concerted military action was the dominant agenda item. Travel was difficult, so *Volksraad* meetings were seldom quorate. At a meeting in October in Rustenburg a decision was taken to hold over any discussion on "all provisions deemed necessary to serve as ground rules – that is, constitutional rules – for approval and ratification by the public" until there was peace and it was again safe to travel.<sup>76</sup> Factionalism again reared its head, when disputes erupted over where future meetings of the *Volksraad* were to take place and who was entitled to call them. Barren soil indeed for constitutional discussions. Division was heightened when the first minister of religion for the trans-Vaal *Boers*, the Hollander, Van der Hoff, was appointed in Potchefstroom through the facilitation of Pretorius, without the Lydenburgers having been consulted. Given the centrality of religion in their lives, this action aggravated existing tensions. Often, in the years ahead, religious differences fuelled political differences.

In December 1852 Hendrik Potgieter died, three days shy of his sixtieth birthday. Though a towering figure in the Boer community during the Great Trek and in the early 1840s, his particular brand of might-is-right, populist and autocratic leadership belonged to a past age and he had little influence on trans-Vaal politics in the years preceding his death. His successors, though, in the Soutpansberg region, would continue to practise a populist style of politics that would bedevil the constitutional debate for some time.

The Lydenburg *Volksraad* had been working on a set of regulations for the proper governance and functioning of the *Volksraad*, incongruously sub-titled *Grondwet voor de Volksraad van de Zuid Afrikaansche Republiek* (Constitution for the *Volksraad* of the South African Republic). The *Volksraad* informed the public that

75 The letter from Stockenström to Pretorius is published in Pretorius & Krüger 1937: 184-186.

76 Art 2 of the minutes published in *Volksraadsnotule II* at 87.

these regulations would be discussed at its next meeting in Lydenburg in September 1853.

Before the meeting in September could take place Andries Pretorius died. He had picked up an infection while on yet another commando in the west and died in July 1853 at his farm in the Magaliesberg, aged fifty four. He was the leading *Voortrekker* of his time. The greatness that he thought was in his grasp was not to be. His grand political design went far beyond the ideal propagated by the insular Lydenburgers of a Dutch dependency operating through Portuguese-controlled Delagoa Bay independent of British influence. It was rather for a fully independent *Boer* Republic from the Orange to the Limpopo Rivers, invested with all the trappings of civilised and prosperous statehood, occupying its rightful southern African space alongside colonial Britain and allied to powerful and friendly African nations.<sup>77</sup> This grand design was pursued by his son after his death. However, as events later unfolded in the 1850s and 1860s it became clear that he lacked his father's charisma and political *nous* and was also constricted by the lingering *animus* his father had generated among many in his lifetime.

Surprisingly, all regions sent representatives to the September meeting of the *Volksraad* in Lydenburg and a spirit of conciliation prevailed. The important discussion of the proposed instructions for the *Volksraad* (*Grondwet voor de Volksraad*) took place and were approved subject to public comment.<sup>78</sup> The term *grondwet* was a misnomer. It was really a charter for the proper conduct of the business of the *Volksraad*. It did, though, contain a number of important provisions that were to influence later constitutional deliberations.

The *Volksraad* comprised twelve members (this number could be increased to a maximum of seventy-two depending on the population size) who were elected annually by means of the majority vote of males twenty one years and older resident in the region in which the prospective member was resident. A chairman was chosen at each session of the *Volksraad*, confirming the egalitarian principle that none was entrusted with an executive function beyond the ambit of the *Volksraad* meeting. The *Volksraad* had the sole authority to make laws, issue mandates and take decisions on all matters that affected the Republic. A list was provided of the matters on which it had final authority: "In a word," the section concluded, "to provide all of the input and make all of the rules required for the Republic and to execute such." Laws and decisions approved or made by the *Volksraad* would have preliminary validity only (except laws and resolutions that brooked no delay) and would only be finally approved and become fully operative at the next *Volksraad* meeting. This was provided no lawful objections were lodged against such laws or resolutions. Landdrosts and commandants-general could attend *Volksraad* meetings but only to provide advice and information, if required.

77 See, *inter alia*, Wichmann 1941: 69 & 78 and see, too, Binckes 2003: 525-530.

78 The text of the *Instructions* is published in *Volksraadsnotule II* at 476-480. See, too, at 163.

Present in this *Volksraad grondwet*, therefore, were the familiar democratic principles on the basis of which the *trekkers* had governed themselves since the late 1830s: Participative government, in which the *volkstem* was exercised by means of annual elections and by means of referral to the *volk* for comment on legislation before final approval; non-hierarchical government; the *Volksraad* as the *hoogste gezag*; power centralised in one ultimate decision-making body; exclusion from final decision-making of the judicial and the military authority. Importantly, too, no distinction was drawn between “laws” and “resolutions”: both enjoyed the authority vested in them by the *Volksraad*.

Two other important decisions were taken at the meeting. The state would henceforth officially be called *De Zuid Afrikaansche Republiek* (the South African Republic) and the confirmation of the appointment of MW Pretorius to succeed his father as Commandant-General.<sup>79</sup>

At a *Volksraad* meeting in Potchefstroom in November a controversial constitutional refinement was introduced. It was decided (subject to public comment) that each of the four regions (styled “colonies” in the minutes) of the Republic (Potchefstroom, Lydenburg, Rustenburg and Soutpansberg) would have three *Volksraad* members, thus limiting the size of the *Volksraad* to twelve. For good measure it was confirmed – confirmation was clearly needed – that the *Volksraad* was the *hoogste gezag* in the Republic.<sup>80</sup>

### 2 3 2 The debates, tensions and ineptness that prefaced the constitution-drafting

With Andries Pretorius no longer there to move things along, very few matters of constitutional significance occurred in 1854. The Orange River Sovereignty was granted its independence from Britain by means of the Bloemfontein Convention in February of that year. Within three weeks of the signing of the Convention, the Free State Republic had adopted a constitution.<sup>81</sup> The expected natural amalgamation of the two independent *Boer* entities into one grand Republic, one Pretorius had so passionately desired, did not happen. The Orange Free State coveted their independence and most saw no reason to throw in their lot with the Transvaal. Far removed from the commercial opportunities and civilising influences the British colonies presented, the Transvaal *Boers* with their quarrelsome leaders and interminable religious disputes were not coveted company.<sup>82</sup>

Christoffel Brand, influential Cape politician, journalist and lawyer and long-standing friend of the *Boers*, and soon to become the first Speaker of the newly

79 See arts 29-31 of the minutes published in *Volksraadsnotule II* at 152-154.

80 On these decisions see arts 120-121 in the minutes published in *Volksraadsnotule II* at 191.

81 The text of the Constitution of the Orange Free State is published in Eybers 1918: 286-296.

82 See Wichmann 1941: 132-140; Van Jaarsveld 1951: 150-151.

established Cape Legislative Assembly, in a fraternal letter to influential Lydenburg politician, Cornelis Potgieter, urged the *Volksraad* to appoint two qualified lawyers, one as Chief Justice and the other as Secretary of State, to assist with the essential constitutional, legislative and executive work that lay ahead for the young Republic.<sup>83</sup> It didn't happen. They had not enough funds to pay their own officials, let alone the funds with which to entice young, qualified, adventurous lawyers.

The *Volksraad* only met once in 1854, in June at Rustenburg. The debilitating and morale-sapping state of war that existed on a semi-permanent basis between the *Boers* and the various African tribes precluded opportunities for refined reflection on affairs of state. At this meeting a discussion took place which, fairly innocuous in itself, nevertheless had far-reaching consequences for the constitutional debate in the coming years.

The decision to limit the *Volksraad* membership to twelve, taken at Potchefstroom in November 1853, had been subject to public comment. Despite agitated debate on the matter (was it appropriate for the *Volksraad* to amend its *grondwet* so soon after its approval?) the *Volksraad* ratified the decision to limit membership to twelve, on the basis of the majority view of the people, expressed in an opinion poll in which 1 000 men participated.<sup>84</sup>

On 11 September 1854 five field-cornets of the Lydenburg region, on behalf of those residing in their respective districts, addressed a petition to the *Volksraad*. It was concerned primarily with church affairs. In it they also expressed the sentiment that the *Volksraad* could not possibly have had the authority to approve some of the decisions taken at the June meeting.<sup>85</sup> They took serious issue with the decision to amend the *Volksraad grondwet* to limit membership to twelve only. They demanded that the *grondwet* should remain as it was. There was no sound reason for this amendment, they said: Saving on the cost of some additional members surely could not weigh up against the demise of the entire state – which would happen if laws agreed to were changed willy-nilly. They were particularly aggrieved because they noted that the decision to amend the *grondwet* was taken on the basis of a majority view expressed by the *volk*: “Does the majority represent law and justice (*de regt en de wet*) in this country?”, they asked.

They then proceeded to unpack their argument in a manner remarkable for the insight it reflected into constitutional concerns and its distinctly progressive flavour. We mean to ask, they wrote, have the existing laws granted the majority the right to make or amend laws as it suited them, even if they were unjust? We have been told that it has been said that the public has the *koningstem* (the King's voice). Is this still the case if the public demand to do an injustice, or if a section of the public has been granted the authority to exercise power over another section or to make or amend

83 His letter is published in *Volksraadsnotule III* at 203-209.

84 See arts 2, 6-16 & 45-46 of the minutes published in *Volksraadsnotule III* at 9-11 & 15.

85 The petition is published in *Volksraadsnotule III* at 228-230.

the law to suit them or when they so desire? If that were indeed the case, then surely there would be no need for a *Volksraad* or for government officials. All matters could simply be referred to a majority vote by the people. The majority then replaces the Law. Surely this cannot be, not when God has in the Good Book commanded us to have law and a government. Surely one section of the public cannot simply exercise power over others that results in domination? The majority cannot simply dominate. We have noted how much punishment and how much injustice have been brought upon mankind by the majority (no doubt a reference to the 1848 European revolutionaries and the *Communist Manifesto* published by Marx and Engels). We demand merely that law and justice should prevail, never the majority.<sup>86</sup>

This document was preceded by two other *Volksraad* petitions. On 28 June, after the *Volksraad* meeting, Commandant-General Piet Potgieter (Hendrik's son and his successor as Commandant-General of Soutpansberg), writing on behalf of the inhabitants of the Soutpansberg, informed the *Volksraad* that they held the view that any decision taken by the *Volksraad* which did not carry the general consensus of all (the *volonté générale*), would have no binding power over "the public under my authority" if it was contrary to their interests. Precisely the sentiment the Lydenburg field-cornets took issue with.<sup>87</sup>

Adriaan Stander, the old ally of Andries Pretorius and a firebrand of note, had caused a stir in the Free State *Volksraad* (he had returned to the Winburg district, from whence he had originally come and was stoking unification fires) when he petitioned it in September. In his petition he called for the removal from office of the anti-unity President, Josias Hoffman. He asked, with reference to the fact that a large number of Winburg Free Staters were staunch supporters of one united *Boer maatschappij*: "Does the public have the King's voice, yes or no?" The people should be consulted on the issue before the *Volksraad* can make the decision (not to consider unity). It was the same stance he had adopted in 1850 when, in a letter, he had lamented that the public was no longer the King. This was clearly the case, he had written then, if the *Volksraad* chose not to appoint Pretorius Commandant-General, against the wishes of a large section of the public. The Free State *Volksraad* provided a terse response: The public is King, but the *Volksraad* represents the King's voice.<sup>88</sup>

From these petitions, and the petition of the Lydenburg field-cornets in particular,<sup>89</sup> it is possible to extract a number of serious constitutional questions that were in effect posed to the governance authorities: The *volkstem* was clearly fundamental to the republican democracy espoused by the *Boers*. But how does it work in practice? Does the *Volksraad* truly represent the voice of the people? Why then consult with the public, as provided for in the *Volksraad grondwet*? On what matters should the

86 See, too, Wypkema 1939: 379.

87 See Wichmann 1941: 152.

88 *Idem* at 144.

89 The latter petition is published in *Volksraadsnotule III*: see n 85 *supra*.



public be consulted? Surely not on *all* resolutions it takes? What counts as resolutions that brook no delay? And what if, once consulted, it is apparent – as will almost invariably be the case – that there is no consensus and that in fact many views exist? Does the majority view *always* sway the *Volksraad*, as representatives of the people? What if the *Volksraad* members disagree among themselves? And, asked the field-cornets with great insight, what if the decision taken by the *Volksraad* (whether or not based on majority public opinion) was unjust? Who determines what is just and unjust? Surely the ultimate desire of the people is that they should be governed by law and by justice? Surely a law once made and properly consulted should retain its validity and not be subject to constant revision?

Clearly there were men of ability among the field-cornets, mid-level government functionaries responsible for law and order, who literally heard the voice of the people in the daily performance of their duties. Had not another field-cornet in September 1851<sup>90</sup> berated Andries Pretorius for arrogating to himself the *koningstem* by issuing directives to the *Volksraad*? And resigned his position because he preferred to stay true to the laws of the *Volksraad*, “for in doing so I will be free”?

By mid-1855 the state, as an entity, had hit rock bottom. They were rudderless, devoid of the acumen and the resources required to craft for themselves a constitutional dispensation and to establish the essential instruments of democratic government. Two letters, from the Lieutenant-Governor of the Cape, Darling, and from the newly appointed Governor, Sir George Grey, sent to Andries Pretorius and received by MW, his son, had been read out to a military council meeting near Lydenburg in February. Embarrassingly for the anti-British *Boers*, both expressed fraternal concern for their welfare and offered assistance to the *Boers* to govern the country and to provide for their spiritual and material welfare. They sent them copies of Cape legislation and administrative arrangements for their use.<sup>91</sup> Small wonder EB Watermeyer, a member of the first Cape Parliament established in 1854 and later a judge of the Cape Supreme Court, said in a public lecture at that time that “the trek spirit, with its attendant evils, must rate as the Curse of South Africa”.<sup>92</sup>

A lengthy reply to the letter Brand had written in January 1854<sup>93</sup> and which had been received only a full year later, had been prepared (by Bührmann) and was approved by the meeting.<sup>94</sup> Among the many topics covered, pertinent comments were made on the *staatsregeling* (state structure) of the Republic. There had always been clarity from the earliest times, they wrote, that the *Volksraad*, elected by the majority vote of the public, was the *oppergezag* (supreme authority), however poorly this was executed in practice. However, there were others who held the view

90 See n 67 *supra*.

91 See arts 2 & 5 of the minutes published in *Volksraadsnotule III* at 34 & 36-37.

92 Quoted by Kotzé 1894: 3.

93 See at n 80 *supra*.

94 It is published in *Volksraadsnotule III* at 330-336.

that an *eenhoofdig bestier* (autocratic head) was most appropriate for their society. Still others believed that, although a *Volksraad* was indispensable, it was necessary that an *eenhoofdig oppergezag* (autocratic supreme authority) should have the final authority in the state to approve or reject *Volksraad* business and to guide the *Volksraad*. Insufficient knowledge of or experience in constitutional affairs meant that these differences never got beyond political arguments and quarrels. We have, they wrote with much pathos, no lawyers or constitutional experts among us to guide us and the best man among us is incapable, not even with the best will in the world, of providing what we need to design the constitutional state we desire and to be truly free, truly able to govern ourselves.

Still the *Volksraad* plodded on. It met in Rustenburg in June, where no decisions of constitutional significance were taken. They did, though, appoint crude, rude and shrewd Stephanus Schoeman as Commandant-General for Soutpansberg in the place of Piet Potgieter, who had been killed in a battle with the Ndebele in 1854.<sup>95</sup> He would have a major, if deleterious, impact on constitution drafting in the years ahead. They also noted, with some pique, the petition of the five Lydenburg field-cornets<sup>96</sup> and concurred with the view expressed by one of the members that “the Law and the *Volksraad* were the highest authority, everybody knows this”. It would not have occurred to them that a statement that both the law and the *Volksraad* were the highest authority could be fundamentally contradictory. They considered – although nothing more – a proposal from Schoeman for the establishment of a federal structure in the Republic, in which each regional council and the federal *Volksraad* would function, not in terms of a constitution, but in terms of *de oude wetten*, a reference to the Thirty-Three Articles.<sup>97</sup>

Christoffel Brand, long-standing friend of the *Boers*, had, in May 1855, written another letter in which he had offered his services to them at no cost to help arbitrate differences and to formulate an acceptable constitutional dispensation. Shamefully, there was no consensus in the *Volksraad* over whether or not to take him up on his offer. He wrote two further letters, repeating his offer. As a result of indifference and miscommunication, he never came.<sup>98</sup>

The next *Volksraad* meeting took place at Pienaar’s River (fifty kilometres north of present-day Tshwane) in September 1855. Divided as never before, influenced by

95 Ferreira 1978, in his comprehensive biography of Schoeman, paints a picture of a man who had natural leadership ability and was popular among men, but who exhibited abrasiveness, shortness of temper and a thin skin, unable to engage in compromise until it was forced upon him: see in particular 379-384.

96 See n 85 *supra*.

97 On these decisions and discussions, see arts 9-12 & 169 of the minutes published in *Volksraadsnotule III* at 43 & 85 and see, too, 280-281.

98 See art 163 of the minutes in *Volksraadsnotule III* at 83-84 and the letters published at 292-293 & 338-339. See, too, art 57 of the minutes of the September *Volksraad* meeting published in *Volksraadsnotule III* at 102-103. See, further, one of Brand’s letters at 365-366.

the inflamed passions of the burghers gathered for the meeting, the *volk* and their *Volksraad* were no longer capable of engaging at a level higher than that of personal prejudice and self-interested alliances. The simmering discontent around religious matters now boiled over. Sides were chosen. You were either for the Reverend Van der Hoff and his Transvaal Church and therefore a supporter of MW Pretorius of the Potchefstroom/Magaliesberg region; or you were against Van der Hoff and therefore a supporter of closer ties with the Cape Synod (and by implication with the Cape Colony), as were the Lydenburg *Volksraad* and the Lydenburg Church Council.

A Lydenburg Commission Council (a commission council was a sub-committee of the *Volksraad* and functioned as an executive committee) had approved a decision of the Lydenburg Church Council to re-unite with the Cape Synod of the Dutch Reformed Church – in direct contravention of an earlier *Volksraad* decision for the Transvaal Church to break ties with the Cape Synod. One of the host of charges<sup>99</sup> – laid by Commandant-General MW Pretorius – before a special court against the commission council members was treason, no less: The Cape Dutch Reformed Church was the state church of the Cape Colony, therefore answerable to the Cape Legislature, in turn subservient to the British Crown. Unification meant subservience to the British Crown. This was consorting with the enemy, a crime specified in the Thirty-Three Articles. The special court was comprised of Pretorius sympathisers only, because the Lydenburg delegation had removed themselves from the toxic atmosphere (the Soutpansbergers did not even bother to attend). The seven were tried *in absentia*, found guilty and declared unworthy of ever holding office again in the Republic. The sentence was confirmed by the *Volksraad*.<sup>100</sup>

Predictably, the alienation and bitterness this sentence precipitated had a lasting impact on future constitutional deliberations. You were now either a loyal Pretorius supporter or a fierce Pretorius opponent. The Rustenburg/Magaliesberg and Potchefstroom regions chose the former approach, Lydenburg and Soutpansberg the latter.<sup>101</sup>

Amidst all of this bitter fighting, the *Volksraad* took a decision that had far-reaching consequences. It appointed an eight-man commission to compile *een ontwerp van wetten* (a draft of laws, that is, fundamental laws) and to present their proposal to *het geheele publiek en alle ambtenaren* (the whole of the public and all officials) at the next *Volksraad* meeting in Potchefstroom in November. One of the commission members was Paul Kruger.<sup>102</sup>

99 The comprehensive charge sheet is published in *Volksraadsnotule III* at 370-377.

100 See arts 53-54 of the minutes of the Pienaar's River meeting published in *Volksraadsnotule III* at 102.

101 On these church-based disputes see, too, Wichmann 1941: 157-161; Swart 1963: 59-65.

102 See arts 33 & 68-69 of the minutes published in *Volksraadsnotule III* at 99 & 104.

### 2 3 3 First attempts to draft a constitution amidst large-scale *Sturm und Drang*

#### 2 3 3 1 The Stuart Constitution of 1855

The commission had less than a month to draft a constitution. They managed to do this. This could only have been possible if some preparatory work had already been done, and if it had been done by someone well versed in constitutional matters. That someone was a Hollander, Jacobus Stuart. He was an Amsterdam businessman who had arrived in the Republic in December 1851 and had befriended, first, Andries Pretorius and later MW Pretorius. He had tried to launch a land settlement scheme for skilled Dutch immigrants to settle in the Republic, which had failed. He had fully identified with the Republican cause (having written a book on the *Boers* promoting their cause) and, as a man of learning and intelligence, had been a huge asset in the governance and administration of the Republic. He was the secretary or chairperson of the commission and, according to his own account, not one single clause in the draft constitution did not receive his personal attention. Clearly, his was the dominant presence in the drafting process. It has been speculated that he had a French translation of the United States Constitution with him at the time of the drafting.<sup>103</sup>

The *volk* duly gathered at Potchefstroom on 5 November 1855 (the Lydenburgers were absent). As had become the norm, the *Volksraad* was not quorate and five additional members had to be hastily elected and sworn in. The main item on the agenda was the draft prepared by the commission. The draft was read out to the public in the morning and in the afternoon the *Volksraad* and the public were asked to indicate their support for the draft. Tellingly, the *Volksraad* – supposedly the *hoogste gezag* – chose to first ask the commandants-general and their military officers to express their views, before it would itself commit to a view. There were only two commandants-general present (MW Pretorius and Stephanus Schoeman, the third, Joubert from Lydenburg, having refused to participate). Pretorius and his military council voted for the draft to be approved and for it to be implemented immediately. Schoeman and his officers voted for a three-month delay to allow the rest of the public an opportunity to comment. In an impassioned atmosphere the *Volksraad* approved and adopted the so-called *Nieuwe Wetten*. It instructed that the public be given an opportunity over the next twelve months to voice concerns against any provision. If the concerns were justified, the offending provisions would be amended to better reflect the general welfare of the country and its people.<sup>104</sup>

103 For biographical details on Jacobus Stuart see *Dictionary of SA Biography IV* sv “Stuart, Jacobus” at 814-816. See, too, Wypkema 1939: 321-328.

104 See introductory comments and arts 3, 5-8 of the minutes of the Potchefstroom *Volksraad* meeting published in *Volksraadsnotule III* 106-107.

The constitution was a monumental effort, given the prevailing conditions in the country. Its dominant characteristic was that “as a whole and in detail [it] bore the imprint of the *Voortrekker*, whose knowledge and experience were necessarily limited”.<sup>105</sup> It was, in the view of Lord Bryce, “the pure and original product of African conditions”, drawing little from the experience of older countries or their models of government.<sup>106</sup> This latter comment should come with a caveat: The *Voortrekkers* and their descendants were in fact strongly influenced by the Batavian Constitution and the principles espoused by the Dutch Patriot movement.

It was entitled *Nieuwe Wetten voor de Maatschappij der Hollandsche Afrikanen benoorden de Vaal Rivier* (New Laws for the Society of Dutch Africans north of the Vaal River) and comprised a Preamble, 327 sections divided into eleven chapters and an Appendix on martial law.<sup>107</sup> When compared to the concise sixty-one articles of the Free State Constitution, it was a prolix, rambling affair, with statements of fundamental principle interspersed with detailed provisions on any number of mundane, administrative matters. In fact, its title (*Nieuwe Wetten voor de Maatschappij*) and the statement in the Preamble that its purpose was to make new laws for the society and to incorporate the existing laws in so far as these did not demand improvement, best articulated what the commission had in mind. It was not meant to be a *constitution*, not in the sense in which the Free State or the United States of America or France or the Netherlands had constitutions. It was meant to be a comprehensive statement of laws to regulate a society that had had little regulation thus far, supplemented by those laws already in existence and fully operational, and in which were incorporated certain fundamental principles constitutive of their statehood.

There are clear indications that the Batavian Constitutions of 1798 and 1815 and the Dutch Constitution of 1848 influenced the structure and style of the *Nieuwe Wetten* and some of its principles and institutions.<sup>108</sup> This should not surprise, given the Patriot-inspired democratic principles embraced by the *Voortrekkers* and the Dutch background of Stuart.

Since the *Nieuwe Wetten* was the foundation on which future constitutional drafts and the eventual 1858 *Grondwet* was built, some detail of its provisions is required, with particular reference to the provisions that caused such controversy in later constitutional debates.

Provisions constitutive of the state (thirty-three articles in all) were captured in the first chapter, entitled *Algemeene Bepalingen* (General Provisions) and in the second chapter, entitled *Over de Bescherming en Verdediging van Kerk en Staat* (On the Protection and Defence of Church and State). In these articles the *volkswil* (the

<sup>105</sup> See Thompson 1954: 60.

<sup>106</sup> See Bryce 1901: 431.

<sup>107</sup> The text is published in *Volksraadnotule III* at 380-422.

<sup>108</sup> On which see, in particular, Wypkema 1939: 332-346.

will of the people) is expressed loudly and clearly through the *volkstem* (the voice of the people), thus confirming the primacy of the Patriot- and Batavian-inspired democratic principles adopted by the *Voortrekkers*.<sup>109</sup> It is *het volk* that determines, demands, desires, aspires, prohibits. The form of government was republican and the desire of its people was to be recognised and respected by the civilised world as an independent and free people. The *volk* demanded the “most comprehensive possible” civil liberties, including the maintenance of its religious beliefs, the right of assembly and the right to press freedom. The *volk* expected that its obligations would be met, that law and justice would be maintained and acknowledged its subservience to law, order and justice. The *volk*, though acknowledging its obligation to proselytise the heathens, would not allow *gelykstelling* (equivalence) between whites and *kleurlingen* (persons of colour), unless it was convinced that it would cause the Republic no harm. In this latter qualification, audaciously liberal when compared to the crude earlier provisions regarding persons of colour, one also detects the influence of the less-prejudiced Hollander, Stuart.

In a clear and decisive departure from the traditional *trekker* notion of a single chamber of representative, egalitarian government in which all state power resided, the powers of state were now clearly separated. Again, Stuart’s knowledge of the Constitution of the United States, of the Batavian Constitution of 1815 and of the Dutch Constitution of 1848 (and perhaps some behind-the-scenes advice from Brand) seems apparent.<sup>110</sup> Authority to respectively present and to execute laws was assigned by the *volk* to a State President and his *Staatsraad* (State Council), a term adopted from the Batavian Constitution. Legislative authority resided with the *Volksraad*. It comprised *vertegenwoordigers of lasthebbers des volks* (representatives or mandatories of the people), elected by enfranchised citizens. Its authority to legislate was constrained only to the extent that the *volk* would be given three months in which to provide comment to the *Volksraad*, should the people wish to do so. A *Krygsraad* (Military Council) would uphold law and order. Judicial authority resided with landdrosts, *heemraden* (assessors) and jurymen and the exercise of justice was left to their judgment and conscience. A seat for the legislative and executive authority would be established in a central location (decided by the *Volksraad* at its November meeting to be the new town of Pretoria – named after Andries Pretorius – situated next to the Apies River on two farms bought by MW Pretorius for this purpose).<sup>111</sup>

Other sections in the *Grondwet* provided important additional detail to the statements of principle contained in the General Provisions. For purposes of this discussion the following provisions are pertinent:

109 *Idem* at 334-335, 344.

110 *Idem* at 337-338.

111 Art 70 of the minutes published in *Volksraadsnotule III* at 116.

A *State President* was elected by the *volk* for a renewable period of three years. He was the first and highest official of the state. All officials were subservient to him, except those who exercised judicial authority. These latter were *geheel en al vry en onafhankelyk* (wholly free and independent). He (or other members of the State Council delegated by him) proposed legislation to the *Volksraad*, having first informed the public of such draft legislation three months prior to its submission to the *Volksraad*. Once legislation was approved by the *Volksraad*, he arranged for its promulgation within two months and implementation within one further month. Only he (with the concurrence of a majority of the State Council) could declare martial law or a state of emergency). He would, “as far as possible”, comply with the need expressed by the *volk* for the state and the church to flourish (in particular by providing for teachers and *predikanten* – ministers of religion) and for it to be properly defended. He constituted the *Volksraad*, based on the results of the annual *Volksraad* elections; he opened and dissolved meetings of the *Volksraad*; he presented officials to the *Volksraad* for appointment; he dismissed state officials and filled vacancies; he was responsible for the civil service; he and the State Council were collectively responsible for using state land beneficially; he had the power to mitigate punishments or to pardon offenders, after having sought the advice of the court; he concluded foreign treaties after having sought and gained the approval of the *volk* to do so; he appointed foreign representatives and he alone corresponded with foreign nations. He was furthermore obliged to account to the *Volksraad* for his activities and the manner in which he exercised his rights and duties by means of a comprehensive report to the *Volksraad* every year in September.

The State Council, the executive council of the state, comprised the State President, the Deputy State President (like the President, elected by the *volk*), two enfranchised citizens and a Secretary of State (all elected by the *Volksraad*). They were elected for varying terms of office.

The *Volksraad* comprised a minimum of twelve members. They had to be members of the Transvaal Dutch Reformed Church, between the ages of thirty and sixty, landowners, not related to one another and had to be of pure blood unto the fifth generation. They were elected by majority vote for a two-year period (special provision was made for a three-year transitional period for the *Volksraad*). A chairman was chosen by the members from among them for a one-year period. *Volksraad* sessions were to be held in public, unless the chairman or the State President decided otherwise. A member of the public could speak only when spoken to by the chairman. No legislative draft would be presented to the *Volksraad* unless it had been presented to the public three months beforehand. If the three-month public notification phase was not adhered to, the State President would investigate the oversight and fine the errant official responsible. In the event that the annual budget or any other law the approval of which brooked no delay, was not approved by the *Volksraad*, a revised law (or budget) would be presented to a United Council. This council would comprise

the State Council, the *Volksraad* and the Commandant-General and was chaired by the *Volksraad* chairman. Each member had an equal vote, and the chairman had a casting vote.

Crucially, no provision was made, as in the 1854 Free State Constitution, for a special procedure to amend the *Nieuwe Wetten*. It was therefore like any other law, subject to amendment at the will of the *Volksraad*. The absence of such a special procedure made it, in the language of Lord Bryce, a “flexible” rather than a “rigid” constitution.<sup>112</sup> The influence of the Batavian Constitution of 1798 has been posited as a reason for this approach.<sup>113</sup> It reflected the dominance of the *volkstem*. This meant in practice that the *volk* was sovereign, it would not bind itself to legislative immutability, nor would it surrender its sovereignty to a *Volksraad* or to a Constitution. In the United States Constitution, thus ran the argument, the people gave up their sovereignty in favour of a carefully crafted Constitution. This the *Boers* would never do.

The *judicial authority* resided in landdrosts, *heemraden* (assessors) and jurymen, assisted by registrars, court messengers and, when required, by commandants and field-cornets. The landdrosts and *heemraden* were elected by majority vote of the inhabitants of the four regions. They had to be members of the Transvaal Dutch Reformed Church, at least twenty five years old and not be engaged in commercial activity. For each region a hierarchy of courts existed. A right of appeal was provided for. There was no “high court” or “supreme court”, therefore. The appointments were made by the *Volksraad* upon the recommendation of the State President. All entrusted with the exercise of judicial authority were “wholly free and independent”.

Elections took place at the Potchefstroom meeting for all of the office bearers. MW Pretorius was duly elected State President.<sup>114</sup>

Within a week things began to unravel. Bowing to pressure from Schoeman and his supporters (Schoeman, deeply distrustful of Pretorius, had his sights set on the Presidency) the *Volksraad* revisited its earlier approval of the *Nieuwe Wetten* and now declared that it would only be implemented after a three-month period during which the public were to become acquainted with its provisions. Another election of State President and Commandant-General would then take place. Indecision ran rampant.

This ushered in a period of intrigue and plotting between Pretorius supporters, Schoeman supporters and the people from Lydenburg (with Bührmann in the thick of things), who felt themselves wholly excluded from the constitutional debate as a result of the events at Pienaar’s River some months earlier. When the *Volksraad* met at Rustenburg in March 1856 the tensions between the factions had not yet

112 See Bryce 1901: 449-455, esp 453-454. On the distinction between “rigid” and “flexible” constitutions see 150-159.

113 See Wypkema 1939: 342, 344.

114 See arts 9 & 47-48 of the minutes published in *Volksraadsnotule III* at 107-108 & 112.



dissipated. Once again the *Volksraad* proved feckless.<sup>115</sup> The sentences imposed on the Lydenburg burgers by the special court in September 1855 constituted an absolute bar to any constitutional progress being made. No one was able to break the deadlock, despite earnest attempts by the three commandants-general to mediate the differences.

## 2 3 3 2 The Pretorius/Schoeman Constitution of 1856

Pretorius and Schoeman met a month later to try to regenerate a system of government that had gone into terminal decline. They called for a meeting of the *Volksraad* in the new town of Pretoria in May to produce a second draft of a set of fundamental laws afresh, based on certain principles that they proposed.

The following were among the principles they agreed upon:<sup>116</sup> (1) The *Volksraad* was the *hoogste gezag* in the Republic and functioned only as a legislative body. (2) The *volk* would be given a three-month period in which to comment on a proposed law before it was implemented. (3) *Volksraad* members would be elected by national majority vote and not regional majority vote. (4) Judicial authority would vest in landdrosts, *heemraden* and jurymen and they would exercise their authority in accordance with their judgement and conscience. (5) There should be an executive authority (a *Staatsraad*) to implement the decisions of the *Volksraad* and serve as the government when the *Volksraad* was not in session. This State Council proposed laws to the *Volksraad* and, among other functions, made temporary appointments to be ratified by the *Volksraad*. In cases of danger or of emergency the State Council took provisional decisions, subject to its accountability to the *Volksraad*.

The *Volksraad* duly met in Pretoria in May.<sup>117</sup> One of its members was Paul Kruger, now clearly at the heart of the constitutional process. Jacobus Stuart's services were not required and in fact he would play no further part in the constitutional deliberations. Using the 1855 Stuart draft as their discussion document and guided by the Pretorius/Schoeman principles, they produced a draft (which they simply called a *Wet* – a Law) within four days. It was a much truncated version of the Stuart draft and included some important revisions:

The *Volksraad* would comprise twelve members, no more no less, appointed by the whole *volk* for a renewable three-year period (not two years). It was the *hoogste gezag des lands* and also the legislative authority. Its powers were, among others, to make laws, issue directives and to regulate and generally to create such institutions and state such requirements as the Republic needed.

A subtle shift is discernible here. The chapter on the *Volksraad* now follows directly after the General Provisions chapter and not after the chapter on the executive authority as in the 1855 draft. The *Volksraad* would have a fixed number

115 The minutes of the Rustenburg meeting are published in *Volksraadsnotule III* at 123-133.

116 See documents published in *Volksraadsnotule III* at 433-434 & 434-435.

117 The minutes are published in *Volksraadsnotule III* at 134-144.

of seats (twelve, not “a minimum of twelve” or twenty four or “up to seventy two”) and its members appointed for three years, rather than annually or biennially. Reference in the introductory “General Provisions” chapter of the 1855 draft to their “representative or mandatory” role was now replaced by a statement that this small group of men with extended periods of membership would be the highest authority in the state and also have legislative authority.

In terms of this draft, then, the *Volksraad* would no longer be the handmaiden of the *volk*, in a system where continued individual membership was dependent on the ability of a member to faithfully represent the ebb and flow of vacillating popular sentiment. The immediacy of the influence the *volk* had thus far been able to exercise over the *Volksraad* members and their decision-making had now been replaced by an arm’s length mandate to govern. The members would now be respected burghers chosen to do a job, which was to govern the country on behalf of the *volk* and to make laws (subject to an opportunity granted to the *volk* for a three-month period to comment on proposed legislation).

If the question, *Wie heeft de Koningstem?* were to have been posed to this commission council by one such as Adriaan Stander, the answer would probably have been that the *Volksraad*, and no longer the *volk*, was the King’s voice.

Executive authority resided in a *Staats Generaal* (State General), not in a State President. The latter was the *hoogste ambtenaar* (highest official, not the highest authority), to whom all other officials (except judicial officers) were subservient. He was elected by the *volk* for a five-year period and was expected to report annually to the *Volksraad* on the manner in which he executed his functions. Other members of the State General was a State Secretary appointed by the *Volksraad*, the landdrost of Pretoria (the official seat of government) and two “unofficial” members elected by the *Volksraad*.

The expectation that this exercise would bear fruit was misplaced.<sup>118</sup> Conditions in the country at that time were miserable. Drought and disease was again pervasive, and the continued and widespread hostility of the African tribes demanded concerted military campaigns and the enlistment of burghers increasingly unwilling to go on extended commandos. Schoeman, maverick that he was, distanced himself from the Pretoria deliberations. He informed Pretorius that he rejected the proposed new Law, had always rejected any Pretorius-inspired constitutional efforts and would continue to do so. The Lydenburgers, being absent from the deliberations, attached no legitimacy to the Pretoria efforts. In fact, Lydenburg had exhausted its patience with the constant usurpation by the Potchefstroom and Rustenburg/Magaliesberg regions of state governance responsibilities that rightfully belonged to a *Volksraad* of which the Lydenburgers deemed themselves to be the legitimate curators. Instigated

118 On the following see, in particular, Wichmann 1941: 166-175; Ferreira 1978: 74-76.

by Bührmann, they declared themselves independent from the rest of the Republic.<sup>119</sup> Schoeman applauded them from afar.

Paul Kruger, then in the prime of life, would have been a witness to and a participant in these interminable displays of disputation and contrariness and well knew the damage to progress and good government they caused. Small wonder, then, when he was State President of the Republic many years later, that he would insist upon the necessity for consensus-seeking, consultation and the dissolution of opposition among the *volk*. He did this to the point where his demands that no opposition should exist to a proposed measure became as stultifying as was the incessant bickering of the 1850s.

### 2 3 3 3 The Pretorius Constitution of January 1857

MW Pretorius now began to exhibit some statesmanship. He called for a meeting of the *volk* in December 1856 in Potchefstroom. The aim was to discuss a constitution for the Republic at which all were present, Lydenburg included. Lydenburg refused to participate. It would be a rubber-stamp exercise and Pretorius would become an *eenhoofdig bestierder* (autocrat) – they clearly hadn’t studied the Pretoria proposals very carefully. Schoeman rejected the whole exercise. Nevertheless – and to his credit – Pretorius persisted. A twenty-three-person committee that included MW Pretorius was appointed with the brief “to increase and to improve the Laws of this country where this is deemed necessary”. Paul Kruger was not a member.

They completed their work on 5 January 1857. The introduction to the document stated that additional reasons for the drafting of the Laws were the need to state authoritatively what the country’s *maatschappelyke beginselen* (societal principles) were and to strengthen the bond of unity between the burghers. In a postscript they refer for the first time in an official document to their labours as a “*Constitutie*”. This was almost an afterthought, as the document itself had no heading. Clearly what started off as a compendium or codification of laws, underpinned by general societal principles, came latterly to be called a constitution. There was then no thought that it was a *constitutive* and immutable document, which is the status Chief Justice John Kotzé sought to attach to it forty years later.

The committee used as its reference document Stuart’s 1855 *Nieuwe Wetten* (the Stuart Constitution of 1855), both in form and in substance, not the 1856 Pretorius/Schoeman revision. In particular, and importantly, in the draft *Constitutie* the committee retained in all material respects the fundamental provisions of the *Algemeene Bepalingen* of the *Nieuwe Wetten*. It used a fine tooth comb on the *Nieuwe Wetten*, refining, re-formulating, amending, inserting, to produce an improved version

119 On the Lydenburg declaration of independence see, *inter alia*, Wichmann 1941: 166-175; Swart 1963: 63-65; and Ferreira 1978: 76-78.

of the earlier draft.<sup>120</sup> Pertinent were the following provisions: (1) The chief executive officer was to be called a “President” and his council an “Executive Authority”. His powers and functions remained largely the same as provided for in the 1855 *Nieuwe Wetten*, which is to say they were extensive, but subject to *Volksraad* accountability. (2) Provisions in respect of the *Volksraad* remained unchanged from the *Nieuwe Wetten*. Its members (a minimum of twelve) were “representatives or mandatories” of the *volk*, elected for a period of two years to make laws, the drafts of which were first to be published for public comment – and the officials punished who neglected their duties to properly disseminate the draft laws to the *volk*. None of the revisions suggested in the 1856 Pretoria draft were incorporated: No reference to the *Volksraad* as the *hoogste gezag*; no detailed description of its functions other than law-making; no three-year term; no ultimate appeal authority in judicial affairs. The King’s voice once more belonged to the *volk*, not the *Volksraad*. (3) Judicial authority remained with landdrosts, *heemraden* and jurymen. They were to exercise their authority to apply “the prescribed laws” (this phrase being a new addition to the *Nieuwe Wetten* provisions) in accordance with their judgement and conscience. A *hoog-geregtshof* (high court) was introduced and its decisions were deemed to be “final and decisive”. The guarantee of freedom and independence of judicial officers was retained. Typical of the unstructured and inelegant approach adopted by the committee, reference is made to a *Staats Procureur* (State Attorney) but the office and its functions were nowhere defined. Upon the recommendation of Christoffel Brand a young Hollander, Proes, was appointed State Attorney in May 1859, having acted for some months previously.<sup>121</sup> Its beginnings were inauspicious and the office of State Attorney became a demanding and thankless, poorly-paid position. In the first decade of its existence there were no less than ten State Attorneys.

The *volk* present at Potchefstroom duly approved the *Constitutie*. They also appointed MW Pretorius as President and Schoeman as Commandant-General (an appointment he rejected out of hand) and inaugurated Pretorius in ceremonial fashion, hoisting the newly-designed national flag. They continued to treat Lydenburg as part of the Republic.

Laudable though Pretorius’s efforts were to try to bring order, structure and finality to a constitution-making process that had dragged on interminably, he should have known that men like Schoeman and Bührmann and their supporters would never accept the indecent haste and regional bias by means of which matters had been concluded. They didn’t. The *Boer* psyche of the time lacked the elevated capacity (or the will) for seeking common ground, for give and take and for compromise, for discrimination between *persona* and *res*, between the man and the office.

120 The *Constitutie*, as published in the Government Gazette of 16 October 1857, is published in *Volksraadsnotule III* at 439-471.

121 See communication from Pretorius to the *Volksraad*, published in *Volksraadsnotule IV* at 242.

The sincere, if crude, attempts in the Pretorius Constitution to create a clear yet functional separation of the powers of state, to achieve a balance between the competing claims for the *koningstem* – the sovereign voice – made by the People, the People’s Assembly and the Chief Executive, were unappreciated or underappreciated. If the *Volksraad* was not, demonstrably and unequivocally, the *hoogste gezag*, the constitution gave free reign both to *eenhoofdig bestier* and to populist sentiment expressed in a regionally-biased majority view. Thus argued Bührmann on behalf of Lydenburg. If Pretorius was the driving force behind the committee’s work at Potchefstroom, then he was entrenching a dictatorship for himself. He was behaving, like Louis XIV, as if *l’etat, c’est moi*. Thus argued Schoeman on behalf of Soutpansberg. And MW Pretorius lacked his father’s ability for decisive and critical engagement on the essential details.

Emotions reached fever pitch in the following months and left little room for common sense. Schoeman denounced the entire *Constitutie*-drafting affair as an exercise in the glorification of Pretorius. He was not averse to war talk, which led to the Soutpansberg being blockaded and to Paul Kruger arguing that arms should be taken up against the “rebel” Schoeman.<sup>122</sup> Pretorius, in those times of strife, urged on by his supporters, saw fit to try to insinuate himself into Free State affairs and to force the thorny issue of unification. Predictably, his clumsy attempts were rejected and his reputation suffered.<sup>123</sup> Bührmann, combative as ever and campaigning on behalf of Schoeman (Lydenburg being nominally independent) in the Suikerbosrand (Heidelberg) district against Pretorius and the *Constitutie*, was arrested for stirring up discontent among the gullible burghers. When informed of this, Schoeman challenged Pretorius to a duel: Whoever succumbs, he exclaimed, will have suffered God’s justice and will have been shown up as the perpetrator of injustice. Pretorius, absent in Natal at the time, did not respond.<sup>124</sup>

This theatre of the absurd continued without interruption.<sup>125</sup> The Lydenburg and Soutpansberg factions sought and obtained the assistance of Free State President Boshoff to diminish the power of Pretorius, the “arrogant autocrat”. Things got so out of hand that two groups of burghers, pro- and anti-Pretorius (Paul Kruger being in the thick of things as a Pretorius supporter), confronted each other on opposite sides of the Renoster River just south of the Vaal. Hostilities were called off by the burghers themselves when they realised that no one knew who had started it all and what it was they were fighting for. Peace was declared. All were relieved, except Schoeman, who had been spoiling for a fight.

122 Schoeman’s (and his supporters’) reaction to the *Constitutie* and subsequent behaviour is described in detail by Ferreira 1978: 78-82; see, too, Wichmann 1941: 176-177.

123 On Pretorius’s foray into Free State affairs see, in particular, Van Jaarsveld 1951: 143-168; see, also, Wichmann 1941: 177-179; Ferreira 1978: 82-89.

124 On these events see Wichmann 1941: 179; Swart 1963: 66-67; Ferreira 1978: 85-89.

125 On subsequent events see, in particular, Van Jaarsveld 1978: 169-208; see, too, Ferreira 1978: 89-113.

After much to-ing and fro-ing and flexing of muscles between the representatives of Pretorius and Schoeman the two parties eventually reached agreement on 1 July 1857 that their grievances would be submitted to a judicial tribunal (comprising six from each side) for arbitration. At this time a petition to Pretorius and his executive from disgruntled burghers pointedly reminded them that in a Republic the collective of the burghers were *koning* and owners of the land, not individuals nursing grievances.<sup>126</sup>

### 2 3 3 4 The ratified Pretorius Constitution of September 1857

A semblance of calm having been restored, the *Volksraad* met at Rustenburg in early September 1857, without, though, any representation from Lydenburg and Soutpansberg.<sup>127</sup> It considered the *Constitutie*, approved it and directed that the entire text be published in the *Government Gazette* for the general approval of the public, which was duly done in October.<sup>128</sup> It ratified the appointments of the President and the other members of the Executive Council made in Potchefstroom in January. The *Volksraad* also demonstrated at this meeting the flexible attitude they and the *volk* adopted towards the *Constitutie*. This was namely to treat it as a law like any other, susceptible to amendment, even to being amended the very next day after it had been solemnly approved (Pretorius having proposed a number of amendments). Urged by Pretorius, the *Volksraad* was also at pains to try to make peace with Soutpansberg and Lydenburg. They were invited to a gathering of the *volk* at Rustenburg in November to resolve all grievances and to promote unity. A deputation (among whom was Paul Kruger) would visit these regions to urge attendance upon them.

Despite public statements that they would never submit to Pretorius's dominion, and despite their nominal "independence", a Lydenburg delegation led by Bührmann went to Potchefstroom to meet with Pretorius and his executive. Schoeman, meanwhile, was preparing his charge-sheet against Pretorius for presentation to the agreed-upon special tribunal, and stockpiling arms and ammunition.

The meeting between the Lydenburg delegation and Pretorius proved cordial and fruitful. Although the eventual unification of Lydenburg and the Republic only happened some thirty months later, it facilitated the smoothing-over of differences in political and religious affairs. An important constitutional principle was also discussed and agreement on it reached. Lydenburg had namely objected to the perception created by Pretorius and his supporters that the King's voice (the *koningstem*) resided with

126 See Wypkema 1939: 378.

127 The minutes are published in *Volksraadsnotule III* at 150-156, extracted from the *Government Gazette* of 25 Sep 1857.

128 The publication of a *Government Gazette* had been approved by the *Volksraad* in Sep 1857: see art 22 of the minutes of the Sep 1857 *Volksraad* meeting published in *Volksraadsnotule III* at 155.

the majority view of the populace. Of course, Pretorius held sway over two large, populous and (compared to the others) relatively prosperous regions of the Republic (Potchefstroom and Rustenburg as well as parts of the Marico district). Therefore, whenever the *Volksraad* met in these regions (which was increasingly often) the majority of the *volk* present would invariably support Pretorius's views. The parties agreed, in language redolent of the petition of the five Lydenburg field-cornets in 1854, that *wet en regt in vervolg alleen regeeren zoude* (law and justice alone would govern in future). What they meant was that ultimate authority for governing the country would reside in that body ultimately responsible for law and justice, namely the *Volksraad* comprising elected representatives of the people. This body would not be dictated to by a majority vote but would take into account all views expressed and govern as dictated by law and justice. Classic "*Volksraad as hoogste gezag*" doctrine, therefore.<sup>129</sup>

### 2 3 4 A *Grondwet* (Constitution) for the Republic is finally approved

The *volk* eventually gathered at Rustenburg in mid-January 1858. The main attraction was the showdown between Schoeman and Pretorius.<sup>130</sup> Schoeman arrived with eighty armed men and Paul Kruger, on Pretorius's behalf, stood ready to resist. The judicial tribunal was constituted and proceedings began before an excitable public on 25 January 1858.

It was a sorry affair. It dragged on and on, progress impeded by trivialities and one-upmanship. In due course, on 1 February, a whole week later, the court, having convinced themselves that whatever decision they made, whether in favour of Pretorius or of Schoeman, would be rejected by one portion of the public, passed no judgement and disbanded.

Confronted with such spinelessness Pretorius and Schoeman, commendably, took matters into their own hands. On the next day their respective military councils met, twenty-five representing Pretorius (Paul Kruger's name was listed second, indicating his prominence) and fourteen representing Schoeman.<sup>131</sup> They decided that each party would nominate six members, to be approved by the general public, to form a committee with Pretorius and Schoeman. The committee's mandate was *uit alle bestaande landswetten eene Algemeene landswet te zullen maken* (to draft a General National Law out of all the existing national laws). Actions and statements made by one party against the other would be retracted and deemed never to have taken place or made (this included the abortive judicial process of late January).

Important instructions were given to the commission council: In the *Algemeene landswet* the *Volksraad* would be acknowledged as the *hoogste gezag* and no laws

<sup>129</sup> See Wichmann 1941: 217-218.

<sup>130</sup> *Idem* at 218-220; and see, in particular, Ferreira 1978: 114-118.

<sup>131</sup> The minutes of the meeting are published in *Volksraadsnotule III* at 493-496.

would be valid unless approved by the *Volksraad*, but only after consultation with the public. The President would, after the *landswet* had been approved, exercise his duties in accordance with approved instructions. In the *Algemeene landswet* the Commandant-General would be acknowledged as a member (full voting member) of the Executive Council (the subservient role of the Commandant-General had been a major sticking point for Schoeman); only the *Volksraad* could dismiss him from office; and in time of war he took instruction from the Executive Council, except where martial law was declared. In effect, therefore, the Commandant-General would *not* be subservient to the President (Pretorius). Described by a late nineteenth-century commentator as an *eenigsins boertige* (somewhat crude) solution<sup>132</sup> to a problem of constitutional principle, it did pave the way for conciliation between Pretorius and Schoeman.

Once the committee had completed its task (it was to begin on the next day and continue until the work had been completed) the new law would be implemented immediately. It would also, though, be published for the public's information and comment and be presented to the *Volksraad* for approval (even though it had by then already been approved and implemented). Such a *Volksraad* would comprise twelve members appointed by Pretorius and twelve by Schoeman.

The decision of the combined military councils was presented to the public that same afternoon and the drafting committee constituted. It met from 3 to 13 February in the office of the landdrost of Rustenburg. Among the members counted Paul Kruger, Hendrik Bührmann and Cornelis Potgieter (the latter two representing Schoeman, not the "independent" Lydenburg). William Robinson was chosen as chairman. He was born on a British Settler ship and had thrown in his lot with the *Boers*, accompanying them on the Great Trek and becoming a close friend of Paul Kruger.<sup>133</sup>

The committee used the Pretorius Constitution of September 1857 as their source document (in turn based on the Stuart Constitution of 1855).<sup>134</sup> They gave it a name: *Grondwet der Zuid-Afrikaansche Republiek* (Constitution of the South African Republic). For days on end they waded through the *Constitutie*, revising, adjusting, removing, re-arranging and inserting the clauses, those called for by the combined military councils and otherwise those required in the spirit of compromise on matters of principle both big and small. Despite calling it a *Grondwet* – a fundamental law – they did not make provision for its amendment or revision by special procedure, as was the case with the Free State Constitution. For them it was a law like any other,

132 See Ferreira 1978: 121, quoting Frans Engelenburg, who was editor of the influential pro-government newspaper *De Volkstem* in the 1880s and 1890s.

133 See *Dictionary of SA Biography vol IV* sv "Robinson, William" at 541-542.

134 The minutes of the meeting of the drafting committee are published in *Volksraadsnotule III* (n 72) at 159-163.



a very comprehensive and important law, but a law conceptually no higher than any law.

They had decided to achieve consensus on all of their deliberations and this they managed to do. In the prevailing atmosphere this was no mean achievement. A four-man sub-committee was appointed to present the 232-article *Grondwet* to the *Volksraad*. One of them was Paul Kruger. There can be little doubt that Kruger had been at the coalface of the constitutional deliberations since 1855, was privy to and participant in all of the convoluted arguments and disputes and that he played a prominent role in the deliberations.

The *Volksraad* duly met on 16 February 1858.<sup>135</sup> The *Grondwet* was approved by the *Volksraad* – subject only to the right of the public to lodge a *wettig bezwaar* (lawful objection) to any of the clauses. MW Pretorius was duly sworn in as “President of the Executive Council of the South African Republic” and Stephanus Schoeman as “Commandant-General and member of the Executive Council”. Pretorius was then ceremoniously handed a copy of the *Grondwet*, the national flag and the national coat of arms, to the accompaniment of a twenty one cannon-gun salute.

The *Zuid-Afrikaansche Republiek* finally had a *Grondwet*, six long years after the idea had first been mooted.<sup>136</sup>

Schoeman had had his way. The role and function of the Commandant-General was effectively divorced from the (sole) authority of the President. The nomenclature used for the two senior positions was instructive: Pretorius was President, not of the Republic, but of the Executive Council of the Republic (a servant of the people, therefore, not a Napoleon); Schoeman was Commandant-General *and also* member of the Executive Council, his seat at the high table assured.

Bührmann also had his way. In the General Provisions section the *Volksraad*'s supreme authority was entrenched. The all-important section 12 – source of so much later friction – provided as follows (translated from the original Dutch):

The people assigns [*geeft ... in handen*] legislative authority to a *Volksraad*, the highest authority in the land, comprising representatives or mandatories of the people, elected by enfranchised citizens; however, only to the extent that the people will be given a period of three months to provide its comments to the *Volksraad* on a proposed law should it wish to do so; except those laws which brook no delay.

It is no exemplar of drafting elegance. The article was complemented by a number of articles in the chapter on the *Volksraad*, entitled, instructively, *Over den Volksraad, het hoogste Gezag, of de Wetgewende Magt* (On the *Volksraad*, the Highest Authority, or the Legislative Power). This chapter was now placed *before* the chapter on the President and the executive authority, no doubt to confirm its precedence over the

135 The minutes of the meeting are published in *Volksraadsnotule III* at 163-169.

136 The *Grondwet* is published in *Volksraadsnotule III* at 496-524. See, too, Jeppe & Kotzé 1887: 35-68; Eybers 1918: 363-409 (with an accompanying English translation).

executive authority. Article 29 stated that the *Volksraad* was the *hoogste gezag des lands, en de Wetgewende magt* (the highest authority in the land and the legislative power). Clearly, the intention was to draw a distinction between its *legislative* authority and its *overall* authority in governing the country. The *Volksraad* would comprise “at least twelve members” (to accommodate population growth and the demand for ongoing fully representative government); and members would be appointed for two years, to afford the *volk* an opportunity to regularly choose their representation in government. Rules were retained that made sure that draft laws were properly published for public comment for the obligatory three months; fines were retained for those officials found to be negligent in this regard; the President and the Executive Council were directed to make the judgement call whether the three-month notice period could be dispensed with in matters that brooked no delay; and it still remained the prerogative of the *Volksraad* chairman to allow or disallow the discussion of the law.

The events leading up to the final approval of the *Grondwet* were conflict-ridden and hostile to the point where actual armed violence was a real possibility. The anxious deliberations on the final wording of the *Grondwet* were conducted by the most influential men in the Republic (Pretorius, Schoeman and Bührmann) and their trusted advisers sitting around a table and striving for – and achieving – consensus. When reflecting on these circumstances and the actual formulations contained in the final product the following conclusions seem apparent: The King’s voice (the *koningstem*) belonged to the people (the *volk*), not to the *Volksraad* and not to an autocratic President. William Robinson, chairperson of the drafting committee, said as much in early March 1858: “*van Art. 1 tot Art. 28*” [encompassing the General Provisions chapter and the second chapter on the Protection and Defence of Church and State] *word duidelik vastgesteld de koningstem van het Volk*” (from arts 1-28 the King’s voice of the people is clearly determined).<sup>137</sup> The *volk* elected the President (for a five-year period) and the Commandant-General (for an indefinite period) and the *volk* approved, by means of an electoral process, the appointment of landdrosts from one or two persons proposed to it by the Executive Council. The President was constrained to comply with the wishes of the *volk* as far as possible in respect of the advancement and welfare of Church and State.

The *Volksraad* was not only the legislative authority, it was the supreme authority in the state, exercising an authority that superseded that of the President and of the judicial authority. The President was the first and highest official of the state, who proposed laws, but did not make them. The judicial authority (landdrosts, *heemraden* and jury men) was, to be sure, completely free and independent, and judicial officers were to exercise that authority in accordance with their judgement and conscience. But, importantly, they were to do so *in the application of the landswetten* (national

137 Quoted by Wypkema 1939: 377.

laws) approved by the *Volksraad*. The phrase, “in the application of the national laws”, served as further confirmation that the judicial authority, though free and independent, was still obliged to apply the laws made by the *Volksraad* and therefore remained subject to the *Volksraad*’s supreme authority. They applied the law, they did not make the law.

The *Volksraad* exercised that authority because the *volk* willed it to be so. Through a variety of mechanisms the *volk* still controlled the manner in which the members of the *Volksraad* exercised the mandate the *volk* had given them. It was important that the *Volksraad* exercised the highest authority in the state, because it could and did happen that no clarity existed as to what the views of the *volk* were when they exercised their King’s voice. Proper means to accurately gauge the considered temper of the *volk* was absent and would remain absent. In practice the populist majority sentiment expressed at people’s assemblies in the region where the *Volksraad* met became the default mechanism for the *volk* to have its voice heard. But in the unsettled regionalism of the times the *volk*’s voice became not so much a sovereign voice as the voice of a dominant region exercising sway over the other regions. It was then up to the *Volksraad*, comprising regularly-elected mandatories of the *volk*, to employ their knowledge, wisdom and experience, to benefit from considered debate and judicious expressions of opinion, in order to take resolutions, make laws and otherwise govern the country in accordance with their understanding of *volk*-inspired *wet en regt* (law and justice). The *volk* had an opportunity every two years to replace its representatives if they did not govern lawfully and justly. They also had an opportunity with every law that was proposed to express their opinion on it.

On 18 February 1858, therefore, six long years after Andries Pretorius had sought the advice of Andries Stockenström on how to go about writing a constitution for the Transvaal, a *Grondwet* approved by all finally came into being. It germinated in the crucible of *Boer* conflict, ignorance, prejudice, passion, stubbornness, strength, persistence and idealism. Its very authenticity, a demonstrable product of the wishes, hopes, passions and demands of the people for whom it was written, was both its strength and its weakness. Its strength, because as an expression of the *volkstem*, the will of the people, it retained a legitimacy that became ingrained in the psyche of the *Boers*. Its weakness, because it was very much a creature of its times. Attempts in later years to retain its essential features and to shun evolutionary change when, by the late 1880s, the society for which it had been crafted had irrevocably changed, became the stuff of artifice. The *Grondwet* was regularly amended largely to reinforce a style of government that belonged not to the gold-powered and cosmopolitan 1890s but to the ox-paced agrarian world of the 1850s. This strength of and this weakness in the *Grondwet* fundamentally influenced the constitutional debate between President Paul Kruger and Chief Justice John Kotzé in the 1890s and led directly to the latter’s dismissal. It permeated the futility of Robert Brown’s quest to

share in the wealth of the goldfields. It even contributed to the eventual demise of the *volk* as they succumbed to their own obstinacy and to British military supremacy in the war of 1899-1902.

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# JUDICIAL ADMINISTRATION BEYOND THE ORANGE RIVER FROM 1839 TO 1843: THE FIRST MAGISTRATES AND THEIR DUTIES

Liezl Wildenboer\*

## ABSTRACT

In the aftermath of the Great Trek, the emigrant farmers settled in the areas that would later become known as Natal, the *Zuid-Afrikaansche Republiek* and the Orange Free State. From October 1840 until August 1843 these areas were administered as one territory and were governed by the Natal *Volksraad* seated at Pietermaritzburg. As early as 1839 the Natal *Volksraad* demarcated districts and appointed magistrates for each district. These districts were Pietermaritzburg, Port Natal, Weenen, Potchefstroom and Winburg. During this early period, the magistrates were tasked with duties beyond their usual judicial responsibilities. This contribution takes a closer look at the office of the magistrate beyond the Orange River during the period from 1839 to 1843 by looking first at the individuals who were appointed to these positions, and secondly by examining some of their duties as are evident from the minutes of the Natal *Volksraad*.

**Keywords:** Early administration of justice; Natal; *Zuid-Afrikaansche Republiek*; Orange Free State; magistrate; Pietermaritzburg; Port Natal; Weenen; Potchefstroom; Schoonspruit; Winburg; judicial duties; non-judicial duties; Orphan Chamber; harbour master

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## 1 The magistrates' courts until 1843

The administration of justice in South Africa beyond the Orange River during the period from 1838 to 1843 has been discussed elsewhere.<sup>1</sup> That contribution looked at the administration of justice in Natal and in the territory west of the Drakensberg during the years after the arrival of the *Voortrekkers* until the adjunct council at Potchefstroom declared itself independent from Natal in August 1843 following the British annexation of Natal.<sup>2</sup> Since no law reports for this period exist, not much is known about the administration of justice at the time. What little we do know is gleaned from surviving regulatory documents, minutes of the *Volksraad* and other related documents of that time. These documents give some indication of the basic judicial structures and the jurisdiction of the courts during that period.

Nevertheless, as any lawyer knows, the devil is in the details and the administration of justice entails specific processes and duties. It is therefore useful to take a closer look at the duties of the most important official responsible for the administration of justice at that time, the magistrate. This contribution therefore briefly discusses the office of the magistrate during those early years. First, the various magisterial districts established in Natal and the territory west of the Drakensberg are identified. This includes an inventory of the individuals that were appointed to these offices between 1838 and August 1843. Secondly, an attempt is then made to give an indication of the various duties of the magistrates as evidenced by their instructions received from and their correspondence with the *Volksraad*.

## 2 The magistrates' courts and the first magistrates

### 2.1 Pietermaritzburg

Pietermaritzburg was viewed as the capital of Natal. It was the main seat of government and most of the *Volksraad* meetings were held there.<sup>3</sup>

On 29 June 1839 PR Nel was provisionally appointed as the first magistrate for Pietermaritzburg.<sup>4</sup> Six months later he was succeeded by JP Zietsman who was

1 Wildenboer 2016: 173-190.

2 The areas east and west of the Drakensberg were theoretically governed as one territory from 16 Oct 1840 until the Potchefstroom adjunct council's declaration of independence. For more on the adjunct council and the British annexation of Natal, see Wildenboer 2016: 174 nn 1 & 2 and the sources cited there.

3 According to the contemporary account by Erasmus Smit, Pietermaritzburg was established on 23 Oct 1838 and was named after Piet Retief and Gerhard Maritz – see Preller 1988: 166, entry of Tues 23 Oct 1838.

4 For the appointment of Nel, see *Volksraadsnotule Natal*: 12-14, art 12 of the minutes of the *Volksraad* of 29 Jun 1839. See, also, Preller 1920: 275-291: "Verhaal van Dirk Uijls", esp at 290 where it is noted that Philip Nel was the first magistrate of Maritzburg, and that he was succeeded by "Sietsema" (Zietsman); and Preller 1938: 111-182: "Herinneringe van JH Hattingh Sr" at 135.

appointed for a period of one year.<sup>5</sup> Zietsman swore an oath in his official capacity on 3 January 1840,<sup>6</sup> but applied for resignation five months later in May 1840<sup>7</sup> after complaints of partiality were received. The complaints concerned the case of one Lingenfelder who had allegedly flouted the laws regarding liquor licences and had then not been prosecuted by Zietsman.<sup>8</sup> In his defence, Zietsman pointed out that the matter fell outside his jurisdiction as the events had occurred during a military expedition<sup>9</sup> and should therefore have been addressed by the military commander. It is assumed that the matter was settled amicably and unofficially as the matter was not raised again. In any event, Zietsman's resignation was not seriously considered and was never tabled at the *Volksraad*; he remained in his position as magistrate until January 1841<sup>10</sup> and was officially thanked by the *Volksraad* for his work during his term as magistrate.<sup>11</sup>

In February 1841 JN Boshoff<sup>12</sup> – who would later be elected as president of the Orange Free State in 1855 – was appointed as magistrate of Pietermaritzburg.<sup>13</sup> He took his oath as magistrate on 1 February 1841.<sup>14</sup> Although he was originally appointed for a period of six months, his contract was later renewed.<sup>15</sup> He remained in this position until his resignation in August 1842<sup>16</sup> and was also thanked for his term of service.<sup>17</sup>

JB Rudolph was appointed as magistrate from 1 November 1842,<sup>18</sup> but he did not remain in office for long. On 24 October 1842 – even before his term officially started

5 *Volksraadsnotule Natal*: 24-25, art 3 of the minutes of the *Volksraad* of Dec 1839 (specific date unknown).

6 *Volksraadsnotule Natal*: 26-28, art 1 of the minutes of the *Volksraad* of 3 Jan 1840.

7 For Zietsman's application for resignation, see his letter dated 9 May 1840 published in *Volksraadsnotule Natal*: 346, app 22/1840.

8 For a discussion of the allegations against Zietsman, see *Volksraadsnotule Natal*: 31-32, art 5 of the minutes of the *Volksraad* of 4 Mar 1840; and *Volksraadsnotule Natal*: 32-34, art 1 of the minutes of the *Volksraad* of 5 Mar 1840.

9 For an account of the events during the military expedition, see *Volksraadsnotule Natal*: 324-339, app 11/1840, esp at 331 and 335-336.

10 Zietsman was allowed to resign only in Nov 1840 but he was required to serve his full term until Jan 1841: see *Volksraadsnotule Natal*: 68-70, art 10 of the minutes of the *Volksraad* of 17 Nov 1840.

11 *Volksraadsnotule Natal*: 81-85, art 1 of the minutes of the *Volksraad* of 2 Feb 1841.

12 For more on Boshoff, see Wildenboer 2016: 175 n 6.

13 *Volksraadsnotule Natal*: 76-77, art 6(a) of the minutes of the *Volksraad* of 19 Jan 1841. Boshoff would receive £50 remuneration and he was required to stay on for three months if he resigned.

14 *Volksraadsnotule Natal*: 80-81, art 2 of the minutes of the *Volksraad* of 1 Feb 1841.

15 In Aug 1841 his contract was renewed for an unspecified period of time – see *Volksraadsnotule Natal*: 109-110, art 9 of the minutes of the *Volksraad* of 4 Aug 1841.

16 *Volksraadsnotule Natal*: 157-159, art 11 of the minutes of the *Volksraad* of 8-10 Aug 1842. He was required to remain in office for another three months.

17 *Volksraadsnotule Natal*: 160-165, art 39 of the minutes of the *Volksraad* of 4-6 Oct 1842.

18 *Ibid.*



– he called a special meeting of a commission of the *Volksraad* and gave notice that he had to undertake an urgent and long overdue trip to the interior. Unfortunately the existing evidence does not give the reasons for this trip. He requested that someone else be appointed to take over his duties in his absence. However, the commission was not sympathetic and instructed Rudolph to postpone his trip until January the next year when he could motivate his absence in front of the full sitting of the *Volksraad*. They also stipulated that, in the event that the trip became absolutely unavoidable, Rudolph had to give the *Volksraad* fourteen days' notice to enable them to appoint the eldest member of the *heemraden* in his absence.<sup>19</sup> Rudolph probably could not postpone his trip further and eventually simply resigned in early January 1843, but had to remain in office for another three months.<sup>20</sup>

In April 1843 former magistrate Zietsman was re-appointed, this time for a term of one year.<sup>21</sup> He would receive £100 for his services, with the promise of further remuneration if government finances allowed.

## 2 2 Port Natal

There had been a British settlement at Congella as early as 1824.<sup>22</sup> From June 1839 the *Boers* who reached Port Natal settled at three different locations near the rivers respectively known as the “Congela”, the “Umgeni” and the “Omlaas”. The name “Port Natal” was the name of the district<sup>23</sup> encompassing the entire bay of Natal (today known as Durban) and the surrounding territory. “Congella” referred to the settlement within the district of Port Natal. The two names were, however, sometimes used interchangeably.<sup>24</sup> In one early document the magistrate of Port Natal was also

19 *Volksraadsnotule Natal*: 165, art 1 of the minutes of the meeting of the commission of the *Volksraad* upon request of JB Rudolph on 24 Oct 1842.

20 *Volksraadsnotule Natal*: 167-170, art 2 of the minutes of the *Volksraad* of 2-4 Jan 1843. He was required to remain in office for three months.

21 *Volksraadsnotule Natal*: 173-177, art 1 of the minutes of the *Volksraad* of 3-6 Apr 1843.

22 For the early British settlement at Port Natal, see Theal 1908: 295ff. A small group of people under the leadership of FG Farewell settled at Port Natal on land granted to them by King Shaka. They had received a grant of “the port or harbour of Natal” from King Shaka when one member of the group had saved his life after a failed assassination attempt. For the document granting the land to “FG Farewell and Company”, see Bird 1888: 191-195. Congella had been a settlement on the banks of the river to the north of the bay of Natal: see the copy of the 1824 hand-drawn map of Durban available at <http://www.south-africa-tours-and-travel.com/history-of-durban.html> (accessed 21 Apr 2015). However, there remains uncertainty about the first inhabitants of Congella (also known as Khangela or Kangela) – see Koopman 2004: 81-83.

23 For an explicit reference to “the district of Port Natal”, see *Volksraadsnotule Natal*: 157-159, art 18 of the minutes of the *Volksraad* of 8-10 Aug 1842. See, also, *Volksraadsnotule Natal*: 144-146, art 10 of the minutes of the *Volksraad* of 25 Feb 1842, in which petitions for plots of land in Congella were referred to the magistrate of Port Natal.

24 See, eg, Eybers 1918: 143, doc 91 which states that the treaty of 1835 between the British residents and Dingaan was “done at Congella” and “signed on behalf of the British Residents at Port Natal”.

referred to as the magistrate of Tugela.<sup>25</sup> However, the territory that Dingaan had ceded to the *Boers* included only land south of the Tugela River and could therefore only have included the area south of that river.<sup>26</sup> Today, the name “Congella” is probably better known for the battle that took place there in May 1842 between the *Boer* forces and British soldiers under the command of Captain TC Smith. Smith’s forces were besieged and were saved by a relief force sent from Cape Town after Dick King’s famous 500 miles journey on horseback to Grahamstown in ten days.<sup>27</sup>

One of the British inhabitants, Alexander Biggar, was appointed as the first magistrate of Port Natal in May 1838.<sup>28</sup> Biggar resigned a few weeks later due to personal circumstances. It has been suggested that he suffered from depression following the death of both his sons and that this led to his resignation.<sup>29</sup> Biggar himself died in battle shortly after on 27 December 1838.<sup>30</sup>

FJ de Jager was provisionally appointed in June 1839.<sup>31</sup> However, he apparently requested assistance, because barely a month later PJ Joubert was provisionally appointed as magistrate along with four *heemraden*, De Jager being one of them.<sup>32</sup> It is not certain for how long Joubert remained in office as the date of the appointment of his successor is unclear.

Although there is no official record of his appointment as magistrate, F Roos had already resigned from this position by April 1840.<sup>33</sup> He officiated as magistrate as early as September 1839<sup>34</sup> and in October 1839 he headed the embassy to Mpande

25 See the extract from the report of the magistrate of Tugela on his embassy to Mpande (Panda) in Oct 1839 as it appeared in *De Zuid Afrikaan* of 29 Nov 1839; also published in *Volksraadsnotule Natal*: 309-312, app 28/1839. The purpose of the embassy to Mpande was to officially recognise him as the Zulu leader and as Dingaan’s successor. The *Volksraad* undertook to support Mpande against Dingaan and in return Mpande would settle Dingaan’s debt to the *Volksraad*. For more on the embassy to Panda, see Nathan 1937: 284-285; Theal 1915: 392; Stockenström 1925: 18-19.

26 See Eybers 1918: 148-149, doc 95.

27 See Theal 1908: 369-374; Davenport & Saunders 2000: 113; Stockenström 1925: 38-47. See, also, Cubbin 1992: 48-69 for a discussion of the events that led to the confrontation at Congella. For more on King, see Tabler 1977: 64-66.

28 *Volksraadsnotule Natal*: 407, app 4/1842, esp the postscript to attachment IV. See Theal 1915: 377 and Nathan 1937: 239 who claim that Biggar was succeeded by L Badenhorst. However, I could not find any official evidence of Badenhorst’s appointment as magistrate before Sep 1840 (see n 45 *infra*). For more on Biggar, see Tabler 1977: 12-13.

29 Nathan 1937: 239; Theal 1915: 377.

30 Nathan 1937: 265.

31 *Volksraadsnotule Natal*: 12, art 8 of the minutes of the *Volksraad* of 28 Jun 1839.

32 See art 4 of the minutes of the *Volksraad* of 29 Jul 1839 published in Eybers 1918: 152-153, doc 99.

33 *Volksraadsnotule Natal*: 38-42, art 1 of the minutes of the *Volksraad* of 4 Apr 1840.

34 *Volksraadsnotule Natal*: 15-16, art 11 of the minutes of the *Volksraad* of 6 Sep 1839; *Volksraadsnotule Natal*: 17-18, art 2 of the minutes of the *Volksraad* of 3 Oct 1839.

as the “landdrost of Tugela” (magistrate of Tugela).<sup>35</sup> On 4 April 1840 P Ferreira was appointed as Roos’ successor in an acting capacity,<sup>36</sup> although it is uncertain who performed the official duties during the next few months. Documentary evidence suggests that Roos, despite his resignation, remained in his position<sup>37</sup> until he again tendered his written resignation in August 1840<sup>38</sup> after complaints that he had left his position.<sup>39</sup> Despite receiving a plot of land as reward for his services, financial difficulties may have contributed to his resignation as he was required to pay his travel expenses incurred in his official capacity from his monthly salary of fifty *rijksdaalders*.<sup>40</sup> This may explain why he successfully applied for permission to act as notary directly after his resignation.<sup>41</sup>

P Ferreira was immediately reappointed in an acting capacity,<sup>42</sup> but he also resigned shortly thereafter in September 1840.<sup>43</sup> Ferreira’s request was initially declined due to a debacle about a missing boat and the subsequent confusion about the person responsible for granting permission for the use of the boat to two employees or servants of a certain Dr Bucken.<sup>44</sup> Unfortunately it is unclear what the outcome of this debacle was as no further mention is made of it in the existing evidence.

In September 1840, L Badenhorst was elected by way of vote and subsequently appointed as magistrate for Port Natal.<sup>45</sup> Nevertheless, it appears that the *Volksraad* anticipated problems regarding Badenhorst’s availability for his official duties: when Badenhorst was appointed, it was determined even at that stage that Ferreira would still act as provisional magistrate during Badenhorst’s absence.<sup>46</sup> This measure seems to have been insufficient, because in January 1841 the *Volksraad* resolved that, in the district of Port Natal, the eldest member of the *heemraden* should act as magistrate

35 Nathan 1937: 284-285; Theal 1915: 392. See, also, n 25 *supra*. Stockenström 1925: 18-19 erroneously states that the embassy was headed by magistrate Servaas van Breda; however, Roos himself confirms in his report that Van Breda merely accompanied the embassy in his capacity as a member of the *heemraden* – see *Volksraadsnotule Natal*: 309-312, app 28/1839.

36 *Volksraadsnotule Natal*: 38-42, art 1 of the minutes of the *Volksraad* of 4 Apr 1840.

37 Roos is on record as the magistrate for Port Natal as late as Jun 1840 – see *Volksraadsnotule Natal*: 44-46, arts 2-5 of the minutes of the *Volksraad* of 5 Jun 1840. One source mentions that Roos was still the magistrate of Port Natal as late as 9 Jul 1840 – see Preller 1938: 5-54: “n Natalse dagboek van 1840”, esp at 12.

38 *Volksraadsnotule Natal*: 52-53, art 2 of the minutes of the *Volksraad* of 8 Aug 1840.

39 *Volksraadsnotule Natal*: 48-49, art 2 of the minutes of the *Volksraad* of 5 Aug 1840.

40 *Volksraadsnotule Natal*: 44-46, art 4 of the minutes of the *Volksraad* of 5 Jun 1840; and *Volksraadsnotule Natal*: 56-57, art 5 of the minutes of the *Volksraad* of 12 Aug 1840.

41 *Volksraadsnotule Natal*: 52-53, art 4 of the minutes of the *Volksraad* of 8 Aug 1840, being the same day that his letter of resignation was accepted by the *Volksraad*.

42 *Volksraadsnotule Natal*: 52-53, art 3 of the minutes of the *Volksraad* of 8 Aug 1840.

43 *Volksraadsnotule Natal*: 62-65, art 21 of the minutes of the *Volksraad* of 29 Sep 1840.

44 *Ibid.*

45 *Volksraadsnotule Natal*: 60-62, art 11 of the minutes of the *Volksraad* of 4 Sep 1840.

46 *Ibid.* See, in general, Anonymous 1977: 40-41.

for an annual salary of £50 until further notice.<sup>47</sup> Not even this temporary measure could resolve the issue and in February 1841 AWJ Pretorius and CP Landman were officially appointed to find somebody for the position.<sup>48</sup> As a result, the *Volksraad* finally appointed JS Maritz in April 1841<sup>49</sup> and he took the oath on the same day. Maritz resigned after a year.<sup>50</sup> His successor, J Bodenstein, was appointed in April 1842 in the dual capacity of magistrate and harbour master.<sup>51</sup>

In August 1842 the district of Port Natal was merged with the district of Pietermaritzburg.<sup>52</sup> The reasons for this decision are unclear, but it is possible that the persistent problems regarding the availability of a magistrate for Port Natal may have contributed. Consequently, Bodenstein was requested to hand over all official books and paperwork to the magistrate of Pietermaritzburg and the office of the magistrate for Port Natal ceased to exist.<sup>53</sup>

## 2.3 Weenen

Weenen was established in August 1840.<sup>54</sup> AT Spies was provisionally appointed as the first magistrate for a period of six months.<sup>55</sup> At the time of his appointment, Spies already officiated as commandant for Weenen. The *Volksraad* decision provided that he was allowed to occupy both positions, but that his judicial duties had preference; in the event that his judicial duties prevented him from performing his military duties, the eldest field-cornet had to take over such military duties. At the end of the six-month period, the *Volksraad* received a petition from forty local inhabitants requesting that Spies remain as magistrate.<sup>56</sup> After making some enquiries, the *Volksraad* expressed its satisfaction with the work done by Spies and renewed his

47 *Volksraadsnotule Natal*: 77-79, art 1 of the supplementary minutes of the *Volksraad* of 14-19 Jan 1841.

48 *Volksraadsnotule Natal*: 81-85, art 22 of the minutes of the *Volksraad* of 2 Feb 1841.

49 *Volksraadsnotule Natal*: 92-94, arts 15 & 16 of the minutes of the *Volksraad* of 12 Apr 1841. He was appointed for a period of one year at a salary of 1333:2:4 *rijksdaalders*.

50 *Volksraadsnotule Natal*: 132-135, art 12 of the minutes of the *Volksraad* of 8 Jan 1842. He gave three months' notice.

51 *Volksraadsnotule Natal*: 151-152, art 3 of the minutes of the *Volksraad* of 28 Apr 1842. During the transitional period before Bodenstein's appointment, M Stadelaar very generously offered his services free of charge; this offer was gratefully accepted – see *Volksraadsnotule Natal*: 144-146, art 5 of the minutes of the *Volksraad* of 25 Feb 1842.

52 *Volksraadsnotule Natal*: 157-159, art 18 of the minutes of the *Volksraad* of 8-10 Aug 1842. For a description of the former boundary between the two districts, see *Volksraadsnotule Natal*: 56-57, art 6 of the minutes of the *Volksraad* of 12 Aug 1840.

53 *Volksraadsnotule Natal*: 157-159, art 19 of the minutes of the *Volksraad* of 8-10 Aug 1842.

54 For a description of the boundaries of Weenen, see *Volksraadsnotule Natal*: 57-58, art 2 of the minutes of the *Volksraad* of 13 Aug 1840.

55 *Volksraadsnotule Natal*: 57-58, art 3 of the minutes of the *Volksraad* of 13 Aug 1840.

56 *Volksraadsnotule Natal*: 81-85, art 21 of the minutes of the *Volksraad* of 2 Feb 1841.

contract.<sup>57</sup> Spies resigned a year later,<sup>58</sup> but he was required to remain in office for a further three months. During the transitional period, and until a new magistrate was appointed, the eldest member of the *heemraden* was required to step in if requested to do so.<sup>59</sup> At some point, FJ de Jager acted as magistrate for Weenen from March 1841, but he resigned a few weeks later in April 1841, citing his apparent inability to cope with the responsibilities of the position.<sup>60</sup>

W Jacobs was elected as magistrate and appointed in April 1842<sup>61</sup> and took his oath on the twenty-ninth of that month.<sup>62</sup> When he resigned at the beginning of 1843,<sup>63</sup> he was told that he could only resign after he had cleared his name of a complaint received against him.<sup>64</sup> The matter was referred to the (acting) magistrate and *heemraden* but it is not certain what the outcome of the dispute was.<sup>65</sup> No further mention of the complaint against Jacobs is made in the official documentation and the nature of the complaint remains unknown. Nevertheless, there appears to have been irregularities in the accounts of both Jacobs and his predecessor, Spies.<sup>66</sup>

In April 1843, T Dannhauser was appointed as a member of the *heemraden* and, in addition, would act as magistrate in the interim.<sup>67</sup> His accounts appear to have been in order.<sup>68</sup> However, his authority was questioned by some of the local inhabitants and he eventually resigned in April 1845.<sup>69</sup>

## 2 4 The territory west of the Drakensberg

The territory west of the Drakensberg during this period consisted of two districts, namely that of Potchefstroom and Winburg. The district of Potchefstroom (also referred to in early documents as Mooirivier) was situated north of the Vaal River in the area that would later be known as the *Zuid-Afrikaansche Republiek*. The district

57 *Ibid.* In terms of his renewed contract he would receive remuneration of fifty *rijksdaalders* per month for work already performed, and seventy-five *rijksdaalders* per month thenceforth – see *Volksraadsnotule Natal*: 88-89, art 2 of the minutes of the *Volksraad* of 9 Apr 1841.

58 *Volksraadsnotule Natal*: 125-126, art 5 of the minutes of the *Volksraad* of 4 Jan 1842.

59 *Volksraadsnotule Natal*: 142-144, art 13 of the minutes of the *Volksraad* of 24 Feb 1842.

60 *Volksraadsnotule Natal*: 15 n 20; *Volksraadsnotule Natal*: 88, art 3 of the minutes of the *Volksraad* of 8 Apr 1841.

61 *Volksraadsnotule Natal*: 150-151, art 5 of the minutes of the *Volksraad* of 27 Apr 1842.

62 *Volksraadsnotule Natal*: 152-155, art 5 of the minutes of the *Volksraad* of 29 Apr 1842.

63 *Volksraadsnotule Natal*: 167-170, art 1 of the minutes of the *Volksraad* of 3 Jan 1843.

64 *Volksraadsnotule Natal*: 173-177, arts 7 & 12 of the minutes of the *Volksraad* of 3-6 Apr 1843.

65 *Volksraadsnotule Natal*: 178-180, art 8 of the minutes of the *Volksraad* of 4-5 Sep 1843.

66 *Volksraadsnotule Natal*: 173-177, art 36 of the minutes of the *Volksraad* of 3-6 Apr 1843; and *Volksraadsnotule Natal*: 186-188, art 4 of the minutes of the *Volksraad* of 3-4 Jun 1844.

67 *Volksraadsnotule Natal*: 173-177, art 12 of the minutes of the *Volksraad* of 3-6 Apr 1843.

68 *Volksraadsnotule Natal*: 198-201, art 19 of the minutes of the *Volksraad* of 7-8 Apr 1845.

69 *Volksraadsnotule Natal*: 195-197, art 6 of the minutes of the *Volksraad* of 6-7 Jan 1845; *Volksraadsnotule Natal*: 198-201, art 7 of the minutes of the *Volksraad* of 7-8 Apr 1845.

of Winburg (also referred to as Santrivier, Sandrivier or Vetrivier)<sup>70</sup> was situated north of the Orange River, but south of the Vaal River in the area that would later become known as the Orange Free State.<sup>71</sup>

## 2 4 1 Potchefstroom

In September 1839 the Natal *Volksraad* appointed J de Klerk<sup>72</sup> as the first magistrate for the area “on the other side of the Drakensberg” (my translation).<sup>73</sup> Initially, and for political reasons, the magistrate sat not at Potchefstroom, but at Schoonspruit (today known as Klerksdorp).<sup>74</sup> It has been suggested<sup>75</sup> that the reasons for the choice of Schoonspruit as the first seat of the magistrate’s court were twofold and politically motivated: First, the Natal *Volksraad* did not want to recognise Potchefstroom as a town as that would elevate the status of its leader, Andries Hendrik Potgieter. By insisting that the magistrate execute his duties from Schoonspruit, Potchefstroom was denied the status as the capital west of the Drakensberg. Secondly, it was hoped that the emigrant farmers living west of the Drakensberg would reconsider returning to Natal and so increase the number of emigrants in that area. The magistrate’s court was eventually moved to Potchefstroom when the latter was recognised by the Natal *Volksraad* as a town and as the seat of the adjunct council.<sup>76</sup>

This situation resulted in a strained relationship between De Klerk and Potgieter, and probably contributed to De Klerk’s resignation in August 1840.<sup>77</sup> His request was at first denied<sup>78</sup> and he continued in his duties until October 1841.<sup>79</sup> Despite

70 See, eg, *Volksraadsnotule Natal*: 67, art 1 of the minutes of the *Volksraad* of 16 Nov 1840; and *Volksraadsnotule Natal*: 157-159, art 2 of the minutes of the *Volksraad* of 8-10 Aug 1842 – this latter decision refers to the farm “Doornkob aan Zand Revier Destrict Winburg” (Doornkop at Sand River District Winburg). See, also, Van der Walt *sd*: 20.

71 For more on the general history of Potchefstroom, see Van den Bergh 2013: 452-464; Van der Walt *sd*: *passim*. See, too, on the early history of Winburg, Van der Walt *sd*: 20-23.

72 Also referred to in the documents of that time as “De Clercq” or “De Clerq”.

73 *Volksraadsnotule Natal*: 16-17, art 3 of the minutes of the *Volksraad* of 7 Sep 1839. See, also, De Wet 1958: 244.

74 See the short description of the history of Klerksdorp available at [http://www.klerksdorp.co.za/history\\_klerksdorp](http://www.klerksdorp.co.za/history_klerksdorp) (accessed 26 Feb 2016).

75 Van den Bergh 2013: 456-457.

76 Probably when the adjunct council was elected in Feb 1841. This was also the first time that the name Potchefstroom was explicitly mentioned in the minutes of the Natal *Volksraad* – see *Volksraadsnotule Natal*: 81-85, art 4 of the minutes of the *Volksraad* of 2 Feb 1841.

77 *Volksraadsnotule Natal*: 50-51, art 3 of the minutes of the *Volksraad* of 7 Aug 1840.

78 Most probably because there was no other suitable candidate at that time. The *Volksraad* responded that De Klerk himself had to nominate a successor – see *supra* n 77. However, the reason for the denial was probably politically motivated as well: by insisting that De Klerk nominate his own successor, the *Volksraad* confirmed his authority and prevented the nomination of a representative from Potchefstroom.

79 As is evident from the minutes of the *Volksraad*. See *Volksraadsnotule Natal*: 62-65, art 8 of the minutes of the *Volksraad* of 28 Sep 1840; *Volksraadsnotule Natal*: 81-85, arts 3, 13, 14 and 19 of the minutes of the *Volksraad* of 2 Feb 1841; *Volksraadsnotule Natal*: 88, art 1 of the minutes of the *Volksraad* of 8 Apr 1841; and *Volksraadsnotule Natal*: 116-119, art 12 of the minutes of the *Volksraad* of 9 Oct 1841.

the strained relationship with Potgieter, De Klerk appears to have been a popular magistrate as is evident from the petition signed by seventy-six persons requesting that he be re-appointed even before he officially resigned.<sup>80</sup> When De Klerk was at last released from his duties, he was apparently reluctant to relinquish his authority. He refused to hand over official documentation and continued to issue orders regarding the inspection of farms. The secretary of the *Volksraad* was instructed to resolve the matter.<sup>81</sup>

At the time of De Klerk's final resignation, P Louw was mentioned as his successor,<sup>82</sup> but no mention is made in the Natal *Volksraad* minutes of his official appointment or of his taking the oath as magistrate. In fact, this is the only time that Louw's name appears in the minutes of the Natal *Volksraad* for the period 1838 to 1845. However, two documents survived in which Louw signed in the capacity as deputy magistrate and the evidence therefore suggests that he undertook at least some of the duties of a magistrate by as early as November 1841.<sup>83</sup>

Not much is known about Louw's successors. Only one document mentions JH Grobler<sup>84</sup> as the acting magistrate a year later.<sup>85</sup> One source<sup>86</sup> suggests that Grobler was appointed as the first magistrate of Potchefstroom and supervised the development of that town in 1840. This date is however incorrect for two reasons: first, De Klerk remained the magistrate (albeit seated at Schoonspruit) until at least October 1841; and, secondly, Grobler supervised the development of Potchefstroom only in December 1841.<sup>87</sup> It is unclear for which period he officiated or who his successor was.<sup>88</sup>

80 *Volksraadsnotule Natal*: 81-85, art 16 of the minutes of the *Volksraad* of 2 Feb 1841.

81 *Volksraadsnotule Natal*: 116-119, art 12 of the minutes of the *Volksraad* of 9 Oct 1841.

82 *Ibid.*

83 See National Archives Repository (Pretoria) [hereafter TAB] SS 1B R88/41 at 57-58 for a document dated 1 Nov 1841 and signed by, among others, the commandant (H Potgieter), the magistrate (PJ Louw – he signed as PJ Lou), five *heemraden* and three field-cornets. Also, in Oct 1850, a certain P Louw submitted a report to the *Volksraad* at Potchefstroom of his activities as “adjunk-Landdrost” (deputy magistrate) for Potchefstroom – see *Volksraadsnotule Deel I*: 145-151, art 6 of the minutes of the *Volksraad* of 16 Oct 1850.

84 Grobler later actively participated in the official affairs of the ZAR. In 1852 he was one of the signatories of the Sand River Convention and in 1860 he was appointed as acting president in the absence of MW Pretorius. For more on his life, see Du Plessis 1977: 364-365.

85 TAB SS 1B R103/42 at 129, also published in Pretorius, Kruger & Beyers 1937: 176, R103/42 dated 30 Nov 1842. This document, dated 30 Nov 1842, concerned a confirmation of the registration of the farm Vaalbank in favour of Daniel van Vuren (snr) and was signed by Grobler in his capacity as “fungeerend landdros” (acting magistrate).

86 Du Plessis 1977: 364.

87 See Van der Walt *sd*: 12.

88 However, as early as Aug 1845 JH Visage was recognised as the acting magistrate of Potchefstroom – see, eg, *Volksraadsnotule Deel I*: 156-157, app 2/1845; Pretorius, Kruger & Beyers 1937: 268-269, R120j/47 dated 4 Mar 1847; and *Volksraadsnotule Deel I*: 68-69, art 2 of the minutes of the provisional sitting of the *Volksraad* at Ohristad of 14 May 1847.

## 2 4 2 Winburg

The first magistrate for the district, J Vermeulen, was appointed in November 1840.<sup>89</sup> He was appointed in two capacities, namely that of provisional field-cornet and as acting magistrate. Although his appointment was never made permanent, he remained in office for more than two years. He resigned in October 1842<sup>90</sup> and was succeeded by JJ Wessels in January 1843.<sup>91</sup>

The evidence suggests that the magistrate of Winburg was subject to the magistrate of Potchefstroom. In one document, Vermeulen referred to himself as the deputy magistrate.<sup>92</sup> In addition, upon their appointment in 1840, the provisional magistrate and *heemraden* of Winburg were instructed to refer all serious matters that could not be settled by them to the “effective magistrate” of the court at the Sand River.<sup>93</sup> Although the magisterial district of Winburg was also known as Sand River, it is not clear who the “effective magistrate” was or why there would be two magistrates at Winburg. There is no mention in the surviving documents of another magistrate at that time. It is therefore possible that the magistrate for Potchefstroom was seen as the “effective magistrate”, being the only other *Boer* court west of the Drakensberg at that time. This argument would explain why Vermeulen was never appointed in a permanent capacity – because the provisional magistrate of Winburg was subject to the magistrate for Potchefstroom. Unfortunately, this, however, remains mere speculation due to the lack of evidence in this regard.

## 3 The duties of the first magistrates

During this period the various districts were sparsely populated and widespread. Farming duties and traveling distances resulted in isolated living conditions for many of the inhabitants. The *Volksraad* sat sporadically, and then mostly at Pietermaritzburg.<sup>94</sup> The first magistrates served as a reminder of governmental

89 *Volksraadsnotule Natal*: 67, art 1 of the minutes of the *Volksraad* of 16 Nov 1840.

90 *Volksraadsnotule Natal*: 160-165, art 37 of the minutes of the *Volksraad* of 4-6 Oct 1842. He was requested to remain in his position for another three months.

91 *Ibid.* Magistrate Vermeulen personally nominated Wessels as his successor. No further mention is made of Wessels in his capacity as magistrate for Winburg in the minutes of the Natal *Volksraad* or of the Potchefstroom *Volksraad* after 1843 and it is uncertain for which period he served in this capacity.

92 This document no longer exists but is referred to in *Volksraadsnotule Natal*: 147-148, art 3 of the minutes of the *Volksraad* of 14 Mar 1842.

93 *Volksraadsnotule Natal*: 67, art 1 of the minutes of the *Volksraad* of 16 Nov 1840. The original wording of this provision reads: “Zaaken van Gewigt welke door hen tot geen schikking kan gebragt worden zullen ze moeten verwijzen na den Effectiefe landdrost aldaar, deeze hof bestaat aan de Santrevier” (“Serious matters that cannot be settled by them must be referred to the effective magistrate there, this court exists at the Sand River” – my translation).

94 As is evident when paging through the minutes of the Natal *Volksraad*.



authority in their respective communities.<sup>95</sup> They were therefore not only responsible for administering justice and ensuring the rule of law, but they also represented a two-way communication channel between the local inhabitants and the *Volksraad*. They were tasked with keeping their districts informed of important events and changes that could impact on the community as a whole,<sup>96</sup> and they provided the *Volksraad* with much needed feedback and input from the members of their districts.<sup>97</sup> This becomes clear when studying the plethora of tasks that the magistrates were required to fulfil. Although it is difficult to provide a complete list of the duties and responsibilities assigned to the magistrates, some of these are set out below as is evident from the minutes of the Natal *Volksraad*.

### 3 1 Duties regarding the administration of justice

Some of the duties of the magistrates in terms of the 1838 and 1841 Regulations have already been described elsewhere.<sup>98</sup> In general, the duties of the magistrates remained the same for both sets of regulations. Nevertheless, the abolition of the jury system for all but criminal trials involving the death penalty in terms of the 1841 Regulations meant that the magistrates' duties regarding the summoning of jury members were greatly reduced. Another change introduced by the 1841 Regulations was that tariffs of legal costs were now determined by the *Volksraad*, and no longer by the magistrates.<sup>99</sup>

95 See, eg, *Volksraadsnotule Natal*: 46-48, art 4 of the minutes of the *Volksraad* of 9 Jun 1840, which instructed the magistrate and two members of the *heemraden* of each district to represent the government, and in particular when they had to determine the town boundaries. On the important role of the magistrates in general, see Nieuwoudt 1964: 67-68.

96 *Volksraadsnotule Natal*: 14-15, art 5 of the minutes of the *Volksraad* of 5 Sep 1839 where the magistrate was instructed to remind the inhabitants that contamination of the drinking water and unnecessary shooting were prohibited; *Volksraadsnotule Natal*: 63-65, art 11 of the minutes of the *Volksraad* of 29 Sep 1840 in which the magistrate of Port Natal was instructed to convey to the English inhabitants there who wished to return to the Cape that they were permitted to travel only via the Drakensberg or by sea; and *Volksraadsnotule Natal*: 160-165, art 38 of the minutes of the *Volksraad* of 4-6 Oct 1842 in which all the magistrates were instructed to inform their local inhabitants of the due date for nominations for members of the *Volksraad*.

97 *Volksraadsnotule Natal*: 96-98, art 4 of the minutes of the *Volksraad* of 15 Jun 1841, detailing a response of the *Volksraad* to a written request from the magistrate of Port Natal on behalf of two local inhabitants asking for advice on the procedure regarding cross-border hunting trips; and *Volksraadsnotule Natal*: 142-144, art 8 of the minutes of the *Volksraad* of 24 Feb 1842, which sets out a request from the magistrate of Weenen on behalf of a group of native inhabitants asking for permission to conduct a revenge raid on the band of robbers from Joob's group ("Joob's volk") for a murder and livestock theft.

98 Wildenboer 2016: 174-182.

99 Prescribed tariffs for the territory west of the Drakensberg as suggested by magistrate De Klerk were approved by the *Volksraad* in Feb 1841 (in other words, in terms of the 1838 Regulations) – *Volksraadsnotule Natal*: 81-85, art 13 of the minutes of the *Volksraad* of 2 Feb 1841. The tariffs approved for the main district (Pietermaritzburg) also applied to the district of Weenen – *Volksraadsnotule Natal*: 88-89, art 2 of the minutes of the *Volksraad* of 9 Apr 1841. I could not

Other judicial duties of the magistrates included the execution of sentences;<sup>100</sup> submission of three-monthly reports regarding their administration;<sup>101</sup> notifying the *heemraden* of forthcoming court sittings;<sup>102</sup> punishing offenders of the harbour regulations;<sup>103</sup> providing a guarantee for the efficient administration of justice;<sup>104</sup> keeping a record of all farms;<sup>105</sup> drafting, witnessing and signing all deeds of transfer;<sup>106</sup> issuing certificates of ownership;<sup>107</sup> selling immovable property;<sup>108</sup> appointing land inspectors;<sup>109</sup> registering bonds over immoveable property;<sup>110</sup>

find any other tariffs for Pietermaritzburg approved during this period. The tariffs applicable in the district of Pietermaritzburg were sent to the magistrate for the territory west of the Drakensberg in Jan 1843 – see *Volksraadsnotule Natal*: 167-170, art 22 of the minutes of the *Volksraad* of 2-4 Jan 1843. For amendments to the existing tariffs, see *Volksraadsnotule Natal*: 173-177, art 4 of the minutes of the *Volksraad* of 3-6 Apr 1843.

- 100 See *Volksraadsnotule Natal*: 25-26, art 14 of the minutes of the *Volksraad* of 2 Jan 1840 where the magistrate was instructed to execute sentences of imprisonment and public labour; and *Volksraadsnotule Natal*: 46-48, art 2 of the minutes of the *Volksraad* of 9 Jun 1840 regarding the execution of a sentence for blasphemy. The magistrate of Pietermaritzburg was granted permission to appoint an “onder schout” to assist in supervising the prisoners – see *Volksraadsnotule Natal*: 323, app 9/1840 and *Volksraadsnotule Natal*: 32-34, art 7 of the minutes of the *Volksraad* of 5 Mar 1840 for the request of the magistrate and the response of the *Volksraad* respectively.
- 101 *Volksraadsnotule Natal*: 26-28, art 2 of the minutes of the *Volksraad* of 3 Jan 1840.
- 102 *Volksraadsnotule Natal*: 44-46, art 3 of the minutes of the *Volksraad* of 5 Jun 1840.
- 103 *Volksraadsnotule Natal*: 68-70, art 7 of the minutes of the *Volksraad* of 17 Nov 1840. For the instructions to the harbour master, see *Volksraadsnotule Natal*: 318-322, app 6/1840.
- 104 *Volksraadsnotule Natal*: 44-46, art 12 of the minutes of the *Volksraad* of 5 Jun 1840. A magistrate had to provide a document signed by four guarantors, each guaranteeing the amount of 10 000 *rijksdaalders* should the magistrate not fulfil his duties; and the identities of these guarantors had to be approved by the *Volksraad*.
- 105 *Volksraadsnotule Natal*: 46-48, art 13 of the minutes of the *Volksraad* of 9 Jun 1840.
- 106 *Volksraadsnotule Natal*: 102-104, art 2 of the minutes of the *Volksraad* of 18 Jun 1841. The Secretary of the *Volksraad* stood in when the magistrate was unavailable or when the magistrate himself was the buyer or seller in a transaction – see *Volksraadsnotule Natal*: 119-121, art 13 of the minutes of the *Volksraad* of 11 Oct 1841.
- 107 *Volksraadsnotule Natal*: 157-159, art 4 of the minutes of the *Volksraad* of 8-10 Aug 1842. For an example of a certificate of ownership, see Pretorius, Kruger & Beyers 1937: 176, R103/42 dated 30 Nov 1842. The Secretary and two other members of the *Volksraad* had to sign all deeds of grant (*grondbriewe*) – see *Volksraadsnotule Natal*: 113-115, arts 14 and 15 of the minutes of the *Volksraad* of 7 Oct 1841.
- 108 *Volksraadsnotule Natal*: 86-87, art 6 of the minutes of the *Volksraad* of 7 Apr 1841.
- 109 *Volksraadsnotule Natal*: 102-104, art 3 of the minutes of the *Volksraad* of 18 Jun 1841.
- 110 *Volksraadsnotule Natal*: 113-115, art 16 of the minutes of the *Volksraad* of 7 Oct 1841. Only the magistrate for Pietermaritzburg could register bonds. The administration fee per bond was six *rijksdaalders*, of which half went to the treasury.

fulfilling notarial duties in the absence of a notary;<sup>111</sup> solemnising marriages;<sup>112</sup> and the drafting and signing of contracts of employment.<sup>113</sup>

It is not clear how often magistrates were required to be at the office. In February 1842 the *Volksraad* stipulated that the person to be elected as magistrate for Weenen would be required to be available for official duties at least one day a week, but that he should be on standby for emergencies at any time.<sup>114</sup> However, the magistrate could appoint a clerk<sup>115</sup> to assist him, subject to the clerk then being available during office hours. Alternatively, if the magistrate preferred to handle all the administration personally, he could claim the clerk's salary in addition to his own remuneration, but was then compelled to report for duties every day. Nevertheless, this arrangement was most probably dictated by necessity and represented an exception to the rule; in general, magistrates were probably expected to be available during office hours, although this is a mere speculation. Lastly, magistrates were not eligible for election to the *Volksraad*.<sup>116</sup>

### 3.2 Duties regarding the Orphan Chamber

In June 1840 the magistrates of the outer districts (*buiten districten*) were appointed as agents of the Orphan Chamber (*Weeskamer*).<sup>117</sup> They took over the duties of the existing Orphan Master (*Weesheer*), JB Rudolph, after allegations of mismanagement and irregularities concerning that office had surfaced.<sup>118</sup> Rudolph was instructed

111 *Volksraadsnotule Natal*: 157-159, art 7 of the minutes of the *Volksraad* of 8-10 Aug 1842. In this instance the magistrate had to notarially execute an antenuptial contract as no notary was available.

112 *Volksraadsnotule Natal*: 38, art 7 of the register of the minutes of the *Volksraad* of 10 Mar 1840. This decision was confirmed by the *Volksraad* despite public protest – see *Volksraadsnotule Natal*: 81-85, art 17 of the minutes of the *Volksraad* of 2 Feb 1841.

113 *Volksraadsnotule Natal*: 28-30, art 11 of the minutes of the *Volksraad* of 6 Jan 1840. These contracts of employment concerned persons from the indigenous communities who wished to have their children employed, and applied to boys up to the age of twenty-five and girls up to the age of twenty-one.

114 *Volksraadsnotule Natal*: 142-144, art 13 of the minutes of the *Volksraad* of 24 Feb 1842. This arrangement also applied as an interim measure in the magisterial district of Port Natal after Maritz had submitted his resignation.

115 See, also, *Volksraadsnotule Natal*: 198-201, art 18 of the minutes of the *Volksraad* of 7 & 8 Apr 1845 where the magistrate (presumably of Pietermaritzburg) later received permission to appoint a clerk for each sitting of court of the magistrate and *heemraden* at a prescribed daily fee.

116 *Volksraadsnotule Natal*: 121-123, art 9 of the minutes of the *Volksraad* of 12 Oct 1841. This restriction applied only for the duration of the appointment as magistrate.

117 *Volksraadsnotule Natal*: 46-48, art 11 of the minutes of the *Volksraad* of 9 Jun 1840.

118 There appears to have been dissatisfaction with Rudolph's administration, as three of his guarantors requested to be released from their obligations as early as Oct 1839 – *Volksraadsnotule Natal*: 18-20, art 8 of the minutes of the *Volksraad* of 4 Oct 1839. In response to the allegations, Rudolph claimed that a shortfall of 15 000 *rijksdaalders* incurred by his office was due to the

to decline any new estates for administration,<sup>119</sup> and had to submit a report to the *Volksraad* on the finalisation of all existing estates.<sup>120</sup>

Henceforth, the magistrates were allowed to appoint executors to administer intestate estates as well as the estates of orphans subject to the same rules and regulations applicable in the Cape colony.<sup>121</sup> As early as February 1841 the magistrate for the territory west of the Drakensberg was instructed to prepare accounts for all the estates of orphans, to settle all payments due to creditors, spouses and orphans above the age of majority and to keep all properties due to minor orphans under his supervision. He was permitted an executor's fee of five percent.<sup>122</sup> Any estate moneys held by the Orphan Master could now be deposited with the magistrates, but in the event of enemy attacks, fire or other unforeseen circumstances these moneys could not be guaranteed.<sup>123</sup> In addition, magistrates could appoint guardians to look after the financial interests of children where a parent entered into a second marriage.<sup>124</sup>

### 3 3 Other duties

Magistrates were also tasked with various non-judicial duties. Importantly, they handled the finances of their districts. They received all moneys for their districts on behalf of the government;<sup>125</sup> settled approved governmental debts;<sup>126</sup> and accepted the deposit guarantee from the auction master.<sup>127</sup> A statement of account had to be submitted to the *Volksraad* every three months.<sup>128</sup>

reluctance of the previous and current auction masters (IP Hammes and HJ Maartens respectively) to settle outstanding accounts. See *Volksraadsnotule Natal*: 92-94, art 1 of the minutes of the *Volksraad* of 12 Apr 1841; *Volksraadsnotule Natal*: 16-17, arts 9 & 14 of the minutes of the *Volksraad* of 7 Sep 1839; *Volksraadsnotule Natal*: 22-23, art 1 of the minutes of the *Volksraad* of 11 Nov 1839; *Volksraadsnotule Natal*: 28-30, art 6 of the minutes of the *Volksraad* of 6 Jan 1840; and *Volksraadsnotule Natal*: 32-34, art 7 of the minutes of the *Volksraad* of 5 Mar 1840. It is therefore unclear whether Rudolph was personally to blame for the shortfall. The Secretary of the *Volksraad* was instructed to restore any cattle in the possession of the Orphan Master to the rightful minor owners and to institute legal proceedings against Rudolph if necessary: see *Volksraadsnotule Natal*: 121-123, art 14 of the minutes of the *Volksraad* of 12 Oct 1841.

119 *Volksraadsnotule Natal*: 92-94, art 1 of the minutes of the *Volksraad* of 12 Apr 1841.

120 *Volksraadsnotule Natal*: 81-85, art 26 of the minutes of the *Volksraad* of 2 Feb 1841.

121 *Volksraadsnotule Natal*: 100-102, art 16 of the minutes of the *Volksraad* of 17 Jun 1841.

122 *Volksraadsnotule Natal*: 81-85, art 13 of the minutes of the *Volksraad* of 2 Feb 1841.

123 *Volksraadsnotule Natal*: 100-102, art 16 of the minutes of the *Volksraad* of 17 Jun 1841.

124 *Volksraadsnotule Natal*: 94-95, art 2 of the minutes of the *Volksraad* of 13 Apr 1841; *Volksraadsnotule Natal*: 113-115, art 3 of the minutes of the *Volksraad* of 7 Oct 1841.

125 *Volksraadsnotule Natal*: 41-42, art 5 of the minutes of the *Volksraad* of 4 Apr 1840.

126 *Volksraadsnotule Natal*: 52-53, art 6 of the minutes of the *Volksraad* of 8 Aug 1840 esp n 50; *Volksraadsnotule Natal*: 157-159, art 14 of the minutes of the *Volksraad* of 8-10 Aug 1842. See, also, *Volksraadsnotule Natal*: 86-87, art 7 of the minutes of the *Volksraad* of 7 Apr 1841 where the magistrate of Pietermaritzburg was instructed to repay a government loan from EF Potgieter.

127 *Volksraadsnotule Natal*: 28-30, art 6 of the minutes of the *Volksraad* of 6 Jan 1840.

128 *Volksraadsnotule Natal*: 26-28, art 2 of the minutes of the *Volksraad* of 3 Jan 1840. For examples of quarterly financial reports of the magistrate of Pietermaritzburg, see *Volksraadsnotule Natal*:

Citizens had to swear allegiance for a period of fifteen years to the newly found country in order to obtain citizenship.<sup>129</sup> In terms of article 4 of the Burghership Law and the Possession of Fixed Property of 1841 (Natal)<sup>130</sup> only a citizen could obtain immovable property. The administering of the oath was the responsibility of the magistrates.<sup>131</sup> They also had to administer an oath to members of the *heemraden*,<sup>132</sup> the harbour master<sup>133</sup> and to members of special commissions.<sup>134</sup> Foreigners who applied for citizenship had to obtain certificates of residence from either the local magistrate or from the local field-cornet and two respectable inhabitants of the area in which the applicant lived. To obtain a certificate, a person was required to have lived in the Republic for at least twelve consecutive months and to have conducted him- or herself “peaceably, submissive, honest, faithful, and sober”. After obtaining such a certificate, the applicant had to pay the prescribed fee of 50 *rijksdaalders* and be confirmed by the *Volksraad*, and then take the oath of allegiance before the local magistrate.<sup>135</sup>

Magistrates were also responsible for issuing liquor licences.<sup>136</sup> To qualify for such a licence, a person had to have a good reputation for not personally imbibing and had to obtain a certificate to this effect signed by two members of the *Volksraad*.<sup>137</sup> The magistrate of Port Natal was further expected to act as harbour master in the latter’s absence without additional remuneration, although he was permitted to delegate this responsibility.<sup>138</sup> In one case the magistrate of Port Natal was responsible for monitoring diseases on incoming ships when he had to accompany the doctor on

344-345, app 20/1840 for the period Jan to Mar 1840; *Volksraadsnotule Natal*: 348-350, app 27/1840 for the period Apr to Sep 1840; and *Volksraadsnotule Natal*: 359-360, app 2/1841 for the period Oct to Dec 1840. The magistrate apologised for submitting the two quarterly reports for the months Apr to June and July to Sep in a consolidated report: see his letter to the *Volksraad* published in *Volksraadsnotule Natal*: 358-359, app 1/1841.

129 *Volksraadsnotule Natal*: 53-55, art 7 of the minutes of the *Volksraad* of 10 Aug 1840. See, also, *Volksraadsnotule Natal*: 14-15, art 8 of the minutes of the *Volksraad* of 5 Sep 1839.

130 Eybers 1918: 162-164, doc 103.

131 *Volksraadsnotule Natal*: 53-55, art 7 of the minutes of the *Volksraad* of 10 Aug 1840.

132 *Volksraadsnotule Natal*: 16-17, art 4 of the minutes of the *Volksraad* of 7 Sep 1839; *Volksraadsnotule Natal*: 50-51, art 10 of the minutes of the *Volksraad* of 7 Aug 1840.

133 *Volksraadsnotule Natal*: 68-70, art 5 of the minutes of the *Volksraad* of 17 Nov 1840.

134 *Volksraadsnotule Natal*: 104-105, art 11 of the minutes of the *Volksraad* of 19 Jun 1841. This oath was sworn before the magistrate of Pietermaritzburg. For the wording of the oath, see *Volksraadsnotule Natal*: 105 n 28.

135 Art 3 of the Burghership Law and the Possession of Fixed Property of 1841 (Natal) as translated by Eybers 1918: 162-164, doc 103. For a copy of the original Dutch version of the document, see *Volksraadsnotule Natal*: 372-374, app 12/1841. For the original and amended wording of this oath, see *Volksraadsnotule Natal*: 304-305, app 23/1839.

136 *Volksraadsnotule Natal*: 81-85, art 25 of the minutes of the *Volksraad* of 2 Feb 1841.

137 *Ibid.*

138 *Volksraadsnotule Natal*: 121-123, art 18 of the minutes of the *Volksraad* of 12 Oct 1841.

board the *Mazeppa* to check for signs of smallpox.<sup>139</sup> In an unrelated incident he was also tasked with investigating the disappearance of a boat for public use.<sup>140</sup>

Other duties included the issuing of permits for felling Tamboti trees in Port Natal;<sup>141</sup> recording of *inboekeling*;<sup>142</sup> granting of permission for public assemblies for the purpose of signing a petition;<sup>143</sup> investigating complaints regarding the distribution of livestock;<sup>144</sup> building of a pound for stray livestock<sup>145</sup> and drafting regulations pertaining to the pound;<sup>146</sup> taking responsibility for recovered livestock that had previously been stolen;<sup>147</sup> settling disputes regarding livestock;<sup>148</sup> officially conveying decisions of the *Volksraad* to the field-cornets;<sup>149</sup> surveying land;<sup>150</sup> and reminding field-cornets of their duties.<sup>151</sup>

From time to time the magistrates were also tasked with duties pertaining to public works. In September 1840, magistrate Zietsman was instructed to build a prison at Pietermaritzburg.<sup>152</sup> This was the second such instruction, the first one being issued to the magistrate and the *heemraden* of Pietermaritzburg earlier that year<sup>153</sup> following a public petition in that regard.<sup>154</sup> The *Volksraad* prescribed detailed building specifications for the proposed project.<sup>155</sup> Furthermore, the magistrates were responsible for improving and maintaining the roads, although they could

139 *Volksraadsnotule Natal*: 46-48, art 10 of the minutes of the *Volksraad* of 9 Jun 1840.

140 *Volksraadsnotule Natal*: 63-65, art 21 of the minutes of the *Volksraad* of 29 Sep 1840.

141 *Volksraadsnotule Natal*: 12-14, art 6 of the minutes of the *Volksraad* of 29 Jun 1839.

142 *Volksraadsnotule Natal*: 28-30, art 10 of the minutes of the *Volksraad* of 6 Jan 1840. The magistrate had to issue a separate certificate for each child – *Volksraadsnotule Natal*: 86-87, art 3 of the minutes of the *Volksraad* of 7 Apr 1841. For more on the *inboekeling* system, see Boeyens 1994: 187-214; and Morton 2005: 199-215.

143 *Volksraadsnotule Natal*: 40-41, art 7 of the minutes of the *Volksraad* of 3 Apr 1840.

144 *Volksraadsnotule Natal*: 35-36, art 1 of the minutes of the *Volksraad* of 6 Mar 1840.

145 *Volksraadsnotule Natal*: 53-55, art 6 of the minutes of the *Volksraad* of 10 Aug 1840.

146 *Volksraadsnotule Natal*: 38-39, art 4 of the minutes of the *Volksraad* of 1 Apr 1840.

147 *Volksraadsnotule Natal*: 28-30, art 12 of the minutes of the *Volksraad* of 6 Jan 1840.

148 *Volksraadsnotule Natal*: 113-115, art 2 of the minutes of the *Volksraad* of 7 Oct 1841.

149 *Volksraadsnotule Natal*: 63-65, art 12 of the minutes of the *Volksraad* of 29 Sep 1840; *Volksraadsnotule Natal*: 86-87, art 2 of the minutes of the *Volksraad* of 7 Apr 1841.

150 *Volksraadsnotule Natal*: 20-21, art 5 of the minutes of the *Volksraad* of 8 Nov 1839.

151 *Volksraadsnotule Natal*: 104-105, art 4 of the minutes of the *Volksraad* of 19 Jun 1841.

152 *Volksraadsnotule Natal*: 62-63, art 10 of the minutes of the *Volksraad* of 28 Sep 1840.

153 *Volksraadsnotule Natal*: 28-30, art 2 of the minutes of the *Volksraad* of 6 Jan 1840.

154 *Volksraadsnotule Natal*: 314-315, app 31/1839.

155 *Volksraadsnotule Natal*: 20-21, art 3 of the minutes of the *Volksraad* of 7 Nov 1839. These specifications required the following: twenty-five feet by eighteen feet with a flat roof and the lowest wall at nine feet built of planed yellow wood. The building had to contain a wall in the middle and each room had to have at least one window, a door and a doorframe. The second instructions amended the size of the building to twenty-five feet by twenty-four feet, but did not say anything regarding the further specifications: see *Volksraadsnotule Natal*: 28-30, art 2 of the minutes of the *Volksraad* of 6 Jan 1840. For more on the prison system in Natal after 1845, see Peté 2015: 102-118.

delegate this responsibility.<sup>156</sup> Other related duties included the building of a powder magazine;<sup>157</sup> preparing an estimate of the costs and a report on the viability of proposed waterworks;<sup>158</sup> renting a house for the purpose of *Volksraad* assemblies;<sup>159</sup> building a council house from funds to be sourced;<sup>160</sup> and acquiring shovels and pick-axes for governmental use.<sup>161</sup>

## 4 Summary

From the above it becomes clear that the magistrate played a crucial role in the general administration beyond the Orange River during the period 1839 to 1843. His duties extended way beyond the usual judicial responsibilities. He was seen as an intermediary between the government – in most cases, seated far away – and the inhabitants of his district. It is for this reason that various magisterial districts were established on both sides of the Drakensberg. As the representative of the government, a magistrate not only had to dispense justice, but also had to manage the finances of his district, convey information and announcements to the inhabitants and supervise building projects relating to public works. However, he also conveyed the needs and concerns of the inhabitants to the government, and in this sense acted as the representative of the people.

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- 156 *Volksraadsnotule Natal*: 91-92, art 1 of the minutes of the *Volksraad* of 11 Apr 1841.
- 157 *Volksraadsnotule Natal*: 28-30, art 3 of the minutes of the *Volksraad* of 6 Jan 1840. This instruction was issued to the magistrate and *heemraden* and the building had to be at least twelve feet by fifteen feet.
- 158 *Volksraadsnotule Natal*: 96-98, art 3 of the minutes of the *Volksraad* of 15 Jun 1841; *Volksraadsnotule Natal*: 135-136, art 2 of the minutes of the *Volksraad* of 10 Jan 1842. In terms of the latter instruction the magistrate of Port Natal had to invite tenders on the building of a dam and inform the *Volksraad* of the outcome of the process; the magistrate also had to submit a very comprehensive report to the *Volksraad* on the geographical and geological viability of such a dam.
- 159 *Volksraadsnotule Natal*: 121-123, art 15 of the minutes of the *Volksraad* of 12 Oct 1841.
- 160 *Ibid*. This instruction was issued to the magistrate and *heemraden*.
- 161 *Volksraadsnotule Natal*: 152-155, art 4 of the minutes of the *Volksraad* of 29 Apr 1842.

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# THE HISTORY AND POLITICS OF CONTEMPORARY COMMON-LAW PURISM

**Emile Zitzke\***

## ABSTRACT

This article explores the phenomenon of common-law purism in South Africa from a critical-legal-realist perspective, in historical context. The problem addressed in this piece is that the politics that could underlie common-law purism has not been comprehensively explored before. The problem is unpacked by conducting an archaeological study into what could be called “classical common-law purism” that once featured in the mid-1900s of South African legal history in terms of which various judges and academics committed themselves to the task of purifying the South African common law from English influences in favour of untainted Roman-Dutch law. In this regard close attention is paid to the lives and law of the late

- \* Postdoctoral Research Fellow, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (A Centre of the University of Johannesburg). The idea for this paper comes from a discussion had with Johan van der Walt in Luxembourg in 2014 where I was given this valuable piece of advice: Be politically open and clear. I presented an earlier version of this paper at a seminar hosted at Saifac in October 2016 where I received helpful feedback, comments and questions from Deeksha Bhana, Stu Woolman, and David Bilchitz. Khuraisha Patel, Duard Kleyn and David Bilchitz attentively read and critiqued the article-version of the paper. I owe a part of my reading list for this work to André van der Walt who passed away towards the end of 2016, before he could read it. I dedicate this paper to his memory and legacy in private-law jurisprudence.

Chief Justice LC Steyn and Professor JC de Wet as two prominent figures often associated with this movement, with the aim of linking the two thinkers' socialisation and political commitments to their purism. It is then shown that at the time when classical common-law purism was on its deathbed, it was rejuvenated and took on a contemporary form. The goal of the movement was no longer to purify Roman-Dutch law from English "stains"; instead, the objective became to shield the common law against a human-rights inspired Constitution. In that discussion it is demonstrated that contemporary common-law purism is currently a dominant theoretical approach, at least in the law of delict and, perhaps through a process of abstraction, in "private" law more generally. Specific attention is paid to the views of various delict academics to illustrate the prevalence of contemporary common-law purism. In that process an attempt is made to draw connections between various thinkers' socialisation, political commitments and their purism. Finally, some concluding thoughts are provided on the possible political commitments contained in the purist movement. Essentially, the invitation that is extended to private-law lawyers is to be more politically candid about what they aim to achieve, as a matter of justice, in the stances that they take on the issue of constitutional application to common-law problems.

**Keywords:** Constitutional avoidance; common-law purism; critical legal studies; American legal realism; critical legal realism; law and politics; constitutional application; human rights and private law; private-law theory

## 1 Introduction

This discussion is about constitutional avoidance. More specifically, constitutional avoidance as it features in common-law scholarship and practice. For brevity sake and for reasons that I hope will become clear as this paper progresses, I will refer to this type of constitutional avoidance as "contemporary common-law purism". My fundamental aim in this piece is to expose the *various* political stances ("ideologies", "philosophies" or "normative frameworks") that could underlie and/or be reflected in contemporary common-law purism, which has problematically remained dormant in much of the discourse on this phenomenon.

This is a problem for two main reasons. Firstly, political concealment in legal reasoning often leads to theoretical shallowness. Theoretical shallowness results in scholars misunderstanding each other, a lack of meaningful engagement and perhaps reluctance to learn from one another. To state my contention in Habermasian terms, we could appreciate each other's arguments better if we understand each other's normative claims to law's validity.<sup>1</sup> Secondly, political secrecy in our discussions on the interaction between constitutional rights and the common law can result in erroneously-called "neutral" or "apolitical" concerns, for example "legal certainty", cloaking underlying or manifest political sentiments. Of course one could rely on

1 See, generally, Habermas 1992.

legal certainty as a justification for following the contemporary common-law purist paradigm, but then one should be clearer about the normative importance of legal certainty for the “post”-colonial, “post”-apartheid democratic South Africa. The importance of legal certainty for the current South African condition is at present an under-theorised concept in our private-law scholarship that I will later show is sometimes invoked as an absolute necessity with no deeper attempt at justification.

I conduct my analysis firstly by endeavouring to discover the historical roots of the problem. I do this, in Part 2, by conducting a brief archaeological study into what could be called “classical common-law purism” that once featured in the mid-1900s of South African legal history in terms of which various judges and academics committed themselves to the task of purifying the South African common law from English influences in favour of untainted Roman-Dutch law. In this regard I will pay close attention to the lives and law of the late Chief Justice LC Steyn and Professor JC de Wet as two prominent figures often associated with this movement, with the aim of linking the two thinkers’ socialisation and political commitments to their purism.

In Part 3, I will show that at the time when classical common-law purism was on its deathbed, it was rejuvenated and took on a contemporary form. The goal of the movement was no longer to purify Roman-Dutch law from English “stains”; instead, the objective became to shield the common law against a human-rights inspired Constitution.<sup>2</sup> In this discussion I will demonstrate that contemporary common-law purism is currently a dominant theoretical approach, at least in the law of delict and, perhaps through a process of abstraction, in “private” law more generally. I specifically look at the views of various delict academics to illustrate the prevalence of contemporary common-law purism. In that process I once again attempt to draw connections between various thinkers’ socialisation, political commitments and their purism.

Finally, in Part 4, I attempt to provide some concluding thoughts on the possible political commitments contained in the purist movement. Essentially, the invitation that I extend to private-law lawyers is to be more politically candid about what they aim to achieve in the stances that they take on the issue of constitutional application to common-law problems. The invitation serves the purpose of endorsing “critical legal realism” as a theoretical framework for understanding different positions on the Constitution’s application to the common law. Critical legal realism, as I use the term, integrates key assumptions of two paradigms, namely “American legal realism” and “critical legal studies”.<sup>3</sup>

2 The Constitution of the Republic of South Africa Act 200 of 1993 (hereafter “the 1993 Constitution”) was the first South African Constitution to contain and promote human rights which was taken up in the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

In essence the legal realists of the early 1920s argued that, among many other things, judges are unavoidably influenced by their psychological and sociological dispositions in the process of reasoning their judgments, that, when coupled with gaps and ambiguities in legal texts, results in law's indeterminacy.<sup>4</sup> For example, one could argue that judges with liberal politics often tried to subvert apartheid policies that allowed arbitrary arrest and detention through processes of creative legal interpretation,<sup>5</sup> or that a white middle-class judge who recently decided that the singing of *dubul' ibhunu* constitutes hate speech was probably influenced by his race and class.<sup>6</sup>

Critical legal scholarship of the 1970s drew on the ideas of the realists but took on the view that the law is radically indeterminate because of political conflicts that arise from within legal provisions themselves.<sup>7</sup> The early critics reasoned that legal texts are internally conflicted because on one legal issue we could find competing political concerns at play.<sup>8</sup> For example, one legal provision relevant to a specific issue might allow individuals to act selfishly (arguably supporting an "individualistic" politics that could be described as being "classically liberal" or perhaps "libertarian"), while another legal provision relevant to the same issue might require individuals to look out for one another (arguably supporting an "altruistic" politics that corresponds with "egalitarian" or even "socialist" concerns). In other words, the law is radically indeterminate because the law itself provides different political options to choose from.<sup>9</sup> Furthermore, the critics argue that even where political conflicts do not arise in the law, many simple legal provisions have political manifestations. For example, a right to virtually absolute private-property ownership cannot be said to be a neutral right – it certainly has classically liberal and capitalist ideological underpinnings that are not necessarily natural and inescapable.<sup>10</sup>

When the thoughts of the realists and critics collide, we could argue that the space of legal interpretation is the field in which the political pliability of legal texts

3 See a similar merger of the two schools of thought conducted by Hanson & Yosifon 2003: 179ff. Without expressly using the phrase "critical legal realism", Visser 1989: 21-22 appears to promote a similar approach. Cf Albertyn & Davis 2010: 190 who use the term "critical legal realism" as a synonym for "critical legal studies".

4 A lucid and succinct account of American legal realism can be found in Engle 2010: 69ff. More detailed accounts of the history of the movement are provided by Singer 1988 and Tamanaha 2009. For the South African context see, eg, Dugard 1971; Hoorntje 2004: 158ff; and Van Blerk 1998: 55-81.

5 Dugard 1971: 190-195.

6 Modiri 2013: 280ff.

7 On the link between American legal realism and critical legal studies see, eg, Anonymous 1982; White 1986; Engle 2010; and Albertyn & Davis 2010: 192ff.

8 Cogent accounts of the history and concerns of critical legal studies are provided by Unger 1983; and Tushnet 1991. South African accounts of the basic principles of critical legal scholarship feature in, eg, Van Doren 1989; Van Blerk 1996; Van Blerk 1998: 147-170; and Le Roux & Van Marle 2004.

9 This is classical critical legal studies, first introduced by Kennedy 1976.

10 See the literature canvassed in Zitzke 2014.

and a lawyer's personal political make-up often meet. In the context of constitutional application to the common law, constitutional jurisprudence may be exploited in either direction – to apply or not to apply the Constitution – due to various political conflicts inherent in the text of the Constitution itself. Even though bordering on oversimplification, we could consider the following basic examples: Section 8 of the 1996 Constitution requires courts to develop the common law in order to further constitutional rights which supporters of the liberal rights paradigm might support; section 39(2) of the 1996 Constitution could be understood to mean that the common law must be developed if it falls short of the flexible standard of the “spirit, purport and objects of the Bill of Rights” which supporters of more critical schools of thought could support because elastic standards tend to result in more socially just outcomes; and section 39(3) and Schedule 6 of the 1996 Constitution could be read to mean that the common law must be presumed to be constitutionally compliant unless some flagrant discord exists, a sentiment that supporters of anti-human-rights movements could find valuable. For some lawyers this basic reduction of the interplay between personal politics and approaches to constitutional application will be reflective of the truth. However, for others, their politics is not unidimensional and so different situations will call for different approaches to the issue of constitutional application. Undoubtedly, for many of us, personal politics is continuously subject to change and development and thus stances on constitutional application may also change over time.

In summary, my argument is that when a judge or an academic takes a stand about the Constitution's application to the common law, their personal political make-up (no matter how simple, complex or consistent) will very often influence their decision about which interpretation of the Constitution they should follow, and that – in turn – has political results. I specifically emphasise that personal politics “very often” (not “always”) will influence one's opinion on constitutional application because it is possible that the socialising effect of legal training can cause a lawyer to experience an estrangement of his or her personal politics and approach to constitutional application.

Karl Klare famously observed in the early years of South African democracy that a serious dissonance exists between the substance of the Constitution and the types of legal reasoning that South African lawyers find persuasive.<sup>11</sup> On one interpretation of Klare's work, we could stretch his uneasiness about South African legal culture so far as to say that some lawyers with progressive mind-sets, committed to the transformative potential of the Constitution, might stifle the realisation of their own political goals because they have been trained to think and reason the private law “pure”.<sup>12</sup> This does not mean that if your personal politics and

11 Klare 1998: 151.

approach to constitutional application have no clear link that you can avoid political accountability.

Of course, regardless of the link between your personal politics and your approach to constitutional application, the choice that you exercise with regard to constitutional application in a given situation will have manifest political results.<sup>13</sup> For example, suppose that we are back in 2004 before *Minister of Home Affairs v Fourie* was heard.<sup>14</sup> On the issue of same-sex marriage it is possible that a hypothetical scholar might have picketed over weekends for the recognition of the equal worth of gay people while writing articles during the week for law journals about how the common-law definition of marriage, restricted to heterosexual marriage, had to be preserved for the sake of the institutional integrity of the common law. Suppose further that in the scholar's writings she made no argument for legislative intervention instead of common-law development because, in her mind, "law and politics have nothing to do with one other". Stranger things have happened. What must be emphasised in this regard is that the stance taken in the scholar's academic argument had the manifest political effect of stifling the social transformation that the scholar was fighting for in her private time. It might not have been her direct intention but that is the effect of her jurisprudence.

It is against the backdrop of critical legal realism that this paper should be understood. The key idea that I promote here is this: The possibility exists that if we, as private lawyers, are politically clearer about why we generally, as a matter of justice (and not just black-letter law), endorse or reject the Constitution's reach into private law, we could all deepen our theoretical understanding of this issue and perhaps this could open a new level of discourse that is both enlightening and exciting. Even if our personal politics does not comfortably fit with our reading of the law on constitutional application, I think it is worthwhile identifying the clash and then to proceed to explain what the underlying ideology of each is, why we think the inharmoniousness exists, and which of the clashing options are more desirable.

## 2 Classical common-law purism

### 2.1 The historical backdrop

Classical common-law purism (in traditional literature simply called "purism") involves the cleansing of South African common law from English influences with the ultimate goal of creating and maintaining an unmixed system of Roman-Dutch

12 This point is to some extent echoed in Davis & Klare 2010: 406.

13 See eg Botha 2004.

14 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) is the much-celebrated decision in which the Constitutional Court held that the common-law definition of marriage was unconstitutional on the basis that it unfairly discriminated against homosexual people who were excluded from its ambit. The Court instructed Parliament to pass national legislation that would make provision for same-sex legal unions. This legislation was later passed as the Civil Union Act 17 of 2006.

law. The apparent conflict between the Englishness and Roman-Dutch character of our common law must be understood against the backdrop of the socio-political conditions of South Africa in its early colonial history. To use the phraseology of Daniël Visser (from whom I also borrow the idea of linking external legal history to the development of jurisprudential paradigms), classical purism must in some way be connected to the “cultural forces” at play during its inception.<sup>15</sup>

The source of law that South Africans know today as common law came about as a result of two official conquests. After the Dutch East India Company arrived at the Cape in 1652 they eventually decided to colonise the territory in the name of the Dutch Republic and impose their laws onto African people.<sup>16</sup> Colonisation was possible because the conquerors regarded the inhabitants as uncivilised and therefore their territories were deemed *terra nullius*. But the process of colonisation did not only involve the displacement of African political and economic power.<sup>17</sup> It also involved epistemicide – the killing of existing forms of knowledge and the subsequent prevention of the development of that knowledge. Following Frantz Fanon, colonisation had at its heart the effect of pushing Black lives into the “zone of non-being”<sup>18</sup> through a process of external (material) and internal (psychological) othering.<sup>19</sup> Part of the epistemicidal effects of colonisation certainly related to the death of culture and language, but for purposes of present discussion it must be emphasised that a crucial effect was the discarding of African law and its replacement with a Dutch-inspired legal system. If no Cape-specific administrative legislation was passed on a specific issue, the laws of Holland (including the commentary thereon by the Old Dutch writers), the Batavian *placaaten*, and Roman law applied.<sup>20</sup> During this time, the Afrikaans-speaking farming community of Dutch settlers, French Huguenots and other European immigrants became known as the Boers. Later they would be called Afrikaners.

The British occupied the Cape in 1795 for the first time, interrupted between 1803 and 1806 by Dutch rule, after which the British finally took control of the area in 1806.<sup>21</sup> Under English rule the precedent laid down in *Campbell v Hall*<sup>22</sup> was followed in terms of which the legal *status quo* had to continue subject to incremental changes brought about by the British colonial authorities.<sup>23</sup> The effect was that Roman-Dutch law largely remained intact. The most significant English

15 Visser 2003.

16 See, eg, Van Niekerk 2011: 20-21.

17 See, eg, Terreblanche 2002: 153-155.

18 Fanon 1967: 2.

19 *Idem* 8.

20 Wessels 1920; Hahlo & Kahn 1968: 574; Van Zyl 1971: 434ff; and Thomas *et al* 2000: 96-97.

21 Hahlo & Kahn 1968: 575; Van Zyl 1971: 443; and Thomas *et al* 2000: 97.

22 *Campbell v Hall* (1774) 1 Cowp 204 at 209, 98 ER 1045 at 1047.

23 Hahlo & Kahn 1968: 575; Van Zyl 1971: 444; and Thomas *et al* 2000: 97-98.

changes related to the structure of government and the courts, as well as notable revisions to criminal, mercantile and procedural law.<sup>24</sup>

Some of the Boers eventually left the Cape to establish their own states free from English control. This process would later be called the Great Trek of 1835-1848. The Natal Colony of the Boers was annexed within five years by the British with the result that Roman-Dutch law with English sprinkles, as it featured in the Cape, applied.<sup>25</sup> In the *Zuid-Afrikaansche Republiek (ZAR)* and the Orange Free State (OFS), Roman-Dutch law was applied. In the OFS this meant that the writings of, among others, Voet, Van Leeuwen, De Groot, Van der Linden and Van der Keesel were authoritative.<sup>26</sup> In the *Zuid-Afrikaansche Republiek* the law was based on Van der Linden's *Koopman's Handboek* except on issues on which he was silent in which case van Leeuwen's *Het Roomsche-Hollandsch Recht* or the *Inleidinge* of De Groot would be authoritative.<sup>27</sup> Up to this point in our history it is clear that Roman-Dutch law constituted the bulk of colonial South Africa's substantive law, with English alterations featuring more strongly in the British colonies.

The battle between the *Boers* and the British for political control of South Africa did not end here. The South African War (1899-1902) ensued, ultimately pitting the British colonial forces against the Boer Republics.<sup>28</sup> The Boers surrendered to the British Empire, the result eventually being the establishment of the Union of South Africa in 1910.<sup>29</sup> The four colonies became united under the authority of the British Monarch's representative in the form of the Governor-General.<sup>30</sup> As HR Hahlo and Ellison Kahn have shown, the laws of the colonies were carried forward into the Union. However, the court system comprised of a single Supreme Court with four provincial divisions and an appellate division.<sup>31</sup> The result was that South Africa would now have a unified legal system that would properly be called "South African law" instead of the Roman-Dutch or English law. Despite this mirage of unity, Phillip Thomas *et al* indicate that during the time of the Union "the Boer War had strengthened Afrikaner nationalism with the result that South African politics during the first half of the century were dominated by English versus Afrikaner confrontation

24 Hahlo & Kahn 1968: 576-577; Van Zyl 1971: 445; and Thomas, Van der Merwe & Stoop 2000: 98-99.

25 Van Zyl 1971: 471-472; and Thomas, Van der Merwe & Stoop 2000: 99-100.

26 Van Zyl 1971: 468; and Thomas, Van der Merwe & Stoop 2000: 103.

27 Van Zyl 1971: 462-463; and Thomas, Van der Merwe & Stoop 2000: 103-104.

28 Traditionally the term "Anglo-Boer War" is used to depict that the war was between Britain and the *Boer* Republics. Here, I use the term "South African War" to emphasise the fact that there were many African people who were also caught up in the hostilities between the *Boers* and the British. I take cognisance of the fact that there was technically no unified "South Africa" in existence at the time, but this term features prominently in modern accounts of South African history. See, eg, Thompson 2014: 132ff.

29 The South Africa Act of 1909 (9 Edw VII c 9) constituted the Union.

30 Hahlo & Kahn 1960: 128.

31 *Idem* 249ff.



at the expense of the country's black population".<sup>32</sup> This was further exacerbated by the fact that Black people were excluded from the realm of political and economic autonomy which eventually became formalised as Apartheid.<sup>33</sup> In truth, there was very little unity in the Union.

The battle between the *Boers* and the British may have come to an end in physical confrontational terms but a South African "Legal Cold War" arose in practice and scholarship. Following the South African War, many Afrikaners yearned to establish a collective identity and to recover the political power that they once had.<sup>34</sup> To secure academic legitimacy (and even superiority) Afrikaner scholars could strategically rely on a claim that Roman-Dutch law was the "true" law of South Africa, giving them a linguistic advantage over their English counterparts.<sup>35</sup> By the late 1940s, Afrikaner legal scholarship was in flight with a renewed interest in the pure Roman-Dutch law.<sup>36</sup> Many Afrikaner academics were afforded opportunities to study in the Netherlands, while English scholars were often sent to Oxford or Cambridge.<sup>37</sup> The divide between Afrikaner and English legal academe in South Africa was real, as illustrated by a writer with the *nom de plume* of Proculus who identified two competing schools of South African jurisprudence that flourished by the early 1950s<sup>38</sup>

On the one hand "Antiquarians" specialised in the historical study of the common law, often conducting overlong analyses of the progression from Roman to Roman-Dutch law with a briefer study of South African case law on the specific issue. They often concluded their research with scathing comments directed against the South African judiciary for not strictly adhering to the Roman-Dutch position.<sup>39</sup>

On the other hand the "Modernists" would focus on South African judicial pronouncements, only returning to the old authorities where uncertainty in modern law existed.<sup>40</sup> The Modernists took on the view that South African law was a mixture of Roman-Dutch and English law and that even though the Roman-Dutch component laid the foundation for our law, English influences could not be denied as a legitimate part of our legal system.<sup>41</sup> Furthermore, the Modernists contended that the law necessarily develops when judges interpret rules. Even in countries with codified legal systems, the modern law contained much more detail than a plain-meaning reading of the Codes might suggest at first glance.<sup>42</sup> According to the Modernists,

32 Thomas *et al* 2000: 104.

33 Terreblanche 2002: 6ff.

34 Visser 2003: 54.

35 *Ibid.*

36 Thomas *et al* 2000: 105.

37 Visser 2003: 55.

38 Proculus 1950.

39 *Idem* at 306.

40 *Ibid.*

41 *Idem* at 309.

42 *Idem* at 312.

judicial developments of our common law beyond the original scope of Roman-Dutch rules should be accepted as legitimate as long as it “satisfactorily meets the needs of the society it serves”.<sup>43</sup>

In 1952 GA Mulligan, King’s Counsel at the Johannesburg Bar, redefined Proculus’ problem.<sup>44</sup> Mulligan identified a deeper issue at stake in the struggle between Antiquarians and Modernists: Hidden in Proculus’ commentary is an identification of a legal battle between Afrikaner scholars who advocated a return to pure Roman-Dutch law and English academics who promoted the modern and local development of South African law which incorporated both Roman-Dutch and English elements. For Mulligan the Antiquarian school promoted Roman-Dutch “purism” – the first time that the phrase was used. Opposing the purists were the “pollutionists” and the “pragmatists”. The pollutionists made South African law more English than might have been necessary, probably because they relied on English case law and books on account of those being more accessible and readily understandable.<sup>45</sup> Phrased differently, in my own terms, the pollutionists suffered from English overexcitement. The pragmatists acknowledged that South African law had three parts, namely Roman-Dutch law, English law and modern South African developments of the old rules brought about by the judiciary to keep up with the advancement of society. According to the pragmatists, all three of these components had to be recognised to give a true account of the South African legal system.<sup>46</sup> Regardless of how one divides the jurisprudential armies, the war was ultimately between the purists and non-purists, and it was a political battle.

At this point we must reflect on the ideological underpinnings of the classical purist movement. In addition to the post-South-African-War blues, it must be remembered that by 1948 Afrikaner and white supremacy reached its zenith with the formal introduction of Apartheid. In this regard Eduard Fagan contends that

it would be naïve to suggest that the racial “purity” so ardently espoused by (predominantly) Afrikaner politicians did not have its corollary in the movement in favour of “purity” in South African law – by which is meant the exclusion of what are perceived to be English additions to the pre-existing Roman-Dutch system.<sup>47</sup>

He further argues that “due attention should be given to the historical and political matrix from which the purists’ claim to Roman-Dutch law’s right of pre-eminence arose”<sup>48</sup> and that, even though the motivations for different classical purists could have been diverse, it certainly arose from “a political *Zeitgeist* which

43 *Ibid.* See, similarly, Price 1947: 504; and Hathorne 1952.

44 Mulligan 1952.

45 *Idem* at 30-31.

46 *Idem* at 31-32. See, also, Bodenstein 1912; and Visser 1986.

47 Fagan 1996: 61.

48 *Idem* at 63.

was concerned, above else, with the separation of cultures”.<sup>49</sup> Even though this could be the case, François du Bois and Daniël Visser emphasise that there were those purists who definitely were inspired by Afrikaner nationalist politics, but that there were others who sincerely believed that Roman-Dutch law should remain pure for the sake of preservation of legal science and system.<sup>50</sup> In the next two sub-parts (§ 2 2 & § 2 3) I explore to what extent politics, as opposed to the “apolitical” concerns of legal science and system, played in the reasoning of judges and academics of the time. It would be an impossible task to explore every academic and judge’s law-and-politics relationship. For that reason I have decided to consider the lives and law of two prominent figures in the classical-purist movement. In part, I consider these two individuals because much has been written about them as humans and as lawyers. But also – in part – I must concede, because their stories support aspects of the critical-legal-realist insight. The two figures are the late Chief Justice LC Steyn (1903-1976) and Professor JC de Wet (1912-1990).

## 2 2 Classical purism as nationalism: LC Steyn

After growing up in a pro-Nationalist environment and attending anti-English schools,<sup>51</sup> Lucas Cornelius Steyn was employed as a legal advisor to the South African government in various capacities<sup>52</sup> until he was appointed to the Transvaal Provincial Division of the Supreme Court in 1951 at the age of forty-seven. Within four years he was promoted to the Appellate Division and by 1959 he became the Chief Justice of South Africa.<sup>53</sup> These introductory facts are important because Edwin Cameron claims that a link exists between them and Steyn’s “executive-minded” and “chauvinist” jurisprudence. His jurisprudence is said to have been executively-minded because he more often than not adjudicated cases in favour of government with little to no consideration for individual liberty. His jurisprudence was additionally chauvinist because he often foisted classical purist ideals on our law, not for the sake of functionality and development but simply for the sake of cultural purity.

Steyn was the Nationalist government’s man. He served as legal advisor to the state departments of external affairs and justice, during which he represented South Africa under Nationalist rule at various United Nations assemblies.<sup>54</sup> Even though he could comfortably be described as a “public servant”, due to the nature of his employment he also fulfilled an instrumental role in the building of the Nationalist

49 *Idem* at 64.

50 Du Bois & Visser 2003: 619; repeated in Du Bois 2004: 224.

51 Cameron 1982: 38.

52 Kahn 1971: 1.

53 *Idem* at 2.

54 *Idem* at 1-2.

state as a politician. The Nationalist state's political ideology was constructed on the foundational belief in purity of all kinds. As explained above, at least one leg of purism related to the decontamination of various South African institutions from Englishness. By means of examples, immigration laws were introduced to make it more difficult for English people to move to South Africa; the Rand Afrikaans University was established in 1967 to promote Afrikaans as an academic language and was led by the Nationalist cabinet minister Nic Diederichs who later became state president; and South Africa became a Republic independent from British control in 1961.<sup>55</sup> One might object and claim that Steyn's appointment to the bench in 1951 was not political and that he was appointed on merit, being a holder of a doctoral degree from the University of Stellenbosch and an author of a famous book on statutory interpretation.<sup>56</sup> Unfortunately there is evidence that his competence may have been a strategic consideration that hid the true reason for his appointment, which was his commitment to Nationalist politics. As Edwin Cameron says, "his legal philosophy was of a piece with the broader pattern of nationalism then ineluctably being impressed upon the life of the country".<sup>57</sup> This made him a suitable candidate for the office of Chief Justice despite him being junior to the liberal and English Appellate Division judge Oliver Schreiner, who was not one of the government's favourites.<sup>58</sup>

Steyn's commitment to Nationalist politics is reflected in various executive-minded decisions on statutory interpretation in which he favoured the government at the expense of protecting the freedom of the individual.<sup>59</sup> Such decisions were not necessarily corrupt in the sense that his pronouncements were fettered by governmental powers, but they were morally corrupt and laid many bricks towards the building of the Apartheid state.<sup>60</sup> More pertinently for purposes of the present discussion it must be emphasised that Steyn's Nationalism also influenced his approach to common-law problems.

As a symbol of racial and cultural purism, Steyn attempted to shave away as many English influences on our law as possible. Although there are many,<sup>61</sup> one

55 Cameron 1982: 41.

56 Kahn 1971: 1.

57 Cameron 1982: 42.

58 *Idem* at 41-42.

59 See, eg, his judgments or concurrences commented on by Cameron 1982: 53ff: *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A); *Collins v Minister of the Interior* 1957 (1) SA 552 (A); *Minister of the Interior v Machadodorp Investments* 1957 (2) SA 392 (A); *Publications Control Board v William Heinemann* 1965 (4) SA 137 (A); *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A); *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A); *Down v Malan NO* 1960 (2) SA 734 (A); *Group Areas Development Board v Hurley NO* 1961 (1) SA 123 (A); *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A); *Loza v Police Station Commander, Durbanville* 1964 (2) SA 545 (A); *Rossouw v Sachs* 1964 (2) SA 551 (A); and *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A).

60 Cameron 1982: 52; cf Dyzenhaus 1982.

61 See the nineteen-page case review of Steyn's impact on South African law by Rumpff 1978: 87-106.

well-known example that I will focus on here is *Regal v African Superslate*.<sup>62</sup> In *Regal* a dispute arose between the owners of adjacent properties. Regal sought an interdict to prohibit African Superslate from continuing to allow refuse slate to be deposited in an adjacent river, causing the slate to wash onto Regal's property.

For more than eighty years since *Holland v Scott*,<sup>63</sup> South African courts had relied on the English law of nuisance to resolve disputes of this nature. Nevertheless, Chief Justice Steyn thought it prudent to disrupt the longstanding principles of nuisance because English law was not "our common law".<sup>64</sup> According to Steyn, English nuisance law was imported under the guise that it was compatible with the Romanist principles that "it is prohibited to do on your own property that which may harm another's" and "do not use your own property to do harm to another", but that the similarity between the English and Romanist rules of neighbour law were "nothing more than coincidental", and that "our law" cannot be replaced by the English law of nuisance.<sup>65</sup> As explained in the preceding discussion, South African law is a mixture of Roman-Dutch and English law as developed by our courts. "Our common law" should therefore be accepted as a hybrid system law. Not so, according to Chief Justice Steyn. In the remainder of the judgment, Steyn meticulously explained what the *Codex* and *Digesta* of the Roman Emperor Justinian had to say about the legal relationship between neighbours, what Dutch and German authors thought of it, and held that these views constituted "our law".

For Steyn, the term "our common law" meant Roman law as received in Western Europe. The "our" did not signify a united South African people; the "our" referred to Afrikaners. The possibility also does not seem to exist to save Steyn's purism in *Regal* on the ground of legal certainty, system or science. Steyn disrupted eighty years' worth of law – legal certainty was clearly not his objective. Legal systematisation or science was also not on the agenda because, in Steyn's own words, the Roman-Dutch position was "fragmented" and existed in a time and context of different remedies and procedural rules that were very different to our own.<sup>66</sup> In fact, various neighbour-law remedies recognised in Roman-Dutch law had fallen into disuse,<sup>67</sup> but Steyn was adamant that the Roman-Dutch position was relevant for modern South African law. Steyn's reasoning in *Regal* was critiqued by AS Mathews and JRL Milton because

it is still undesirable that a doctrine which the courts have explicitly adopted (or taken for granted) for more than eighty years should be subverted without any consideration of the extent to which it achieved a just solution of conflicts and to which it reflected desirable social policy. It is notable that policy considerations are entirely overlooked [...] in the judgments delivered in *Regal's* case.<sup>68</sup>

62 1963 (1) SA 102 (A).

63 (1882) 2 E.D.C. 307.

64 *Regal v African Superslate* at 106D.

65 *Idem* at 106F.

66 *Idem* at 106H.

67 *Idem* at 109H.

68 Mathews & Milton 1965: 40.

In short, Steyn purified the common law, simply for the sake of purity with no consideration given to established rules (that would keep many formalists happy), reputable principles (which Dworkinians would support) or good policy (punted for by more critical scholars), and without any regard being had for the fact that “[o]ur pride in our national jurisprudence is rightly based on its inherent merits, not the purity of its ancestry”.<sup>69</sup> Cameron is then surely correct when he describes Steyn’s jurisprudence as chauvinist and inextricably linked to his Nationalist politics. Moreover, I argue that Steyn’s executive-mindedness is circumstantial evidence supporting the claim that his purism was politically motivated. However, not all classical purists were inspired by Nationalism like Steyn may have been.

### 2.3 Classical purism as liberal deviationist doctrine: JC de Wet

Professor JC de Wet is conventionally considered to be the “head boy” of the classical purist movement in South African legal academia and was a much-loved academic who taught at Stellenbosch (1936-1972) and the University of Cape Town (1976-1981). I say he was much-loved because two *Festschriften* honour his legacy,<sup>70</sup> providing us with enough academic literature to draw tentative links between his politics, academic socialisation and jurisprudence. There are two comments to be made here about De Wet, both of which emphasise that his purism was not influenced by Afrikaner-Nationalist politics. Firstly, there is evidence that shows that De Wet’s purism was not absolutist. Secondly, there is evidence that De Wet was a devoted liberal and perhaps there may be snippets of data that show that his purism and liberal politics were in fact intertwined.

Even though it is true that De Wet more often than not favoured a pure Roman-Dutch version of the common law, he never threw the baby out with the bathwater. De Wet was willing to accept that English law sometimes provided better solutions to South African legal problems than the Roman-Dutch rules.<sup>71</sup> In general terms De Wet regarded English law as being “unsystematic” in comparison to Roman-Dutch law, but he nevertheless made it clear that there are instances where we can learn from English law.<sup>72</sup> Thus, his approach to the common law probably cannot comfortably be described as being Antiquarian. De Wet did not simply want a return to Roman-Dutch law – his approach made room for the development of the common law drawing from a wide variety of intellectual resources, promoting those rules and principles that were grounded in “reason” and “equity”.<sup>73</sup> This leads us to De Wet’s politics.

69 Boberg 1966: 175.

70 Gauntlett 1979; Du Plessis & Lubbe 2013.

71 See, generally, Van Niekerk 1980: 186-187; Van Blerk 1982: 374.

72 Du Bois & Visser 2003: 619.

73 Van Niekerk 1980: 186.

It has been repeatedly emphasised by De Wet's biographers that his purism was not influenced by "nationalism"<sup>74</sup> or "chauvinism"<sup>75</sup> (after all, he was married to an atheist English woman called Hilda who voted for the Progressive Party)<sup>76</sup> but by his desire for "system" and "science" in law. With that said, there are interesting links to be drawn between his politics and his jurisprudence. De Wet practiced liberal politics by, for example, speaking out against intimidation tactics of the National Party (NP), stood as an independent candidate in the city council where he took a clear position in promoting a multiracial vision for South Africa, and opposed the removal of coloured people from Stellenbosch.<sup>77</sup> In this sense we could argue that De Wet embraced the ideals of the Enlightenment (or, as critical scholars like to call it, "Western Modernity") from which flows his support for the (a) scientific and systematic study of law, and (b) infiltration of liberal philosophy into activism and the law. Let us consider two examples to illustrate this point.

Before De Wet's prolific work on South African criminal law called *Strafreg*,<sup>78</sup> criminal liability was objectively determined under the influence of English law. De Wet took on the viewpoint that justice must mean justice for the "individual in the dock" and thus he supported a subjective approach to criminal liability as it featured in the Continental systems.<sup>79</sup> Therefore, for De Wet, an accused's conduct must be subjectively blameworthy: the doctrine of *versari in re illicita* had to fall (and judging by his witty and comical writing style, I am sure he would have footnoted #VersariMustFall if hashtags had existed back then); ignorance of the law had to be a valid defence against an allegation of *dolus*; and so on.<sup>80</sup> In the case of the nature of the fault enquiry in criminal law, De Wet may well have pushed for legal reform, through a reinvigoration of the Roman-Dutch tradition, with the underlying motivation of creating a more liberal version of South African society and law. Compare LC Steyn: He also held the view that *versari* had to be done away with in *S v Bernardus*.<sup>81</sup> However, similar to his judgment in *Regal* discussed above, Steyn was not primarily concerned with reasoning whether or not *versari* was just and equitable. His main concern was that *versari* was not reconcilable with later Roman-Dutch writings. FLH Rumpff, who seems to have praised Steyn's jurisprudence, notes that Steyn probably decided *Bernardus* in the way that he did under the influence of his purist teacher Professor HDJ Bodenstein.<sup>82</sup> Thus we can argue that Steyn's justification for eradicating *versari* from South African criminal law was based on

74 *Idem* at 187.

75 Du Bois & Visser 2003: 619.

76 Van Wyk 2013: 48-50.

77 *Idem* 47-48; and Froneman 2014: 476.

78 De Wet & Swanepoel 1949. The fourth edition of this work was published in 1985.

79 Van Niekerk 1980: 187; and Van Blerk 1982: 371.

80 See the overview provided by Snyman 2013: 351ff.

81 1965 (3) SA 287 (A).

82 Rumpff 1978: 100.

Nationalist purism coupled with the socialising effect of legal education, while De Wet's justification was grounded in, among other things, his liberal philosophy.

Further indicators of De Wet's liberalism in criminal law may be seen in, for example, his rather mischievous comment following a long discussion about sodomy in its various forms and masturbation: "One can only hope that less conservative views as these from 1926 will reign ... We surely do not live in the Middle Ages anymore and the history of Sodom lies even further back."<sup>83</sup> In a footnote, specifically about male anal sex, De Wet notes: "As to men, we can really get by without this crime."<sup>84</sup>

We may also consider De Wet's view on duress in contract law. In Roman-Dutch law, and in South African law, a contract could be cancelled if any person (including third parties) exercised force or made a threat of force against one of the contracting parties. De Wet objected to this view and regarded the English position to be of more value in terms of which a contract may only be cancelled on account of duress if the duress was exercised by one of the contracting parties.<sup>85</sup> As we know today, the sanctity of contract is regarded as a crucial feature of liberal contract law that regards the autonomy of contracting parties as paramount.<sup>86</sup>

The examples just cited show that there were instances where De Wet used certain provisions of law, regardless of their roots, to promote a liberal conceptualisation of justice. In an Ungerian sense, De Wet used the common law and comparative law as a subtle form of "deviationist doctrine" which is, in rudimentary terms, the use of law to promote subversive political aims.<sup>87</sup> For Unger the subversive aim is probably less classically liberal, but the general tenor of his idea stands strong in De Wet's work: A provision of law had to be critiqued if it fell short of liberal standards. Even though De Wet started writing some thirty years before the naissance of critical legal studies, his exciting, critical and humorous writing style can be regarded as being a primeval form of "deconstruction" and "trashing".<sup>88</sup> Perhaps for De Wet, one could argue, his call for a stronger systematisation of law was intrinsically linked to his "Enlightened" philosophy. Of course, I by no means suggest that De Wet was fully articulate about his deviationist approach to law and consequently there could be aspects of his jurisprudence that point in other directions.

Even though De Wet believed in liberal principles, he has been criticised for being less radical in his line of attack against the nationalist Apartheid government. There is no evidence that he lashed out against the regressive ways in which Apartheid legislation effectively allowed kidnapping, torture and murder to flourish. However, as Johan Froneman speculates (correctly, I think), De Wet probably thought it best to

83 De Wet 1985: 285. My own translation from the Afrikaans.

84 *Idem* at 285 fn 81. My own translation from the Afrikaans.

85 See De Wet & Van Wyk 1978: 43ff. This examples observed by Van Blerk 1982: 374.

86 See, eg, *Barkuizen v Napier* 2007 (5) 323 (CC) at par 57.

87 Unger 1983: 576ff.

88 See a similar acknowledgement (although not with reference to CLS) by Cameron 1993: 59ff.



avoid criminal charges for supporting the revolution by conserving a great deal of his privilege as a well-off white man in Apartheid South Africa. Instead, he intended to bring about subtle but important changes in the ways that lawyers and, through their work, society operated. Thus, De Wet should not be labelled as a radical Afrikaner. But the labels “critical” and “liberal” Afrikaner would be appropriate.<sup>89</sup>

Furthermore, it must be borne in mind that De Wet completed a doctoral thesis at the University of Leiden in the Netherlands.<sup>90</sup> The socialising effect of his academic training there should not be overlooked. We might conclude that De Wet’s jurisprudence was the combined result of his liberal politics, academic socialisation and possibly other unknown factors that have not received as much attention as the former two. In summary I would regard it incorrect to say that De Wet’s purism was simply an apolitical call for science and system. It would be equally wrong to say that his purism was inspired by Afrikaner nationalist politics. Thus, even though his jurisprudence was influenced by the socio-political circumstances of the time, his concern for individual liberty and autonomy in his approach to law shows that he was, in his own modest way, fighting those circumstances rather than keeping them alive.

## 2 4 The near-death of classical purism

There are two paramount principles to be drawn from the preceding discussions about LC Steyn and JC de Wet. Firstly, classical purism did not have a uniform political inspiration. For Steyn purism was a way to live out Nationalist politics in law, while De Wet saw it as a strategic conceptual tool that could subtly introduce liberal values into the law. I admit that there could have been more political motivations for the purist movement that are yet to be discovered and explored. Secondly, regardless of the various possible political stimuli of classical purism, the role of purist legal education on the minds of lawyers of the time should not be underestimated. To conclude the discussion on Steyn and De Wet, there is a final point that should once again be emphasised. Even if we did not have enough evidence to show that the purist strategies of Steyn and De Wet were personally political, their purism can be said to have had political manifestations. In other words, having actively supported classical purism against the social, cultural, economic and political backdrop of time had political effects. A failure to properly disclose one’s political aim(s) in adhering to classical purism during the time of De Wet and Steyn therefore would have had the unfortunate and unintended effect of symbolically promoting Nationalism. Perhaps De Wet could have been clearer about his political stance but luckily for him he left enough jurisprudential breadcrumbs for us to trace his true inspiration back home.

89 Froneman 2014: 478.

90 De Wet was awarded two doctorates in law. The first at the University of Stellenbosch (De Wet 1939) and a second for a monograph (De Wet 1940) at the University of Leiden.

Be that as it may, classical purism did not thrive indefinitely. By the 1980s the zeal for the movement started waning. The reasons for this decline could have been multifaceted. Some may argue that the objectives of the classical purist movement was met because in many material ways the purists succeeded in making the South African common law more puristically Roman-Dutch. For that reason, purist energy could afford to lose momentum. Others may argue that purism came to an end because bigger and more important issues arose in 1980s when the legal fraternity's opposition to Apartheid grew, and so the focus shifted from what the common law was to what public law had to do.<sup>91</sup> Supplementary reasons could have included the rise of modern comparative approaches to law that diluted the importance of Roman-Dutch purity, together with the growing acceptance that the South African common law encapsulated the entire European *ius commune* and not just Roman-Dutch law. That is not to say that classical purism completely died. There certainly were and still are scholars who take the plight for purifying the common law from English authorities seriously, but those scholars have not received as much popular attention as classical purists once did. To abridge, classical purism was on its deathbed in the 1980s.<sup>92</sup> But, in an unexpected turn of events, purism was resuscitated, revitalised and given new spirit. It now took on a contemporary form.

### 3 Contemporary common-law purism

#### 3.1 The historical backdrop

From the preceding discussion we know that colonisation and Apartheid created manifold serious problems for South Africa. The problems flowing from colonisation and Apartheid can be grounded in what Sampie Terreblanche has called the common theme of triadic oppression. Firstly, colonial and apartheid powers claimed political superiority over Africans. Secondly, the forces economically disempowered the African people by taking their land and natural resources. Thirdly, African people and imported slaves were enchained in various forms of unfree work to the benefit of white masters. At the core of these themes of colonial and Apartheid oppression are claims to political, economic, social and intellectual supremacy. In terms of the sources of South African law these claims to supremacy relegated African law to a position where it remained largely underdeveloped and disrespected and, furthermore, it created a climate in which classical purist notions of the law could flourish. The problem of Afrikaner (and more broadly, white) supremacy was however resisted in various forms. The politics of different resistance movements must be understood to appreciate competing approaches to the introduction of human rights in South

91 Du Bois 2004: 226.

92 Van Zyl 1971: 492.

Africa, which will in turn also give a greater appreciation for the various approaches to the infiltration of human rights into South African private law.

Early on there was Mahatma Gandhi's passive resistance movement against pass laws.<sup>93</sup> The African National Congress (ANC) also employed passive resistance techniques at first – famously portrayed in the Defiance Campaign of 1951-1952 – and its resistance was grounded in the civil rights tradition with its commitment to non-racialism as is prevalent from reading the Freedom Charter of 1955.<sup>94</sup> The ANC's commitment to non-racialism arguably arose from the presence of white communists amongst the ANC's allies.<sup>95</sup> By 1959, dissidents broke free from the ANC to form the Pan Africanist Congress of Azania (PAC). The PAC was formed as a rejection of a number of aspects about the ANC's philosophy including the "Christian liberal tradition" that promoted non-violence, the idea that true African liberation could be achieved with the assistance of white people, and the absorption of European ideologies (such as communism) that displaced the prominence of black nationalist thought.<sup>96</sup> The PAC became a militant organisation that was sceptical about the Freedom Charter's potential to disrupt white power in its various forms.<sup>97</sup> In 1960 both the PAC and the ANC were banned, which resulted in both organisations introducing strategic militarisation. In 1961 the military wing of the PAC called *Pogo* was formed (that would later be replaced by the Azanian People's Liberation Army, APLA), and in 1962 the ANC's *Umkhonto we Siswe* (MK) took up the armed struggle against apartheid.<sup>98</sup> Effectively South Africa was on a knife's edge to falling into full-blown civil war.

Let us fast forward to the 1980s. By this time many lives had been lost and there was no clear prospect of one party finally triumphing over the other. Furthermore, the NP government was facing severe sanctions from the West to end Apartheid. Those sanctions put the NP rule in such a precarious situation that, even if it did not really want to, it simply had to heed the call for the introduction of human rights in South Africa.<sup>99</sup> On the other hand, the ANC came to realise that it needed broader

93 See, eg, Gandhi 1961.

94 This commitment is evidenced by phrases like these in the Freedom Charter: "The rights of the people shall be the same, regardless of race, colour or sex"; "There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races"; "All people shall have equal right to use their own languages, and to develop their own folk culture and customs"; "All national groups shall be protected by law against insults to their race and national pride"; "The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime"; "All shall be equal before the law"; "All shall enjoy equal human rights"; "Men and women of all races shall receive equal pay for equal work"; and "Peace and friendship amongst all our people shall be secured by upholding the equal rights, opportunities and status of all".

95 See eg Kondlo 2009: 53.

96 *Idem* 54.

97 *Idem* 57.

98 See, eg, Bophela 2005; Cherry 2011; and Simpson 2016.

99 Woolman & Swanepoel 2014: 35.

political support from the international community (and not just from the far left) if it wanted to succeed as a legitimate government after formal apartheid would end.<sup>100</sup> By 1988 the ANC published its *Constitutional Guidelines for a Democratic South Africa* in which it committed itself to constitutionalism and a Bill of Rights.<sup>101</sup> In 1990 Nelson Mandela was released and various liberation organisations were unbanned.<sup>102</sup> By 1991 the NP instructed the South African Law Commission to draft a report on the possibility and promise of human rights.<sup>103</sup> The NP conducted a referendum in 1992 asking white South Africans to vote on whether negotiations should have been initiated with the ANC. Indeed, they voted that negotiations had to start.

Both the ANC and NP showed the clear intention to support a peaceful, negotiated transition grounded in human rights and, in principle, violence was conditionally suspended from both sides. As the evidence collected by the *Interim Report on Group and Human Rights* showed, “[t]here is almost universal acceptance and insistence that human rights should be recognised and respected in this country as rights or interests that merit protection”.<sup>104</sup> Joining the ANC and NP’s appeal to human rights and constitutionalism was, among others, the Democratic Party,<sup>105</sup> the predominantly Indian party called Solidarity (not to be confused with the trade union Solidariteit today),<sup>106</sup> the predominantly coloured Labour Party,<sup>107</sup> the Inkhata Freedom Party,<sup>108</sup> and the Government of KaNgwane.<sup>109</sup> Even though the South African Communist Party (SACP) was invited to make submissions to the Commission on human rights, it did not respond but was an ostensible ally of the ANC.<sup>110</sup> Additionally, the majority of religious associations in South Africa supported the idea of a Bill of Rights for South Africa.<sup>111</sup> There were however three main groups of objectors to the popular opinion. The far-left, in the form of the PAC, the far-right, in the form of various

100 *Idem* 35.

101 *Idem* 35-36.

102 *Idem* 35.

103 *Idem* 35-36.

104 South African Law Commission 1991: 6.

105 *Idem* 147.

106 *Idem* 148.

107 *Idem* 149.

108 *Idem* 167.

109 *Idem* 162.

110 *Idem* 167.

111 The Interim Report notes that religious associations that supported human rights included the Nederduits Gereformeerde (NG) Kerk which originally also supported apartheid (205); the Apostolic Faith Mission (221ff); the Methodist Church (222ff); the Roman Catholic Church (225); churches affiliated with the Church of England (225ff); the Presbyterian Church (227ff); the Baptist Union of South Africa (228ff); the Jewish Board of Deputies (232ff); and the Islamic Council (233ff). Conflicting views were presented by the ranks of the Reformed Churches in South Africa (209ff), and various charismatic churches (229ff). The Zion Christian Church did not respond to the request for comment because the church discourages political involvement of its members (233ff).

Afrikaner supremacist organisations, and some religious alliances were less excited about the introduction of human rights.

While the ANC and NP were reflecting on the potential of peaceful transition, the PAC was still demanding war. In an excellent account of PAC history, Kwandiwe Kondlo notes that the organisation preferred violence over negotiations because the latter would be ineffective in restoring land to African people and securing their right to self-determination.<sup>112</sup> In other words, negotiations with white people who held the land and other forms of power ran the risk of allowing the privileged few to maintain their systemic advantage. Furthermore, the likelihood of securing African sovereignty without neo-colonial interferences decreased as the proclivity for negotiation with an empowered white minority increased. The persistent call for violence is probably what caused the PAC's popularity and power to wane during the period of democratic transition where the international community and the majority of South Africans championed a non-violent dedication to human rights negotiations.<sup>113</sup> The PAC was, however, not the only organisation against the idea of peaceful transition and the introduction of human rights in South Africa.

The South African right wing was also loath to accept the notion of human rights. The Conservative Party (CP), which was even more fundamentalist than the NP, denied the necessity of a Bill of Rights because it would have been "superfluous"; it would have introduced equality (which was said to be a "leftist" political ideology compared to the "neutral" policy of Apartheid); it would impose communism on the entire nation by securing socio-economic rights; it would politicise judges who would be required to interpret a leftist constitution compared to the "neutral" one in place; and the sovereignty would vest in a document and not in the majority of South Africans who were apparently white.<sup>114</sup> The Herstigte Nasionale Party followed the CP declaring that human rights are "anarchist" and "communist" in nature, and that they would result in the flourishing of "terrorism".<sup>115</sup> The conceptual conflation of communism, liberalism and terrorism (that we know today are different notions) probably came about because all three concepts were grouped together as a threat to white minority rule. There were a few right-wing individuals who also made submissions to the Commission on Human Rights, making obscure arguments about why Apartheid had to stay and why white supremacy was important for the prosperity of South Africa.<sup>116</sup> The Afrikaner Weerstandsbeweging (AWB) was so adamant about the entitlement of the Afrikaners to secede from South Africa that it practically expressed no opinion about the introduction of human rights in principle.<sup>117</sup> The Afrikaner Volkswag and the Boere Vryheidsbeweging added a further dimension

112 Kondlo 2009: 261.

113 *Idem* 258-259.

114 South African Law Commission 1991: 145ff.

115 *Idem* 152ff.

116 *Idem* 171ff.

117 *Idem* 162.

to the rejection of human rights by emphasising how human rights *deified* man and *defied* God – while Apartheid laws apparently did not.<sup>118</sup>

In a similar vein various religious institutions also objected to the notion of human rights for South Africa. The Afrikaanse Protestante Kerk (APK) was a splinter group from the NG Kerk that broke away when the NG Kerk declared that it would no longer support Apartheid. Unsurprisingly the APK rejected the notion of a Bill of Rights because it was godless and they could not accept a prohibition of unfair discrimination that was purportedly, for them, sanctioned by their God.<sup>119</sup> The Nederduitsch Hervormde Kerk emphasised that humans have no rights but only privileges and that an integrated society would be unacceptable in the eyes of their God.<sup>120</sup> The Christian organisation Vereniging Bybel en Volk rejected human rights because they were too “humanistic”.<sup>121</sup> These religious organisations might be categorised under the umbrella term of right-wing religious associations.

Despite all the conflicting opinions about the question of whether South Africa needed a bill of rights, the majority opinion (effectively comprising of the ANC, NP and its supporters and allies) prevailed. The legs of the peaceful negotiation table were made from human rights and constitutionalism – the real matters that had to be discussed revolved around what the content of the new Constitution would be. It comes as no surprise that during the Congress for a Democratic South Africa (CODESA) and the Multi-Party Negotiation Forum the ANC and the NP took on prominent roles. Various debates took place about issues of secessionism, federalism, and the exact content of the Constitution, but the core of the compromise reached between various stakeholders was that a five-year transitional government would be democratically elected to finalise a new Constitution for South Africa.<sup>122</sup> The term “compromise” used here is important. Right-wing organisations refused to meet anyone else halfway and even unsuccessfully tried to derail the negotiation process. Similarly, the PAC was concerned that the process of reaching a compromise would create an elite class of persons that excluded exploited African labourers.<sup>123</sup> A faction of PAC strategists later realised that even though they disagreed with the process of negotiation that they had to make their voice heard at the negotiation table.<sup>124</sup> It was thanks to the mediation of the government of Zimbabwe that the PAC’s military wing APLA and the NP government could reach a ceasefire during the time of negotiation. Eventually thirty four constitutional principles were agreed upon by the various stakeholders that ensured power-sharing between them. The so-called “final”

118 *Idem* 155-161.

119 *Idem* 215ff.

120 *Idem* 219ff.

121 *Idem* 235ff.

122 Woolman & Swanepoel 2014: 38.

123 Kondlo 2009: 263.

124 *Idem* 267.

Constitution had to be squared with the thirty four constitutional principles that were laid down in the “interim” Constitution of 1993, by the Constitutional Court.<sup>125</sup> From here the first truly democratic elections were held on 27 April 1994 and in due course the newly elected parliament of South Africa sat as the Constitutional Assembly to pass the Constitution of the Republic of South Africa, 1996. That Constitution was finally certified by the Constitutional Court in December of 1996,<sup>126</sup> signed by President Nelson Mandela shortly after that, and took effect on 4 February 1997.

The opinions of different scholars on the place and purpose of human rights in private law must be understood to have been formed in the arena of the socio-political debates about human rights that were prominent during the period of democratic transition in South Africa. Similar to how the political climate of the time allowed for the flourishing of classical purism, the political debates surrounding the introduction of the Bill of Rights influenced the stances that people would take to its impact on the common law.

As noted in the introduction to this piece, my focus in the discussion of contemporary purism will be on delict scholarship. In § 3 2, I will pay attention to the early and later work of professors Johann Neethling, Johan Potgieter and Hans Visser, who will go down in history as some of the most influential delict authors of our time. The trio authored the famous textbook entitled *Deliktereg* in 1989, which has since been translated as *Neethling-Potgieter-Visser Law of Delict* and has seen its sixth and seventh editions published after Visser’s passing. I consider their work in particular because each of the three scholars has published prolifically about the theory of the interaction between private law and human rights during the time of democratic transition and thereafter, and it might focus our attention on more conservative arguments pertaining to the rejection of human rights in private law. In § 3 3, I turn to outline the work of scholars who have been arguing against models of strong constitutional application to private law, but from a more progressive or even radical perspective. I will, firstly, consider the recent thinking of a former South African delict academic and legal philosopher (who today works on legal theory in Luxembourg), Professor Johan van der Walt, as it relates to the issue at hand. I survey his most recent work because it is in my view the most politically candid comparative and in-depth theoretical work on human rights in private law. I further provide some tentative reflections on what we might call the decolonial thought of Professor Mogobe Ramose whose anti-constitutionalism has featured more prominently in recent times. The thinking of Professor Anton Fagan, whom I regard as one of the most provocative and important delict scholars in South Africa

125 Woolman & Swanepoel 2014: 37-38.

126 The first unsuccessful attempt at certification is recorded as *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC). After further amendment, the Constitution was successfully certified in *Certification of the Amended Text of the Constitution of South Africa, 1996* 1997 (2) SA 97 (CC).

today, is discussed in § 4 together with an invitation that is extended to the broader community of delict and private law academics. I consider these scholars' works to try to provide support for my claims about critical legal realism.

## 3.2 Contemporary purism as conservative sentiment

Even though Neethling, Potgieter and Visser have written a textbook in which they ostensibly speak with a unified voice on the issue of human rights in delict, their respective scholarship before the first edition of the textbook perhaps shows different nuances in their respective viewpoints.

In 1971 Neethling wrote a thought-provoking article about the juridical nature of human rights.<sup>127</sup> His view was that even though human rights had not been constitutionally entrenched in South Africa at that time, the common law afforded a great deal of protection to human rights. For Neethling, the protection of human rights was a private-law issue because they served to protect the individual. Human rights featured in private law either as presumptions of public freedom (for example the presumption in favour of free speech), subjective rights (where the rights in question have some type of economic value), or capacities (where the rights in question have no economic value). On the other hand, the protection of community interests fell in the domain of public law and comprised of, among other things, the limitation of human rights.<sup>128</sup> These central points of Neethling's argument are striking because he indirectly acknowledges that human rights and the common law are at least reconcilable, at best that the two disciplines cannot necessarily be divorced from one another. Even though the scope of Neethling's article did not allow him to delve into whether unrestrained limitations of human rights should be tolerated, as was the case in South Africa, it seems that he was, in principle, not in a severe state of anxiety about the relationship between human rights and the common law.

By 1989 Potgieter's views on human rights came to the fore.<sup>129</sup> His prime concern was that human rights could not be justified on the basis that they were Christian, contrary to what many churches and their followers believed during the time of democratic negotiation and transition in South Africa.<sup>130</sup> Firstly, Potgieter contended that human rights originated from humanist philosophy and not the Bible.<sup>131</sup> Secondly, Potgieter said that natural man reflects the image of Satan (and not of God) because of man's sinful nature before his acceptance of Jesus as saviour.<sup>132</sup> Thus, because all humans are inherently evil, Potgieter contended that people do not deserve protection as the human-rights ideology suggests. To the contrary, the evil

127 Neethling 1971.

128 *Idem* 243ff.

129 Potgieter 1989.

130 *Idem* 387.

131 *Idem* 393.

132 *Idem* 395-396.



inherent in human beings requires severe limitations of rights.<sup>133</sup> The “unwarranted suspicion of the country’s legal system and security forces” and the “general spirit of opposition against any form of authority” were products of the “exaggerated obsession with the freedom of man” who is erroneously presumed to be inherently good under the human-rights paradigm.<sup>134</sup> Thirdly, with reference to various biblical texts, Potgieter suggested that especially the rights to bodily integrity and life cannot be secured for Christians because humiliation, persecution, oppression and death are part and parcel of what they must endure.<sup>135</sup> Fourthly, human rights are associated with uprisings against the state that are not sanctioned by Jesus who is said to have suffered at the hands of government but accepted his fate.<sup>136</sup> Jesus’s love was self-sacrificing and he never requested equal rights for anyone else.<sup>137</sup> Finally, for Potgieter, unequal treatment of people did not constitute injustice – true injustice results from crime, violence, adultery, broken families, child molestation, corruption and other evils that human rights would never be able to cure.<sup>138</sup>

There can be no doubt that the Black population (by that I include Coloured, Indian and Asian people) in South Africa suffered the most under Apartheid laws that aimed to criminalise their mere being, even though many white citizens also found themselves in conflict with the legal system for their conscience, belief, feelings and/or deeds. Thus, even though Potgieter targeted the human race as a whole when he painted the picture of the natural human as an incarnate devil, we could argue that his call for the endurance of suffering, his support expressed for strong policing, the plea for the silent acceptance of authority, and his downplaying of inequality as injustice, are all effectively parts of an offensive telegram posted to Black South Africa: Accept your fate as an inferior and oppressed people because it is what Jesus would have done. His view on human rights expressly fell into the conservative camp within the Reformed Churches in South Africa.<sup>139</sup>

If Potgieter had made it clear in his arguments that he opposed both Apartheid and human rights from a Christian perspective and that both systems should have been substituted with a pure commitment to love and the humane treatment of people, we could have concluded that his rejection of human rights was not necessarily conservative or right-wing. Unfortunately, his implicit support for Apartheid ideology taints his purportedly “neutral” Christian rejection of human rights with conservative political sentiment. This is also the gist of Lourens du Plessis’s response to Potgieter’s legal theology.<sup>140</sup>

133 *Idem* 399.

134 *Idem* 400. My own translation from the Afrikaans.

135 *Idem* 398 & 401.

136 *Idem* 401.

137 *Idem* 403.

138 *Idem* 404-405.

139 South African Law Commission 1991: 209ff & 243ff.

140 Du Plessis 1990.

Du Plessis retorted with two strategic attacks. Firstly, Du Plessis explained that the Bible does not have to say expressly that it supports human rights for that to be the case, and even if human rights had humanist origins it could nevertheless be reconciled with biblical teachings. Thus, one could read human rights and the Bible separately and conclude that the two are harmonious.<sup>141</sup> Du Plessis's second strategy was to show how various biblical texts existed that prove Potgieter's comments to be questionable. For example, Potgieter made no reference to Jesus's most important command that even many non-Christians can find agreeable: Love your neighbour as yourself.<sup>142</sup> Potgieter's comments are in no way compatible with that command. According to Du Plessis, biblical exegesis always required contextual understanding, which was missing in Potgieter's work.<sup>143</sup> For Du Plessis, Potgieter read the Bible from a particular "paradigmatic orientation", just like everyone else,<sup>144</sup> and that his understanding of the Bible was unavoidably influenced by his "hardly-disguised political presuppositions and prejudices".<sup>145</sup>

Potgieter's approach was described by Du Plessis as being "right-wing reactionary *status quo* theology" because it is filled with a pre-determined commitment to a rejection of human rights on account of a fear of socio-economic transformation to the potential detriment of the privileged minority of white South Africans.<sup>146</sup> Du Plessis concluded his response to Potgieter, significantly for present purposes, by saying that a "good way to stop the cry of reactionary theology is to be honest about one's own paradigmatic contextualised engagement with the Bible".<sup>147</sup> Similar to what Du Plessis had to say about Potgieter's reading of the Bible, I caution that we must be honest about our own paradigmatic and contextualised engagement with the common law on the issue of purism.

Potgieter replied to Du Plessis in the same year.<sup>148</sup> In addition to the technical arguments about what the Bible should be understood to mean, Potgieter this time appeared to have shown a more balanced distrust towards human rights. He rubbished the claim that the Bible supported Apartheid just as much as the claim that it could support human rights. He contended that his concern was simply about what a plain reading of the Bible said about human rights.<sup>149</sup> To prove that he was not entering the political arena, he indicated that human rights could hold some positives such as the end of the abuse of state power, the responsible use of individual freedom, the promotion of "civilised standards", and "stability, law and order" in the time of

141 *Idem* 409.

142 *Idem* 408.

143 *Idem* 406.

144 *Idem* 409.

145 *Idem* 410.

146 *Idem* 411-412.

147 *Idem* 412. My own translation from the Afrikaans.

148 Potgieter 1990.

149 *Idem* 413.

transition.<sup>150</sup> At first glance, it would not be unfair to suggest that Potgieter appears to have reneged on his earlier position to some extent (even though the phrase “civilised standards” leaves one questioning who the “uncivilised” folk were in his eyes). However, his restrained support for human rights during this time can be treated with cynicism.

Due to the fact that the introduction of human rights in South Africa was imminent and seemed inescapable, the concern of Potgieter’s work turned from a complete rebuff of human rights to a call for objectivity during the transition period so that all persons would be protected by human rights.<sup>151</sup> He would moderately and tentatively support the general idea of human rights in a new Constitution as long as it was drafted and implemented in a politically objective way. In his view “[l]aw must now shed the shackles of political domination”,<sup>152</sup> and so jurists who would be tasked with drafting the new Constitution and its Bill of Rights had to do so with “scientific care” in a way that refrained from falling into right-wing or leftist camps; human rights thus had to be “ideology neutral” for the new South Africa.<sup>153</sup> This was indeed a strange imploration. I do not deny that, for example, the legal technicalities associated with whether a cheque has two or three lines drawn across it are of little political importance. But it seems impossible to adopt a Bill of Rights after an authoritarian, white-supremacist regime and label that process as neutral, regardless of what the content of the rights would be. The very act of admitting that the *status quo* of the time was problematic was an inescapably political deed, just as it would have been a political act to demand the maintenance of Apartheid. If Potgieter’s request was aimed at finding a midway between the far right and the far left, that request would also have been manifestly political and a green light to the ideology of centrism. That aside, Potgieter himself fell short of his petition for political neutrality. In the same piece in which he advised neutrality, he described the “liberal-Western” approach to human rights as a catalyst for “increased crime, spiritual bankruptcy and moral decay”. Additionally, he noted with concern that “most” South Africans of the time were allegedly (I must emphasise, *allegedly*) conservative and that an imposition of a non-conservative law on them would be a great injustice.<sup>154</sup> This is not the type of argument that I would describe as politically dispassionate.

The 1993 Constitution entered the scene and so Visser teamed up with Potgieter to provide some critical comments on the Bill of Rights.<sup>155</sup> In that piece the professors emphasised the need for a “proper” Bill of Rights, but nevertheless approached the 1993 Constitution with circumspection. They were “doubtful” as to whether the Bill

150 *Idem* 422. My own translation from the Afrikaans.

151 Potgieter 1991.

152 *Idem* 802.

153 *Idem* 803.

154 *Idem* 806.

155 Visser & Potgieter 1994.

of Rights would be able to save South Africa from “unsophisticated” political views of the majority of South Africans, the lack of experience of the new government, the criminal records of various new government officials, and suspect political agendas of some political parties.<sup>156</sup> In addition to these problems, it seems that their angst about human rights was also premised on the fact that the 1993 Constitution would open the door for the flourishing of sodomy,<sup>157</sup> Satanism, sex shops, suicide, scandalous textual interpretation, and an array of other “evils” not necessarily starting with the letter “s”.<sup>158</sup> Even though the implicit call in the paper of Visser and Potgieter was for a politically neutral (read: conservative) Bill of Rights, there is a rotation back to an anti-human rights sentiment during this time.

In the same volume Neethling and Potgieter collaborated on a discussion about a defamation decision and the possible impact of the 1993 Constitution on such cases.<sup>159</sup> Here a different spirit of argumentation featured in their piece. The claim was not that the Bill of Rights had to be done away with or that human rights were evil; instead Neethling and Potgieter accepted that human rights were probably here to stay and that the question was now what they meant for other areas of law. The essence of Neethling’s 1971 description of the juridical nature of human rights was restated: The common law has always protected human rights and thus the new Bill of Rights was not going to disrupt the common law of defamation. The “common law = human rights” model however held its own problems. As Henk Botha observed, Neethling and Potgieter used the model to justify existing common-law rules relating to defamation without being open to the possibility of reimagining those rules in light of constitutional norms.<sup>160</sup> For them the common law of defamation, which tends to elevate the right to reputation above the right to freedom of speech, struck the perfect balance between the constitutional rights to dignity and freedom of expression, without any further interrogation of alternative possibilities. For example, they were quick to rebuke anyone who argued that freedom of expression should have become more prominent in post-Apartheid (post-censorship) South Africa, and ridiculed those contenders on the basis that they dared question the views of esteemed judges.<sup>161</sup> Thus, for Botha, Neethling and Potgieter’s acceptance of human rights was only nominal acceptance without true appreciation for what the Constitution could have meant for the transformation of private law.

In their next case discussion on defamation law, Neethling and Potgieter ostensibly tried to dispel the notion that they were opposed to the Constitution.<sup>162</sup>

156 *Idem* 493.

157 See, in this regard, also Visser 1995a: 704-705 where the author also expresses anxiety about “abnormal sexual orientation” receiving too much constitutional protection at the expense “normal” relationships.

158 Visser & Potgieter 1994: 494-498.

159 Neethling & Potgieter 1994.

160 Botha 1994.

161 *Idem* 497.

162 Neethling & Potgieter 1995.

They went so far as to accept that constitutional values could enrich the common law of defamation (and this time they were open to the possibility that the common law could change to strike a better balance between the rights to dignity and freedom of expression), but nevertheless cautioned for care and that the Constitution did not demand a radical break from past legal traditions.<sup>163</sup>

Commenting on the same case, Visser had a different view, imbued with human rights anxiety.<sup>164</sup> This time the alarm about human rights did not stem from its inherent evil nature but that the interpretation of human rights would be unscientific.<sup>165</sup> Visser argued that the constitutional interpretation exercise would lead to chaos in private law because: (1) judges' political and intellectual baggage are drawn into interpretation; (2) the text of the Constitution was too ambiguous and vague to mean anything in particular; (3) lawyers would now have to be politically conscious and actively promote reconciliatory ideals in law; (4) the reliance on historical context in the interpretation of human rights would invariably be slanted towards addressing the injustice of Apartheid without considering the "general backwardness, lack of discipline, genocide, lawlessness, spiritual darkness etcetera in too many parts of the African continent"; and (5) the interpretation of the Constitution would require delving into the "tedious" deliberations that led to its adoption.<sup>166</sup>

As to his first three contentions, the critical legal realist jurisprudence promoted throughout this discussion would respond by saying that law is always an open-ended interpretative exercise with rival possibilities that are often informed by a judge's personal make-up. The third to fifth contentions lift the veil covering Visser's politics. Visser's incredulity towards human rights might be phrased as a concern for legal certainty and objectivity, but his refusal to entertain the reconciliatory ideal of the Constitution coupled with his snide remarks aimed at African people is starkly "reminiscent of the 'old order'",<sup>167</sup> to say the least. A more subtly phrased attempt would have been necessary to convince us as readers of his work that he was writing from a position of political neutrality. Thankfully, for critical legal realists, Visser has provided us with enough evidence to show that his anti-constitutionalism was blatantly reactionary and right-wing political.

After Visser's troubling remarks were responded to by Gretchen Carpenter and Christo Botha,<sup>168</sup> it appears that his human-rights fears calmed down. Additionally, cases such as *Fose v Minister of Safety and Security*,<sup>169</sup> *Potgieter v Killian*,<sup>170</sup> and *Du Plessis v De Klerk*<sup>171</sup> put Visser at ease that private law was not going to be battered

163 *Idem* 710. See also Neethling 1997; and Neethling & Potgieter 1997.

164 Visser 1995b.

165 *Idem* 747.

166 *Idem* 748-749.

167 Carpenter & Botha 1996: 126.

168 *Ibid.*

169 1996 (2) BCLR 232 (W).

170 1995 (1) BCLR 1498 (N).

171 1996 (3) 850 (CC).

to a point where it would become unrecognisable. Human rights were not that bad after all and perhaps Neethling and later Potgieter had a point when they said that the common law was largely compatible with human rights. That is not to say that, for Visser, human rights were of fundamental importance because human dignity had to be restored after Apartheid; no, on the contrary, human rights were tolerable because it would not be as unsettling to the common law as initially anticipated and because some German delict scholars told us that human rights are not necessarily detrimental for the development of private law.<sup>172</sup>

Today Neethling and Potgieter's textbook acknowledges that the Constitution could have an effect on private law, but that it should be presumed that the common law is consistent with the Constitution because the contents of the Bill of Rights have historically always been part of our common law.<sup>173</sup> We might respond to this comment and say that even though the common law certainly did afford protection to various subjective rights that are similar in name to those rights protected in the Constitution, the latter rights are arguably more expansive than the subjective rights recognised at common law. The right to bodily integrity and freedom, for example, was recognised in Dutch law at the time of South Africa's colonisation. However, slavery was a legitimate practice of the Dutch for many years after colonisation. It is therefore not unimaginable that the spirit of certain constitutional rights could be different to that of common-law rights and therefore one should be cautious to always have as starting point that the common law is robotically constitutionally compliant. Why this obsession with keeping the common law pure?

There is an interesting and as yet unexplored textual psychological analysis to be made about contemporary common-law purism. Sigmund Freud taught that the unconscious is that part of the mind where we push painful desires, fears, needs and conflicts that are unresolved within ourselves.<sup>174</sup> The process of pushing the painful experiences from our consciousness to the realm of the unconscious occurs through the use of various defences or coping mechanisms. There is, for example, selective perception, selective memory, denial, displacement, projection and regression. Yet, there is also the coping mechanism of *avoidance*. Avoidance is the process by which traumatic experiences, conversations about those experiences, or resurgences of those experiences are evaded.<sup>175</sup>

Let us apply this elementary exposition of Freud's theory to the situation at hand as an attempt to hypothesise at least one underlying reason for the contemporary purism in Neethling, Potgieter and Visser's textbook. The transition period in South Africa that led to the constitutional drafting process involved an ideological

172 See Visser 1996a; Visser 1996b; Visser 1997a; Visser 1997b.

173 Neethling & Potgieter 2015: 18.

174 For a general introduction to psychoanalysis as a critical tool for literary analysis, see Tyson 2006: 11ff.

175 See eg Wegman 1985: 219ff.

battle. Those who engaged in the battle on fundamental terms, in other words on the question of whether human rights should be introduced in South Africa or not, either won or lost. The eventual introduction of the new Constitutions and their Bills of Rights signalled the defeat of scholars like Potgieter and Visser who were originally apprehensive about human rights. In light of their passionate appeals for the rejection of human rights canvassed above, it is not unreasonable to say that their defeat constituted an academically traumatic experience. One way of coping with the trauma would be to avoid talk about human rights, or at least to avoid the infiltration of human rights into private law that caused so much consternation all those years ago. Thus, when these scholars today effectively say that human rights must be avoided in delict cases (unless if some special circumstances arise), we could say that they are avoiding human rights in the Freudian sense. What was the best way to avoid the trauma while being mindful of the fact that human rights are now the order of the day? The answer is by relying on Neethling's earliest contention that human rights manifest themselves in the common law. In this way a compromise was reached in terms of which the views of Neethling, Potgieter and the late Visser can reside in harmony in one textbook, speaking with one voice on the issue of human rights in delict. In this way, the scholars could keep the common law pure, while admitting that human rights exist in modern South Africa, but without having to rejoice about the transformative promise of the Constitution. Even if one is not convinced by this psychoanalytic move on my part, at the very least, the position of the professors on human rights in private law has a manifest conservative political verve, even if their original political beliefs have in fact since changed, for the simple fact that they have not expressly recanted their earlier views. Professor Neethling might be the only one of the trio on whom it is difficult to impose right-wing political motives – with that said he was reticent in serious debates during the period of transition which was a time when his voice could have brought moderation and calm. However, as will be revealed in the next section, contemporary common-law purism can be informed by a radically different political commitment.

### 3.3 Contemporary purism as leftist scepticism

Not all contemporary common-law purism is necessarily conservative. This is what Johan van der Walt writes in his most recent book, *The Horizontal Effect Revolution and the Question of Sovereignty*, on the interaction between human rights and private law.<sup>176</sup> As a point of departure, it should be emphasised that Van der Walt is not passionately against the idea of constitutionalism or even the broad idea of constitutional application to private law. However, he is concerned about the fact that models advocating strong constitutional rights application have two potentially calamitous effects. On the one hand, overzealous constitutional application to the

<sup>176</sup> Van der Walt 2014.

private sphere could serve to crush value pluralism. On the other hand, even though we might expect constitutional rights to influence private law in ways that churn out progressive results, this is not an inexorable reality. These two points of concern proffered by Van der Walt require further explanation and reflection.

Many South African legal scholars have been enthusiastic about the Constitutional Court's remark in *Carmichele v Minister of Safety and Security*<sup>177</sup> that "[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system".<sup>178</sup> However, Van der Walt contends that we should be cautious about "'juristocratic' impositions of substantive constitutional values on walks of life that do not call for them."<sup>179</sup> Even though the private is sometimes political, it is not always political according to Van der Walt.<sup>180</sup> For him the only time that the private becomes political, and therefore constitutional rights become relevant for the private sphere, is when a dispute raises a social majority-minority tension. For example, the question of same-sex marriage is such an issue – the implications of a dispute about who can get married strikes at a social tension between a specific majority (heterosexuals) and minority (homosexuals). Constitutional rights play into such a dispute because a liberal democratic constitution has an important function to fulfil in the mediation of majority-minority relations. If a dispute arises about how many days a person should have to lodge an insurance claim, that dispute does not raise an issue of social importance between a majority and minority. Thus, there are disputes that are *de minimis non curat lex constitutionis* and have trivial constitutional importance. Such disputes, which are most disputes according to Van der Walt, should not involve the invocation of constitutional rights because it would impinge on individual liberty unnecessarily by forcing an objective, normative value system onto every aspect of human existence. That, in turn, does not promote normative relativism and pluralism.<sup>181</sup>

Even if we were to accept for a moment that constitutional rights could and should form a normative value system that regulates our most private dealings with others, Van der Walt warns that constitutional rights do not always result in progressive, social justice compliant judgments.<sup>182</sup> In a string of cases the European Court of Justice has recently been faced with trying to strike a balance between the right to social security on the one hand and the right to economic freedom on the other hand.<sup>183</sup> In those cases, says Van der Walt, the Court acted conservatively

177 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

178 *Idem* par 54.

179 Van der Walt 2014: 30.

180 *Idem* 22.

181 *Idem* 16.

182 *Idem* 7.

183 See *Laval* EU: Case C-341/05 [2007], *Viking* EU: Case C-438/05 [2007], *Luxembourg* EU: Case C-319/06 [2008], and *Rüffert* EU: Case C-346/06 [2008]. Discussed in more detail in ch 7 of Van der Walt 2014.



in favour of the interests of the rich and powerful which effectively eroded the progressive political project of social reform in Europe. Thus, Van der Walt argues that the horizontal application of human rights has not brought about the egalitarian revolution in Europe that might have been hoped for. The task of bringing about more serious social reforms probably lies in the hands of social movements and electoral politics, and it appears that the constitutionalisation of private law could actually do more harm than good for the realisation of egalitarian dreams.<sup>184</sup>

It should be clear from the above exposition that Van der Walt is writing neither from the right-wing camp, nor the libertarian faction of constitutional-common-law adversaries. It appears that his apprehension towards human rights in the private sphere is legitimately rooted in an egalitarian, liberal democratic approach to constitutionalism. Hidden in his problematisation of the current trend of the eager constitutionalisation of private law is an argument that reminds us of the limits of law – perhaps many people have been so enthusiastic about the possibility of human rights shaking up the politics of private law that they have forgotten that human rights are not perfect legal mechanisms that can magically take away all of a society's problems. In fact, just like the endurance of the common law has been criticised for being a project of ongoing colonial domination, the South African Constitution has also been decried as a neo-colonial assignment used by the West to dominate Africa.

Professor Mogobe Ramose has been one of the foremost African philosophers who have taken issue with the constitutional veneration that is observed in South Africa today. He notes that

the transition to the 'new' South Africa did not restore full, integral, comprehensive and unencumbered sovereignty to the indigenous peoples conquered in the unjust wars of colonisation. Only limping defective sovereignty was conceded by the successors in title to the 'right of conquest'. Thus the much acclaimed 'miracle' of change in South Africa is a basic source of concern, since it set aside the basic question of substantive historical justice in the name of compromise. Compromise without justice is blind and empty. But justice without compromise is a recipe for future contestations. It is precisely the formal vacuous justice conceded to the indigenous conquered peoples of South Africa which is today the reason for the contestations that prevail in the country.<sup>185</sup>

For Ramose, justice will only be realised if full and substantive African sovereignty is restored. One might think that this is a peculiar view to hold; after all, a Black government is in power and all people are afforded human rights in terms of the Constitution. However, there are three main reasons why Ramose believes that true African sovereignty has not been restored to the conquered people of South Africa.

Firstly, the current constitutional dispensation in South Africa makes a mockery out of former African kingdoms by recognising "traditional leaders" but effectively affording them no genuine political or legal authority over their territories – a problem

184 Van der Walt 2014: 9.

185 Ramose 2007: 319.

intensified by the fact that most land in South Africa still belongs to the white minority. Thus, territorial sovereignty does not truly vest in Africans.<sup>186</sup> Secondly, customary law (which should really be called African law) is subject to constitutional scrutiny (which is a cornerstone principle of European law), which means that European domination persists in the realm of legal epistemology in the “new” South Africa.<sup>187</sup> Thirdly, even if Africans decide to pass new laws in an attempt to decolonise their condition (which is their popular democratic entitlement to do) their attempts are subject to testing against a Eurocentric document that proclaims itself to be supreme. As a result, sovereignty in South Africa still, to all intents and purposes, vests in Europe and not in the African people.<sup>188</sup>

At first glance one might see an overlap between the early thinking of Potgieter and Visser and the current thought of Ramose. Indeed, both sets of views are manifestly anti-constitutional. But the snag is that the political spirit underlying the two forms of anti-constitutionalism are very different and are divided between the far right and the far left of the ideological spectrum. There is another weighty difference between the views of the delict scholars and Ramose.

Ramose’s decolonial vision for South African law does not amount to common-law purism. If I understand Ramose correctly, he would reject both the common law and the Constitution as sources of law in the process of decolonising South African law. Ramose’s theory would reject labelling the South African common law as both “South African” and “common”. His theory would categorise the common law as conquestuous European law that is not shared in “common” by all people who find themselves living in the *locus* that is South Africa. It is true that the original European law brought to South Africa has mutated into a body of rules with its own shape and form, but that law was developed for and by Europeans incidentally living in South Africa (even if those Europeans might have called themselves “South Africans”). Ultimately the economic and political spirit of the European law is so different to African law that we should be slow to conflate the two systems. Therefore, decolonial anti-constitutionalism does not amount to common-law purism in any way and, true to its origins, the “decolonial option” will not resemble the current dominant forms of “South African” law in any way.<sup>189</sup>

To conclude this section on contemporary common-law purism, it must once again be emphasised that common-law purity can be underscored by different political commitments – from the far right to the left. However, even if one’s common-law purism is inspired by progressive political aims, it lacks the frank realisation that a decolonial reimagination of the law will not take place under the guise of the common law or the Constitution.

186 *Idem* 323ff.

187 *Idem* 324.

188 *Idem* 326ff.

189 On the origins of “decolonial options” see, eg, Mignolo 2011.

## 4 Purism's politics: An invitation

From the preceding discussion I hope that it is clear that the stance that we take on whether, as a matter of justice, human rights should impact the common law is influenced by different non-legal factors. If we are to understand each other better, it could help if we are politically as clear as possible about why we take the stand on this issue that we do. Furthermore, it unfortunately seems that often, when scholars say that they support common-law purism on the basis of “legal science and certainty”, they use the appearance of personal and legal objectivity to cloak personal politics. We pertinently saw this in the work of LC Steyn and perhaps also in the writings of Potgieter and Visser. With that said, I do not deny that there are scholars who have shown keen interest in determining the “plain meaning” of the Constitution’s application provisions without necessarily carrying right wing or politically conservative commitments. One such example is professor Anton Fagan.

As a starting point, it must be highlighted that Fagan does not pertinently ask the question whether it would be a good idea, as a matter of justice, for the Constitution to apply to private common law. Instead, he has focused some of his most important research on the plain meaning of the constitutional text to discover the relationship between different application provisions. Ostensibly relying on the legal positivist philosophy of Hart, Fagan has argued that the common law may be developed for one of three reasons, namely, to give better effect to constitutional rights (following section 8), for the sake of justice (in accordance with section 173) or because of the common law itself (relying on section 39(3)).<sup>190</sup> Once it is decided that the common law must be developed for one of these three reasons, the spirit, purport and objects of the Bill of Rights (quoted in section 39(2)) kicks in as the standard according to which the development is to take place – in that way, section 39(2) plays a secondary role in the common law’s development.<sup>191</sup> Fagan’s exposition of the application provisions disrupted the popular approach to constitutional application in South Africa that made common-law development possible either directly (where the common law was inconsistent with specific rights, according to section 8) or indirectly (where the common law fell short of the spirit, purport and objects of the Bill of Rights according to section 39(2)).<sup>192</sup> Fagan’s challenge to the popular constitutional application models was met with fervent criticism from Dennis Davis<sup>193</sup> and Christopher Roederer<sup>194</sup> who scolded him for being a naughty positivist. Despite the negative connotations that the term “positivist” might hold in many postcolonial states,<sup>195</sup> being called a positivist in our time of constitutional

<sup>190</sup> Fagan 2010: 622.

<sup>191</sup> *Idem* 621.

<sup>192</sup> On these popular models of constitutional application in delict see Loubser & Midgley 2012: 33-35; and Neethling & Potgieter 2015: 18-22.

<sup>193</sup> Davis 2012.

<sup>194</sup> Roederer 2013.

<sup>195</sup> See, eg, Okafor 1984; Taiwo 1985; and William & Oke 2008.

supremacy is not the same as being called a supporter of right-wing politics. Even if we accept that Fagan's reading of the application provisions has a positivist feel, Fagan at no point says that the Constitution should have no impact on private law and gives no indication that he is against positive reforms in private law.

On my interpretation, his silent motive was simply to question whether the conventional direct/indirect application separation was really constitutionally mandated or a strange importation and adaptation of German constitutional law. Even though I do not call myself a positivist, I grant Fagan the necessary interpretative charity and must concede that he has opened up a new way of thinking about the application provisions in the Constitution – and by that I do not say that his interpretation is *the* correct rendition, but it could surely be one of many acceptable renditions.<sup>196</sup> To some critical legal scholars, Fagan's relegation of the spirit, purport and objects of the Bill of Rights to a secondary role in common-law development is unacceptable, probably because critics are well known for their passion for flexible standards (such as the spirit, purport and objects of the Bill of Rights) that can easily be manipulated to achieve altruistic or egalitarian aims. Strangely, if I consider how the phrase “spirit, purport and objects of the Bill of Rights” has been used by our courts in the past, a pattern appears that the phrase invariably means “constitutional rights”.

In *Carmichele* the common law was in truth developed because it appeared that it did not afford the victim sufficient protection of her constitutional rights to dignity, bodily integrity, privacy and equality. The same may be said about *K v Minister of Safety and Security*.<sup>197</sup> I cannot recall a single case of common-law development in delict where the flexible standard of “spirit, purport and objects” has not been given sole content to by substantive constitutional rights. If this is true, then there is no ostensible difference between common-law development on the ground of “giving effect to constitutional rights” (the direct, liberal model, following section 8) and “falling short of the spirit, purport and objects of the Bill of Rights” (the indirect, critical model, following section 39(2)). Perhaps from a practical point of view there is very little difference between whether we say we develop the common law directly or indirectly.<sup>198</sup> If this is the case, then Fagan could be right about saying that the “spirit, purport and objects” (factually) do not play a primary role in deciding the foundational question of whether a specific common law provision requires development, and politically it does not really matter whether we want to rely on rights or standards to develop the common law because constitutional rights and standards always go hand in hand in the process of constitutional application – the “progressive” decisions in *Carmichele* and *K*, that the critics seem to praise as being

196 Similar contentions are raised by Bhana 2008; and Bhana 2013. Friedman 2014 has also become more inclined to follow similar lines of reasoning.

197 2005 (6) SA 419 (CC).

198 See, esp, Ferreira 2006.

beyond reproach, were ultimately not developments made because of “the spirit, purport and objects” but on the basis of a conglomeration of constitutional rights that had to be given effect to. Therefore, it can hardly be said that Fagan’s contention (that the spirit, purport and objects of the Bill of Rights only play a secondary role in common-law development) is imbued with conservative politics, even though his approach to the interpretation of texts might be regarded as being conservative.

The avid critical reader of Fagan might turn around and exclaim that there are conservative political sentiments reflected in Fagan’s work because he has rejected the use of constitutional rights in *Carmichele* and *K*.<sup>199</sup> Again, I would emphasise that Fagan is not necessarily completely opposed to the idea of constitutional rights impacting private law. What he is chiefly worried about is what he regards as bad understandings of existing common-law rules. Additionally, in the context of both *Carmichele* and *K*, Fagan’s concern about the way in which the Constitution was used relates to who the bearers of constitutional obligations are. For example, according to Fagan, employees of the police do not automatically bear the responsibility of the entire police force. Whether an employee bore a specific duty must be determined with reference to their employment contracts that may or may not incorporate constitutional duties. As I read Fagan, he is concerned about overbroad impositions of constitutional duties on employees of the state – a cleaner in the South African Police Service does not bear the same duty to protect the public as a station commander does, and so both persons cannot be said to bear the same intensity of constitutional duty simply by virtue of the identity of their employer. At times it may appear as though Fagan has little sympathy for the victims of gender-based violence in *Carmichele* and *K*, with the result that his approach to law is described as being reminiscent of the old order and/or politically conservative. One of the dangers of positivist legal research that only asks “what is the law?” without further endeavouring to ask “what does justice demand?” is that it seems like an implicit approval of the law, no matter how unjust it is. However, Fagan does not have flagrantly conservative politics.

To the contrary, Fagan is one of the founding members of the Five Plus Project that aims to involve “comparatively well-off people” to donate 5 per cent or more of their income to the project that works toward poverty alleviation.<sup>200</sup> Fagan obviously has an idea of what privilege is and has shown a commitment, in his own way, to transforming South African society. His politics certainly does not have the appearance of right wing or conservative sentiments. In light of the above, it would be interesting to hear Fagan’s thoughts on what justice demanded in the cases of *Carmichele* and *K*, even though he believes that the Constitutional Court got the common law and constitutional application wrong in both cases.

The exposition of Fagan’s approach to law and a suggestion about his politics is necessary because, as we have seen in the preceding sections, just because someone

199 Fagan 2008; and Fagan 2009.

200 See University of Cape Town (accessed 14 Mar 2017).

perhaps appears to be a common-law purist does not necessarily mean that his ideas are not useful or valuable. I have found Fagan's ideas to be particularly useful in making critical sense of the hegemonic direct/indirection constitutional application discourse that still features most prominently in delict scholarship today. I have also found Fagan's ideas to be useful in the critical, egalitarian (re)conceptualisation of vicarious liability and wrongfulness, even though he has a fairly rigid idea of what the law is and what legal interpretation involves (one that I do not necessarily agree with). My invitation to Fagan and other private-law academics is to consider writing something that relates to fundamental, political questions about the application of human rights to private law. For example, in political terms of justice, what are his/her views about the application of constitutional rights to the common law? In political terms of justice, what is the relationship between having a solid law of delict (and a strict model for legal interpretation) and a good society? In political terms of justice, how should we cope with the fact that a really rigid application of the rules relating to vicarious liability and wrongfulness might lead to victims of gender-based violence being left remediless? In fact, is it acceptable for such victims to be left remediless? Perhaps some academics will say that these questions do not matter because, as some strands of positivist theory go, law and justice are two separate concepts that are unrelated to each other. That approach would certainly have a manifest political effect when the strict application of laws produces conservative results. Perhaps some academics will come forward and say, in critical tone, that the law cannot be just or fair and so we should leave justice as a task for the non-lawyers. Or, if the law is unjust, it should not be the task of lawyers to remedy that unfairness.

I am indeed interested to hear what my fellow private-law academics' thoughts are on these issues and whether they believe that there is any link at all between their politics and their approaches to the law-and-justice interface. We are bound to disagree with each other. But that is acceptable and enjoyable because South Africa no longer outlaws difference. As Thorne Godinho has recently argued following Chantal Mouffe, we have to embrace agonistic politics if we want to create a space that is welcoming to a plurality of voices.<sup>201</sup> If some of our colleagues want to move to Orania that is fine, but they should at least be candid about that fact. We owe it to each other to be politically clear to enhance our understanding of each other's work, to stop lying to ourselves and our students about what we *really* think about the role of the Constitution for "post"-colonial and "post"-Apartheid South Africa, and to ensure that there is the necessary theoretical depth in our work and thinking.

My invitation has some chutzpah. It would be wrong of me to leave my position on politics and common-law purism unclear. I am a white, middle class, privileged man with a Christian upbringing, born in 1991 amidst many of the debates that I have spoken about in this piece. By the time that I went to school, Mandela was free and I attended integrated schools. I grew up in a fairly liberal household where my English, atheist, Marxist family members were just as welcome as those who

201 Godinho 2016.

were German, Satsangi vegetarians. Diversity was acceptable, just as criticism was harshly yet lovingly dished out with the goal of counselling and bettering each other. I saw how my parents took into our house many people who did not have homes. I was taught that giving up certain privileges to care for and love others is not only desirable but imperative. I have always had a predilection for disrupting the pecking order – probably something that I learnt from my grandfather who was a union leader in England many years ago. I received my legal education at the University of Pretoria. That experience exposed me to right-wing conceptions of the law (even as to the role and place of human rights), liberal approaches to law (let us call that human-rights focused education) and more radical paradigms (from classic CLS to decolonial theory). The latter was by far more appealing to me and held the potential for a re-imagination of private law that I thought was stimulating. The knowledgeable professor Johan Scott is my doctoral father who encouraged me to study the common-law rules of delict properly before embarking on any form of critique, but he was nevertheless accommodating of my new ideas. These fun facts about my life – that necessarily paints an incomplete picture of who I am – have shaped my politics in many ways.

Sometimes I get myself into trouble for using Marxist rhetoric in my writing and teaching even though I think Marx was wrong about a lot of things. I think Marx had a point about hierarchy, hegemony and the danger of blind acceptance of all things as normal. I think he was particularly wrong in his economic reductionism. I am interested in the feminist ethic of care – love, altruism and sacrifice are not weird concepts to me. I am conscious of how my race and gender have contributed to a lot of undeserved goodness in my life. I am actively thinking about how to deal with that. I think peaceful coexistence of diverse people is in principle possible, while being mindful of the fact that economic divisions between those people can cause severe tensions that erode peace. These political odds-and-ends link in some way to my approach on the Constitution's influence on the common law.

In my doctoral thesis,<sup>202</sup> I problematised two extreme approaches to constitutionalising private law.

On the one hand I took issue with constitutional avoidance, that I have labelled “contemporary common-law purism”, and which could take of the form on anti-constitutionalism (an active rejection of human rights),<sup>203</sup> constitutional heedlessness (a passive maintenance of the common-law *status quo*),<sup>204</sup> or constitutional deficiency (an attempt at taking the Constitution seriously in private law, while not truly effecting substantive constitutional change).<sup>205</sup> Constitutional avoidance is problematic, in my view, because the Constitution does have some strategic potential for achieving socially just results in our courts. For example, the enforcement of

202 Zitzke 2016a.

203 See, also, Zitzke 2015a; and a forthcoming follow-up piece Zitzke 2016b.

204 See, also, Zitzke 2015b.

205 See, also, Zitzke 2016c.

certain constitutional obligations among non-state actors could give effect to an Africanist conceptualisation of human rights that places individual duty at the centre of a well-functioning society. Human rights do hold some potential to bring about moments of deconstructive-substantive-equality to private relationships in order to fight against privatised apartheid. Lastly, human rights can play an important role in disrupting the hegemony of the common law through the creation of a single system of law subject to a transformative constitution. This does not mean that I uncritically accept the Constitution.

On the other hand, I also took issue with constitutional over-excitement that I defined as a phenomenon when judges or academics use the Constitution as the sole source of law, as if common law, African law and/or legislation do not exist. I suspect that constitutional over-excitement occurs because deducing brand new laws from the Constitution is easier than consulting hundreds of precedents on a specific topic, or simply because some lawyers believe that the Constitution holds the answers to all of our problems. Of course, the Constitution is not always the best panacea for South African people's problems. Following Van der Walt, we might say that constitutional over-excitement has the potential to erode legal pluralism. We might also say that it could lead to really conservative results, because human rights could be used in strongly libertarian ways. Following Ramose, we can also say that the Constitution, despite its potential, has its limits. It is quite clear that this inanimate object has been deified and made supreme, even though it has in many ways failed to give South Africa a decolonial option. I would be slow to say that the Constitution has radically transformed our society and economy in material ways that matter to the most vulnerable and exploited of our community. The Constitution, like all law, is limited in what it can do and we should be open to criticising it just like we might be to the common law.

How should we deal with the common law and its interaction with the Constitution? In the meantime, until paradise comes to the southern tip of Africa, we should venerate neither common law nor the Constitution and we should use whatever tools we have at our disposal to contribute towards realising the needs of the loveless, the poor and other exploited human beings. If the common law as it stands can help us achieve that goal, why not acknowledge that? If the Constitution could be useful for strategic litigation purposes, why not use it? But, at the same time, we should not accept either source of law as necessary, inevitable or perfect and we should be open to rejecting both if needs be. The true decolonial re-imagination of what we call South African private law will, perchance unsurprisingly, require something much more than a simple union of the common law and the Constitution.



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**Review of Gargely Deli, *Salus Rei Publicae Als  
Entscheidungsgrundlage des Römischen Privatrechts***

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### Introductory comments

“The well-being of the people should be their highest law” (*ollis salus populi suprema lex esto*), Cicero tells us in his famous dissertation on the laws (*De legibus* 3 3 8). Commencing with this well-known text in his discussion of the salvation of the state or common weal as the basis or foundation of decision-making in Roman private law, the author uses *salus rei publicae* and *salus populi* as virtual synonyms. In his introductory observations (ch 1) he points out that these concepts in time acquired a particularly public-legal, and even more so a political, character. The question has, however, arisen whether the common weal was also an authoritative standard in disputes between individuals and was hence applicable in the sphere of private law. That is, indeed, the topic of this particularly interesting and informative contribution by an Hungarian academic writing in German.

The author makes use of numerous references, including, at the outset, the great Romanist, Max Kaser, whose contribution on “*ius publicum* and *ius privatum* (in SZ 103 (1986) 98) is particularly relevant in this regard. He relies also on sources specifically mentioned in the various decisions of courts and officials empowered to deal with the resolution of disputes and, likewise, on the possible theoretical and philosophical background of such decisions. To illustrate this further he focuses on the points of contact between private and public interests, with particular reference to a number of examples drawn from applicable sources occurring in the Digest (*Digesta*) of Justinian’s *Corpus Iuris Civilis*.

The examples discussed by the author cover six cases taken from procedural law (the *pactum de quota litis*); the law of things (*specificatio*); the law of contracts, more particularly the contract of purchase and sale (*lex commissoria*); the law of quasi-contract, more particularly unauthorised administration (*negotiorum gestio*); the law of delict in conjunction with marine law and an action for pilfering of cargo (*actio oneris aversi*); and the law of succession with reference to testamentary provisions in conflict with good morals (*contra bonos mores*).

Inasmuch as the said cases may be regarded as difficult or complicated, the author has relied on the debates set forth in the classical juristic writings appearing in the time of the Roman Republic (509-27 BC), particularly Marcus Tullius Cicero, and in the time of the Roman Principate (27 BC-284 AD), during which the schools of the Sabiniani and Proculiani played an important role. In discussing post-classical Roman law the author has relied strongly on the five leading jurists mentioned in the “law of citations” (*lex citationis*), namely Papinian, Paul, Gaius, Ulpian and Modestinus.

### First case: *Pactum de quota litis*

The first of the above-mentioned six cases is dealt with in chapter 2. It comes from procedural law and deals with the problem of when a lawyer’s fees are permissible in accordance with the successful outcome of litigation (*ex eventu litis*) by virtue of an agreement to this effect (*pactum de quota litis*). In Roman and later law, such as cited by the French jurist, Jean Domat, such an agreement was regarded as iniquitous and was hence prohibited. This may still be the case in modern law, insofar as the recently promulgated *Code of Conduct for Lawyers in the European Union* (1988, as amended in 1998 and 2002) states: “A lawyer shall not be entitled to make a *pactum de quota litis*”.

The author is of the view, however (p 15 n 15), that such an agreement was not *per se* forbidden but was simply a form of transferred praetorian or honorary law which regarded the said *pactum* as immoral (*contra bonos mores*). He relies in this regard on a decision of the *praetor* Claudius Saturninus in the case of one Marius Paulus, as reported in Ulpian D 17 1 6 7 and critically evaluated and interpreted by Otto Behrends, Rolf Knütel and Berthold Kupisch (p 17 n 21) in their translation of this text. According to Kupisch, in a contribution to the Klaus Peter Berger *Festschrift* (2000), Kupisch states unequivocally that an agreement of this nature was not necessarily forbidden, but was in conflict with good morals (*contra bonos mores*).

A somewhat different interpretation is that of Thomas Rüffner, who appears to reject the *pactum de quota litis* on the basis that it constituted a form of “double remuneration” (*fructus duplio*). There follows a lengthy discussion which I do not propose to consider for present purposes. Generally speaking the author is inclined to the view of Kupisch rather than that of Rüffner. He sees the conduct *contra bonos mores* as being founded on the cunning (*calliditas*) and greed (*aviditas*) of the



creditor (Marius Paulus) rather than on an attempt to acquire double remuneration. At most he would be entitled to interest on the amount owing.

## Second case: *Specificatio*

The next case (ch 3) deals with the creation or manufacture (*specificatio*) of a new thing (*res nova*) from the material of another. According to the author legal historians regarded this as a meaningful phenomenon. In this regard he refers to Theo Mayer-Maly's three grounds for what he calls an inspirational approach, namely the productivity of this problem for comprehending Roman legal thought, the fate of the history of private law in modern times (*Privatrechtsgeschichte der Neuzeit*) and the relationship between a legal institute and social uncertainty. In this regard he points out that many European legal codifications make reference to this institute as an ever-recurring actuality. In order to establish a novel interpretation of this early institute without harming the original thought process underlying it, the author directs his attention to a single question arising in a text from the *Institutes* of Gaius (Gai *Inst* 2 79), namely whether good faith (*bona fides*) was necessary for acquiring ownership to property by means of *specificatio*.

The author commences with a discussion of *bona fides* in manufacturing law. He points out that, among the older writers, there is a difference of opinion on this score. The question is frequently asked whether the existence of good faith is subjective and not clearly defined or whether it relates to the procedure used in the manufacturing system. In this regard the outside world may see the subjectivity of the manufacturer as being indicated by objective facts.

Later writers have rejected *specificatio* as a form of acquisition of ownership. Thus in a reconsideration of *specificatio* and *accessio* in 2006, A Plisecka (p 40 n 91) stated remarkably that the requirements of these two institutes give rise to the loss of ownership rather than the acquisition thereof. They in fact belong, according to Gaius (Gai *Inst* 2 79), to the category requiring natural reason (*naturalis ratio*), the good or bad faith of the manufacturer being irrelevant. The author points out (p 41 n 94) that Gaius rendered the concepts natural reason and natural law (*ius naturale*) as synonyms. Good faith in this context meant not a prerequisite for the accession of ownership but simply that the purchaser *bona fide* regarded the seller as owner or that the manufacturer was *bona fide* when he believed that the material in question belonged to him. The author agrees with this view.

The next part of the discussion deals with the natural law principles of *specificatio* with particular reference to Gaius (Gai *Inst* 2 66-79) and the schools of thought represented by the *Proculiani* and *Sabiniani*. Of note is that one of these principles is the general enrichment principle relating to unjustified enrichment, as set forth in Pomponian (D 12 6 14): *nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiores*. For present purposes it is not necessary to give further consideration to this.

The author's personal view is that the question whether or not good faith should be a requirement for the acquisition of ownership by the manufacture of a new thing from existing material, is anachronistic and misleading. This arises from the issue of conflicting natural law principles and from the fact that good faith was regarded by many prominent jurists as irrelevant.

### Third case: *Lex commissoria*

In the Roman law of contract, more specifically the contract of purchase and sale (*emptio venditio*), the parties could conclude an ancillary agreement (also known as a *clausula cassatoria*) that, if the purchaser should fail to pay the purchase price within the prescribed time, the seller would have the right to cancel the agreement. Where instalments were payable the already paid instalments would be forfeited.

The author points out that this Roman institution laid the foundation, in modern European law, for a general right of withdrawal from a contract on account of non-performance. He cites a number of examples, including from the German *Bürgerliches Gesetzbuch* I §360 and the French *Code Civil* Art 1184. In the latter the creditor is given a choice between compelling performance of the agreement, where it is possible, and claiming dissolution of the agreement with damages and interest.

It is not only in European law that this link between Roman and modern law is found, but also in legal systems such as that of the United States of America. To such an extent have these Roman legal principles continued to exist that it is indicative of a lengthy relationship between private and public interests.

A basic question in this discussion is whether the *lex commissoria* constitutes a suspensive or resolutive condition. In this regard, the author observes, the modern legal sources on the subject approach the question in a somewhat exaggeratedly dogmatic way. Some of the modern writers regard the *lex commissoria* as an agreement (*pactum*) with resolutive effect, while others see it as a right of withdrawal with suspensive effect or as a secondary agreement with a suspensive character. In this way the different approaches were not regarded as indissolubly in conflict, particularly with regard to whether, in the contract of purchase and sale (*emptio venditio*), the application of this condition was to the benefit of the purchaser or seller or of both parties. For present purposes an in-depth discussion of this issue is not required inasmuch as it will be dealt with in the author's summation below.

The author next gives consideration to the role of social relationships in the application of the *lex commissoria* in the sense of regarding the issue from a socio-economic, rather than a techno-legal, point of view. This may be illustrated by a text of Ulpian (D 18 3 4 1), citing the jurist Neratius, which suggests how socio-economic issues, with their dogmatic refinements, may best be countered in practice. Hence it would be humane if the purchaser should sometimes be entitled to fruits, in the form of interest, when he has lost part of the purchase price. In this way he

would not be worse off than he was before concluding the sale and would at least not lose the fruits of his labours. This would also reflect the interests of both parties prior to conclusion of the agreement in the sense of dividing the profits (*commoda*) and losses (*incommoda*) and accords, in the author's view, with the general principle regarding the division of profit and loss.

In this regard the author points out that Professor David Daube linked the balancing of interests in the contract of purchase and sale with that occurring in the contract of letting and hiring. In the contract of pledge, however, the *lex commissoria* was forbidden by post-classical Roman legislation and its applicability differed from case to case. This is illustrated with reference to a case cited by Paul in D 4 4 38pr relating to the refusal to apply a *lex commissoria* in a property claim of a minor *pupilla* against her family head (*paterfamilias*) and the subsequent granting of a full restitution order (*in integrum restitutio*). The author compares this with the application of the unconscionability doctrine, in socio-economic context, in the Californian case of *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (C A D C 1965).

As a further step in his discussion the author turns to the right of withdrawal as a retroactive response in terms of the *lex commissoria*. He links this to the increasing tendency of legal dogma to become an end in itself, giving rise to the possible rejection of such response in similar fashion to the general prohibition existing in certain modern codifications. It likewise creates the impression that this rejection may be linked to an intrinsic and inseparable attribute of its inherent nature. In Roman law, with its particularly casuistic approach, there was no general principle in this regard but merely a case-to-case consideration in accordance with the facts and circumstances of each case.

The author opines that this has given rise to fruitless legal scientific debates among modern legal historians, much of which is based on the interpretation of two imperial rescripts as set forth in C 4 53 3 and C 4 53 4 respectively. In the first the Emperor Severus Alexander denies a seller, relying on a *lex commissoria*, a proprietary claim (*rei vindicatio*) against a purchaser who is in arrears with payments, but restricts the applicable legal right to a contractual action arising from the sale (*actio venditi* or *actio ex vendito*). In the other text the seller is denied the *rei vindicatio* when he chooses to claim interest on the purchase price. If he chooses not to do so it would appear that he would indeed be accorded the *rei vindicatio*. This distinction, the author suggests, should be understood in the context of market-related and socio-economic factors.

In his concluding comments on the *lex commissoria*, the author points out that the topic is complex and not always fully comprehensible. This may be attributable to the fact that the relevant classical Roman law was not dogmatically exclusive and homogeneous, but particularly casuistic in its focus on achieving a just and effective outcome. In more modern context it has led to fairly innovative methodology

sometimes described as “social engineering” in which judicial intuition is applied in socio-economic context. The author warns, on the one hand, against an exaggerated tendency to generalise and, on the other, against the danger of a dogmatic approach that becomes an end in itself and forgoes its role as a means to achieve a particular goal. Although legal institutes serve the purpose of preparing real life for human, artificial, intervention, they cannot present a complete picture since law as such cannot attain full reality. In any event that cannot be its purpose inasmuch as law, when approaching reality, finds support in socio-economic relationships.

#### Fourth case: Unauthorised management of affairs (*negotiorum gestio*)

I should mention at the outset that, in his initial footnote 251 at p 88, the author refers to my work on the topic (DH van Zyl *Negotiorum Gestio in South African Law: An Historical and Comparative Analysis*, Durban 1985) incorrectly under the name “Van Zeyl” (rendered as “Dries van Zyl” in the bibliography at p 201). Generally speaking, however, the sources are well-resourced and identified and I encountered no similar errors elsewhere in the publication.

In identifying the issue arising from the unauthorised management or administration of the affairs of another, the author distinguishes between *negotiorum gestio* in the sense of the legal representation of an absent person and the voluntary, amicable management of the affairs of another on a *bona fide* basis without being authorised or mandated to do so. The source of this institution was Roman law, in which complex questions arose, more particularly with regard to the direct and indirect action (*actio directa* and *actio indirecta* or *contraria*) which came to the fore in the post-classical law of Justinian.

The difficulty was that there was no unity in the individual aspects of *negotiorum gestio*, something which could be attributed to the absence of consensus between the unauthorised manager (*negotiorum gestor*) and the person whose affairs have been managed (*dominus negotii*). As a result the institution was what the author refers to as incomplete or “half-sided” (“halbseitig”), in the sense that it could not be wholly rectified by later approval or ratification by the *dominus negotii*. He regards this as a form of asymmetry which has substantially characterised *negotiorum gestio* during its still continuing historical development.

Because of its incomplete nature there was no clear basis on which the *gestor* could claim the costs or expenses of his *negotiorum gestio*. This appears to have been dependent on whether or not it had been to the benefit, or in the interest, of the *dominus negotii*. Inasmuch as the *gestor* would not, however, necessarily know who the *dominus* was at the time of the *gestio*, he could not be expected to know whether he had been acting in his interest or to his benefit. Nor was it clear whether the *gestio* had been in the public interest or in accordance with good (public) morals

(*boni mores*). The applicable principle appears to have been whether the *gestio* had, objectively speaking, been useful or reasonable at the time of its commencement (*utiliter coeptum*). It was this utility or reasonableness (*utilitas*), the author suggests, which linked public and private interests and served to resolve issues of great social significance.

## Utility or reasonableness? Caught up in the net of varying interpretations

The author refers to the aspect of utility or reasonableness at the commencement of the *gestio* (*utiliter coeptum*) as a difficult issue of interpretation already confronting the classical Roman jurists. He refers in this regard to a text of Ulpian as set forth in D 3 5 9 1, in which it is held that a person who institutes an action for unauthorised management (*actio negotiorum gestorum*) may rely on that action not only if the *gestio* was successful, but also if it was unsuccessful, provided it was *utiliter coeptum*. This would, however, depend on the interpretation of the facts and circumstances of each particular case which the author describes, in the relevant sub-heading, as being “within the net of polysemantics”.

The author points out that it is the outcome (*effectum*) of the *gestio* which counts, and not the subjective will of the *gestor*. Of course the *gestor* may not institute an action if the *dominus* has expressly prohibited (*domino prohibente*) the *gestio*. In addition his claim is restricted to the unjustified enrichment of the *dominus* in the case of the *mala fide* management of the affairs of the *dominus* for the benefit of the *gestor* (D 3 5 5 5) or the management of such affairs in the *bona fide* belief that they are those of the *gestor* himself (D 3 5 48). In this regard it must also be borne in mind that the adverb *utiliter* has various meanings, including “usefully”, “practically” and “expediently”. To this may be added “reasonably”.

In what follows the author spends some time discussing the two examples given by Ulpian in the cited text (D 3 5 9 1), namely effecting improvements to a building which later burns down and taking care of a sick slave who later dies. For present purposes it is not necessary to deal with this discussion in any detail. Much emphasis is placed on the varying opinions of the Roman jurists Proculus and Celsus, both of whom render the concept *utiliter* as “usefully” or “beneficially”. Proculus, however, approaches it subjectively whereas Celsus applies an objective standard. This means that the *gestor* would be entitled to an action for expenses provided, objectively speaking, he acted reasonably, like a “diligent father of a family” (*diligens paterfamilias*), at the time of the *gestio*, even if it was unsuccessful (*effectus non habuit* or *eventus non sit secutus*).

Ulpian’s own opinion (D 3 5 9 1), the author suggests, is that the issue of subjectivity or objectivity of the usefulness or benefit of the *gestio* must be gauged not from the *ex post* point of view of the *dominus* but from the *ex ante* point of view

of the *gestor*. It was hence not a matter of establishing the objective interest of the *dominus* after the event, but of considering whether, at the commencement of the *gestio* (before the event – *ex ante*), it was reasonable and useful or beneficial.

The discussion then turns to what the author describes as the “Stoic cosmological” influence on the development of the institution of unauthorised management of the affairs of another. He refers in this regard to Seneca’s conception of the two basic Stoic principles of the universe (*cosmos*), namely active reason (*logos*) and passive spirituality (*pneuma*). The Stoics did not understand cause and effect as modern lawyers do, but rather as a chain of causes linked together in a harmonious whole like a string of pearls.

Similarly Roman jurists did not regard causal relationships as being linked in linear or chronological context, but as the effect of actions or conduct on physical matter or substance. Thus in the example of unauthorised management aimed at effecting improvements to a building, it was not the act of improvement as such, but the conduct of the *gestor*, which was relevant for purposes of establishing whether or not an action for expenses could be brought. It was the state of the building requiring improvement before being burnt down which moved the *gestor* to his said conduct.

In his summing up of this chapter the author attempts what he calls a normative consideration of Ulpian’s aim in further developing the criteria underlying *utiliter* conduct in the sphere of unauthorised management. Inasmuch as the *ex ante* perspective required this to be present at the commencement of the *gestio* (*debet utiliter esse coeptum*), it was clear that neither the *gestor* nor the *dominus* could have known beforehand whether or not the *gestio* would be successful. Ulpian hence created a test in terms of which recognition was given only to a *gestio* in respect of which the *gestor* in good faith (*bona fide*) believed that his envisaged *gestio* would be both useful (*utiliter*) and successful. He would then be entitled to remuneration to the extent of a balancing of his interests with those of the *dominus*.

### Fifth case: *Actio oneris aversi*

The issue discussed in this section arises from a Digest text of Alfenus, epitomised by Paul in D 19 2 31 and relating to the loss of replaceable goods, such as grain, being transported by sea. The nature of the loss was considered in the context of relationships of economic interest and the possible applicability of what the author refers to as the mysterious *actio oneris aversi*, in the sense of an action arising from the diversion or misappropriation of cargo in the form of a load or burden. In this regard the Romans had regard to two aspects which were not easily linked, namely commercial security and economic effectiveness.

According to the author Paul divided the text (D 19 2 31) into six sections, namely (1) the factual aspect; (2) the legal issue; (3) the inclusion of analogous legal norms; (4) the decision, in two parts, rejecting relief; (5) the first part of the decision, being the basis of the transfer of rights, similar to property rights, of disposal of the

grain to a ship-owner (one Saufeius); and (6) the explanation of the second part of the decision relating to the correctness of the delivery-up or return (*recte datum*) of the grain and simultaneously elucidating the question of liability.

The relevant facts set forth at the commencement of the text were that several persons had poured their grain together in the ship of Saufeius, who succeeded only in returning the share of one of these persons before the ship sank. The question then arose whether the remaining persons could claim their respective shares from the ship-owner or mariner by means of the *actio oneris aversei*. This depended on whether exactly the same, or merely a similar, object was required to be returned. In the former case the object remained the property of the owner, who would have an action for theft (*actio furti*) if the object was not returned, in which event the *actio oneris aversei* would be superfluous. In the latter case, however, the object was regarded as having been loaned (by *locatio conductio*) to or deposited (by *depositum*) with the mariner, who forthwith became the owner of the object (in the present case the grain). He would then be liable (to the lender or depositor) to the extent of his fault (*culpa*), apparently once again without recourse being had to the *actio oneris aversei*. For in cases contracted in the interest of both parties liability for fault comes to the fore.

In what follows the author undertakes a detailed analysis of the text with reference to the six-fold division referred to above and with a view to resolving the apparent contradictions occurring in such text. I shall deal briefly with it.

In this regard it should be noted at the outset that the author seems to attribute the sinking or foundering of the ship to an act of God (*vis maior*), in the sense of circumstances beyond the control of the ship's captain or crew. This would absolve them from liability, but would nevertheless require their actions relating to the transport of the cargo to be executed with care. Should this not be done, fault (*culpa*) in some or other form, and its concomitant liability, may become prevalent.

Somewhat confusing are the references in the text to the contractual institute of lease (*locatio conductio*) and the proprietary institute of deposit (*depositum*), more specifically "irregular deposit" (*depositum irregulare*). This may be because the relevant maritime commercial law had developed differently from other forms of common law. It may also elucidate the mysterious *actio oneris aversei*, which has variously been regarded as obsolete or even supplanted by actions like the *actio locati* arising from loan or the *actio furti* arising from theft in criminal law. This leads to the inevitable conclusion that the *actio oneris aversei* required a contractual relationship but had a criminal function. The author suggests that it filled a legislative gap, as illustrated by the various actions which could be used in its place. This included, in the case of the transport of grain, the post-classical (Justinianic) *condictio triticaria* which was directed at reclaiming the grain.

In this regard the author expresses the view that the original function of the *actio oneris aversei* might in fact have been to prevent mariners transporting grain

from making a profit out of a resale of the grain and thus breaching their contractual obligations. Even though they might have felt justified in doing so because of the risk accompanying the transport of grain by sea, the contractor who had entrusted the grain to the mariner also required protection. This would accord with the mariner's duty of care and contractual obligations.

## Sixth case: Testamentary provisions *contra bonos mores*

This final case is dealt with in the form of a question under the heading "Why is an act in conflict with good morals impossible? ('Warum ist eine sittenwidrige Handlung unmöglich?')". The author relies at the outset on research by Theo Mayer-Maly as contained in his article "The *boni mores* in historical perspective" (in *THRHR* 50 (1987) 60-77) with special reference (at 71-73 of such article) to a Digest text of Papinian (D 28 7 15).

This text provides that, where a son who was under parental power had been appointed in his father's will as an heir subject to a condition of which neither the senate (*senatus*) nor the emperor (*princeps*) approved, the son could have the will set aside on the basis that it was not within his (the son's) power to satisfy the condition. The reason for this was that conduct which offends against one's sense of duty (*pietas*), reputation (*existimatio*) or sense of shame (*verecundia*) or which, in general terms, is in conflict with good morals (*contra bonos mores*), was regarded as being impossible to execute. In other words that which was legally disapproved by senatorial resolution or imperial decree was equated with that which was legally impossible.

The author regards this text as puzzling in that it gives rise to two important questions, namely, in the first place, how the condition mentioned in the text can be characterised and, secondly, what significant relationship can be said to exist between the concepts of illegality, impossibility and immorality appearing from the text. In what follows the author attempts to provide new answers to these questions.

With reference to the opinions of a number of modern jurists on the formulation and interpretation of the said text, the author attempts, firstly, to identify the stylistic and structural detail of the text on the assumption that it does not contain interpolations. At the outset he finds it strange that the disapproving legislation of the senate or emperor is not specifically mentioned. He suggests that this might have been because it was intended as a text-book example in terms of which Papinian introduced a dogmatic innovation directed at equating illegality and impossibility.

Secondly, the verb *infirmet* used in the text for setting aside the will is, according to the author, seldom used in this sense in the Digest. It indicates that it may be based on the praetorian concept of equity as applied on a case to case basis and as such constitutes an innovation. The passive form *infirmetur* occurs in a text of Paul (D 50 17 112) which states that it does not matter whether he has by law no action (*ipso*



*iure quis actionem non habeat*) to set aside the will or whether it may be set aside by way of an exception (*per exceptionem*).

The third aspect raised by the author turns upon that section of the text relating to the words *ac si condicio non esse in eius potestate*. This indicates subjective impossibility of a condition not being within the power of the heir. The words *ac si*, he suggests, may in fact be indicative of a fiction in terms of which the *praetor* held a possible act to be impossible. This would then create a link between a finding of the *praetor* in terms of praetorian law (*ius praetorium* or *ius honorarium*) and legality of a legal document (*in casu* a will) in terms of civil law (*ius civile*). The *praetor* was enabled to overcome the legality of the civil law by finding the testamentary provision to be in conflict with good morals (*contra bonos mores*) and hence impossible to execute. In this way morality, based on the aforesaid values of *pietas*, *existimatio* and *verecundia*, led to an otherwise possible act becoming impossible.

The author then turns to what he calls “the possible circumstances” (*die möglichen Umstände*) surrounding the text in question. This relates to the position of other potential heirs and the situation should the testator die intestate. After discussing the opinions of various modern jurists, the author voices his disagreement with the view of Mayer-Maly, namely that the immoral can be equated with the impossible. In his view impossibility and immorality were situated on different levels in classical Roman law, impossibility falling into a dogmatic category while immorality played a foundational role. It was only during the post-classical, Justinianic, development phase that they grew closer together. The text, he says, distinguished clearly between illegality, impossibility and immorality. It was on moral grounds that the illegal provision was declared impossible. In this sense the concept of *boni mores* was not derived from religious or philosophical doctrines, but from grounds of dogma and justice. The fact that Papinian held the illegal provision to be impossible does not mean that he equated illegal provisions with immoral and impossible provisions.

The author concludes this topic with a brief discussion of the confusion existing between the concepts of impossibility, immorality and illegality. He makes it clear that the interpretation of these concepts is not based on considerations of philosophy or legal theory. In this regard he refers to the views of a number of modern Roman and Roman-Dutch (or Roman-European) jurists like JW Wessels and RW Lee. Going back to the Roman origins it is clear that, in the cited text, Papinian regarded the act or conduct in question, and not the provision as such, as illegal. That is the basis on which the *praetor* could set aside the will only to the extent that he declared the testamentary provision, with its immoral basis, to be impossible.

Yet, the author observes, Papinian did not wish to transplant any moral principles into law. His approach was “ethically hued” (*ethisch gefärbt*) only in the sense that he based a “technical resolution” (*technische Lösung*) on a “moral execution” (*einer moralischen Ausführung*). This did not, however, mean that he equated illegal provisions with immoral provisions. His legal genius came to the fore in the brilliant

manner in which he held an illegal provision to be impossible in order to ensure the total invalidation of the will.

## Concluding observations

The author points out at the outset that the six cases dealt with above are drawn from a variety of fields, but have in common that they are generally regarded as constituting relatively complex examples. There was no magical formula which provided answers to all the relevant problems, but from ancient to modern times several jurists have attempted to approach these problems in as objective a way as possible by making use of a definable value system. This was preferable to seeking to draw rational conclusions from relatively unstructured material.

For the rest the author summarises his discussion of the six cases and concludes that they illustrate the intersection between private and public interests, giving rise to an exemplification of state well-being (*salus reipublicae*). Although it is somewhat restricted in content, it deals with important aspects of private law in historical context and, I believe, achieves its aim of illustrating that the well-being of the state or community is indeed the basis of decision-making in Roman private law.

DH van Zyl

Retired Judge of the High Court of South Africa

## IM GEDENKEN AN IMRE MOLNÁR

22. September 1934 – 16. Oktober 2016

Am 16. Oktober 2016 ist Professor Imre Molnár, der international anerkannte Romanist und hochgeschätzte Lehrer und Meister von ungarischer Juristengenerationen dahingeschieden.

Imre Molnár ist am 22. September 1934 in Tataháza geboren. Seine Gymnasialstudien absolvierte er in Baja und Szeged. Bereits zu dieser Zeit wurde sein Interesse – vor allem von seinem Lateinlehrer József Visy – für die klassische Antiquität geweckt. Sein Universitätsstudium durfte er erst im Revolutionsjahr 1956 beginnen, da er aufgrund seiner Abstammung (um die damalige Terminologie des Kommunismus zu gebrauchen) als „klassenfremd“ galt. Sein Diplom erwarb er im Jahre 1960 an der Universität der Wissenschaften in Szeged. Während seines Jurastudiums erwachte sein Interesse für das römische Recht, vor allem dank seinem Meister Professor Elemér Pólay (1915-1988), dem wahrscheinlich bedeutendsten Romanisten seiner Zeit.

Nach seinem Studium ging er in die juristische Praxis und kehrte nach acht Jahren (in 1968) dem Ruf von Professor Pólay folgend an die Universität in Szeged zunächst als Assistent zurück, wo er in 1979 (nach dem Erwerb des Titels *Candidatus Scientiarum*, d.h. nach seiner Promotion) zum Dozenten ernannt wurde. Im Jahre 1985 übernahm er die Leitung des Lehrstuhls für römisches Recht (die er bis 1999, d.h. bis zu seinem 65. Lebensjahr innehatte) von Professor Pólay, den er nicht nur als seinen Meister verehrte, sondern ihm auch freundschaftlich bis an dessen Lebensende nahestand. In 1987 erwarb er den Titel *Doctor Scientiarum* (in der heutigen Terminologie: Doktor der Ungarischen Akademie der Wissenschaften) und wurde in darauf folgenden Jahr zum Universitätsprofessor ernannt. Von 1994

bis 1998 stand er als Dekan der Staats- und Rechtswissenschaftlichen Fakultät der Universität in Szeged (damals József Attila Universität der Wissenschaften) vor. Im Jahre 2004 ging er in den Ruhestand und wurde emeritiert. Während seiner ganzen Laufbahn hielt er regelmäßig Vorträge an internationalen Konferenzen und seine längere Forschungsaufenthalte in München, Rom und Köln ermöglichten es ihm wissenschaftliche und freundschaftliche Bande mit den bedeutendsten Romanisten seiner Generation zu knüpfen.

Die Schwerpunkte seiner Forschungsarbeit lagen in drei Themenkreisen: der *locatio conductio*, der Haftungsordnung des römischen Rechts und des römischen Strafrechts. Seine – in 1977 verteidigte – Promotionsarbeit ist im Jahre 1982 auf Ungarisch erschienen<sup>1</sup> und noch im selben Jahr veröffentlichte er im *Aufstieg und Niedergang des römischen Welt* einen längeren Beitrag über die „Verantwortung und Gefahrtragung bei der *locatio conductio* zur Zeit des Prinzipats“.<sup>2</sup> Über die Jahrzehnte publizierte er mehrere Arbeiten über die verschiedenen Aspekte der *locatio conductio*.<sup>3</sup> Den Titel *Doctor Scientiarum* erlangte er im Jahre 1987 mit seiner Arbeit über die Haftungsordnung des römischen Rechts,<sup>4</sup> die in 1993 auf Ungarisch und in 1998 auch auf Deutsch veröffentlicht wurde.<sup>5</sup> Über die verschiedenen Aspekte desselben Themas publizierte er zahlreiche weitere Beiträge in Ungarn und im Ausland,<sup>6</sup> die ihn zu einem der anerkanntesten Experten dieses (im römischen Recht

1 „A *locatio conductio* a klasszikus kori római jogban“ [„Die *locatio conductio* im klassischen römischen Recht“] *Acta Universitatis Szegediensis, Acta Juridica et Politica* Tom XXIX 1982 96 S (Zweite erweiterte Auflage (Szeged) 2013: 197 S).

2 In *Aufstieg und Niedergang des römischen Welt* Teil II Band 14 (Berlin-New York) 1982: 583-680.

3 „Gefahrtragung beim römischen Dienst und Werkvertrag“ *Labeo* 1975: 23-44; „Subjekte der *locatio conductio*“ in *Studi in onore di Cesare Sanfilippo II* (Milano) 1982: 413-430; „Objekt of *locatio conductio*“ in *Bullettino dell' Istituto di Diritto Romano* 1982: 127-142; „The social determination of lease relations and the social programs arising from that in Ancient Rome“ in *Studia in Honorem L. Nagy. (Acta Universitatis Szegediensis, Acta Juridica et Politica* Tom XXXI) (Szeged) 1984: 223-229; „Rechte und Pflichten der Subjekte der *locatio conductio*“ *Index* 1983-1984: 157-188; *Le cause di estinzione del contratto e il problema dell' esistenza del diritto di disdetta nella „locatio-conductio“* *Labeo* 1986: 298-309; „Beruf und Arbeit im römischen Recht in *Facetten des Wandels*“ (Mannheim) 2001: 54-62.

4 *A római magánjog felelősségi rendje* [Die Haftungsordnung des römischen Privatrechts] (Szeged) 1993: 252 S.

5 *Die Haftungsordnung des römischen Privatrechts* (1998) (Szeged) 216 S.

6 „Die Ausgestaltung des Begriffes der *vis maior* im römischen Recht“ *IURA* 1981: 73-105; „Erfolgshaftung oder ein typisierter *dolus malus* im archaischen römischen Recht“ *Bullettino dell' Istituto di Diritto Romano* 1987: 27-43; „Der Haftungsmaßstab des *pater familias diligens* im römischen Recht“ in *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag* (Nimwegen 23. bis 27. September 1990) (Nijmegen) 1992: 23-31; „Die Haftungsordnung des römischen Privatrechts“ *Acta Universitatis Szegediensis, Acta Juridica et Politica* Tom XLIX (Szeged) 1996: 371-383.

zentralen) Fragekreises machten. In den letzten zwei Jahrzehnten seines Lebens galt sein Interesse in erster Linie dem römischen Strafrecht: mehrere seiner Arbeiten sind auch in deutscher Sprache veröffentlicht worden,<sup>7</sup> und im Jahre 2013 wurde ein Sammelband seiner Aufsätze, die diesem Thema galten, herausgegeben.<sup>8</sup> Neben diesen größeren Themenkreisen behandelte er zahlreiche weitere Fragen in seinen Beiträgen, so unter anderen die Problematik der Gefahrtragung beim Kauf.<sup>9</sup>

Sein Lebenswerk wurde er mit zahlreichen Preisen und Ehrungen bedacht: In 1999 erhielt er den *Apácai Csere János Preis*, in 1995 und 2004 wurde er von seinen Studenten zum Lehrer des Jahres gewählt, in 2003 erhielt er den *Offizierskreuz des Verdienstordens der Ungarischen Republik*, in 2005 den *Klebersberg Kúnó Preis* und in 2007 den *Eötvös József Kranz*; anlässlich seines 70., 75. und 80. Geburtstages wurde er von seinen Schülern und Kollegen mit Festschriften beehrt.<sup>10</sup>

Das Hinterland für seine ertragreiche Forschungs- und Lehrarbeit bot sein – einem *bonus et diligens pater familias* würdiges – Privatleben: im Jahre 1960 heiratete er die Gymnasiallehrerin Magdolna Asztalos; seine Tochter Judit ist Richterin, sein Sohn Attila Anwalt geworden. Zeit seines Lebens war er ein nicht nur geistig, sondern auch körperlich aktiver Mensch: der Liebe zum Sport (in den 70er Jahren gewann er mit seiner Mannschaft die Goldmedaille des Ungarischen Athletischen Turniers in Hammerwurf) und zur Gartenarbeit blieb er bis ins hohe Alter treu.

Während der Zeit seiner Lehrtätigkeit, die sich fast über ein halbes Jahrhundert erstreckt hatte, ist es ihm – dank seiner *eruditio* und didaktischem Gefühl – gelungen seinen Studenten das römische Recht auf jener Weise nahezubringen, die nicht nur

7 „Grundprinzipien des römischen Strafrechts“ in *A bonis bona discere: Festgabe für János Zlinszky zum 70. Geburtstag* (Miskolc) 1998: 189-208; „Das adulterium als ein das Ansehen der römischen Familie verletzendes Verbrechen“ in *Status familiae. Festschrift für Andreas Wacke zum 65. Geburtstag* (München) 2001: 345-364; „Ausgewählte gesetzliche Straftatbestände im antiken Rom und in unserem geltendem Recht“ in *Roman Law as Formative of Modern Legal Systems. Studies in Honour of Wiesław Litewski* (Kraków) 2004: 15-24.

8 *Ius criminale Romanum* (Szeged) 2013: 255 S.

9 „*Periculum emptoris* im römischen Recht der klassischen Periode“ in *Sodalitas. Scritti in onore di Antonio Guarino* (Napoli) 1984: 2227-2255; „Die Frage der Gefahrtragung und des Eigentumsüberganges beim Kauf“ *Index* 1987: 57-75.

10 „*Tanulmányok Molnár Imre tiszteletére [Beiträge zu Ehren von Imre Molnár]*“ *Acta Universitatis Szegediensis, Acta Juridica et Politica* Tom LXV (Szeged) 2004: 842 S; *Római jog és a magánjog fejlődése Európában. Tanulmányok Molnár Imre 75. születésnapjára [Römisches Recht und Privatrechtsentwicklung in Europa. Beiträge zu Ehren des 75. Geburtstages von Imre Molnár]* (Szeged) 2011: 264 S; „Ünnepi kötet Dr. Molnár Imre egyetemi tanár 80. születésnapjára“ *Festschrift zu Ehren des 80. Geburtstages von Imre Molnár. Acta Universitatis Szegediensis, Acta Juridica et Politica* Tom LXXVI (Szeged) 2014: 516 S.

## OBITUARY

für die wissenschaftliche Bildung, sondern auch für das pragmatische Rechtsdenken von Juristengenerationen von ausschlaggebender Bedeutung war.

Mit dem Ableben von Imre Molnár – eines Meisters und Freundes, der seinen Schülern und Kollegen jederzeit mit Rat und Tat beizustehen bereit war – ist auch der letzte Vertreter jener großen Generation der ungarischen Romanistik, zu der György Diószdi (1934-1973), Ferenc Benedek (1926-2007) und János Zlinszky (1928-2015) gehörte, dahingeschieden.

*Sit ei terra levis!*

Tamás Nótári

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## ADVOCATE DIRK GYSBERT REITZ: AN ADDENDUM

**JP van Niekerk\***

Historians will know that research is never completed. It is more often than not terminated or, we like to think, merely suspended because of the constraints of time or the law of diminishing returns. Fortunately there are always others willing to resume the research and to advance it, maybe long after we have moved on, to other topics if not to other realms.

Shortly after the publication of my piece on Dirk Reitz,<sup>1</sup> I had the pleasant surprise of receiving correspondence<sup>2</sup> from Dr Kees Briët of Rotterdam, on whose excellent work on the High Court of the Dutch Indies<sup>3</sup> I had relied heavily for background to Reitz's judicial career in Batavia. Dr Briët filled in some gaps on the Batavian period, and also provided a quite significant piece of information on Reitz's qualifications. With his permission, I recount the information he provided and also add some further shards I uncovered in following up on his references.

1 Earlier this year a new work appeared on the Reitz family.<sup>4</sup> Despite its promising title (*Afrikaner Odyssey. The Life and Times of the Reitz Family*), it unfortunately contains little that is new and nothing of interest on our man.<sup>5</sup>

1 Van Niekerk 2016(2): 310-346.

2 On file with the author.

3 Briët 2015.

4 Meredith 2017.

5 Francis William snr is mentioned in passing at 13-15, Dirk not at all.

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2 Dirk Reitz obtained a doctorate in law at the University of Utrecht in October 1817.<sup>6</sup> In November 1844 his *alma mater* conferred an honorary doctorate on him.<sup>7</sup> In the published record of the University's graduates,<sup>8</sup> in which his honorary doctorate is recorded, there is more. Apart from his name and his then position as "*supremae curiae in India Batavia senator*", the entry also states that Reitz was "*Juris utriusque Dr Universitatis Absedonensis*". Stumped at first, Dr Briët soon worked out that the "Absedonensis" was a misspelling for "Aberdonensis". Reitz therefore had another doctorate, one from the University of Aberdeen. This led to the records of that institution which soon provided the answer.<sup>9</sup> On 14 October 1818, Dedericus Gisbertus Reitz, an LLD from Utrecht, received his doctorate from Aberdeen. Significantly, but, as will be explained shortly, erroneously, the entry on Reitz then adds: "It being necessary for the candidate to attain a degree of LLD from a British University, in order to enable him to practise before the courts at the Cape of Good Hope, his native country." This, at least, settles my query as to whether the introduction of English as the exclusive language to be used in Cape courts was a (contributory) reason for Reitz's departure:<sup>10</sup> he no doubt had a command of English, which is not to say that the clear signs of the imminent anglicisation of the legal administration at the Cape did not remain an important consideration in his decision to emigrate.

3 Holding two doctorates – the one Dutch, the other British – naturally made Dirk Reitz an exceptional, if not unique member of the Cape bar which, as I have shown, had its fair sprinkling of doctors. However, it is not quite correct that he had to obtain a British doctorate to practise at the Cape. The requirement of a British qualification or experience for admittance as an advocate by, or for appointment to the bench of, the newly created Supreme Court, was only laid down from 1828, long after Reitz had left the Cape. Article III of the Royal Charter of Justice of 24 August 1827<sup>11</sup> provided that the Supreme Court's judges "shall be Barristers in England or Ireland, or Advocates admitted to practice in Our Courts of Session in Scotland, or in said [ie, the Cape] Supreme Court". As is known, the judges making up the bench were

6 See par 5 at 316 of my article.

7 See par 11 at 336 of my article.

8 Van Cittert-Eymers 1963: 52.

9 Anderson 1898: 103. The University of Aberdeen was created in 1860 when Marischal College (founded in 1593) and King's College, Aberdeen, merged. There is no mention of any Reitz in the latter's records: see Anderson 1897.

10 See par 6 at 323-325 of my article.

11 The Charter, which came into operation on 1 Jan 1828, is published in the *Cape of Good Hope Government Gazette* of Tue 11 Dec 1827 (and formally entitled, *HM's Royal Charter, for the better and more effectual Administration of Justice within the Colony of the Cape of Good Hope*). For a reprint, see *Theal Records of the Cape Colony* vol 32: 274-292; and see, further, Visagie 1978.



imported from Britain and no local advocate (or for that matter, no judge on the local Court of Justice) was seriously considered for appointment. In all probability, Reitz, despite his two doctorates, would not have been found suitable on the basis of having practised at the Cape. In order to be admitted to practise before the new Supreme Court as an advocate, according to article XVII of the Charter, applicants had to have been “admitted as Barristers in England or Ireland or advocates in the Court of Sessions of Scotland or to the degree of Doctor of Laws at Our Universities of Oxford, Cambridge or Dublin”. This did not apply to advocates already previously admitted to practice, as would have been the case with Reitz, had he stayed on. Ironically, of course, even had Reitz returned to the Cape after 1828, he would not have qualified, his doctorate being from one of the “less prestigious” British universities!<sup>12</sup>

4 I had recorded that Reitz had left the Cape for Batavia in mid-1824 and that he had commenced practice as an advocate there by September of that year.<sup>13</sup> This is confirmed by a resolution number 24 of the governor-general<sup>14</sup> of the Dutch Indies of 26 August 1824,<sup>15</sup> granting Reitz, at his request, permission to reside on the island of Java, more specifically in Batavia, and to practise as advocate before the local courts, on payment of fl300 per month from public funds (“uit ‘s lands kas te Batavia”) for a period of six months to provide him with sufficient means of subsistence.<sup>16</sup>

5 In July 1833 Reitz was appointed as a permanent member of the Court of Justice at Samarang.<sup>17</sup> This occurred by resolution number 1 of the governor-general of 20 July 1833.<sup>18</sup> Earlier, in October 1832, he was, on the death of one of its members (JWD

12 Unless it could be argued that his earlier admittance still sufficed to allow him to practise despite his having left the colony.

13 See par 6 at 322-323 and par 8 at 328 of my article.

14 Incidentally, in n 110 of my article at 327, I had the name of one of the three first post-British commissioners-general in 1816 wrong: he was Cornelis Theodorus Elout (not Ekhouit).

15 NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2784. The decisions and resolutions of Dutch East Indian governors-general are taken up in the Dutch National Archives in The Hague (NL-HaNA), as part of the archives of the Ministry of Colonies (Ministerie van Koloniën, KOL), which holds the archive inventory number 2 10 01. East Indian gubernatorial decisions and resolutions “buiten rade” (ie, made by the governor without the consent of the Council of India), from 1816-1849, appear in 291 vols with inventory numbers 2435-2725; those decisions and resolutions of the governor “in rade” (ie, made by the governor-in-Council), from 1819-1836, appear in 94 vols with inventory numbers 2770-2863. The resolution referred to here appears in inventory number 2784, which covers decisions and resolutions during Aug-Sep 1824. Again Dr Briët went way beyond the call of collegiality to supply me with electronic versions of the relevant archival documents referred to in this addendum, indispensably so as, at the time of writing, this part of the Dutch National Archives was not available for reasons of digitalisation.

16 This settlement amount was paid to encourage young lawyers like Reitz to settle and practise in Batavia.

17 See par 10 at 332 of my article.

18 NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2848.

de Jongh), appointed as temporary member of that Court. This was after, in August of that year, he had qualified as an East Indian official<sup>19</sup> because, so it was stated, he could in the current circumstances not make a proper living as an advocate.<sup>20</sup> One can only speculate about this, but probably (hopefully) it was not because of Reitz's qualities as a lawyer but because of a lack of legal work in Batavia. In March 1836 Reitz was back in Batavia, elevated to the High Court there.<sup>21</sup>

6 In 1847, Reitz was appointed as president of the Batavian Orphan Chamber.<sup>22</sup> This occurred by gubernatorial decision no 2 of 26 January 1847.<sup>23</sup> The decision itself provides some background information. The death of the previous president, JH Hofmeijer, had created a vacancy while another member, A Houtkoper, had received two years' home leave in December 1846. Furthermore, the imminent introduction of codification in the East Indies would involve the Orphan Chamber in new duties and subject it to new laws. As a result, so Hendrik Ludolf Wichers, president of the High Court reported to the governor-general in that December, it would require the Chamber's president to be a lawyer, able to guide its other members on legal matters. So, although the High Court would by the acceptance of Reitz's application for the post, lose a capable member, president Wichers nevertheless supported his appointment. By the same decision, the monthly salary of the Chamber's president was increased from fl800 to fl1000, the additional amount to be funded from the Chamber's income.<sup>24</sup>

7 Finally, in the Iconographic Bureau Collection of the Dutch Rijksbureau voor Kunsthistorische Documentatie (RKD) in The Hague, there is a silhouette portrait of Dirk Gijsbert Reitz by an unknown artist.<sup>25</sup> Alas, it shows little more than a shadowy outline, appropriate, I suppose, for a man of which much more no doubt remains to be uncovered.

19 "Reitz ... kunnen worden beschouwd als het radikaal van Indisch ambtenaar te bezitten."

20 See resolution no 22 of 31 Oct 1832: NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2845.

21 See par 10 at 333 of my article. On his incapacity as member of that Court to stand surety, see gubernatorial decision no 20 of 3 Jul 1838: NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2584.

22 See par 11 at 335 of my article.

23 See NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2690.

24 Hopefully that secured Reitz's financial position, for as late as October 1843 he still applied to take over the contract for running the existing governmental tea garden (probably a tea plantation) in the suburb of Kadoe, unsuccessfully so as "het voornemen niet bestaat om theetuinen in de residentie Kadoe bij kontract aan particulieren af te staan": see decision no 6 of 15 Oct 1843: NL-HaNA, Koloniën, 1814-1849, 2 10 01, inv nr 2650.

25 See <https://rkd.nl/en/explore/portraits/128272> (accessed 14 Feb 2017).



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## ERRATUM

We apologise for the error that was made regarding the date on which Professor Hennie Erasmus passed away. He died on 15 May 2016 and not on 15 June 2016 as reported in the Obituary published in *Fundamina* 22(1) 2016, pages 150-161.



Prof Hennie Erasmus