

# RACE AND NATION. ON *IUS SANGUINIS* AND THE ORIGINS OF A RACIST NATIONAL PERSPECTIVE

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## ABSTRACT

Until the beginning of the nineteenth century, the *ius soli* was the default common standard to acquire citizenship in Europe. Its roots – which were ultimately developed by the Middle Ages’ glossators and commentators – were interconnected with the notion of sovereignty and had a working simplicity that avoided the generation of stateless people in various territories of the early modern European states. With the promulgation of the Code Napoléon<sup>1</sup> this finally came to change with the introduction of the *ius sanguinis* as the main criterion to recognise nationality. Its imposition was against the whole of the Western legal tradition – one preserved in the Americas because of the independence processes the different colonies experienced from their earlier metropolis – the main scholarship that influenced the code and even the wishes of Napoleón. What made the codifying commission adopt such an unusual standard? We will try to establish that the emergence of the first essays on what came to be known as scientific racism – a dark science, which tends to explain national character in terms of genetic heritage – was at the very base of this development.

**Keywords:** *Ius soli*; *ius sanguinis*; race; nation

1 Code Napoléon / Code civil des Français of 1804 (hereinafter referred to as the French Civil Code).

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## 1 Introduction

During 2017, nationality and its acquisition became one of the most debated subjects in the public arena. It was even a mayor concern during the last presidential campaign in the United States, where at least one of the candidates proposed the amendment of the constitutional disposition that provides American citizenship to all people born in its territory – the so called *ius soli*.

This article intends to draw a simple history of the principles that rule the acquisition of nationality in Western societies, that is to say, the so-called *ius soli* and *ius sanguinis*, in order to provide some information about the formation of both principles and the ideas that led to their adoption. This is an historical and comparative exercise, which intends to contribute to the ongoing debate by providing a detailed analysis of the reasons and arguments that underpin the adoption of these two systems to confer nationality.

This article will start with a short history of the acquisition of citizenship up to the French revolution, attempting to establish the foundations of the different Western legal traditions on the topic. Then it will analyse the momentous change in the criteria for nationality attribution that took place during the Napoleonic era – the introduction of the *ius sanguinis* in Western legal tradition – in order to explain its expansion and ultimate predominance in the European legal systems during the nineteenth century.

The third part of this article deals with the ideology behind the introduction of the *ius sanguinis* and how it may be linked with the emergence of scientific racism during the late eighteenth century. Thereafter, some conclusions will be drawn.

## 2 The origins of the *ius soli* and the *ius sanguinis*

*Ius soli* and *ius sanguinis* are the usual terms employed to refer to two different systems of acquisition of nationality on which most of the Western societies tend to base their institutions. However, despite the Latin terminology there are no such Roman institutions to be found. In fact, the rules of acquiring citizenship in the Roman world were quite different from our own. Under Roman law, citizenship could be acquired by birth, by liberation, or through a special grant of the city. We are only concerned with birth, where the rule is that a son born from marriage acquired the citizenship of his father,<sup>2</sup> while if he was born from an extra-marital relationship, he would follow the citizenship of his mother.<sup>3</sup> The underlying reasons for such attribution were imbedded in the Roman perceptions of family ties. The link

2 D 1 5 19 *Celsus libro 29 digestorum. Cum legitimae nuptiae factae sint, patrem liberi sequuntur: volgo quaesitus matrem sequitur.*

3 D 1 5 24 *Ulpianus libro 27 ad Sabinum. Lex naturae haec est, ut qui nascitur sine legitimo matrimonio matrem sequatur; nisi lex specialis aliud inducit.*

between the members of a group was based on the fact that they had all been under the *patria potestas* of the same *pater*, usually the eldest man in the group, who had absolute power over its members, including the possibility of killing them.<sup>4</sup> These members were the *agnati*, and were also known as *familia proprio iure*, for only this relationship created legal consequences.<sup>5</sup> The kinship relationships outside this narrow legal framework were usually without legal consequences and were regarded as natural – common to all men and animals alike<sup>6</sup> – as opposed to legal.

This strict criterion to confer citizenship in Roman law underwent a substantial change at the beginning of the third century. In 212 AD emperor Antoninus Caracalla conferred Roman citizenship on all the inhabitants of the Roman Empire.<sup>7</sup> Although the reasons for and consequences of this grant remain controversial, for present purposes the key feature of this important act was a big change regarding the criterion for assigning citizenship during late antiquity: one from power-based family relations to residence. Residence in the Empire thus became the determinant factor for granting citizenship, while the later Roman Empire was slowly becoming a territorial state. Roman citizenship meant that there was only one legal system in

- 4 The peculiar nature of family relationships in Roman law has been under furious debate for over a century. As a matter of fact, there seem to be two main explanations for its peculiar character. On the one side, family relationships have been envisioned as holding a political nature. Each family would be a political unit that would be ruled by a sovereign, commanding individual, the *pater familias* (see Bonfante 1963: 7ff). Another explanation would point to the economic unity of the family. In Republican Rome there was no single word to describe property, so the power relations that would constitute the core of the family would mimic the power a man had over material goods to use and dispose of them (see Arangio-Ruiz 1914: 109-158; Voci 1953: 101; Kaser 1960: 47; Pugliese 1985: 11).
- 5 D 50 6 195 2 *Ulpianus libro 46 ad edictum. Familiae appellatio refertur et ad corporis cuiusdam significationem, quod aut iure proprio ipsorum aut communi universae cognationis continetur. Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae, ut puta patrem familias, matrem familias, filium familias, filiam familias quique deinceps vicem eorum sequuntur, ut puta nepotes et neptes et deinceps. Pater autem familias appellatur, qui in domo dominium habet, recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus. Et cum pater familias moritur, quotquot capita ei subiecta fuerint, singulas familias incipiunt habere: singuli enim patrum familiarum nomen subeunt. Idemque eveniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet. Communi iure familiam dicimus omnium adgnatorum: nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt.*
- 6 D 1 1 1 3 *Ulpianus libro primo institutionum. Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censer.*
- 7 D 1 5 17 *Ulpianus libro 22 ad edictum. In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt.*

the Empire – in contrast with the different personal laws of the previous era – since there was only one ruler and (after the adoption of Christianity) one God.

However, the legal framework of citizenship came into conflict with the economic realities of the later Empire. During the Late Republic and the Early Empire Rome had become a market society.<sup>8</sup> In this context, geographical mobility was one of the main features that Rome's dominion over the Mediterranean world brought to antiquity. Cicero, defining the spirit of ancient cosmopolitan states that *patria est ubicumque est bene*,<sup>9</sup> that is, that one's homeland is wherever one feels good. The myth of Romulus founding Rome as an asylum that welcomed anyone who wanted to migrate “might have been designed expressly to legitimise a citizen body based not on birth but on the desire to become Roman”.<sup>10</sup>

Although the needs of the productive economy were satisfied partially with a free labour market,<sup>11</sup> the pressure for mobilising labour triggered a massive heterogeneous migration based on slavery, involving millions of captives from the wars conducted by Rome being sold at markets.

During the Late Empire, Rome's market economy was shrinking. The catastrophic consequences of the third-century crises, and the extended de-monetisation of the Empire<sup>12</sup> led to a contrary movement in order to fixate manpower. A slave workforce became rare, and was replaced by *coloni* in large areas of the Empire.<sup>13</sup> These *coloni* were poor citizens, nominally free, but bound to the land they were working by ties that in the Middle Ages would give rise to feudalism.

A contradiction was the result, for while the economic pressures were demanding the control of movement within the Empire, the legal framework granted Roman

8 The presence or absence of markets in the Roman economy is a fiercely debated subject. Nowadays discussion commences with the work of Finley (1999), who proposed a weak role for markets for the classical world, mostly for the big metropolises of antiquity, like Rome or Alexandria, while the rest of the Empire would remain under an economic model based on limited commerce in the context of a peasant economy. Several academics have followed his model, proposing low levels of monetisation and restricted local markets (see Finley 1999: 95-122; Crawford 1970: 40-48; Meikle 2002: 233-250). This is known as “primitivism”. Since the beginning of the twenty-first century, an alternative perspective has taken root, proposing deeper levels of monetisation throughout the Empire and a proper market economy for the Late Republic and Early Roman Empire, which accordingly has been called “modernism” (see Greene 1990: 45-66; von Reden 2012: 266-285). For the complete debate, see Bang 1997: 1-21.

9 *Tusc Disp* 5 108.

10 See Neville 2006: 1 5167.

11 Free labour in late Republican and Imperial Rome has been a topic of intense recent debate, with some scholars suggesting that beside the slave market, there was also a market for free labour in the late Republic (see Harris 2011: 1 546-578; Kehoe 2012: 114-131). The most extreme approach, suggesting the prevalence of a market of free labour for Rome, is Temin 2013: 114-138.

12 See Lo Cascio 2000: 307-326.

13 For the economic implications of colonate, see Marcone 1997: 151-174. See, further, on colonate's legal framework, Sirks 1999: 419-430; Sirks 2008: 120-143; Santilli 1999: 275-292.

citizenship to all free people of the Empire. New legal devices were designed in order to restrict their mobility and migration. A whole new set of regulations was produced to settle the productive forces of the Empire. A labour law of sorts was created, which aimed to limit workers' mobility and assign them to their place of origin. During the time of Constantine the Great, field workers could not leave their jobs until the harvest was finished,<sup>14</sup> while a little later, Valentinian and Valens prohibited them from leaving their lands of origin at all.<sup>15</sup> Imperial governors were charged with the task of returning them to their lands of origins if they were apprehended elsewhere,<sup>16</sup> thus establishing a formal prohibition to either include them in any city census or grant them a right of residence.<sup>17</sup>

In this context, the question of a person's origin became quite relevant once again. In the Later Empire it was a person's origin which conferred the right to establish residence, and residence consequently acquired a status equivalent to citizenship.<sup>18</sup> A person's origin was determined at his birth, according to his father's origin. A series of imperial decisions made this point clear.<sup>19</sup> In the new Christian empire, born from the ashes of the third century, Roman citizenship was universal although there was a kind of denizenship that depended on birth and which ultimately gave the right to establish residence in a particular region of the Empire.

After the disintegration of the western part of the Empire, common legal rules disappeared during the Dark Ages and only re-emerged once the invasions and depopulation receded to give way to a new world which eventually adopted earlier legal rules.

14 C 11 48 1.

15 C 11 48 3.

16 C 11 48 6.

17 C 11 48 11.

18 Centuries later the medieval commentator Baldus said that residence was a kind of (*quasi*) citizenship: Baldo Ubaldi in I-XI *Codicis Libros Commentaria*, 1577, 7: *Nam ratione domicilii est effectus sub illa lege: quam quasi civis est.*

19 This was decided in a series of decisions which started with the emperor Antoninus Caracalla and continued down to Constantine:

C 10 391 *Imperator Antoninus. Cum te Byblium origine, incolam autem apud Berytios esse proponis, merito apud utrasque civitates muneribus fungi compelleris. \*ANT. A. SILVANO. \*<A XXX>.*

C 10 39 3 *Imperator Philippus. Filios apud originem patris, non in materna civitate, etsi ibi nati sunt, si modo non domiciliis retineantur, ad honores seu munera posse compelli explorati iuris est. \*PHILIPP. A. PATROCLO. \*<A XXX>.*

C 10 39 4 *Imperatores Diocletianus, Maximianus. Origine propria neminem posse voluntate sua eximi manifestum est. \*DIOCL. ET MAXIM. AA. SECUNDO. \*<A XXX>.*

C 10 39 5 *Imperator Constantinus. Si quis vel ex maiore vel ex minore civitate originem ducit, si eandem evitare studens ad alienam se civitatem incolatus occasione contulerit et super hoc vel preces dare temptaverit vel qualibet fraude niti, ut originem propriae civitatis eludat, duarum civitatum decurionatus onera sustineat, in una voluntatis, in una originis gratia. \*CONSTANT. A. AD MAXIMUM VIC. ORIENTIS. \*<A 325 PP. VIII K. IAN. PAULINO ET IULIANO CONSS.>.*

A main problem seemed to be the status of students, who wandered around different cities of the Empire.

When, eventually, Roman legal rules re-appeared at the beginning of the twelfth century, the Glossators quickly extracted legal rules from the ancient texts. The different passages treating citizenship and residence in the Corpus Iuris were identified and commented on in an attempt to give a synchronic sense to what was essentially a group of diachronically diverse rules. On the one hand, there was the concession of Roman citizenship to all inhabitants of the Empire, while – on the other hand – there was a set of rules that distinguished between people's origin (*origo*). In this context, the glossator Azo commented that a person could be a member of a city (*municipes*, from *munus*, burden, to share the burdens) by birth, liberation or by option. This membership was his real citizenship.<sup>20</sup>

Although the old Roman Empire had dissolved into different kingdoms hundreds of years before, during the Middle Ages there was still a sense of unity which involved political, legal and religious dimensions. There was one law – the recently re-discovered Roman law that was called the *ius commune*; one Emperor – the German Emperor, who was also King of Italy and crowned by the Pope; and one Church.

During the later Middle Ages, a new conception of the relationship between sovereign and territory emerged, one where each king would hold the sole legal authority in his kingdom, well beyond the grasp of the German emperors, who would be stripped of their universal aspirations and considered kings only of the lands they could control.

In this context, Baldus from Ubaldi, a fourteenth-century commentator, explicitly stated that the Emperor could not rule over those who were not his direct subjects<sup>21</sup> and could not impose rules on those which were not under his allegiance.<sup>22</sup> As far as allegiance was concerned, it was addressed in a new fashion, albeit on the basis of interpreting the old texts. Baldus established a difference between the citizens by origin and those who could acquire citizenship by other means.<sup>23</sup> Those who were citizens by origin were considered natural citizens (*cives naturales*). He stated that citizens by origin were those who were born in a city.<sup>24</sup> Therefore, if someone was born in Florence, he was Florentine by origin.

20 Azo, *Ad singulas leges XII librorum Codicis Iustiniani*, 1596, 1097: *Municipes aut nativitas facit, aut manumissio aut optio. Et dicuntur proprie municipes, quasi muneris participes in civitatis sic recepti, ut munera nobiscum facerent ... tunc municipes dicamus cuiuscunque civitatis, ut puta cives Campanos, Puteolanos ...*

21 Baldo Ubaldi, *Ad singulas leges XII librorum Codicis Iustiniani*, 1577, 5: *Imperator non imponit leges nisi subditis.*

22 *Idem* at 6: *Imperator nec de iure, nec de facto possit imponere legem non subditis.*

23 Baldo Ubaldi *In primam digesti veteris patrum commentaria*, 1577, 33.

24 Baldo Ubaldi *Ad singulas leges XII librorum Codicis Iustiniani*, 1577, 278: *In loco originis, et in colatus, cogitur quis subire onera ... Nota ex eo, quod dicit, Biblium ex origine, quod item est, quod dicere Florentinum, et natum de Florentia, quod declara, ut plene dixi in l.j. ad munic ... De incolis, et ubi quis domicilium habere videtur. Et de his, qui studiorum causa in alia civitate degunt.*

In this regard the new states that emerged in Western Europe systematically adopted this rule, which would some centuries later come to be called *ius soli*. Following Baldus's doctrine, any man born in the territory of a kingdom became its citizen.

Already in the thirteenth century, the kingdom of Castilia established that the law of the land was mandatory even for foreigners.<sup>25</sup> Even more, it expressly stated that a man was a natural citizen of the place where he was born.<sup>26</sup> When Spain came to be a state after the marriage of Elizabeth and Ferdinand, these rules remained in force, and the *ius soli* became the law of the land and remained so until the beginning of the nineteenth century.<sup>27</sup>

In France the situation was similar. In 1315, by a royal decree of Louis X, it was established that by natural law whoever was born in France, was to be a Frenchman,<sup>28</sup> thus following the doctrine of Baldus. In 1515, this was confirmed by a decision of the Parliament of Paris.<sup>29</sup> During the eighteenth century the doctrine was well-established and Pothier<sup>30</sup> summarised it as follows:

The citizens, the true and natural French, following Bacquet's definition, are those born within the limits of the French dominions.

England, with the well-known case of *Calvin v Smith* in 1608,<sup>31</sup> adopted the very same rule, establishing that whoever was born in the territories under the dominion of the English king was English. Whether the rule was a reception of the *ius commune* or a parallel development of English law, remains to be settled. Anyhow, Blackstone<sup>32</sup> summarised the position as follows:

25 Gregorio López, *Las Siete Partidas Glosadas*, 1555, 8: "*Todos aquellos que son del señorío del fazedor de las leyes, sobre las cosas que pone, son tenudos de las odeder e guardar, e juzgarse por ellas ... E esso mismo dezimos de los otros.*"

26 *Idem* 68: "*Por mayor tovieron los sabios antiguos aquella naturaleza que los omes han con la tierra por nascer en ella.*"

27 The *Novísima Recopilación* of 1805 stated a new rule. To become a churchman one had to be born in the lands that belonged to the Spanish territories from Spanish parents (l 7, t 14, l 1 from the *Novísima Recopilación*). Nevertheless, during the early nineteenth century this rule was interpreted as meaning that only men that were born in the Spanish territories from Spanish parents were Spanish naturals. See Bello 1886: 107; Asso del Río & M de Manuel y Rodríguez 1806: 35; Tapia García 1828: 7; and Escriche 1875: 255.

28 See Dalloz & Dalloz 1840: 199.

29 Berdah 2006: 142.

30 1846: 17: *Les citoyens, les vrais et naturels Français, suivant la définition de Bacquet, sont ceux qui sont nés dans l'étendue de la domination française.*

31 *Calvin v Smith* 77 Eng Rep 377 (KB 1608). A man named Robert Calvin was born in Scotland after its subjugation to the English Crown. When he died he left lands in England. If he was considered English, he could leave them to his heirs, but because he was not born in England, this issue came to trial. Eventually it was decided that whoever was born in the territories of the Crown, was under the allegiance of the King, and therefore English (see Price 2013: 73-145; Dumbraja 2014: l 537).

32 1826: 366.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.

By the eighteenth century the common rule in Western European states was that citizenship was attributed at birth according to the place where the person was born. Baldus's interpretation of the old Roman rules and the political requirements of the emerging states were the two forces that informed this phenomenon. Still, there were cases when the parents' nationality was taken into account in order to grant nationality to their descendants when they were not born in the territory of the Crown. An example would be the French Parliament – a kind of appeal court – which regularly conferred citizenship on this ground from the sixteenth century onwards. This was, however, rather exceptional.<sup>33</sup>

Contrary to the belief of modern scholarship,<sup>34</sup> citizenship was considered one of the three statuses a person could hold during the *Ancien Regime* – the two others being freedom and family status.<sup>35</sup> Citizenship could not be changed<sup>36</sup> and it was one of the fundamental sources of rights and duties a person acquired at birth.

The system worked well. The largest and most important states of modern Europe adopted it, and statelessness was next to impossible. Although the frontiers of modern Europe changed from time to time, citizenship did not seem to be a pressing matter, for the rules were so clear that the determination of citizenship through the place of birth was even believed to be a rule of natural law. All of this would change during the French Revolution.

### 3 Revolution and change

The French Revolution was the most important historical event during the last two hundred years, and many important features were restructured during those

33 See Weil 2008: 1 147; Berdah 2006: 142.

34 For instance, Weil 2008: I 100 states that “(f)rom this point on [the enactment of the French Civil Code] nationality became a right attached to the person: like the family name, it was transmitted by fatherhood; it was attributed at birth; it was no longer lost if its holder established residency abroad”.

35 In most basic law books, which after the sixteenth century usually followed the model of the Justinian Institutes, the matter was treated in relation to the different status a person might hold – normally in the first book, right after freedom and before family status. This came directly from Roman influence. Gaius' Institutes – and therefore Justinian's – treats citizenship at the very end of his discussions about the status of liberated slaves. See, eg, the very influential seventeenth-century text of Arnoldus Vinnius (1755) at 44: *Institutionum Imperialium Commentarius* which was the basic text for first-year students all around Europe and even in the Spanish American colonies.

36 C 10 39 4 *Imperatores Diocletianus, Maximianus: Origine propria neminem posse voluntate sua eximi manifestum est. \*DIOCL. ET MAXIM. AA. SECUNDO. \*<A XXX>.*

few stormy years. At first glance, the *ius soli* was not opposed to the revolutionary ideals. As a matter of fact, its universal tone and overview was appealing for legal intellectuals, although other principles were implemented in order to broaden its scope. During the Revolution, together with being born in France or born to a French father, residence – the mere fact of living in France – became sufficient to claim French citizenship.<sup>37</sup> In addition, according to the ideals of the Revolution some of the most outstanding intellectual heroes of the time – people who had never lived in France or had no apparent connection with the country – were granted French citizenship on condition that they would live in France, as was the case with Thomas Payne, George Washington and Jeremy Bentham, among others.<sup>38</sup> Among the different criteria for obtaining French citizenship, the most important – at least for the public eye – remained the place of birth. In the texts that aimed to educate the French people politically, the definition of a French citizen was quite simple: anybody who was born in France.<sup>39</sup>

Although later constitutions of the French Revolution somehow restricted the right to French citizenship, the *ius soli* was still its main feature until the enactment of the French Civil Code in 1804.<sup>40</sup> Still, already during the discussions of the Constitution of 1799 – the one written immediately after the *coupe d'état* that empowered Napoleon – a new tendency emerged restricting French citizenship to those who were born to French parents, thus leaving stateless a growing section of the population.<sup>41</sup> This would later be known as the *ius sanguinis*. Although this line of thought was blocked on the eve of Napoleon's rule, it later – during the composition of the French Civil Code – returned, and eventually imposed itself against the French legal tradition, the generous original aims of the Revolution, and even the wishes of Napoleon himself.

37 In fact, the Constitution of 1791 even gave citizenship to those who were descendants of people expelled from France for religious reasons. Article 2, which covers the problem, states as follows: *Article 2. - Sont citoyens français:*

- *Ceux qui sont nés en France d'un père français;*
- *Ceux qui, nés en France d'un père étranger, ont fixé leur résidence dans le Royaume;*
- *Ceux qui, nés en pays étranger d'un père français, sont venus s'établir en France et ont prêté le serment civique;*
- *Enfin ceux qui, nés en pays étranger, et descendant, à quelque degré que ce soit, d'un Français ou d'une Française expatriés pour cause de religion, viennent demeurer en France et prêtent le serment civique.* See Brubaker 1993: 6; Weil 2008: 1.189.

38 Berdah 2006: 143; Weil 2008: 1.200.

39 *D. Quels sont ceux qu'on appelé en France citoyens R. Tout homme né et domicilié en France âgé de 21 ans accomplis, tout étranger âgé de 21 ans accomplis qui domicilié en France depuis d'une année.* Anonimus (1793-1794=2nd year of the Republic): 5.

40 See the Constitutions of 1793, art 2; 1795, art 8; and 1799, art 2.

41 Later known as the *ius sanguinis*: the term comes from the middle of the nineteenth century, from the work of the Exegetic School.

The coupe that took the young general to power (9 Nov 1799) was backed by many of the leading figures of the Revolution, among whom Emmanuel-Joseph Sieyès was one of the most conspicuous. A new Constitution was to be enacted in order to give legitimacy to Napoleon’s rule. Nevertheless, conflicts emerged between Napoleon and Sieyès regarding this legal document. Sieyès wanted a fairly balanced Constitution that would not grant absolute power to any man or institution, but Napoleon had a different opinion. Finally, Sieyès lost the struggle and had to abandon his propositions, leaving the way open for the new Napoleonic Constitution. Among Sieyès propositions was granting French citizenship – at this time the term “nationality” was not in use<sup>42</sup> – to those who were born either in France or abroad to a French father.<sup>43</sup> This proposition was opposed by Napoleon himself, with the backing of Pierre Daunou<sup>44</sup> who supported the traditional notion of the *ius soli*. Finally, article 2 of the Constitution of 1799 stated as follows:<sup>45</sup>

Any man who was born and has residence in France, who, having become twenty-one years old, inscribes in the civic register of his communal register, and who has since stayed a whole year in the territory of the Republic, is a French citizen.

The article does not define nationality, but citizenship. At the time citizenship was understood as the right actively to participate in public affairs, supposing that the citizen had also the status of national. The article was understood as granting French nationality to those born in France, while it gave citizenship to those who met the other requirements, namely being a male of at least twenty-one years of age who had performed the required inscription and lived in France for a year.<sup>46</sup>

Shortly thereafter, during the discussion of the French Civil Code, the problem re-emerged. A commission to draft the Code was appointed in 1800, comprising François Denis Tronchet, president of the Court de Cassation, Jean-Étienne-Marie Portalis and Félix Julien Jean Bigot de Préameneu. The work of this commission was discussed with the Conseil d’État, where Napoleon himself participated in the discussion, together with Théophil Berlier, Antoine Jacques Claude Joseph (Compte de) Boulay de la Meurthe, and Jean Jacques Regis de Cambacérès who had already drafted several Civil Codes and was the second consul with Napoleon.

During the session of 14 Thermidor of the ninth year of the Revolution (1 August, 1801)<sup>47</sup> the Conseil d’État discussed the relevant article (7) regarding nationality.<sup>48</sup>

42 See Weil 2008: 1 100.

43 *Idem* 1 299.

44 *Idem* 1 304.

45 Article 2–*Tout homme né et résidant en France qui, âgé de vingt et un ans accomplis, s’est fait inscrire sur le registre civique de son arrondissement communal, et qui a demeuré depuis pendant un an sur le territoire de la République, est citoyen français.*

46 Ngairé Heuer 2007: 129; Weil 2008: 1 282.

47 Weil (2008) gives a different date, namely 25 Jul 1801, but 14th Thermidor is the date that appears in the Conseil d’État’s archives. See Weil 2008: 1 304.

48 See Conseil d’État 1841: 12.

Tronchet proposed that only the son of a Frenchman was to be French, whether he was born in France or in a foreign country. This proposition was immediately rejected by the Council. Cambacérès pointed out that an abandoned child would not bear any nationality. Boulay stated that the Constitution already granted the right of being French to those who were born in France, even from foreign parents. Napoleon proposed to replace the article simply by the following:<sup>49</sup> “Any individual born in France is French.” Tronchet defended his view by arguing that imposing French nationality on anyone whose parents were not French just because he was born in French territory, would be unfair and against the established principles of civil law. Napoleon pointed out that a child born in France would have a French upbringing and that as such would make him French. Tronchet’s position was swiftly rejected and the Conseil d’État adopted Napoleon’s view. The Conseil d’État’s original proposition contained both the *ius soli* and the *ius sanguinis* to grant French nationality at birth.

The draft Civil Code had to be approved by the Tribunat, an assembly that, among other duties, was tasked to oversee the legislative process. It was presided over by Pierre Daunau, the same man that had already aided Napoleon to gain approval of the 1799 Constitution. Accordingly, everything was supposed to go smoothly. However, it did not. There was strong opposition by the Tribunat to many of the propositions contained in the draft. The opposition to the *ius soli* was headed by Joseph-Jerome (Compte de) Siméon, who compiled a report on the matter.<sup>50</sup> Siméon argued that while the son of an Englishman born in France would be considered French, the son of a Frenchman born in England would not necessarily be considered English. He argued that this so-called Frenchman could still take his wealth back to England at any time.<sup>51</sup> According to Siméon feudalism was linked with the *ius soli*, and that would merely be a side effect of feudalism.<sup>52</sup> Ultimately the rule was rejected and the commission had to revert to Tronchet’s proposition. The text was again presented to the Tribunat and approved on 18 March 1803 with *ius sanguinis* as the only criterion to confer French nationality at birth.<sup>53</sup>

49 “*Tout individu né en France, est Français*” in Conseil d’État 1841: 12.

50 The chapters of the French Civil Code were presented to the Tribunat on 11th Frimaire and a commission was formed to analyse the matter on the next day, manned by Boisjolin, Boissy, Caillemer, Chabot, Siméon, Thiessé and Roujoux. A report from the commission was presented on the 25th of the same month by Siméon, while the discussion continued on 5th Nivôse, with arguments from Malherbe supporting the *ius soli*.

51 See Coin-Delisle 1865: 225.

52 Weil 2008: 1 395. The complete report is available in Mavidal & Laurent 1864: 165ff. According to Simeon feudalism was linked with the *ius soli*. He does not explain in which way, but he states so expressly. His reasoning probably pointed to the fact that during the Ancien Régime the *ius soli* was the prevalent form to acquire French citizenship and because he believed that the idea of a French racial nation was more modern.

53 Weil 2008: 1 415.

It is not easy to recount developments between 1799 and 1803, when the principle of *ius sanguinis* emerged and became the dominant feature of the new French legal system. Up to then, this principle was universally adopted by all European powers and had the general approval of leading political thinkers of the time.<sup>54</sup> Most of them did not give the matter much thought, while legal scholars usually accepted Baldus' interpretation of Roman texts as the standard rule on the matter.<sup>55</sup> It has been pointed out that it was Tronchet's background as a lawyer (who had pleaded in favour of the *ius sanguinis* during the old regime for his clients) and his respect for Roman law that would explain his approach favouring the exclusivity of the *ius sanguinis*.<sup>56</sup> However, his preference for the *ius sanguinis* should not have excluded the *ius soli*, especially against a tradition that was deeply ingrained in the predominant conception of the modern state.

There are probably other motives that might have inspired the final decision about the exclusion of the *ius soli* from the French Civil Code. While Napoleon's cannons were conquering Europe, a new and dark science quietly emerged in the European panorama. It whispered black words to its intellectuals and gave a whole new perspective to an old prejudice, namely scientific racism.

## 4 Scientific racism

Racism is not new to the Western mind. Many kinds of prejudices have been built into the long history of Europe, and they were eventually transmitted worldwide with the expansion of European civilisation during the sixteenth and seventeenth centuries. Some of the most illustrious thinkers of the Enlightenment displayed a rather crude racial perspective.

One of the first and more influential ideas about race in France was systematically put forward by Henri (Compte) de Boulainvilliers in his *Histoire de l'Ancien gouvernement de la France* (1727). His central thesis was that the French nation consisted of two different races, namely a Germanic race that descended from the Franks which formed the core of the nobility, and a Gallo-Roman race that was subdued by the Germanic race and that was predominant among the commoners or third estate. For him, the French nation was a sort of union, founded by the king, between the Franks (in his language simply the French) and the Gauls.<sup>57</sup> The

54 The only exception we have been able to find was Pufendorf, who believed in a contractual theory of the State, where the descendants of the first citizens – those who had accepted the social contract to form the city – would be properly called citizens. See Pufendorf 1682: 126 = 2 6 13.

55 We should say, anyhow, that some legal scholars pointed out that Baldus' interpretation was flawed and that Roman citizenship was transmitted at birth regarding the father's citizenship. See, eg, Cujacius (1663), o. 33 *Recte Romanum interpretamur Roma oriundum qua appellatone, et in jure nostro semper notatur origo paterna, non origo propria et natale solum*.

56 Weil 2008: 1 350.

57 See de Boulainvilliers 1727: 32-36.

dominant position of the aristocracy was founded on the conquest of Gaul by the Franks. Miscegenation, which commenced with the coronation of Hugh Capet, endangered the stability of the nation. His views became common in the eighteenth century and even made their way into Diderot's *Encyclopédie*.<sup>58</sup>

During the eighteenth century, many new scientific disciplines took root in Europe. Before, most of the organised knowledge, whether about nature or mankind, was considered to be part of philosophy. However, after the inexplicable successes of Modern Europe in physics and cartography, new sciences emerged, with their own methods and objects of study. Many branches of philosophy were cut off and a whole range of new sciences emerged. This is the era of Lavoisier, the father of modern chemistry; of Adam Smith, the father of modern economy; and also of Carl Linnaeus, the father of scientific taxonomy.

Carl Linnaeus was a well-recognised scholar who made a major contribution to biology by classifying all known natural species according to gender. His major work, *Systema naturae per tria regna naturae*, published in 1735, was divided into three parts, which corresponded to the three natural kingdoms, namely one for minerals, one for vegetables, and one for animals. For the animal kingdom, he devised a classification of all the different types of animals known to man, including a gender for the mammals (*mammalia*), divided into different branches, one of which was occupied by the primates among which one could find man (*homo*).<sup>59</sup> Humans were classified into six different types: *Ferus* (wild), *Americanus* (American), *Europaeus* (European), *Asiaticus* (Asian), *Afer* (African) and *Monstruosus* (monstrosities).<sup>60</sup> To each human type, a set of characteristics such as skin colour, other physical features and moral peculiarities, was attached. We do not have to go into the particularities of this distinction, but we might, for instance, say that an *Afer* was black, phlegmatic, clumsy and ruled by caprice, while the *Americanus* was described as being choleric, dark-skinned, easy to laugh and ruled by custom, while the *Europaeus* was white, very smart, and ruled by ceremonies.

Although the features contained in these human types were not new, it is important to point out that this was the first time that a description of human races was embedded in a scientific work – one that places man in its natural context as one of many other species according to objective standards such as geography and skin colour. Racism suddenly became part of a new science that was being developed by one of the brightest minds of European Enlightenment. The consequences would over time become devastating.

58 In fact, in the voice Française you can find a quick overview of Boulainvilliers' theory distinguishing between the two races that constitute the French nation.

59 Linnaeus 1757: 18.

60 *Idem* 20-22. According to Bethencourt, in the first edition of 1735 *ferus* and *monstruosus* were not included, and neither the descriptions that followed in the edition we worked with. See Bethencourt 2013: 1 6121.

This new science was taken up by one of the most influential thinkers of the French Enlightenment, Georges-Louis Leclerc, comte de Buffon (1707-1788). As one of the youngest members ever of the French Academy and Director of the *Jardin des Plantes*, Buffon had an impeccable scientific reputation. He wrote an astonishing natural history in thirty-six volumes, which elevated him to one of the most prominent scientific figures of his generation. His work influenced the *Encyclopaedia* of Diderot and had a huge effect on the European Enlightenment. One of his most controversial works concerned men and human races, the *Histoire naturelle de l'homme et de la femme*. There, following Linnaeus's lead, he classified men according to races, featured by skin colour, general body shape and moral character.<sup>61</sup> His work constitutes a vast description of different human types on different continents, sometimes describing them almost country by country. Racial features were, according to Buffon, the consequences of climate, food and costumes.<sup>62</sup> Miscegenation was one of the main features that might affect a race, either improving or weakening it,<sup>63</sup> and creating new nations, as in the case of the Tartars who were a mixture of Chinese and Russians.

Racial degeneration and interbreeding was a much-debated topic in the intellectual circles of the Enlightenment. Even Kant, under the influence of Buffon,<sup>64</sup> wrote a series of articles on race, where he points that the main difference between races was that when they mixed, they produced half-breeds, while when members of the same race interbred, they conferred on their off-spring randomly the features of each parent.<sup>65</sup> He explicitly opposed racial mixing and feared it.<sup>66</sup>

Montesquieu was also influenced by this science. He opined that different climates affected the physical and moral constitutions of the inhabitants of a region,<sup>67</sup> causing people from cold climates to be bolder and stronger than those from warm climates. According to his analysis, people from India would be “naturally a pusillanimous people”,<sup>68</sup> and that these matters should be taken into account for successful legislation.<sup>69</sup>

Although there existed an intellectual climate that favoured the inclusion of racial ideas in legislation, we should nevertheless evaluate some of the ideas of the proposers of the *ius sanguinis* as the sole means of becoming part of a nation in order

61 Leclerc (Compte) de Buffon 1834: 173.

62 For a general description see Berthencourt 2013: 1 6153ff.

63 Leclerc (Compte) de Buffon 1834: 175.

64 Mikkelsen 2013: 1 266.

65 See, eg, his 1788-essay “On the Use of Teleological Principles in Philosophy” where he defines races as common lines of descent, and then expressly treats the matter of miscegenation. For a recent translation see *idem* 1 4306ff.

66 *Idem* 1 328.

67 Montesquieu 1772: 283-286.

68 *Ibid* 283-286.

69 *Idem* 379.

to establish if there had been a racist motive. This is, admittedly, slippery ground, for often the motives are not clearly stated, but indirectly proposed or related to other matters which would somehow affect the legislative position. For instance, Tronchet, the main defender of the *ius sanguinis* in the *Conceil d'État*, cannot be directly linked to any of these racial theories. He was a rather conservative man, who defended Louis XVI as a lawyer and before the Revolution pleaded many cases in favour of the application of the *ius sanguinis* for his clients. Although he had a keen interest in science, this does not necessarily mean that he supported the racial theories of his time.

The matter is somehow different when analysing the works of Sieyès. In his famous essay, *Qu'est-ce que le Tiers état*, he relies on Boulainvilliers' thesis to deny the validity of the right of conquest as a mean of justifying the nobility's claim over the commoners or Third Estate.<sup>70</sup> He explicitly rejected the view that the Franks' conquest of Gaul would confer on the aristocracy a right to dominate the Gallo-Roman population. Therefore, according to him, the Third Estate, namely the commoners in the nomenclature of the Ancient Regime, could reclaim their rights and demand a new Constitution.

Although Sieyès<sup>71</sup> holds and defends a legalistic idea of the nation, where having a common law and a common legislative power would be its defining features, he also seems to have a somehow naturalistic idea of the nation, where the nation would pre-exist any positive rule and would emerge directly from the natural order.<sup>72</sup> In fact, in having a different legal order and legislative representation, the aristocracy, namely the Franks, would exclude themselves from the nation.<sup>73</sup> In this sense, the Third Estate would really be the only nation in France, and the descendants of the Franks –the nobles – should not be regarded as French citizens.<sup>74</sup>

70 Sieyès 2002: 8: “*Que si les aristocrates entreprennent, au prix même de cette liberté, dont ils se montreraient indignes, de retenir le peuple dans l’oppression, il osera demander à quel titre. Si l’on répond à titre de conquête, il faut en convenir, ce sera vouloir remonter un peu haut. Mais le tiers ne doit pas craindre de remonter dans les temps passés ...*”

71 “*Qu’est-ce qu’une nation? Un corps d’associés vivant sous une loi commune et représentés par la même législature*” (*idem* 5).

72 “*la nation se forme par le seul droit naturel. Le gouvernement, au contraire, ne peut appartenir qu’au droit positif*” (*idem* 54).

73 “*Ainsi, ses droits civils en font déjà un peuple à part dans la grande nation. C’est véritablement imperium in imperio*” (*idem* n 68 5). “*Il faut entendre par le tiers état l’ensemble des citoyens qui appartiennent à l’ordre commun. Tout ce qui est privilégié par la loi, de quelque manière qu’il le soit, sort de l’ordre commun, fait exception à la loi commune, et par conséquent, n’appartient point au tiers état*” (*idem* 6).

74 *Idem* 8: “*La nation, alors épurée, pourra se consoler, je pensé, d’être réduite à ne se plus croire composée que des descendants des gaulois et des romains. En vérité, si l’on tient à vouloir distinguer naissance et naissance, ne pourrait-on pas révéler à nos pauvres concitoyens que celle qu’on tire des gaulois et des romains vaut au moins autant que celle qui viendrait des sicambres, des welches et autres sauvages sortis des bois et des étangs de l’ancienne Germanie?*”

Although Siey s is arguing for equality, there is a racial element in his argument, which derives directly from one of the earliest theories of scientific racism in France. This might explain his preference for *ius sanguinis* in the discussions for the 1799 Constitution.

In the case of Sim on, the main antagonist of *ius soli* in the *Tribunat*, the link is somehow stronger. In his speech in the *Tribunat* there are only faint links to race, such as when he argues that the son of a Frenchman who has renounced his nationality should be immediately admitted to citizenship because “he has French blood in his veins”.<sup>75</sup> It seems clear that he is afraid of the effects that foreign people would have on the French population, for he stated that “we seriously expose ourselves to receive those without a homeland who want to enrich themselves with our rights, while infecting us with their vices”.<sup>76</sup> Some nineteen years later, the same man vehemently criticises the liberation of slaves, saying that the tree of liberty could produce poisonous fruit if its not properly cultivated.<sup>77</sup> Granting slaves immediate freedom was an excess, a simple *fanatisme de la libert *.<sup>78</sup>

During the second session where the matter was discussed, on 5th Niv se, the tribune JA Perreau displayed a disturbing idea of nationality<sup>79</sup> where a nation would be the union of several families. These families can bond because they belong to a race, which is the base of any nation.

The arguments that Malherbe raised against propositions such as these, claiming that they were contrary to the French legal tradition and revolutionary principles, quoting Montesquieu and Adam Smith, seemed insufficient to stem the tide.

## 5 Conclusions

Although we cannot directly link scientific racism with the supporters of the *ius sanguinis*, the intellectual climate that favoured racial distinctions conferred a measure of scientific blessing on it. Late eighteenth-century France had developed a set of old prejudices into a fully-fledged biological theory that attempted to

75 “*Son p re a pu perdre sa qualit , mais il n’a pu alterer tout   fait le sang fran ais qui coule dans les veines de son enfant*”, J.-J. Sim on, Discours sur la Jouissance de droits civils, in Mavidal & Laurent 1864: 165.

76 “*Nous serions expos s   recevoir parmi nous ceux qui, n’ayant pas de patrie, voudraient s’enrichir de nos droits et nous infecter de leurs vices.*” J.-J. Sim on, Discours sur la Jouissance de droits civils, in Mavidal & Laurent 1864: 166.

77 “*...l’arbre de la libert  ne produit des poisons et la mort que par la faute de ceux qui le cultivent*” (Sim on 1824: 183).

78 *Idem* 186.

79 “*Dans chaque famille d’abord, el longtemps apr s, dans les premiers  tablissements de ces soci t s plus nombreuses, form es, sous le nom de nations, de la reunion des familles, ce n’ tait qu’  des souvenirs fix s par la continuit  des affections et des usages que l’on confiait le soin de conserver les distinctions des individus et des races*” in Mavidal & Laurent 1864: 269.

distinguish and classify men. The *ius sanguinis*, the right of the blood, had gained a greater impetus to becoming the foundation of citizenship in France during the Napoleonic era and in the rest of Europe afterwards.

During the first half of the nineteenth century, given the influence of the French Civil Code, the *ius soli* was systematically removed from most European legal systems<sup>80</sup> and replaced with the modern and scientific *ius sanguinis*.<sup>81</sup> During the twentieth century, the *ius soli* abated even more once England departed from its tenets.<sup>82</sup> Although during the early years of the twenty-first century, some exceptions are still to be found, especially with the adoption in Germany of elements of the *ius soli* into its legislation,<sup>83</sup> other countries, like Denmark, abolished it altogether in 2004, except for Nordic people.<sup>84</sup>

With the growing phenomenon of immigration, the *ius sanguinis*-rules will only increase the number of stateless people that will be living in Europe, something essentially contrary to article 15(1) of the Universal Declaration on Human Rights of 1948 and article 1 of the 1961 Convention on the Reduction of Statelessness. By contrast, it is virtually impossible to speak of the integration of people whom the relevant legal system considers not to belong to the country where they were born. They are simply labelled as second or third generation immigrants. One might wonder where they are supposed to have immigrated from if they might never have travelled outside their home city and were born in the very state that denies them citizenship.

In the Americas, the *ius soli* seems to be the dominant principle. The rule was inherited from their old colonial masters, from the common-law system in the United States, and from the *Siete Partidas* in the case of Latin American countries. Although these nations have experienced massive immigration throughout the nineteenth and twentieth centuries, the challenges of immigration have been overcome. Probably the *ius soli* played an important role in this process.

80 The wave of reforms developed in parallel with the process of codification, although some countries which did not have a civil code, adopted the principle through miscellaneous legislation. The *ius sanguinis* was adopted in most European states during the nineteenth century: Austria (1811), Belgium (1831), Spain (1837), Prussia (1842), Italy (1865), Russia (1864), The Netherlands (1888), Norway (1892) and Sweden (1894). See Weil 2001: 19.

81 In fact, when the rules of the *ius sanguinis* were to be reformed in France in 1881, the *ius soli* was seen as a backwards relic of feudal Europe, foreign to the French traditions and modern science. See Brubaker 1993: 11.

82 Since the reform of 1914, and especially with the 1981 and 1986 acts, British legislation has been consistently undermining the application of the *ius soli*, to the point that what once was considered a feature of British law is nowadays something oddly exceptional. See Cesarani 1996: 11266ff.

83 Vink & de Groot 2012: 1121.

84 *Idem* 1222.

## BIBLIOGRAPHY

- Anonimus (1793-1794 = 2nd year of the Republic) *Cathéchisme Français Republicaine, par un sans-culotte Français* (Paris)
- Arangio-Ruiz, Vincenzo (1914) *Le genti e le città* (Messina)
- Asso del Río, Jordán & Manuel y Rodríguez, Manuel (1806) *Instituciones del Derecho Civil de Castilla* 7th ed vol 1 (Madrid)
- Bang, Peter (1997) *Antiquity between Primitivism and Modernism* (Aarhus)
- Bello, Andrés (1886) *Derecho Internacional* (Santiago)
- Berdah, Jean François (2006) “Citizenship and national identity in France from the French Revolution to the present” in Ellis, Steven G, Halfdanarson, Guomundur & Isaacs, Anne Katherine (eds) *Citizenship in Historical Perspective* (Pisa)
- Berthencourt, Francisco (2013) *Racisms, from the Crusaders to the Twentieth Century* Kindle (ed) (Princeton & Oxford)
- Blackstone, William (1826) *Commentaries on the Laws of England* vol 1 (London)
- Bonfante, Pietro (1963) *Corso di diritto romano, Diritto di famiglia* (Milano)
- Brubaker, Rogers (1993) “De l’immigré au citoyen” *Actes de la recherche en Sciences Sociales* 99 (1): 3-25
- Cesarani, David (1996) “The changing character of citizenship and nationality in Britain” in Cesarini, David & Fulbrook, Mary (eds) *Citizenship, Nationality and Migration in Europe* (London & New York)
- Coin-Delisle, Jean-Baptiste-César (1865) “Des français par naissance. Extrait de un nouveau commentaire, inédit, du titre de la Jouissance et de la privation des droits civils” *Revue Critique de Législation et de Jurisprudence* 26: 214-233
- Conseil d’État (1841) *Discussion du Conseil d’État et du Tribunat sur le Code Civil: Avant la rédaction définitive de chacune des Lois qui le composent* (Paris)
- Crawford, Michael (1970) “Money and exchange in the Roman world” *J of Roman Studies* 60: 40-48
- Cujacius, Iacobus (1663) *Opera omnia* (Lutetia Parisiorum)
- Dalloz, Victor & Dalloz, Armand (1840) *Jurisprudence générale du Royaume en matière civile, commerciale, criminelle et administrative et droit public* (Paris)
- De Boulainvilliers, Henri (1727) *Histoire de l’Ancien Gouvernement de la France. Avec XIV lettres historiques fur les Parlemens ou Etats-Generaux* (La Haye & Amsterdam)
- Dumbraya, Costica (2014) *Nationality, Citizenship and Ethno-Cultural Belonging* (Hampshire)
- Escriche, Joaquín (1875) *Diccionario Razonado de Legislación y Jurisprudencia* vol 4 (Madrid)
- Finley, Moses I (1999) *Ancient Economy* (Berkeley & Los Angeles)
- Greene, Kevin (1990) *The Archaeology of the Roman Economy* (Berkeley & Los Angeles)
- Harris, William V (2011) “Poverty and destitution in the Roman Empire” in *Rome’s Imperial Economy* (Oxford)
- Kaser, Max (1960) “La famiglia romana arcaica” in *Conferenze romanistiche* (Milano)

## RACE AND NATION

- Kehoe, Denis (2012) "Contract labor" in Scheidel, Walter (ed) *The Cambridge Companion to the Roman Economy*: 114-131 (Cambridge)
- Leclerc, Georges-Louis (Compte) de Buffon (1834) *Histoire naturelle de l'homme et de la femme* (Paris)
- Linnaeus, Carl (1757) *Systema natura per tria regna naturae* vol 1, pars 1, *editio decima* (Holmiae)
- Lo Cascio, Elio (2000) "Mercato libero e commercio amministrato in età tardoantica" in Zacagnini, Carlos (ed) *Mercanti e politica nel mondo Antico* (Roma)
- Marcone, Arnaldo (1997) *Storia dell'agricoltura romana* (Roma)
- Mavidal, J & Laurent, E (1864) *Archives Parlementaires de 1787 à 1860* t 3 (Paris)
- Meikle, Scott (2002) "Modernism, economics and the ancient economy" in Scheidel, Walter & von Reden, Sitta (eds) *The Ancient Economy*: 233-250 (New York)
- Mikkelsen, Jon M (2013) *Kant and the Concept of Race. Late Eighteenth-Century Writings* (New York)
- Montesquieu, Charles-Louis (1772) *L'esprit des lois* (Paris)
- Neville, Morley (2006) "Social structure and demography" in Rosenstein, Nathan & Morstein-Marx, Robert (eds) *A Companion to the Roman Republic* (Oxford)
- Ngaire Heuer, Jennifer (2007) *The Family and the Nation: Gender and Citizenship in Revolutionary France 1789-1830* (Ithaca & London)
- Pothier, Robert-Joseph (1846) *Traité des personnes et des choses* (Paris)
- Price, Polly J (2013) "Natural law and birthright citizenship in Calvin's Case" *Yale J of Law and Humanities* 9(1): 73-145
- Pufendorf, Samuel (1682) *De officio hominis et civis juxta legem naturalem libri duo* (Cantabrigia)
- Pugliese, Giovanni (1985) "Aperçu historique de la famille romaine" in *Scritti giuridici scelti* vol 3 (Napoli)
- Santilli, Aldo (1999) "Quaedam servitus: il colonus tra legislazione e pensiero giuridico" *Societas-Ius. Munuscula di allievi a Feliciano Serrao*: 275-292 (Napoli)
- Sieyès, Emmanuel (2002) *Qu'est-ce que le Tiers état* (Paris)
- Siméon, Joseph-Jerome (1824) "Discours prononcé dans le comité secret des Cinq-Cents, à l'occasion du renvoi que les îles de France et de la Réunion (Bourbon) avaient fait des deux Commissaires du Gouvernement Burnet et Baco" in *Siméon, Joseph-Jerome, Choix de discours et opinions* (Paris)
- Sirks, Adrian JB (1999) "Ne colonus inscio domino suum alienet peculium" *Mélanges Fritz Sturm* 1: 419-430
- Sirks, Adrian J (2008) "The colonate in Justinian's reign" *The J of Roman Studies* 98: 120-143
- Tapia García, Eugenio (1828) *Febrero Novísimo* vol 1 (Madrid)
- Temin, Peter (2013) *The Roman Market Economy* (Princeton & Oxford)
- Vink, Maarten Peter & de Groot, Gerard-René (2012) "Citizenship attribution in Western Europe: International framework and domestic trends" in Vink, Maarten Peter (ed) *Migration and Citizenship Attribution. Politics and Policies in Western Europe* (Oxford)
- Vinnius, Arnoldus (1755) *Institutionum Imperialium Commentarius* vol 1 (Lugundi)

- Voci, Pasquale (1953) “Esame delle tesi del Bonfante sulla Famiglia Romana Arcaica” in *Studi in onore di Arangio-Ruiz* vol 1 (Napoli)
- Von Reden, Sitta (2012) “Money and finance” in Scheidel, Walter (ed) *Cambridge Companion to Roman Economy*: 266-285 (Cambridge)
- Weil, Patrick (2001) “Access to citizenship: A comparison of twenty-five nationality laws” in Aleinikoff, Alexander & Klusmeyer Douglass (eds) *Citizenship Today: Global Perspectives and Practices* (Washington DC)
- Weil, Patrick (2008) *How to be French. Nationality in the Making since 1789* trl Catherine Porter (Durham & London)

## Cases

*Calvin v Smith* 77 Eng Rep 377 (KB 1608)

## Legislation

- Acte Constitutionnel du 24 Juin 1793 (Constitution of 1793)
- Constitution of the French Republic of 5 Fructidor, Year III (1795)
- Constitution du 22 frimaire an VIII (Constitution of 1799)
- Code civil des Français (French Civil Code) of 1804
- British Nationality and Status of Aliens Act 1914 Universal Declaration on Human Rights of 1948
- Convention on the Reduction of Statelessness of 1961
- British Nationality Act 1981
- 1986 British legislation

# THE *LEX CORNELIA DE INIURIIS* AND “HYPERLINKS” IN ROMAN LAW

Jacob Giltaij\*

## ABSTRACT

The development of modern technology has resulted in some interesting new legal problems, such as whether using a hyperlink on a website to libellous material amounts to punishable defamatory libel. This article asks the question if there are analogous cases and rules to be found in the Roman law of insult to these novel forms of indirect or veiled modes of defamatory libel. It appears that specifically indirect forms of insult were not punished by means of the private delict *iniuria* but rather by the republican *crimen* formulated in the *lex Cornelia de iniuriis*. A *senatus consultum* in the early principate then either enhanced the scope of the *lex Cornelia*, or effected the application of the *lex Iulia de maiestate* to these indirect modes of insult. The article contends that the ground for the *senatus consultum* may tell us something about the division between “public” and “private” in Roman law, and perhaps even Roman society in general.

**Keywords:** Defamatory libel; insult; *iniuria*; *lex Cornelia de iniuriis*; *crimen laesio maiestatis*; Augustus

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# 1 Introduction

In 2009, the Court of Appeal for British Columbia in Canada delivered a judgment in the case of *Crookes v Newton*.<sup>1</sup> The appeal was lodged by Crookes, a politician in the Canadian Green Party, against Newton, the owner and operator of a website, but also the author of an article regarding the politics of Crookes. The case was one of defamatory libel. It was, however, not the article itself that was considered libellous by Crookes, but the content of websites behind various hyperlinks in the article written by Newton. The question the Court faced was whether hyperlinking to these websites alone constituted publication of their content, therefore making Newton liable for defamatory libel. Thus, in *Crookes v Newton* an interesting point of law was raised, namely whether the mere reference to potentially libellous material should be punishable, that is, constitutes publication, even if the person publishing it did not overtly agree with, support or perhaps even know its content. Although the matter was raised in a thoroughly modern context, hyperlinking to other websites, the point of law may well be extended into the legal historical sources. The Canadian Court suggested as much in 2009 by employing an English case from well before the invention of websites in delivering its judgment.<sup>2</sup> In *Hird v Wood* from 1894, a man sat at a road pointing to an insulting placard hanging next to him at passers-by. According to the court the mere act of referring to the placard constituted a form of publication, and the man was therefore held liable for defamatory libel. *Hird v Wood* notwithstanding, neither the Court of Appeal for British Columbia nor the Supreme Court of Canada – two years later – found Newton to be liable for defamatory libel, stating that the usage of hyperlinks is to be likened to footnotes, and is not in and of itself a publication of the content they refer to. The goal of this article is to extend the scope of the point of law raised in *Crookes v Newton* and to look at what the Roman legal sources have to say regarding the liability for whoever publishes libellous material rather than the one composing it.<sup>3</sup> I will do this by first looking at the

1 *Crookes v Newton* 2009 BCCA 392.

2 *Crookes v Newton* at 392 no 84: “I agree, as well, that the circumstances of a case may add more so as to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents. For example, in *Hird v Wood* (1894) 38 SJ 234 (CA), referred to in Carter, evidence of the defendant pointing to a placard with content was held to be sufficient evidence of publication to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents (...) So a statement to the effect ‘N is described at [hyper link]’ may itself incorporate a libel so as to be defamatory.”

3 For comparisons between *iniuria* and versions of libel and slander in the common law, see Zimmermann 1996: 1074-1078; Descheemaeker & Scott 2013: 26-31 in particular; and Ibbetson 2013: 33-48: “The component parts are there, but they have not begun to be digested into anything like a single whole” and naming “defamation” (36). For South-African law, there is actually a direct connection: Scott 2013: 119-139. For Dutch law, see the recent case of *Paay tegen Geenstijl Media et al* (RB Amsterdam 25.7.2018), where the latter website linked to previously published libellous content. Modern technology has led to a number of analogous and similar legal problems, such as “revenge porn”, see eg Brown 2018.

notion of *libellus famosus* in general, which would to a degree be the equivalent of defamatory libel in Roman law. Then, I shall discuss some of the legal texts in which a similar situation as the one the Court of Appeal for British Columbia was presented with seems to occur. As we shall see, the problem of publication actually leads to an interesting technical problem in Roman legal sources, namely by virtue of it being one of the manifestations of *iniuria* (physical abuse and insult) which was apparently not punishable by a private *delictum*, but rather under the *lex Cornelia de iniuriis*, which was at least, to a degree, a public *crimen*. It could therefore, in the words of Buckland,<sup>4</sup> be one of a “variety of cases” where the content of a private delict and a public crime differ from one another. The main queries of this article then read: “[W]hy does publishing an insult seem to be a public crime, whereas composing the same insult constituted a private delict, and what does that say concerning the relations between the *lex Cornelia de iniuriis* and the *iniuria* of the Praetorian Edict, crimes and delicts in the Roman legal order, and the notions of ‘public’ and ‘private’ in Roman law and society in general?”

## 2 Insult in Roman law

Even though the original delict in the Roman law of the XII Tables primarily punished physical injuries,<sup>5</sup> insult came to be a foremost category of *iniuria*. This is evidenced by the equation of *iniuria* with *contumelia* meaning “injury to someone else’s person” in a general sense by the late republican jurist Labeo.<sup>6</sup> The situation is complicated, however, by the fact that physical injuries can amount to insults, that is, affronting one’s honour. We can see this most clearly in the flogging of someone else’s slave amounting to an insult to his master.<sup>7</sup> The pure insult, namely without inflicting physical harm, may fall under one of two categories of the Edict of the *praetor*: *convicium*, which seem to be primarily and specifically defined verbal injuries,<sup>8</sup> and *infamandi causa factum*, anything that brings someone else into disrepute.<sup>9</sup> Ulpian indicates that the difference between these two modes of insult consists of whether or not something is shouted loudly in a crowd: if this is the case, the *praetor* can extend the *actio iniuriarum* for *convicium*.<sup>10</sup> I will, however, focus on more indirect forms of insult, which in the case of an insulting song was at least a part of the broad category of *infamandi causa factum*.<sup>11</sup> The same goes for its publication (*carmen proponere*), although with Raber I take “publication” here to

4 Buckland 1963: 590-591.

5 Zimmermann 1996: 1050-1051; Hagemann 1998: 1-2.

6 See G 1 141; Coll 2 5 1. See, further, Hagemann 1998: 64-67; Ibbetson 2013: 40 (“disrespect”).

7 G 3 222; D 47 10 15 46; Hagemann 1998: 65, 84. Not always: D 47 10 15 35.

8 See D 47 10 15 4: Hagemann 1998: 68-71. Present in the XII Tables: Zimmermann 1996: 1053-1054.

9 D 47 10 15 27; Lenel 1927: 401, par 103; Hagemann 1998: 75-81.

10 D 47 10 15 12; Zimmermann 1996: 1054; Hagemann 1998: 69.

11 D 47 10 15 27; Raber 1969: 60; Zimmermann 1996: 1056-1057; Hagemann 1998: 78.

mean the actual performance of the song, in which case the source and the purpose of the insult is relatively clear, making it less relevant for my argument. Then, again, the rubric of *infamandi causa factum* has an interesting feature that distinguishes it from the other rubrics, namely that a subjective intent of insult seems to be the only element necessary for the culprit to be liable.<sup>12</sup> In other words, the transgression under the rubric is so broadly defined that it is difficult to imagine that our situation – insult by publishing or referring to another source – would not have been covered by it. Focusing on the written insult,<sup>13</sup> only in a single legal source, not in the Digest, a measure of connection is made between the rubric *infamandi causa factum* and the written pamphlet.<sup>14</sup> The content of this source, however, is directly relevant to our argument. First of all, this is because the text seems to distinguish between the verbal and written insult, or the *carmen*<sup>15</sup> and *libellus famosus*<sup>16</sup>. Second, the text is interesting because in the case of the song it is primarily the composer who is punished,<sup>17</sup> whereas the culprit who is punished for a *libellus famosus* is the one who is “publishing” (*proposuerint*) it. We already came across the term *proponere* earlier, and it seems to indicate the spreading of it in a very wide sense, not just writing or performing the *libellus*.<sup>18</sup> Therefore, a degree of analogy to our problem of hyperlinks could be argued in regard to this text. This is all the more the case seeing that the trial in which the publication of the *libellus famosus* is punished appears to be a criminal rather than a private one: the penalty consists of relegation to an island. However, this could also at first glance be taken as proof that the connection between the Edict rubric and the *libellus* stems from the post-classical era, when the *cognitio* had definitively taken over the *formula*-trial. Yet, there is a counter-argument to be made, to the extent that publishing the *libellus famosus* in whatever form during the classical era actually was not punished by means of a private *actio iniuriarum* in the context of *ne infamandi causa*, but under the *lex Cornelia de iniuriis*. In a text seemingly in the context of the *lex Cornelia*, Ulpian states that anyone who writes, composes or publishes (*scripserit composuerit ediderit dolove malo fecerit*) a book pertaining to the disgrace of anyone (*librum ad infamiam alicuius pertinentem*) or brings it about that these things are done (*quo quid eorum fieret*), whether the publication will be in

12 D 47 10 15 27; Raber 1969: 60-61 (60: „Der geistige Urheber des Produkts konnte von dem, der das Lied sang oder sonst wie verbreitete, verschieden sein“). Also, Scott 2013: 125-126, referring to Daube 1991.

13 Which would not emerge as a separate category until Azo: see Descheemaeker/Scott 2013: 12.

14 PS 5 4 15-17. See also Raber 1969: 60; Hagemann 1998: 138-140, who then again does not seem to take G 3 220 into account. D 47 10 15 44 is interesting, but clearly written in the context of *qui servum alienum*. *Libellus* in D 47 10 15 29 refers to the introductory form of the *cognitio*-trial: see Raber 1969: 63. This is despite the Digest-title actually reading *De iniuriis et famosis libellis*.

15 *Pauli Sententiae* 5 4 15.

16 *Pauli Sententiae* 5 4 17.

17 Hagemann 1998: 139: „Während in Par. 15 der Verfasser mit dem Verbreiter offenbare identisch ist.“

18 *Ibid*: „schriftliche Verbreitungsart.“

anyone’s name or anonymous (*etiamsi alterius nomine ediderit vel sine nomine*), he will be punished under the statute by the inability to testify in open court.<sup>19</sup> The wording suggests Ulpian might be referring to the original text of the *lex* here, but this is notoriously difficult to determine. Also, it should be indicated that the term *libellus famosus* is actually not used here, but the rather synonymous “*liber ad infamia pertinens*”.<sup>20</sup> Thirdly, whereas pseudo-Paul agrees that the Edict employs *proponere*, if Ulpian is more true to its wording and intent, the *lex Cornelia* apparently entailed a wider set or at least a myriad of more specific forms of “publication”.<sup>21</sup> Moreover, even otherwise arranging for the publication and irrespective whether or not the original author is referred to or known to the person publishing, the writing is liable under the statute. Thus, the application of the *lex Cornelia* is very wide; even wider perhaps than the analogous Edict rubric *ne quid infamandi causa fiat* which concerned any action by which another man would incur infamy.<sup>22</sup> We do not possess much information on the scope and functioning of the *lex Cornelia de iniuriis* at any stage of its development. It seems certain that by the time of pseudo-Paul the *lex* had been subsumed completely under the private delict of *iniuria* in the *cognitio*-trial.<sup>23</sup> In the era of Ulpian, however, it is less obvious to assume that the *lex* had ceased to function as an autonomous entity, if only because the largest extant series of fragments is handed down in a text composed by Ulpian himself, albeit one written in the context of his commentary on the Edict.<sup>24</sup> There is no obvious concrete “Klagenkonkurrenz” between the *actio iniuriarum* and the (private law-modelled) *actio ex lege Cornelia de iniuriis*, save perhaps in some obscure cases in Cicero concerning physical injuries.<sup>25</sup> However, speaking against the *lex Cornelia de iniuriis* as a dead letter already in Ulpian’s time, are the small but significant differences between the application of *iniuria* as a public crime and as a private delict, such as

19 D 47 10 5 9: *Si quis librum ad infamiam alicuius pertinentem scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret, etiamsi alterius nomine ediderit vel sine nomine, uti de ea re agere liceret et, si condemnatus sit qui id fecit, intestabilis ex lege esse iubetur*; Mommsen 1899: 800, who however assumes the *lex* in question is the Law of the XII Tables (nt 3). On this see Raber 1969: 61; Von Lübtow 1969: 159; Bauman 1970: 254, n 30 (D 47 10 5, clearly the *lex Cornelia de iniuriis*); and Liebs 1972: 270-271. However, I do not agree that from this it follows that the penalty in the *lex* itself already was intestability, see below. This is not mentioned in Pugliese 1941. Daube 1991 (at 467) states as follows: “[T]he *lex Cornelia de iniuriis* dealt only with *pulsare, verberare, domum vi introire*.”

20 *Libellus famosus* is probably a post-Augustan invention: see Daube 1991: 465, 469.

21 The term used here is *edere*, the meaning of which, however, does not seem to differ fundamentally with regard to *proponere*; indeed Heumann & Seckel actually refer to D 47 10 5 9 in the context of the former, and not the latter, notion.

22 Compare D 47 11 1 1: Daube 1991: 469-471.

23 See, however, PS 5 4 8; and Buckland 1963: 590.

24 D 47 10 5pr-11 from Book 56: Lenel 1889 II: col 767-768, nos 1337 (*pr*-8) and 1338 (8-11).

25 Miglietta 2001: 102, 189-190. Compare Liebs 1972: 270-271. Hackl has argued for D 47 10 7 1 actually entailing a concurrence between *iniuria* under the Edict and under the *lex*: Hackl 1972: 170-172.

the aforementioned category of *vi domum introire* as well as the structure of the claim.<sup>26</sup> For example, as late as the second century AD, slaves are explicitly excluded from a prosecution under the *lex Cornelia de iniuriis*; a harsher punishment awaiting them *extra ordinem*.<sup>27</sup> Furthermore, as will be set out below, there apparently was a necessity in the first century AD to expand on the *lex Cornelia de iniuriis* by means of a *senatus consultum*. Finally, generally speaking, according to the literature both forms of *iniuria* probably existed alongside each other for quite a long period of time.<sup>28</sup> Among these instances of *iniuria* the *lex* probably had a wider or different scope than the private delict, and we can therefore also include Ulpian's statement in D 47 10 5 9 as regarding any form of publication of a book pertaining to the disgrace of anyone. Under the rubric *ne quid infamandi causa fiat*, the publication of poems that injure anyone's modesty was punishable (*carmen proponere quod pudorem alicuius laedat*).<sup>29</sup> In that context, Daube gives a series of analogous texts I understand to be by-and-large outside the scope of the Edict rubric. Among these is D 47 10 5 9, as well as G 3 220 and D 47 10 15 44, dealing with insults and physical injuries done to a slave.<sup>30</sup> The fourth of these texts seems to be very interesting to our query: In D 47 10 6, a *senatus consultum* is stated by means of which it was determined that when the name of the victim is not mentioned in the insult, a public *quaestio* must be the place of prosecution (*voluit senatus publica quaestione rem vindicari*). When the name of the victim is, however, stated, the private legal remedy is the path to follow (*ceterum si nomen adiectum sit et iure communi iniuriarum agi poterit*).<sup>31</sup> The text makes it clear that the public and private forms of legal protection are mutually exclusive.<sup>32</sup> Thus, as Daube states, the text concerns the public law aspect and the private law aspect in cases of insult by publication.<sup>33</sup> Given the texts I have discussed above, it seems certain that the public prosecution referred to here is a trial under the *lex Cornelia de iniuriis*.<sup>34</sup>

26 D 3 3 42 1: *ad actionem iniuriarum ex lege Cornelia procurator dari potest nam etsi pro publica utilitate exercetur, privata tamen est*. See Pugliese 1941: 117f, 120 (D 42 2 12 4 (*reum recipere*), 122; Hagemann 1998: 63.

27 D 48 2 12 4; Pugliese 1941: 152.

28 Mommsen 1899: 803-808; Buckland 1963: 591.

29 D 47 10 15 27; Daube 1991: 473.

30 Daube 1991: 473-474.

31 *Quod senatus consultum necessarium est, cum nomen adiectum non est eius, in quem factum est: tunc ei, quia difficilis probatio est, voluit senatus publica quaestione rem vindicari. Ceterum si nomen adiectum sit, et iure communi iniuriarum agi poterit: nec enim prohibendus est privato agere iudicio, quod publico iudicio praeiudicatur; quia ad privatam causam pertinet. Plane si actum sit publico iudicio, denegandum est privatum: similiter ex diverso.*

32 Kaser/Hackl 1996: 186; Mommsen 1899: 801 n 4.

33 Daube 1991: 473-474. Note that the text states a *quaestio*. Placed in the context of Paulus' *Commentary on the Edict* rubric *Ne quid infamandi causa fiat*; Lenel 1889 I: col 1072, col 685.

34 Despite Mommsen 1899: 804 designating the trial under the *lex* as "not a *iudicium publicum*" due to the character of the charge as exclusive to the violated party.

### 3 The *lex Cornelia de iniuriis* and a *senatus consultum*

There is all the more reason to assume this, seeing one of the texts in book 56 of Ulpian’s commentary on the Edict regarding the *lex Cornelia* also refers to a *senatus consultum*.<sup>35</sup> The text states that a *senatus consultum* extends the same punishment (*eadem poena ex senatus consulto tenetur*) to those composing epigrams and unwritten insults (*qui epigrammata aliudve quid sine scriptura in notam aliquorum produxerit*), and even to those enabling the buying and selling of these things (*qui emendum vendendumve curaverit*). The relation to the preceding and subsequent texts in the Digest seems clear: the *lex Cornelia de iniuriis* punished the writing, composing or publishing of written insults both anonymous and signed, and what was most likely a single *senatus consultum* extended the penalty to specific other mediums (D 47 10 5 10: short poems, *sine scriptura*) as well as the situation in which the name of the victim is not explicitly mentioned in the work (D 47 10 6). Unclear, however, is the precise substantive relation to the Edict rubric *ne quid infamandi causa fiat*, mainly due to its apparent enormous scope: to a degree in accordance with Daube a distinction could be made on the basis of the specific purpose of the insult in question, the Edict rubric contrary to the *lex* penalising injuries with the intent of bringing *infamia* in its technical sense.<sup>36</sup> Moreover, it remains to be seen whether or not the application of the *lex* is analogous to or exceeds the scope of the Edict rubric to the extent of concerning someone being punished for merely making reference to an insulting *libellus*, the central question I have posed in this article. For this, it seems prudent to take a closer look at the *senatus consultum* that the relevant texts have been citing. One of the reasons to do so is the reason given in D 47 10 6 for distinguishing between a public prosecution and a private *actio iniuriarum*. According to Paul, this reason is simply a consideration of the difficulties of proof when someone is not named (*quia difficilis probatio est*). In any case, primarily it needs to be determined which *senatus consultum* Ulpian and Paul refer to here. Citing D 47 10 6, Mommsen appears to state that handling an offensive *carmen* up until Augustus had been punished in a private trial. The emperor then by means of the *senatus consultum* brought both insulting *carmina* and *libelli* under the ambit of the *lex Iulia de maiestate*.<sup>37</sup> For this, he adduces two texts: Suetonius *Augustus* 55<sup>38</sup> and Tacitus *Annales* 1 72 (in combination with Cassius Dio 56 27).<sup>39</sup>

35 D 47 10 5 10: *Eadem poena ex senatus consulto tenetur etiam is, qui epigrammata aliudve quid sine scriptura in notam aliquorum produxerit: item qui emendum vendendumve curaverit.*

36 Daube 1991: 470-471. Following Daube himself, the terminology regarding the *lex* in D 47 10 5 9 is however republican, and reads *liber ad infamia pertinens*.

37 Mommsen 1899: 565, 800.

38 *Etiam sparsos de se in curia famosos libellos nec expavit et magna cura redarguit ac ne requisitis quidem auctoribus id modo censuit, cognoscendum posthac de iis, qui libellos aut carmina ad infamiam cuiuspian sub alieno nomine edant.* See, also, Bauman 1970: 251, 253.

39 The text and translation are from Church, Brodribb & Bryant 1942.

Tacitus *Annales* 1 72: Non tamen ideo faciebat fidem civilis animi; nam legem maiestatis reducerat, cui nomen apud veteres idem, sed alia in iudicium veniebant, si quis proditione exercitum aut plebem seditionibus, denique male gesta re publica maiestatem populi Romani minuisset: facta arguebantur, dicta inpune erant. Primus Augustus cognitionem de famosis libellis specie legis eius tractavit, commotus Cassii Severi libidine qua viros feminasque illustres procacibus scriptis diffamaverat; mox Tiberius, consultante Pompeio Macro praetor an iudicia maiestatis redderentur, exercendas leges esse respondit. Hunc quoque asperavere carmina incertis auctoribus vulgata in saevitiam superbiamque eius et discordem cum matre animum.

But he [= Tiberius, JG] did not thereby create a belief in his patriotism, for he had revived the law of treason, the name of which indeed was known in ancient times, though other matters came under its jurisdiction, such as the betrayal of an army, or seditious stirring up of the people, or, in short, any corrupt act by which a man had impaired “the majesty of the people of Rome”. Deeds only were liable to accusation; words went unpunished. It was Augustus who first, under colour of this law, applied legal inquiry to libellous writings, provoked, as he had been, by the licentious freedom with which Cassius Severus had defamed men and women of distinction in his insulting satires. Soon afterwards, Tiberius, when consulted by Pompeius Macer, the praetor, as to whether prosecutions for treason should be revived, replied that the laws must be enforced. He too had been exasperated by the publication of verses of uncertain authorship, pointed at his cruelty, his arrogance, and his dissensions with his mother.

Paul in D 47 10 6 can still be rhymed with Tacitus, since the text speaks only about a public prosecution in a very general sense, and can therefore also have referred to a punishment under the *lex Iulia de maiestate*. However, the Tacitus-text, in particular, seems to directly contradict Ulpian in D 47 10 5 9, at least provided the jurist is indeed writing in the context of the *lex Cornelia de iniuriis* and the historian discusses a procedure under the *lex Iulia de maiestate*. More specifically, by virtue of our query concerning the legal problem of “publishing” anonymous insults in Roman law, the Tacitus-text allows us to ask two questions, namely: (1) Was the anonymous or otherwise indirect insult not done to the *princeps* but to other Romans with a high social status seen as *laesio maiestatis* after the enactment of the *senatus consultum* in 6 AD?; and (2) Was the anonymous or otherwise indirect insult punished in the *quaestio de maiestatis* or the *quaestio de iniuriis*, if there was such a thing as the latter at all, or both? And on what criterion did the choice for following either procedure depend?

Reasoning from the texts we have adduced previously, Bauman in his work on the *crimen laesio maiestatis* provides an extensive discussion of the problem. In it, he strongly distinguishes between defamatory insults in written *libri* and *libelli*, and oral *carmina*, all of which were covered (as I understand already before Augustus) by the *lex Cornelia de iniuriis*; and the problems of the anonymous publisher and the unnamed victim, which were the topic of the Augustan *senatus consultum* extending the *lex Cornelia de iniuriis*.<sup>40</sup> In accordance with the Tacitus-text, and following

40 Bauman 1970: 257. He dates the *senatus consultum* at 6 AD: 261.

Mommsen and Bauman, in the latter case in practice the procedure under the *lex Iulia de maiestate* was followed, prompting references in the legal texts to it being *publica (rem, utilitas)*, a sanction exceeding a mere fine, and allowing for informers rather than only the injured party bringing the charge.<sup>41</sup> From this, it seems as if though the criterion for following either the procedure under the *lex Cornelia de iniuriis*, basically a private *actio de iniuriis* in Bauman, or the public prosecution by means of the *quaestio de maiestate* is whether the majesty of the Roman people was injured by the anonymous publication as Tacitus has it: The *senatus consultum* extending the *lex Cornelia* to all anonymous insults aimed at high status Romans in this reading is a trick played by Augustus to be able to punish anonymous lampoons on him, while retaining the semblance of the Roman republican criminal order by subsuming it under *iniuria (ad infamiam alicuius)* rather than *laesio maiestatis* (against the *princeps* himself).

#### 4 Defamatory libel and the adjudicative powers of Augustus

Depending on what he means by *specie legis*, Tacitus *Annales* 1 72 provides strong support for this reading. However, there does seem to be a discrepancy between the content of the historical and the legal sources here. Though this could simply be an issue of transmission, there are no references to be found to (publishing) a (anonymous) *famosus libellus* being an instance of *laesio maiestatis* in the context of the *actio iniuriarum*, the *lex Cornelia de iniuriis* or the *crimen laesio maiestatis*. Rather, the legal sources suggest a rather unbroken trajectory from the date of the *senatus consultum* until at least the era of pseudo-Paul of a separate procedure of sorts under the *lex Cornelia de iniuriis*. Moreover, the procedure in question is designated *publica (utilitatem)* by Paul himself,<sup>42</sup> suggesting at least its continued hybrid character, and the sanction went beyond the fine alone to intestability by virtue of the enhancing *senatus consultum* itself.<sup>43</sup> In a more general sense, once it is accepted that the procedure under the *lex Cornelia de iniuriis* has both public and private aspects, the presence of informers does not have to preclude the privileged character of the *accusatio* (or rather the *actio*). All of this is not to say that Tacitus, Mommsen and Bauman are wrong. I do, however, wish to introduce a possibility to the discussion, namely that the procedure for anonymous insults was subsumed at a very early stage at least partly by the imperial *cognitio*-procedure. This suggestion does not minimise the difficulties to determine the type of legal procedure followed

41 *Idem* 254, 261-263. See, too, PS 5 4 17; D 47 10 6; and D 47 10 5 11.

42 D 3 3 42 1.

43 D 28 1 18 1. See, also, D 22 5 21*pr*, that simply states: “(A) person who has been convicted of having written a libellous poem is incompetent to testify”: Mommsen 1899: 800 n 3. It is possible that the penalty was already envisioned in the *lex Cornelia* itself: see Von Lübtow 1969: 158.

for certain transgressions at some point in the early principate; quite the contrary: the measure of transference from ordinary *quaestio* to *cognitio* alone has been the subject of a long debate.<sup>44</sup> To illustrate this debate, it suffices to look at D 47 10 6 again as cited previously, in which there is talk of a *quaestio rem vindicari*, in a period during which it is highly unlikely that a *quaestio* either under the *lex Cornelia de iniuriis* or the *lex Iulia de maiestate* was still in existence. These difficulties are expedited when considering the transfer from *formula*-procedure to *cognitio*. Generally speaking, there probably was no meaningful transfer in the latter case before the era of Hadrian. As such, I suggest it is extremely valuable to look at the development of the more publicly defined categories of *iniuria*, particularly those that seemed to have been outside the scope of the private *delictum*, such as *vi domum introire* and the anonymous defamatory libel, not coincidentally the topic of this paper. There are several reasons for this: for example, we actually have an example of a more or less publicly-defined form of *iniuria* punished (in a *cognitio*) *extra ordinem* predating Augustus, being the prosecution of sorts of a criminal slave.<sup>45</sup> Moreover, Mommsen suggests there was an early move by Augustus to prosecute in or preside over a criminal procedure pertaining to defamatory libel not concerning himself.<sup>46</sup> The point of introducing the element of the *cognitio* regards the fact that Bauman's argument hinges on there still being a meaningful intent to distinguish between the procedural rules of the publicly defined version of *iniuria* and the *quaestio de maiestate* in this particular case during the early principate. However, to what extent was this actually relevant if the transgression in question was just taken up in the relatively open imperial *cognitio*? And reading from this perspective, is it perhaps possible to read the words of Tacitus more ambivalently, particularly considering he is writing at the start of the second century AD, a period in which any distinction between various *quaestiones* was surely rendered minimal, if not irrelevant, already? It should be indicated here that Tacitus refers to an out-and-out *cognitio* in *Annales* 1 72.<sup>47</sup> Following Tacitus, the first procedure for (anonymous) defamatory libel under the *senatus consultum* was that against an orator named Cassius Severus. The details of this trial (or trials) are severely muddled, the problem being that Seneca *maior* and Tacitus seem to suggest that Severus was acquitted at least on the first go, whereas Cassius Dio and Tacitus elsewhere refer to

44 Pugliese 1982: 735-746, discussing Tacitus *Annales* 1 72 at 751 as an instance of the *lex Iulia de maiestate* and insult punished in the *cognitio* at 777.

45 D 48 2 1 4.

46 The reference is to Horace *Satires* 2 1 82. See Mommsen 1899: 801, and also Bauman 1970: 252: "(I)t is not certain that Horace intends a serious reference to any law." Also, the orator Cassius Severus (see below) had been involved in multiple seemingly criminal procedures involving insults: see Bauman 1970: 257-259. Lastly, already in 27/26 BC Gaius Cornelius Gallus is accused of *hybris* before Augustus: see Volkmann 1969: 113, 115-116.

47 Bauman 1970: 259.

a condemnation and relegation.<sup>48</sup> In any case, three things seem certain: 1) at least one of the trials was conducted in Augustus’s personal forum, namely his *cognitio* in the terminology of the second century AD; 2) when Severus was convicted at least once for defamatory libel this was for an anonymous insult, at least if there was any relation to the new procedure under the *senatus consultum* at all; and 3) the insult was not aimed primarily at Augustus. Regardless of whether there was a technical-legal relation between the procedure and the *crimen laesio maiestatis*, by all accounts there was a practical one. After discussing the Severus-case, Cassius Dio proceeds with trials involving *maiestas* as such.<sup>49</sup> Furthermore, from a recent overview of the cases in which emperors were involved in their judicial capacities in whichever shape or form it emerges there were several in which elements of defamatory libel and *laesio maiestatis* appear.<sup>50</sup> As Bauman states: “It seems that Cassius [Severus, JG] was tried at a time when conspiracy was in the air.”<sup>51</sup> However, the anonymous insult, at least against Augustus himself, seems to have been dealt with before Severus. Suetonius refers to the cases of Junius Novatus and Cassius Patavinus, probably taking place in 6 AD.<sup>52</sup> Novatus was punished with a fine for “publishing” (*edidisset*) a letter insulting Augustus under the name of a young Agrippa, whereas Patavinus had incurred a banishment for seditious talk at a public event. Seeing he was punished with a mere fine, it is likely that Tacitus is actually inaccurate in this instance, and that at least the case of Novatus did take place in Augustus’s *cognitio* in whatever form it existed this early on under the *senatus consultum* enhancing the *lex Cornelia de iniuriis* Suetonius would allude to later, in *Augustus* 55. In any case, the cases are dated 6 AD, the same year in which the *senatus consultum* was enacted, fitting the apparent epidemic of (anonymous) lampoons in or around that year.<sup>53</sup> Otherwise, it seems unclear precisely what connects the punishments inflicted on Novatus and Patavinus: a fine is too light for the *crimen laesio maiestatis*, whereas a banishment is too harsh for *iniuria*. Although the seditious element with respect to the transgression of Patavinus suggests an application of the *lex Iulia de*

48 See Bauman 1970: 259-260; Seneca *maior, Controversiae* 2 4 11; Cassius Dio 55 4 4; and Tacitus *Annales* 4 21 5 (by a senate decree). According to Bauman 1970: 259, he was first acquitted for *convicium*, but then condemned in the *cognitio de famosis libellis*, and thereafter possibly condemned again while in exile on Crete.

49 Bauman 1970: 259; Cassius Dio 55 4 4.

50 Interesting is the (fictional?) conviction and exile of Ovid, see Tuori 2016: 74-80.

51 Bauman 1970: 259.

52 *Clementiae civilitatisque eius multa et magna documenta sunt. Ne enumerem, quot et quos diversarum partium venia et incolumitate donatos principem etiam in civitate locum tenere passus sit: Iunium Novatum et Cassium Patavinum e plebe homines alterum pecunia, alterum levi exilio punire satis habuit, cum ille Agrippae iuvenis nomine asperrimam de se epistulam in vulgus edidisset, hic convivio pleno proclamasset neque votum sibi neque animum deesse confodiendi eum.* See, also, Bauman 1970: 253.

53 Cassius Dio 55 27; Bauman 1970: 260.

*maiestate*,<sup>54</sup> this discrepancy in punishments for similar transgressions also fits an early iteration of a *cognitio*-procedure. Furthermore, with the case of Novatus, we are close to the situation postulated at the beginning of this article: the “publication” of the anonymous – in this case pseudonymous – insult. Regardless of Augustus’s efforts going as far as publicly burning the insulting placards, it seems they remained endemic long after the enactment of the *senatus consultum*: whether or not connected to *laesio maiestatis* and whether or not aimed at the Emperor himself, defamatory libel continued to be a main subject matter in his *cognitio* even during his later life.<sup>55</sup>

## 5 Conclusion

In the introduction to this article I have asked a question based on a very modern problem of law: Would someone not insulting someone else directly but indirectly, by using a “hyperlink”, be punished in Roman law, and if so, under what law or regulation? No concrete analogous case in Roman law was found in which someone had insulted someone else indirectly. I would say the closest we have gotten is the pseudonymous insult by Junius Novatus in Suetonius, *Augustus* 51. However, the pseudonymous insult was most likely made punishable by a *senatus consultum* enacted in 6 AD, during the reign of Augustus (D 47 10 6). There is even a possibility that the pseudonymous insult was punished under the *lex Cornelia de iniuriis* from the time of its enactment (D 47 10 5 9). In a general sense, the same appears to be the case for our legal problem, namely the punishment of the “publication” of the insult by someone else, someone who may not be aware of or in agreement with the insulting content: either the *lex*, the *senatus consultum* or the jurists refer to terms like *proponere* and *edere* in this context. If the original *lex Cornelia de iniuriis* has already punished the publication of the insult rather than its performance or composition, the question then becomes what the function of the later *senatus consultum* entailed. According to Mommsen and Bauman, the *senatus consultum* may have extended the scope of the libel to the *lex Iulia de maiestate*, for which they adduce Tacitus *Annales* 1 72. Yet, there seems to be a discrepancy here with the content of the legal sources, which tend to refer (solely) to the *lex Cornelia de iniuriis* as late as Ulpian and Paul. Assuming Paul is talking about the 6 AD *senatus consultum*, the jurist actually provides a ground for its enactment: when the name of the author is not mentioned, the path to take is a public prosecution, because of difficulties of proof. However, the “Klagenkonkurrenz” in the text in question seems to be one between the *actio ex lege Cornelia de iniuriis* and the *actio iniuriarum*, since the text goes to the trouble to specify that the private option is *iure communi*: depending on the strength of this as an argument, at least it makes a form of indirect

54 Thus making it more than a simple *convicium* in the sense of D 47 10 15 12 as well.

55 Cassius Dio 56 27 1: an instance of the *cognitio* is suggested by the similar application outside of Rome and the punishment inflicted “personally”.

or veiled insult a rare instance of a “Klagenkonkurrenz” between private and public *iniuria*, one that goes beyond physical injuries at that. So what happened in 6 AD? Were certain aspects of the delict *iniuria* pertaining to forms of veiled or indirect insults brought under the ambit of the *lex Iulia de maiestate* even if they had not been aimed at the Emperor but at the majesty of the Roman people as Tacitus states? Or is Tacitus inaccurate, and *specie legis* really entails an extension of the *lex Cornelia de iniuriis*? Or did the distinction not matter anymore already in 6 AD, since the *senatus consultum* brought a variety of indirect forms of defamatory libel under the scope of the emperor’s *cognitio*? Various instances of circumstantial evidence can be presented in favour of the latter possibility: the (later) literary sources pertaining to indirect forms of defamatory libel, including Tacitus 1,72, tend to suggest a personal jurisdiction of the emperor from Augustus onwards, employing terms such as *cognitio*. There are precedents for specific forms of *iniuria* such as that done by a slave being prosecuted *extra ordinem* even before Augustus; and the ground for the 6 AD *senatus consultum* constituting problems of evidence fits well with the more extensive power of the magistrate in the context of the *cognitio*-trial. Yet, the more interesting conclusion concerns the dichotomy between public and private that plays throughout the distinction between various forms of *iniuria*. This distinction we may still see in modern systems of civil law: forms of libel that in one way or another affect the public good are prosecuted as crimes, whereas those that only concern the individual interest of the injured party are subject to claims under private law. In Roman law, there seems to be a connection between what constitutes the public good and the “difficulties of proof” when it came to more indirect or veiled forms of defamatory libel. Here, there is a clear and typically pragmatic ground for opting for a more-or-less public prosecution, due to the more extensive powers of the magistrate in the *cognitio*-trial, thus also safeguarding the private interest of the injured party. As Paul has it (D 3 3 42 1): “Even though the *actio* [*ex lege Cornelia de iniuriis*, JG] is instituted for the public good, it is still a private one.”

## BIBLIOGRAPHY

- Bauman, Richard (1970) *The crimen maiestatis in the Roman Republic and Augustan Principate* (Johannesburg)
- Brown, Jonathan (2018) “‘Revenge porn’ and the *actio iniuriarum*: Using ‘old law’ to solve ‘new problems’” in *Legal Studies* 38-3: 396-410
- Buckland, William (1963) *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge)
- Daube, David (1991) “*Ne quid infamandi causa fiat*. The Roman law of defamation”, in *Collected Studies in Roman law* I ed by D Cohen & D Simon (Frankfurt am Main): 465-500
- Descheemaeker, Eric & Scott, Helen (2013) “*Iniuria* and the common law” in *Iniuria and the Common Law* Eric Descheemaeker & Helen Scott (eds) (Oxford/Portland, OR): 1-31
- Hackl, Karl (1976) *Praejudicium im klassischen römischen Recht* (München)

- Hagemann, Matthias (1998) *Iniuria. Von den XII Tafeln bis zur Justinianischen Kodifikation* (Köln/Weimar/Wien)
- Ibbetson, David (2013) “*Iniuria. Roman and English*” in *Iniuria and the Common in Iniuria and the Common Law* Eric Descheemaeker & Helen Scott (eds) (Oxford/Portland, OR): 33-48
- Kaser, Max & Hackl, Karl (1996) *Das römische Zivilprozeßrecht* (München)
- Lenel, Otto (1889) *Palingenesia iuris civilis I-II* (Leipzig)
- Lenel, Otto (2010) *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung* (Amsterdam/Aalen)
- Liebs, Detlef (1972) *Die Klagenkonkurrenz im römischen Recht. Zur Geschichte der Scheidung von Schadenersatz und Privatstrafe* (Göttingen)
- Von Lübtow, Ulrich (1969) ”Zum römischen Injurienrecht”, *Labeo* 15-2: 131-167
- Miglietta, Massimo (2001) *Servus dolo occisus. Contributo allo studio del concorso tra ‘actio legis Aquiliae’ e ‘iudicium ex lege Cornelia de sicariis’* (Napoli)
- Mommsen, Theodor (1899) *Römisches Strafrecht* (Leipzig)
- Pugliese, Giovanni (1941) *Studi sull’iniuria* (Milano)
- Pugliese, Giovanni (1982) “Linee generali dell’ evoluzione del diritto penale pubblico durante il principato” in *Aufstieg und Niedergang der römischen Welt* II.14 (Berlin/New York, NY): 722-789
- Raber, Fritz (1969) *Grundlagen klassischer Injurienansprüche* (Wien/Köln/Graz)
- Scott, Helen (2013) “*Contumelia and the South-African law of defamation*” in *Iniuria and the Common Law* Eric Descheemaeker & Helen Scott (eds) (Oxford/Portland, OR): 119-139
- Tuori, Kaius (2016) *The Emperor of Law. The Emergence of Roman Imperial Adjudication* (Oxford/New York, NY)
- Volkman, Hans (1969) *Zur Rechtsprechung im Principat des Augustus* (München)
- Zimmermann, Reinhard (1996) *The Roman Law of Obligations* (Oxford)

# JOHN STUART MILL ON MATRIMONIAL PROPERTY AND DIVORCE LAW REFORM

Henry Kha\*

## ABSTRACT

Victorian England is often seen as an era of stability for marital and family life. In reality, it was a period of significant legal and social change that opened the way for the introduction of the modern family court system. It was a time and place where women had very few legal rights in regards to divorce and matrimonial property. John Stuart Mill was a key proponent for the advancement of women's rights in the Victorian period. The article argues that Mill was an advocate for equal opportunity for women based on ideals of liberty, but this was based on a gender complementarian division of roles within the family. The article focuses on Mill's major work on women's rights, *The Subjection of Women*. Mill presented a radical piece of writing based on principles of equality as a source of moral progress amidst the reactionary politics of Victorian England.

**Keywords:** John Stuart Mill; Victorian England; divorce law; marriage law; Married Women's Property Act; law reform

## 1 Introduction

The political philosophy of liberalism played a significant role in shaping Mill's views on marriage and divorce. This is most evident in Mill's application of the

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“tyranny of the majority” theory and the “no harm” principle from *On Liberty*. Mill condemned the fact that men could not be charged for committing marital rape.<sup>1</sup> He criticised the artificial distinction between public and private by suggesting it was ludicrous to suggest that someone could be a *public* democrat and a *private* despot.<sup>2</sup> Instead, Mill argued for the avoidance of the tyranny of the majority that “establishes a despotism over the mind, leading by natural tendency to one over the body.”<sup>3</sup> The statement was a criticism of the wide-spread belief in the doctrine of coverture that led men to believe that they had a natural right to rule over women as if she was a possession.<sup>4</sup> The doctrine of coverture translated into denying a married woman independent legal personality, thus creating a situation where a wife could not legally-speaking be raped by her husband.

A fundamental element of liberalism is the “no harm” principle. Mill outlines: “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>5</sup> The fact that the law denied women basic rights, such as legal personhood in marriage,<sup>6</sup> *feme sole* property rights,<sup>7</sup> and the right to divorce from an abusive relationship,<sup>8</sup> interfered with the liberty of women. Thus, Mill argued that the law promoted harm towards women and believed this could be remedied by removing gender inequality from the law, which would improve the state of women, free women from the harmful excesses of the law and advance the progress of society.<sup>9</sup> These liberal ideas formed the foundation for Mill’s philosophy against the subjection of women.

There has been some academic debate that has attempted to class Mill as a particular type of feminist.<sup>10</sup> A number of scholars, such as the ones mentioned below, have attempted to categorise Mill from the perspective of either a liberal or a radical feminist critique. The former promotes the idea that Mill’s political liberal theoretical framework influenced his conclusion that women should be afforded equality of opportunity. For example, Zillah Eisenstein states as follows: “Mill reiterates the importance of the equality of opportunity doctrine in *On the Subjection of Women*

- 1 The origins to the exemption on marital rape can be traced to the legal treatise of Matthew Hale, an eighteenth century English legal jurist. See Hale 1736: 629.
- 2 Mill 1984b: 299; Morales 2007: 64.
- 3 Mill 1977: 302.
- 4 The origins of the doctrine of coverture can be traced to the legal treatise of William Blackstone, an eighteenth century English legal jurist. See Blackstone 2016.
- 5 Mill 1977: 223.
- 6 Blackstone 2016: 284.
- 7 Stretton & Kesselring 2013: 6-7.
- 8 Matrimonial Causes Act 1857, s 27. See Kha and Swain 2016: 319.
- 9 Mill 1984b: 293-294.
- 10 Eisenstein 1981: 127; Himmelfarb 1974: 173-174; Morales 2005: 99-100; Tong 2009: 20; Tulloch 1989: xvi.

and argues that one's birth should not determine one's station in life."<sup>11</sup> The liberal feminist critique views Mill as a law reformer rather than a revolutionary.<sup>12</sup> The latter views Mill as a gender egalitarian who argued that women should be provided substantive equality and not simply equality of opportunity. Thus, for example, Maria Morales argues that Mill promoted a perfect equality between the sexes as a substantive relational ideal.<sup>13</sup> The shortcoming of the radical feminist critique is its presentist agenda of attempting to portray Mill as a gender egalitarian to fit its narrative of the modern women's movement. Gertude Himmelfarb states:

As the women's movement has currently chosen to emphasize equality rather than liberty, so it has distracted attention from the individualistic nature of Mill's argument. For Mill the central problem was the individual: how to give to the individual woman the same degree of liberty enjoyed by the individual man, how to make more complete individuals of both women and men.<sup>14</sup>

An analysis of the legal history of women's rights in Victorian England demonstrates that the radical feminist characterisation of Mill is ahistorical; whereas the liberal feminist critique is more grounded in the legal historical context. Mill was a product of the Victorian era and believed in a gender-based division of roles with the husband acting as the breadwinner and the wife serving as the primary care-giver to the children.<sup>15</sup> There is also a gap in the scholarship on analysing Mill's philosophical ideas from the perspective of the legal history of Victorian England. Dale Miller, for example, analyses Mill's ideals on the family, but does not seriously explore the legal history in significant depth.<sup>16</sup> The analysis of the legal history is essential in understanding the role of the law in influencing the philosophy of Mill and explaining how his views influenced the development of the law. This article will argue that Mill was a gender complementarian in the area of family life, who believed in equal opportunities for women. This shall be demonstrated through an analysis of the law in its historical context and the views Mill espoused in his writings. The focus will be on examining what Mill said himself and the development of the law during his time.

## 2 The campaign for matrimonial property law reform

In regards to matrimonial property rights, women could not own property *feme sole* until the enactment of the Married Women's Property Act 1882. Although the wife could still hold onto property under equity by means of a trust, the matrimonial property regime for most of the nineteenth century gave the husband almost absolute

11 Eisenstein 1981: 127. See also Himmelfarb 1974: 171.

12 Tong 2009: 20.

13 Morales 2005: 100.

14 Himmelfarb 1974: 174.

15 Mill 1984b: 297.

16 Miller 2017: 472-487.

legal control of his wife's property after marriage.<sup>17</sup> The campaign for married women's property rights emerged in the 1860s, which saw the rise of a feminist campaign for greater recognition of women's legal rights.<sup>18</sup> The issue of married women's property rights was tied to the wider campaign for women's suffrage. Mill played an important role in bringing attention to the injustice of denying married women the legal right to own property. His role as a politician was instrumental in the enactment of the Married Women's Property Act 1870.

The expansion of married women's property rights came to have a significant impact not only on the legal status of women, but also on the wider debate surrounding divorce law. Gender equality found in matrimonial property rights naturally prompted questions about gender equality in the grounds for divorce. Once married women obtained the right to equal access to matrimonial property, it raised questions about the right of married women to equal access to the grounds for divorce. Mary Lyndon Shanley states that "[t]he end of coverture certainly ranks along with suffrage as the *sine qua non* of public recognition of women's autonomy and personhood".<sup>19</sup> Indeed, the Married Women's Property Act 1882 gave wives equal property rights with their husbands, which elevated the legal and social status of women. The corollary of this legal change was the scrutiny of other glaring areas of sex discrimination, such as in the law of divorce. As Ann Sumner Holmes explains, a "[wife] appeared as her husband's equal rather than his ward. From this perspective, the double standard in the divorce laws seemed anachronistic".<sup>20</sup> It would take another four decades after the abolition of coverture for the double standards in the grounds for divorce to be abolished.<sup>21</sup> Nevertheless, the expansion of married women's property rights had made the repeal of the double standard in the grounds for divorce inextricably linked based on the promotion of women's rights and gender equality.

*Feme sole* for all women regardless of marital status was recognised in 1882. This motivated politicians, judges, lawyers and feminists to advocate for the removal of the double standard between genders in the grounds of divorce. Although married women could own property in equity under a trust, there was no legal recognition of the right of married women to own property at common law. In practice only wealthy and middle class women settled trusts in preparation for marriage, while most other women married without the protection of equity.<sup>22</sup> Even when separated a married

17 Married women were deemed to be *feme covert*. Conversely, a woman who owned property in her own legal right was considered to be *feme sole* and therefore was *discover*. However, the Court of Chancery recognised the married woman's right to separately own paraphernalia, such as clothing, jewellery and personal ornaments either gifted by friends, family members or the husband. See Holcombe 1983: 41.

18 Shanley 1989: 50.

19 Shanley 1986: 72.

20 Holmes 1995: 608.

21 Matrimonial Causes Act 1923. See Probert 1999a; Probert 1999b.

22 Dicey 1905: 381.

woman was unable to live financially independently from her estranged husband, since the wife's earnings were the legal property of the husband.<sup>23</sup> This problem was compounded by the fact that married women were unable to enter into their own contracts.

## 2 1 Married Women's Property Act 1870

The first major attempt to introduce property rights for married women was debated at the same time as the divorce legislation in 1856 and 1857. During the House of Lords Select Committee debates on the 1856 Divorce Bill, Lord Lyndhurst proposed to allow separated married women the right of *feme sole*, particularly the right of married women to keep their own earnings and to inherit property from estates.<sup>24</sup> This would help redress some of the inequalities faced when married women separated. The proposal was eventually recognised as sections 25 and 26 of the Matrimonial Causes Act 1857. In February 1857, Lord Brougham introduced the first Married Women's Property Bill into the House of Lords. This was a radical measure that proposed to grant all married women the rights of *feme sole*, including allowing married women to legally enter into contracts in their own name, create their own separate wills and keep their own earnings.<sup>25</sup> The House of Commons followed suit in the middle of the year when Sir Erskine Perry and Richard Monckton Milnes introduced a similar Bill in order to remedy the financial exploitation of married women found in the doctrine of coverture.<sup>26</sup>

Lord St Leonard sensed that the Bill would be a highly divisive issue. The proposal undermined the longstanding doctrine of coverture by disrupting the traditional gender roles of male headship and female submission.<sup>27</sup> Therefore, he successfully persuaded his colleagues to support his amendment to the Divorce Bill that provided the rights of *feme sole* to separated married women, whilst avoiding the potentially divisive issue of coverture.<sup>28</sup> Lawrence Stone argues that there was a sense of irony in the success of Lord St Leonard's proposal, because it may have inadvertently curtailed the extension of this right to all women irrespective of marital status.<sup>29</sup> Indeed, Parliament was able to dismiss further calls to extend the right of *feme sole* for a few decades. Lord St Leonard described the Bills that called for an extension of *feme sole* to all married women as a "mischievous one", and believed that his amendment was measured "going as far as was desirable, and so prevent a

23 Cretney 2003: 92-93; Holcombe 1983: 18.

24 HL Debate 26 Jun 1856, vol 142, cols 1968-1969.

25 HL Debate 3 Feb 1857, vol 144, cols 605-619.

26 HC Debate 14 May 1857, vol 145, cols 266-281.

27 HL Debate 25 May 1857, vol 145, col 800.

28 *Idem* at cols 806-808.

29 Stone 1995: 376.

greater evil".<sup>30</sup> The scope of *feme sole* was contained in order to ameliorate concerns over the abolition of the doctrine of coverture.

The campaign for married women's property rights initially subsided, but the matter soon re-emerged in the 1860s, which saw the emergence of a feminist campaign for the recognition of women's legal rights.<sup>31</sup> The issue of married women's property rights was tied with the wider campaign for women's suffrage. Mill campaigned for the suffrage of women based on his belief that women should have equal rights to vote in order to enable women to effectively protect themselves against injustice and to broaden parliamentary representation that was hitherto ruled by an oligarchy.<sup>32</sup> In 1869, Mill wrote in *The Subjection of Women* that "[t]o have a voice in choosing those by whom one is to be governed, is a means of self-protection due to everyone".<sup>33</sup> Mill was also the Member for City and Westminster in the House of Commons between 1865 and 1868 and used his position to advocate for the feminist cause in Parliament.<sup>34</sup>

In 1866, Prime Minister Lord John Russell's Reform Bill was brought before Parliament. This was the most significant electoral law reform since the Reform Act 1832, which introduced "an essentially modern electoral system based on rigid partisanship and clearly articulated political principle".<sup>35</sup> Leading feminist Barbara Leigh Smith Bodichon,<sup>36</sup> who was acting on the advice of Mill, successfully collected 1,499 signatures for a petition calling for the right of women to vote.<sup>37</sup> Mill introduced an amendment to the Reform Bill by calling for "men" to be replaced with "persons," thereby attempting to enfranchise women on the same footing as men.<sup>38</sup> However, the amendment was comfortably defeated by 196 votes to 73.<sup>39</sup> Many MPs were uncomfortable with a radical change to the gender roles in Victorian society, particularly suggestions of equal rights for women. Samuel Laing encapsulated the feelings of those who were opposed to the Bill: "Now ... he hoped the day was far distant when our women should become masculine and our men effeminate."<sup>40</sup> Although women were not given the vote, the Bill later passed into law as the Reform Act 1867. This enfranchised a significant proportion of the English borough electorate from 500,000 in 1866 to 1.25 million in 1871.<sup>41</sup>

30 HL Debate 25 May 1857, vol 145, col 800.

31 Shanley 1989: 50.

32 Mill 1984b: 301.

33 *Ibid.*

34 Kinzer, Robson & Robson 1992: 5.

35 Phillips & Wetherell 1995: 412.

36 In 1857, Barbara Leigh Smith married Eugène Bodichon and took his surname.

37 Holcombe 1983: 115.

38 HC Debate 20 May 1867, vol 187, cols 817-829.

39 *Idem* at cols 843-845.

40 *Idem* at col 840.

41 Parry 1993: 217.

A more organised feminist movement was created with the formation of women's suffrage committees across England. The issue of women's suffrage raised deeper questions about the wider legal rights of women in English society. During the 1860s the women's suffrage movement gave rise to a renewed campaign for married women's property rights.<sup>42</sup> Mill provided the philosophical framework and political impetus for the recognition of married women's property rights. Ann Robson states that "Mill's contribution to the women's movement cannot be overestimated".<sup>43</sup> Mill argued that women should be entitled to the legal right to possess their own property regardless of their marital status.<sup>44</sup> He believed that the denial of property rights to married women was unjustly oppressive. Moreover, he saw it as unfair that the husband should possess total legal rights to matrimonial property in order to perpetuate the legal fiction of coverture. Mill states:

She can do no act whatever but by his permission, at least tacit. She can acquire no property but for him; the instant it becomes hers, even if by inheritance, it becomes *ipso facto* his. In this respect the wife's position under the common law of England is worse than that of slaves in the laws of many countries: by the Roman law, for example, a slave might have his peculium, which to a certain extent the law guaranteed to him for his exclusive use.<sup>45</sup>

Feminists played an important role in campaigning for reform of married women's property rights in the 1870s and 1880s. The first generation of feminists led by Bodichon in the 1850s failed to bring about any meaningful reform of married women's property rights, and they disbanded soon after the Matrimonial Causes Act 1857 was passed.<sup>46</sup>

The second generation of feminists who campaigned for women's property rights was led by Elizabeth Clarke Wolstenholme Elmy, Josephine Grey Butler, Emilia Jessie Boucherett and Ursula Mellor Bright. They were actively involved in the second incarnation of the Married Women's Property Committee established in 1868.<sup>47</sup> This time the feminist activities were centred in Manchester rather than London. The second generation proved to be far more successful in bringing about change. The Married Women's Property Committee pushed legislative reform of married women's property law in 1870 and 1882 through organising petitions and lobbying politicians. For example, the Married Women's Property Committee brought pressure to bear in the period prior to the passing of the Married Women's Property Act 1870. They presented twenty nine petitions containing a total of 33,000 signatures to Parliament in 1868.<sup>48</sup> In 1869, they submitted a further 113 petitions

42 Smith 2007: 8.

43 Robson 1990: 101.

44 Mill 1984b: 296-297.

45 *Idem* at 284.

46 Holcombe 1983: 108.

47 *Idem* at 118-147.

48 *Idem* at 145.

with more than 42,000 signatures to the House of Commons and seventy petitions containing a total of 30,000 signatures to the House of Lords.<sup>49</sup> This was the beginning of an effective and organised feminist movement in the late nineteenth century.

In 1868, George Shaw-Lefevre introduced the Married Women's Property Bill in the House of Commons that was co-sponsored by Mill and Russell Gurney for its first reading.<sup>50</sup> The Bill was briefly considered by the select committee, but it was recommended that another select committee be appointed after the upcoming general election.<sup>51</sup> By the end of the year, the Liberals had defeated the Conservatives in the general election with William Ewart Gladstone becoming Prime Minister. Although Mill lost his own seat, there were many newly elected MPs who were sympathetic to the advancement of women's rights.<sup>52</sup> In 1869, Gurney re-introduced the same Bill that Shaw-Lefevre presented a year before during the first reading, which was co-sponsored by Jacob Bright and Thomas Emerson Headlam.<sup>53</sup> The Bill proposed to grant married women equal rights to own property in their own name at common law. A rival Bill was presented by an opponent of reform Henry Cecil Raikes in an attempt to block Gurney's Bill. Raikes proposed to extend equitable rights over property for all married women. The aim was to provide legal recognition to a settlement that had been made upon marriage of which the local municipal authority would become the trustee of the wife's property.<sup>54</sup> The proposal was complicated and would have failed to recognise the common law property rights of married women. In 1870, both of the Bills were considered by the House of Commons during their second reading, but Raikes' Bill was defeated and Gurney's Bill prevailed.<sup>55</sup>

The Bill then proceeded to the House of Lords where it was met with overwhelming disapproval. Lord Penzance, who had been Judge Ordinary of the Court for Divorce and Matrimonial Causes for seven years at the time of the debate, believed that the Bill "would subvert the principle on which the marriage relation had hitherto stood, and its tendency would be to cause increased discord and separation".<sup>56</sup> Lord Westbury also opposed the Bill and was concerned that married women would be tempted to purchase jewellery at the expense of looking after their children.<sup>57</sup> The tone of these comments reflect the sense of paranoia felt by many parliamentarians at the time. Their main concern was to uphold the traditional gender roles that had hitherto perpetuated discrimination against women over matrimonial property and divorce. On the other hand, *The Times* recognised that the Bill was non-partisan and

49 *Ibid.*

50 HC Debate 21 Apr 1868, vol 191, cols 1015-1025.

51 Holcombe 1983: 168.

52 *Idem* at 169.

53 HC Debate 25 Feb 1869, vol 194, col 331.

54 HC Debate 21 Jul 1869, vol 198, cols 402-403.

55 HC Debate 8 May 1870, vol 201, cols 878-892.

56 HL Debate 21 Jun 1870, vol 202, col 603.

57 *Idem* at cols 606-608.

“it simply secures for the poor a justice already attained by the rich”.<sup>58</sup> The Bill was significantly amended during the Lords Select Committee. The amended Bill allowed married women to keep their earnings, saving deposits and some property coming from estates of a deceased.<sup>59</sup> The original Bill became almost unrecognisable. It was now a compromise, albeit one skewed in the favour of the conservatives rather than the reformers.

When the Bill returned to the House of Commons for debate, Gurney – acting on the advice of the Married Women’s Property Committee – urged that the amended Bill be accepted so there was at least some progress made on this issue.<sup>60</sup> The British suffragette Lydia Becker critically remarked that the 1870 parliamentary debates “throughout assumed that the matter must be settled according to men’s notions of what was just and expedient for women”.<sup>61</sup> Although the amendments had enraged supporters of the original Bill, Gurney decided that it would be better to get some legislation passed on married women’s property rights rather than risk delay and face another embarrassing defeat. However, Gurney defiantly stated that “legislation on this subject could not end with this Bill, as there would yet remain much to be remedied”.<sup>62</sup> The Bill passed the House of Commons and received Royal Assent on 9 August 1869. The Married Women’s Property Act 1870 allowed all married women to keep their wages and earnings gained from their own exercise of literary, artistic and scientific skill,<sup>63</sup> inherit minor legacies received on intestacy of next of kin for up to £200,<sup>64</sup> and retain savings kept on deposit.<sup>65</sup> The Act was Mill’s last major successful law reform, but the change was only a piecemeal law and there was still a demand for the absolute right of *feme sole* for all married women.

## 2 2 The Married Women’s Property Act 1882

The 1870 Act fell short of the expectation of the reformers and they continued to campaign for complete legal rights to property for married women. Although Mill passed away in 1873, the campaign for comprehensive law reform of married women’s property continued by feminists and progressive politicians alike. His influence provided the political drive and the philosophical rationale to continue the push for law reform. A minor amendment was made in 1874 under the Married Women’s Property Act (1870) Amendment Act 1874. The Act made the husband liable for the wife’s pre-nuptial debts and assets he had received upon entering into

58 Anon 1870b: 9.

59 HL Debate 18 Jul 1870, vol 203, cols 395-401.

60 HC Debate 3 Aug 1870, vol 203, col 1488.

61 Becker 1872: 57.

62 *Ibid.*

63 Married Women’s Property Act 1870, s 1.

64 *Idem* s 7.

65 *Idem* ss 2-5.

the marriage. This remedied the situation of creditors being unable to recover the debts of separated married women. Hence, it became known as the “Creditor’s Bill”.<sup>66</sup> The 1870 and 1874 Acts dampened the push for reform in the 1870s. It was only during the early 1880s that the legal status of married women’s property rights was once again challenged. In 1880, William Gladstone’s Liberal Party won the general election and ended six years of Conservative rule under the premiership of Benjamin Disraeli. This proved to be a turning point as the Liberals were more sympathetic than the Conservatives to reforming married women’s property law. Although Gladstone opposed the introduction of civil divorce<sup>67</sup> and women’s suffrage,<sup>68</sup> he was willing to tolerate reform on matrimonial property rights for women as long as it did not have a major impact on the traditional structures of family life.<sup>69</sup>

In May 1880, the Liberal MP John Hinde Palmer introduced a Married Women’s Property Bill for England.<sup>70</sup> His colleague George Anderson introduced an equivalent Bill for Scotland on the same day.<sup>71</sup> The Bills both proposed to grant all married women the full rights of *feme sole* in England and Scotland respectively. The Bills would have entitled married women to legally own property, to enter into contracts where a married woman could sue and be sued, and to be personally liable for her own torts. In June 1880, both of the Bills were heard together for their second reading. The Attorney-General, Sir Henry James (later Lord James of Hereford) expressed the Liberal Government’s support for the Bills in principle, which helped both Bills pass the second reading without division.<sup>72</sup> Despite a promising start, the Bills did not proceed any further. Sir George Campbell, a Scottish Liberal MP, became the leading opponent of matrimonial property law reform based on his socially conservative views on gender roles. He entered a notice of opposition to the Bills and successfully forced their withdrawal under the half-past-twelve rule.<sup>73</sup> This was a procedural device that prohibited the introduction of opposed business past 12.30 am.<sup>74</sup> Since it was late in the parliamentary year, the issue of married women’s property rights was not revisited again in 1880.

The year 1881 proved to be more auspicious for campaigners of married women’s property rights. The Scottish and English Married Women’s Property Bills were introduced together again and both passed their second readings without division on 13 January 1881.<sup>75</sup> The Scottish Bill quickly passed both houses of

66 Shanley 1989: 104.

67 Kha & Swain 2016: 318.

68 Van Wingerden 1999: 52.

69 Isba 2006: 151-152.

70 HC Debate, 21 May 1880, vol 252, col 293.

71 *Idem* at col 295.

72 HC Debate, 9 Jun 1880, vol 252, cols 1533-1545.

73 Shanley 1989: 122.

74 Vieira 2015: 92.

75 HC Debate, 13 Jan 1881, vol 257, cols 706-714.

Parliament and received Royal Assent on 18 July 1881, becoming the Married Women's Property (Scotland) Act 1881. The Scottish Bill was able to pass speedily with the support of the Lord Advocate, John McClaren.<sup>76</sup> However, the English Bill was obstructed from further debate by socially conservative opponents in the 1881 parliamentary debates. This led to the continued postponing of the Bill until it was forced to be withdrawn. Despite the temporary setbacks, the Lord Chancellor, Lord Selborne, gradually came to support the introduction of the English Bill. This was somewhat surprising as he was known to have opposed married women's property rights in a speech he delivered to the Judicial Society in 1870.<sup>77</sup> Lee Holcombe states "[t]hat the conservative-minded Lord Chancellor had become a convert to the cause of women's rights is extremely doubtful".<sup>78</sup> Selborne's support for married women's property rights stemmed from his desire to see the consolidation of the 1870 and 1874 Acts.<sup>79</sup> In fact, Selborne introduced the Scottish Bill, whereby he outlined that the Bill's purpose was to "carry out the same process of enlarging the wives' legal rights".<sup>80</sup> Selborne realised that further matrimonial property law reform was an inevitable consequence of the introduction of the 1870 Act and wider law reform.

In February 1882, Selborne introduced the English Bill into the House of Lords, where it was finally adopted as official Government policy.<sup>81</sup> This was a turning point as Selborne was determined to finally get the law passed by introducing the Bill to the House of Lords himself. This was a clear example of the critical importance of Government support in bringing about reform, especially on issues of social sensitivity. The Government's support for the Bill was largely uncontroversial and its passing was "almost unobserved by the mass of the persons whom it will affect".<sup>82</sup> The Bill passed its second reading in March,<sup>83</sup> and its third reading in the House of Lords in May.<sup>84</sup> The Bill was then sent to the House of Commons. In June, Osborne Morgan introduced the Bill into the House of Commons on behalf of the Government.<sup>85</sup> It passed its second reading without division and without debate.<sup>86</sup> During the third reading, Sir George Campbell spoke against the Bill claiming it will create a "social revolution," but he was met with laughter and cries of "Oh, oh!" and "No, no!"<sup>87</sup> The Bill passed its third reading with minor amendments on 15 August.<sup>88</sup>

76 HC Debate, 29 Apr 1881, vol 260, cols 1523-1525.

77 Anon 1870a: 10.

78 Holcombe 1983: 198.

79 HL Debate, 7 Mar 1882, vol 267, col 316.

80 HL Debate, 27 May 1881, vol 261, col 1439.

81 HL Debate, 14 Feb 1882, vol 266, col 626.

82 Anon 1882: 9.

83 HL Debate, 7 Mar 1882, vol 267, cols 316-317.

84 HL Debate, 19 May 1882, vol 269, col 1066.

85 HC Debate, 2 Jun 1882, vol 269, col 1932.

86 HC Debate, 8 Jun 1882, vol 270, col 464.

87 HC Debate, 11 Aug 1882, vol 273, cols 1603-1605.

88 HC Debate, 15 Aug 1882, vol 273, cols 1844-1847.

It received royal assent on 18 August, becoming the Married Women's Property Act 1882.

Although the 1882 Act allowed married women to have the same rights of *feme sole* as unmarried women, the Act did not completely redress the issues of married women's property rights.<sup>89</sup> The rights of a married woman were described using the language of equity. Section 1(2) of the Married Women's Property Act 1882 states that "[a] married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her *separate property* on any contract".<sup>90</sup> Therefore, the wife's liability was proprietary rather than personal in contracts and torts.<sup>91</sup> Furthermore, the husband was still liable for the torts of the wife committed by her during coverture under common law.<sup>92</sup>

Nonetheless, the reform of married women's property rights through the 1870 and 1882 Acts fulfilled the longstanding dreams of Mill and many English feminist campaigners. The law reform of married women's property rights had a domino effect and challenged other areas where women faced sex discrimination in the law, such as the double standard in the grounds for divorce. William Cornish states that "[i]n truth, both [the 1870 and 1882] Acts were the upshot of sharp warfare about the very core of Victorian marriage".<sup>93</sup> Indeed, equality on the issue of matrimonial property law between husbands and wives challenged the existing double standards under divorce law. If a married woman could have equal access to matrimonial property, then the question why women could not have equal access to divorce would inevitably be asked. The shifting views on the legal rights of women and the growing frustrations with divorce law contributed to the growing clamour for divorce reform.

### 3 Divorce law reform

Mill strongly advocated for the introduction of civil divorce, but more importantly the liberty to dissolve marriage on equal terms. In the 1850s, there were more and more individuals calling for the reform of the divorce law.<sup>94</sup> In a letter dated November 1855, John Stuart Mill strongly advocated for civil divorce to be introduced on equal terms:

My Opinion on Divorce is that though any relaxation of the irrevocability of marriage would be an improvement, nothing ought to be ultimately rested in, short of entire freedom on both sides to dissolve this like any other partnership.<sup>95</sup>

89 Cretney 2003: 97-100; Holcombe 1983: 201-202; Shanley 1989: 124-130.

90 Emphasis added.

91 The Married Women's Property Act 1882 represented the fusion of common law and equity. See Holcombe 1983: 202.

92 *Edwards v Porter* [1925] AC 1.

93 Cornish 2010: 766.

94 Kha & Swain 2016: 309-310.

95 Mill 1972: 500.

Once the Matrimonial Causes Act 1857 came into effect, it ended the *de facto* prohibition of divorce and saw the introduction of civil divorce. However, it created a double standard between husbands and wives. A husband only had to prove his wife's adultery as a prerequisite for the dissolution of marriage. On the other hand, a wife not only had to prove the husband's adultery, but also "aggravated enormity". This included incest, bigamy, cruelty to the wife, depravity of the husband (eg rape, sodomy and bestiality) or the desertion of the husband for at least two years without reasonable excuse.<sup>96</sup> Despite the enormous legal barriers, approximately forty percent of divorce petitioners in the period between 1858 and 1900 were wives.<sup>97</sup> Mill held a unique view of marriage as the ultimate expression of a friendship between a man and a woman. It is important to appreciate his views on marriage, since it ultimately influenced his views on the grounds for divorce.

### 3 1 Marriage as friendship

Harriet Taylor was married to Mill and she had a profound role in ideologically influencing Mill, which is most evident in the publications that they published on the topic of women's rights either separately or together.<sup>98</sup> Mill published *On Marriage* in 1833, where he argued that it was absurd to talk of equality while marriage remained indissoluble.<sup>99</sup> In the same year, Taylor also wrote a publication entitled *On Marriage*, where she criticised the societal expectation of women's roles in society.<sup>100</sup> She argued that women were merely seen as objects that gain their usefulness in marriage, and criticised the law's failure to remedy women "who suffer most from its evil" by denying individuals the legal right to divorce.<sup>101</sup> In both of these publications, Mill and Taylor advocated for women's equality and law reform in the areas of marriage and divorce. They also co-authored the *Papers on Women's Rights* between 1847 and 1850, and advocated for "the negation of all distinctions among persons, grounded on the accidental circumstance of sex".<sup>102</sup>

Mill was clearly influenced by his wife and begins *The Subjection of Women* with a radical polemic:

That the principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.<sup>103</sup>

96 Matrimonial Causes Act 1857, s 27.

97 Cretney 2003: 169.

98 Mendus 1994: 292.

99 Mill 1984a: 42.

100 Taylor 1984: 376.

101 *Ibid.*

102 Taylor Mill and Mill 1984: 386.

103 Mill 1984b: 261.

This was a very provocative statement in the nineteenth century. In theory, women were free to marry whomever they pleased under the law. In *Hyde v Hyde and Woodmansee*, Sir James Wilde (later Lord Penzance) delivered a landmark judgment: “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>104</sup> In practice, however, women had little choice in the matter despite the supposed voluntariness. As Shanley points out, “women were not free within marriage, and they were not truly free not to marry”.<sup>105</sup> Women had no access to university education, they were practically barred from most professions and they could not own property in their own right. Therefore, women were dependent on men in order to sustain a living.

Mill describes the consequences of marriage for women as “the primitive state of slavery lasting on”.<sup>106</sup> Sir James Wilde’s allusion to “Christendom” in his judgment is indicative of the prevailing view at the time that marriage was seen as upholding a particular Christian view of society. The fate of women is predestined in the Bible: “[T]hy desire shall be to thy husband, and he shall rule over thee.”<sup>107</sup> The Biblical understanding of women was later interpreted in a self-fulfilling prophecy by the renowned English eighteenth century jurist Sir William Blackstone into the doctrine of coverture: “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”<sup>108</sup> Therefore, in Victorian England a woman had almost no independent legal rights as these were subsumed under her husband.

Mill was more controversial for challenging the traditional understanding of gender roles rather than for advocating for law reform. Mill believed that “society in equality is its normal state”.<sup>109</sup> He argued that the marriage laws were in a primitive state. In order for society to evolve and reach its desired point, it must recognise the equality of women.<sup>110</sup> Therefore, Mill was critical of the idea of a natural hierarchy, whereby men were viewed as the ontological superiors of women. He rejected the assertion that female subjugation by men was “natural.” Instead, he argued that this was the result of the political and social apparatuses of control, which made women dependent on men based on men’s paranoia of gender equality threatening their dominant standing in law and society.<sup>111</sup> These views were considered to be rather

104 (1866) LR 1 P&D 130, 133.

105 Shanley 1998: 401.

106 Mill 1984b: 264.

107 Genesis 3:16 (KJV).

108 Blackstone 2016: 284.

109 Mill 1984b: 294.

110 *Idem* at 336.

111 *Idem* at 340.

radical during his time.<sup>112</sup> Mill also believed the subjection of women could not be extirpated through the law alone, but legal change could help reform the treatment of women and the thinking of men. Some of the moral excesses of Victorian England marriage law included the legality of marital rape, the paucity of domestic violence legislation and the husband exercising almost unbridled rights over his wife's property.

Mill envisaged marriage as a friendship and believed such an outlook would help ameliorate men's fears of gender equality in the law and improve the overall status of women.<sup>113</sup> Mill's writings helped to invigorate the campaign for the reform of married women's property rights. According to Stephen Cretney, Mill's publication of *The Subjection of Women* in 1869 "gave powerful intellectual stimulus to the reform movement".<sup>114</sup> The initial aim was to separate the property of husbands and wives. However, this was not achieved until the enactment of the Married Women's Property Act 1882. The Married Women's Property Act 1870 was amended when it was a Bill so much so it only granted married women the legal right to own property earned from their employment,<sup>115</sup> saving deposits<sup>116</sup> and small legacies.<sup>117</sup> A major theme in *The Subjection of Women* is friendship as "the ideal of marriage" with marriage serving as "a foundation for solid friendship".<sup>118</sup> Although Mill supported law reform in the areas of marriage and divorce, he always believed in the institution of marriage playing an important role in fostering the relationship between a man and a woman and for the upbringing of children. Mill states that "[m]arriage is not an institution designed for a select few ... The tie of affection and obligation to a wife and children is very strong with those whose general social feelings are strong".<sup>119</sup> Marriage as a friendship was a creative way to challenge traditional understandings of marriage.

The concept of marriage was not only a legal one but also religious. The Church of England once had an exclusive monopoly over the solemnisation of marriages. This was promoted by Lord Hardwicke's Marriage Act 1753, which gave sole legal recognition to marriages solemnised by the Church of England.<sup>120</sup> All other marriages solemnised by other denominations, except Quaker and Jewish marriages,<sup>121</sup> were not legally recognised until the Marriage Act 1836 came into effect. The Marriage

112 Ward & McGlynn 2016: 229.

113 Mill 1984b: 334.

114 Cretney 2003: 96.

115 Married Women's Property Act 1870, s 1.

116 Married Women's Property Act 1870, s 2.

117 A married woman was only entitled to "any sum of money not exceeding two hundred pounds under any deed or will". See Married Women's Property Act 1870, s 7.

118 Mill 1984b: 334.

119 *Idem* at 287.

120 Probert 2009: 228-229.

121 *Idem* at 232-236.

Act 1836 created civil weddings and allowed for marriages to be solemnised in Nonconformist and Roman Catholic churches.<sup>122</sup> Thus, it repealed the Marriage Act 1753 and ended the Church of England's monopoly over the solemnisation of marriage. Marriage was traditionally seen as a sacramental union that promoted a Christian understanding of the role of men and women on earth. "The Form of Solemnization of Matrimony" in the *Book of Common Prayer* of 1662 describes "the causes for which Matrimony was ordained":

First, It was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name. Secondly, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body. Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.<sup>123</sup>

This can be summed up as marriage having the purpose of giving birth and raising children, safeguarding against sexual relations outside of marriage and for the mutual promotion of the welfare of the married couple. Despite the enactment of the Marriage Act 1836, the civil definition of marriage still echoed the spirit of the Book of Common Prayer. Sir James Wilde in *Hyde v Hyde and Woodmansee* relied on the Christian faith as a source of doctrine to deny the recognition of polygamous relationships in "Christendom".<sup>124</sup> On the one hand, marriage was still seen as fundamentally an act grounded in Christian dogma. On the other hand, the description of marriage as something that can be "contracted" indicated the spirit of the times. Marriage was beginning to be characterised by the law as a secular contractual relationship in consonance with Reformation thinking rather than as a sacramental union,<sup>125</sup> which could be ended on the grounds of matrimonial causes for divorce in the Matrimonial Causes Act 1857.

It was within this legal historical context that Mill broke with the *status quo* by writing *The Subjection of Women*. Friendship was never seen as a pre-requisite to marriage, merely an incidence of marriage for those fortunate to marry a person of compatible disposition. Mill simply emphasised the humanity of marriage rather than ecclesiastical sacramentality or the judicial legality of marriage. Marriage as friendship was seen as promoting harmony in the private sphere that would naturally manifest itself in the public square. Mill rejected the dichotomy of public and private. Gender equality in the law could not occur if men acted brutally towards their wives in the private sphere, while acting with superficial civility in the public square. Mill believed that the "true virtue of human beings is the fitness to live

122 Cretney 2003: 9.

123 Church of England 2004: 302.

124 (1866) LR 1 P&D 130.

125 Rheinstein 1972: 22-23.

together as equals".<sup>126</sup> Thus, without friendship in marriage, law reform in the area of sex discrimination would be impossible and society could not progress. Mill's ideas on marriage quite naturally shaped his beliefs on divorce, namely that where friendship in a marriage no longer exists the relationship should be allowed to be dissolved through divorce.

### 3 2 The sexual double standard of divorce

Mill gave an equivocal response on the question of whether domestic violence was a suitable ground for a wife to divorce her husband:

I am not saying that she ought to be allowed this privilege. That is a totally different consideration. The question of divorce, in the sense involving liberty of remarriage, is one into which it is foreign to my purpose to enter.<sup>127</sup>

Mill seems to be more concerned with the social issue of female subjugation than the legal issue of sex discrimination. Susan Mendus argues that Mill's contemporaries in the nineteenth century viewed him as "both moral and radical," but twentieth century commentators confuse Mill as simply an apologist for liberalism who saw law reform as a means of achieving his ends.<sup>128</sup> Another possible explanation for Mill's reticence on the topic of women's divorce may be found in his belief in the importance of marriage. Although Mill condemned the legal nature of marriage as "the only actual bondage known to our law",<sup>129</sup> he held a positive view of a good marriage as the ultimate friendship that celebrates a loving companionship and facilitates a stable family life for children.<sup>130</sup> If friendship no longer existed in a marriage, then Mill believed "the happiness of both parties would be greatly promoted by a dissolution of marriage".<sup>131</sup> Mill expressed the latent views held by many in society that an irretrievably broken down marriage should be dissolved. However, Mill was a marginal voice during the debate on the reform of divorce law.

In 1854, Barbara Leigh Smith published a provocative pamphlet calling for divorce and matrimonial property law reform.<sup>132</sup> She criticised the doctrine of coverture: "A woman's body belongs to her husband; she is in his custody, and he can enforce his right by a writ of *habeas corpus*."<sup>133</sup> She was also critical of the inaccessibility of divorce: "The expenses of only a common divorce bill are between six hundred and seven hundred pounds, which makes the possibility of release from

126 Mill 1984b: 294.

127 *Idem* at 285.

128 Mendus 1994: 287.

129 Mill 1984b: 323.

130 *Idem* at 334.

131 Mill 1984a: 45.

132 Leigh Smith 1856.

133 *Idem* at 4.

the matrimonial bond a privilege of the rich.”<sup>134</sup> Her efforts attracted support from the Law Amendment Society after Liberal MP Richard Monckton Milnes submitted Leigh Smith’s pamphlet to the Law Amendment Society.<sup>135</sup> The society was founded by Lord Brougham in 1844<sup>136</sup> to support his law reform agenda,<sup>137</sup> and to make a case for reform through its quarterly journal *The Law Review*.<sup>138</sup>

In 1856, the Law Amendment Society endorsed Leigh Smith’s pamphlet and published a report supporting the right of married women to own property and to legally enter contracts in line with their own aim to fuse equity and common law.<sup>139</sup> Married women could already practically own property as a beneficiary under a trust, but the status of *feme sole* under law would give married women separate legal personality and financial independence.<sup>140</sup> The Law Amendment Society believed that the inconsistency between equity and common law found in matrimonial property law only made the law unnecessarily complicated,<sup>141</sup> and supported the introduction of civil divorce with the goal of making divorce more accessible as a matter of legal equality.<sup>142</sup> Early feminists supported the introduction of civil divorce and making divorce more accessible on the grounds of equality.<sup>143</sup> Leigh Smith, along with like-minded friends Mary Howitt and Bessie Parkes, established the *English Women’s Journal* (1858-1864) and the Langham Place Circle (1858-1866) to push the cause of “liberal feminism”.<sup>144</sup>

Mill was disappointed with the divorce law – at least in principle. He criticised the law reform as “feeble attempts” to repress domestic violence.<sup>145</sup> More significantly, Mill found the hypocrisy of the law particularly abject: “If she leaves her husband, she can take nothing with her, neither her children nor anything which is rightfully her own. If he chooses, he can compel her to return, by law, or by physical force.”<sup>146</sup> In order to remedy some of the issues mentioned, Mill believed that courts should intervene and determine the best interests of the child in the event of an unamicable

134 *Idem* at 6. The figure is supported by the findings of the Campbell Commission. See “The First Report of the Commissioners Appointed by Her Majesty to Enquire into the Law of Divorce, and More Particularly into the Mode of Obtaining Divorces A Vinculo Matrimonii” *British Parliamentary Papers* 40 (1852-1853): 270.

135 Shanley 1989: 34.

136 Law Amendment Society 1856; Shanley 1989: 34-35.

137 Garratt 1935: 326.

138 *Idem* at 332.

139 Law Amendment Society 1856.

140 Holcombe 1983: 38.

141 Law Amendment Society 1852.

142 Wroath 1998: 130.

143 *Ibid.*

144 Murdoch 2014: 8; Herstein 1993.

145 Mill 1984b: 287.

146 *Idem* at 285.

divorce,<sup>147</sup> and women should have the legal right to own property.<sup>148</sup> In regards to divorce, Mill recognised a remedy in the judiciary: “It is only legal separation by a decree of a court of justice, which entitles her to live apart.”<sup>149</sup> However, the establishment of the Court for Divorce and Matrimonial Causes did not immediately provide access to divorce for all married couples. Cretney describes the unpopularity of the divorce law in late Victorian England:

By the beginning of the twentieth century the hardship and injustice of the law was widely appreciated, whilst the fact that the law seemed to enshrine a double standard of morality ... was an easy target for the increasingly vocal feminist movement.<sup>150</sup>

## 4 Conclusion

Mill was an *agent provocateur* on issues of morality, yet it outwardly seems inexplicable that his stance on moral issues did not translate into a practical argument on broadening the grounds for divorce. Indeed, Mill was one of the greatest activist philosophers in the nineteenth century, outraging most social commentators of his day with the idea that women could and should be equal to men. Mill’s reticence on this topic can be explained based on his confidence in the institution of marriage. Mill’s view of marriage as friendship is a positive one that celebrates a loving relationship that helps foster a stable family life for children. Mill believed that if friendship did not exist in marriage, then “the happiness of both parties would be greatly promoted by a dissolution of marriage”.<sup>151</sup> It is important to remember that divorce was stigmatised and rare in Victorian England. Although Mill condemned the legal and social nature of marriage as “the only actual bondage known to our law”,<sup>152</sup> he never condemned the institutional idea of marriage itself. Instead, he extolled the virtues of marriage in solemnising the serendipity of friendship between a man and a woman.

Mill believed that gender equality was a moral issue that could be remedied to some extent through law reform. However, he believed that law reform could only go so far. Discrimination against women in the law was merely a symptom of the wider sexist thinking that was pervasive among men in nineteenth century Victorian England. Change had to occur in the minds of men. The treatment of women had to

147 Mill 1972: 500.

148 Mill 1984b: 296-297.

149 *Idem* at 285.

150 Cretney 2003: 202.

151 Mill 1984a: 45.

152 Mill 1984b: 323.

improve in order to change the litany of injustices both legal and moral perpetrated against women. *The Subjection of Women* was Mill's call for reform on the mistreatment of women in law and society. In particular, the call to end the doctrine of coverture, the abolition of the double standards to the grounds for divorce, and the legal right for women to own property. These ideas formed the foundation for law reform from the late nineteenth century onwards. Although Mill was radical in his day, he still upheld the institution of marriage and encouraged the traditional division of labour with men as breadwinners and women as the primary caretakers of children. Mill believed in gender equality, but also recognised the importance of men and women playing their complimentary roles.

## BIBLIOGRAPHY

- Anon (1870a) "The rights and liabilities of married women" *The Times* 27 January: 10
- Anon (1870b) "The session has received the second of its three warnings" *The Times* 1 June: 9
- Anon (1882) "Quietly, and almost unobserved by the mass of the persons whom it will affect" *The Times* 17 August: 9
- Becker, Lydia (1872) "The political disabilities of women" *The Westminster Review* 41(1): 50-70
- Blackstone, William (2016) in David Lemmings (ed) *Commentaries on the Laws of England*, vol 1 (Oxford)
- Capaldi, Nicholas (2004) *John Stuart Mill: A Biography* (Cambridge)
- Church of England (2004) *The Book of Common Prayer* (Cambridge)
- Cornish, William (2010) "Wives: The quest for civil independence" in William Cornish, J Stuart Anderson, Ray Cocks, Michael Lobban, Patrick Polden & Keith Smith (eds) *The Oxford History of the Laws of England* vol 13 (Oxford): 757-766
- Cretney, Stephen (2003) *Family Law in the Twentieth Century* (Oxford)
- Dacey, AV (1905) *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London)
- Eisenstein, Zillah (1981) *The Radical Future of Liberal Feminism* (New York)
- Garratt, GT (1935) *Lord Brougham* (London)
- Glassman, Peter (1985) *J.S. Mill: The Evolution of a Genius* (Gainesville)
- Hale, Matthew (1739) *The History of the Pleas of the Crown* vol 1 (London)
- Herstein, Sheila (1993) "The Langham Place Circle and Feminist Periodicals of the 1860s" *Victorian Periodicals Review* 26: 24-27
- Himmelfarb, Gertrude (1974) *On Liberty and Liberalism* (New York)
- Holcombe, Lee (1983) *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto)
- Holmes, Ann Sumner (1995) "The double standard in the English divorce laws, 1857-1923" *Law and Social Inquiry* 20(2): 601-620

## JOHN STUART MILL ON MATRIMONIAL PROPERTY AND DIVORCE LAW REFORM

- Isba, Anna (2006) *Gladstone and Women* (New York)
- Kha, Henry & Warren Swain (2016) "The enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates" *J of Legal History* 37(3): 303-330
- Kinzer, Bruce, Ann Robson & John Robson (1992) *A Moralist in and Out of Parliament: John Stuart Mill at Westminster, 1865-1868* (Toronto)
- Law Amendment Society (1852) "Fusion of Law and Equity" *Law Review and Quarterly J of British and Foreign Jurisprudence* 16(1): 184-189
- Law Amendment Society (1856) "Report of the Personal Laws Committee (of the Law Amendment Society) on the Laws Relating to the Property of Married Women" *The Westminster Review* 66: 331-360
- Leigh Smith, Barbara (1856) *A Brief Summary, in Plain Language, of the Most Important Laws Concerning Women: Together with a Few Observations Thereon* (London)
- Mendus, Susan (1994) "John Stuart Mill and Harriet Taylor on women and marriage" *Utilitas* 6(2): 287-299
- Mill, John Stuart (1972) "Letter 253" in Francis Mineka and Dwight Lindley (eds) *The Later Letters of John Stuart Mill 1849-1873 Part I*, vol 14 (Toronto): 499-501
- Mill, John Stuart (1977) "On liberty" in John Robson (ed) *Essays on Politics and Society*, vol 18 (Toronto): 213-310
- Mill, John Stuart (1984a) "On Marriage" in John Robson (ed) *Essays on Equality, Law, and Education, Collected Works*, vol 21 (Toronto): 35-50
- Mill, John Stuart (1984b) "The subjection of women" in John Robson (ed) *Essays on Equality, Law, and Education, Collected Works*, vol 21 (Toronto): 259-340
- Miller, Dale (2017) "Mill on the family" in Christopher MacLeod and Dale Miller (eds) *A Companion to Mill* (Chichester): 472-487
- Morales, Maria (2005) "The corrupting influence of power" in Maria Morales (ed) *The Subjection of Women: Critical Essays* (Lanham): 98-113
- Morales, Maria (2007) "Rational freedom in John Stuart Mill's feminism" in Nadia Urbinati & Alex Zakaras (eds) *J.S. Mill's Political Thought: A Bicentennial Reassessment* (Cambridge): 43-65
- Murdoch, Lydia (2014) *Daily Life of Victorian Women* (Santa Barbara)
- Parry, Jonathan (1993) *The Rise and Fall of Liberal Government in Victorian Britain* (New Haven)
- Phillips, John A & Charles Wetherell (1995) "The Great Reform Act of 1832 and the political modernization of England" *The American Historical Review* 100(2): 411-436
- Probert, Rebecca (1999a) "The controversy of equality and the Matrimonial Causes Act 1923" *Child and Family Law Quarterly* 11: 33-42
- Probert, Rebecca (1999b) "The double standard of morality in the Divorce and Matrimonial Causes Act 1857" *Anglo-American Law Review* 28: 73-86
- Probert, Rebecca (2009) *Marriage Law and Practice in the Long Eighteenth Century* (Cambridge)
- Reeves, Richard (2007) *John Stuart Mill: Victorian Firebrand* (London)
- Rheinstein, Max (1972) *Marriage Stability, Divorce and the Law* (Chicago)

- Robson, Ann (1990) “No laughing matter: John Stuart Mill’s Establishment of Women’s Suffrage as a Parliamentary Question” *Utilitas* 2(1): 88-101
- Shanley, Mary Lyndon (1986) “Suffrage, protective labor legislation, and married women’s property laws in England” *Signs* 12(1): 62-77
- Shanley, Mary Lyndon (1989) *Feminism, Marriage, and the Law in Victorian England, 1850–1895* (Princeton)
- Shanley, Mary Lyndon (1998) “The subjection of women” in John Skorupski (ed) *The Cambridge Companion to Mill* (Cambridge): 396-422
- Smith, Harold (2007) *The British Women’s Suffrage Campaign, 1866-1928* (Harlow)
- Stone, Lawrence (1995) *Road to Divorce: England 1530-1987* (Oxford)
- Stretton, Tim & Krista Kesselring (2013) “Introduction: Coverture & Continuity” in Tim Stretton & Krista Kesselring (eds) *Married Women and the Law: Coverture in England and the Common Law World* (Montreal): 3-23
- Taylor, Harriet (1984) “On Marriage” in John Robson (ed) *Essays on Equality, Law, and Education, Collected Works*, vol 21 (Toronto): 375-377
- Taylor Mill, Harriet and John Stuart Mill (1984) “Papers on Women’s Rights” in John Robson (ed) *Essays on Equality, Law, and Education, Collected Works*, vol 21 (Toronto): 378-392
- Tong, Rosemarie (2009) *Feminist Thought* (Boulder)
- Tulloch, Gail (1989) *Mill and Sexual Equality* (Hemel Hempstead)
- van Wingerden, Sophia A (1999) *The Women’s Suffrage Movement in Britain, 1866-1928* (New York)
- Vieira, Ryan (2015) *Time and Politics: Parliament and the Culture of Modernity in Britain and the British World* (Oxford)
- Ward, Ian & Claire McGlynn (2016) “Women, law and John Stuart Mill” *Women’s History Review* 25(2): 227-253
- Wroath, John (1998) *Until They are Seven: The Origins of Women’s Legal Rights* (Winchester)

## Case law

*Edwards v Porter* [1925] AC 1

*Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

## Legislation

Married Women's Property Act 1870 (33 & 34 Vict, c 93)

Married Women's Property Act (1870) Amendment Act 1874 (37 & 38 Vict, c 50)

Married Women's Property (Scotland) Act 1881 (44 & 45 Vict, c 21)

Married Women's Property Act 1882 (45 & 46 Vict, c 75)

Matrimonial Causes Act 1857 (20 & 21 Vict, c 85)

Matrimonial Causes Act 1923 (13 & 14 Geo V, c 19)

Reform Act 1832 (2 & 3 Wm IV, c 45)

Reform Act 1867 (30 & 31 Vict, c 102)

# THE OMISSIONS IN *OPPELT*

Duard Kleyn\*  
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## ABSTRACT

In this article, we explore the relationship between the legal historical method and the constitutionally transformative approach to the study of the South African private law. For this purpose, we provide an analysis of the decision in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC). In that case the claimant suffered a spinal injury during a rugby match and claimed damages on the basis of various omissions of medical professionals who failed to treat him timeously. These omissions lead to the claimant becoming quadriplegic. A legal historical analysis is conducted on the Aquilian liability for omissions and how the law related to omissions has developed in modern South African law. Thereafter the transformative constitutional approach to the South African private law – and more specifically the South African law of delict – is taken up. We conclude by considering the omissions in the *Oppelt* case, not only in the sense of conduct, but also in the sense that the Supreme Court of Appeal omitted to consider relevant constitutional considerations and the Constitutional Court omitted to thoroughly grapple with the common-law principles related to the case.

**Keywords:** Delict; omissions; wrongfulness; legal historical method; transformative approach to private law

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## 1 Introduction

In this article we wish to honour Professor Johan Scott who recently retired from the Department of Private Law at the University of Pretoria's Faculty of Law. Duard Kleyn is one of Professor Scott's earlier doctoral candidates who conducted an analysis of the place and purpose of the *mandament van spolie* in South African law from an historical perspective.<sup>1</sup> Emile Zitzke is Professor Scott's last doctoral candidate at the University of Pretoria who investigated the interplay between the South African Constitution and the law of delict.<sup>2</sup> The historical method and, since democratisation, constitutional approaches to South African private law have formed a substantial part of Professor Scott's research interest.<sup>3</sup> In this piece we hope to show that the possibility might exist for an amalgamation of these two approaches to the study of South African law. We shall illustrate this possibility by conducting an analysis of the decision in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*.<sup>4</sup>

In that matter the seventeen-year-old claimant suffered serious low-velocity spinal injury during a rugby game. He was taken to Westfleur Hospital within the hour. At Westfleur, the attending doctor followed a hospital protocol which required that patients had to be referred to Groote Schuur Hospital before they could be sent to the special spinal-injury unit at Conradie Hospital. Mr Oppelt arrived at Groote Schuur more than two hours after the injury had occurred. At Groote Schuur the attending doctors referred him to the spinal-injury unit at Conradie where he had arrived by ambulance nearly twelve hours after the injury had been sustained. He underwent treatment at Conradie Hospital more than twelve hours after the injury. The victim alleged that the attending doctors at the various hospitals had *omitted* to provide punctual and apposite medical treatment to him, resulting in quadriplegia. The legal history and the constitutional implications of the doctors' omissions which caused the victim patrimonial harm is our focus in this article.

Our discussion is premised on four assumptions. Firstly, that the *lex Aquilia* forms the foundation of the rules of the South African law of delict that relates to the determination of liability for the causing of patrimonial harm.<sup>5</sup> Secondly, that it is the implication of the Constitutional Court's judgment in the seminal case of *Carmichele v Minister of Safety and Security*<sup>6</sup> that a proper understanding of the

1 Kleyn 1986. Regarding the historical method in South African law see, eg, Van Zyl 1972; Van Zyl 1979: 3-4.

2 Zitzke 2016. Regarding the importance of a constitutional approach to the South African common law see, eg, Davis & Klare 2010.

3 See, eg, Scott 1976 compared to Scott 2011, Scott 2012, Scott 2013 and Scott 2015.

4 2016 (1) SA 325 (CC).

5 See, eg, Zimmermann 1990: 921 & 960; Loubser & Midgley 2012: 27; Neethling & Potgieter 2015: 8-12.

6 2001 (4) SA 938 (CC) at par 55.

common-law position on a specific issue is necessary in order to decide whether and how to develop the common law. Thirdly, that *Carmichele* also stipulates that it is both desirable and necessary for the common law to be developed along constitutional lines to secure, albeit to a limited extent, the transformation of the common law.<sup>7</sup> Fourthly, the implication of the first three assumptions is that both the historical and transformative approaches to private-law research should work in tandem with, rather than in opposition to, each other.

Therefore, in section 2 a brief historical overview of the law relating to omissions in the context of the law of Aquilian liability will be provided. Section 3 will then concisely consider the impact that the Constitution had in the determination of liability for omissions with specific reference to the *Oppelt* cases. Thereafter section 4 will provide some tentative thoughts on the importance of integrating the historical and constitutional methods for the flourishing of the South African common law.

## 2 Historical background: The *lex Aquilia*

### 2.1 General

Ulpian<sup>8</sup> tells us that the *lex Aquilia* is a plebiscite that was passed by the assembly of the plebs (the *concilium plebis*) and that it was proposed by a *tribunus plebis* called Aquilius. It is unknown who Aquilius was or when he lived.<sup>9</sup> Ulpian<sup>10</sup> also points out that the *lex Aquilia* “*derogavit*” all earlier laws as well as those contained in the *Twelve Tables* dealing with unlawful damage and that it is not necessary to refer to those laws any more. There is some controversy as to what exactly Ulpian meant with “*derogavit*” and it is suggested that to read it as “repealed”, in the strict sense of the word, might be misleading as it seems that some of the earlier laws still remained.<sup>11</sup> This, however, does not detract from the significance of the *lex Aquilia*. Given the impact of the *lex Aquilia*, a vexing question has always concerned the dating of the Act. Although this issue remains uncertain, the majority opinion favours the year 287 BC.<sup>12</sup>

The *lex Aquilia* was not a lengthy or complicated piece of legislation. It consisted of three chapters,<sup>13</sup> which would today rather be viewed as paragraphs.

7 *Carmichele* at par 54.

8 D 9 2 1 1.

9 Voet 9 2 1.

10 D 9 2 1 *pr.*

11 See Voet 9 2 2 who refers to D 4 7 7 1 where Paul and Labeo refer to the old law of cutting down trees by stealth that is still in force. Zimmermann 1990: 953 mentions “repealed and superseded”. See, also, Van den Heever 1944: 15-20; Lawson 1950: 4-6; De Zulueta 1953: 209; Buckland 1966: 585; Du Plessis 2010: 319.

12 This opinion is often based on the last secession of the plebs and the adoption of the *lex Hortensia* in 287 BC which made plebiscites binding on the whole Roman population, plebs and patricians alike. See Zimmermann 1990: 955; Lawson 1950: 4; Thomas 1975: 227; Van den Heever 1944: 7.

13 See Inst 4 3 for a brief overview and Voet 9 2 4.

For our purposes, chapters one and three are of importance and will be discussed below. Their content has been preserved by Gaius and Ulpian. Chapter two (which concerned the *adstipulator*) had fallen into disuse in classical Roman law.<sup>14</sup>

There are many interesting issues in respect of the *lex Aquilia*, for example the calculation of the penalty or amount of damages, but the focus in this section will be on the nature of the human conduct (direct, indirect and omissions) as well as the corresponding legal remedies. The original version of the *lex Aquilia* did not provide a general act that covered all forms of unlawful damage. Its scope was quite narrow. Therefore, it was extended over the years by the praetor, the jurists and legislation, as will become clear from the discussion below.

## 2.2 Chapter 1 of the *lex Aquilia*

In his *Institutes*, Gaius provides us with the content of the first chapter of the *lex Aquilia*. If someone unlawfully kills (*occidere*) another's slave or four-footed animal of the class of cattle (*pecus*), he will be condemned to pay the owner the highest value thereof in that year.<sup>15</sup> This account of Gaius was taken over in Justinian's *Digest*<sup>16</sup> and *Institutes*.<sup>17</sup> *Pecus* denote grazing animals which are kept in herds such as sheep, goats, horses, mules and, according to Labeo, also pigs (thus, farm animals). Later elephants and camels were also included. Dogs and wild beasts such as bears, lions and panthers do not fall within the category of *pecus*.<sup>18</sup> It is clear, as De Zulueta points out, that chapter one "is limited in primitive style to a particular kind of injury done to particular kinds of property".<sup>19</sup>

In the original version of the *lex Aquilia*, *occidere* denoted direct conduct or physical action.<sup>20</sup> Gaius explains it as damage done with one's own body (*corpore suo*).<sup>21</sup> This approach is also followed in Justinian's *Institutes*.<sup>22</sup> In the *Digest* it is mentioned that there will be liability for *occidere* only if the death resulted as it were by one's own hand (*quasi manu*).<sup>23</sup> Direct conduct is also explained as damage by the body to the body, or rather to a thing (*corpore corpori*).<sup>24</sup>

14 D 9 2 27 4; Inst 4 3 12. Regarding the second chapter of the *lex Aquilia*, see Zimmermann 1990: 954 and Lawson 1950: 6-7, the latter who regards this whole matter as obscure. See, also, Van den Heever 1944: 4-5.

15 G 3 210: "Damni iniuriae actio constituitur per legem Aquiliam, cuius primo capite cautum est (ut), si quis hominem alienum alienamue quadrupedem quae pecudum numero sit iniuria occiderit, quanti ea res in eo anno plurimi fuit, tantum domino dare damnetur."

16 D 9 2 2pr.

17 Inst 4 3pr.

18 D 9 2 2 2; Inst 4 3 1.

19 De Zulueta 1952: 210. See, also, Van Warmelo 1971: 335.

20 Kaser 1971: 620.

21 G 3 219.

22 Inst 4 3 16.

23 D 9 2 51pr.

24 Kaser 1971: 620; Buckland 1966: 589; Van Warmelo 1971: 337; Van Zyl 1977: 340.

The *Digest* provides us with some examples of causing death directly, for example hitting the victim with a sword or stick or another weapon or kicking with the foot;<sup>25</sup> when someone throws another off a bridge and the victim is killed by the impact or drowns;<sup>26</sup> or when a doctor operates negligently on a slave.<sup>27</sup> Also if a midwife administers a drug with her own hands from which the woman dies,<sup>28</sup> or if someone administers a drug by force or persuasion in a drink or by injection.<sup>29</sup>

In all of the above cases the remedy is the direct Aquilian action, the *actio legis Aquiliae*. However, it seems that during the first century AD chapter 1 started to be extended,<sup>30</sup> and liability was also recognised where death was not caused *corpore suo* but where the assailant still furnished the cause of death. The jurists referred to this indirect form of conduct as *causam mortis praestare*<sup>31</sup> or *mortis causam praebere*.<sup>32</sup> Celsus<sup>33</sup> says that it matters a great deal whether death was caused by *occidere* or *mortis causam praestare* because in the latter case the *actio legis Aquiliae* does not apply. For indirect conduct the praetor granted *actiones utiles* or *actiones in factum*.<sup>34</sup>

Gaius mentions that *actiones utiles* are granted in cases where one locks up another's slave or *pecus* and starves them to death; or drives another's beast so hard that it perishes; or persuades another's slave to climb a tree or go down a well and he falls and is killed.<sup>35</sup> The same examples are mentioned in Justinian's *Institutes*<sup>36</sup> but there it is pointed out that if neither the direct action nor the *actio utilis* will lie, the *actio in factum* can be awarded. Another example is the case where a midwife gives a drug to a woman who takes it herself, then an *actio in factum* is granted.<sup>37</sup> Likewise when someone scares the horse which another's slave is riding so that the horse throws the slave into the river and he dies, an *actio in factum* is granted,<sup>38</sup> also when someone holds a slave while another kills him the *actio in factum* will be granted against the one who held the slave,<sup>39</sup> or against the person who drives someone else's oxen over a precipice.<sup>40</sup>

25 D 9 2 7 1.

26 D 9 2 7 7.

27 D 9 2 7 8.

28 D 9 2 9 *pr.*

29 D 9 2 9 1.

30 Lawson 1950: 22-23.

31 Ulpian D 9 2 9 *pr.*

32 Ulpian D 9 2 11 1.

33 D 9 2 7 6.

34 Kaser 1971: 621.

35 G 3 219.

36 Inst 4 3 16.

37 D 9 2 9 *pr.*

38 D 9 2 9 3.

39 D 9 2 11 1.

40 D 9 2 53.

## 2 3 Chapter 3 of the *lex Aquilia*

Ulpian provides a brief summary of the content of chapter three.<sup>41</sup> In all other cases apart from the killing of a slave or *pecus*, if anyone does damage to another by wrongfully burning (*urere*), breaking (*frangere*) or destroying (*rumpere*) property, he must be condemned to pay to the owner whatever the property was worth in the most recent thirty days. Gaius explains that it implies that an action is provided under this chapter if a slave or *pecus* is wounded or if a dog or wild beast is killed or wounded which cases are not covered by chapter 1.<sup>42</sup> Ulpian furthermore remarks that all the early jurists (*omnes veteres*) understood *rumpere* to mean *corrumpere* (spoil)<sup>43</sup> and he refers to Celsus who was of the opinion that *corrumpere* therefore included breaking and burning.<sup>44</sup> Gaius<sup>45</sup> says that *corrumpere* implies damage in any way for example also cutting, bruising, spilling *et cetera*. Zimmerman,<sup>46</sup> therefore, concludes that the interpretation of *rumpere* as *corrumpere* rendered “the other words contained in chapter three, ‘*urere*’ and ‘*frangere*’ somewhat redundant”. Hence chapter 3 was more advanced and elastic in comparison to chapter 1 which was quite rigid.<sup>47</sup>

As was the case in chapter 1, it is assumed that under chapter 3 only direct physical human conduct was initially required to establish liability, similar to Gaius’ *corpore suo* requirement.<sup>48</sup> In these cases the direct action under the *lex Aquilia*, the *actio legis Aquiliae* was granted. The Digest furnishes us with the following examples: To singe a slave with a lighted torch;<sup>49</sup> to burn down an orchard or a house;<sup>50</sup> to burn down a block of flats;<sup>51</sup> to pour wine away or spoil it;<sup>52</sup> to tear or stain clothes;<sup>53</sup> to pour someone else’s millet or corn in a river;<sup>54</sup> to strike a slave or a mare who then suffers a miscarriage;<sup>55</sup> to overload a mule so that parts of its body are fractured;<sup>56</sup> and to sink a merchant ship.<sup>57</sup>

41 D 9 2 27 5. “Tertio autem capite ait eadem lex Aquilia: ‘Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto.’” See, also, G 3 217 and 218; Inst 4 3 13.

42 G 3 217; see, also, Inst 4 3 13.

43 D 9 2 27 13.

44 D 9 2 27 16. De Zulueta 1952: 212 suggests that this interpretation of *rumpere* was settled well before the end of the Republic.

45 G 3 217.

46 Zimmermann 1990: 985.

47 De Zulueta 1952: 210.

48 Kaser 1971: 620; Zimmermann 1990: 983.

49 D 9 2 27 6.

50 D 9 2 27 7.

51 D 9 2 27 8.

52 D 9 2 27 15.

53 D 9 2 27 18.

54 D 9 2 27 19.

55 D 9 2 27 22.

56 D 9 2 27 23.

57 D 9 2 27 24.

Later the indirect conduct was also recognised to give rise to liability under chapter 3 and in such cases an *actio utilis* or *in factum* was granted. If one man lighted a furnace and another watched over it carelessly so that the house burns down, the *actio utilis* lies against him who watched over it carelessly.<sup>58</sup> When someone has an oven against a party wall and the wall burns down, the *actio in factum* will apply.<sup>59</sup> If someone sows weeds or wild oats in another's crops and spoils them, the *actio in factum* under the *lex Aquilia* will apply.<sup>60</sup> When someone damages my aqueduct, therefore my materials, because I do not lead the water over my land, an *actio utilis* should be granted.<sup>61</sup> If someone cuts a ship's mooring rope and the ship is consequently lost, an *actio in factum* applies.<sup>62</sup> If a municipal magistrate seizes someone's cattle as security and then starves them to death by not allowing the owner to feed them, an *actio in factum* will be granted.<sup>63</sup>

## 2.4 Damage to freemen

The purpose of the *lex Aquilia* was to deal with the delict of wrongful damage to property (*damnum iniuria datum*) which included damage to slaves and inanimate things (*res*). It did not cover the injury of or damage to the body of a freeman. But, as Lawson<sup>64</sup> points out, a slave was a Janus-like character as a slave was a person and a thing, and although injuring a slave was covered by the *lex Aquilia* it also amounted to a personal injury. The position of the slave served as a bridge to the injuring of a freeman eventually being covered by the *lex Aquilia*. Just like an owner could recover damages for the injury of his slave, a *paterfamilias* could recover his loss of profits for his son's services when the son's eye was damaged.<sup>65</sup> Finally, as Ulpian<sup>66</sup> mentions, a freeman can recover for an injury to himself under the *lex Aquilia* with an *actio utilis*. He cannot use the direct action because a freeman is not deemed to be the owner of his own limbs. Du Plessis,<sup>67</sup> remarks that "this appears to be a major departure from the original scope of the *lex Aquilia*" and that it is a post-classical development, possibly as late as Justinian.

In the preceding discussion of types of human conduct and corresponding remedies under the *lex Aquilia*, the distinction between the original direct conduct and the later recognition of indirect forms of conduct in classical law as well as

58 D 9 2 27 9.

59 D 9 2 27 10.

60 D 9 2 27 14.

61 D 9 2 27 32.

62 D 9 2 29 5.

63 D 9 2 29 7.

64 Lawson 1950: 21.

65 D 9 2 7pr.

66 D 9 2 13pr.

67 Du Plessis 2010: 327.

damage to a freeman were pointed out. It is clear that in the case of direct conduct, the direct action provided by the *lex Aquilia* (the *actio legis Aquilia*) was awarded. For indirect conduct and for the injuring of a freeman *actiones utiles* and *in factum* were awarded under the *lex*. These were praetorian actions *ad exemplum legis Aquiliae*.<sup>68</sup> The difference between these two kinds of extended actions is not clear and the texts are not consistent in this regard. Gaius<sup>69</sup> remarks that when the damage was done *corpore suo* the direct action lies, but when damage was done in other ways, the *actio utilis* is awarded. In Justinian's *Institutes*<sup>70</sup> – as in Gaius' *Institutes* – the direct action for damage done *corpore suo* is mentioned, and the *actio utilis* for damage caused in other ways, but then also the action *in factum* is mentioned when the damage was not caused by the body to a thing – for example when someone releases another's slave from his bonds and the slave runs away. The *Digest*<sup>71</sup> contains a general statement that in cases of damage not covered by the *lex Aquilia*, an *actio in factum* is awarded. Romanists mention that the difference between *actiones utiles* and *in factum* is vague but that it is rooted in the intricacies of the law of procedure, specifically with the transition from the *legis actio* procedure to the *formula* procedure.<sup>72</sup>

## 2.5 The *omissio*

In the sections above we encountered examples of direct and indirect conduct under chapters 1 and 3 of the *lex Aquilia*. We must now turn to the omission, which is an important issue for this contribution. Romanists are unanimous in their view that there existed no Aquilian liability in Roman law for a mere omission.<sup>73</sup> Beinart<sup>74</sup> also points out that the terms *commissum* or *omissum* are not used in the *Digest* texts.

When discussing human conduct under the *lex Aquilia*, some authors even refrain from using the term *omissio* (or omission). They only distinguish between direct conduct *corpore corpori* and other forms of conduct for which the supplementary actions were awarded.<sup>75</sup> However, there are those who use the term omission, like Zimmerman, but he emphasises the fact that there was no liability for a mere omission; it had to be preceded by previous direct conduct.<sup>76</sup> The examples he has in mind are where someone locks up another's slave or cattle and then starves them to death<sup>77</sup> or takes a slave's clothes away and he then freezes to death,<sup>78</sup> or the doctor

68 Kaser 1971: 503-505.

69 G 3 219.

70 Inst 4 3 16.

71 D 9 2 33 1.

72 Kaser 1971: 621; Buckland 1966: 589; Lawson 1950: 24-27; Van den Heever 1944: 22.

73 Kaser 1971: 503; Kemp 1978: 121ff; Zimmermann 1990: 1043; Lawson 1950: 26; Beinart 1949: 141.

74 Beinart 1949: 143.

75 Buckland 1966: 589; Thomas 1975: 368; Du Plessis 2010: 327-328.

76 Zimmermann 1990: 979-980. See, also, Thomas 1975: 273; Van Zyl 1977: 393.

77 D 3 219; and see D 9 2 29 7.

78 D 19 5 14 1.

who fails to provide postoperative care.<sup>79</sup> But some authors consider these as types of indirect conduct.<sup>80</sup>

The focus will now shift to post-Roman developments. Since the reception of Roman law in Western Europe, the law in practice as regards *damnum iniuria datum* gradually diverted from the rigid constraints of the Roman *lex Aquilia*. This was brought about by the influence of canon law, Germanic law and the approach of the practitioners.<sup>81</sup> This eventually prompted Christian Thomasius to write his *Larva Legis Aquiliae Detracta Actioni de Damno Dato Receptae in Foris Germanorum* (the abbreviated translation being “the mask of the *lex Aquilia* torn off”) in the early eighteenth century in which he maintained that the action they used for damage done was as different from the Aquilian action as a bird from a four-footed beast.<sup>82</sup> The law in practice departed from the dogmatic ballast of Roman times and did away with the distinctions between direct and indirect conduct, direct actions and *actiones utiles* and *in factum*. It was time for a new theoretical framework, a “*mores hodiernae*” which was provided by the natural lawyers.<sup>83</sup> As part of this dogmatic approach, Hugo Grotius proclaimed in his *De Iure Belli ac Pacis*, eighty years before Thomasius’s *Larva*, that any conduct, whether a commission or an omission that causes damage because of fault should be made good.<sup>84</sup> This was the “principal and fundamental proposition” of the natural law of delict<sup>85</sup> and based on the second of Ulpian’s *praecepta iuris* “*alterum non ledere*”.<sup>86</sup>

The stream of natural law of delict found its way into the modern codifications of law of the eighteenth and nineteenth centuries. Most important were articles 1382 and 1383 of the French Code Civil. These articles proclaimed that damage caused by any conduct gave rise to liability if there was fault. Lawson<sup>87</sup> remarks that “[a]rticle 1382 which enunciates a general liability for fault, reads like a manifesto, and it is doubtless to its quality of simple inevitability that it has owed its remarkable extension throughout the world”.

79 Inst 4 3 6.

80 Van Warmelo 1971: 338-339; Thomas 2000: 371.

81 Zimmermann 1990: 1031; Lawson 1950: 28.

82 Hewett 2000: par 1; Lawson 1950: 28.

83 Zimmermann 1990: 1031.

84 De Groot 1625: 2 17 1: “Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo quod aut homines communiter, aut pro ratione certae qualitatis facere debent. Ex tali culpa obligatio naturaliter oritur, si damnum datum est, nempe ut id resarciatur.”

85 See Zimmermann 1990: 1032 who also refers to the views of Samuel Puffendorf and Christian Thomasius in this regard.

86 D 1 1 10 1. See, also, Kleyn & Van Niekerk 2014.

87 Lawson 1950: 29. Article 1382 of the French Code Civil (1804) reads as follows: *Tout fait quelconque de L'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*. See, also, art 2042 of the Italian Code Civile (1942). The German Civil Code or Bürgerliches Gesetzbuch (1900) deviates from the gist of the French Code, see, eg, Lawson 1950: 29. See, further, Kemp 1978: 558ff.

Fault was always the basis of Aquilian liability. Zimmermann<sup>88</sup> remarks that liability based on fault in the nineteenth century “acquired the status of an unquestionable axiomatic truth”. But with the recognition of a mere omission giving rise to delictual liability, the issue of *iniuria* (unlawfulness) also became important. When must one act? Legal theory dictated that one must act when there is a duty on one to act and, when one culpably neglects that duty, delictual liability arises. The duty to act depends on perceptions of public policy, common sense and terms of modern conceptual thinking.<sup>89</sup>

But not all lawyers departed from the Roman approach to Aquilian liability. Voet in his *Commentarius ad Pandectas* (1734) did not subscribe to the idea of liability on account of a mere omission. He followed the traditional Roman law approach that liability for an omission can only arise when there was prior positive conduct, for instance where a doctor did an operation but then abandoned curative treatment or when one took a duty upon him, like looking after a fire, but did not fulfil it.<sup>90</sup> Voet had a great influence in South African law. However, not all Roman-Dutch lawyers shared Voet’s views. Mattheus II, for instance, was of the opinion that both a commission and an omission could lead to liability.<sup>91</sup>

## 2 6 The *lex Aquilia* and omissions in South African law leading up to *Oppelt*

In the early twentieth century South African judges in the Appellate Division strictly observed the prior-conduct rule in the determination of the actionability of omissions. In *Halliwell v Johannesburg Municipality*<sup>92</sup> the municipality laid cobblestones in Johannesburg’s city centre but failed to maintain those stones. When Mr Halliwell crossed the cobblestone path with his horse carriage on a Christmas morning, his horse stumbled on the poorly-maintained road and Mr Halliwell was sent, flying like Santa Clause, through the air. The court held that the municipality was liable for the failure to maintain the cobblestone road which led to Mr Halliwell’s injuries. This was explicitly done on the basis of the prior-conduct rule. This rule was also employed in the case of *Silva’s Fishing Corporation v Maweza*,<sup>93</sup> where the owner of a boat sent fishermen out to sea (the prior positive conduct) but when the boat stopped working, the owner did nothing to save the fishermen (the subsequent omission). The boat owner was held liable for his omission.

88 Zimmermann 1990: 1034.

89 *Idem* 145; Lawson 1950: 30-31; Beinart 1949: 158.

90 Voet 9 2 3. Voet maintains that it would be too harsh for a person to be held liable on wrongdoing for the slightest fault of omission. See, further, Kemp 1978: 144.

91 *De Criminibus* (1644) *Ad Lib* XLVIII Tit V Caput 6, 5.

92 1912 AD 659.

93 1957 (2) SA 256 (A).

The absolute prominence of the prior-conduct rule as the only ground on which liability for an omission could be established came to an end with the decision in *Regal v African Superslate*.<sup>94</sup> In the judgment of Steyn CJ, the Appellate Division noted that the prior-conduct rule was not the only basis on which an omission would be actionable. It was explained that one neighbour owes a legal duty to prevent harm to another neighbour stemming from the former's property, if it would be reasonable and practicable to do so. This ultimately stems from the idea that if one is in control of dangerous property, one would be held liable in delict for harm that flows from the failure to prevent the danger from materialising. For the first time, the Appellate Division noted that the prior-conduct rule and the rule related to the control of dangerous property are both grounds on which the wrongfulness of an omission can be established. Before this decision, the prior-conduct rule featured in academic commentaries under the heading of "conduct", meaning that the element of conduct would be missing in a delictual action if there was no prior conduct. In *Regal* it was made plain that the conduct element could be satisfied by simply showing the factual existence of an act or an omission. The wrongfulness of the omission was then established by means of the prior-conduct rule or the rule related to the control of dangerous property. The principle from *Regal* was later also applied in the case of *Minister of Forestry v Quathlamba* where a fire started on one property, the owner of that property failed to control or contain the fire, and the fire spread to a neighbouring property.<sup>95</sup>

A much more radical extension of the rules related to the wrongfulness of omissions featured in the seminal case of *Minister van Polisie v Ewels*.<sup>96</sup> In that case police officers passively stood by and watched as a fellow police officer brutally assaulted a civilian. The question was whether the passive police officers acted wrongfully in their failure to put a stop to the assault. The Appellate Division referred to the above cases to explain that mere omissions are not regarded as wrongful. However, the wrongfulness of an omission could be shown by invoking the prior-conduct rule and the control-of-dangerous-property rule. The court held that those two rules are just two of many factors to consider in determining the wrongfulness of omissions. On our own translation, the court laid down the following general principle for establishing the wrongfulness of omissions:<sup>97</sup>

It appears that the stage of development has been reached where an omission is regarded as wrongful conduct also when the circumstances of the case are of such a nature that the omission does not only attract moral outrage but also that the legal convictions of the community require that the omission should be regarded as wrongful and that the suffered harm ought to be compensated by the person who failed to act positively. To determine

94 1963 (1) SA 102 (A).

95 1973 (3) SA 69 (A).

96 1975 (3) SA 590 (A).

97 *Ewels* at 597.

whether there is wrongfulness, it is, in a given case of an omission, thus not about the “negligence” of the *bonus paterfamilias*, but about the question whether, in light of all the facts, a legal duty existed to act reasonably.

This *dictum* laid the foundation for understanding wrongfulness as a mixture of considerations related to morality (perhaps a call to natural law), the legal convictions of the community (a concept explained more thoroughly below), the appropriateness of compensation as a remedy for given harm-causing conduct, and the existence or not of a legal duty to act reasonably. In *Ewels*, considerations that weighed in favour of a finding of wrongfulness of the omission of the passive policemen included the legal duty placed on the police to protect citizens from harm, the special relationship between police officers and the public, and the fact that the passive policemen were in a position to exercise authority or control over their assaultive colleague.

After *Ewels*, it could be said that a new era dawned for the South African law of wrongful omissions. Even though the older grounds for wrongful omissions were not eradicated, their “sole prominence” seemed to have faded for the most part. In the case of *Cape Town Municipality v Bakkerud*<sup>98</sup> similar facts to those of *Halliwell* arose, but the court considered a multitude of factors (ultimately related to the imminence of the risk posed by a poorly maintained sidewalk) that could show that the legal convictions of the community required the imposition of a legal duty on the municipality. In the case of *Administrateur Transvaal v Van der Merwe*,<sup>99</sup> where the facts of *Minister of Forestry* were mimicked, the court considered the control-of-dangerous-property rule as only one factor to establish the wrongfulness of an omission. Other factors highlighted by the court include the balancing of interests of the wrongdoer, the victim and the community; the relationship between the disputing parties (presumably borrowed from *Ewels*); the social consequences of the conduct and holding the alleged wrongdoer liable in a case such as this; whether there were reasonably practical measures by which the harm could successfully be averted; and the cost of such measures. Clearly, it can be seen that the policy considerations taken into account in interrogating the wrongfulness of omissions is ever-expanding.

However, even the Supreme Court of Appeal is not always consistent in how it applies the multitude of factors for determining the wrongfulness of omissions. In the more recent decision of *Za v Smith*,<sup>100</sup> a man visited a private game reserve and made his way up a mountain covered by snow. He ventured too far to the slope of the mountain and plummeted to his death. The question faced by the Supreme Court of Appeal was whether the owner of the game reserve’s failure to prevent harm to Mr Za was wrongful. The court ultimately disposed of the wrongfulness enquiry by quite simply relying on the old rule stating that a person in control of

98 2000 (3) SA 1049 (SCA).

99 1994 (4) SA 347 (A).

100 2015 (4) SA 574 (SCA).

potentially dangerous property owes a duty to others to prevent that harm from occurring. As such, the omission in this case was wrongful. Talk about other factors did not prominently feature in this judgment. Thus, it would seem that sometimes the wrongfulness of an omission could be established on a single factor that points in that direction, while in other cases, a more complex grappling with a variety of factors that must be weighed and balanced is employed.

The more complex, multi-layered approach to establishing the wrongfulness of omissions seems to have the approval of the Constitutional Court. After *Ewels*, the judgment that had the biggest influence on the law of wrongful omissions is the Constitutional Court's decision in *Carmichele*. In *Carmichele*, the claimant was attacked by a dangerous criminal with a horrendous track record of perpetrating gender-based violence. The problem was that the criminal appeared in court shortly before his attack on the claimant, where the prosecutor did not oppose his release pending the trial, despite the criminal's history. Thus, the prosecutor failed to bring relevant information before the court that probably would have secured his detention pending the trial. Furthermore, various members of the South African Police Service did not listen to the claimant's concerns that the criminal was roaming free on the streets of her neighbourhood and did not take steps to ensure his removal from a society filled with potential victims. After being unsuccessful in the lower courts, Ms Carmichele appealed to the Constitutional Court where the issue of wrongfulness dominated the Court's attention. The *Carmichele* judgment is important in many respects, but for current purposes, we simply draw attention to two aspects of the judgment that may be deduced from the following quotation on the enquiry into the wrongfulness of omissions:<sup>101</sup>

This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the "spirit, purport and objects of the Bill of Rights" and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

The first striking aspect of this quotation is that the wrongfulness has to be understood in constitutional terms. As much, the Constitution gave content to the "legal convictions of the community" first expressed in the case of *Ewels*. In *Carmichele*'s case, her constitutional rights and the corresponding constitutional obligations imposed on the state and its various functionaries were relevant considerations. These rights and duties are supported by international law.<sup>102</sup> Secondly, the Constitutional Court alluded to the fact that the determination of wrongfulness is a balancing exercise

101 *Carmichele* at par 43.

102 *Idem* at par 47ff.

where competing considerations in favour of and against wrongfulness must be considered.

The multi-layered balancing exercise in the wrongfulness enquiry was most clearly communicated in later police-liability cases (the facts of which all involve some type of failure on the side of the police that leads to physical harm being suffered by innocent victims). In the case of *Minister of Safety and Security v Van Duivenboden*,<sup>103</sup> the Supreme Court of Appeal held that the wrongfulness enquiry involves weighing up factors in favour of a positive finding of wrongfulness and those factors that would resist a positive finding of wrongfulness. Factors in favour of wrongfulness in that case included the victim's constitutional rights that the state was under a duty to protect; statutory duties placed on the police to protect victims; and the constitutional norm of accountability that required an appropriate remedy to be given to victims of state malfeasance. However, contrariwise the Supreme Court of Appeal noted that the norm of accountability would not always require a private-law duty being placed on the state – if there were other effective remedies available to the victim, those remedies should be pursued before an award for damages in delict is sought; if the victims of state negligence constitute an indeterminate segment of society, a court would be less likely to find wrongfulness; and if the award for damages would impede the efficiency of government then a court would be less likely to establish wrongfulness.

Variations on this balancing exercise were observed in the cases of *Van Eeden v Minister of Safety & Security (Women's Legal Trust Amicus Curiae)*,<sup>104</sup> *Minister Van Veiligheid en Sekuriteit v Geldenhuys*,<sup>105</sup> *Minister of Safety and Security v Hamilton*,<sup>106</sup> *Minister of Safety and Security v Rudman*,<sup>107</sup> *Minister of Safety and Security v Venter*,<sup>108</sup> and *Mashongwa v Passenger Rail Agency of South Africa*.<sup>109</sup> What becomes clear from these cases is that the “wrongfulness” of an omission is not simply determined with reference to whether a legal norm or rule has been breached.<sup>110</sup>

A different tune is apparently sung in the context of non-state wrongdoers. In *Van Duivenboden*,<sup>111</sup> the Supreme Court of Appeal explicitly stated that state actors and non-state actors are not treated the same insofar as the determination of the wrongfulness of an omission is concerned:

103 2002 (6) SA 431 (SCA).

104 *Ibid.*

105 2004 (1) SA 515 (SCA).

106 2004 (2) SA 216 (SCA).

107 2005 (2) SA 16 (SCA).

108 2011 (2) SACR 67 (SCA).

109 2016 (3) SA 528 (CC).

110 See, in this regard, *South African Hang and Paragliding Association v Bewick* 2015 3 SA 449 (SCA).

111 *Van Duivenboden* at par 19 (footnotes omitted).

The reluctance to impose liability for omissions is often informed by a *laissez faire* concept of liberty that recognizes that individuals are entitled to ‘mind their own business’ even when they might reasonably be expected to avert harm, and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy, might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm.

The reluctance to impose positive duties on private actors can be seen in recent cases such as *Tsogo Sun Holdings v Qing-He Shan*,<sup>112</sup> where it was held that casinos (and by extension perhaps other public accommodations too) are under no obligation to scan patrons for dangerous weapons. As such, if a dangerous patron shoots another patron, the casino will not be held liable for its failure to check whether patrons are carrying guns upon their entry. A similar reluctance was recently shown in *Stedall v Aspeling*<sup>113</sup> where a child was severely injured on account of a property owner’s failure to close gates leading to a swimming pool in which the child nearly drowned. The Supreme Court of Appeal held that the failure to secure the gates leading to the swimming pool was not wrongful and that the sole responsibility for the child’s injury lay with the distracted parents who did not keep a continuous eye on the child. This is not an absolute reluctance though: As mentioned above, in *Za* a property owner was held liable for the failure to exercise care over their potentially dangerous property. Similarly, in *Pro Tempo v Van der Merwe*,<sup>114</sup> it was held that a school acted wrongfully in its failure to prevent children with disabilities from playing in an area where steel rods had been planted in the ground next to trees. The child victim in that case sat on one of the steel rods and impaled himself thereon, resulting in serious bodily injury. The wrongfulness there appeared to have been established on the basis of control over a dangerous situation and perhaps the prior-conduct rule.

According to the modern delict canon in South African law, we still establish the wrongfulness of omissions primarily on the basis of certain crystallised manifestations of the legal convictions of the community, namely the “prior-conduct rule”, “control of a dangerous situation”, “statutory duty”, “a special relationship between the parties”, “holding a particular office” or a combination of those factors.<sup>115</sup> In this canon, very little attention has been paid to the nuances between the wrongfulness of omissions of the state versus those of non-state actors and very little attention has

112 2006 (6) SA 537 (SCA).

113 2018 (2) SA 75 (SCA).

114 2018 (1) SA 181 (SCA).

115 See, eg, McKerron 1971: 14ff; Boberg 1984: 33ff; Van der Merwe & Olivier 1989: 20ff; Zimmermann 1990: 1046ff; Van der Walt & Midgley 2005: 70ff; Neethling & Potgieter 2015: 60ff.

also been paid to the balancing exercise promoted in the cases cited above. It will be seen below that these complexities have also not necessarily been understood by the various courts that had to grapple with the problem in *Oppelt*.

The developments canvassed here on the law relating to the wrongfulness of omissions are aptly summarised by Van der Westhuizen J in *Loureiro v iMvula Quality Protection*:<sup>116</sup>

The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.

It is against this backdrop that the decisions of the various courts in *Oppelt* should be understood. It is important to stress further that an omission would have to be “negligent” and the “factual and legal cause” of the “harm” suffered by the victim in order to be actionable. Wrongfulness is thus not the beginning and the end of a delictual dispute.

### 3 The Constitution and omissions in *Oppelt*

#### 3.1 Litigation history

Mr Oppelt was successful in the High Court with his claim to hold the employer of the various doctors vicariously liable.<sup>117</sup> However, a unanimous bench of the Supreme Court of Appeal overturned that decision mainly on account of its interpretation of the medical evidence presented at the trial which had a negative effect on the finding of factual causation. Two doctors testified about the medical consequences flowing from a failure to treat spinal injuries swiftly. On the one hand Dr Newton testified that his experience and academic research had shown that patients who receive treatment for spinal injuries within four hours of injury have a sixty four per cent chance of full recovery while those who are treated more than four hours after injury have virtually no prospect of recovery.<sup>118</sup> On the other hand Dr Welsh testified that there was no consensus among medical professionals on Dr Newton’s four-hour rule.<sup>119</sup> The Supreme Court of Appeal held that Dr Newton’s evidence was statistically unreliable, inaccurate and questionable,<sup>120</sup> effectively telling the academic reviewers of Dr Newton’s research that they did not know what they were doing – a peculiar

116 2014 (3) SA 394 (CC) at par 53.

117 *The Head: Health, Department of Health Provincial Administration: Western Cape v Oppelt* 2014 ZASCA 135 at par 4.

118 *Idem* at paras 5-8 & 10.

119 *Idem* at paras 9 & 11-13.

120 *Idem* at paras 18-20.

proclamation of scientific self-confidence on the part of the Supreme Court of Appeal. This finding meant that the victim had not proven on a balance of probabilities that the omissions of the doctors factually caused the victim's quadriplegia.<sup>121</sup>

Finally, the Supreme Court of Appeal briefly indicated that because there was no consensus in the medical profession on whether spinal injuries should be treated within four hours, neither wrongfulness (the existence of a legal duty borne by the doctors) nor negligence (reasonable foreseeability and preventability of harm) could be established.<sup>122</sup> Consequently, the appeal was upheld.<sup>123</sup>

The Supreme Court of Appeal judgment is primarily problematic because of its approach to the evaluation of expert evidence, as critiqued by the Constitutional Court on appeal discussed below. But the judgment is also problematic from a theoretical and doctrinal perspective. Doctrinally the judgment creates the impression that one scientific fact could justify negative findings of factual causation, wrongfulness and negligence which are elements that have historically been regarded as fulfilling different functions with different considerations being relevant to the establishment of each. Theoretically, it is noted with concern that the Supreme Court of Appeal did not mention the Constitution even once in its judgment. The constitutional avoidance in this case is symptomatic of a chronic problem observed in recent judgments of the Supreme Court of Appeal which could be called "constitutional heedlessness" in terms of which a "business-as-usual" approach is applied to common-law problems while more serious constitutional engagement is in fact necessary.<sup>124</sup> These problems have fortunately been resolved by the Constitutional Court on appeal.

### 3.2 *Oppelt* in the Constitutional Court

The majority of the Constitutional Court held that the Supreme Court of Appeal erred in at least two fundamental respects. Firstly, the Supreme Court of Appeal radically and unjustifiably departed from its earlier judgment in *Michael v Linksfield Park Clinic*<sup>125</sup> with regard to the evaluation of expert evidence. The Constitutional Court in *Oppelt* noted that the Supreme Court of Appeal in *Michael* had held, among other things, that there is a difference between scientific and judicial measures of proof, and that an expert's testimony must show logical reasoning based on something more than professional intuition.<sup>126</sup> Applied to the case at hand Dr Newton's four-hour rule was based on his own experience as a specialist practitioner, bolstered by the reviewed and published work of others, as well as an article that he authored that had been accepted for publication at the time of his testimony. Dr Welsh's testimony

121 *Idem* at paras 21-23.

122 *Idem* at paras 24-25.

123 *Idem* at paras 27-28.

124 Zitzke 2016: 22ff; Zitzke 2015: 259ff.

125 2001 (3) SA 1188 (SCA).

126 *Oppelt CC* at par 36.

amounted to speculation because he provided no logical basis for his reasoning, unlike Dr Newton.<sup>127</sup> The result of approving Dr Newton's testimony is that factual causation had now been established: If the doctors treated Mr Oppelt within four hours of sustaining the injury, the probability was that he would have made a full recovery.<sup>128</sup>

Secondly, and more importantly for purposes of the present discussion, the Supreme Court of Appeal fell into the trap of constitutional heedlessness in the determination of the wrongfulness of the doctors' conduct. While the Supreme Court of Appeal held that the doctors bore no legal duty towards Mr Oppelt for "scientific" reasons, the Constitutional Court reiterated its earlier definition of wrongfulness provided in *Loureiro*<sup>129</sup> to the effect that the enquiry is centred around whether the alleged wrongdoer bore a legal duty not to cause harm and whether it would be reasonable to impose liability on the alleged wrongdoer – the criterion of reasonableness, which relates to the legal convictions of the community, has to be constitutionally construed.<sup>130</sup>

In this regard the Constitutional Court held that section 27(3) of the Constitution, stating that "[n]o one may be refused emergency medical treatment", was a relevant consideration in determining whether the doctors owed a legal duty towards Mr Oppelt. The legal convictions of the community, constitutionally understood, thus required doctors to provide patients with proficient medical care. This position is complimented by section 25(2)(m) of the National Health Act<sup>131</sup> which enjoins the Health Department to provide and coordinate, among other things, emergency medical services. The purpose of the constitutional provision for emergency healthcare was described in *Soobramoney v Minister of Health, Kwa-Zulu Natal*<sup>132</sup> as a safeguard against bureaucratic impediments standing between a person who has faced a medical catastrophe and immediate medical attention.<sup>133</sup> The way in which section 27(3) was interpreted in *Soobramoney* provided the court with four criteria for determining whether the right to emergency medical care was breached: (1) There must be an *emergency*; (2) treatment must have been *necessary*; (3) the treatment must have been *available*; (4) and the treatment must have been *refused*.<sup>134</sup>

Applied to the facts in *Oppelt*, the Constitutional Court held that according to the hospitals' triage scales the victim required urgent medical intervention and thus there was an *emergency*.<sup>135</sup> The treatment was *necessary* because the medical evidence

127 *Idem* at paras 37-48.

128 *Idem* at par 49.

129 See par 34.

130 *Idem* at par 51.

131 61 of 2003.

132 1998 (1) SA 765 (CC) par 20.

133 *Oppelt CC* at par 55.

134 *Idem* at par 57.

135 *Idem* at par 58.

presented showed that spinal injuries require treatment sooner rather than later.<sup>136</sup> The treatment was held to be *available* because the Department of Health made no pleas relating to lack of resources. Furthermore, the closed reduction treatment for spinal injuries like the one that Mr Oppelt had is inexpensive and takes little time to administer especially when the equipment was available as it was in this case. No reasons were given why a helicopter had not been dispatched to transport Mr Oppelt even though the records showed that the helicopter had been available.<sup>137</sup> Even though various doctors examined Mr Oppelt that does not mean that he had received emergency medical treatment. “Reasonable” and “appropriate” intervention was required. In other words, “refusal” does not simply mean that the patient is turned away at the hospital doors. Instead, the court applied a constructive test for “refusal” whereby tardy care, in the face of a need therefor and availability thereof, constitutes a denial of emergency treatment.<sup>138</sup> Due to the breach of section 27(3) of the Constitution, the conduct of the doctors was held to be wrongful.<sup>139</sup>

Negligence was also held to be present. The classical test for negligence laid down in *Kruger v Coetzee*<sup>140</sup> requires a court to establish whether the reasonable person in the shoes of the alleged wrongdoer would, firstly, have reasonably foreseen the possibility of harm; secondly, would have taken reasonable steps to prevent the harm; and, thirdly, did not take those preventative steps. The Constitutional Court in *Oppelt* held that the reasonable-person criterion is raised to a higher standard of the reasonable medical practitioner in cases where the alleged wrongdoer has alleged to have a certain degree of care and skill.<sup>141</sup> Here, a reasonable doctor would reasonably have foreseen the possibility of harm because it had been well known that spinal injuries required the promptest possible treatment (even if the four-hour rule was not generally accepted) and that the harm could reasonably have been averted if the doctors had made attempts to transfer the patient to Conradie Hospital directly from Westfleur, thus preventing a delay.<sup>142</sup> Due to these facts, the doctors had been negligent.<sup>143</sup> Thus, the appeal was upheld and Mr Oppelt was entitled to claim whatever damages he was able to prove.<sup>144</sup>

With regard to the law of delictual liability flowing from omissions, this judgment is to be welcomed in many respects with a few caveats that should nevertheless be raised. Contrary to the Supreme Court of Appeal, the Constitutional Court did not hold that one statement of scientific evidence could prove or disprove all the elements

136 *Idem* at paras 60-61.

137 *Idem* at par 62-65.

138 *Idem* at par 66.

139 *Idem* at par 68.

140 1966 (2) SA 428 (A) 430E-G.

141 *Idem* at par 71.

142 *Idem* at par 79.

143 *Idem* at par 83.

144 *Idem* at par 86.

of a delict. The Constitutional Court maintained clear doctrinal separation between the factors relevant in determining factual causation, wrongfulness and negligence respectively: For factual causation, (1) the four-hour rule promoted by Dr Newton was relevant; (2) for wrongfulness, the constitutional legal convictions of the community were important; and (3) negligence could be established with regard to the general foreseeability of harm that could flow from sluggish medical treatment, even though the reasonable doctor might not have had intimate knowledge of Dr Newton's new four-hour theory. Theoretically, this judgment also fits more comfortably in the transformative paradigm in that the Constitution was taken seriously by the court. An explicit and thorough constitutional analysis featured in the determination of wrongfulness, which is a great improvement from the judgment of the Supreme Court of Appeal. However, this judgment is also vulnerable to criticism.

Even though the court should be commended for the doctrinal respect shown to the elementology of delict, the court would have done better if it had conceded that the determination of wrongfulness is not solely a constitutional issue. The common-law description of wrongfulness certainly involves the legal convictions of the community and the establishment of a legal duty not to cause harm. However, as Neethling and Potgieter indicate, various flexible principles have arisen from case law as to when a legal duty not to cause harm arises.<sup>145</sup> Some common-law criteria from the delict canon relevant to establishing the existence of a legal duty imposed on the doctors in *Oppelt* include the control of Mr Oppelt's "dangerous situation",<sup>146</sup> a "special relationship" between the doctors and their patient,<sup>147</sup> and perhaps the "breach of a rule of law" or "breach of a statutory (or constitutional) duty".<sup>148</sup> Furthermore, we know from *Carmichele*, *Van Duivenboden* and subsequent state liability cases that the breach of a constitutional duty does not necessarily translate into private-law liability in delict. Consideration could have been given to the unavailability of alternative remedies, the fact that there is a determinate victim here, that the efficiency of government would not have been impeded by the imposition of a legal duty, and perhaps a conversation could have been had about why delictual liability should follow here even though the problem in this case ultimately arose from the implementation of a bad government policy.

Thus, in addition to the breach of section 27(3) of the Constitution, an interplay of traditional common-law factors also justified the finding of wrongfulness. To the extent that the court solely applied constitutional law to the determination of wrongfulness, it could be said to have acted "constitutionally over-excitedly" due to the fact that established common-law principles were effectively ignored and replaced by the Constitution.<sup>149</sup> This type of excitement does not necessarily amount

145 Neethling & Potgieter 2015: 55ff.

146 *Idem* 62-65.

147 *Idem* 69-71.

148 *Idem* 66-69 & 78-79.

149 Zitzke 2015: 279.

to a transformative approach to the common law. A truly transformative approach to common-law matters recognises a strong interplay between common law and Constitution so as to avoid the unnecessary monumentalisation of either source of law, while being mindful of the supremacy of the Constitution and the important role that it has to play in rethinking South African law to keep abreast with the democratic needs of the people that it is meant to serve.<sup>150</sup>

## 4 Conclusion

The *Oppelt* case is about omissions. Not only *omissions* in the sense of conduct – indeed, we also find the Supreme Court of Appeal’s *omission* of the Constitution which poses a hurdle to the transformative aims of the supreme Constitution which places all law under the human-rights spotlight. Simultaneously the Constitutional Court’s *omission* of properly considering the common-law principles relevant to the establishment of wrongfulness also inhibits the transformative project of the Constitution – it should be remembered that a “transformation” is situated somewhere in between a “revolution” and mere “reform”.<sup>151</sup> If the Constitution aimed to revolutionise South African law, it would have required a complete rewrite of all legislation, common law and customary law. However, the Constitution does not provide for such measures.<sup>152</sup> Instead, it obliges us to reimagine the common law, where necessary, along constitutional lines.<sup>153</sup> This does not mean that judges should sit back and allow the common law to stagnate in non-human-rights splendour. Rather, a midway between the two extremes of constitutional avoidance and constitutional over-excitement should be found. And it is our argument that at least one way of accomplishing this is by combining the historical and constitutional approaches to common-law analysis and that the two methods should be employed symbiotically rather than antagonistically.

## BIBLIOGRAPHY

- Beinart, Ben (1949) “Culpa in omittendo” *J of Contemporary Roman-Dutch Law* 12: 141-169  
 Boberg, PQR (1984) *The Law of Delict* (Cape Town)  
 Buckland, WW (1966) *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge)  
 Davis, Dennis M & Klare, Karl (2010) “Transformative constitutionalism and the common and customary law” *South African J on Human Rights* 26(3): 403-509

150 *Idem* 290.

151 Klare 1998: 150.

152 See, eg, s 39(3) and Schedule 6 of the Constitution which implies that old laws and rights remain in force, subject to constitutional compliance.

153 See, eg, ss 2, 8(2)-(3) & 39(2) of the Constitution.

## THE OMISSIONS IN OPPELT

- De Groot, Hugo (1625) *De Jure Belli ac Pacis* (Amsterdam)
- De Zulueta, Francis (1952) *The Institutes of Gaius. Part II: Commentary* (Oxford)
- Du Plessis, Paul (2010) *Borkowski's Textbook on Roman Law* (Oxford / New York)
- Hewett, Margaret (ed/trans) (2000) *Larva Legis Aquiliae: The Mask of the Lex Aquilia Torn Off. The Action for Damage Done: A Legal Treatise by Christian Thomasius* (Oxford)
- Kaser, Max (1971) *Das römische Privatrecht Erster Abschnitt* (München)
- Kemp, KJ (1978) *Delictual Liability for Omissions* (University of Port Elizabeth)
- Klare, Karl (1998) "Legal culture and transformative constitutionalism" *South African J on Human Rights* 14: 146-188
- Kleyn, Duard (1986) *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (University of Pretoria)
- Kleyn, Duard & Van Niekerk, Gardiol (2014) "Ulpian's *praecepta iuris* and their role in South African law, part 1: Historical context" *Fundamina* 20(1): 437-445
- Lawson, FH (1950) *Negligence in the Civil Law: Introduction and Selected Texts* (London)
- Loubser, Max & Midgley, Rob (eds) (2012) *The Law of Delict in South Africa* (Cape Town)
- McKerron, RG (1971) *The Law of Delict* (Cape Town)
- Neethling, J & Potgieter, JM (2015) *Neethling-Potgieter-Visser Law of Delict* (Durban)
- Scott, Johan (1976) *Die Geskiedenis van die Oorerflikheid van Aksies op Grond van Onregmatige Daad in die Suid-Afrikaanse Reg* (University of Leyden)
- Scott, Johan (2011) "Effect of the destruction of a dwelling on the personal servitude of *habitatio*: *Kidson v Kimspeed Enterprises CC* 2009 5 SA 246 (GNP)" *J of Contemporary Roman-Dutch Law* 74: 155-169
- Scott, Johan (2012) "Staatsaanspreeklikheid vir opsetsdelikte van die polisie – die Hoogste Hof van Appél kry nogmaals bloedneus: *F v Minister of Safety and Security* 2012 1 SA 546 (KH)" *Journal for South African Law* 2012(3): 541-558
- Scott, Johan (2013) "Vicarious liability for intentional delicts – the constitutional factor clinches liability: *Von Beneke v Minister of Defence* 2012 5 SA 225 (GNP); *Minister of Defence v Von Beneke* (115/12) [2012] ZASCA 158" *Journal for South African Law* 2013(2): 348-361
- Scott, Johan (2015) "Delictual liability for adultery: A healthy remedy's road to perdition" in Potgieter, J *et al* (ed) *Essays in Honour of Johann Neethling* (Durban) 421-438
- Thomas, JAC (ed) (1975) *The Institutes of Justinian Text Translation and Commentary* (Amsterdam / Oxford)
- Thomas, PhJ *et al* (2000) *Historical Foundations of South African Private Law* (Durban)
- Van den Heever, FP (1944) *Aquilian Damages in South African Law* (Cape Town)
- Van der Merwe, NJ & Olivier PJJ *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (Pretoria)
- Van der Walt, JC & Midgley JR (2005) *Delict: Principles and Cases* (Durban)
- Van Warmelo, Paul (1971) *'n Inleiding tot die Studie van die Romeinse Reg* (Cape Town)
- Van Zyl, DH (1972) "Die regshistoriese metode" *Journal of Contemporary Roman-Dutch Law* 35: 19-37
- Van Zyl, DH (1977) *Geskiedenis en Beginsels van die Romeinse Privaatreg* (Durban)

- Van Zyl, DH (1979) *Geskiedenis van die Romeins-Hollandse Reg* (Durban)
- Zimmermann, Reinhard (1990) *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Münich / Cape Town)
- Zitzke, Emile (2015) “Constitutional heedlessness and over-excitement in the common law of delict’s development” *Constitutional Court Review* 7: 257-290
- Zitzke, Emile (2016) *A New Proposed Constitutional Methodology for Effecting Transformation in the South African Law of Delict* (University of Pretoria)

## Cases

- Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A)
- Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA)
- Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- Halliwell v Johannesburg Municipal Council* 1912 AD 659
- Kruger v Coetzee* 1966 (2) SA 428 (A)
- Loureiro v iMvula Quality Protection* 2014 (3) SA 394 (CC)
- Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)
- Michael v Linksfield Park Clinic* 2001 (3) SA 1188 (SCA)
- Minister of Forestry v Quathlamba* 1973 (3) SA 69 (A)
- Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA)
- Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA)
- Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)
- Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA)
- Minister van Polisie v Ewels* 1975 (3) SA 590 (A)
- Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA)
- Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC)
- Pro Tempo v Van der Merwe* 2018 (1) SA 181 (SCA)
- Regal v African Superslate* 1963 (1) SA 102 (A)
- Silva’s Fishing Corporation v Maweza* 1957 (2) SA 256 (A)
- Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC)
- South African Hang and Paragliding Association v Bewick* 2015 3 SA 449 (SCA)
- Stedall v Aspeling* 2018 (2) SA 75 (SCA)
- The Head: Health, Department of Health Provincial Administration: Western Cape v Oppelt* [2014] ZASCA 135
- Tsogo Sun Holdings v Qing-He Shan* 2006 (6) SA 537 (SCA)
- Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA)
- Za v Smith* 2015 (4) SA 574 (SCA)

## Legislation

Bürgerliches Gesetzbuch (1900)

French Code Civil (1804)

Italian Code Civile (1942)

National Health Act 61 of 2003

# WAS AUNT JANE A SHOPLIFTER?

DAVID PUGSLEY\*

## ABSTRACT

This article thoroughly re-examines Aunt Jane's prosecution for shoplifting in the light of the three pamphlets published in the week after the trial, her own letters, contemporary local newspapers, and contemporary rules of evidence and criminal procedure. It concludes that the verdict of not guilty was correct and that the prosecution witnesses were guilty of perjury.

**Keywords:** Jane Austen; Leigh Perrot; shoplifting; Assizes

## 1 Introduction

Jane Austen's mother had an elder brother, James Leigh (1736-1817).<sup>1</sup> In 1751, at the age of fifteen, he inherited an estate in Oxfordshire, worth £5,000 a year, under the will of his great uncle, Thomas Perrot, and added Perrot to his surname. He sold

1 His father was the Rev Thomas Leigh, Fellow of All Souls and Rector of Harpsden, Oxfordshire. His uncle was Theophilus Leigh, Rector of Adlestrop, 1718-1762, and Master of Balliol for fifty years from 1727 until his death in 1785, aged ninety one. See *Balliol College Annual Record* 2017, 42-47.

\* Hon Archivist of the Western Circuit. The Western Circuit consists of the counties of Hampshire, Wiltshire, Dorset, Devon, Cornwall, Somerset, Bristol and, since 1971, Gloucestershire. From the Middle Ages until 1971 two High Court judges travelled round this circuit twice a year. Since 1971 two High Court judges act as Presiding Judges on the circuit. The Western Circuit is also the organisation of barristers who practise on the circuit, over 1200 of them.

that estate and bought Scarlets, near Reading. In 1764 he married Jane Cholmeley (1746-1836). I shall refer to them as Uncle James and Aunt Jane.<sup>2</sup>

Uncle James had never had to work for his living. He took very little physical exercise for the rest of his life. He did not hunt, or shoot or fish, or ride or travel. He had no children to keep him active. He suffered badly from gout. They spent a lot of their time at Bath, where they moved into no 1, Paragon Buildings, in 1795. It was a large house and a visitor in April 1799 talks of going to a party there: “eight tables, ninety people.”

Jane Austen and her mother came to stay in Bath in May and June 1799. She reported that Uncle James had over-walked himself and could now only travel in a chair, but a week later he was getting better again. She went to a cheap shop in Bath Street where gauzes were on sale at only 4/- (= 4 shillings) a yard, “but they were not so good or so pretty as mine”. In 1797 William Smith had been advertising his cheap haberdashery warehouse at no 1, Bath Street and “new cloak gauzes from 3/- to 4/- per yard”.<sup>3</sup> That was probably where she went.<sup>4</sup> It was certainly where Aunt Jane went on Thursday 8 August.

## 2 The card of white lace

They left Paragon Buildings together, but Uncle James was walking very slowly and Aunt Jane went on ahead to do some shopping and promised to come back to meet him later. At no 1, Bath Street, she was served by Elizabeth Gregory, who was in charge of the shop, and bought some black lace. Gregory called her shopman, Charles Filby, to measure the lace, work out the price, pack up the parcel and take the money, which he did. Aunt Jane left the shop with the parcel in her hand and went back to meet Uncle James, who was not far away. They did some more shopping and were returning down Bath Street sometime later when Elizabeth Gregory rushed out of the shop and accosted her and asked her if she had some white lace in the parcel as well as the black lace which she had bought. She handed over the parcel, which Elizabeth Gregory opened and found a card of white lace inside.<sup>5</sup> She took the white lace and went back into the shop. They continued on their way home, but they

- 2 I am reminded of John and Fanny Dashwood in *Sense and Sensibility*. John inherited from his great uncle, and from his mother (half when he came of age and half at the death of his father), and his marriage added to his wealth. If Fanny had been accused of shoplifting I can imagine her behaving like Aunt Jane, and if she had spent months in prison before her trial I can imagine him behaving like Uncle James.
- 3 *Bath Chronicle*, 29 Jun 1797.
- 4 But there was another cheap haberdashery warehouse at no 13, Bath Street, run by R Arnell, advertised in the *Bath Chronicle* from Dec 1796 to Dec 1800. Both shops bought their supplies from the same warehouse in London at 173 Fleet Street.
- 5 See *Genesis*, ch 44.

had not gone very far when Charles Filby caught up with them, near Bath Abbey churchyard, and asked their name and address. Uncle James said they lived at no 1, Paragon Buildings, and his name was on the front door.

That was Thursday afternoon. Nothing more happened until Monday evening, when Aunt Jane received an anonymous letter addressed to Mrs Leigh Perrot, Lace dealer, no 1 Paragon Buildings, containing these lines: “Your many visiting Acquaintance, before they again admit you into their houses will think it right to know how you came by the piece of Lace stolen from Bath Street a few days ago. Your husband is said to be privy to it.”<sup>6</sup> And two days later, on Wednesday 14<sup>th</sup>, she was summoned before the Mayor and the magistrates at the Town Hall and found that Filby and Gregory had given evidence on oath: Filby that he had seen her take the white lace, and Gregory that she had found the lace worth 20/- in her possession. She was therefore sent to the County Gaol to await trial at the next Assizes.

### 3 Assize towns and dates

Since the Middle Ages two High Court judges had come round the Western Circuit twice a year, in March/April and July/August, to hear civil and criminal cases at the Assizes. If a prisoner was too late for one session of the assizes, he or she would have to wait for the next. If she was too late for the summer assizes she would have to wait nearly eight months for the next spring assizes.<sup>7</sup> In 1799 the summer assizes for Somerset had been held in Bridgwater, beginning on 27 July, and the judges had moved on to Bristol on 1 August. It was too late for Aunt Jane.

In most counties there had been only one or two regular assize towns. Somerset was different. In the Middle Ages the assizes had been held at Ilchester, and the County Gaol was still there. Sometimes they were held at Chard. In 1672 and 1681 the summer assize was held in Bath. At the end of the eighteenth century the spring assize was held in Taunton and the summer assize alternately in Bridgwater and Wells. And that is why Aunt Jane, having been accused of shoplifting in Bath, was sent to the County Gaol in Ilchester and tried at the following spring assizes in Taunton.

### 4 Ilchester gaol

Uncle James went with her and stayed with her the whole time in spite of his ill health. They were not treated as common prisoners, but paid to stay in the governor’s house. But they had to share it with the governor and his family, and to put up with “Vulgarity, Dirt and Noise from Morning to Night. Cleanliness has always been

6 Jane Leigh Perrot’s letter to her cousin, Montague Cholmeley, 11 Sept 1799, printed in Somerset & Dorset Notes & Queries, vol 18, Mar 1924 at 5.

7 This system continued until 1879 when a system of four assizes a year was introduced.

Perrot's greatest delight, and yet he sees the greasy toast laid by the dirty Children on his Knees, and feels the small Beer trickle down his sleeves on its way across the table unmoved. *Mrs Scadding's knife well licked to clean it from fried onions helps me now and then*".<sup>8</sup> It is reminiscent of scenes in the Price household in Portsmouth when Fanny Price returned there from Mansfield Park, and indeed Jane Austen may have drawn her inspiration from the events in Ilchester Prison.<sup>9</sup>

## 5 Taunton assizes

The Taunton Assizes opened on Thursday 27 March and lasted three days. This was serious business. The court sat for long hours, and disposed of cases expeditiously. Four prisoners were condemned to death (two for burglary, one for assault and robbery, and one for sheep-stealing) and were in fact hanged at Ilchester on 9 April. Three more were sentenced to seven years transportation, and one to two years in prison (all for theft). If Aunt Jane had been convicted she might have been hanged,<sup>10</sup> or transported to Australia.<sup>11</sup>

The assizes were also a great social occasion in a period when there was otherwise very little public amusement or entertainment. The nobility, gentry and respectables of the county converged on Taunton from all directions. The price of beds doubled. A handsome new theatre had just been completed in Silver Street, and there were performances every night during the assizes. There were dinners and parties and dances. There was an Assize Ball on the Friday night, before Aunt Jane's trial on the Saturday. The trial for shoplifting, for which the sentence could be death, and involving the leading silks on the Western Circuit,<sup>12</sup> was the icing on the cake,

8 Letters to her cousin, Montague Cholmeley, 10 Oct and 10 Nov 1799, reprinted in *Somerset & Dorset Notes & Queries*, 1924, 7 and 59.

9 Ives 1980: 25-32: "Rebecca's puddings, and hashes, brought to table with half-cleaned plates, and not half-cleaned knives and forks." "The table cut and notched by her brothers, where stood the tea-board never thoroughly cleaned, the cups and saucers wiped in streaks, the milk a mixture of motes floating in thin blue, and the bread and butter growing every minute more greasy than even Rebecca's hands had first produced it." (The quotations come from Mansfield Park, chapters 42 and 46 respectively.) But I disagree with him (at 26) and Halperin 1988: 32, that Aunt Jane was the model for Mrs Norris. They are two totally different characters. Mrs Norris was an interfering busybody, very conscious of her poor relation status, and her sponging (near the end of ch 10) and her disposal of supernumerary glasses of wine and jellies in the domestic sphere are quite unlike shoplifting outside it.

10 Mary Jones, *alias* Murphy, was capitally convicted at the Old Bailey on 12 Sep 1771 for stealing twelve yards of thread lace, value 30/-, privately in the shop of Mr Foot, linen draper, in Ludgate Street. She was hanged at Tyburn on 16 Oct. "Had not her indecent Behaviour to the Judge and Jury prevented it, she probably might have been saved." (See *Oxford Journal*, 19 Oct 1771.)

11 But see, *infra*, under "Character Witnesses".

12 The civil court was not opened for business because the leading counsel who normally practised there were all busy in the criminal court.

and it is said that 2,000 people turned up,<sup>13</sup> though most of them will not have been able to see or hear anything.

## 6 The trial

Immediately after the trial three pamphlets were published recording the proceedings. A fourth pamphlet was advertised three weeks later, by Wm Legge, of the Temple, price eighteen pence, with marginal notes.<sup>14</sup> I have been unable to find any copies of it or any other reference to it, which is a pity because the marginal notes may have commented on differences between the other three versions.

The modern reprints of the three published pamphlets all have the name Jane Cholmeley Leigh Perrot on the front cover, as if she were the author. And indeed the catalogue of the National Library of Australia expressly says that she was the author in all three cases. That cannot be right. The three accounts cannot even agree on how long the jury took to reach its verdict: seven minutes, about fifteen minutes, twenty minutes, nearly half an hour. And her full name, Jane Cholmeley Leigh Perrot, does not appear on any of the reprinted title pages. I can only think that it was manuscript on her copies of the pamphlets and that she was the owner, not the author.

The first pamphlet was published in London, price 1/- , and an extract from it appeared in the *Bath Chronicle* the following Thursday. The title page says: “The trial of Mrs Leigh Perrot, wife of – Leigh Perrot, Esq.” Apparently the author did not know his Christian name. So it cannot have been Aunt Jane. He talks of assizes *holden* at Taunton; describes the Assize Hall; says that the *Nisi Prius* Court was not opened for business; and that all the Counsel on the Circuit surrounded the table of the Crown Bar. He left the court after the judge’s summing up, without waiting for the verdict, and he did not know how long they took to reach it. I think that must have been one of the barristers, who was in a hurry to return to London at the end of the circuit. There was no Spring Assize at Bristol at that time; he had been away from home on circuit for four weeks; and he wanted to get back as soon as possible. I think it may have been Jekyll, one of the junior counsel for Aunt Jane, who had read out her unsworn statement when her voice failed her so frequently.

The second pamphlet was published in Bath, price 6d. An extract from it appeared in the *Exeter Flying Post* the following Thursday, and a second edition a week later. It was copied by a number of local newspapers and by the *Lady’s Magazine; or Entertaining Companion for the Fair Sex, Appropriated Solely to Their Use and Amusement* for April 1800, published on 1 May: volume 31, pages 171-176, with the

13 Borowitz 2016: 303 says that the Assize Hall seated 2,000 and was filled to capacity. In fact nearly all of them had to stand, and “many hundreds of them could not possibly hear a word that was said, and were almost pressed to death, and suffocated with the heat, merely for the satisfaction of seeing the Criminal Court at a distance”. (London pamphlet, see *infra*.)

14 *Bath Chronicle*, 24 Apr 1800.

well-known portrait of Aunt Jane, which was engraved specially for the magazine. It was printed and sold by W Gye, Market Place, Bath. His name occurs several times during the course of the trial in the other pamphlets, but only once here (p 8), and it is omitted altogether in the *Lady's Magazine*. We do not know who the shorthand writer was, perhaps the reporter from the *Exeter Flying Post*.<sup>15</sup>

The third pamphlet was published in Taunton, on 8 April, price 2/- , and sold by all the Booksellers in Bath and Bristol. The editor was John Pinchard, Attorney, of Taunton,<sup>16</sup> and it contains his short hand notes of the trial. The advertisement in the *Bath Chronicle* ends with a note: *It is necessary to apprise the Public, that a Person at Bath, (a Party interested in the Prosecution) applied to the Editor for his Manuscript; which request not being complied with, a Sixpenny Account is, it seems, to be published to-morrow, in order to forestall the above.* The advertisement at the beginning of the pamphlet itself is clearer: *Unconnected, and unacquainted, with either of the parties, he gives the Trial without comment or embellishment; and pledges himself that he has not intentionally either added to it, or omitted, any word which can materially affect its accuracy.*<sup>17</sup> Three pages later we find that the second count of the indictment stated that the lace was the property of William Gye and Lacon Lamb. The other two pamphlets did not mention their names at this point.

## 7 The case for the prosecution<sup>18</sup>

After the opening formalities the leading counsel for the prosecution, Vicary Gibbs, KC,<sup>19</sup> addressed the jury. At the end of his speech he anticipated that the defence would be either a mistake on the part of Filby, in putting the white lace in the same parcel with the black; or that it was a malicious prosecution for the purpose of extorting

15 The Pickering & Chatto catalogue 786 offered a first edition for £7,500 and added that on a blank leaf inserted between the title page and the first page of the text there was a contemporary manuscript note: "Filby, who is the most prominent in this Prosecution of the Milliners against Mrs Perrot, was a Bankrupt when living in St Paul's Church Yard, London, under the Firm 'Terry and Filby', and for some cause could never get his Certificate. It was even said that something of the same sort had been attempted, to extort to prevent the exposure (as in this case) of a Prosecution. Even this short account of the Trial (a partial one) seems to point this out – as the great first cause – !"

16 For many years Chief Clerk to the Magistrates. He died in 1842, aged seventy eight.

17 The Brick Row Bookshop offered a first edition for \$4,500, adding: Contemporary ink signature on the title page of William Burgh, who has written in the margin of page 16, commenting on the proceedings: "Why did he not challenge it then? There was a Possibility of a Mistake, the opportunity of rectifying it should have been given. It now looks as if she was suffered to take it away in order to ground a malicious prosecution, or with a hope to be silenced by Reward."

18 The case for the prosecution is most conveniently set out in the Gye pamphlet, p 4. It does not mention Gye.

19 A future Attorney General, Chief Baron of the Court of Exchequer, and Chief Justice of the Court of Common Pleas.

money from the Prisoner's husband. In that case all the prosecution witnesses must be perjured. That could not be right, he said, because the witnesses went to the Town Hall immediately after the transaction to report the theft to the Town Clerk, the Deputy Town Clerk, and to everyone they met. "It was then impossible to recall the report. If, therefore, the facts are proved, can it (said he) be believed that the charge is fabricated?"

The witnesses for the prosecution were Elizabeth Gregory, who was in charge of the shop; Charles Filby, the shopman; and Sarah Raines, an apprentice. A shopwoman called Leeson was also present at the time but was not called as a witness.

According to them, when Aunt Jane entered the shop, Filby was at the top end behind the left hand counter near the door measuring a box of white lace. She went to the far end of the counter to look at some black lace with Elizabeth Gregory, and she chose the lace she wanted. Gregory called Filby to come and measure the lace, which presumably cost so much a yard, and the price came to £1-19/-. At the same time she called Raines to put the rest of the black lace into the box and to put it away, which she did.

Filby wrapped the black lace round a small card and put it in a piece of whited brown paper which he took from under the counter close by him (Pinchard, 15). He rolled the bought lace on a small piece of card, some paper was close by, put the lace in it and folded the paper up (Gye, 11). He rolled up the lace on a small piece of card, and taking up a piece of paper close by him, he folded up the card of black lace in the paper (Jekyll, 14). Sarah Raines said that he put what he had measured on a small card and put it in paper; she did not know where he took the paper from, as he did not go from the place where he was standing to get it. There was not anything else in the paper (Pinchard, 27). On cross-examination she went further. All the time she was absent from her work she was employed in putting away the black lace which her attention was principally engaged in. She admitted that there was nothing particular to draw her attention in the manner of Filby's putting up the black lace, and that she saw him every day putting up parcels. She did not then pay any particular attention to him, nor did she observe particularly from whence he took the paper to wrap up the parcel in (Pinchard, 28-29). There was nothing particular in the manner of Filby's putting up the parcel to attract her attention; and she did not know where he got the paper from to wrap up the parcel (Jekyll, 22).

Aunt Jane paid with a £5 note. Filby went to get the change. When he came back he found that she had moved from the place where he had left her and was standing at the top end of the shop, looking back, and with her left hand near the box of white lace. When he took the change to her he saw her left hand come out of the box with a card of the lace in her hand. He saw the corner of the card. It was partly concealed by her cloak. The black lace was in her right hand. He gave her the change at that end of the counter nearest the door; he laid it down on the counter, and she took it up with her *right* hand, in which the black lace was. She then asked him where Mrs

Smith was, when she would be at home, and some other questions, and then left the shop (Pinchard, 16-17).<sup>20</sup>

When Aunt Jane had gone Filby stayed in the shop for two or three minutes chatting with Sarah Raines and Miss Leeson and then went down to Miss Gregory who was in the kitchen having her dinner. He did not examine the white lace box at that time (Pinchard, 17; Gye, 12).<sup>21</sup>

After Filby had spoken to her Gregory came back up into the shop and stood at the door (Pinchard, 28, Sarah Raines). In about a quarter of an hour after she came up, she saw Mrs Leigh Perrot in the street, on the other side of the road, with her husband (Pinchard, 7). On cross-examination she said about five minutes after she came up. She could not say exactly how long it was; never has since, at any moment, been able to say exactly what time had elapsed (Pinchard, 11).

She crossed the road and accosted them. "Pray, ma'am, have not you a card of white lace as well as black?" "No, I have not a bit of white lace about me." "See in your pocket, ma'am." "If I have, your young man must have put it up in mistake." Gregory said that Prisoner trembled very much, was much frightened, and coloured as red as scarlet (Pinchard, 8). She handed over the paper parcel to Gregory, who opened it and saw the card with white lace, and the black lace over it. The black lace card was about an inch shorter than the white lace card. She took out the white lace and looked at it. "Yes, it is mine; I will swear that to be the shop mark." Aunt Jane repeated that the man must have given it in mistake. "Tis no such thing, tis no such thing; you stole it, you are guilty." Uncle James said, "She did not," or something of that sort. Gregory took out the white lace and returned to the shop with it.

She called Filby up from the kitchen, and after consulting with her he went out to look for Mrs Leigh Perrot, whom he found with her husband at the corner of the Bath Abbey churchyard. Filby asked him his name. He answered that he lived at no 1, Paragon Buildings, and his name was on the door. Filby went there directly and saw the name.

He then went to Gye's, and afterwards went with Miss Gregory to the Town Hall (Pinchard, 18). This visit to Gye's by Filby is not mentioned in Gregory's evidence or in the other pamphlets; but all agree that the lace was in the possession of Mr Gye one night only and he returned it to her the following day.

20 See n 16, *supra*.

21 This is very strange. If he had seen the card of white lace in Aunt Jane's hand, why did he waste three minutes talking to the girls before going down to tell Miss Gregory in the kitchen? See the case reported in the *Manchester Courier*, 15 Jul 1826: James Tinley went into Samuel Lowe's shop and asked to buy two pieces of ribbon. When Lowe turned round to get his yardstick he saw the prisoner put his hand into the drawer. He immediately charged him with the theft, upon which he pulled out a piece of ribbon from his pocket, and returned it. He was then searched and another piece of ribbon was found, together with a large quantity of items of jewellery stolen from another shop.

Gregory and Filby went to the Town Hall to lay an information, but the Mayor and the Magistrates had already left because they were busy with the soldiers who were passing through the town on their way to Holland. They went every day until the following Wednesday, when they were finally able to lay the information.

## 8 The case for the defence

Aunt Jane pleaded Not Guilty. What was the case for the defence? The short answer is that there was no direct defence. First, she, the prisoner, could not give evidence on oath in her own defence. So she could not challenge the prosecution account of events in the shop. Secondly, Uncle James, her husband, could not give evidence on oath either. So they could not challenge the prosecution account of events in the street.<sup>22</sup> Thirdly, defence counsel were not entitled to address the jury; they could only examine and cross-examine witnesses. So they had no opportunity to set out the case for the defence in reply to the statement of the case for the prosecution.<sup>23</sup> Fourthly, the defence were not entitled to see the depositions of the witnesses for the prosecution, their sworn statements before the Magistrates.<sup>24</sup> So cross-examination had to be conducted to a large extent in the dark. It could not be prepared before the trial.<sup>25</sup>

- 22 “The more I reflect on the diabolical Set that swore such abominable Falsehoods the less I wonder at the Numbers that swing every Year – indeed I am almost led to fear that many Innocent People suffer from false Oaths ... by timing it when I had only my Husband with me they were sure that I could have no Evidence against them.” (*Notes & Queries*, 135.) In Jan 1754 Joshua Kidden was capitally convicted for robbing Mary Jones, Widow, on the highway, of a guinea and some silver, and was hanged at Tyburn. On 1 Mar Mary Jones and three friends divided up the reward of £40 given by statute for the conviction of a highway robber. Five months later it was discovered that the whole thing had been a conspiracy to claim the Blood Money. All four were tried for murder at the Old Bailey, and convicted. These extraordinary rules of evidence in capital cases were not reformed until 1898, and there was no appeal from the verdict of a jury until 1908. The members of the jury were considered to represent the people, and when the people had spoken, that was that.
- 23 Hence they could not contradict Vicary Gibbs’ assertion that once the alleged theft had been reported to the Town Hall it could not be recalled. This was a private prosecution which could have been stopped at any time. See, also, Mackinnon 1937: 40 n 1. Aunt Jane was aware of this possibility: “If Filby had gone off the very day before the Trial, we should have lain under the Stigma of having bought him off without a possibility of Clearing ourselves.” (*Notes & Queries*, 135.) This rule was not reversed until the Prisoners’ Counsel Act 1836.
- 24 “At present the depositions of witnesses taken before the Magistrate are sent to the judge who presides at the trial, but are not allowed to be seen by the prisoner or his Counsel. The cross-examination of these witnesses is, therefore, conducted under circumstances of no ordinary difficulty, for the Counsel has no means of cross-examining a witness upon his statements before the Magistrate, and of showing in that manner the difference between his evidence at one time and at another.” See *Bell’s Life in London*, 15 Jun 1834.
- 25 This rule was reversed by the Prisoners’ Counsel Act 1836, s 4: “All persons under trial shall be entitled to inspect, without fee or reward, all depositions that have been taken against them and returned to the Court before which their trial shall take place.”

## 9 Aunt Jane's unsworn statement

Aunt Jane could not give evidence on oath in her own defence, as we have already seen. But she was entitled to make an unsworn statement. This was not evidence and was not subject to cross-examination. It was not normally used to enter into the facts of the case but to make a plea for justice and mercy.

She had prepared a written version of her speech. After the trial she made a copy of it which she sent to her cousin Montague Cholmeley.<sup>26</sup> When she attempted to address the Court she was so agitated that her voice failed her several times in the first few sentences and the court had great difficulty in following what she was saying and the shorthand writers reported it differently.<sup>27</sup>

Jekyll was asked to sit next to her and to repeat what she wished to say. The changeover is clearly indicated in the London pamphlet: "Blessed (said she) in the affections of a most generous husband ...". After that all reports say very nearly the same thing. It is particularly worthy of note that all three omit the sentence: "I will only ask you whether to be found opposite to the Shop within the space of little more than half an hour, and with the Lace in my Hand, is like the conduct of a guilty person." It was in her text. Presumably it was not read out in court. There is one curious variant. She invoked "that God whom we all acknowledge and adore". So reported by Gye and Pinchard. The London pamphlet, followed by the *Times* and all the other newspapers, and the *Lady's Magazine*, has "that God whom you all adore". "I call that God to witness that I did not know that I had the lace in my possession, nor did I know it when Miss Gregory accosted me in the street. I have nothing more to add."

## 10 The witnesses for the defence

The defence could not challenge the evidence of the prosecution witnesses directly, but they could cast doubt on it indirectly by showing that Filby was an unreliable witness and that similar mistakes had been made on other occasions. They called John Crouch, a pawn-broker in Cripplegate, London. On cross-examination Filby had sworn that he had never had any dealings with Crouch. Crouch now swore that Filby and his brother had both done business with him in the years 1793 and 1794, but perhaps not more than once or twice.

26 *Notes & Queries*, 103-104. She made at least one mistake in copying it out. In the sentence, *I shall leave the task where I am certain it will be executed with justice and mercy*, she left out the word *task*.

27 Her text said: "Placed in a Situation in every respect the most enviable." In Pinchard that became "the most eligible", in Gye "the most affluent", and in the London pamphlet "the most comfortable imaginable".

Miss Blagrave gave evidence that on 19 September she had bought a veil in the shop from Filby. When she got home and opened the parcel she found that there were two veils in it. She took the second one back the following day and was never accused of having stolen it.

Mary Kent gave evidence that at the beginning of August she had bought four pairs of gloves in the shop, though not from Filby. When she got home and opened the parcel she found that there were five pairs in it and returned the extra one the following day.

## 11 The character witnesses

The defence then called fourteen character witnesses. The first four were the good and the great.

George Vansittart, Esq (1745-1825), of Bisham Abbey, made a fortune as a merchant in British India, reputed to be worth £150,000, and retired to Berkshire in 1776, a few miles from the Leigh Perrots. He was MP for Berkshire from 1784 to 1812. “There was frequent intercourse between their families ... he conceived her to be a person of honourable and religious principles, and incapable of any act of dishonesty.”

Lord Braybrooke (Richard Griffin, 2<sup>nd</sup> Baron Braybrooke, 1750-1825), of Billingbear House, Berkshire, was MP for Grampound, 1774-1780; Buckingham, 1780-1782; and Reading, 1782-1797. He succeeded to the peerage in 1797, and was Lord Lieutenant of Essex from 1798 until his death in 1825. In June 1780 he married Catherine, youngest daughter of George Grenville. Her father was Prime Minister, 1763-1765; her brother, William, was Prime Minister, 1806-1807; and her cousin, William Pitt, the younger, was Prime Minister, 1783-1801 and 1804-1806, that is, he was Prime Minister at the time of the trial. Lord Braybrooke “lived within a few miles of the Leigh Perrots, visited the family and knew them well. He always considered Mrs Leigh Perrot’s character strictly honourable and unimpeachable”.

Francis Annesley, Esq (1734-1812), was MP for Reading, 1774-1806, for half of that time with Lord Braybrooke. He was one of the trustees of the British Museum, and the first Master of Downing College, Cambridge, from 1800 until his death. “He used to dine four or five times with the Leigh Perrots every summer; lived about six miles from them; no one could have supposed that she could do anything dishonourable.”

John Grant, Esq of White Waltham, bought Waltham Place in 1774, four miles from Scarlets. He was High Sheriff of Berkshire in 1780. They frequently visited and dined with each other. “Their fortune was ample, and there was no occasion for any appearance of meanness in her conduct.”

With that support it is probable that if Aunt Jane had been convicted she would have spent a few months in prison and then received a free pardon from the King. In

1799 Lieut Stevenson, who had been convicted of murder and sentenced to death in March at the Exeter spring assizes for his part in a fatal duel, received a free pardon from the King in September. Aunt Jane had a much stronger case.

The next two witnesses were clergymen. The Rev Philip Nind was vicar of Wargrave and Waltham St Lawrence and one of Lord Braybrooke's domestic chaplains. Scarlets was in his parish. He lived about two miles and a quarter from the Leigh Perrots. "No people attended the church more regularly than they did. He never could have suspected the Prisoner to have been guilty of such an action."

The Rev William Robert Wake was Vicar of Backwell, Somerset, Curate of St Michael's, Bath, and Chaplain to the Earl of Bristol. The Leigh Perrots lived in his parish in Bath. "They were constant attendants at the church. He was particularly pleased at their being generally at church in the afternoon, when very few people except tradesmen and servants attend the church. She would have been the last person to have committed such an action."

There were eight more witnesses, local residents and tradesmen, including a linen draper, a mercer and a jeweller, who gave evidence to the same effect.

## 12 The judge's summing up

Mr Justice Lawrence summed up the case for the jury for nearly an hour. His summing up is only reported very briefly in the three pamphlets. He went carefully through the evidence, but they had already reported what the witnesses had said and were not going to repeat it.

The three versions differ considerably and it is impossible to reconstruct what he actually said. In any case those who were listening, including the members of the jury, will have remembered or interpreted it differently.

The version in the Bath pamphlet (Gye) was the shortest. The judge emphasised her excellent character; he said that if they believed Filby they must convict; but they should bear in mind that she had returned to Bath Street so soon when she might have gone home and hidden the white lace; and he left the case with them.

The London pamphlet (Jekyll) was the most favourable to the prisoner. If they put their confidence in Filby the charge was proved; but the witnesses for the defence had cast doubt on his reliability as a witness and on his carefulness as a shopman; and she had passed the shop again within half an hour with the parcel in her hand. So many respectable persons had spoken of her high character. And he concluded: "If the felony has not been proved to your satisfaction, you will let that character have its due influence in favour of the prisoner, and acquit her."

The Taunton pamphlet (Pinchard) has the longest report, going on for four pages. The judge dwelt particularly on some material parts of the testimony given by the witnesses. We are not told what those material parts were, but it is possible to identify them. Pinchard's report is not a verbatim account of the proceedings but

a set of minutes giving the substance of them. But at two points he sets out the question and the witness' answer verbatim, presumably because the judge drew them especially to the attention of the jury.

Bond cross-examined Filby (p 24):

“Q. You not only say then that you saw Mrs Leigh Perrot’s hand in the box, but that you also saw the card in her hand under her cloak?”

A. Yes, I did. I saw it distinctly hanging down under her cloak.”<sup>28</sup>

He had already made this point in his evidence in chief (pp 16-17). Bond wished to underline it. And the question for the jury was simply whether they believed him when he said that he saw the card of white lace but did nothing about it. If they believed him they should convict.

The judge at the end of Jekyll’s cross-examination of Sarah Raines (p 29):

“Q. You say he did not put any white lace in the parcel with the black. How could you know that, not being particularly observant?”

A. I saw that he put in the black lace only.

Q. Are you certain of that?

A. Yes, my lord, I am.”<sup>29</sup>

She had already admitted in cross-examination that her attention was principally engaged in putting away the black lace; that there was nothing particular to draw her attention to what Filby was doing; and that she did not see where he took the paper from to make the parcel. So the first question was a good one: how could she know that? She did not, and could not, answer that question.

We have no evidence about the demeanour of the witnesses when they answered the questions. When Gregory accosted Aunt Jane in the street she says that she trembled very much and turned bright red. We do not know anything about the body

- 28 The other two pamphlets agree in substance but do not have the Q and A form. After the trial was over Aunt Jane insisted that she did not have on *any* cloak. (*Notes & Queries*, 103.) See Borowitz 2016: 318-319: “It would be hard to believe that the Leigh Perrots, promenading on one of the main streets of Bath where they were well known, did not come across a single friend or acquaintance on the day in question who could have testified that Mrs Leigh Perrot was not wearing a cloak. No such testimony was introduced.” But she did not know on the day in question, 8 Aug, that she would need such testimony, and it was very unlikely that anyone would remember on 14 Aug, let alone on the following 29 Mar, what she had been wearing on that day. Gregory and Filby must have remembered what she was wearing in the shop, or they could not have found her so quickly and easily in the street afterwards. So why did she say that she was not wearing *any* cloak? I suggest that she was not talking about what she was wearing, but about what it was called. She was not wearing a cloak, functional and vulgar, but a cape, fashionable and respectable.
- 29 The London pamphlet is substantially the same and has the second Q and A verbatim, but not the first. That gives a totally different impression. The Bath pamphlet is much vaguer.

language of the witnesses, but the members of the jury will have been able to watch it and draw their own conclusions.

The judge drew the jury's attention to the fact that Filby's evidence stood uncontradicted,<sup>30</sup> except in one point of trivial consequence concerning his dealings with Crouch. It was corroborated by the testimony of Gregory that Aunt Jane had not waited for her change at the far end of the counter but had wandered off near the white lace by the door; and by the testimony of Raines that Filby had only put black lace in the parcel.

On the other side he emphasised her previous good reputation and the fact that she had returned and passed the shop with the parcel containing the lace in her hand, which was not the conduct of a guilty person; and the fact that she turned as red as scarlet was not an indication of guilt, anyone suddenly accosted in the street might have reacted in the same way.<sup>31</sup>

He said three times that the question was whether they believed or disbelieved the witnesses for the prosecution, and in case of doubt they should remember her very excellent character which should have great weight with them towards an acquittal.

The jury did not take long to return a verdict of *Not Guilty*.

### 13 What really happened?

Obviously the jury did not believe the witnesses for the prosecution. So what really happened? If Aunt Jane had been allowed to give evidence on oath, what would she have said? If her Counsel had been allowed to address the jury what might he have said?

When the card of white lace was found it was in the parcel *underneath* the card of black lace, which was about an inch shorter. Why was it in the parcel? And why was it *underneath* the black lace?

It must have been put there, either by Aunt Jane or by Charles Filby.

Why should Aunt Jane have put it there, where it was not even hidden, when she could have hidden it anywhere in her clothes, where she could not be searched in public?<sup>32</sup> That seems unlikely.

Could Charles Filby have done it? We know where the white lace came from. It came from a box of white lace that he was measuring behind the counter near the door. We do not know where the brown wrapping paper came from. Sarah Raines openly admitted that "[s]he does not know where he took the paper from, but it was very near him, as he did not go from the place where he was standing to get it."

30 But it could not be contradicted, because Aunt Jane could not give evidence.

31 It might have been an indication of anger at a false accusation made in a public street.

32 See the case reported in the *Taunton Courier*, 6 Oct 1830, of the lady of very fashionable appearance and very elegantly dressed who concealed several yards of lace in her bosom.

She confirmed that in cross-examination “[she] did not observe particularly from whence he took the paper to wrap up the parcel in”. What Filby said is differently reported in the three pamphlets: “He put the black lace in a piece of whited brown paper which he took from under the counter close by him (Pinchard, 15).” “Taking up a piece of paper close by him, he folded the black lace in the paper (Jekyll, 14).” “Some paper was close by; he put the lace in it & folded the paper up (Gye, 11).” Pinchard’s account is more detailed than the other two, but does not contradict them. It is unlikely that he made up the extra details; it is more likely that they left them out because they did not think that they were important. We may conclude that the paper was “under the counter close by him”.

That does not seem to have been the place where wrapping paper was usually kept or where Raines would have looked for it. That suggests that Filby had put it there himself.

When Gregory called Filby to come and measure the black lace he turned round and put the lid of the white lace box on the chair on which he had been sitting. While his back was turned he quickly put the sixth card of white lace on a piece of brown paper which was kept there. He then turned back and walked to the far end of the counter with his yardstick in one hand and the brown paper in the other, which he quickly put under the counter at that end. No one will have been paying much attention while this was going on.

He then measured Aunt Jane’s black lace and wrapped it round a small piece of card which he quickly put on top of the white lace and wrapped up the parcel, while Raines came and put away the rest of the black lace. He did it so fast that Aunt Jane, who might have been watching, did not notice. Nor did Sarah Raines, who was paying attention to what she was doing rather than watching him.

And that is why the white lace was in the parcel underneath the black.

She paid with a £5 note, and while Filby went to get the change she wandered up to the other end of the counter. That must have looked rather suspicious. What was she doing? She could not tell the court.

Fortunately we have a letter, written to her cousin, Montague Cholmeley, on 11 September, just five weeks after the events, setting out her side of the case.<sup>33</sup>

It is true that this is not on oath and not subject to cross-examination. But it does not argue against the prosecution case, because she had not seen the depositions and did not know the details contained in them. She simply sets out the facts as she remembers them, and they were fresh in her memory.

On 8 August she went on ahead of Uncle James, who was going to catch her up later. She went in to no 1, Bath Street, and bought some black lace. While she was waiting for her change “I turned from the counter to the door to catch my Goodman

33 *Notes & Queries*, 4-6.

who in going to drink his Water generally passed that way.” She simply wanted to be near the door, not near the other end of the counter.

When she left the shop she went back the way that Uncle James usually came and had not gone far before she met him. They went together to the Cross Bath, stopped to pay a tradesman’s bill, and proceeded through Bath Street to post a letter at the Post Office.

Now, where was that letter while she was in the shop? Was it in her left hand? That would explain why she did not bother to hide it or hurry to leave the shop. It would also explain why Filby took no notice of it. He knew that it was not the card of white lace, because he had put that in the parcel. He changed his story later on, as we shall see, but that is why he did nothing at the time.

When they came opposite the shop, Elizabeth Gregory rushed across the street and accosted her with these words: “I beg pardon, Madam, but was there by mistake a card of white lace put up with the black you bought?” Aunt Jane said she could not tell as she had not been home and the parcel had never been out of her hand and she had not opened it. She gave the parcel to Gregory, who opened it, and there was a card of White Edging which she took out saying “Oh, here it is,” and went back to the shop.

So we have two different accounts of the event and the conversation in the street. Which is correct? If the Gregory version is correct, Aunt Jane had no reason to change it. But if Aunt Jane’s version is correct, Gregory had to change it if she was going to prosecute for theft, because it was evidence of mistake. And that explains another oddity: if she accused them of theft in the street, why did she not ask them their name and address then and there, with a view to prosecuting them, which Filby did later on?

Aunt Jane could not comment on the Gregory version in court, but she did comment on it in a letter to Montague Cholmeley on 14 April, two weeks after the trial.<sup>34</sup> She said she was feeling more calm – “but the more Calm I feel (tho’ perhaps a contradiction) the more ruffled I am with all the people principally concerned in this most infamous Transaction”. Commenting on the Gregory version she said: “Can anyone believe that all this could have been said to me in one of the most public streets in Bath, at two o’clock when everybody was passing to the Cross Bath to drink the Water and that no person should have heard it, which she says was the Case?”<sup>35</sup>

Aunt Jane’s version is more plausible.

If Gregory thought at that time that there had been a mistake, the next question is: What had Filby told her? Certainly not that he had seen the card in her hand

34 *Idem* 135-137.

35 The point had already been taken in court when Gregory was cross-examined by Dallas: Pinchard, 11; Jekyll, 12; omitted by Gye.

underneath the cloak. Presumably that after Aunt Jane had left, and he had had two or three minutes conversation with the shop girls, he went back to work measuring the white lace and found that one card of white lace was missing. Hence Gregory's comment when the white lace was found: "Oh, here it is."

After that Filby went out and found the Leigh Perrots near Bath Abbey and asked their name and address, and then went to see William Gye. They decided to threaten prosecution in order to extort money from Uncle James. Filby, who now recalled that Aunt Jane had had something in her left hand, made up his new account of what happened and what was said in the shop. Gregory made up her new account of what happened and what was said in the street.

But the jury did not believe them.

## 14 What happened to them all?

Charles Filby left Bath and returned to London, where his name appears in bankruptcy proceedings for years to come.

Elizabeth Gregory was found dead in a wood at Luckham in 1815.<sup>36</sup>

William Gye died of an apoplectic affection in 1802.<sup>37</sup>

Mary Smith, Elizabeth Gregory's sister, who had been in Cornwall on 8 August, returned to Bath and ran the shop successfully at least from November 1799 to March 1807.<sup>38</sup> William Smith died in 1803.<sup>39</sup>

Aunt Jane and Uncle James: I am tempted to say that they lived happily ever after.<sup>40</sup> Their social position was unquestioned. It was even suggested that if he stood for Parliament at Ilchester at the next election he would stand a very good chance of winning.<sup>41</sup> Members of the family often came to visit. About 1811 they moved into a much larger house at 49, Great Pulteney Street, on the other side of the river. They continued to divide their time between Bath and Scarlets, where he died on

36 *Bath Chronicle*, 14 Sep 1815.

37 *Gloucester Journal*, 26 Apr 1802.

38 *Bath Chronicle*, 21 Nov 1799, 19 Mar 1807. See Aunt Jane's letter to her cousin on 14 Apr 1800: "the Man is off and the Shop I hear must be ruin'd." This was side by side with the advertisement for the second edition of the Gye pamphlet.

39 *Bath Chronicle*, 8 and 15 Dec 1803.

40 In two items on the Jane Austen website in 2011 and 2012 Ellen Moody refers to another incident in 1805, but gives insufficient details of her source for us to form any judgment about it. Two incidents, each involving a single item, would not make Aunt Jane a kleptomaniac, even if they had been proved, which they were not. For a good example of shop-lifting mania see the *Bath Chronicle*, 29 Nov 1827. The prisoner was a medical doctor in good practice who had received a fortune of nearly £2,000 with his wife. He used to go about to shops and auction rooms wearing a large camblet cloak with a number of pockets inside. His house was full of silks, ribbons, plated ware and other items stolen from shops in Dublin. He was convicted of stealing three yards of linen and sentenced to seven years transportation. This is very different from Aunt Jane.

41 *Notes & Queries*, 135.

## WAS AUNT JANE A SHOPLIFTER?

28<sup>th</sup> March 1817, aged eighty one (a few months before Jane Austen herself); and she died on 13 November 1836, aged ninety.

## BIBLIOGRAPHY

Borowitz, Albert (2016) *Crimes Gone By*: 303 & 318-319 (Cleveland, Ohio)

Halperin, John (1988) *Studies in Fiction and History from Austen to Le Carré*: 32 (Basingstoke and London)

Ives, Sidney (1980) *The Trial of Mrs Leigh Perrot, Wife of James Leigh Perrot, Esq*: 25-32 (two hundred copies for subscribers and five copies for libraries of deposit; printed and bound at the Stinehour Press, for the Club of Odd Volumes, Boston)

Mackinnon, Sir Frank Douglas (1937) *Grand Larceny, Being the Trial of Jane Leigh Perrot, Aunt of Jane Austen*: 40 (London)

## Additional bibliographic information

Trial of Mrs Leigh Perrot, wife of – Leigh Perrot, Esq. No author named, perhaps Joseph Jekyll. Printed by JH Myers, no 2, Paternoster Row, for West and Hughes, no 40, Paternoster Row, and C Chapple, no 66, Pall Mall (London, 1800)

Trial of Jane Leigh Perrot at Taunton Assizes. No author named, perhaps William Gye. Printed and sold by W Gye, and to be had of the booksellers in town and country (Bath, 1800)

Trial of Jane Leigh Perrot, wife of James Leigh Perrot, Esq. Taken in court by John Pinchard, Attorney, of Taunton. Printed by and for Thomas Norris, White Lion Court (Taunton, 1800)

# THE FIRST OF MAY: DO WORKERS HAVE ANYTHING TO CELEBRATE IN SOUTH AFRICA TWENTY YEARS INTO DEMOCRACY?

**M Tenza\***

## ABSTRACT

The fight for workers' rights and other conditions of service in employment has been an on-going process for a number of decades. Unions have been at the forefront of driving this fight against stiff resistance from employers, especially prior to 1994. However, after the demise of apartheid, we have seen labour contributing immensely to the development of workers' rights in a few ways. First, the involvement of labour at the National Economic Development and Labour Council has ensured that matters affecting workers or their inputs are taken into account when Parliament legislates on issues affecting them. And, secondly, the participation of unions in the creation of collective agreements ensures that workers play a vital role in the creation of codes of conduct that regulate terms and conditions in the workplace. In areas where unions have successfully managed to address issues affecting workers these have been made known and is believed to be celebrated during the International Workers Day. The celebration of this day is not only limited to achievements or successes that unions and workers have achieved over the years, but labour can also use these kinds of celebrations to reflect on the gaps and shortfalls in their attempts to uplift the lives of workers. It is acknowledged that great improvements have been made in the area of labour law such as the proposed National Minimum Wage and

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various pieces of legislation and amendments to existing ones. However, it is clear that the journey of liberating workers is not near the end as unions and workers still face huge challenges of eradicating wage inequality in employment, inequality for work of equal value, the issue of safety in the workplace, labour brokering, the e-tolling system in the Gauteng roads, and many more.

**Keywords:** Workers day; trade unions; rights of workers; National Minimum Wage; challenges in the twenty-first century; unsafe working conditions; labour brokers; and e-tolls

## 1 Introduction

The collective power of labour (through unionism) to improve the working conditions of workers is well-documented in South Africa. Unions played a vital role during the process of liberating and reconstructing the country and in fighting for workers' rights prior to and after 1994. Unions fought for community and political rights at a time when other influential organisations and political parties were banned. As a result, the road leading to the achievement of the rights of workers enjoyed today has never been an easy one to follow for both unions and the workers they represent. Employers resisted the introduction of workers' rights in employment, which then forced workers to use collective power against them. The use of collective power in the form of strikes and protests has helped to achieve at least three broad goals for the benefits of workers in general: (1) improved wages and the creation of new rights; (2) the creation of policies aimed at improving working conditions; and (3) the achievement of political and socio-economic goals such as those dealing with the problem of e-tolls and high food prices. Trade unions have, however, gone into decline since 1994.<sup>1</sup> Currently, they represent about twenty-five per cent of the workers and are in a crisis situation.<sup>2</sup> This is disappointing as the journey towards liberating workers from the chains of unfair working conditions, low wages and labour brokering, is not yet complete. Bearing in mind what unions have achieved in South Africa and that they are in a state of decline the question that arises is whether the first of May (International Workers Day) is worth the celebration? This article argues that despite the decline in the appetite for trade unionism in South Africa, the tremendous contribution that unions have made in the struggle for the liberation of workers cannot go unnoticed.<sup>3</sup> Due to a variety of achievements by trade unions this

- 1 See Godaan "The state of the union? Attitudes to South African trade unions" (HSRC) available at <http://www.hsrc.ac.za/en/review/hsrc-review-march-2013/the-state-of-the-union>.
- 2 Maquthu 2017: "The future of trade unions", paper presented at Annual Labour Law Conference, Emperor's Palace, Gauteng Province.
- 3 Most of the rights in the LRA and Constitution are the product of the hard work of unions dating back to the negotiations that gave birth to the Constitution in Kempton Park. Unions are still fighting for the rights of workers with the intent of improving their working conditions.

article will limit its discussion to the role of trade unions in addressing the issue of inequality and discrimination in employment. The article further discusses their role in fighting for the socio-economic rights of workers.

## 2 May Day: Where did it all start?

The first of May has become International Workers Day for workers celebrating achievements in the fight for their rights and better conditions at work.<sup>4</sup> The celebration of Workers Day began on 1 May 1886 in the United States (US).<sup>5</sup> Prior to the declaration of 1 May as Workers Day in the United States, there was a fierce battle between employers and workers over the number of hours that workers had to work over an ordinary day.<sup>6</sup> Previously, workers were forced to work ten to sixteen hours per day under unsafe conditions. Death and injury were common during this period in the history of labour relations. As early as 1860, workers attempted to shorten these hours of work without any negative effect on their pay. This, however, did not materialise, due to employer resistance. It was only in the 1880s that organised labour garnered enough strength to declare that the hours of work could be a maximum of eight hours per day.<sup>7</sup>

### 2.1 Brief history and summary of union achievements in South Africa

In South Africa, trade unions have played a vital role in transforming the exclusive labour relations' system that favoured a certain group of people to one where all workers are treated with fairness and dignity.<sup>8</sup> For many years, black workers in South Africa were denied the right to form and join trade unions, to bargain collectively, and to strike.<sup>9</sup> Certain legislation was designed to put a stop to these rights. For example, during the apartheid era, gatherings in South Africa in the form of strikes, pickets and protests, were generally regulated by the Internal Security Act.<sup>10</sup> This Act empowered the Minister of Law and Order to prohibit the activities of any person who, in the opinion of the Minister, engaged in activities calculated to endanger the security of the state or from participating in any gathering or class of gatherings.<sup>11</sup>

4 See <http://www.sahistory.org.za/dated-event/1-may-international-workers-day>.

5 *Idem. Fourth Annual Report, Bureau of Labour Statistics* (New York, 1887) at 1.

6 Foner 1986: 8.

7 In South Africa, working hours are regulated in terms of sec 9(1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). The Act makes it clear that workers are only allowed to work eight or nine hours a day, depending on whether they work a five- or six-day week.

8 See the Preamble to the LRA.

9 *SANDU v Minister of Defence* (1999) 4 SA 469 (CC) par [20].

10 Act 74 of 1982.

11 Section 20 of the Internal Security Act.

Non-compliance with the requirements of the Act could result in incarceration. The Suppression of Communism Act,<sup>12</sup> which was later incorporated into the Internal Security Act, allowed the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his/her opinion, reason to believe that the objects of communism would be furthered at such a gathering.<sup>13</sup> The Public Safety Act<sup>14</sup> also had an impact on the gatherings of people. It provided that the Commissioner could –for the purpose of the safety of the public – issue orders whereby any particular gathering or any gathering of a particular nature, class or kind be prohibited at any place or in any area specified in the order.<sup>15</sup> It was only during the 1980s that the rights to form and join trade unions, to bargain collectively and to strike, were afforded to black workers.<sup>16</sup> The coming into effect of the Constitution of the Republic of South Africa<sup>17</sup> (Constitution), the Labour Relations Act<sup>18</sup> (LRA), the Basic Conditions of Employment Act<sup>19</sup> (BCEA), the Employment Equity Act<sup>20</sup> (EEA) and other labour legislation, all changed the situation drastically. The Constitution provides for the labour relations’ clause in section 23. This clause provides that workers have the right to “form and join a trade union, to participate in the activities and programmes of a trade union and to strike”. The Constitution further provides that “(n)ational legislation may recognise union security arrangements contained in collective agreements”.<sup>21</sup> As a result, the LRA was enacted in 1995 to give effect to labour rights and other matters affecting employees and employers in employment. The LRA states that one of its purposes is to “provide a framework within which employees and their trade unions, and also employers’ organisations, can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest ...”.<sup>22</sup> A cursory review of union history in South Africa, and particularly black worker trade unionism, reveals that unions have good reasons to celebrate the role they have played in reclaiming the dignity of workers in the workplace since the dawn of democracy.<sup>23</sup> This is supported by the number of labour rights that have been achieved through active unionism. These include, among many rights: (1) the right to freedom of association which enables workers to join or not join trade unions;<sup>24</sup>

12 Section 9 of the Suppression of Communism Act of 1950.

13 *S v Meyer* 1981 (4) SA 604 (A).

14 Act 3 of 1953.

15 Regulation 7(1), Proclamation 109 issued in terms of the Public Safety Act of 1953.

16 *SANDU v Minister of Defence* (n 9) par [20].

17 Constitution of the Republic of South Africa, 1996.

18 Act 66 of 1995.

19 Act 75 of 1997.

20 Act 55 of 1998.

21 Section 23(6) of the Constitution.

22 Section 1(c)(i) of the LRA.

23 Buhlungu *et al* 2012: 1.

24 Section 18 of the Constitution. For workers, the right to freedom of association is an enabling right which entitles them to form or join workers’ organisations of their own choice, in order to promote common organisational interests. See, also, Budeli 2009: 57.

(2) the right of pregnant employees to take maternity leave;<sup>25</sup> and (3) the right not to be unfairly discriminated against.<sup>26</sup> Labour also fought for the establishment of the Unemployment Insurance Fund (UIF) to cater for unforeseen circumstances that can bedevil workers, and, recently, for the National Minimum Wage (NMW) for those who earn below R3500 per month.<sup>27</sup> All these and many other rights not listed here emphasise that unions have achieved a lot for workers in a very short space of time.<sup>28</sup>

The most important of all these labour rights is the right to freedom of association. Although freedom of association is guaranteed in the Constitution, it seems to be the foundation for all the other collective rights. For example, a strike can only be exercised by a group of people with a common goal of addressing grievances against their employer.<sup>29</sup> Employees will be able to exercise their right to strike, picket or protest as a group only if associating themselves with that group is protected. Association in this regard includes activities of the group to whom the person is affiliated or is a member. In the absence of such liberties, it may be impossible to join or participate in the activities of an association or a union. There is, however, no provision in the Constitution and the LRA which states that the right to strike can only be exercised by a union. Practice has, thus far, shown that a strike becomes effective if it is convened by a registered union. So, it is necessary that the right to associate or not to associate with a union be protected, and hence there is a right to freedom of association in the Constitution.<sup>30</sup>

## 2.2 How do unions participate in the creation of rights and policies affecting labour in South Africa?

The introduction of the LRA ensured that labour plays an important role in the formulation of rights applicable to workers generally, as well as those rights that apply within a particular workplace.<sup>31</sup> This is done via their participation in collective agreements creating a code of conduct in the workplace.<sup>32</sup> Some rights are created through collective bargaining up to the point where industrial action is used to break an impasse. The LRA encourages that issues affecting workers and employers must be decided by both labour and employer. It discourages unilateral decision-making

25 Section 25 of the BCEA and sec 186 of the LRA.

26 Section 9 of the Constitution, read with sec 6 of the EEA.

27 Marrian (7 Feb 2017) "Nedlac parties agree on hourly minimum wage" *Business Day* at 1.

28 Nearly all the labour legislation that protects worker rights was enacted immediately after 1994. This includes the Basic Conditions of Employment Act of 1997, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Skills Development Act 97 of 1998, and the Mine Health and Safety Act 29 of 1996.

29 Section 213 of the LRA.

30 Section 18 of the Constitution.

31 See Preamble to the LRA.

32 Section 1(1)(c) and (d) of the LRA.

as it emphasises mutual understanding on matters affecting both parties. The role of trade unions in advancing workers' rights is not only limited to the creation of codes of conduct and collective agreements in the workplaces where they enjoy a certain representation (eg majority representation). Unions also participate in the formulation of policies regulating or affecting labour, and recommend to parliament on the way forward or reject a proposal where they are of the view that it would not advance the interest of workers. This they do via participation at the National Economic Development and Labour Council (NEDLAC). It is a representative, specialist and state-funded body created out of the realisation that labour legislation is unique and requires a collaborative tripartite initiative.<sup>33</sup> NEDLAC provides a platform where interaction between the State, organised labour and organised business takes place. This interaction is important for ensuring that all role-players are involved in policy-making and envisaged legislation that could have an impact on employers and employees.<sup>34</sup> The ultimate aim is to make economic decisions more inclusive, and to promote the goals of economic growth and social equity. Before a labour matter goes to Parliament, it needs to be referred to NEDLAC.

NEDLAC's work is conducted in four chambers, which discuss different aspects of social and economic policy. The chamber tasked with all new labour law and changes to existing law is the Labour Market Chamber. A proposal to amend the LRA to include a provision that will enable victims to claim directly from a union for strike-related violence, will have to go via NEDLAC. It will have to be discussed at NEDLAC with some proposal for Parliament to consider when a Bill is eventually tabled. NEDLAC has, however, been criticised for wasting time in its deliberations and because of the inability of parties to reach consensus on recommendations.<sup>35</sup> The reasons for the latter, are that representatives from government and labour are not mandated by their principals to take decisions, and not all parties are represented at NEDLAC. According to some authors NEDLAC is at a "tipping point" since it has become less effective and more adversarial in recent years.<sup>36</sup>

### 3 The road ahead and challenges facing labour in the twenty-first century

Despite having the right to freedom of association and other collective rights as "weapons" in the fight against abuse and to promote better working conditions in the workplace, workers and their unions still face challenges in navigating their way forward and addressing issues affecting workers in general. Some of these challenges date back to the pre-1994 era, and are not yet addressed twenty-three years into

33 Parsons 2001: 240; and, also, Parsons 2007: 124.

34 Section 5 of the National Economic Development and Labour Council Act 35 of 1994.

35 Gostner *et al* 1998: 137; and Webster 1995: 39.

36 Smith 2014: 81.

democracy. These include the issues of inequality in employment, unemployment, poverty, and unsafe working conditions particularly in the mining sector. These issues have been on the list of grievances against employers, but it seems there is lack of willingness from the side of employers to deal with them decisively. Unions would be failing workers if these challenges were not taken seriously and addressed.

Due to the number of challenges facing workers, this article investigates the role of trade unions in addressing wage inequality, labour brokers and unsafe working conditions, and particularly in the mining sector.

### 3.1 The issue of wage inequality

The Constitution recognises that the history of South Africa was characterised by racial discrimination and accompanying injustice.<sup>37</sup> As a result, the Constitution speaks directly to issues of inequality and unfair discrimination, and provides the people of South Africa with an equality clause to heal such injustices.<sup>38</sup> The equality clause provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”.<sup>39</sup> It is not only racial inequality that has been outlawed, but also all other forms of unjustified inequality, including wage inequality or discrimination.

By implication, the drafters of the Constitution and the equality clause, in particular, had in mind a system of using law to address issues of inequality. To confirm its commitment to this, the legislature enacted the Employment Equity Act<sup>40</sup> (EEA) to deal specifically with discrimination and inequality in employment. The issue of equal treatment and the elimination of unfair discrimination is also the subject of debate at international level. There are two important conventions dedicated to addressing inequality and unfair discrimination among member states. These are the *International Labour Organisation (ILO) Equal Remuneration Convention* 100 of 1951, which South Africa ratified in 2000, and the *ILO Discrimination (Employment and Occupation) Convention* 111 of 1958, which was ratified in 1997. These international treaties place duties on member states to comply with their provisions and to reflect an international position on a particular subject. In addition, South Africa is a signatory to the *Southern African Development Community (SADC) Protocol on Gender and Development* of 2008. The Protocol requires member states to ensure the application of the principle of equal pay for work of equal value to both males and females. It further suggests that member states should review, adopt and implement legislative measures to achieve these goals.<sup>41</sup>

37 See the Preamble to the Constitution.

38 *Ibid.*

39 Section 9(1) of the Constitution.

40 Act 55 of 1998.

41 Article 19(2)(a) of the Protocol.

However, despite the initiatives by South Africa to comply with the above international conventions, and having enacted legislation to deal specifically with these issues, there has been criticism of the failure to include a specific provision in the EEA that deals specifically with the issue of equal pay, and this is thus a sign of a failure to comply with international law.<sup>42</sup> Case law has also confirmed this position. In *Mangena v Fila South Africa (Pty) Ltd*,<sup>43</sup> the applicant, a black male, alleged that the respondent had discriminated against him on the grounds of race, in that it paid his chosen comparator, a white female, a higher salary despite the fact that the work performed by both of them was the same or alternatively of equal value. The Labour Court remarked that the EEA does not specifically regulate equal pay claims, as is the position with equality legislation in many jurisdictions. It further remarked that a claim for equal pay for work of equal value should be determined in terms of the EEA, as the Act is broad enough to incorporate such a claim.<sup>44</sup>

The legislature has, however, responded to accusations of failure to comply with international law by introducing the Employment Equity Amendment Act<sup>45</sup> (EEAA), which amends the EEA.<sup>46</sup> The EEAA makes specific provisions to address the issue of “equal pay for work of equal value” and attempts to eradicate inequality with regard to the performance of work of equal value.<sup>47</sup> It prohibits unfair discrimination in the terms and conditions of employment between employees performing the same or substantially the same work or work of equal value.<sup>48</sup> The EEAA further provides that the Minister may prescribe the criteria and methodology for assessing work of equal value.<sup>49</sup> As a follow-up to these requirements, the Minister has, thus far, published the Employment Equity Regulations of 2014.<sup>50</sup> These Regulations set out factors which should be used to evaluate whether two different jobs are of equal value. These factors are:

- (a) the responsibility demanded of the work, including responsibility for people, finances and material;
- (b) The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
- (c) Physical, mental and emotional efforts required to perform the work; and

42 Commission for Employment Equity in respect of opportunity and treatment, in Commission for Employment Equity Annual Report 3; clause 3 3 3 of the Memorandum on Objects of Employment Equity Amendment Bill 2012, as found in the Employment Equity Amendment Bill [B31B of 2012]. See Ebrahim 2016: 1.

43 (2010) 31 *ILJ* 660 (LC).

44 *Idem* at 668.

45 Act 47 of 2013.

46 Act 55 of 1998.

47 Section 6(4)-(5) of the LRA as amended.

48 *Ibid.*

49 *Ibid.*

50 See Government Gazette No 37873 of 1 Aug 2014.

(d) To the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.<sup>51</sup>

In *Louw v Golden Arrow Bus Services (Pty) Ltd*,<sup>52</sup> the applicant, a black male employed as a buyer alleged that the respondent/employer committed direct unfair discrimination on the ground of race, in that it paid his comparator, a white male employed as warehouse supervisor, a higher salary for work of equal value. The Labour Court held that the mere differential treatment of persons from different races was not *per se* discriminatory on the grounds of race, unless the difference in race was the reason for the disparate treatment. The court further found that the applicant had failed to prove that the jobs, on an objective evaluation, were of equal value.<sup>53</sup> However, it is not only important to have legislation that addresses issues of equal pay for work of equal value, it is also important that workers are given decent work that will enable them to live a better life or attain a living wage.<sup>54</sup> One of the goals of the ILO is the achievement of “decent” and “productive” work for both men and women in conditions of freedom and equity, security and human dignity.<sup>55</sup> The understanding of the concept “decent work”, is that work is not only a source of income but also a measure of determining one’s dignity and also a source of family stability, peace in the community and economic growth.<sup>56</sup> To further the goal of “decent work”, the ILO’s Decent Work Agenda<sup>57</sup> aims to implement decent work at country level, by means of policy and institutional interventions and the Decent Work Country Programmes that have been developed to identify decent work deficits in member countries, and also to devise strategies and targets to overcome such deficits.<sup>58</sup> In support of this, South Africa has pledged its commitment to the attainment of decent work and sustainable livelihoods for all workers.<sup>59</sup> The question that then arises, is whether it is possible to implement these ILO provisions in certain sectors of the economy such as agriculture, domestic sector and hospitality industry, for example? It is argued that in South Africa there have been several interventions to uplift the plight of employees in these sectors. For example, the Minister of Labour often makes sectoral determinations with regard to wages in these sectors, as well as other sectors identified by the Economic Conditions Commission (ECC) as worthy of intervention. These determinations are, however, insufficient to cater for

51 See Government Gazette No 37873 of 1 Aug 2014.

52 (2000) 21 *ILJ* 188 (LC).

53 *Idem* at 197.

54 Equality is at the heart of the notion of decent work, see Hepple 2001: 5.

55 ILO 1999.

56 ILO 2010.

57 Decent Work Agenda of the ILO, available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm>.

58 ILO [unknown date].

59 Cohen and Moodley 2012: 329.

an acceptable living wage for such employees. It can therefore be argued that such determinations do not bring about a living wage for these workers. For example, the current wage determination in domestic workers is R12.42 or R11.91 per hour, depending on whether a person works in rural or urban areas.<sup>60</sup> This is short of the proposed National Minimum Wage of R20 per hour. It is, however, expected that these hourly rates will be pushed up when the NMW commences.

The absence of a living wage for workers in the domestic and other sectors such as the taxi industry is always a concern to many people, as it not only affects their standard of living, but also their dignity.<sup>61</sup> Furthermore, gender inequalities continue to undermine the project of eradicating inequality and discrimination based on payment: the so-called payment for equal work of equal value. For example, women face glaring pay differentials, gender stereotyping, discrimination based on maternity and family responsibilities, and difficulties in balancing work and family life.<sup>62</sup> Women are mainly concentrated in the feminised professions like nursing and teaching (which is horizontal occupational segregation), while also remaining in lower job categories compared to their male counterparts and being grossly under-represented in senior positions.<sup>63</sup> They are also paid less compared to their male counterparts. Despite commitment by the South African government to decent work and security for all workers,<sup>64</sup> the general sense is that there are quite a large number of vulnerable workers in South Africa with those working on farms earning pitiful wages below the prescribed minimum wage. The grey literature has also reported on these matters. For example, in the wake of the wage strike in the farming industry in De Doorns in the Western Cape Province, the Minister of Labour intervened and announced a minimum wage of R105 per day for all workers in the farms.<sup>65</sup> Despite this announcement by the Minister, certain farmers still pay their workers less than the prescribed minimum wage.<sup>66</sup> In *People's Union for Democratic Rights v Union of India*,<sup>67</sup> workers were paid wages lower than the prescribed minimum wage contrary to various pieces of legislation regulating the industry. The matter was referred to the Supreme Court of India. The Court, in concluding that any work done for less than the minimum wage amounts to forced labour, stated that:

60 A domestic worker is defined as including housekeepers, nannies, domestic drivers and gardeners.

61 Section 10 of the Constitution.

62 Cohen and Moodley 2012: 325.

63 *Idem* at 323.

64 See Decent Work Agenda of the ILO.

65 Government Gazette No 36115 of 5 Feb 2013.

66 Mtyala "Western Cape Farmers Pay above Minimum" *Sowetan Live*, available at <http://www.sowetanlive.co.za/news/2013/02/25/western-cape-farm-pay-above-minimum> (accessed 22 Feb 2017).

67 1983 (1) SCR 546 at 491.

[I]t may be physical force which compels a person to provide labour or service to another or it may even be compulsion arising from hunger or poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt a particular course may properly be regarded as ‘force’ and if labour or service is compelled as a result of such ‘force’ it would be ‘forced labour’.<sup>68</sup>

Around 6.6 million working people in South Africa are paid less than R20 per hour.<sup>69</sup> This implies that such employees live or earn below the breadline.<sup>70</sup> The most affected workers are domestic workers, taxi drivers, and those in the private security industry, hospitality, agriculture, forestry, wholesale and retail, meat trade, fishing, textile, clothing, hairdressing, furniture and cleaning industries as these workers are known to be paid less than what other sectors pay. It is furthermore not only employees employed in these sectors that are affected by the scourge of wage inequalities since there is a general sense of wage inequality in South Africa, with black workers being paid less relative to their white counterparts doing the same job.<sup>71</sup>

### 3 1 1 Addressing wage inequality and the proposed minimum wage

Although inequality and unfair discrimination is contrary to the law, the main problem is the resultant poverty.<sup>72</sup> The dominant feature of South Africa’s equality jurisprudence is income inequality and the resultant poverty which affects most of the population. To deal with these challenges, the Constitution makes provision for a regulatory framework for substantive equality and for redressing unfair discrimination in employment.<sup>73</sup> As stated above, in order to give content to the equality provision of the Constitution, the EEA was enacted to deal specifically with these issues in employment. In this regard, the EEA can be described as transformative legislation that is intended to reduce both social and economic disparities between groups, and to transform the hearts and minds of South Africans.<sup>74</sup>

In addition, the EEA, as amended in 2014, expands on the principle of equal pay for work of equal value. Section 6(4) of the amending Act provides that “a difference in terms and conditions of employment between employees of the same employer

68 *Ibid.*

69 Voladia “How the search for a new minimum wage laid bare South Africa’s fault lines” *Mail & Guardian*, available at <http://mg.co.za/article/2016-11-28-how-the-search-for-a-national-minimum-wage-laid-bare-south-africas-faultlines/> (accessed 22 Feb 2017).

70 See [https://www.buildon.org/global-education-crisis-facts/?gclid=Cj0KCQjw95vPBRDVARIsAKvPd3LUbOcUjfpwsRWJK-wXnd5rQXN62rYHoELR3pd7obrZnnKTGoCwBsJlaAmJIeALw\\_wcB](https://www.buildon.org/global-education-crisis-facts/?gclid=Cj0KCQjw95vPBRDVARIsAKvPd3LUbOcUjfpwsRWJK-wXnd5rQXN62rYHoELR3pd7obrZnnKTGoCwBsJlaAmJIeALw_wcB) (accessed 18 Oct 2017).

71 *Louw v Golden Arrow Bus Services* (n 52); and *Magma v Fila South Africa (Pty) Ltd*.

72 Tenza (26-28 May 2015) “A marathon of twenty years of eradicating poverty: Is South Africa making progress?”, Proceedings of 2<sup>nd</sup> International Conference on National Capacity Building Strategy for Sustainable Development and Poverty Alleviation, Dubai.

73 Section 9 of the Constitution.

74 Kok 2008: 124-125. See, also, Cohen 2012: 35.

performing the same work, or work of equal value, is unfair discrimination if the difference is directly or indirectly based on any one or more of the grounds listed in section 6(1) of the EEA”.

It is therefore submitted that since the economy is failing to create jobs, more focus should be directed at addressing income poverty, that is, paying more attention to people who are already working and ensuring they have secured employment and earn decent wages.<sup>75</sup> To achieve this, the concept of decent work will have to be harnessed to address inequality in the workplace, and a paradigm in terms of which rights that currently apply to labour relationship will extend to all forms of work. As stated above, most of the people who work in domestic, retail, agriculture and other sectors support big families and are usually breadwinners in their homes. In this regard, those who are fortunate to be employed or to be working, need to be targeted as a strategy to enhance their standard of living and, eventually, that of the families they support. This will take place through a radical elimination of income inequality for people who are employed in sectors known to be paying low wages, that is, below the poverty line.

The proposed NMW seems to be the solution to the problem of inequality and low wages, with its ambition of compelling employers to pay employees at least R20 per hour which translates into R3500 a month.<sup>76</sup> The government has led the way in terms of attempting to address this issue. It has proposed legislative reforms to be introduced into our labour relations’ system. The parties at NEDLAC have agreed on this minimum wage, and it is expected to apply across all sectors in the Republic.<sup>77</sup> Employers are expected to comply, unless exempted in terms of the law. A number of workers are expected to benefit from this initiative. The introduction of the NMW is sourced from international law. The ILO Minimum Wage Fixing Convention of 1970 obliges member states to establish a system in their municipal law or domestic law that will introduce a minimum wage covering all groups of wage earners, whose terms of employment are such that coverage would be appropriate.<sup>78</sup> However, South Africa has not yet signed the Convention. The introduction of a minimum wage is not unique to South Africa, as other countries such as the United Kingdom, China, Malaysia and the Cape Verde Islands all have a minimum wage policy. NEDLAC also agreed on the establishment of a National Minimum Wage Commission (NMWC) to review the minimum wage annually.

75 This does not mean that the unemployed are not catered for, but that government should keep formulating policies that will open avenues for the unemployed.

76 A minimum wage is the lowest hourly, daily or monthly wage that employers may legally pay employees or workers.

77 Godongwana (30 Aug 2015) “Essential steps towards a renewal of SA’s economy” *Sunday Times* at 19.

78 Article 1 of the *Minimum Wage Fixing Convention* of 1970.

There is criticism that the introduction of the NMW will result in job losses, increased unemployment, and low economic growth.<sup>79</sup> Research has rejected this view as lacking empirical evidence.<sup>80</sup> It can also be argued that if the NMW is set too high, the government would be running the risk of poor compliance and difficulty in enforcing compliance with the system. For example, farm workers in Cape Town still earn low wages even after the determination by the Minister of Labour. It can also be argued that the minimum wage is far from a living wage and can hardly address poverty. The Congress of South African Trade Unions (COSATU) has lambasted it saying that it lacks definite targets. Their argument further states that the yet to be formed NMWC will review the minimum wage annually, which, according to COSATU, leaves the door open for a zero increase if a yet-to-be formed NMWC decides not to recommend an increase.<sup>81</sup> The government, however, has responded to the criticisms of the NMW by saying that this is a significant starting point leading to the achievement of the goal of a living wage, which is broadly understood to be the amount needed for a household to achieve a decent standard of living.<sup>82</sup> The impact of the NMW on poverty will be monitored through the NMWC. It is believed that the NMWC will have more powers to deal effectively with those employers who fail to comply with the law. In addition, labour inspectors need to be reskilled to enable them to perform their obligation satisfactorily.

It is further argued that the NMW will, in the long run, lead to job losses as those employers who cannot afford the minimum wage will opt to implement retrenchment in order to meet the legislative or other demands. To cater for these eventualities, exemptions are provided to employers who cannot afford to pay their employees the prescribed minimum wage.<sup>83</sup> This is not automatic, and the affected employers should apply for exemptions so that these developments do not affect them negatively. Exemption is, however, not indefinite as it is only applicable until 2019.<sup>84</sup> This means that after 2019, all employers are expected to comply with the law and pay their employees the prescribed minimum wage.<sup>85</sup>

The main aim of the minimum wage is the alleviation of poverty among vulnerable people in South Africa by bridging the wage gap, including between gender, and thereby overcoming poverty. To determine if the minimum wage achieves the desired goals, it will have to be assessed against levels of poverty. If implemented properly, the NMW will not only have a positive effect on individual workers and

79 Belman and Nawakitphaitoon 2015: 621.

80 *Ibid.*

81 Ensor "Minimum wage to come into force in May 2018" (accessed 19 Oct 2017) available at <http://www.heraldlive.co.za/news/2017/02/08/minimum-wage-come-force-may-2018/>.

82 *Ibid.*

83 See the National Minimum Wage Report (accessed 19 Oct 2017) available at <http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF>.

84 See NMW Report, (accessed 21 Jul 2017) available at <http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF>.

85 *Ibid.*

their families, but will also deliver broader economic and social benefits. If set at an appropriate level, the NMW could help stimulate the economy, while also reducing poverty and inequality.

The implementation of the NMW was expected to take effect on 1 May 2018, and the government was tasked with accelerating the process of initiating legislation to regulate this matter.<sup>86</sup> This means that the government was tasked with rolling-out the Minimum Wage Bill and amendments to the BCEA for the minimum wage to be available and implemented by May 2018. The BCEA will have to be amended to ensure that it provides for the minimum wage bill. However, some low-income workers such as farmworkers and domestic workers will be excluded from the application of the NMW as there is a sectoral determination that applies to such sectors. It is however, believed that domestic and farmworkers will get at least R18 an hour, while R15 per hour will be paid to domestic workers and R11 an hour for people employed in the government's expanded public works programme. NEDLAC has agreed that the farm, forestry and domestic sectors will be brought up to 100 per cent of the minimum wage within two years pending research by the NMWC.<sup>87</sup>

### 3 2 The issue of labour broking

Labour broking entails that one person supplies the business of his or her client with workers. It is a well-known form of exploitation of workers earning low wages – who at the same time share their small wages with labour brokers. In South Africa, the system of labour brokers has been in existence for quite a number of years, but without a solution.<sup>88</sup> Labour broking has been a burning issue in South Africa's employment sector with many workers employed through this system complaining that the system parasitises them.

The system of labour broking is referred to as Temporary Employment Services (TES), and is regulated by section 198 of the LRA as amended by section 198A of the Labour Relations Amendment Act.<sup>89</sup> TES is defined as “any person who, for a reward, procures for or provides to a client other persons who render services to, or perform work for, the client; and who are remunerated by the temporary employment service”.<sup>90</sup>

Labour broking or the externalisation of labour, as it is commonly referred to in academic circles, is a method of providing labour that is triangular (or trilateral) in which a client or core business implicitly or explicitly determines the conditions under which the employees of the service provider engages work.<sup>91</sup> According

86 Marrian N “Nedlac parties agree on hourly minimum wage” *Business Day* (7 Feb 2017) at 1.

87 *The Times* 3 Nov 2017 at 8.

88 Van Niekerk *et al* 2015: 68.

89 Act 6 of 2014.

90 Section 198 of the LRA.

91 See Theron 2014: 1831.

to Benjamin, triangular relationships exist where the recruitment, dismissal and employment functions conventionally performed by the employer, are outsourced to an intermediary (or a TES).<sup>92</sup> With this triangular relationship, the TES is responsible for the recruitment, employment and placement of workers. The client, on the other hand – who happens to be an employer – issues instructions and supervises the worker in his/her her workplace, without incurring the responsibility of an employer. Thus it is clear that the reason for externalisation of work to labour brokers is to avoid the application of labour law.<sup>93</sup> The end result is that workers are deprived of labour-law protection.

Angered by this triangular employment relationship and the consequences of being employed via the labour broker, workers have been complaining that the existence of a middle-man (broker) between the employee and employer causes great hardship in terms of their survival as they share the small wage they earn with the labour broker. An example of this dissatisfaction is found in the platinum mines, where, more than other mining sectors, they have externalised employment and rely largely on agencies and contractors to complement a relatively small “core” workforce.<sup>94</sup> It is therefore not coincidental that there were increases in the number of violent strikes in the platinum mines in 2012 and early 2013.

### 3 2 1 The regulation of labour brokers

With the introduction of the new amendments in the Labour Relations Amendment Act<sup>95</sup> (LRAA), the fight against the casualisation of workers has taken another turn in favour of workers.<sup>96</sup> The coming into effect of the LRAA has significantly improved the position of workers supplied by labour brokers in South Africa. First, it provides that the client of the labour broker or the person or business being supplied with workers by the labour broker, is the employer of the labour-broker staff.<sup>97</sup> Second, employers or clients of labour brokers now have a certain responsibility towards employees – something they never had before. For example, during dismissal disputes, claims that were usually the sole responsibility of a labour broker are now a shared responsibility between the labour broker and the client employer.<sup>98</sup> Third,

92 Benjamin 2010: 847. See, also, Theron 2005: 618-649, who mentions that the origin of this phrase remains a mystery.

93 Benjamin P “Workers’ protection in an increasingly informalised labour market: The case of South Africa”, paper presented at the workshop ‘Decent work agenda for South Africa’, Cape Town, South Africa, April 2007.

94 Theron 2014: 1832.

95 Act 6 of 2014

96 Section 198A(1) of the LRA as amended by the LRAA.

97 Section 198A(3) of the LRA as amended by the LRAA.

98 *Ibid.*

employers are now compelled to employ full-time employees who have been in their employ for more than three months in succession.<sup>99</sup>

Another important change that the amendments brought to the terrain of labour relations, is that for a period of three months, the labour broker can hold onto the *status quo* – that is, be the employer of the workers procured to provide services to the client employer. After three months, the amendments state that the worker provided by the labour broker is deemed to be an employee of the client employer.<sup>100</sup> This is, however, not a solution, as employers have a flexible staff complement which they can use to justify the use of labour brokers. A permanent solution is required, where there is in fact a total ban on labour brokers. If labour brokers can hire workers only up to three months, employers will rotate workers to suit their needs or to avoid the application of the relevant law.

### 3 3 Unsafe working conditions

The issue of safety in the workplace has been on the negotiating table whenever unions and employers negotiate terms and conditions of work. This is particularly the case in the mining sector. Before 1994, the mining industry would report about 500 fatalities annually. However, this figure has dropped substantially from where it was prior to 1994. In 2016, the Chamber of Mines reported seventy-three deaths down from seventy-seven in 2015.<sup>101</sup> Despite this decline, unions have been arguing that there is no commitment by employers to prevent or avoid accidents in the mines, caused by rock falls and other factors. An example is the Lilly Gold Mine incident where three employees have been trapped underground for almost three years with no attempts undertaken to recover the bodies. The question is whether unions are doing enough to compel or persuade employers to deal effectively with these kinds of accidents.

#### 3 3 1 Training and compliance with applicable legislation as preventative measures

There is a general duty on employers to provide employees with a safe working environment. In terms of the Occupational Health and Safety Act<sup>102</sup> (OHSA), an employer must provide for the health and safety of persons at work and in connection with the use of plant and machinery protection against hazards to health and safety arising from the activities of people at work, and also for the establishment of an Advisory Council.<sup>103</sup> In terms of OHSA, every employer must provide and maintain

99 Section 198A(3) of the LRA as amended.

100 Section 198B(3) of the LRA as amended.

101 Mtongana M (12 Feb 2017) “Mine bosses warn on ‘sledgehammer’ safety inspections” *Business Times* at 7.

102 Act 85 of 1993.

103 Preamble to the OHSA. See, also, s 1 of MHSA.

a safe working environment. The employer must provide and maintain all the equipment necessary to do the work and all the systems in terms of which work is done. This must be in a condition that does not adversely affect the health and safety of employees.<sup>104</sup> Before using personal protective equipment, the employer must try and reduce or remove the danger. Only after this has been attempted, should personal protective equipment be used. In terms of the Mine Health and Safety Act<sup>105</sup> (MHSA), there is a duty on the employer and employees to create a culture of health and safety and also a duty to enforce safety measures.<sup>106</sup> Some of these duties include the need to maintain a working environment that is safe and without risk to the health of employees,<sup>107</sup> and to ensure that people who are not employees, but who may be affected during the operation, are informed of the potential damage or harm.<sup>108</sup>

To ensure that all the above obligations are met, the employer must ensure that every employee is informed about hazards to his or her health, the safety attached to any work that must be performed, and the precautionary measures that must apply in respect of the hazards while every employee is expected to take all reasonable steps to ensure their own safety and that of others.<sup>109</sup> However, it would be a fruitless exercise to expect employees to do all of the above if they do not have training on how to use equipment and how to protect themselves from unforeseen hazards in their workstations, and particularly in the mining industry where accidents often occur. Because of unique dangers in the mining sector, workers there need extensive and on-going training. Such training must be compulsory in order to ensure that all involved are aware of the needed reactions should a danger takes place. Each time a new job is assigned to an employee or a new employee is employed, training must be provided. The training must also include courses on the use of new technology if the mine plans to use such technology in its operations.

Training will also not be sufficient if the mine does not prioritise safety. At all times, employees need to be reminded that safety is of the utmost importance. The union has the task of ensuring that all that the legislation and collective agreement promises are fulfilled. It is also their duty to ensure that there are no deaths and injuries in the mining and other sectors. Unions should take initiatives on this and monitor compliance by both employers and employees.

104 Section 8(2) of the OHSA.

105 Act 29 of 1996.

106 Section 1 of the MHSA.

107 Section 5(1) of the MHSA.

108 Section 5(2)(b) of the MHSA.

109 Section 13 of the OHSA.

## 4 Conclusion

Evidence shows that the participation of labour in the creation of labour rights and their involvement at NEDLAC is bearing some fruit. Workers have managed to secure many labour rights that enable them to achieve the dream of favourable working conditions, to bargain collectively with employers using negotiating platforms provided by the law to secure wages at the negotiating table, and have rights to take industrial action to press for their demands. Other rights available to employees include the right to freedom of association which includes the right to form or join a union of your choice, the right to assembly, the right to picket, and the right to strike. However, the struggle for better conditions of work, wage increases, and all other issues that affect workers in and outside their workplaces is not yet complete. The declaration of the first of May as International Workers Day seems to remind workers in South Africa that regardless of the milestones they have travelled thus far in terms of fighting for and addressing the plight of workers, there is much that needs to be done in the future. Even though workers have achieved the MNW which is, in fact, regarded as inadequate due to high inflation in South Africa, they still need to work hard to address issues of inequality, in particular, and equal pay for work of equal value, labour brokers, e-tolls, and unsafe working conditions, which still prevail in many workplaces.

## BIBLIOGRAPHY

- Belman D, Wolfson P & Nawakitphaitoon K (2015) "Who is affected by the minimum wage?" *Industrial Relations: J of Economy and Society* 54(4): 582-621
- Benjamin P (2010) "Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document" *Industrial Law Journal* 31: 845-871
- Budeli M (2009) "Workers right to freedom of association and trade unionism in South Africa: An historical perspective" *Fundamina: A Journal of Legal History* 15(2): 57-74
- Buhlungu S & Tshoaei M (2012) *COSATU Contested Legacy* (Cape Town)
- Cohen T & Moodley L (2012) "Achieving decent work in South Africa" *Potchefstroom Electronic Law Journal* 15(2): 320-344
- Cohen T (2012) "The efficacy of international standards in countering gender inequality in the workplace" *Industrial Law Journal* 33: 19-35
- Ebrahim S (2016) "Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" *Potchefstroom Electronic Law Journal* 19(1): 1-28
- Foner PS (1986) *A Short History of the International Workers Holiday 1886-1986* (New York)
- Gostner K & Joffe A (1998) "Negotiating the future: Labour's role in NEDLAC" *Law, Democracy & Development*: 131-151
- Hepple B (2001) "Equality and empowerment for decent work" *International LR* 140(1): 5-18

- Kok A (2008) “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?” *Stellenbosch LR* 19: 122-142
- Parsons R (2001) “Steps towards social dialogue and the development of NEDLAC in a democratic South Africa 1979-2001” *South African J of Economic History* 16: 139-171
- Parsons R (2007) “The emergence of institutionalised social dialogue in South Africa” *South African J of Economics* 75(1): 1-21
- Smith A (2014) “Addressing South Africa’s labour market challenges – A future role for social dialogue and tripartism?” *The Dispute Resolution Digest*: 81
- Theron J (2014) “Decent work and the crisis of labour law in South Africa” *Industrial Law J* 35: 1829-1850
- Theron J (2005) “Intermediary or employer? Labour brokers and the triangular employment relationship” *Industrial Law J* 26: 618-649
- Van Niekerk A, Smit E, Christianson MA, McGregor M & Van Niekerk BPS (2015) *Law@work* (LexisNexis, South Africa)
- Webster E (1995) “NEDLAC: Corporatism of a special type?” *South African Labour Bulletin* 19(2): 33

## Websites

- Decent Work Agenda of the ILO (accessed 18 Nov 2017) available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm>
- [https://www.buildon.org/global-education-crisis-facts/?gclid=Cj0KCQjw95vPBRDVARIsAKvPd3LUbOcUfpwsRWJK-wXnd5rQXN62rYHoELR3pd7obrZnnKTGoCwBsJIaAmJIEALw\\_wcB](https://www.buildon.org/global-education-crisis-facts/?gclid=Cj0KCQjw95vPBRDVARIsAKvPd3LUbOcUfpwsRWJK-wXnd5rQXN62rYHoELR3pd7obrZnnKTGoCwBsJIaAmJIEALw_wcB)
- Ensor L (accessed 19 Oct 2017) “Minimum wage to come into force in May 2018”, available at <http://www.heraldlive.co.za/news/2017/02/08/minimum-wage-come-force-may-2018/>
- Godaan S (accessed 19 Oct 2017) “The state of the union? Attitudes to South African trade unions” (HSRC) available at <http://www.hsrc.ac.za/en/review/hsrc-review-march-2013/the-state-of-the-union>
- <http://www.sahistory.org.za/dated-event/1-may-international-workers-day> (accessed 19 Oct 2017)
- ILO 1999 (accessed 11 Oct 2017) <http://www.ilo.org>
- ILO 2010 (accessed 11 Oct 2017) <http://www.ilo.org>
- Memorandum on Objects of Employment Equity Amendment Bill 2012 (accessed 20 Oct 2017) available at [http://www.gov.za/sites/www.gov.za/files/B31B-2012\\_17Oct2013.pdf](http://www.gov.za/sites/www.gov.za/files/B31B-2012_17Oct2013.pdf)
- National Minimum Wage Report (accessed 19 Oct 2017) available at <http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF>

## Cases

- Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC)
- Mangena v Fila South Africa (Pty) Ltd* (2010) 31 *ILJ* 660 (LC)

## THE FIRST OF MAY

*People's Union for Democratic Rights v Union of India* 1983 (1) SCR 546  
*S v Meyer* 1981 (4) SA 604 (A)  
*SANDU v Minister of Defence* (1999) 4 SA 469 (CC)

## Legislation

Basic Conditions of Employment Act 75 of 1997  
Compensation for Occupational Injuries and Diseases Act 130 of 1993  
Constitution of South Africa, 1996  
Employment Equity Act 55 of 1998  
Employment Equity Amendment Act 47 of 2013  
Employment Equity Amendment Bill [B31B of 2012]  
Internal Security Act 74 of 1982  
Labour Relations Act 66 of 1995  
Labour Relations Amendment Act 6 of 2014  
Mine Health and Safety Act 29 of 1996  
National Economic Development and Labour Council Act 35 of 1994  
Occupational Health and Safety Act 85 of 1993  
Public Safety Act 3 of 1953  
Skills Development Act 97 of 1998  
Suppression of Communism Act of 1950

*BROWN V LEYDS NO* (1897) 4 OR 17:  
A CONSTITUTIONAL DRAMA IN FOUR  
ACTS.  
ACT FOUR: KOTZÉ DELIVERS HIS  
JUDGEMENT, KRUGER DISMISSES  
HIM, MILNER PREPARES FOR WAR  
AND BROWN SEEKS INTERNATIONAL  
REDRESS

**Derek van der Merwe\***

ABSTRACT

This is the fourth and final article in a series on the historical and jurisprudential background to the well-known case of *Brown v Leyds NO* (1897) 4 OR 17, based on the book, *Brown v Leyds, Who Has the King's Voice* (2017, LexisNexis). It discusses Chief Justice Kotzé's judgement in *Brown* in detail and the major political fallout it generated. Kotzé's judgement was his expression of the ultimate authority of the 1858 *Grondwet* (Constitution) in the *Zuid-Afrikaansche Republiek*, the judicial interpretation of which transcended legislative and executive authority in the state. In finding for Brown and against the state, Kotzé asserted in open court the primacy of judicial interpretation of the *Grondwet* over the highest authority of the *Volksraad*

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(the legislative authority), that is, the sovereign authority that the state president and his *Volksraad* had always regarded as an unimpeachable constitutional guarantee. The judgement caused unprecedented political upheaval. It led to the state president dismissing the chief justice from office. It also served to confirm the conviction of imperial Britain that the *Boers* could not be trusted to govern the land in which the world's largest gold deposits lay. The chief justice's dismissal was a significant contributor to the outbreak of the Anglo-Boer War in October 1899. Robert Brown, in whose favour Kotzé had found, was unable to exert the rights to the claims on the Witfontein gold diggings the Supreme Court had found he was entitled to. He took his cause to the United States Senate. After the Anglo-Boer War, the United States took up Brown's cause with Great Britain. Great Britain refused to acknowledge any obligation to Brown to recompense him for the loss of his claims. The dispute dragged on for years. Only in 1923 did an international arbitral tribunal, presided over by Henry Fromageot, finally dispose of the matter, finding for Great Britain and therefore against Brown.

**Keywords:** 1858 *Grondwet*; Supreme Court; constitution; constitutional democracy; *Volksraad*; *Boers*; supreme authority; sovereign authority; highest authority; King's voice; *volk*; judicial independence; testing right; *Volksraad* resolutions; Paul Kruger; John Kotzé; Robert Brown; Alfred Milner; Joseph Chamberlain; United States; Great Britain; international arbitration; Anglo-Boer War

## 1 Introduction

In May 1895 Chief Justice Kotzé made *obiter* comments in his judgement in *Hess v The State*.<sup>1</sup> He stated that it was clearly his duty as a judge, “above all”, to respect and maintain the *Grondwet*, and that it was incumbent upon the judicial authority to test whether a law passed by the legislative authority was valid in accordance with constitutional provisions. He found that Law 11 of 1893, regulating defamation by the press, did not pass the test of validity and that, therefore, had it been necessary for the judgement to do so, he would have struck down the law as unconstitutional. He acknowledged in his *obiter* remarks that his view on the judicial testing right had changed.<sup>2</sup>

Two months later, on 22 July, an American mining engineer and would-be gold-digger, Robert Brown, instituted an action in the Supreme Court, in which he sought an order declaring that his pegging off of 1 200 gold claims on the proclaimed Witfontein goldfield on the western edge of the Witwatersrand, was in fact valid. At issue was the validity of the decision of Paul Kruger's Executive Council to suspend the proclamation of the Witfontein goldfield (and therefore also of Brown and others' right to mine their pegged-off claims) by resolution, until better arrangements for the

1 (1895) 2 OR 112 at 114-116.

2 See the discussion of Kotzé's *obiter* comments in Van der Merwe 2018 (1): 126-128.

public peace could be made. The resolution, published in the *Government Gazette*, was confirmed by the (First and Second) *Volksraad* in terms of a resolution some ten days later. At issue, therefore, was the competence of the Executive Council and, later, of the *Volksraad*, to make (and to repeal) legislative enactments by non-legislative means (through resolutions) and therefore to make law in a manner not prescribed by the *Grondwet*.<sup>3</sup>

Kruger had been aware of Kotzé's assertion of the judicial testing right in his *obiter* comments in May in *Hess* and recognised, in Brown's litigation in July, that the manner under which the proclamation of the Witfontein goldfields had been suspended would create an opportunity for Kotzé to assert the testing right, this time in a substantive judgement. He therefore invited Kotzé to meet with him on 6 September, before argument had been heard in the *Brown* matter, to try to persuade him not to adopt an approach that would have severe repercussions. The meeting did not go well. Kruger said it was inconceivable that a court could declare the legislation of the *Volksraad* invalid (only the *volk* – the people – could do so); he appealed to the sense of brotherhood that existed between them; and he made it clear that he would have to suspend the judge if he did not climb down from his high horse. Kotzé would not be persuaded: he told Kruger that he would continue to follow the dictates of his conscience and the law; anyway, the *volk* was too sensible to allow conflict to exist between the legislature and the judiciary.<sup>4</sup>

Kotzé's determination to go the distance in this matter of constitutional principle was evident in a matter heard by the Supreme Court in early December, some three weeks after Brown's application was argued before Kotzé CJ, Ameshoff J and Morice J from 15 to 19 November.<sup>5</sup> The Court found that an acting judge, Esser, had been appointed irregularly by State Secretary Leyds, that is, not in accordance with the provisions of the *Grondwet*, and that no consequences could be attached to the subsequent discharge of his judicial duties. In his judgement, Kotzé reiterated what had by now become his mantra, namely that faithful observance of the *Grondwet* and its principles was the "only safeguard which the people have".<sup>6</sup>

In the last quarter of 1895 the developing tension between Kruger and Kotzé on the supremacy of the *Grondwet* and the concomitant right of the judiciary to test the validity of laws passed by the *Volksraad* was overshadowed by political events that threatened the very fabric of the *Boer* state. At stake was the extent and nature of political reform in the Republic. For Kruger and his *Boer* supporters, the independence

3 On the circumstances surrounding Brown's action, see *idem* 128-129.

4 Kotzé, clearly sensing conflict ahead, had made careful notes of this meeting: see Editorial 1898b: 90-93. See, also, the discussion in Van der Merwe 2018: 129-130.

5 The opposing counsel represented the very best of the Republican Bar: for Brown appeared Wessels and Curlewis (both later to become chief justices of the Union of South Africa) and for the state appeared Esselen, the leader of the Republican Bar and at the time state attorney.

6 See *Snuif v The State* (1895) 2 OR 294 at 297. See, further, Van der Merwe 2018: 130.

of the *Boer* nation was non-negotiable and therefore electoral and economic reforms were always going to be piecemeal and insubstantial. He had a deep-seated mistrust of the British<sup>7</sup> and so his opposition to British influence would always be heated and intransigent. The progressive *Boers* aligned themselves with the moderates among the *uitlanders* (the non-*Boer* foreigners in the mining and related industries) and sought substantive franchise reform, more competitive, less draconian economic regulation and the incorporation of the South African Republic<sup>8</sup> in a southern African federation of African states and colonies under British influence. The imperialists wanted nothing less than full British paramountcy over the whole of southern Africa and therefore actively sought to destroy the independence of the Transvaal. The swirl of political undercurrents was, of course, caused and determined by the vast riches of the Transvaal goldfields and the aim to exercise ultimate control over them. Intrigue, conspiracy, espionage and open hostility between *Boer* and *uitlander* had been fomenting throughout 1895 and reached boiling point at the end of the year.<sup>9</sup> Robert Brown, too, who had arrived at the Witwatersrand in 1894, was a participant in the unfolding events of 1895: as a *Boer* sympathiser and advocate for reform rather than for revolution, he still had no hesitation in litigating against the Kruger government.<sup>10</sup> These political tensions would reach their apogee in the Jameson Raid of 29 December 1895 to 2 January 1896. The Raid had a profound influence on political events in the years leading up to the outbreak of the Anglo-Boer War in October 1899. It also had a significant influence on John Kotzé.

## 2 The Jameson Raid and its influence on John Kotzé

The chief instigator of the Raid was Cecil John Rhodes, who started his planning for a military overthrow of Kruger's government at Groote Schuur in Cape Town in June 1895.<sup>11</sup> The plan was for Dr Leander Jameson, then administrator of the British South Africa Chartered Company of Mashonaland, to lead a military incursion into the Republic from Pitsani in the Bechuanaland Protectorate on the Republic's western border. They would ride into Johannesburg, there joining forces

7 His state secretary and right-hand man, Willem Leyds, shared this deep mistrust of the British: see Bossenbroek 2012: 87-88.

8 The official name of the Republic was the “*Zuid-Afrikaansche Republiek*” (South African Republic). British officials continued to use the term “Transvaal”, the name they had given to the Republican territory upon annexation in 1877. For purposes of this contribution, these names will therefore be used interchangeably.

9 See, among many, Marais 1961: 46-135; Meredith 2007: 291-310; Van der Merwe 2015: 48-54; and, most recently, Van Onselen 2017: 179-283.

10 See Van Onselen 2017: 114-116, 180, 193-194, 198 and 203-204.

11 The most recent, comprehensive discussion of the events leading up to the Raid, the Raid itself and its aftermath is by Van Onselen 2017: 101ff. Recent publications on the Jameson Raid also include Meredith 2007: 311-351; Bossenbroek 2012: 84-89; and Van der Merwe 2015: 54-62.

with *uitlanders* led by a group who called themselves “Reformers” (Lionel Phillips, John Hays Hammond, Charles Leonard, Frank Rhodes – Cecil’s brother – and George Farrar) and the leaders of a sixty-four-strong “Reform Committee”. There was frenzied planning in Johannesburg in preparation for the grand revolution. The National Union, established in 1892 to serve as an increasingly strident voice for *uitlander* political opinion,<sup>12</sup> published a lengthy manifesto of *uitlander* grievances and demands on 26 December.<sup>13</sup> It was written by Charles Leonard, its chairman, and brother of Jim Leonard QC, a leading member of the Bar. Among its demands was for an independent judiciary and a constitution that was not susceptible to ready amendment. It also referenced Brown’s Witfontein litigation and lamented the unconstitutional interference by the legislature in established rights. Clearly, Charles Leonard and John Kotzé were like-minded in this regard. Alfred Beit, the richest and most influential of the Randlords, would finance the venture.<sup>14</sup>

The entire operation was an ignominious failure. The planned uprising in Johannesburg never took place and Jameson’s 500-odd troops were surrounded by Republican forces near Doornkop, on the western edge of modern Soweto, and forced to surrender on 2 January 1896. Coincidentally, the place where Jameson’s troops were forced to surrender was very close to the place at which Robert Brown had sought to purchase his licences to peg off claims on the Witfontein farm.<sup>15</sup>

John Kotzé was on holiday in Cape Town when informed – on Christmas Day – that a crisis was imminent in the Republic and returned to Pretoria the next day. State Secretary Leyds was in Europe at the time, so Kruger recruited Kotzé and Judges Jorissen and Ameshoff to serve as advisors as the events from 30 December unfolded. Kotzé was in his element in serving Kruger during the coming days.<sup>16</sup> He was a member of a delegation comprising himself, Judge Ameshoff and Jan Kock (long-standing member of the Executive Council) that met with Lionel Phillips and three other so-called Reformers on Monday 1 January 1896, when *Boer* forces first engaged with Jameson and his men, to listen to their grievances; he communicated with JH Hofmeyr, leader of the influential *Afrikaner Bond* in the Cape Colony and looked after the British High Commissioner, Sir Hercules Robinson, when the latter came to Pretoria to mediate between the parties. Also acting as advisor on foreign affairs in Leyds’s absence, he convinced Kruger not to participate in a conference of European nations organised by Kaiser Wilhelm of Germany (at Leyds’s instigation) designed to secure the Republic’s independence, arguing that it would unnecessarily

12 See Marais 1961: 56-57; and Van der Merwe 2015: 39-40.

13 A Dutch translation of the manifesto appears in Van Oordt 1898: 629-642.

14 See Meredith 2007: 311.

15 See Nathan 1941: 351.

16 He describes his participation in these events as Kruger’s advisor in some detail in Kotzé 1941: 241-256.

further inflame British passions and goad Great Britain and Germany into open confrontation.

In his memoirs, Kotzé is full of praise for the manner in which Kruger remained master of the situation and defused the crisis through negotiations with Robinson.<sup>17</sup> The Reform Committee surrendered, *uitlanders* who gave up their weapons were pardoned, Jameson and his officers would stand trial in England, and Jameson would be sentenced to fifteen months' imprisonment (although he served only four months and became a popular hero for standing up to the dastardly *Boers*).<sup>18</sup> In addition, Kruger managed to placate the excitable *Boers* who were spoiling for another Majuba.<sup>19</sup> Undoubtedly, Kotzé was as close to Kruger as he had ever been – as close, in any event, to the brotherhood Kruger had spoken of in his September meeting with Kotzé.

Rhodes resigned as Prime Minister of the Cape Colony. Kruger had all sixty-four members of the Reform Committee arrested on 9 and 10 January 1896. On the same day, he issued a so-called forgive-and-forget proclamation.<sup>20</sup> In it he informed the Johannesburg *uitlanders* that he would forgive them their treasonous activities if they would only but work with the government. He also promised them that Johannesburg would be given full municipal status and that they would have their own mayor and a measure of self-government. Little came of these promises, though. Some saw in this proclamation the hand of John Kotzé, although Jorissen, implausibly, claimed the credit.<sup>21</sup>

Joseph Chamberlain, British secretary of state for the colonies and undoubtedly aware of Rhodes' machinations in the run-up to the abortive raid, far from eating humble pie after the incident, went on a full-scale diplomatic offensive against the Republic.<sup>22</sup> In March 1896, he had a long despatch on Transvaal affairs drafted, in which he attached moral culpability to Kruger for not heeding the many *uitlander* grievances. He also invited Kruger to attend a conference in London to discuss Transvaal and broadly South African affairs. Kotzé, ever desirous of compromise, counselled Kruger to attend the conference. Initially willing to do so, he eventually declined, persuaded by Leyds (much to Kotzé's chagrin, one imagines) that if the Republic could not co-determine the conference themes, there was no point in

17 See Kotzé 1941: 252-256.

18 Jameson returned to southern Africa after his imprisonment. He participated in the Anglo-Boer War, became a member of the Cape Parliament in 1900, leader of the Progressive Party in the Cape in 1903, Prime Minister of the Cape Colony from 1904 to 1908 and the first leader of the opposition in the Union Parliament. He died in London in 1917. See *Dictionary of SA Biography* vol 3: 438-442 at 441-442.

19 See Nathan 1941: 357-362; Meredith 2007: 346-348; and Bossenbroek 2012: 88-89.

20 On which, see Jorissen 1897: 33-35; Nathan 1941: 362-363.

21 See Jorissen 1897: 142; and Nathan 1941: 364.

22 See Meredith 2007: 346.

going.<sup>23</sup> Leyds had returned to Pretoria at the end of March<sup>24</sup> and could therefore stymie any influence Kotzé might have hoped to continue exercising over Kruger.

The sixty-four so-called Reformers were tried on charges of treason on 24 April 1896. The trial judge was Reinhold Gregorowski, appointed specially for the purpose, as all the Republican judges were involved in the affair in one way or another, acting as advisors to Kruger during the rebellion.<sup>25</sup> The leaders (Phillips, Hays Hammond, Farrar and Frank Rhodes – Charles Leonard had fled the country), having pleaded guilty, were found guilty of treason by Gregorowski J and sentenced to death on 28 April. The other reformers pleaded guilty to a lesser charge of treason, and were found guilty and sentenced to differing terms of imprisonment, fines and periods of banishment from the Republic. Later, Gregorowski wrote that he knew at the time of sentencing that the death sentences imposed by him would be commuted, since Chief Justice Kotzé had told him so.<sup>26</sup> This in fact happened. Within two weeks, Kruger commuted the death sentences (though not without stern resistance from Leyds and General Piet Joubert, the commandant-general), first to terms of imprisonment and later to fines (the fines were paid by Rhodes and Beit).<sup>27</sup>

John Kotzé had used the opportunity given him by Leyds's absence to make himself indispensable to President Kruger and to indulge in the high politics he had always yearned for. However, his politics of compromise did not yield the results his political ambitions demanded. He was characterised in February by one senior foreign official as “an ambitious, intriguing man who wants to be President, or K.C.M.G., or both”.<sup>28</sup> When Leyds returned to Pretoria at the beginning of April and resumed his role as prime minister to Kruger, the opportunity for Kotzé to exhibit statesmanship had come and gone.

This was bad enough for Kotzé, but worse still – the newly revised *Grondwet* passed by the First *Volksraad* in early June did not meet his expectations.<sup>29</sup> Revisions to the *Grondwet* had been under discussion since 1893 and Kotzé and his fellow judges had actively provided input into the review process.<sup>30</sup> Importantly, Kotzé had proposed that the *Grondwet* be amended to provide for a special procedure that would elevate it to a higher plane than ordinary legislation. Such an elevation was crucial to Kotzé's cause for a true constitutional democracy as practised in the United

23 See Marais 1961: 108-114; Van Niekerk 1985: 145-147.

24 Van Niekerk 1985: 147.

25 On Gregorowski, see Roberts 1942: 362. He had been a judge in the Orange Free State (he was appointed a judge when not quite twenty-five years old) and was State Attorney of the OFS at the time of his special appointment.

26 See Kahn 1959: 56 n 53.

27 On the trial, see Nathan 1941: 373-376; Van Niekerk 1985: 147-148; Meredith 2007: 350; Bossenbroek 2012: 88; and Van Onselen 2017: 327-329.

28 See Marais 1961: 140.

29 The text of this revised *Grondwet* appears in Schagen van Leeuwen 1897: 35-59.

30 On which, see Van der Merwe 2018: 123.

States, the universal lodestar for the pursuit of republican politics. It meant, crucially, that the constitutionally guaranteed “highest authority” of the *Volksraad* did not also mean that it was the *sovereign* authority – that it had the King’s voice. Kotzé, then, no doubt preparing his judgement in the Brown matter, would have noted this with much disappointment.

There was more disappointment for Kotzé at this time. A letter, written by Phillips to Alfred Beit in 1894 regarding Judge Benny de Korte’s profligacy and inability to pay his debts, had come into the possession of the investigators who were sifting through the documents of the Reformers, in search of evidence of treasonous activities. The letter was presented by Leyds to the Executive Council in May, who immediately ordered De Korte’s suspension and the appointment of a special court to hear charges of misconduct in his judicial capacity against De Korte. The special court, comprising five *Volksraad* members and judges Kotzé, Ameshoff and Morice, met on 10 June 1896 to hear the charges against De Korte. Although the court found that he had not acted improperly in his judicial capacity, the evidence presented at the hearing was a damning indictment of De Korte’s behaviour. He resigned his office two days later. It was a major blow for Kotzé’s efforts to depict the judiciary as the final arbiter of the constitutional integrity of the organs of state, if its second-most senior judge displayed such financial impropriety.<sup>31</sup>

Feeding off the statesmanship he had displayed in his handling of the Jameson Raid and its consequences, and undaunted by the strong political pressure Joseph Chamberlain was placing on him for meaningful political reforms,<sup>32</sup> Paul Kruger later in that year continued to publicly preach his political mantra. It remained very different from the mantra adopted by John Kotzé. In the First *Volksraad* and again at a luncheon in his honour in early December, he reiterated that the *Koningstem* (the King’s voice) belonged to the *volk* (the people), that is to the majority of the enfranchised burghers (those who had voted him and his supporters into office); on them rested the burden of divinely imposed statehood.<sup>33</sup> Paul Kruger, with his populist insistence that the state was governed, and its destiny determined, by the *volkstem* (the will of the majority of the people), was ideologically as far removed as ever from John Kotzé and his insistence on constitutional democracy as the ultimate guarantor of people’s freedoms. Kotzé fretted at this time, convinced that Kruger and the *Volksraad* needed better guidance on legislation passed in this year than State Secretary Leyds was providing to him.<sup>34</sup>

31 On Phillips’s letter, De Korte’s financial impropriety and the special court and its proceedings, see Van der Merwe 1979: 243-245 and 249-251. The composition and terms of reference of the special court were captured in the new *Grondwet*, published in the *Government Gazette* only a week earlier: see Schagen van Leeuwen 1897: 45-46.

32 On which, see Van Oordt 1898: 760-762 and 768-769; Marais 1961: 122-135; and Van Niekerk 1985: 150-151 and 153-158.

33 See Kleynhans 1966: 23 nn 7 and 11, and 26 n 29.

34 See Marais 1961: 140.

Political events since the Jameson Raid clearly influenced the judgement in the Brown matter that he would belatedly hand down in January 1897, fully fourteen months after hearing argument. No reason is given in any of the judgements for this long delay. One can but assume that Kotzé, mindful of the effect his judgement would have on political events in the Republic, delayed the handing down of the judgement as long as possible, in order to seek the most opportune time, politically speaking, for him to do so.

### 3 *Brown v Leyds NO* (1897) 4 OR 17

#### 3.1 The judgement of Kotzé CJ

Kotzé CJ and his fellow judges, Ameshoff J and Morice J, handed down their judgements on 22 January 1897, a full eighteen months after Robert Brown had first instituted his action.

Kotzé CJ first recounted the facts.<sup>35</sup> There was no question, he said, that the relevant portion of Witfontein farm had become a duly proclaimed public digging on 19 July 1895. In order for its proclamation to be suspended, another proclamation needed to be passed in accordance with the provisions of the Gold Law. The proclamation passed by the Executive Council and published on 20 July did not meet these requirements. That is why the Second *Volksraad* passed its resolution on 26 July, affirming the content of the 20 July proclamation and thus denying legal redress to Brown and others who had pegged off claims on 19 July. That is also why the First *Volksraad* on 1 August resolved to affirm the resolution of the Second *Volksraad*.

The first question in law was therefore whether the Second *Volksraad* resolution of 26 July (later confirmed by the First *Volksraad*) had the force of law.<sup>36</sup> Section 32 of Law 4 of 1890 (the law that provided for the establishment of the Second *Volksraad*) had made it clear that the First and Second *Volksraad* had the same legislative competence. That is to say, any law or resolution passed by it and duly published in the *Government Gazette* under the authority of the state president, was valid law, except if the *volk* clearly indicated their displeasure. The fact that all of these procedural conditions had been met, did not dispose of the matter. Two questions needed to be answered. First, did the resolution, which amounted to an implied amendment of the Gold Law, count as the declaration of the will of the legislature in the form of a law? Second, even if the answer to the first question is provided by the express statement in section 32 that a resolution of the Second *Volksraad*, duly published, is valid law, did section 32 constitute valid law?

35 His judgement appears at 22-41 of the published report. The facts are recounted in Van der Merwe 2018: 128-129.

36 *Idem* 23.

In seeking an answer to these questions, Kotzé CJ began by examining the history of the approval of the *Grondwet* on 18 February 1858. His conclusion was that the *Grondwet* was not simply another law of the *Volksraad*. In section 12 it proclaimed the *Volksraad* to be the legislative power in the state and, as such, the “hoogste gezag” (highest authority). This did not mean, as he had erroneously decided in *Executors of McCorkindale v Bok NO*,<sup>37</sup> that “the *Volksraad*, as the highest authority, is, in the sense of the absolute power, above the *Grondwet*”. Rather, “the portion of the sovereign power [the King’s voice] entrusted to the *Volksraad* by the people shall be exercised under and in accordance with the terms of the authority or mandate expressed in the Constitution”.<sup>38</sup> The crucial distinction between the highest authority of the *Volksraad* (established in the *Grondwet*) and the sovereign authority of the people (exercised by means of the *Grondwet*) is necessary to maintain free self-government based on the sovereignty of the people against a despotism that can arise if the most important agent of the state (the council of the representatives of the people: the *Volksraad*) declares itself to be, or acts as if it is, the state itself. The *Grondwet* is there to limit the exercise of power in the interests of the people.<sup>39</sup> In this part of his judgement he quoted extensively from American jurisprudence, in particular from the 1885 decision of *Poindexter v Greenlow*.<sup>40</sup>

The sovereign people, therefore, entrusted the highest (legislative) authority to the *Volksraad* through the medium of the *Grondwet*; it is from the *Grondwet* that the *Volksraad* derives its powers, the latter is not independent from it, and exercises its authority within the limitations that the former prescribes.<sup>41</sup>

It is within the province of another organ of state established by the *Grondwet*, the judiciary, to test the validity of a particular law by reference to the provisions of the *Grondwet*: “A Constitution is, in fact, and must be regarded by the judges, as a fundamental law.”<sup>42</sup> A popular government that exists under a constitution (such as the *Grondwet*), has a fundamental law that prescribes the manner in which the legislature is to declare its will for it to have the force of law. The duty of the court is to test whether the legislature’s expression of will is a law or not – in form, but also in substance. This right of the judicial organ of state to test the validity of the laws passed by another organ of state need not be expressly formulated in a constitution, and there is sufficient authority<sup>43</sup> to assert that it arises by irresistible implication.<sup>44</sup> Most eminent, most eloquent and most persuasive of the jurists he consulted was

37 (1884) 1 SAR 202. His judgement in *McCorkindale* is discussed in Van der Merwe 2018: 96-100.

38 *Brown v Leyds NO* (1897) 4 OR 17 at 26.

39 *Idem* 26-27.

40 114 US 270 (1885) at 291.

41 *Brown v Leyds NO* (1897) 4 OR 17 at 27.

42 *Idem* 29.

43 In his judgement, Kotzé CJ references Roman-Dutch, Dutch, German, English and American law.

44 *Brown v Leyds NO* (1897) 4 OR 17 at 28-29 and 31 n “(u)”.

Marshall CJ, from whose famous judgement in *Marbury v Madison*<sup>45</sup> he quoted a full page and a half in the reported judgement.<sup>46</sup>

Having thus provided meticulously for the jurisprudence to underpin his judgement, he proceeded to analyse the facts. The resolution of the Second *Volksraad* of 26 July 1895 was not law, because it was not introduced, considered, adopted and duly promulgated in the form prescribed by the *Grondwet*, the fundamental law of the state. A *Volksraad* resolution has no constitutional standing.<sup>47</sup> To be sure, the rules of procedure of the *Volksraad* use language that suggests that laws and resolutions have the same legislative force, and the practice of the *Volksraad* over many years equally suggests that laws and resolutions are both treated as legislative enactments by the *Volksraad*. Such impressions, however, are erroneous. Neither rules of order, nor long and established practice, can alter the *Grondwet*. The *Grondwet* is binding upon the people, collectively and individually, until they have (here quoting the constitutional lawyer, Alexander Hamilton (1757-1804)) “by solemn and authoritative act annulled or changed the established form”.<sup>48</sup> Resolutions passed by the *Volksraad* bind the government, but – not being laws properly speaking – cannot bind the people: a distinction already drawn by SG Jorissen J in *Trustees in the Insolvent Estate of Theodore Doms v Bok NO*.<sup>49</sup>

As the confirmation of the Executive Council proclamation of 20 July 1895 by the Second *Volksraad* was formulated as a resolution, and did not comply with the constitutional provisions for law-making, it had no legal standing. And it mattered not that section 32 of Law 4 of 1890 provided that resolutions of the Second *Volksraad*, duly published in the *Government Gazette*, were valid. This is because the *Grondwet*, the fundamental law of the state, provided that a resolution of the *Volksraad* does not have the force of law; if Law 4 of 1890 says it does, it is in conflict with the *Grondwet* and must yield to its fundamental authority. “If the Court is not at liberty to inquire into the constitutionality of Article 32,” he asked rhetorically, “what becomes of the protection of the citizens vouchsafed to them by the *Grondwet*?”<sup>50</sup>

A resolution of the Second *Volksraad* validated the Executive Council proclamation that suspended the initial proclamation of 19 June of the eastern portion of the Witfontein farm as a public digging that would open on 19 July, and sought to deny Brown legal redress. This, however, was not valid law. Therefore, Robert Brown was entitled to be placed in as nearly as possible the same position in which he would have been on the morning of 19 July, had the responsible clerk allowed

45 5 US 137 (1803).

46 *Brown v Leyds NO* (1897) 4 OR 17 at 29-30.

47 *Idem* 34.

48 *Idem* 33.

49 (1887) 2 SAR 189 at 202-203. SG Jorissen J’s judgement on this point is discussed in Van der Merwe 2018: 110-111.

50 *Brown v Leyds NO* (1897) 4 OR 17 at 34.

him to purchase the licence that entitled him to peg off 1 200 prospecting claims. Kotzé CJ ordered the responsible clerk to issue to Brown a prospecting licence for 1 200 claims, upon payment being effected.<sup>51</sup> Brown also claimed, in the alternative, astronomical damages of £372 000 (around £3.7m in today's currency),<sup>52</sup> should it no longer be possible to peg off the claims.<sup>53</sup> Kotzé CJ ruled that if it became impossible for Brown to peg off all or some of the claims, the court would then hear evidence in order to determine the amount of damages.<sup>54</sup>

Ameshoff J and Morice J also delivered judgements, concurring in the finding of Kotzé CJ.

### 3.2 The judgements of Ameshoff J and Morice J

Ameshoff J also found for Brown.<sup>55</sup> The “great legal question” the court was called upon to decide, stated Ameshoff J, was whether the Supreme Court possessed the “testing right”.<sup>56</sup> The answer to this question depended on a determination of the natural meaning of the *Grondwet* provisions, bearing in mind that it was simple-minded farmers who had expressed their collective will in 1858.<sup>57</sup> Through the mechanism of the *Grondwet*, the *volk* (the people), by virtue of their sovereignty (their exercise of the King's voice, he might have said), conferred four powers or mandates: legislative, judicial, executive and military. Of these, the “highest power” was entrusted to the *Volksraad*. This meant no more than that the laws it makes, affects the people directly and it therefore stood under the direct supervision of the people themselves, unlike the other powers. It did not mean a sovereign, unchecked power.

A careful, “natural” reading of the *Grondwet* allowed one to conclude that “a spirit of delegation, a spirit of conferring and entrusting, breathes through the whole

51 *Idem* 37-38.

52 See Van der Merwe 2015: ix-x for the method of calculation used to determine the modern monetary equivalent. At the time, it was thought that the Witfontein goldfield was situated on deep levels of the main reef, therefore worth between £200-£400 per claim. This later proved to be an erroneous assumption, and the claims were deemed to be of little value.

53 On 30 August 1895, the Witfontein farm was re-proclaimed a public goldfield, at which date claims were issued on the basis of a lottery system. Brown did not participate. See Van der Merwe 2018: 129.

54 *Brown v Leyds NO* (1897) 4 OR 17 at 38. Brown also, in the same action, claimed the right to peg off 800 claims on the nearby Luipaardsvlei farm on Monday 22 July 1895, which right had also been denied him on the same basis as in respect of Witfontein. Since the proclamation suspending the opening of the goldfields on both farms had been issued on 20 July 1895, ie, before the Luipaardsvlei goldfields had been opened, the government was within its rights to withdraw a proclamation that had not yet come into effect. Kotzé CJ therefore dismissed Brown's claim in respect of the Luipaardsvlei claims. See *idem* 38-41.

55 His judgement is reported at *idem* 41-54.

56 *Idem* 41.

57 *Idem* 49-50.

law”.<sup>58</sup> To the judicial power was assigned the authority to act according to the laws and to apply the laws as their judgement and conscience dictates. To “act according to the law” (as provided for in art 15) is to exercise its mandate to apply the law, to make sure that not one of the powers or mandates entrusted to the different organs of state is exceeded. That meant to apply the provisions of the Gold Law, to make sure the legislative and executive powers did not exceed their mandates by doing something the Gold Law did not allow (namely to suspend a proclamation of a goldfield in a manner not provided for by the Gold Law). Such a reading of the *Grondwet* reflected the spirit and natural harmony of the *Grondwet*.<sup>59</sup> The court was constitutionally bound to apply the testing right: “I know without hesitation that I must exercise the testing right because of the conception I have of my duty.”<sup>60</sup> He came to the same conclusions as Kotzé CJ and therefore concurred with his findings.

Morice J, too, found for Brown.<sup>61</sup> When the resolution of the Second *Volksraad* of 26 July (later confirmed by the resolution of the First *Volksraad* of 1 August) was passed, Brown had already (on 22 July) had a summons issued in the matter, and the action had therefore commenced. Now, although the common law did provide for a law to be applied to pending cases, the *Volksraad* was not all-powerful. The *Grondwet* provided for a separation of powers; the power of the *Volksraad* did not extend to an infringement of the judicial power, which would be the case if it sought to meddle with cases already before the court. If it was unequivocally clear that the resolution sought to interfere in a pending matter, then he would have been called upon to decide whether such a resolution infringed the separation of powers, and therefore the spirit, embedded in the *Grondwet*. As this was not clear from the wording of the resolution, he was able to find that the resolution did not apply to Brown.<sup>62</sup>

At stake, then, was only the question whether the Executive Council proclamation of 20 July, suspending the proclamation of 19 July that the Witfontein public digging would be open on 19 July, was valid in law. As the proclamation was only published the next day, it had no legal effect on the events of 19 July.<sup>63</sup> Brown was therefore entirely within his rights to demand a licence for the pegging off of his claims, against payment of the monies due, which he had done. To be clear, the judge wrote, he had no right to the land itself on which he had pegged off his claims, only to a right to be placed in the same position as if he had not yet pegged off land. The clerk must therefore issue a licence to Brown for 1 200 prospecting claims on Witfontein, which is what he should have done on 19 July.<sup>64</sup>

58 *Idem* 51.

59 *Idem* 52-53.

60 *Idem* 54.

61 His judgement is reported at *idem* 54-65.

62 *Idem* 59-61.

63 *Idem* 59.

64 *Idem* 62.

### 3 3 Assessment of the judgements

In Kotzé CJ's desire to promote the cause of an American-style constitutional democracy<sup>65</sup> as a bulwark against Kruger's factional and populist politics, he was too ready to attribute to the 1858 *Grondwet* characteristics it simply did not possess. It was not a fundamental law, not in the sense of the US Constitution. It was meant to be – and always treated as such by the people themselves and their mandatories – a living, malleable document, to regulate the orderly exercise of the legislative, executive and judicial powers of government. The people expressly decreed, in articles 12 and 29, that to the *Volksraad* shall be delegated the “*hoogste gezag*” (the highest authority) in the state, apart from its power to legislate.<sup>66</sup> The people built into the *Grondwet* checks and balances to ensure that its highest authority was not abused, the most important of which was biennial representative elections and the right to petition the *Volksraad* on issues of concern. *Het volk* (the people) were the ultimate custodians of the state, and of the freedoms and independence of the individuals that constituted the state: not the *Volksraad* and certainly not the *Grondwet*, a mere instrument for the expression of the will of the people.

It had no higher status than an ordinary law, however much John Kotzé wished to assign this status to it, and however beneficial to good government it would have been had this been the case. There was no special procedure prescribed for its amendment; the people did not oppose its regular amendment, even by means of resolutions; the people were not dissatisfied with expressions of legislative will by means of resolutions. The *Grondwet* was simply not designed as, or meant to be, a vehicle to test the validity of the manner of the *Volksraad*'s exercise of its legislative mandate.

Ameshoff J's insistence that the assignment by the people of the “highest power” in the state to the *Volksraad* was no more than an indication that its power was of a higher order than executive, judicial and military power. This was so, because of the immediacy of the impact of law-making on the people and therefore the need for direct popular supervision. It did not mean that the judicial power to act according to the law (granted in art 15)<sup>67</sup> was subordinate to that highest power, because that would offend the natural meaning of article 15. Ameshoff J is misguided here. The

65 Since Kotzé's first judgement on the validity of *Volksraad* resolutions, in *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202, he had consistently referenced the nature and role of the US Constitution in the US body politic. This was so, because the US was a republic, like the South African Republic, and also because the South African Republic, unlike in Great Britain, had a written constitution, approved by the people, on the basis of which the state was constituted. The manner in which the much-lauded US Constitution guided and determined state governance in the US, wholly encapsulated the ideal state structure (providing, as it did, for judicial review, which Kotzé sought to imprint onto the South African Republic's Constitution).

66 See the actual wording of arts 12 and 29 of the 1858 *Grondwet* as published in Jeppe and Kotzé 1887: 36 and 38.

67 See Jeppe and Kotzé 1887: 36.

“natural meaning” of “highest authority” as provided for in articles 12 and 29, and as interpreted in the light of the historical circumstances leading up to the approval of the *Grondwet* in 1858, was that the people consciously and deliberately granted to the *Volksraad* the authority to make laws and to exercise an authority that superseded all other authority – until the sovereign people saw fit to rein in that authority (to exercise their King’s voice). The *Volksraad* was supreme, its authority unfettered by any other authority, circumscribed only by the people’s sovereign fiat. If it legislated beyond the manner provided for in the *Grondwet*, the people, not the judiciary or the executive, would intervene – which had not happened.

Morice J’s judgement was a deft, but flawed, side-step of the real constitutional issue confronting the Supreme Court. It was mere artifice on his part to argue that the Second *Volksraad* resolution did not explicitly interfere in Robert Brown’s action – it undoubtedly did, no one disputed this at the time. It was also mere artifice to conclude from this that, since there was no explicit attempt to breach the separate power of the judiciary, it was not required of him to determine whether or not the resolution sullied the spirit of the *Grondwet*. Why should Morice J attach any significance to the spirit of the *Grondwet* anyhow, if it makes no mention of resolutions (except tangentially) and if it had no superior status to any other law or resolution? It can only be because he himself recognised that it mattered – and should therefore have been decided by him – whether the *Grondwet* could be altered (and its prescriptions for law-making ignored) by a resolution of the *Volksraad*. One surmises that Morice, a Scotsman and therefore an *uitlander*, albeit a tame one, did not wish to embroil himself in a constitutional controversy that had clear political overtones. He consequently adopted a technicist approach, one that was spurious.

## 4 Reaction to Kotzé CJ’s Brown judgement

### 4 1 Immediate political reaction

Political reaction was immediate, as John Kotzé had no doubt foreseen. He was accused (by Willem Leyds, most notably) of having ulterior motives. He had made himself available as a candidate for the position of state secretary (the elections were to be held in May 1897). Having “criminally” (according to Leyds) provoked a constitutional crisis, the judgement would serve as a blueprint for how he would restore good government underpinned by constitutional principles embedded in the venerable 1858 *Grondwet*.<sup>68</sup> Kotzé later brushed aside these accusations “in silent contempt”.<sup>69</sup> The judgement was handed down in a period of heightened political animosity between the Republic and Great Britain. The dust had not yet settled after

68 See Botha 1926: 83-84 and 92; and Marais 1961: 140-141 and 143.

69 Kotzé, JG “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 267.

the Jameson Raid. The British parliamentary committee of inquiry into the Raid was then still underway. Rhodes, seeking to justify his complicity in the Raid, cited the judgement as an example of how poorly the Republic was governed and Joseph Chamberlain urged the committee to deliberate within the context of unresolved *uitlander* grievances.<sup>70</sup>

It was, from the perspective of internal politics, also not a good time for the court to depict the government as incompetent and to hand a victory to an *uitlander* (Brown). The finding of the majority that *Volksraad* resolutions had no force of law, meant that the majority of the legislation passed by the *Volksraad* (including legislation regulating the mining industry, like the Gold Law) had no validity. This further heightened the sense of incompetence and uncertainty surrounding the manner in which the state conducted its affairs. The prospect of the state having to pay damages to Brown in excess of £300 000 was daunting; it was a massive sum, and such money was best spent on alleviating the economic woes of a *Boer* population in the grip of drought and disease.<sup>71</sup>

Paul Kruger called for an extraordinary sitting of the *Volksraad* in February 1897. Some 2 000 burghers petitioned the *Volksraad* to dismiss Kotzé and Ameshoff.<sup>72</sup> There was little sympathy for Kotzé, even among the *Boer* progressives. Kotzé himself saw no reason for alarm: “The plain road to ... [travel]”, he wrote, was to identify all those resolutions that fell foul of the judgement, to re-cast them in the appropriate constitutionally mandated form and to place them before the *Volksraad* for its immediate adoption.<sup>73</sup>

A law, hastily drafted by State Secretary Leyds and State Attorney Coster, was presented to the *Volksraad* by State President Kruger to combat Kotzé’s (and Ameshoff’s) judicial overreach. It was passed on 26 February by a significant majority (twenty-two votes to four) and published as Law 1 of 1897 in the *Government Gazette* of 3 March 1897.<sup>74</sup> The substance of the law (which came to be called the Testing Right Law) was located in four sections. Section 1 denied to the judiciary the competence to exercise a testing right (a right it was said never to have had and which was not defined); a judicial oath was prescribed in section 2, namely that a judge, prior to appointment, had to swear not to arrogate to himself the testing right; should a judge nevertheless exercise the testing right, section 3 provided that he would be charged with misconduct in his official capacity and tried before a special court (the same court that tried Benny de Korte in 1895); and section 4 granted to the state president the right to formally ask each of the current judges if he deemed it his duty to administer justice in accordance with the existing and future laws

70 See Botha 1926: 83-84; Marais 1961: 138 and 144; and Van Niekerk 1985: 120.

71 See Anonymous 1898: 107; Botha 1926: 87-90; and Marais 1961: 136.

72 See Botha 1926: 68.

73 Kotzé, CJ “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 278.

74 See Tindall in Kotzé 1941: xviii.

and resolutions and not to exercise the testing right – should he fail to answer in the affirmative, he could be summarily dismissed by the state president. Section 6, furthermore, guaranteed rights acquired through judgements of the Supreme Court before the law took effect.

Already on 23 February, when the law was still under discussion, Kotzé and his four fellow judges wrote a letter to the state secretary.<sup>75</sup> The proposed law, they wrote, infringed on the independence of the judiciary (Kotzé in his correspondence always referred to it as “the so-called law”). Best to postpone its discussion (there is no reason for haste) and to rather appoint a *Volksraad* committee (which the judges would gladly assist) to investigate the effects of the judgement and to seek input from the people on the resolution of the problem. They also issued a public statement on the same day.<sup>76</sup> They reiterated their view that the proposed law infringed their independence, said they would cooperate with the government to remove any “difficulties” caused by the judgement, and warned that they would adjourn the court *sine die* and appeal to the people if the law was adopted or if the *Volksraad* discussions infringed judicial dignity.

There was no consensus among the judges, however, on how the effects of the judgement were to be countered. The judges were given until 26 February to present solutions or to lodge their objections to the proposed law. None was forthcoming.<sup>77</sup>

A three-day debate in the *Volksraad* ensued, in which, according to Kotzé, the members engaged in “bitter mother-wit and petty malice”.<sup>78</sup> In the debate, both Leyds and Kruger insisted that the judgement would stand and Brown’s rights would not be infringed upon.<sup>79</sup> Leyds urged the *Volksraad* not to heed the judges’ advice to postpone the law and to seek input from the people: no impression should be created that the judges were co-determinants of law-making; there was no guarantee that the judges would not again assert the testing right; and, as the law was simply an affirmation of an existing state of affairs (no testing right ever existed), the participation of the people was not required.<sup>80</sup> In his contribution to the debate, Kruger repeated his political mantra: only the people – not the judiciary – can reject laws once made by the highest authority in the land, the *Volksraad*. In the people alone resides sovereign authority: *het volk is Koning*, he twice reiterated. The judges are free, as a fish is free, to swim in the laws and write judgements on them; but they cannot reject the laws of the highest authority.<sup>81</sup>

75 See Kotzé 1898: 6-7. See, too, Kotzé, CJ “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 279; and Tindall in Kotzé 1941: xvii-xviii.

76 See Kotzé 1898: 5-6.

77 See the exchange of correspondence published in *idem* 7-10.

78 As quoted by Gordon 1898: 358.

79 See Botha 1926: 87; see, too, Gordon 1898: 350.

80 See Botha 1926: 90-92; Van Niekerk 1985: 121-122; see, also, Marais 1961: 145.

81 See Smit 1951: 180-181; Kleynhans 1966: 23-24.

The judges soon responded. They issued a statement from the bench on 1 March. The law, they stated, violated judicial independence, potentially even the liberty of the Republic, and exposed judges to suspicions of bribery. They would adjourn the court on 5 March indefinitely, until the will of the people had been heard.<sup>82</sup> Gregorowski J stated that no man of honour could occupy a seat on the bench while the law was on the statute book.<sup>83</sup> Kotzé told the British Agent, Conyngham Greene, that in his view the law was a contravention of the London Convention. A group of thirty-nine lawyers in Johannesburg condemned the law as a dangerous infringement of judicial independence. The Pretoria Bar remained silent on the matter.<sup>84</sup>

Undeterred, on 4 March Leyds, on behalf of Kruger, put to the three judges among the five who publicly claimed the testing right (Kotzé, Ameshoff and Jorissen) the question provided for in section 4 of Law 1 of 1897. When the judges protested that they should all be treated equally, the question was duly put to Morice and Gregorowski too. They were given until 17 March to reply, despite their earnest entreaty that the letters be withdrawn “in the interests of the rights of the sovereign people”.<sup>85</sup> In fulfilment of their threat to adjourn the court, they indicated that none was available for the upcoming March circuit. Leyds duly had Esser (the same Esser whose acting appointment had been terminated by the court in November 1895) appointed as an acting judge to attend to the circuit.<sup>86</sup>

## 4 2 Mediation by Chief Justice Henry de Villiers

John Kotzé had earlier written to Sir Henry de Villiers, the chief justice of the Cape Colony, to solicit his support and those of other southern African judges. De Villiers declined to provide his support (he in fact disagreed with the approach adopted by Kotzé in *Brown*). He did offer to mediate in what had become a very public and unsavoury stand-off between the government and the judiciary in the Republic, an offer readily accepted.<sup>87</sup>

De Villiers arrived in Pretoria on 15 March, two days before the deadline for answering the question posed to them by the state president. He first met with the judges (at the time, Kruger was in Bloemfontein on a state visit), who rejected his proposal that they acquiesce in the provisions of the Testing Right Law. He met with

82 See Kotzé 1898: 12-13.

83 See Kotzé, CJ “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 284; and Nathan 1941: 409.

84 The British Resident, Conyngham Greene, in a letter to Alfred Milner, called the Bar’s business-as-usual attitude a “pitiful exhibition” of craven submission to President Kruger’s authority: see Headlam 1931: 217.

85 See Kotzé 1898: 14-15.

86 See *idem* 15-17; and Botha 1926: 70-71. On Esser, see Roberts 1942: 359.

87 See Walker 1925: 290-291.

Kruger on 18 March and recorded his conversation with him in a detailed minute which was later published in the *Cape Times*.<sup>88</sup>

De Villiers informed Kruger that he agreed that the judges had no testing right. He suggested, however, that the judges had a point that needed to be attended to. This was namely the practice of the legislature to simply alter the *Grondwet* provisions at will whenever resolutions are passed. He proposed that Kruger should introduce a measure to protect the *Grondwet* against ready deviation, by adopting a special procedure for its amendment, as was the case with the Free State Constitution. Kruger was not averse to introducing such a measure, but said to De Villiers that he would not bargain with the judges: they must first undertake not to exercise the testing right, and then he would consider a representation from them for a constitutional amendment. De Villiers's response was that the judges must come out of the "affair" with their honour intact. Kruger should therefore consider, not making a bargain, but coming to an understanding (a "*verstandhouding*") with the judges that did not amount to the setting of conditions by either party. Although initially reluctant, Kruger was eventually persuaded by De Villiers to give to the judges an undertaking that he will propose to the *Volksraad* that a special procedure for its amendment be introduced. He warned, though, that it would not happen in the forthcoming session of the *Volksraad* that commenced in May, as much preparatory work must be undertaken and the people must be consulted. De Villiers indicated to him that he was sure the judges would be satisfied if the proposal was tabled only in the 1898 session – a fatal error of judgement, as it turned out.

De Villiers met with the judges on the same day as his interview with Kruger. A draft undertaking composed by De Villiers was discussed. Kotzé, not unreasonably, wanted a three-month time limit set for the amendment to be introduced. They settled for a wording that stated that the amendment would be introduced "as speedily as possible". De Villiers was less than honest with Kotzé in this regard: he knew that Kruger would only introduce the amendment in the 1898 session, but did not inform Kotzé and his colleagues of this. Given the context of the earlier discussion on the time limit, Kotzé was under the impression that "as speedily as possible" meant just that: if not in three months, then soon thereafter, in any event still in 1897.<sup>89</sup>

A letter was duly sent to President Kruger by the judges on 19 March, in which they agreed not to test current and future *Volksraad* laws and regulations against the *Grondwet*. This agreement was conditional upon an understanding that Kruger would present a draft law to the *Volksraad* "*zoo spoedig doenlijk*" (as speedily as possible) that would provide for a special procedure to amend the *Grondwet* and would also provide for judicial independence.<sup>90</sup> A cordial reply was sent to the judges, by Leyds

88 On the minute, see Tindall in Kotzé 1941: xxxvi-xxxviii; and Walker 1925: 295.

89 See Walker 1925: 310-311; see, too, Tindall in Kotzé 1941: xxxix-xl.

90 See Botha 1926: 73-74 for the original letter in Dutch. See, further, Kotzé 1898: 19-20; Walker 1925: 296; and Tindall in Kotzé 1941: xix-xx.

on behalf of Kruger, which created the impression that the crisis had been averted and that, with the judges' assistance, the matter would be attended to.<sup>91</sup> Kotzé even wrote a letter to those lawyers (almost exclusively from Johannesburg) who had supported the judges. In this letter he expressed optimism that a crisis had been averted and that an amicable arrangement was in place to ensure the triumph of truly constitutional and Republican principles.

### 4 3 The storm between Kruger and Kotzé brews in 1898

Kotzé's expectations were cruelly dashed. No judge was asked to provide drafting advice. No committee was appointed. When Kotzé was on leave in Cape Town in April, he found that De Villiers, in an address to the Cape Legislative Assembly, had publicly voiced his opposition to the stance Kotzé had taken in *Brown*. He had also written to Kruger to promote franchise reform in the Republic as a stronger imperative than the entrenchment of the *Grondwet*.<sup>92</sup> At the official opening of the 1898 *Volksraad* session at the beginning of May, which Kotzé had specially come up from Cape Town to attend, Kruger said not a single word about the crisis and its resolution. He merely indicated that a process would be proposed to attend to the matter of constitutional reform, with no details being provided. The elections for the position of state secretary took place. On the opening day of the session the results were announced: of the four candidates, Leyds received the vast majority of the votes (nineteen out of twenty-five); Kotzé received not a single vote, which pleased Leyds to no end.<sup>93</sup>

Kotzé was politically isolated. His plan to establish a constitutional republican democracy, with the (flawed) *Grondwet* as its cornerstone, and to drive his goal by means of the *Brown* judgement, was unravelling. Kruger's attitude was clear: he would not be manoeuvred politically by a (mere) judge, safe in the knowledge that his people would support him to the hilt. Kotzé, however, was nothing if not tenacious. He wrote to the state president on 6 May, in his personal capacity.<sup>94</sup> In this letter he reminded Kruger of his undertaking and repeated his offer for the judges to assist in the drafting process. He received no reply.

He now sought support from elsewhere. He was in regular contact with Conyngham Greene and confided to him that he had reservations about De Villiers's role in the matter.<sup>95</sup> On his return to Cape Town to continue his holiday, he twice met

91 See Kotzé 1898: 20-21 for the letter; and see, *inter alia*, Botha 1926: 84.

92 See Van Oordt 1898: 782-783; Walker 1925: 310-311; Headlam 1931: 79; and Marais 1961: 146 n 1.

93 See Van Niekerk 1985: 182; and Bossenbroek 2012: 103.

94 See Kotzé 1898: 22-23.

95 See Headlam 1931: 79; Marais 1961: 146 n 1 and 191 nn 5 and 6.

with Alfred Milner, then recently appointed as British high commissioner. He also met with Cecil Rhodes.<sup>96</sup>

On 31 May the *Volksraad* appointed a committee chaired by Executive Council member, ADW Wolmarans, to advise on amendments to the *Grondwet*. Such amendments were to be sweeping: not only a special procedure for its revision, but for a proper delineation of all branches of state and a removal from it of all superfluous provisions and the retention of immutable provisions only. The brief of the committee was also to oversee a systematic and comprehensive compilation of all existing legislation. These terms of reference had been proposed by Kruger on 19 May.<sup>97</sup> Clearly, the committee would not finish its work in the current session: Kruger had obviously seen to it that the protection of judicial independence and the entrenchment of the *Grondwet*, the basis of his undertaking to the judges in March, were subsumed under a broader project, thus diluting its primacy.

Kotzé telegraphed to De Villiers about Kruger's machinations and intimated that he would consider withdrawing from the March undertaking. De Villiers, about to set sail for London, where he was to be appointed as Privy Councillor, counselled him against precipitate action.<sup>98</sup> He also said that he had sent him a copy of the minute he had written when he met with Kruger. Upon reading the minute, Kotzé realised that De Villiers had never informed the judges that he had advised Kruger that there was no rush, that the amendments could readily serve only in 1898. Kotzé felt betrayed by De Villiers.<sup>99</sup>

On 9 June the cornerstone of the Pretoria Palace of Justice was laid. It would later become the iconic home of the Supreme Court. Kruger officiated at the ceremony, not the chief justice. Kotzé, who had played no small part in its design, was deliberately snubbed.<sup>100</sup> He continued to keep company with the opponents of those from whom he had been alienated: to Conyngham Greene he expressed "warlike" intentions to withdraw from his undertaking to Kruger; to Percy FitzPatrick, no friend of Kruger's *Boers*, he expressed the hope that "the imperial factor will prove to be the salvation of South Africa".<sup>101</sup>

Kotzé once more wrote to Kruger, on 8 July.<sup>102</sup> In this letter he dispensed with diplomatic niceties. "You have departed from your undertaking", he wrote. "You have not consulted with the judges, the brief of the *Volksraad* committee is so wide

96 See Walker 1925: 311; and Marais 1961: 191-192. Milner's withering back-hander was that Kotzé was "not a strong man", but "useful". He lacked the political charisma to gather strong support for his views, but the avowed anti-Kruger sentiments of the country's chief justice made him "useful" to the British cause.

97 See Smit 1951: 181.

98 See Walker 1925: 311-312.

99 See Kotzé 1898: 23-24; Walker 1925: 311-312; and Tindall in Kotzé 1941: xxxix-xl.

100 See Le Roux 2003: 59-61.

101 See Headlam 1931: 82; and Marais 1961: 191-192.

102 See Kotzé 1898: 24-29. See, too, Botha 1926: 75-76; Tindall in Kotzé 1941: xxiv-xxvii.

and its work subject to no clear timeline: all this points to one who has reneged on his undertaking.” He implored him to request the committee to focus first and foremost on the constitutional amendments, which, he said, could be dealt with expeditiously. He wrote the letter in his personal capacity – the other judges had indicated they would wait until the end of the *Volksraad* session.<sup>103</sup> The letter had one desired effect. The chairman of the committee wrote to Kotzé, asking for the names of judges willing to assist the committee in its task. Kotzé forwarded the latter to each of the judges. Only Esser volunteered his services; some said the chief justice should nominate the judges; some declined. Kotzé also declined to become a member of the committee, because of the presence of Leyds and Coster on the committee, but would provide advice when asked to do so.<sup>104</sup>

A reply to Kotzé’s letter was sent on 16 July.<sup>105</sup> In it, Kotzé’s insistence that the undertaking was departed from was disputed; in fact, it said, the committee-based approach then underway was fully in line with the undertaking to act as speedily as possible. The committee could well present proposed amendments before all the laws were codified, there was no problem in doing so. In a snide concluding remark, it was stated that the other judges clearly did not see the need to correspond with the state president on this matter, since they were prepared to accept the *bona fides* of the president.

The increasingly fractious correspondence between Kotzé and Kruger’s government took place against a backdrop of political and economic problems of such magnitude as to relegate Kotzé’s concerns to a side-show – and an irritating one at that. In mid-year, the British parliamentary inquiry into the Jameson Raid tabled its report. Shamefully, it amounted to a whitewash of Chamberlain and gave Rhodes no more than a stern reprimand.<sup>106</sup> Chamberlain’s diplomatic offensive against the Republic had focussed on a string of imputed breaches by the Republic of the London Convention. The Republic had rebutted these accusations in April and had suggested that the dispute be submitted to international arbitration.<sup>107</sup> Chamberlain’s response, in October, was that the Republic was Britain’s suzerain and as such would not stoop to arbitration with a subordinate.<sup>108</sup>

103 See, further, Kotzé, JG “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 286-287.

104 See Kotzé 1898: 33-34 and 38-42. See, also, Kotzé, JG “An appeal to the inhabitants of the South African Republic” in Kotzé 1941: 287-288; Botha 1926: 76-77; and Tindall in Kotzé 1941: xxix-xxxi.

105 See Kotzé 1898: 29-33; see, also, Botha 1926: 76; and Tindall in Kotzé 1941: xxvii-xxix.

106 See Marais’ incisive analysis of the report: Marais 1961: 71-95. See, further, Meredith 2007: 335-353.

107 The Republic’s rebuttal is published in Van Oordt 1898: 869-894.

108 See Van Oordt 1898: 769-773; Walker: 1925: 314-315; Marais 1961: 195-200; and Bossenbroek 2012: 97-106.

The country was in the grip of a severe drought, a rinderpest epidemic and a recession in the mining industry.<sup>109</sup> An industrial commission had been established by the *Volksraad* in April, to investigate reforms in the industry. Much was expected of it, as a vehicle to bring about much-needed economic reforms and to lessen the tensions between the government and the *uitlanders*. Little came of it, though; the piecemeal reforms eventually approved by the *Volksraad* (Kruger actively participated in the debates) did little to ease political tensions and to liberalise the economy.<sup>110</sup>

True to form, Kotzé pursued his quest, undaunted by events. In August he met with High Commissioner Milner in Cape Town. Milner was given the impression that Kotzé was intent upon pursuing his crusade to breaking point, with or without the support of his fellow judges, and even if it meant him losing his position.<sup>111</sup>

Towards the end of August, Kotzé was called upon to adjudicate in a matter that had run parallel with the Brown matter. One Rothkugel had, like Brown, also pegged off claims on the Witfontein farm on 19 July 1895. One month after the *Brown* judgement, in February 1897, the supreme court had given judgement in Rothkugel's favour, finding that his action was on all fours with that of Brown. Rothkugel, more anxious than Brown to exercise the rights granted to him, had bought a licence in March and tried to peg off his 400 claims on Witfontein. He was refused permission, as the claims had already been awarded by lot to others in August 1895. In June, Rothkugel approached the court (Kotzé CJ, Morice J and Jorissen J presided) to demand £125 000 damages from the state. He did this, not through the issue of a new summons, but by way of a notice that he would present evidence to substantiate his claim for damages. The state's objection to this process was dismissed by Kotzé CJ. The clear intention of the court in February had been that, if the claims could not be pegged off, then the same case should be further heard to determine damages, and finally disposed of.<sup>112</sup>

Judgement was rendered on 23 August 1897.<sup>113</sup> Kotzé CJ expressed himself satisfied with the evidence produced to determine the fair market value of the claims, based on the proximity or otherwise to the probable location of the main reef. He was satisfied that the value of the claims was £6 500. Morice J concurred with Kotzé CJ. EJP Jorissen J was far more sceptical of the credence of the speculative and contradictory evidence presented to the court, so much so that he was unable to determine a fair or even speculative market value. His award of £1 750 amounted to nominal damages only. It is difficult to escape the conclusion that Kotzé CJ was

109 See Van Oordt 1898: 785-786.

110 *Idem* 773-781; Nathan 1941: 388-390; Marais 1961: 189-195; and Van Niekerk 1985: 135-137.

111 See Headlam 1931: 82-83, 89 and 114.

112 See Kotzé CJ's notes of the proceedings, published in *RG* 76: at 201. See, further, Jorissen and Morice JJ's notes at 215 and 216.

113 *Elias Syndicate v Leyds* (1897) 4 OR 248.

willing to lend credence to speculative evidence, far more so than Jorissen J, in order to make an award against the state in the Witfontein matter, an award that, though not meant to sting, would send a message to Kruger and his obstinate bureaucrats.

On 16 September, Kotzé again wrote to President Kruger, a belated reply to the 16 July letter.<sup>114</sup> His purpose throughout, stated Kotzé, was to make sure that the understanding reached between them in March was adhered to, namely that Kruger would take expeditious steps to secure a *Grondwet* protected against sudden change and providing for the pure, worthy and independent administration of justice. He received no reply. In the same month he publicly repudiated De Villiers's statement on the *Brown* matter that had appeared in a London newspaper.<sup>115</sup>

#### 4 4 President Kruger dismisses his chief justice

By the end of 1897, Kotzé was determined to bring matters to a head. He was by now acting alone. The 1897 *Volksraad* session had concluded without so much as a progress report from the constitutional amendment committee appointed in May.

On 16 December, Kotzé wrote a terse note to the president.<sup>116</sup> The understanding reached between us in March, he stated, was that you would submit recommendations to the *Volksraad* for the revision of the *Grondwet* for consideration by it and by the *volk*. Yet nothing has been presented. "Why", he asked with no little asperity, "have you departed from your undertaking and what do you propose to do about it?" Again, no reply. The presidential elections were to take place in early 1898 and Kruger had much more on his mind than his chief justice's petulance.

Kruger won the elections, far more convincingly than had at first been thought.<sup>117</sup> Upon his return from his vacation in Cape Town, and soon after Kruger's election victory, Kotzé wrote his fateful letter to Kruger.<sup>118</sup> "I have waited patiently", he wrote, "for you to uphold your side of the understanding reached between you and the judges in March 1897. Yet nothing has happened and there are no indications that anything is about to happen. The judges agreed not to exercise the testing right on the condition that you would introduce the revision measures as speedily as possible. [He of course knew that Kruger had indicated to De Villiers that he would introduce measures to the *Volksraad* in 1898, so Kotzé was being disingenuous here.] Any undertaking is reciprocal in nature: since you did not fulfil your side of the undertaking, I hereby give notice that my undertaking not to exercise the testing right has lapsed. The understanding of March 1897 therefore no longer exists."

114 See Tindall in Kotzé 1941: xxxvi.

115 See Walker 1925: 317.

116 See Kotzé 1898: 45-46; and, also, Kotzé, JG "An appeal to the inhabitants of the South African Republic" in Kotzé 1941: 289.

117 See Nathan 1941: 412-413; and Marais 1961: 200-202.

118 See, among others, Kotzé 1898: 46-48. This is Kotzé's English translation of the original Dutch.

Kotzé sent his letter to the bar and the side-bar. It made headlines, also in Cape Town. De Villiers had his minute of his meeting with Kruger published.<sup>119</sup> He wrote to Kotzé, expressing fraternal support, despite how Kotzé had misjudged him. Kotzé, in no mood for reconciliation, protested that De Villiers had been less than frank with him on more than one occasion.<sup>120</sup>

On 16 February 1898, Kruger responded. Incredibly, there had been no personal engagement between Kruger and Kotzé during this time. The statement made by the judges on 19 March 1897 and to which I responded positively, he wrote with no little of his own disingenuousness, cannot be construed as a contract – no judge can contract in and out of his duty to apply the law. Your statement that you regard the understanding to have lapsed in effect means that you did not answer positively to the question put to you in March in terms of section 4 of Law 1 of 1897. In terms of that section, therefore, and “to my great regret”, you are discharged with immediate effect as chief justice. Kotzé’s immediate protests that there had undoubtedly been an understanding with reciprocal obligations, that Kruger had breached the conditionality of the undertaking and that, if anything, Kotzé should be tried by a special court, rather than to be summarily dismissed, was rejected by Kruger.<sup>121</sup>

No judge resigned in sympathy with Kotzé. Gregorowski, who had dramatically declared from the bench that no person of honour could occupy a seat on the bench while Law 1 of 1897 existed,<sup>122</sup> was made chief justice. Esselen, leader of the bar, punted to replace Kotzé as chief justice, declined the offer. Ameshoff resigned, because he had been overlooked for the position of chief justice, not out of sympathy with Kotzé.<sup>123</sup>

Kotzé, typically, refused to lie down. He wrote to the bar that he would adjourn the court indefinitely. Leyds, the state secretary, thereupon informed the registrar that anyone who took instruction from Kotzé, rather than Gregorowski, would bear the consequences.<sup>124</sup> In fact, the court would continue to function normally and, apart from a resolution of support passed by lawyers in Johannesburg, Kotzé’s dismissal had no direct impact on judicial business.<sup>125</sup> He addressed a number of public meetings in Pretoria and Johannesburg, one of which was a testimonial dinner in his honour organised by the legal fraternity, and wrote articles in the press – not all of which did him credit.<sup>126</sup>

119 The minute was also published in the *Cape Law Journal*: see Editorial 1898a: 59-64.

120 See Walker 1925: 317-318; and Tindall in Kotzé 1941: xxxix-xl.

121 On the above, see Kotzé 1898: 50-54; Tindall in Kotzé 1941: xxxiv-xxxv.

122 See n 78 *supra*.

123 See Van Oordt 1898: 784; Botha 1926: 80; Editorial 1905: 488-489; Nathan 1941: 409; and Tindall in Kotzé 1941: xxii-xxiii and xxxvi.

124 See Botha 1926: 79-80.

125 See Kotzé 1898: 54-55; and Headlam 1931: 217.

126 See Van Oordt 1898: 785 n 1; Editorial 1898b: 92; and Van Niekerk 1985: 123.

He began to practise at the bar, although he had told Milner in February<sup>127</sup> that he would only do so – and thereby lend legitimacy to the judiciary – if compelled by necessity. He also told Milner that he would publish a manifesto of his grievances (“An appeal to the inhabitants of the South African Republic”), which he duly did.<sup>128</sup> Furthermore, he informed Milner, since he would get no redress in the Republic, that he would take his cause to London. He did so: he went to London in April where, in an interview with Chamberlain, he sought the latter’s support for his claim that his dismissal was in breach of the London Convention and that Britain, as the suzerain power, should intervene. As Milner had forecast, nothing came of his attempts to drum up British support. Kruger accused him of treasonous activity and Kotzé lost much of the sympathy many had for him.<sup>129</sup>

Kruger was not magnanimous in victory. At his inauguration on 12 May 1898 as the fourth state president of the South African Republic, Kruger in his inaugural address devoted some forty per cent of it to the judicial crisis.<sup>130</sup> He began as he had always done in his previous inaugural addresses:<sup>131</sup> he stood before the *volk*, obedient to their call, in which he recognised the voice of God.<sup>132</sup> He would lead them in His light and never, ever would he undermine their sacred independence. Under God’s guidance a *Volksraad* was established and through it a *Grondwet* came into being. Article 8 of the *Grondwet* confirmed the greatest possible freedom of the people, a freedom that was not wanton, but based on God’s word.<sup>133</sup>

Just as the people of Moses exercised their freedom within the confines of the Ten Commandments and of the laws made and applied by the wisest among them, so too in the Republic.<sup>134</sup> In the exercise of its supreme authority, the *Volksraad* made laws and passed resolutions, which the judges were bound to apply according to their judgement and conscience, and which all others were bound to respect. Only the people themselves, in the exercise of their *Koningstem* (their King’s voice) and guided in their thoughts and conscience by God’s presence, could disapprove of a law.<sup>135</sup>

To assert the right to test laws that can only be changed by the supreme and sovereign authority that enacted them, was to arrogate to oneself the testing right that had been introduced to mankind by the Devil. God instructed Adam and Eve not to eat of the fruit of the tree of the knowledge of good and evil, upon pain of death.

127 Details of his interview with Milner are published in Headlam 1931: 216-217 and 224-226.

128 Kotzé, JG “An appeal to the inhabitants of the South African Republic” in Kotzé 1898: 289.

129 See Gordon 1898: 365-366; and Headlam 1931: 232.

130 The speech is published in Van Oordt 1898: 847-865. The paragraphs below contain some paraphrased parts of the speech.

131 See Du Plessis 1952: 41-54.

132 Van Oordt 1898: 848.

133 *Idem* 848-854.

134 See *idem* 855-861 for what follows.

135 *Idem* 857.

The Devil tested them, by telling them that they will not die, but will become one with God and have no need of him. Under Moses, the testing right of the Devil was arrogated by Korah, Dathan and Abiram, who rose up against Moses and Aaron, leaders appointed by God. They disorganised the country and the resultant discord only abated when God destroyed them and their supporters.<sup>136</sup>

The testing right is the principle of the Devil. Once you allow it, discord and disorganisation inevitably follow. God's word teaches that those who assert for themselves a sovereignty they do not possess, and who do not remain within their allotted sphere of power, should be dismissed. Chief Justice Kotzé asserted the testing right and therefore had to be dismissed. He did not remain in his natural habitat – namely that of the laws and their application – but sought, like a fish, to jump out of his waters onto dry land. Just like a fish is too slippery to catch, so the chief justice proved to be when I (with the assistance of the Cape chief justice) tried to coax him back into the waters.<sup>137</sup>

The former chief justice stated that the crisis was all my doing, said Kruger, that I did not keep my promise. That is all nonsense, I gave him no promise, but did give him my word I would attend to matters as soon as possible, and that is what I did. But I no longer blame him, because he is not of sound mind (a statement he was to make twice more in his speech). He has the temerity to now seek British intervention, but his grounds are specious and he knows it. But I no longer blame him, because of his mental infirmity. I would that I could have him confined to an asylum for the insane, because if he were to recover, I would again use his valuable services.<sup>138</sup> Let the whole world know that I did nothing wrong. Let the chief justice's dismissal be a valuable lesson to all, he concluded. The evil of testing the sovereign power of those appointed by the people under the protection of God must be contained.

Kotzé's response to this lengthy peroration was to call him an "oily old Chadband"<sup>139</sup>

The constitutional amendment committee presented its report in October 1898; it was debated in the 1899 session; and *Grondwet* amendments were passed only in late August 1899, two weeks before the outbreak of the Anglo-Boer War. Not one of the proposals that Kotzé had fought for, was accepted.<sup>140</sup>

Kotzé practised at the bar in Johannesburg until mid-1899 and at the bar in Grahamstown for a period from August 1899. He was attorney-general of Rhodesia from 1900 to 1903; judge and later judge-president of the Eastern Districts court from 1903 to 1912; judge and later judge-president of the Cape Provincial Division

136 Kruger's biblical references were to *Genesis* 2: 17 and 3: 5 and to *Numbers* 16.

137 Van Oordt 1898: 858-859.

138 *Idem* 860.

139 See Gordon 1898: 92. "Chadband" refers to the unctuous, self-serving evangelical clergyman promoting a false religiosity in Dickens's *Bleak House*.

140 See Botha 1926: 82; Thompson 1960: 71-72; and Marais 1961: 203 n 1.

from 1913 to 1922; and, from 1922 to 1927, judge of the Appellate Division. He was knighted in 1917. He died on 1 April 1940, aged ninety. In a letter written not long before he died, he adopted a surprisingly magnanimous attitude towards Kruger: "I bear his memory no malice. He was the child and product of the veld ... 'The conceit of knowledge that springs from ignorance' was his undoing."<sup>141</sup> Kotzé is remembered today, not as a progressive constitutionalist and fighter for a constitutional democracy, but as a pre-eminent scholar of the Roman-Dutch law.<sup>142</sup> He would, one suspects, have preferred his legacy to have been for the former rather than the latter.

## 4 5 Jurisprudential reaction to the Brown judgement

Very few of Kotzé's contemporaries in the legal fraternity shared his jurisprudential approach in *Brown*. One exception was JBM Hertzog, later Prime Minister of the Union of South Africa, and for a brief period in 1895, an advocate in Pretoria before becoming a judge in the Free State.<sup>143</sup> Those who thought Kotzé's decision to be wrong in law included Sir Henry de Villiers, Ewald Esselen (who had always maintained the view he had expressed as a judge in *Trustees in the Insolvent Estate of Theodore Doms v Bok NO*),<sup>144</sup> Jan Smuts – then a young advocate in Johannesburg and a later towering figure in national and international politics – and NJ de Wet, a young advocate who later became chief justice of the Union of South Africa.<sup>145</sup>

Two lawyers wrote erudite critiques of the judgement in 1898. The one contribution was published anonymously in the *Cape Law Journal* in 1898 (some say it was written by Jan Smuts)<sup>146</sup> and the other, written by JW Gordon, was published in the *Law Quarterly Review* in London.<sup>147</sup> Both were highly critical of Kotzé's judgement.

The anonymous critique began with the statement that when a legislature decides to express the public law and principles of a state in a constitutional enactment, that in itself does not elevate the enactment to a higher status than other laws. It will only be so if it is clear from the circumstances or from the provisions in the enactment itself. If not clear, then no exalted status attaches to it.<sup>148</sup> Was the 1858 *Grondwet* an enactment with a higher status than other laws, as Kotzé CJ had found? The answer to such a question resided in an analysis of the facts that governed the approval of the *Grondwet* in February 1858.<sup>149</sup> Did the *Grondwet* emanate directly

141 See Nathan 1941: 408-409.

142 On the biographical details of John Kotzé's later career, see Zimmermann and Sutherland 1999: 161-162.

143 See Tindall in Kotzé 1941: xxii-xxiii.

144 (1887) 2 SAR 189 at 192. See, too, Van der Merwe 2018: 109.

145 See Walker 1925: 318-320; Nathan 1941: 407-408; and Marais 1961: 203-204.

146 Anonymous 1898: 94-109.

147 Gordon 1898: 343-366.

148 Anonymous 1898: 95.

149 *Idem* 96-98.

from the sovereign people, and was it their will that was expressed in it? If so, legal checks were indeed imposed on the legislature, but only if those limitation clauses had indeed the meaning that Kotzé CJ attached to them.

The author's detailed scrutiny of the events that had led to the approval of the *Grondwet* guided him to the conclusion that it was not the sovereign will of the people that was expressed in the *Grondwet*, but that it was the *Volksraad* that approved it and that gave the *Grondwet* legislative effect ("The sovereign people did not pass the *Grondwet* ... The *Grondwet* is the creature of the *Raad* ...").<sup>150</sup> As argued in the first of this series of articles, this conclusion was wrong: it was in all respects an instrument of the people, executed through the will of the people.<sup>151</sup>

The author continued on safer ground when he provided abundant evidence that the *Volksraad*, with the concurrence of the people, had made regular amendments to the *Grondwet* in a manner not prescribed by it; also that resolutions were regularly and abundantly passed by the *Volksraad*. His analysis of the *Grondwet* leads to the correct conclusion that it was wrong to impute to it the immutability and definitiveness Kotzé CJ (and Ameshoff J) sought to ascribe to it. Law-making was indubitably the sole province of the *Volksraad* as the highest authority of the state, guided – but not defined – by the *Grondwet*, and by *volk*-approved legislative practice over a forty-year period. The court had no authority, granted either by the *Grondwet* or by internal constitutional practice, to question the law-making powers of the *Volksraad*.<sup>152</sup>

The author furthermore took the view that the circumstances surrounding the withdrawal of the proclamation of the Witfontein goldfield and the manner in which the government dealt with the matter, did not warrant a departure from established precedent. The *Volksraad* resolutions were made in good faith in order to combat a state of unrest and the near-certainty of armed conflict, and did not directly impact on any vested rights that Brown then enjoyed.<sup>153</sup> These are sound arguments.

Surprisingly, the author commended Morice J's judgement.<sup>154</sup> As argued earlier,<sup>155</sup> Morice J sought to base his argument on the wording of the resolution in question and thereby to avoid taking a view on the constitutional issue. However, when he appealed to the spirit of the *Grondwet* to assert that the *Volksraad* cannot, by resolution, interfere in an existing case, he implicitly elevated the *Grondwet* to a higher plane than other legislation. In so doing, he did in fact take a view on the constitutional issue, despite his desire not to do so. In any event, the *Volksraad* had done so before, with impunity,<sup>156</sup> so why not in this case? Furthermore, it was abundantly clear that the resolution was aimed at interfering in the pending matter

150 *Idem* 105.

151 See Van der Merwe 2017: 162-163.

152 Gordon 1898: 98-104.

153 *Idem* 106-107.

154 *Idem* 107.

155 See the discussion at 3 *supra*.

156 In *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202 and *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189.

of *Brown*, so Morice J's assertion that it was not clear that it did so, was patently untenable.

The author, in conclusion, had little sympathy for Kotzé's plight.<sup>157</sup> He had brought it upon himself for he had acted in a manner that any state president would have found insupportable. Section 4 of Law 1 of 1897 was merely a shortcut to what a special court would have found anyway, so it was no use fulminating against that law. Furthermore, the state president had acted "with singular patience and forbearance". Kotzé deserved what happened to him, the same would have happened in any civilised country.

The second author, Gordon, in the *Law Quarterly Review*, made the initial important point in his critique that the *Zuid-Afrikaansche Republiek*, in common with Great Britain, had no "organic statute" that corresponded to what, in the United States and elsewhere, is captured in a Constitution.<sup>158</sup> The "real" constitution of the Republic, he wrote insightfully, was "discernible in its statutes, routine of legislative, judicial, and official business, and historical connexion with older states, but it has never yet been codified, collected, or expounded".<sup>159</sup>

After a detailed analysis of the circumstances surrounding the *Brown* matter,<sup>160</sup> he analysed each of the judgements. He started with the judgement of Morice J, because he characterised it as "much the most intelligible utterance upon the issues raised".<sup>161</sup> Although, as already stated, there is much to take issue with in Morice J's judgement, Gordon did refer to a feature of his judgement that bears scrutiny. "Ingeniously", wrote Gordon, "the judge tapped into a deeply ingrained conviction of the *Boers*, which was namely that the executive and the legislature should not interfere with the independence of the judiciary". Morice J appealed, in effect, to the independence of the judiciary and to the unconscionability of the *Volksraad* being seen to interfere in a matter pending before a court. He thus defeated the intention of the *Volksraad* in finding against it, which made, Gordon said, his judgement as sound in fact as in reason.<sup>162</sup>

As to Kotzé CJ's judgement, Gordon pointed out that the distinction he sought to draw between the *Grondwet* and any ordinary law was not apparent.<sup>163</sup> From the circumstances under which, and the purposes for which, the *Grondwet* was drafted, it was irresistible to infer that the people at the time did not intend to draft a law that was immutable and irrefutable. In fact, they readily acquiesced in the constant amendments to it by means of ordinary legislation. Kotzé CJ's instincts were sound and his sentiment generous ("he felt keenly that public liberty was not safe in such

157 Anonymous 1898: 108.

158 Gordon 1898: 343-344.

159 *Idem* 344.

160 *Idem* 344-348.

161 *Idem* 348.

162 *Idem* 350.

163 *Idem* 356-357.

incompetent hands”),<sup>164</sup> but the approach he adopted reflected his lack of grasp of legal principle and his lack of understating of the political conditions inherent in the problem.

Gordon did not spare Kruger in his criticism of the president’s handling of the affair. He “manufactured a constitutional crisis out of judicial blunder”,<sup>165</sup> in passing Law 1 of 1897, he “knew perfectly well in his secret heart that the whole scheme was a complicated piece of hypocrisy” that deceived no one;<sup>166</sup> and his protests that his dilatoriness in promoting constitutional reform measures did in fact amount to him keeping his promise, was mere “tedious mummery”.<sup>167</sup> His actions were lawless and brutal and the sooner it was appreciated that sovereign power should be wrenched from the feeble hands to which they have been entrusted, the better it would be for all.<sup>168</sup>

#### 4 6 Kotzé CJ’s dismissal contributes to the outbreak of the Anglo-Boer War (1899-1902)

Alfred Milner, the British high commissioner, saw John Kotzé’s dismissal as chief justice of the South African Republic on 16 February 1898 as the destruction of judicial independence in the Republic and its subjection to the executive.<sup>169</sup> On 23 February 1898, a week after the dismissal, he wrote to Chamberlain that the dismissal may lead to serious consequences for the whole of the southern African region and renders it desirable for Great Britain to review its relations with the South African Republic. He questioned the legality of the post-Kotzé composition of the Supreme Court and the validity of its judgements in respect of British subjects and African residents, a situation he described as “unsatisfactory and pregnant with future trouble”.<sup>170</sup>

Milner was being deliberately alarmist in his dispatch to Chamberlain. The Kruger/Kotzé affair had always been about judges’ competence to declare invalid laws made by the *Volksraad* and to do so on the basis of the *Grondwet*. Kotzé’s concern for the independence of the judiciary had always only entailed declaring unconstitutional laws passed in opposition to the provisions of the *Grondwet*. Law 1 of 1897, crude instrument though it was, was merely an affirmation of an existing state of affairs. It pertinently stated that the *Brown* judgement stood, and Kruger had been consistent in his defence of judicial independence over many years.<sup>171</sup>

164 *Idem* 357.

165 *Idem* 358.

166 *Idem* 362.

167 *Ibid.*

168 *Idem* 364-366.

169 See Marais 1961: 204-209.

170 Headlam 1931: 218.

171 Smit 1951: 173-175.

However, the dismissal, coming as it did so soon after Paul Kruger had been re-elected state president for a fourth term a month earlier, certainly meant that internal opposition to Paul Kruger was not strong enough to make a difference. Kotzé, though ineffectual, had been an authoritative voice of opposition, and Kruger had swept aside his political opponents in the elections. Milner decided – and also eventually brought an initially reluctant Chamberlain over to his point of view – that the “medieval race oligarchy” that governed the Transvaal was “too great a curse to all S. Africans to be allowed to exist”.<sup>172</sup> It was time for Britain to round upon them.<sup>173</sup>

An indirect consequence of Kotzé’s dismissal in hastening the advent of war in October 1899 was the so-called Edgar affair.<sup>174</sup> A policeman by the name of Jones, under the mistaken impression that an *uitlander*, Tom Edgar, whom he was in the process of arresting for drunk and disorderly conduct in Johannesburg, was about to attack him, shot and killed Edgar. The policeman, Jones, was tried for culpable homicide in March 1899. The judge was twenty-eight-year-old Antonie Kock, who had been appointed a judge in June 1898. He had been in practice for two years only, was the son of one of Kruger’s staunchest supporters in the Executive Council, and his appointment was in line with a policy to appoint “sons of the soil” into prominent positions in the state.<sup>175</sup> He was unfit for judicial office and Kotzé, had he still been in office, would strenuously have opposed his appointment. He would also not have allowed one so raw and overtly nationalistic as Kock to preside over the trial of a *Boer* accused of shooting an *uitlander*. None other than advocate John Kotzé appeared for Jones. The nine-man jury found Jones not guilty, and Kock J found it necessary, in a courtroom filled with excitable *uitlanders*, to remark that he hoped the police would, under similar future circumstances, know how to do their duty. Milner informed Chamberlain that, in his view, the decision proved that British subjects would not be treated fairly when *Boer* and British interests clashed. The Edgar trial and verdict led to mass demonstrations and unrest that contributed in no small manner to the outbreak of hostilities in October 1899.

## 5 Robert Brown’s quest for justice amidst political turmoil

### 5 1 Brown’s attempts to secure his right to the claims in court

When the *Brown* judgement was handed down, Brown had already left South Africa and his affairs were managed by his friend, one Francis Oakes. Three days after

172 See Meredith 2007: 376-377, quoting from correspondence from Milner to Selborne, Chamberlain’s under-secretary.

173 *Idem* 372-377 and 391-392.

174 On which see, among many, Nathan 1941: 419-422; Marais 1961: 237-243; Van der Merwe 1981: 13-14; and Meredith 2007: 389-390.

175 See Van der Merwe 1981: 12-13. See, too, Roberts 1942: 367.

the *Brown* judgement was handed down, on 25 January 1897, Oakes applied to the responsible clerk at Witfontein for the licence that the court had ordered be granted to Brown for the 1 200 claims he had applied for back in July 1895.<sup>176</sup> According to established practice, he was issued with a provisional licence to peg off the claims; the licence would be renewed after one month once a diagram had been provided to the claims inspector in order for the validity of the claims to be verified. However, the licence was endorsed to the effect that “these claims cannot be renewed as they encroach upon ‘owners’ and ‘*vergunning*’ claims”. Such an endorsed licence in reality had no legal effect, as it was incapable of being renewed.<sup>177</sup>

When Oakes presented to the claims inspector his diagram of the claims Brown had pegged off on 19 July 1895, the inspector informed Oakes in writing that almost all of the claims noted on the diagram encroached on other claims already awarded or upon water rights; it was therefore impossible for him to allocate any claims until he had a proper surveyor’s diagram. Oakes and Brown’s attorney, one Hofmeyr, came to the conclusion that the attitude of the inspector and his officials was “frivolous and untenable”, that they were acting under instructions from “the executive” to be obstructionist and that any attempt to renew the licence would be fruitless.<sup>178</sup>

His next step was therefore to apply to the court for damages, as Kotzé CJ had intimated in his judgement.<sup>179</sup> Unaccountably, Oakes lodged his application only nine months later, in December 1897. He did this by way of notice to the court for the hearing of further evidence and arguments on the nature and extent of the damages suffered by Brown – the same process adopted by Rothkugel in his application some five months previously.<sup>180</sup> The matter was set down for hearing only in March 1898, more than a year after the clerk at Witfontein had issued the contentious licence to Oakes.<sup>181</sup>

The case was heard on 2 March 1898 by Jorissen, Esser and Reitz JJ and judgement was delivered the same day.<sup>182</sup> The state argued that the procedure adopted was flawed and that a new summons should rather have been issued, in which pleadings were filed, stating the full circumstances of the matter, to which the state could then file appropriate counter pleadings. Despite persistent argument by Wessels on behalf of Brown that *Elias* served as precedent for the adoption of the procedure, and that the licence issued by the clerk was legally worthless, the court was unmoved. It was not persuaded that Brown had exhausted all his options in respect of the licence issued in January 1897; the state had not been given a fair opportunity to prove that it could have provided Brown with at least some claims

176 His application is published in *RG* 76: 89.

177 See *idem* 217.

178 *Idem* 88-97.

179 See *Brown v Leyds NO* (1897) 4 OR 17 at 38.

180 See the discussion of *Elias Syndicate v Leyds NO* (1897) 4 OR 248 at 4 3 *supra*.

181 See *RG* 76: 52 and 77.

182 The record of the judgement appears in *idem* 76-80.

before damages were considered. The court therefore ordered Brown to take out a proper summons in which he indicated his claims by means of a surveyor's diagram, in order to prove and to resist damages in due manner.<sup>183</sup>

Oakes, on behalf of Brown, sought advice on what his next steps should be, and Wessels, his counsel, gave it as his opinion that "the decision was absolutely incorrect, absolutely against precedent and perfectly unjustifiable". His advice was for Brown not to pursue the matter any further, an opinion attorney Hofmeyr agreed with.<sup>184</sup> Brown would have faced a difficulty if he had taken out a "proper summons", as ordered by the court. This was namely that he would have had to provide details of the circumstances under which the 1 200 claims were originally pegged off. This would, conceivably, have afforded an opportunity for the state to argue that the decision in *Brown* was wrong: wrong, because it declared invalid laws and resolutions affecting the original pegging off of the claims that the current judges were enjoined, in terms of Law 1 of 1897, to regard as valid law. If the judges were then to declare the resolutions passed in 1895 by the Second and then the First *Volksraad* to have been good in law, Brown would be found never to have had a case.

Subsequently, and based on the opinions of Wessels and Hofmeyr, the judges were accused of bias in a later international arbitration hearing,<sup>185</sup> of hostility towards Brown and of executive-mindedness. This might have been so, but a careful reading of the record of proceedings does not support these contentions. The sense one gets is that the court, in the pedantic attitude it adopted towards what the value of the endorsed licence might conceivably be when in fact it was substantively worthless, was not accommodating towards Brown, arguing form over substance. Brown's dilatoriness in seeking legal redress only nine months later might also have influenced the judges.

## 5 2 Brown's pursuit of extra-judicial means of redress

Oakes informed Brown that he should no longer pursue legal redress, but should rather seek the intervention of the British or United States governments.<sup>186</sup> Brown estimated that he had spent a total of between £20 000 to £30 000 on planning for and pegging off the claims and on subsequent litigation.<sup>187</sup> He pursued this political solution with obsessive vigour.

In October 1898, Brown approached Joseph Chamberlain, the British colonial secretary, with a request that Great Britain, as the suzerain power in the Transvaal, should protect him against the denial of justice he had suffered at the hands of the

183 See *idem* 77.

184 *Idem* 146-148 (Wessels's opinion) and 169-172 (Hofmeyr's opinion).

185 See discussion *infra*.

186 See RG 76: 172-174.

187 See the information contained in affidavits, published in *idem* 172-186.

Republican judiciary. Chamberlain directed him to the United States government.<sup>188</sup> He wrote to the United States secretary of state soon afterwards, citing principles of international law in support of his claim for damages.<sup>189</sup> Only two years later, in January 1901, did the secretary of state take action. He placed the matter before the United States senate. The senate sought advice on the matter from the South African Republic. Detailed documentation was supplied to its committee on foreign relations, not by the republican government, but by the Milner administration, the Transvaal having been annexed by Great Britain during the Anglo-Boer War in July 1900.<sup>190</sup>

The war in South Africa made it difficult to pursue the matter. Only in April 1902, with the end of the war in sight, did Brown's attorney, Thomas Galt, a Canadian, again take active steps. The staff of Alfred Milner, then administrator of the Transvaal, directed him to Attorney-General Solomon, with whom he met several times. Solomon was of the view that Brown should have pursued all legal avenues open to him, before making political representations. Galt's response was that Brown faced the prospect, if he did so, that his claims could be declared void *ab initio* if he were to issue fresh summons.<sup>191</sup> In June, Galt changed tack. He had been informed that the Milner administration would validate all titles to land in the Transvaal recognised prior to the war. Galt sought, not damages, but to lay claim to the land on which Brown had pegged off the claims. Solomon would have none of it and advised Milner that Brown first needed to exhaust all legal remedies still open to him.<sup>192</sup> Further meetings with Milner and with Solomon in July proved fruitless.<sup>193</sup> In September of that year Galt wrote to Chamberlain, who was equally unresponsive.<sup>194</sup>

Eleven days after Chamberlain's dismissal of his petition, Brown died. He was only thirty-seven years old when he died in Phoenix, Arizona, on 3 October 1902. His father, mother and wife, sole beneficiaries of his estate, pursued the matter after his death.<sup>195</sup> He persuaded the United States ambassador to Great Britain, JH Choate, to engage with the British foreign secretary, Lord Lansdowne, on the matter in May 1903. In his response in November 1903, Lansdowne refuted any basis in international law for a claim by Brown against Great Britain: there are no rules or principles of international law that oblige a conquering state to take over the liabilities of a conquered state for unliquidated damages; nor to take over liabilities that arise from alleged corrupt or illegal action of that state in the administration of its justice.<sup>196</sup>

188 *Idem* 154-155.

189 *Idem* 181-186 (his correspondence was conducted for him by two lawyers from his hometown, Pennsylvania).

190 *Idem* 155-156.

191 *Idem* 150.

192 *Idem* 157-158.

193 *Idem* 151-156.

194 *Idem* 149-151.

195 See *idem* 17-20, 176-177 and 178-179.

196 *Idem* 159.

### 5 3 Brown's claim is referred to international arbitration

The United States did not treat this as the final word on the matter. Brown's claim was added to a long list of claims of citizens of the United States against Great Britain, and of the claims of British citizens against the United States. After years of diplomatic negotiation, agreement was finally reached in October 1907 between the two countries on the nature of the mechanism for the peaceful resolution of these disputes and on the nature of the disputes to be submitted for resolution. This paved the way for a *Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain* to be signed by the two countries in August 1910. This agreement was ratified only in April 1912.<sup>197</sup>

The special agreement established an arbitral tribunal to adjudicate upon the 140 claims that had been submitted for arbitration. The tribunal comprised a neutral umpire, Henry Fromageot,<sup>198</sup> and one arbitrator from each country. The terms provided for the tribunal to make decisions based on certain "equities". Brown's claim was one of ten that fell into a category of an alleged denial of property rights of one country's citizens against the other country.<sup>199</sup> The first meeting of the tribunal took place in Washington, DC in May 1913. Its activities were suspended because of the outbreak of the Great War of 1914-1919. It resumed its activities only in October 1923 and concluded its work in January 1926.<sup>200</sup>

The US filed its memorial on behalf of Robert E Brown in September 1913, ten years after Lord Lansdowne had rejected Brown's claim against Great Britain under international law. It claimed, on behalf of Brown, damages from Great Britain of £330 000 (plus interest), based on its denial to Brown of the property rights acquired by Brown in the South African Republic. Great Britain filed its answer in February 1914. With the intercession of the war and its aftermath, the United States only filed its reply to the British answer in April 1923, to which the British submitted a responding memorandum in October 1923.<sup>201</sup> Brown's claim was heard from 2 to 9 November 1923 and a final decision was handed down on 23 November. Legal finality on the Brown saga was therefore only reached some twenty-eight years after Brown had first, in July 1895, initiated his action in the Supreme Court in Pretoria against the state to secure his right to peg off his claims on the Witfontein farm.

197 See RIAA at 9-11.

198 (1864-1949). Fromageot later became a judge of the permanent court of international justice. On Fromageot see Permanent Court of International Justice Individual Judges 1930 *sv* Fromageot, H.

199 *Robert E Brown (United States) v Great Britain* RIAA at 11-15.

200 See RG 76: 77.

201 The memorial, the answer, the reply and the responding memorandum make up the bulk of the documentation contained in the Washington textual reference archives at RG 76.

#### 5 4 The international arbitral award: *Robert E Brown (United States) v Great Britain* RIAA (2006) VI 120

The arbitral tribunal gave their judgement on 23 November 1923. It gave a detailed and accurate summary of the facts and the applicable law.<sup>202</sup> In doing so, they noted the “wider significance” of the *Brown* judgement.<sup>203</sup> Kotzé CJ’s judgement was lauded for its exhibition of great industry and ability; the judicial crisis it precipitated led to “the virtual subjection of the High Court to the executive power” and Law 1 of 1897 was the prelude to a “state of legal anarchy, which ... eventually led to the armed intervention of Great Britain”; effective guarantees of the property rights of *uitlanders* disappeared and the capricious will of the executive was the sole authority of the land. This was an astonishingly naïve verdict on the consequences of the *Brown* judgement, and of Law 1 of 1897. As explained above, whatever the demerits of the judgement, Law 1 of 1897 and the manner of Kotzé’s dismissal, judicial independence was not destroyed, legal anarchy did not rein, the capricious will of the executive was not the sole authority in the land, and the events did not lead to war (at least not directly).

The tribunal analysed the events when Brown applied for his licence after the *Brown* judgement and the eventual judgement against him in March 1898. It concluded that “the disposition to defeat Brown’s claim at any cost was at once disclosed by the Government’s attitude upon this hearing”. It accepted the United States’s argument that the court’s insistence that Brown should issue a new summons was to effectively open the possibility that the original resolutions would be declared valid and that Brown would thus effectively be deprived of the benefit of the *Brown* judgement.<sup>204</sup>

The crucial question was whether there was a denial of justice?<sup>205</sup> The tribunal’s answer was an unequivocal yes. Brown had substantial rights entitling him to an interest in real property or to damages for the deprivation of those rights. It might be that “technical” arguments submitted by Great Britain had merit: that Brown did not acquire property rights; that Brown’s pegging off on 19 July was in fact unlawful; and that Brown had not exhausted his legal remedies. These arguments, though conceivably valid, did not sway the arbitrators. In the first place, they were enjoined to make their decisions based on certain equities, and the circumstances called for such an approach. Secondly, it was incumbent upon them to take a “broader” view of the situation. The “cumulative strength” of the steps taken by the republican government “with the obvious intent” to defeat Brown’s claims meant that a definite denial of justice took place. All three branches of government conspired to ruin Brown’s claim to justice. Property rights became so insecure that it demanded intervention by Great

202 *Robert E Brown (United States) v Great Britain* RIAA 6 at 121-128.

203 *Idem* 124-126.

204 *Idem* 126-127.

205 *Idem* 128-131.

Britain in the interests of elementary justice for all. Astonishingly, given the actual sequence of events, they found that annexation by Great Britain “became an act of political necessity” to enforce principles of justice and fair dealing in securing and respecting property rights.

If there was a denial of justice, could Brown’s claim for damages succeed? The tribunal found that such a claim must fail.<sup>206</sup> There were three interrelated reasons for the finding. In the first place, such a liability for damages never passed to or was assumed by Great Britain. Brown’s claim was a pending claim against certain republican officials and never became a liquidated debt of the former Republic. Secondly, the nature and extent of the suzerainty that Great Britain exercised over the Republic did not mean that it assumed liability for wrongs committed by the Republic. Thirdly, there was no question of state succession involved. A successor state that acquires territory without a concomitant undertaking to assume its liabilities, is not bound to take steps to right the wrongs of the former entity. The tribunal, surprisingly, made no reference to principles of international law or to the opinions of international-law scholars in its decision. It was content merely to deflate the United States arguments related to suzerainty and to British officials’ complicity in denying justice to Brown.

The tribunal therefore dismissed the United States claim on behalf of Robert Brown. In life, Brown had found himself a captive of a politico-constitutional power struggle between the state president and the chief justice of the South African Republic. In death, he was the victim, ostensibly, of an arrangement between two allies in a recent, catastrophic world war, that neither party should bear the brunt of a series of events in which it took no part. A finding that there had been a denial of justice, but that Britain should not provide reparation for it, was an even-handed approach that resonated with international “equities” – even if the facts had to be adapted to interpretations that bordered on the ridiculous to accommodate the result.

## 6 Conclusion

When one reflects on the events that led to the judgement in *Brown v Leyds NO*, the sobering conclusion one is forced to draw is that the major characters in the drama, John Kotzé, Paul Kruger and Robert Brown, lost all that they had set out with great determination to achieve.

John Kotzé’s undoing was not lack of ability, not lack of dedication to his cause, not lack of moral and intellectual fortitude – it was his political ambition. He was a dedicated republican, truly desirous of seeking to achieve a fair deal for all in the immensely rich, but culturally backward, South African Republic of the 1890s. He chose, badly as it happened, to conduct what was essentially a political campaign from the bench. His not unreasonable desire was for true democratic principles to be entrenched in a constitution, as a bulwark against the more excessive chauvinist

206 *Idem* 129-131.

politics adopted by Kruger and his supporters. The more his efforts were thwarted by Kruger's *Realpolitik* to protect the *Boers*, the more his conviction grew that he needed to take a stand in the forum in which he exercised true power – the court. But he chose his weapons for the campaign badly: the 1858 *Grondwet* could be massaged only so far and no further; and the government's genuine desire to avoid the real prospect of civil unrest at Witfontein was not unreasonable, however ham-fisted its approach might have been.

Undoubtedly, Kruger and his government treated Kotzé with something approaching disdain in the aftermath of the *Brown* judgement. But Kotzé did little to dispel a pervasive view that, throughout 1897, he was acting with more petulance than judiciousness. He proved no political match for Kruger. In his efforts to secure support, he overplayed his hand: his overtures to Great Britain smacked of nothing other than an anti-republican sentiment that was unbecoming. Kotzé, a first-rate legal scholar and a proud servant of the Republic, deserved so much better than to become a victim of his own injudicious ambition.

Paul Kruger was correctly described by Kotzé as a child and product of the veld. From that perspective he was a formidable politician, outsmarting all in political acuity. The Witwatersrand goldfields and what they represented brought a dimension to *Boer* affairs that he was unable to properly deal with. His efforts to retain *Boer* independence for his *volk* and no one else, and to retain for them a sovereign voice, became increasingly clumsy and desperate. He retreated ever more into his theocratic comfort zone, in which a zealous reliance on the deity would nullify all opposition. It merely served to further stoke the fires of the opposition, both imperialist and progressive. His treatment of his chief justice in 1897 and 1898 was shameful, but not at odds with how he dealt with all political opposition. His obstinate refusal to make meaningful concessions to his political opponents, to give them a share in the sovereign voice, to protect at all costs a *Boer* independence that had little substance to it, was his undoing – and that of the *volk* on whom he staked his all. The Anglo-Boer War seriously hurt the Boer nation and caused them huge economic, emotional and physical hardship, and destroyed the ideals he had lived and fought for.

Robert E Brown, like so many others, had Virgil's "accursed thirst for gold".<sup>207</sup> He staked his all, but, like Kotzé, he chose badly. Convinced that the main reef ran across the Witfontein farm, he spent a small fortune on planning for the 1 200 claims he wished to peg off. It was all in vain. The claims later proved to be worth very little – the main reef ran further south of the farm. Then, when he sought to enforce what he believed to be his legal rights to the claims he had pegged off, he found himself an unwitting and very unwilling pawn in the power struggle between Kruger and Kotzé. When he sought to recoup his losses from Great Britain, he was stymied, first by the outbreak of the Anglo-Boer War, and later – much, much later – by the outbreak of the Great War. When, twenty-one years after his premature death, his claim was finally heard, it was clear that it would take much persuasion to convince an arbitral

207 *Aeneid* 3 56-57.

tribunal to make a substantial award for and against two allies (the United States of America and Great Britain) who had been through so much, based on a matter over which neither had any initial influence. Brown truly had justice denied to him, though not in the lugubrious terms described by the arbitral tribunal.

## BIBLIOGRAPHY

- Anonymous (1898) "Raad and Bench" *Cape Law Journal* 15: 94-109
- Bossenbroek, M (2012) *Die Boereoorlog* (Afrikaans trl by A Mischke) (Amsterdam)
- Botha, PR (1926) *Die Staatkundige Ontwikkeling van die Suid-Afrikaanse Republiek onder Krüger en Leyds* (Amsterdam)
- Dictionary of South African Biography* vol 3 (1978) (Durban) (cited as *Dictionary of SA Biography* vol 3)
- Du Plessis, JS (1952) *President Kruger aan die Woord* (Bloemfontein)
- Editorial (1898a) "The Transvaal judiciary" *Cape Law Journal* 15: 58-64
- Editorial (1898b) "Chief Justice Kotze" *Cape Law Journal* 15: 90-93
- Editorial (1905) "The late Mr Justice HA Ameshoff" *SALJ* 22: 488-489
- Gordon, JW (1898) "The judicial crisis in the Transvaal" *Law Quarterly Review* 14: 343-366
- Headlam, C (ed) (1931) *The Milner Papers South Africa 1897-1899* vol 1 (London)
- Jeppe, F & Kotzé, JG (1887) *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (Pretoria)
- Jorissen, EJP (1897) *Transvaalsche Herinneringen* (Amsterdam)
- Kahn, E (1959) "The history of the administration of justice in the South African Republic" *SALJ* 76: 46-57
- Kleynhans, WA (1966) *Volksregering in die Zuid-Afrikaansche Republiek: Die Rol van Memories* (Pretoria)
- Kotzé, JG (1898) *Documents and Correspondence Relating to the Judicial Crisis in the Transvaal* (London)
- Kotzé, JG (1941) *Memoirs and Reminiscences* vol 2 ed by BA Tindall (Cape Town)
- Le Roux, L (2003) "Studying legal history through courtroom architecture: Scattered comments on the Palace of Justice, Church Square, Pretoria" *Codicillus* 43(2): 55-63
- Marais, JS (1961) *The Fall of Kruger's Republic* (Oxford)
- Meredith, M (2007) *Diamonds, Gold and War* (New York)
- Nathan, M (1941) *Paul Kruger His Life and Times* (Durban)
- Reports of International Arbitral Awards* vol 6 (2006) United Nations [cited as RIAA]
- Roberts, AA (1942) *A South African Legal Bibliography* (Pretoria)
- Schagen van Leeuwen, JR (ed) (1897) *De Locale Wetten der Zuid-Afrikaansche Republiek 1896* (Pretoria)
- Smit, FP (1951) *Die Staatsopvattinge van Paul Kruger* (Pretoria)
- Thompson, LM (1960) *The Unification of South Africa 1902-1910* (Oxford)
- Van der Merwe, C (2015) *Donker Stroom* (Cape Town)

- Van der Merwe, D (1979) “Skuld en skandaal in die hooggeregshof van die ZAR” 12: 242-251
- Van der Merwe, D (1981) “The extraordinary life of Antonie Francois Kock” *Codicillus* 21(1): 9-17
- Van der Merwe, D (2017) “*Brown v Leyds NO* (1897) 4 OR 17: A constitutional drama in four acts. Act one: The 1858 Constitution of the *Zuid-Afrikaansche Republiek*” *Fundamina. A J of Legal History* 23(1): 111-165
- Van der Merwe, D (2018) “*Brown v Leyds NO* (1897) 4 OR 17: A constitutional drama in four acts. Act three: The King’s voice speaks (differently) through the *ZAR* constitution to President and Chief Justice (1884-1895)” *Fundamina. A J of Legal History* 24(1): 89-133
- Van Niekerk, LE (1985) *Kruger se Regterhand. ‘n Biografie van Dr WE Leyds* (Pretoria)
- Van Onselen, C (2017) *Cowboy Capitalist* (Johannesburg)
- Van Oordt, JF (1898) *Paul Kruger en de Opkomst der Zuid-Afrikaansche Republiek* (Cape Town)
- Virgil *Aeneid* trl by D West (London)
- Walker, EA (1925) *Lord de Villiers and His Times South Africa 1842-1914* (London)
- Zimmermann, R and Sutherland, P (1999) “‘... a true science and not a feigned one’: J.G. Kotzé (1849-1940), Chief Justice der Südafrikanischen Republik (Transvaal)” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 116: 147-194

## Cases

- Brown v Leyds NO* (1897) 4 OR 17
- Elias Syndicate v Leyds NO and the Responsible Clerk of Doornkop* (1897) 4 OR 248-253
- Executors of McCorkindale v Bok NO* (1884) 1 SAR 202
- Hess v The State* (1895) 2 OR 112
- Snuif v The State* (1895) 2 OR 294
- Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189

## United States Cases

- Marbury v Madison* 5 US 137 (1803)
- Poindexter v Greenlow* 114 US 270 (1885)

## International cases

- Robert E Brown (United States) v Great Britain* Reports of the International Arbitral Awards (2006) vol VI, 120 [cited as *Robert E Brown (United States) v Great Britain* RIAA 6]

## Archival sources

- Permanent Court of International Justice Individual Judges* (1930) League of Nations Archive
- RG 76: *American and British Pecuniary Claims Arbitration: Robert E Brown (Claim no 30)* National Archives, Washington DC, USA: Textual Reference Archives II Branch (RDT 2) [cited as RG 76]

# REMARKS ON THE UNIFORMITY OF NATURAL LAW CONCEPTS IN THE HISTORY OF LEGAL PHILOSOPHY

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## ABSTRACT

The aim of this paper is to investigate different meanings of the concept of natural law in the history of ideas since the early Greeks. Texts of Plato, Aristotle and the Stoics are briefly examined, followed by an analysis of some well-known texts of Roman law. Although natural law is generally-speaking linked with human equality, it appears from this investigation that sometimes in antiquity, natural law is also invoked to underpin human inequality. A parallel is drawn with natural-law philosophy in the twentieth century. On the one hand, we find that the link between natural law and human equality is most often maintained, but on the other hand we also find invocations of natural law to justify societal exclusion. Is this the reason for the intrinsic weakness of natural-law philosophy?

**Keywords:** Natural law; Greek philosophy; Roman law; equality

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1. Modern natural-law theory is often linked with values such as liberty and equality. Furthermore, within this line of thought, natural law is most often considered eternal and unchangeable.<sup>1</sup> The Declaration of Human Rights of the French Revolution, the European Convention on Human Rights (Rome, 1950) and the International Covenant on Civil and Political Rights (New York, 1966) provide evidence for this position. In this contribution, I will examine the extent to which these two statements are borne out by the complexity of our classical sources that mention “law and nature”. A slightly forgotten book, written in 1922 by Adolf Menzel<sup>2</sup> (1857-1938) who was at the time a professor of constitutional law at the University of Vienna, will be our guide.<sup>3</sup> Menzel had explained the extent to which the conception of natural law had been debated constantly in classical Greece. From his analysis, it would appear that many different conceptions on natural law were already in competition during this time. Although the different conceptions on natural law in classical times have been meticulously examined in a book by the German scholar Erik Wolf,<sup>4</sup> and in spite of the abundance of secondary literature,<sup>5</sup> it seems worthwhile to me to re-open this topic, also in view of some aspects on natural law in recent history.

2. The Ionic philosophy regarding Nature, in which the elements water, fire, air, and earth jostle for supremacy, provided the basis for Greek philosophy.<sup>6</sup> Conceptions of *nomos* and *physis* played an important role in this philosophy.<sup>7</sup> As a result, the original question in Greek philosophy before Socrates’ times was: What does Nature teach us? Does it teach us equality or in fact inequality? The sophists Thrasymachos<sup>8</sup> and Callicles<sup>9</sup> contended that Nature teaches us inequality. To this I am adding the key points of the ideas of Callicles, which addressed the contrast between *nomos* and *physis*.<sup>10</sup> For a recent explanation of this text we can turn to the

1 Flückiger 1954: *passim*; Jones 1956: 37ff. Exceptions: Montesquieu and Stammler who assume forms of natural law “at variance”. See Montesquieu *De l’esprit des lois* Book XIV-XVIII; cf Donati 1990: 94 n 57 (according to Donati Montesquieu does not adhere to a natural law theory in the strict sense); and Stammler 1902: 93ff.

2 Menzel 1922.

3 Brauneder 1994: 104f.

4 Wolf 1959. During the thirties Wolf was a member of the NSDAP, but after 1937 he changed his views and adhered to the *Bekennende Kirche*, one of the centres of intellectual resistance against Nazism in Germany. See Müller 1987: 95 and Hollerbach 1979: 455-461.

5 Messmer 1950; Donati 1990: n 1; Waldstein 2010. Messmer, Donati and Waldstein seem to adhere to a catholic and absolute doctrine of natural law. See for Messmer: Klose, Schambeck & Weiler 1985.

6 Guthrie 1962: 5ff.

7 Heinimann 1945: 110f, 123f.

8 Thrasymachos taught that justice is an illusion without value, see Hoffmann 1997: 98 (review: Winkel 2000).

9 Hoffmann 1997: 124.

10 According to current opinions the historical existence of Callicles is not beyond doubt. See Praechter 1926: 55 with further references (quoted as Überweg-Praechter); Hoffmann 1997: 111.

comments of Terence Irwin and Joachim Dalfen.<sup>11</sup> Socrates tried to refute the views of Callicles (Gorg 489ff) and, in doing so, he introduced the notion of equality into the discussion.<sup>12</sup> Accordingly Socrates, Plato and somewhat later Aristotle, developed a sort of rationalism which leads to a conception of natural law that is limited to the human equality. According to Schrage this equality is not automatically applicable to political views, however, since certain forms of inequality, such as slavery, are allowed:<sup>13</sup>

Plato *Gorgias* 483 B-C

Φύσει μὲν γὰρ πᾶν αἰσχρόν ἐστιν, ὅπερ καὶ κάκιον, τὸ ἀδικεῖσθαι νόμῳ δὲ τὸ ἀδικεῖν. Οὐδὲ γὰρ ἀνδρὸς τοῦτο γ' ἐστὶν τὸ πάθημα, τὸ ἀδικεῖσθαι, ἀλλ' ἀνδραπόδου τινός, ᾧ κρεῖττόν ἐστιν τεθνᾶναι ἢ ζῆν, ὅστις ἀδικούμενος καὶ προπηλακίζόμενος μὴ οἷος τέ ἐστιν αὐτὸς αὐτῷ βοηθεῖν μηδὲ ἄλλῳ, οὗ ἂν κήδηται. Ἀλλ', οἶμαι, οἱ τιθέμενοι τοὺς νόμους οἱ ἀσθενεῖς ἀνθρωποὶ εἰσὶν καὶ οἱ πολλοί. Πρὸς αὐτοὺς οὖν καὶ τὸ αὐτοῖς συμφέρον τοὺς τε νόμους τίθενται καὶ τοὺς ἐπαίνους ἐπαίνουσι καὶ τοὺς ψόγους ψέγουσιν· ἐκφοβουντές τε τοὺς ἔρρωμενεστέρους τῶν ἀνθρώπων καὶ δυνατοὺς ὄντας πλέον ἔχειν, ἵνα μὴ αὐτῶν πλέον ἔχωσιν, λέγουσιν, ὡς αἰσχρὸν καὶ ἄδικον τὸ πλεονεκεῖν, καὶ τοῦτο ἐστὶν τὸ ἀδικεῖν, τὸ πλέον τῶν ἄλλων ζητεῖν ἔχειν· ἀγαπῶσι γὰρ, οἶμαι, αὐτοί, ἂν τὸ ἴσον ἔχωσιν φαυλότεροι ὄντες. Διὰ ταῦτα δὴ νόμῳ μὲν τοῦτο ἄδικον καὶ αἰσχρὸν λέγεται, τὸ πλέον ζητεῖν ἔχειν τῶν πολλῶν, καὶ ἀδικεῖν αὐτὸ καλοῦσιν· ἢ δέ γε, οἶμαι, φύσις αὐτῇ ἀποφαίνει αὐτῷ, ὅτι δίκαιόν ἐστιν τὸν ἀμείνω τοῦ χειρόνος πλέον ἔχειν καὶ τὸν δυνατότερον τοῦ ἀδυνατώτερου.

For by nature (“*physis*”) everything that is worse is more shameful, suffering wrong for instance, but by convention (“*nomos*”) it is more shameful to do it. For to suffer wrong is not even fit for a man, but only for a slave, for whom it is better to be dead than alive, since when wronged and outraged he is unable to help himself or any other for whom he cares. But in my opinion, those who framed the laws are the weaker folk, the majority. And, accordingly, they frame the laws for themselves and their own advantage, and so too with their approval and censure, and to prevent the stronger who are able to overreach them from gaining the advantage over them, they frighten them by saying that to overreach others is shameful and evil, and injustice consists in seeking the advantage over others. For they are satisfied, I suppose, if being inferior they enjoy equality of status. That is the reason why seeking an advantage over the many is by convention (*nomos*) said to be wrong and shameful, and they call it injustice. But in my view nature (*physis*) herself makes it plain that it is right for the better to have the advantage over the worse, the more able over the less. (Translation Hamilton & Huntington Cairns, Princeton, 1978.)

3. The debate between Socrates and Callicles is still echoed in later literature. This appears, for example, in a text of Aristotle, the *Sophistic Refutations*, already analysed by Menzel:

Aristoteles, *Sophistici Elenchi* 173 a 7-19

Πλεῖστος δὲ τόπος ἐστὶ τοῦ ποιεῖν παράδοξα λέγειν, ὥσπερ καὶ Καλλικλῆς ἐν τῷ Γοργία γέγραπται λέγων, καὶ οἱ ἀρχαῖοι δὲ πάντες ᾤοντο συμβαίνειν, παρὰ τὸ κατὰ φύσιν, καὶ

11 Irwin 1979: 172ff; Dalfen 2004: 320ff.

12 Jones 1977: 49-50, citing Plato, *Menexenus* 239 A. See, further, Frede 1996: 157-174 and in the same book the article of Sorabji 1996: 311-334.

13 1975: esp 17ff.

κατὰ τὸν νόμον· ἐναντία γὰρ εἶναι φύσιν καὶ νόμον, καὶ τὴν δικαιοσύνην κατὰ νόμον μὲν εἶναι καλὸν κατὰ φύσιν δ'οὐ καλόν. Δεῖν οὖν πρὸς μὲν τὸν εἰπόντα κατὰ φύσιν κατὰ νόμον ἀπαντᾶν, πρὸς δὲ τὸν κατὰ νόμον ἐπὶ τὴν φύσιν ἄγειν· ἀμφοτέρως γὰρ ἔσται λέγειν παράδοξα. Ἦν δὲ τὸ μὲν κατὰ φύσιν αὐτοῖς τὸ ἀληθές, τὸ δὲ κατὰ νόμον τὸ τοῖς πολλοῖς δοκοῦν, ὥστε δῆλον ὅτι κάκεῖνοι, καθάπερ καὶ οἱ νῦν, ἢ ἐλέγξει ἢ παράδοξα λέγειν τὸν ἀποκρινόμενον ἐπεχείρουν ποιεῖν.

The widest range of common-place argument for leading men into paradoxical statement is that which depends on the standards of Nature and of the Law so that too Callicles is drawn as arguing in the *Gorgias*, and that all the men of old supposed the result to come about: for nature (they said) and law are opposites, and justice is a fine thing by a legal standard, but not by that of nature. Accordingly, they said, the man whose statement agrees with the standard of nature you should meet by the standard of the law, but the man who agrees with the law by leading him to the facts of nature: for in both ways paradoxical statements may be committed. In their view the standard of nature was the truth, while that of the law was the opinion held by the majority. So that it is clear that they, too, used to try either to refute the answerer or to make him make paradoxical statements, just as the men of to-day do as well. (Translation by WA Packard, with one correction.)

Menzel has pointed to the fact that according to Socrates, Callicles is the one who makes use of paradoxes, whilst according to Plato, it is Callicles who reproaches Socrates for having resorted to paradoxes.<sup>14</sup> Then both can be right: when one of them discusses the level of the *physis*, while the other discusses the level of the *nomos*. In my view, this text could even provide us with arguments that make Callicles a historical person, a disputed question in the history of philosophy.<sup>15</sup>

A second echo of Callicles may be found in the work of Aulus Gellius (about 175 AD), one generation before Ulpian. This text, too, was already quoted by Menzel:

Aulus Gellius *Noctes Atticae* 10 22 1-2: Plato, veritatis homo amicissimus eiusque omnibus exhibendae promptissimus, quae omnino dici possint in desides istos ignavosque, qui obtentu philosophiae nominis inutile otium et linguae vitaeque tenebras secuntur, ex persona quidem non gravi neque idonea, vere tamen ingenueque dixit. 2. Nam etsi Callicles, quem dicere haec facit, verae philosophiae ignarus inhonesta indignaque in philosophos confert, proinde tamen accipienda sunt, quae dicuntur, ut nos sensim moneri intellegamus, ne ipsi quoque culpationes huiusmodi mereamur neve inerti inanique desidia cultum et studium philosophiae mentiamur.

Plato, a man most devoted to the truth and most ready to point it out to all, has said truly and nobly, though not from the mouth of a dignified or suitable character, all that in general may be said against those idle and worthless fellows, who, sheltered under the name of philosophy, follow profitless idleness and darkness of speech and life. 2. For although Callicles, whom he makes his speaker, being ignorant of true philosophy, heaps dishonourable and undeserved abuse upon philosophers, yet what he says is to be taken

14 Menzel 1922: 15; De Romilly 1989: 114.

15 In this train of thought Überweg-Praechter 1926: 127; see also Hoffmann 1997: 111ff. He gives an overview of the arguments in favour of Callicles as an historical person.

in such a way that we may gradually come to understand it as a warning to ourselves not to deserve such reproofs, and not by idle and foolish sloth to feign the pursuit and cultivation of philosophy. (Translation JC Rolfe, Loeb ed.)

Callicles's philosophy is considered here to be "wrong and untrue". This has led us to look into a text of Ulpian which demonstrates that the contrast between true and false philosophy is also important. In this text Ulpian describes the Jurisprudence as the true philosophy.<sup>16</sup>

4. In the *Nicomachean Ethics* Aristotle in turn deals with the contrast between *nomos* and *physis* and as such he endeavours to give an argumentation for the definition that has become the standard for the unchangeable Natural Law:

Aristoteles *Ethica Nicomacheia* V 7 1-3 1134 b 19-27

Τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστὶ τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῶ δοκεῖν ἢ μή, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται, διαφέρει, οἷον τὸ μνάς λυτροῦσθαι, ἢ τὸ αἶγα θύειν ἄλλα μὴ δύο πρόβατα, ἔτι ὅσα ἐπὶ τῶν καθ' ἕκαστα νομοθετοῦσιν, οἷον τὸ θύειν Βρασίδα, καὶ τὰ ψηφισμαῶδη. Δοκεῖ δ' ἐνίοις εἶναι πάντα τοιαῦτα, ὅτι τὸ μὲν φύσει ἀκίνητον καὶ πανταχοῦ τὴν αὐτὴν ἔχει δύναμιν, ὥσπερ τὸ πῦρ καὶ ἐνθάδε καὶ ἐν Πέρσiais καίει, τὰ δὲ δίκαια κινούμενα ὀρώσιν. Τοῦτο δ' οὐκ ἔστιν οὕτως ἔχον, ἀλλ' ἔστιν ὧς.

Political justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently, though having once being settled it is not indifferent: for example that the ransom for a prisoner shall be a mina; that a sacrifice shall consist of a goat and not of two sheep; and any regulations enacted for particular cases, for instance the sacrifice in honour of Brasidas, and ordinances in the nature of special decrees. Some people think that all rules of justice are merely conventional, because whereas a law of nature is immutable and has the same validity everywhere, as fire burns both here and in Persia, rules of justice are seen to vary. That rules of justice vary is not absolutely true, but only with qualifications. (Translation H Rackham, Loeb ed.)

According to Aristotle, law was originally neutral on the ethical level.<sup>17</sup> When Aristotle started his career as the Secretary of Nature,<sup>18</sup> he does not yet differentiate between juridical law and natural law which is a theme that has recently been dealt with by Jan Schröder.<sup>19</sup> According to him, the distinction in the inner substance of

16 D 1 1 1 1: "Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes." See Schermaier 1993: 303-322.

17 Here we are at the origin of the distinction in common law between *mala per se* and *mala prohibita*, see also Thomas Aq, *Summa Theologiae*, q 100, a 3.

18 Düring 1966: 514ff (n 40: Suda and Attikos call him the secretary of nature – τῆς φύσεως γραμματεὺς).

19 Schröder 2004.

the conception of “law in nature” and “statutory law” has not been introduced before 1650.<sup>20</sup>

The opposition between committing an injustice and to suffer injustice, a theme dealt with in the Platonic dialogue *Gorgias*, is also used by Aristotle when he examines the question of righteous behaviour:

Aristoteles *Ethica Nicomacheia* V 5 17 1133 b 29-32

Τί μὲν οὖν τὸ ἄδικον καὶ τί τὸ δίκαιον ἐστίν, εἴρηται. Διορισμένων δὲ τούτων δῆλον ὅτι ἡ δικαιοπραγία μέσον ἐστὶ τοῦ ἀδικεῖν καὶ ἀδικεῖσθαι, τὸ μὲν γὰρ πλεόν ἔχειν τὸ δ’ ἔλαττόν ἐστιν.

We have now stated what justice and injustice are in principle. From the definition given, it is plain that just conduct is a mean between doing and suffering injustice, for the former is to have too much and the latter to have too little. (Translation H Rackham, Loeb ed.)

In his explanation of the theory on “righteous behaviour”, Aristotle also deals with the distinction between “committing injustice” and “suffering injustice” – a theme which is discussed in a passage in the *Dialogue Gorgias* and is part of the basic thesis of Callicles. In this sense, the theory of Callicles has been one of the sources for the theory of Aristotle with regard to the doctrine of the Mean which he had introduced in the second book on the *Nicomachean Ethics*.<sup>21</sup>

5. In Stoic philosophy the words of Callicles do not resound anymore. The originally Platonic and Peripatetic rationalism is still accentuated very much,<sup>22</sup> whilst the consistency (immutability) of natural law is even more accentuated than in the work of Aristotle.<sup>23</sup> This consistency has a direct link with radical rationalism. Nature as a whole follows the *logos* and that also applies to the Norms. With regard to Stoic philosophy, a very well-known text is always quoted, of which unfortunately the history of its textual transmission has been quite neglected. The text reads as follows:<sup>24</sup>

20 Only with Immanuel Kant, at the end of the eighteenth century, are “is” and “ought” questions duly separated which led in the nineteenth century to several forms of legal positivism. A reappearance of cautious thoughts on natural law is only visible at the beginning of the twentieth century. Rudolf Stammler (quoted in n 2) is an example.

21 For Aristotle’s *Theory of the Mean* see Hardie 1980: 129ff and Manthe 1996: 1-31.

22 Forschner 1980: 150ff; see also Algra 2003: 265-296, esp 275ff.

23 See Villey 1953: 475-497. He examines the differences in the natural law theory between Aristotle and the Stoics. According to him natural law is universal for Aristotle, but restrained to human beings for the Stoics. In as far as he is right, see Ulpian’s definitions of *ius naturale* and *ius gentium* in D 1 1 1 3-4 and also Winkel 1993: 443-449. However, we do not agree with Villey when he states that natural law for Aristotle is in the first place legal, whereas for the Stoics it would belong to morals (Villey 1953: 487). This is, however, quite another topic to which we may come back on another occasion.

24 Flückiger 1954: 226; Büchner 1984: 126. Flückiger does not take into account the stoic origin of this text. See, also, Horsley 1978: 35-59.

Cicero *De Re Publica* 3 22

Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat; quae tamen neque probos frustra iubet aut vetat nec improbos iubendo aut vetando movet. huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpret eius alius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus, ille legis huius inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit.

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to the duty by its commands and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowed to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes from what is commonly considered punishment. (Translation CW Keyes, Loeb ed. The text is a reconstruction of Lactantius *Institutiones Divinae* 6 8 6-9.)

We must be aware that the text of Cicero's *Republic* is a reconstruction and that this text was transmitted to us by a much later Christian author, Lactantius (± 250-320 AD). According to Cicero, Natural Law stems from (human) reason, is unchangeable and independent of time and place.<sup>25</sup> This implies that Natural Law is a direct consequence of the human reason without epistemological problems.<sup>26</sup> In other words, the content of Natural Law is immediately accessible to all human beings and may be known to everybody. However, this conception of Natural Law has not always been predominant and Stoicism and Epicurism differ on that point. It is generally accepted that Stoicism has influenced the Christian doctrine which is visible, for example, in the work of St Augustine.

It is therefore understandable why the text of Cicero has been incorporated by Hans von Arnim into the collection of fragments on Stoicism (SVF 111, 325). Long and Sedley<sup>27</sup> indicated that its original context has not been handed down to us.

25 See Pizzorni 1985: 47-67.

26 Flückiger 1954: 377.

27 Long & Sedley 2009a: fragment 67 S; cf also Long & Sedley 2009b: 128. The original context of this passage is lost.

A large part of the text of the *Republic* by Cicero is missing. They furthermore call attention to its transmission by Lactantius which is the “key” to understand the reference in this text to Monotheism. Later Stoicism accentuates even more the human reasoning which could explain why the legal sequence in Stoicism seems to be restricted to human beings. In order to understand this development in the history of Ideas, one could quote another text of Cicero, an annex to the previous one and also a text from *De Finibus*:

Cicero *De Re Publica* 3 11 19

Esse enim hoc boni viri et iusti, tribuere id cuique, quod sit quoque dignum. Ecquid ergo primum mutis tribuemus belvis? Non enim mediocres viri, sed maximi et docti, Pythagoras et Empedocles, unam omnium animantium condicionem iuris esse denuntiant clamantque inexpiabilis poenas impendere iis, a quibus violatum sit animal.

For, they say, it is the duty of a good and just man to give everyone that is his due. Well the, first of all, what is it, if anything, that we are to grant to dumb animals as their due? For it is not men of mediocre talents, but those who are eminent and learned, such as Pythagoras and Empedocles, who declare that the same principles of justice apply to all living creatures, and insist that inevitable penalties threaten those who injure an animal. (Translation CW Keyes, Loeb ed.)

This text must be compared with:

Cicero *De Finibus* 3 20 67 (*SVF* 3 371) [S]ed quomodo hominum hominum inter homines iuris esse vincula putant, sic homini nihil iuris esse cum bestiis. Praeclare enim Chrysippus cetera nata esse hominum causa et deorum, eos autem communitatis et societatis suae, ut bestiis homines uti ad utilitatem suam possint sine iniuria ...

But just as they hold that man is united with man by the bonds of right, so they consider that no right exists as between man and beasts. For Chrysippus well said, that all other things were created for the sake of men and gods, but that these exist for their own mutual fellowship and society, so that men can make use of beasts for their own purposes without injustice. (Translation H Rackham, Loeb ed.)

In the first text it seems that the duties/responsibilities of mankind are also applicable to animals. And also the phrase – *tribuere id cuique* – resounds in the famous definition of Justice by Ulpian: *suum cuique tribuere* (D 1 1 10).<sup>28</sup> In the second text, Justice and the Sphere of Law are only applicable between human beings. This way of thinking is also reflected in the juridical texts such as the beginning of the *Institutes* of Gaius:

G 1 1: Omnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quisque populis ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio

28 See Winkel 1988: 669-679. See also Manthe 1997: 1-26.

inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. Quae singula qualia sint, suis locis proponemus.

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it and is called *ius civile* (civil law) as being the special law of that *civitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of all mankind. This distinction we shall apply in detail at the proper places. (Translated by De Zulueta 1946. This text is lacking in the Verona palimpsest, but can be reconstructed with the help of D 119.)

*Ius gentium* (Gaius does not mention *ius naturale*<sup>29</sup>) is only applicable between human beings. This text reminds us of the distinction which Aristotle made in the text that is quoted in *EN* V 1134 pp 9-24. The same applies for the following text which was written by the jurist Ulpian:

Ulp D 1 1 1 3-4: Ius naturale est quod natura omnia animalia docuit: nam ius istud non humani generis proprium sed omnium animalium quae in terra quae in mari nascuntur avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censi. 4. Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.

Natural law is what nature has taught to all animals. For this law is not proper for human beings, but it is common for all animals which are born on earth or in the sea, and also for birds. From this is derived the union between man and woman which we call marriage, from this the breeding of children, from this education. We see indeed that knowledge of this law is attributed to all animals, even wild ones. 4. *Ius gentium* is the law which all peoples apply. It is easy to understand that this law differs from natural law, because the latter is common for all animals, the former is only common for human beings amongst each other. (Own translation.)

In a previous publication I have argued that the Roman division into *ius gentium* and *ius naturale* should be seen from that perspective.<sup>30</sup> It might be a consequence of the eclectic use of philosophy (of nature) by the Roman jurists.<sup>31</sup> Brouwer has suggested that D 1 1 1 3 could be compatible with Stoic philosophy as well.<sup>32</sup> This point needs more attention. I hope to come back to this on another occasion.

29 See on this problem Wagner 1978: 51ff.

30 Winkel 1993: 443-449.

31 *Ibid.*

32 2015: 75 n 68.

6. The definition of Cicero on Natural Law forms the basis of Natural Law which is axiomatic for the seventeenth century and which was in medieval times further developed by Thomas Aquinas<sup>33</sup> and later, for example, by Hugo Grotius who applied the Stoic doctrine of *oikeiosis* and had formulated some basic principles in the *Prolegomena of De iure belli ac pacis*:

Hugo Grotius *De iure belli ac pacis* Prol § 8: Haec vero quam rudi modo iam expressimus societatis custodia humano intellectui conveniens, fons est eius iuris, quod proprie tali nomine appellatur: quo pertinent alieni abstinentia, et si quid alieni habeamus aut lucri inde fecerimus restitutio, promissorum implendorum obligatio, damni culpa dati reparatio, et poenae inter homines meritum.

This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making of good of losses incurred through our fault, and the infliction of penalties upon men according to their deserts. (Translation FW Kelsey, *Classics of International Law*, 1925.)

In this text one can see the structure of patrimonial law; first of all the inviolability of property, unjustified enrichment and the two kinds of obligations: the contractual obligation and the delictual obligation. At the end of it, Grotius hints at the philosophical basis of criminal law.

7. This does not imply, however, that the pre-Socratic definition on natural law has totally disappeared. In the philosophical works of Macchiavelli, Spinoza, Thomas Hobbes, and Friedrich Nietzsche one can hear an echo of it or even find a renaissance thereof.<sup>34</sup> All these philosophers have used the conception of Natural Law based on inequality. This double transmission of Natural Law remained visible until the twentieth century. Carl Schmitt and the NS ideology "hail" Natural Law based on the inequality for their doctrine on "Gesundes Volksempfinden", especially with regard to the application of the analogy in criminal law. In his inaugural lecture as professor in legal philosophy in Münster/Germany, Fabian Wittreck once again examined the foundations of Natural Law in the Nazi ideology. And in a very explicit way he has drawn our attention to a strange phenomenon, namely the continuity of the invocation of Natural Law. This phenomenon can only be explained by its variable contents.<sup>35</sup> After World War II the German legal philosophers, remarkably enough, once again invoked the principles of natural equality as conceived by Cicero.<sup>36</sup>

33 *Summa Theologiae* Ia IIa 91 art 2.

34 Menzel 1922: 75ff [*Anklänge an die Lehre von Kallikles in der Literatur der Neuzeit*], 80ff [Kallikles und Nietzsche]; see, further, Wolf 1959: 89 [Macchiavelli]; 41 and 88 [Spinoza]; 142ff [Hobbes]; 90 [Nietzsche].

35 Wittreck 2008.

36 See Hommes 1961. Natural law as an academic topic seems to revive in recent years, see, eg, Finnis 1984; an historical and theoretical analysis of natural law philosophy is given by Westerman 1997.

In this respect Gustav Radbruch<sup>37</sup> should be mentioned here, as well as Hans Welzel<sup>38</sup> and Helmut Coing<sup>39</sup> in their advocacy for a conception of Natural Law based on equality. Only the ambiguity of the concepts of Natural Law can explain the fact that Natural Law can be used to support juridical orders which are so very different.<sup>40</sup>

Erik Wolf's position is more difficult to understand. In the beginning of the Nazi regime he was a strong supporter of the new Nazi ideology; later, from 1937 on, however, he adhered to the anti-Nazi *Bekennende Kirche* of Dietrich Bonhoefer.<sup>41</sup>

8. Maybe another example of the double tradition of Natural Law concepts is visible in the political history of South Africa in the twentieth century where we find, on the one hand, the doctrine of apartheid (the invocation of natural inequality) since 1948, and, on the other hand, after the constitutional changes the great importance on human rights – a new form of Natural Law philosophy based on human equality – in the South African Constitution of 1996.<sup>42</sup>

## BIBLIOGRAPHY

- Algra, Keimpe (2003) "The mechanism of social appropriation and its role in Hellenistic ethics" in *Oxford Studies in Ancient Philosophy* XXV (Oxford): 265-296
- Brauneder, Wilhelm (1994) "Menzel, Adolf" *Neue Deutsche Biographie* 17 (Berlin): 104
- Brouwer, René, (2015) "Ulpian's appeal to nature: Roman law as universal law", *The Legal History Review* 83: 60-76
- Büchner, Karl (1984) *M Tullius Cicero: De re publica – Kommentar* (Heidelberg)
- Coing, Helmut (1947) *Die obersten Grundsätze des Rechts* (Heidelberg)
- Dalfen, Joachim (2004) *Plato: Gorgias – Übersetzung und Kommentar* (Göttingen)
- Donati, Alberto (1990) *Elementa iuris naturalis* (Napoli)
- Düring, Ingemar (1966) *Aristoteles, Darstellung und Interpretation seines Denkens* (Heidelberg)
- Finnis, John (1984) *Natural Law and Natural Rights* (Oxford)
- Flückiger, Felix (1954) *Geschichte des Naturrechts, I: Altertum und Frühmittelalter* (Zürich)
- Forschner, Maximilian (1980) *Die Stoische Ethik* (Darmstadt)

Of course there are objections to this revival, for example in the doctrine Neo-Kantian positivists like Hans Kelsen; see further Wild 1953.

37 Radbruch 1946: 105-108.

38 Welzel 1967.

39 Coing 1947.

40 It is – to say the least – astonishing that Erik Wolf does not mention the invocation of natural law during Nazism in Germany (1933-1945) in his book quoted in n 4.

41 *Idem.*

42 Kleyn 1999: 30ff.

- Frede, Michael (1996) "Aristotle's rationalism" in *Rationality in Greek Thought*, Frede, Michael & Striker, Gisela (eds) (Oxford): 157-174
- Guthrie, William (1962 repr 1978) *A History of Greek Philosophy I: The Earlier Presocratics and the Pythagoreans* (Cambridge)
- Hardie, William (1980) *Aristotle's Ethical Theory* (Oxford)
- Heinimann, Felix (1945 repr 1978) *Nomos und Physis* (Basel)
- Hoffmann, Klaus (1977) *Das Recht im Denken der Sophistik* (Stuttgart/Leipzig)
- Hollerbach, Alexander (1979) "In memoriam Erik Wolf" in *Zeitschrift der Savigny-Stiftung für Kanonistische Abteilung* 65: 455-461
- Hommel, Hendrik Jan (1961) *Een nieuwe herleving van het natuurrecht* (Zwolle)
- Horsley, Richard (1978) "The law of nature in Philo and Cicero" in *Harvard Theological Review* 71: 35-59
- Irwin, Terence (1979) *Plato: Gorgias* (Oxford)
- Jones, John (1956 repr. 1977) *Law and Legal Theory of the Greeks* (Oxford)
- Kleyn, Duard (1999) *Phenomena surrounding the acceptance of a new legal text: The rediscovery of Justinian's Corpus Juris and the new South-African Constitution* (Inaugural lecture as a Guest Professor at Erasmus University, Rotterdam) (Rotterdam)
- Klose, Alfred, Schambeck, Herbert & Weiler, Rudolf (eds) (1985) *Das Neue Naturrecht, Gedächtnisschrift für Johannes Messmer* (Berlin)
- Long, Anthony & Sedley, David (2009a) *The Hellenistic Philosophers I* (Cambridge)
- Long, Anthony & Sedley, David (2009b) *The Hellenistic Philosophers II* (Cambridge)
- Mantel, Ulrich (1996) "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes I: Die Mathematisierung durch Pythagoras und Aristoteles" *Zeitschrift der Savigny-Stiftung für Romanistische Abteilung* 113: 1-31
- Mantel, Ulrich (1997) "Beiträge zur antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die praecepta Ulpian", *Zeitschrift der Savigny-Stiftung für Romanistische Abteilung* 114: 1-26
- Menzel, Adolf (1922) *Kallikles, Eine Studie zur Geschichte der Lehre vom Rechte des Stärkeren* (Wien/Leipzig)
- Messmer, Johannes (1950) *Das Naturrecht, Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* (Innsbruck/Wien)
- Müller, Ingo (1987) *Furchtbare Juristen* (München)
- Pizzorni, Reginaldo (1985) "La conoscenza della legge o diritto naturale 'per connaturalitatem' o 'per inclinationem' *Apollinaris* 58: 47-67
- Praechter, Karl (1926 repr 1967) *Friedrich Ueberwegs Grundriss der Geschichte der Philosophie, Erster Band: Die Philosophie des Altertums* (Darmstadt)
- Radbruch, Gustav (1946) *Süddeutsche Juristenzeitung* 1: 105-108 – Radbruch, Gustav (1975) "Gesetzliches Unrecht und übergesetzliches Recht" in *Rechtsphilosophie* Wolf, Erik & Schneider, Hans-Peter (eds) (Stuttgart): 339-350
- De Romilly, Jacqueline (1989) *La loi dans la pensée grecque* (Paris)
- Schrago, Eltjo (1975) *Libertas est facultas naturalis* (Leiden)

- Sorabji, Richard (1996) "Rationality" in *Rationality in Greek Thought* Frede, Michael & Striker, Gisela (eds) (Oxford): 311-334
- Schröder, Jan (2004) "*Gesetz*" und "*Naturgesetz*" in *der frühen Neuzeit* (Stuttgart)
- Stammler, Rudolf (1902) *Die Lehre von dem richtigen Rechte* (Berlin)
- Villey, Michel (1953) "Deux conceptions du droit naturel dans l'Antiquité" *Revue historique de droit français et étranger* 4 31: 475-497
- Wagner, Herbert (1978) *Studien zur allgemeinen Rechtslehre des Gaius, Ius gentium und ius naturale in ihrem Verhältnis zum ius civile* (Zutphen)
- Waldstein, Wolfgang (2010) *Ins Herz geschrieben: Das Naturrecht als Fundament einer menschlichen Gesellschaft* (Augsburg)
- Welzel, Hans (1967) *Naturrecht und materiale Gerechtigkeit* (Göttingen)
- Westerman, Pauline (1997) *The Disintegration of Natural Law Theory* (Leiden)
- Wild, John (1953) *Plato's Modern Enemies and the Theory of Natural Law* (Chicago)
- Winkel, Laurens (1988) "Die stoische οἰκείωσις-Lehre und Ulpian's Definition der Gerechtigkeit" *Zeitschrift der Savigny-Stiftung für Romanistische Abteilung* 105: 669-679
- Winkel, Laurens (1993) "Einige Bemerkungen über *ius naturale* und *ius gentium*" in *Ius est ars boni et aequi. Festschrift für Wolfgang Waldstein Schermaier, Martin & Végh, Zoltán* (eds) (Karlsruhe): 443-449
- Winkel, Laurens (2000) "Review of Hoffmann 1977" in *Zeitschrift der Savigny-Stiftung für Romanistische Abteilung* 117: 585-488
- Fabian Wittreck, *Nationalsozialistische Rechtslehre und Naturrecht* (2008)
- Wolf, Erik (1959) *Das Problem der Naturrechtslehre, Versuch einer Orientierung* (Karlsruhe)

# A TALE OF TWO TRANSLATIONS: VAN LEEUWEN AND VAN DER LINDEN AND THE APPLICATION OF ROMAN-DUTCH LAW AT THE CAPE IN THE 1820s; TO WHICH IS APPENDED A TRANSCRIPTION OF PB BORCHERDS' 1822 TRANSLATION OF BOOK II OF VAN DER LINDEN'S *KOOPMANS HANDBOEK*

**JP van Niekerk\***

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## ABSTRACT

The Roman-Dutch law applicable at the Cape of Good Hope survived the British take-over of the settlement at the beginning of the nineteenth century for a number of reasons. One of these was the increasing availability, through translations into English, of the main sources of that legal system. This contribution spotlights two hitherto little known such translations, of works of Van Leeuwen and Van der Linden. One of these was by a local Cape lawyer, PB Borchers. Although partly typeset and printed, the translation was, for apparently spurious reasons, never published; had it been, it may well have been the earliest legal work published at the Cape. The translation, existing only as archival material, is here transcribed and published for the first time, almost two hundred years after it should have appeared.

**Keywords:** Roman-Dutch law; law at the Cape in the 1820s; role of translations; Van Leeuwen and Van der Linden

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## 1 Introduction

Several factors played a role in what has been termed the “remarkable survival” of Roman-Dutch law at the Cape of Good Hope in the nineteenth century. It survived despite the fact that when the territory became a British settlement in 1806, that legal system was finally cut off from its roots in the Netherlands and came to be subjected to a subtle but persistent process of anglicisation. In addition to the fact that a significant number of lawyers qualified in (Roman-) Dutch law continued to practice in Cape courts,<sup>1</sup> a steady stream of translations into English of the most important sources of Roman-Dutch law in the course of the nineteenth century sought to make that system accessible to the increasing number of local lawyers who had an English background.<sup>2</sup>

A particular problem faced the administration of justice in territories taken over by Britain where a legal system or systems other than English common law applied. The existing system was, in accordance with trite British constitutional principles, and at least for the time being, left unchanged; only a gradual and partial assimilation with English common law was usually envisaged and provided for. This meant that for the time being British judicial officers and civil servants had to apply a foreign legal system, with its sources invariably in a language other than English, to a population which, in many cases, included a growing number of English-speaking immigrants. The legal system with which we are concerned here is Roman-Dutch law, which was the main system<sup>3</sup> applicable in the British colonies of Guiana, Ceylon and the Cape of Good Hope. Apart from a policy of gradual anglicisation – not only of the law, but also of its language,<sup>4</sup> procedures and customs – another solution to this problem was to make the main sources of the applicable legal system accessible by means of translations.<sup>5</sup> Given the larger aim of anglicisation, such translations were,

1 See, generally, Erasmus 2015.

2 See, in particular, Van den Bergh 2012: 86-87.

3 Other, often indigenous, legal systems also applied, but were not always formally recognised by incoming British administrations.

4 See, in particular, Van Niekerk 2015. On the process of anglicisation at the Cape at the beginning of the nineteenth century, see generally Freund 1989; Van der Burg 2011; and Van der Burg 2015.

5 For statutory sources, a related method was the compilation and publication (and often also the translation) of the various pieces of legislation promulgated not only in the Netherlands, in Batavia and in London, but also locally by Dutch and British colonial authorities. On the statutory sources of Cape law, see, eg, Sampson 1887; Roos 1897; and Roos 1906. The need for such a compilation of applicable laws was mooted during the Batavian interlude 1803-1806 but came to nought: see Visagie 1954: 42; and Van der Merwe 1986: 51 n 77. In 1819 a committee was appointed to compile and cast into a digested form the various pieces of legislation issued under previous administrations, but again without consequence: see Theal *RCC* vol 33: 1 at 3-4. In 1825, governor Somerset was requested to compile a collection of Cape statutory law, indicating which promulgations were still in force: see Theal *RCC* vol 20: 12-15. This resulted in the publication in 1826 of *Proclamations, Advertisements and Other Official Notices Published by the Government of the Cape of Good Hope, from Jan 10, 1806 to May, 21, 1825*, compiled by Sir Richard Plaskett and T Miller and containing the relevant pieces both in English and in (not always correctly translated) Dutch: see further Visagie 1954: 42-43; and Van der Merwe 1986: 51-52. A further

at best, an intermediary measure and hence never generally and officially sanctioned. They appeared piecemeal and over a considerable period of time. There was no formal scheme for the official translation into English of foreign, including Roman-Dutch, legal sources to facilitate the colonial administration of justice in the relevant territories.

However, some translations did appear to have, if not official sanctioning or authorisation, then at least official backing and blessing. In this piece we are concerned with two such translations, involving two works of two well-known Roman-Dutch jurists, Simon van Leeuwen's *Het Rooms Hollands Recht* and Johannes van der Linden's *Rechtsgeleerd, Practicaal, en Koopmans Handboek*.<sup>6</sup> Although the translations in question are not completely unknown,<sup>7</sup> they are sufficiently obscure to justify their brief discussion here, the more so given that both seemingly featured prominently in the administration of justice at the Cape in the 1820s and that their provenance is of fascinating legal-historical interest. By the mid-1800s, the various translations of the two works in question were still significant for being of the very few works available in English on the general principles of Roman-Dutch law.<sup>8</sup>

## 2 Van Leeuwen's *Het Rooms Hollands Recht* and its Ceylonese translation

Simon van Leeuwen (1626-1682), with a doctorate from Leiden and a practising advocate, was the author and translator of several legal works,<sup>9</sup> a number of which attained high authority in former Dutch territories before and in the course of the nineteenth century.

One of his early works, *Paratitula juris novissimi, dat is: Een kort begrip van het Rooms Hollands Regt*, published in Leiden in 1652, was the first to employ the term "Roman-Dutch law" in its subtitle. It, in turn, formed the basis of a more comprehensive work,<sup>10</sup> entitled *Het Rooms Hollands Recht*, which appeared in Leiden and Rotterdam in 1664. This, his best-known work, went through several

*Book of Statutes* was compiled and published in 1862 by a commission (comprised of Sir William Hodges CJ; Bell, Cloete and Watermeyer JJ; attorney-general Porter; and colonial secretary Rawson), appointed by governor Sir George Grey in 1858. It contained unrepealed promulgations from 1652 and was annually updated thereafter under the title *Statutes of the Cape of Good Hope*.

- 6 As will become apparent, there were several translations of the two works in question, but the focus here is specifically on two of those translations as they had a significant Cape connection.
- 7 They are referred to in passing by Roberts 1942: 184 and 191 n, and by Farlam 2007: 400.
- 8 See Kahn 1985: 188-189, referring to the announcement by a Cape publisher (AS Robertson) in 1854 in which were mentioned the few legal works in English being available at the Cape, Ceylon, Guiana and in other countries where Roman-Dutch law prevailed.
- 9 See further Roberts 1942: 183-186; Dekkers 1951: 98-100; Van Zyl 1983: 354-358.
- 10 See Nadaraja 1972: 39 n 167.

subsequent editions<sup>11</sup> and was eventually, in 1780-1783 in its 12th edition, updated in two volumes with notes by Corneli(u)s Willem Decker.

The first translation into English of Van Leeuwen's *Het Rooms Hollands Recht* appeared in London in 1820, published by Joseph Butterworth and Son. Entitled *Commentaries on the Roman-Dutch Law*, it was a translation of the 11th edition of 1744 and was stated on the title page to have been translated from Dutch "by a native Cingalese, under the direction of Sir A Johnstone", and to have been edited by TH Horne.<sup>12</sup>

The anonymous translator, or rather translators, it has been stated, were "the translators of the Supreme Court of Ceylon" at the time.<sup>13</sup> The translation was made under the instruction of Sir Alexander Johnstone (1775-1849), a distinguished and influential colonial official, orientalist and judge in Ceylon until 1819,<sup>14</sup> when he returned to England for reasons of health. In 1832 he was made a privy councillor and in 1833 appointed to the Judicial Committee of the Privy Council, the establishment of which body as the court of final appeal in colonial litigation he had supported.

A reformer of judicial administration and supporter of the rights of indigenous inhabitants, Johnstone had in 1807 collected and reported on various local and customary laws in use in Ceylon so as to enable the new British officialdom better to understand and administer justice. In 1809 he had submitted several suggestions for the reform of the judicial administration on the island. Under his guidance, considerable advances were also made in the preparation of a compilation of the applicable law for Ceylon in which provision was made for the preservation of the indigenous laws and customs of local Hindus, Muslims and Buddhists.<sup>15</sup>

11 For example, the 5th ed appeared in 1678; the 6th ed in 1686; the 7th ed in 1698; the 8th ed in 1708; the 9th ed in 1720; the 10th ed in 1732; and the 11th ed in 1744 – all in Amsterdam.

12 We inspected a copy in the British Library which has on its spine the title *Leeuwen Commentaries on the R-D Law*. Roberts 1942: 184 has its title as *Roman Dutch Law, translated anonymously from the 1744 edition by such translators as could be procured in Ceylon* and notes the presence of copies in the libraries of the Supreme Court of Appeal in Bloemfontein and of the Cape High Court. Nadaraja 1972: 52 n 234 has it that on Johnstone's retirement from Ceylon, he presented his papers to the library of the Colonial Office (they are now in the National Archives (NA) at Kew, in CO 54/123-125), in which is contained (in CO 54/124 p 8a) a translation of the 1744 ed of Van Leeuwen's *Het Rooms Hollands Recht*, "made under the orders of Sir Alexander Johnstone by the translators of the Supreme Court". A revised version of this translation, with appendices, was the one published in London in 1820 by command of the Secretary of State.

13 See Nadaraja 1972: xxxvi.

14 Having studied law at Göttingen, Hanover, and at Lincoln's Inn, Johnstone was called to the bar in 1800, appointed to the post of advocate-general of Ceylon, and became acting chief justice in 1806, judge of the Supreme Court in 1807, and third chief justice of the island in 1811.

15 On Johnstone's career, see further Keene 2006; and Nadaraja 1972: 15, 53 n 237, 183.

Significantly, the 1820 translation of Van Leeuwen's *Het Rooms Hollands Recht* also contained, by way of appendices, translations, made by Johnstone's "official translators",<sup>16</sup> of various indigenous laws.<sup>17</sup>

The editor of the 1820 English translation of *Het Rooms Hollands Recht* was Thomas Hartwell Horne (1780-1862), a biblical scholar and bibliographer.<sup>18</sup> Horne started off as a barrister's clerk and later, from 1806 to 1809, became the private clerk to the publisher Joseph Butterworth, all the while cultivating his interest and honing his skills in the editing of books and the compilation of catalogues on various subjects, including theology and law.<sup>19</sup> His appointment as editor of the Van Leeuwen translation in all probability stemmed from his acquaintance with its publisher.

In the preface to the 1820 translation of Van Leeuwen's *Het Rooms Hollands Recht*, the work is referred to as "the book to which the Dutch Courts of Justice on Ceylon most generally referred, as containing the System of Law which they were bound to administer to the Inhabitants on that Island". As the judges of the Supreme Court established by Britain on the island were directed to administer to those inhabitants the same system of laws as administered by Dutch courts previously, Sir Alexander Johnstone, while chief justice, "caused the present Volume to be translated into English, for the use of the Court, by such translators as he could procure on the Island". And because the work was also the basis of civil and criminal law in all those colonies that formerly belonged to Holland but which now formed part of the British Empire, the preface continued, "the following Translation has been printed by command of His Majesty's Secretary of State for the Department of War and the Colonies". It added that no pains had been spared to render the translation as accurate and perspicuous as possible, "so that the Work may form a useful Manual to professional Gentlemen on Ceylon, the Cape of Good Hope, and other Dutch Colonies now under the English Government, where the Dutch Laws

16 Nadaraja 1972: 52 n 234. One translator, the reverend Christian David of Jaffna, had translated several valuable Tamil works and had served in the Supreme Court as interpreter in important trials: *idem* 207 n 108.

17 The appendices (at 731-788) were, according to the preface, added to render the volume more useful as a manual of the actual law of Ceylon. They contained English translations of existing collections of laws and customs of two groups of native inhabitants, namely (1) a description of the established customs, usages and institutions according to which civil cases were decided among Malabar or Tamil inhabitants of (the province of Jaffna on) the island, aka the *Thasavalema* or *Tēsavalamai*, originally collected under Dutch rule in 1706; and (2) the special laws concerning the Muslims (the "Moors or Mohammedans") in force on the island and collected by Johnstone in 1806. See further Nadaraja 1972: 46 n 207, 49 n 224, 183, 193 n 30.

18 See further Hawke 2006.

19 Among his numerous contributions were the following legal titles: compiler of *A Compendium of the Statute Laws and Regulations of the Court of Admiralty, relative to Ships of War, Privateers, etc* (1803); editor of the 2nd ed of Richard Lee *Treatise on Captures in War* (1803); editor of the 20th ed of Richard Burn *Justice of the Peace* (1805); editor of John Clark *Bibliotheca Legum* (1810); and editor of Thomas Pott *Compendious Law Dictionary* (1815).

are still in force”. And lastly, but not without significance,<sup>20</sup> it was observed that as the system or “plan” of Van Leeuwen’s work in a considerable degree resembled that of Blackstone’s *Commentaries on the Laws of England*, it had been deemed proper to substitute the title *Commentaries on the Roman-Dutch Law* in lieu of the original title of the work.

### 3 Van Leeuwen’s *Het Rooms Hollands Recht* and its significance at the Cape

No doubt in part because of the 1820 translation into English, Van Leeuwen’s *Het Rooms Hollands Recht* had, and continued to enjoy, an elevated status as a source of the applicable Roman-Dutch law at the Cape after the British take-over. But was it ever at the Cape more than just one of the sources of that system?

In their *Report on the Case of Mr Bishop Burnett*,<sup>21</sup> dated 7 December 1825, in describing the law applicable at the Cape,<sup>22</sup> the commissioners then comprising the Commission of Eastern Inquiry – John Thomas Bigge and William MG Colebrooke – observed that the laws of Holland and Flanders were founded on Roman law and that these systems in combination had received the appellation of Roman-Dutch law. This legal system, they then tantalisingly continued, formed “the subject of a treatise composed by a learned civilian of Holland [that is, by Van Leeuwen] that has been translated into the English language, and under the auspices of your Lordship [Henry, third Earl of Bathurst, Secretary of State for the Colonies, 1812-1827], has been introduced as authority into the tribunals of those colonies that have been added to the British dominions, and in which the Dutch laws have been retained”.

Taken at face value, this seems to imply that the English translation of Van Leeuwen’s *Het Rooms Hollands Recht*, and in all probability then the 1820 Ceylonese one, had in some way or another been granted some kind of official status as a source of Roman-Dutch law in former Dutch colonies taken over by Britain, including, therefore, at the Cape. However, while true that the Ceylonese translation had been published in London on the instructions of the Secretary of State, we could trace no official record of such status. Otherwise than was subsequently the case in the Orange Free State or the Zuid-Afrikaansche Republiek,<sup>23</sup> neither Van Leeuwen nor

20 See n 38 *infra*.

21 For background to this matter, see further Van der Merwe 1986: 37-42.

22 Theal *RCC* vol 24: 72-107 at 103.

23 The Orange Free State Constitution of 10 Apr 1854 prescribed that the law would be Roman-Dutch law, including the works of Van Leeuwen and Van der Linden: see Van Zyl 1983: 468; and Eybers 1918: 285-296 at 295. Addendum no 1 to the Constitution of the Zuid-Afrikaansche Republiek of 19 Sep 1859 clarified the reference to the applicability of Dutch laws by explaining that the *Koopmans Handboek* of Van der Linden (in so far as it was as not in conflict with the Constitution or local statutes) would continue to be the official law-book and that when it did not treat a matter with sufficient clarity, or not at all, Van Leeuwen’s *Het Rooms Hollands Recht* or

his *Het Rooms Hollands Recht* was ever formally elevated to any official canon of authoritative sources of the law at the Cape. Equally, even though it was one of the so-called “books of authority” relied on by Ceylonese courts in their application of Roman-Dutch law,<sup>24</sup> it seems not to have enjoyed that status even in Ceylon itself, whence the translation originated.

A possible explanation for the commissioners’ statement, advanced by Fine,<sup>25</sup> is that the British government sought to narrow the definition of “Roman-Dutch law” when the Secretary of State for the Colonies “introduced” a translation of Van Leeuwen’s *Het Rooms Holland Recht* as “authority in former Dutch colonies”, including at the Cape. Again, though, while that may indeed have been the motivation behind the official support or, at most, sanctioning of the translation, there is no evidence of how and when exactly the translation was “introduced” as “authority”.

It seems, therefore, that the commissioners’ statement should not be taken literally as suggesting that the unofficial ministerial imprimatur given to the Ceylonese translation of Van Leeuwen’s *Het Rooms Hollands Recht* elevated that work to the position of an authorised and, in some way, privileged source of Roman-Dutch law at the Cape. The translation was merely encouraged or supported to facilitate in the administration of Roman-Dutch law in those British colonies where, for the time being, it still applied.

But, of course, Van Leeuwen’s work remained a favoured source of Roman-Dutch law at the Cape and a further English translation, by Sir John G Kotzé,<sup>26</sup> this time of the 12th edition with Decker’s notes, appeared in two volumes in London in 1882 and 1886 as *Roman-Dutch Law*; a second edition followed in 1921 and 1923.

#### 4 Van der Linden’s *Koopmans Handboek* and its Guianese translation

Johannes van der Linden (1756-1835), also with a doctorate from Leiden and a practising advocate in The Hague and later in Amsterdam, where he held several legal offices and was appointed to the bench in 1827, was a prolific author and

Grotius’s *Inleidinge* would enjoy binding authority: see Van Zyl 1983: 473; Eybers 1918: 362-409 and 416-417; and in particular Wildenboer 2015: 467, referring to “a constitutionally entrenched hierarchy of sources of law”.

24 See Nadaraja 1972: 16, 280 n 243 who observes that Van Leeuwen’s *Het Rooms Hollands Recht*, Van der Linden’s *Koopmans Handboek*, and Voet’s *Commentarius ad Pandectas* “were the books most commonly used by the Supreme Court” in the early years of British rule; copies of the Van Leeuwen translation were supplied to all the provincial courts on the island and it became the work most commonly used by provincial judges.

25 Fine 1991 vol 2: 469-470, 596.

26 As to whose judicial career on various benches in South Africa, see Roberts 1942: 367-368.

prodigious translator of multiple legal and historical works;<sup>27</sup> he was also a renowned bibliophile.<sup>28</sup> Although actively involved in the codification movement in the Netherlands after 1795 as the drafter of several preliminary codes, he also wrote the last recognised work on the general principles of the Roman-Dutch common law, generally known as the *Koopmans Handboek*. It appeared in Amsterdam in 1806, the very year the Cape was returned to British possession.

With the full title *Rechtsgeleerd, Practicaal, en Koopmans Handboek ten dienste van Regters, praktizijns, kooplieden, en allen, die een algemeen overzicht van regtskennis verlangen*, it was, according to the author's preface, intended as an exposition of the general principles of the then current law of and legal practice in Holland for the instruction of persons unacquainted with or untrained in the law ("die, des Regts onkundig zijnde" and "hun, die, zonder gestudeerd te hebben, regtszaaken behandelen moeten"). The need for such a work was because Grotius's *Inleidinge* was too advanced for that group ("voor onkundigen veel te duister") while Van Leeuwen's *Het Rooms Hollands Recht* was by that time out of date.<sup>29</sup>

The work consisted of four books, namely on civil law, criminal law, legal procedure, and commercial law. Although its elementary and practical approach meant that it was not always recognised academically and in the Netherlands as a serious work on and an important source of the Dutch common law,<sup>30</sup> that very feature made it an ideal text for non-lawyers and students seeking to come to grips with the basic principles of Roman-Dutch law. And, in fact, it became much more than that in the former Dutch colonies where British lawyers were active, mainly because it was relatively quickly translated into English.

The first English translation of the *Koopmans Handboek* appeared in Demerara, Guiana, in 1814. It is a rather obscure publication, seldom mentioned in legal bibliographies. In the preface to a later translation, that by Henry,<sup>31</sup> the 1814 translation was stated to have been published "at Demerara by Mr van Braam,

27 See further Roberts 1942: 190-192 (who has it at 190 that Van der Linden was said to have been consulted in governmental matters by the authorities at the Cape after the British occupation); Dekkers 1951: 101; W[essels] 1907: 19-21; and Van Boven.

28 His collection of books was so extensive that he had to lease a warehouse in Amsterdam to store it.

29 As Lee 1915: v observed, both Grotius's and Van Leeuwen's treatment of Roman-Dutch law "inevitably leaves the reader in a state of bewilderment as to the nature and content of the Roman-Dutch Law administered at the present day by the Courts of South Africa, Ceylon and British Guiana". That was no doubt also true a century before.

30 See, eg, W[essels] 1907: 19-21, referring to the *Koopmans Handboek* as a "short sketch of the Roman-Dutch law", intended as textbook for students and for the uninitiated, and therefore very slight and not to be compared to, eg, Grotius's *Inleidinge*. In fact, he continued, a mastery of Van der Linden was insufficient to acquire a fair knowledge of Roman-Dutch law as his work was never intended to be more than "a first book to the student, or a legal *vade mecum* for the merchant" and "a mere preface to the study of the law of Holland".

31 About which more in due course: see par 5 *infra*.

since deceased”. Another source on publications in British Guiana,<sup>32</sup> published in 1918, makes reference to “a most important book” printed by EJ [Edward James] Henery at the Royal Gazette Office there in 1814, a thick octavo of 418 pages, plus an appendix and index, entitled *Judicial, Practical & Mercantile Guide for the use of Judges, Lawyers, Merchants and all those who desire to have a general knowledge of Laws*. Translated from the Dutch of Joannes van der Linden, LLD, Councillor at law at Amsterdam. With an appendix of some Law Terms, etc.

The work in question, the source continues, was of such importance that a translation was proposed in 1812 and a government notice issued offering a premium of 3000 guilders for a correct translation into English. The translator, it surmised, appears to have been one LP van Braam, although his name did not appear in the work. A good copy of the work, this source concludes, is housed in the library of the American Antiquarian Society in Worcester, MA.<sup>33</sup>

Likewise little certain is known of the probable translator, Van Braam, but scattered – and at times conflicting and confusing – pieces of information do emerge. He appears to have been Livius Paulus van Braam, born in Delft, apparently in 1791.<sup>34</sup> One bit of supporting evidence relevant for present purposes is an advertisement that appeared in 1807 – when, if the date of his birth is correct, he was a mere sixteen years old – in the *Essequibo and Demerary [Royal] Gazette* that LP van Braam could be consulted as a “sworn translator in English, French, Dutch”.<sup>35</sup> That also means that he translated Van der Linden’s work at the tender age of twenty-three. Van Braam died in Demerara in 1817 at the age of twenty-eight.<sup>36</sup>

32 Rodway 1918: 287. Cundall 1909: 73 lists “*Judicial, Practical and Mercantile Guide of British Guiana*. By Van der Linden. 1814”, without identifying the translator.

33 We could not find any entry for the work in the online catalogue of the Society’s library at <https://catalog.mwa.org>, available on its website at <http://www.americanantiquarian.org>.

34 He is said in some sources to have been the son of vice-admiral Aegidius van Braam (1758-1822), who resided in England from 1795 to 1814, which might explain his son’s proficiency in English: see “Van Braam, Jhr Aegidius” in <http://stamboonline.nl> (accessed 2 Feb 2018) where it is mentioned that the admiral had three sons – Leonard, Marius and George – who had followed in their father’s Naval footsteps and who were in Indonesia at the time of his death, while another son, Livius, also in the Navy, was (or rather, had been, if he predeceased his father) in Suriname in the West Indies. Conflicting evidence appears from “Surinaamse Genealogie”, sv “Jonkheer Livius Paulus van Braam”, available at <http://www.network54.com> (accessed 23 Nov 2017); there he is stated to have been born in 1791.

35 Other entries, which may or may not refer to our man, include: 15 Mar 1806 *Essequibo and Demerary Gazette* (mention of a “Van Braam, Esq, formerly Captain in the Dutch Navy” being appointed a grave digger to the colony, the editor not being able to resist observing that “[f]rom the number of applicants which we understand there was for this situation, it would seem that ‘the loaves and fishers’ [?] are no less an object of desire here than in Europe”); 27 Dec 1806 *Essequibo and Demerary Gazette* (mention of a Van Braam in Demerara offering a reward for the return of his boat that had become adrift from its chain or was stolen some three days before); a local proclamation (see *Plakaatboek Guyana 1670-1816*, available at <http://resources.huygens.knaw.nl> (accessed 4 Nov 2017)) dated 14 Dec 1811 concerning shipping movements, signed by LP van Braam as acting harbour master; and 24 Jan 1815 *Demerary and Essequibo Royal Gazette*, which, under the heading “General Colonial Order”, mentions promotions and appointments in the Demerara Militia, including, “to lieutenant of LP van Braam, Gent, vice HB Fraser”. *The Gazettes* are available at <https://www.vc.id.au> (and were accessed on 28 Nov 2017).

36 See Oliver 1914: 82-96 (Extract of the Obituaries of the Orphan Chamber of Demerara) where the following entry appears (at 86): “Van Braam, LP, d 3 Sep 1817”.

## 5 The Henry translation of Van der Linden's *Koopmans Handboek*

The 1814 Guianese translation of the *Koopmans Handboek*, it would appear, was a rather imperfect product; after all, if the translation was done by Van Braam, it was the work of a very young person, without any legal background and whose first language was not English.<sup>37</sup>

Although preparations were made for another translation, that only appeared many years later in 1828 in London. Entitled, rather incorrectly,<sup>38</sup> *Institutes of the Laws of Holland by Johannes van der Linden, LLD ... Amsterdam, printed in the year 1806 ...*, it was the work of Jabez Henry. According to the title page, the translation was done by the order of the Earl of Bathurst, Secretary of State for the Colonies, while Henry was described as being of Middle Temple, a barrister at law, and senior commissioner of legal enquiry into the administration of justice in the West Indian and South American colonies.

Jabez Henry (1775-1835) was a colonial judge and an early author in English on the conflict of laws.<sup>39</sup> How and under what circumstances – and, crucially, as it will appear, when – he came to translate Van der Linden require a little closer inspection of his career.

Having qualified with a BA at Cambridge in 1806, he was admitted to Middle Temple and called to the bar in 1809. From 1813 to 1816 he served as (the first English) president of the Court of the united colonies of Demerara and Essequibo, and of Berbice, recently acquired from the Dutch. In that capacity he administered both – Roman-Dutch – civil and criminal law. His appointment, like later ones, he owed to the influence of Earl Bathurst. After having resumed legal practice in England for a short period, he was in 1817 transferred to the Adriatic to become, in 1818, chief justice at Corfu and the first supreme judge of the Ionian Islands, where he encountered the Venetian legal system.<sup>40</sup>

In 1819 Henry again returned to London to practise – he was described in the *Law List* as an “Equity Draftsman and Conveyancer for the Dutch Colonies” – and, apart from a spell away as a member of a commission of enquiry into the administration

37 This was the view taken in the preface to Henry's subsequent translation.

38 See W[essels] 1907: 20, observing that the work's correct title in English is not *Institutes of the Laws of Holland, but rather Practical Legal Manual*. The Blackstone influence, perhaps?: see n 20 *supra*.

39 On Henry, see Nadelmann 1961a; Graham 2001; Graham 2005; Fletcher 2005 in pars 1.21-1.22; Graham 2006; and the Obituary “Jabez Henry, Esq” in Mar 1836 *Gentleman's Magazine* 324.

40 On one of his voyages to Corfu, the bibliophile Henry lost in a shipwreck his entire library of legal works, including those he had collected in Europe, a loss he much lamented. However, by the time of his death, his law and miscellaneous library had again grown substantially and a portion of it was sold at Sotheby's in London in 1834. On the significance to a bibliophile of a loss, whether by shipwreck or otherwise, of a personal library, see Edward Wilson-Lee *The Catalogue of Shipwrecked Books, Young Columbus and the Quest for a Universal Library* (2018) at 236.

of justice in the West Indian and South American colonies from 1824 to 1825,<sup>41</sup> he proceeded to specialise in two niche areas, no doubt informed by his earlier judicial appointments and aided by his proficiency in Dutch, Italian and French.

The first was the increasingly important subject of private international law, in particular cross-border insolvency, a field in which he had some judicial as well as academic experience.<sup>42</sup> Prior to the writings of Joseph Story, English courts relied to a large extent on the discussions of continental authors, especially those of the Dutch school and more specifically those of Huber, on issues of private international law. The most extensive work in English on the subject was by Jabez Henry, whose *Foreign Law* appeared in 1823.<sup>43</sup>

His other specialisation was foreign appeals to the Privy Council,<sup>44</sup> in which Henry built up a large practice, often appearing in the company of illustrious English

41 He was appointed, in Mar 1824, as the senior commissioner to conduct an official enquiry into the administration of justice there. Several detailed reports by him or his fellow commissioners to the British parliament were the result. Of importance was Henry's *Report* in Apr 1828 on the united colonies of Demerara and Essequibo and the adjacent colony of Berbice, in which there is a sketch of the Roman-Dutch legal system that applied there. For further details, see Renton 1890, especially at 358-359.

42 His interest in the field was probably the result of an important decision (and the only reported one) that Henry had delivered in May 1814 as judge in the West Indies in *Odwin v Forbes*. At issue was Anglo-Dutch cross-border insolvency practice and Henry's decision was to the effect that under Roman-Dutch law a local creditor was not at liberty in the colony of Demerara to sue a debtor who had duly obtained a discharge from his debts in English bankruptcy proceedings in respect of a debt provable in those proceedings. A version of Henry's judgment (nothing more than a summary) was later published by John W Buck in his *Cases in Bankruptcy* vol 1 at 57-65, together with a report of the appeal dismissed without reasons by the Privy Council in May 1817. The two decisions are often referred to as *Odwin v Forbes* (1817) 1 Buck 57 (PC).

43 This work of Henry, published in London, was a pioneering and influential 295-page treatise on the conflict of laws, generally known by its short title *Foreign Law*; the full title was *A Treatise on the Difference between Personal and Real Statutes, and Its Effect on Foreign Judgments and Contracts, Marriages and Wills. With an Appendix on the Present Law of France respecting Foreigners*. Aimed at lawyers trained in the common law and treating the civil law relating to private international law for the first time in English, the work also contained, in its second half (at pp 86-189), an extended 90-page version of his 1814 Demerara judgment, with the relevant pleadings, in *Odwin v Forbes*, entitled [*Report on*] *The Judgment of the Court of Demerara, in the Case of Odwin v Forbes, on the Plea of the English Certificate of Bankruptcy, in Bar, in a Foreign Jurisdiction, to the Suit of a Foreign Creditor; as Confirmed in Appeal, with the authorities, and foreign and English Cases*. There is available a 2010 reprint of this work and its second half has also been published separately. For further background, see Lorenzen 1934: 19; and Nadelmann 1961b.

44 Prior to the establishment in 1833 of the Judicial Committee of the Privy Council (by the Judicial Committee Act, 1833 (3 & 4 Will IV c 41), aka Lord Brougham's Act), colonial appeals were heard by a standing committee of the King's (Privy) Council (the King-in-Council), formally known as the Appeals Committee of his Majesty's Most Honourable Privy Council (or the Appeals Committee for short). It is before this body that Henry appeared in 1829-1830. The Committee comprised of all lords who were members of the Council and who attended its hearings under the chairmanship of the Master of the Rolls. They were usually not judicially qualified. The hearings took place in the Cockpit, near the site of 10 Downing St, where the Committee heard arguments in public and whence they then tendered a report or advisory "opinion" (as the judgments were

lawyers. For instance, in 1829 to 1830, in the Council decisions reported in volume 1 of *Knapp's Reports*,<sup>45</sup> Henry appeared in several matters, on appeal from Roman-Dutch jurisdictions,<sup>46</sup> including one from the Cape of Good Hope.<sup>47</sup> The Council on numerous occasions referred to Henry's translation of Van der Linden in those and similar appeals and in one decision, on appeal from Demerara,<sup>48</sup> it referred<sup>49</sup> to "a very excellent book" on the law of Holland, "for a translation of which (Henry's translation of Vanderlinden's Institutes ...) the public are very much indebted to a Gentleman at this bar".

How and when did Henry come to translate Van der Linden? At least one earlier work gave an indication of his inclination to do so. In 1821<sup>50</sup> he wrote a *Report on the Criminal Law of Demerara and the Ceded Dutch Colonies: Drawn up by Desire of the ... Earl Bathurst ... with an Appendix on the Nature of the Office of Fiscal*. Published in London by Henry Butterworth, in this slim 112-page volume

known) to the King-in-Council. Its decisions were not regularly reported until Knapp began his reports in 1829. On the hearing of colonial appeals prior to (the establishment of the Judicial Committee of the Privy Council in) 1833, see further Hodgins 1895; Egerton 1925; CJG 1935; Welsh 1950; Swinfen 1987: 1-8; Howell 1979: 1-22; and the "Introduction" to Taitz, Ackermann & Barrow 1997: 1-6.

- 45 The reports of barrister Dr Jerome William Knapp, who held a DCL, were the first to be published of the decisions of the Privy Council: see Le Quesne 1952. They appeared as *Reports of Cases argued and determined before the Lords of the Privy Council* in three volumes (1829-1831, Aug 1831-Jun 1834, and 1834-1836) that are now available in 12 ER 222-377, 378-545, and 546-709 respectively. Knapp was also the co-author of *Cases of Controverted Elections, &c* (see (1833) 10 *Law Magazine, or Quarterly Review of Jurisprudence* 146) and there is a caricature of him to be seen at <https://antiqueprintmaproom.com> (accessed 5 Feb 2018).
- 46 See *Freyhaus v Cramer and Cantzlaar* ([Jul] 1829) 1 Knapp 107, 12 ER 261, on appeal from Demerara, Henry appearing with Stephen Lushington (1782-1873), who held a DCL from Oxford and was a well-known civilian lawyer with a large practice in the High Court of Admiralty (he was later a judge there 1838-1867), in ecclesiastical courts, and also in the Privy Council (see further Waddams 2006); *Nieuwerkerk v Reynolds* (1829) 1 Knapp 151, 12 ER 278, on appeal from Berbice, Henry appearing with William Adam KC (1751-1839), a Scottish advocate with an LLD from Cambridge (see further Wilkinson 2006); *Craig v Shand* ([Feb] 1830) 1 Knapp 253, 12 ER 315, on appeal from Demerara, Henry appearing with Dr Lushington; and *Frankland v M'Gusty and Pearce* ([Feb-Jul] 1830) 1 Knapp 274, 12 ER 324, on appeal and cross appeal from Demerara, Henry appearing with Henry John Stephen (1787-1864), the son of lawyer and abolitionist James Stephen, who became serjeant-at-law in 1828 (see Stephen 2006).
- 47 See *President and Members of the Orphan Board v Van Reenen* ([Jul] 1829) 1 Knapp 83, 12 ER 252, (and see also Taitz, Ackermann & Barrow 1997: 635) where Henry appeared before the King-in-Council with Brougham KC for the respondents, but where their reliance on a long passage from his Van der Linden translation was held not to be in point. Another Cape appeal from this time, *Balston v Bird* ([May-Jun] 1828) 1 Knapp 121, 12 ER 266, concerned the East India trade and the limits of the East India Co charter; Roman-Dutch law did not feature and neither did Henry.
- 48 *Simpson v Forrester and Bach* ([Dec] 1829) 1 Knapp 231, 12 ER 306; Henry appeared as *amicus curiae*: see at 243, 311.
- 49 *Idem* 241-242, 310.
- 50 Earlier, in 1817, he wrote *An Essay on the Roman Law of Manumission of Slaves, and Its Application to the Colonies*.

Henry severely criticised the archaic and defective nature of the criminal process in the former Dutch colony of Demerara. One reason for this state of affairs was that the criminal law and procedure ordinances of Philip II of 1570 and 1580 were still applicable there.<sup>51</sup> Significantly, this work contains a translation into English of what is termed a “Code of Criminal Law”, being the Criminal Ordinance of Philip II of 1570, followed by a commentary entitled a “Review of the Code”.<sup>52</sup>

Sometime after his return to London from the West Indies,<sup>53</sup> and while busy or just having completed writing his *Foreign Law*, Henry was encouraged to undertake an English translation of Van der Linden’s *Koopmans Handboek* by Sir William Grant. Grant had felt the need for a book of reference on Dutch law as it prevailed in the former Dutch colonies while presiding as Master of the Rolls in the hearing of colonial appeals in the Privy Council.<sup>54</sup> The project was further supported and authorised by Earl Bathurst. Given his competence in several European languages, including Dutch, his earlier translation of (Roman-) Dutch legal materials,<sup>55</sup> and his familiarity with the practical application of Roman-Dutch law in a British colony, Henry was no doubt one of the men in London best qualified for the task. Delayed by Henry’s involvement with the West Indian commission of enquiry, he appears to have embarked on the translation sometime after 1824. In preparation, he travelled to Europe to collect material for the book, acquiring copies of works by respected continental jurists. In the process Henry visited Holland, “almost certainly” in connection with the translation and had a meeting with Van der Linden for this purpose.<sup>56</sup>

The translation eventually appeared in 1828, entitled *Institutes of the Laws of Holland*. It was dedicated to Earl Bathurst, who had encouraged the work with his patronage and support while Secretary of State.

51 See further Lee 1914: 13; Davis 2011: 977.

52 There are also appendices, including one on the office of the advocate-fiscal or procureur-general. In a footnote in the Van der Linden translation, Henry recounted that he had in 1816 translated, “by the desire of Bathurst”, the Criminal Code in force in Demerara, which translation was later appended to his *Report* on the criminal law of the colony.

53 The information in this paragraph appears from Henry’s preface (dated Mar 1828) to the translation.

54 Sir William Grant (1752-1832), who had earlier for two years studied Roman-Dutch law at Leiden and had served as attorney-general of Quebec before commencing practising before the equity courts, was Master of the Rolls and, in that capacity, president of the Privy Council’s Appeals Committee from 1801 to 1817 (see again n 44 *supra*). He retired in 1817, but for a few years after sat on the Committee and assisted in hearing colonial appeals. He was the only one of the English judges on the Privy Council prior to 1833 who had studied Roman-Dutch law and had an extensive knowledge and practical experience of civil law in other parts of the Empire; a DCL was conferred on him by Oxford in 1820. See further Fischer 2006.

55 He was also familiar with the ten-volume collection of decrees and ordinances of Holland, published from 1658 to 1797 – this is probably a reference to the *Groot Placcaet-Boeck* – of which the later volumes were under the editorship of Van der Linden.

56 See Graham 2001: 157, 160. Henry states in the preface that he went to Holland “for the express purpose of consulting the learned author himself on several points ... of importance, and in order to assure myself of the general accuracy of the Translation”.

In the preface, Henry referred to the earlier, 1814 (Van Braam) translation, a work then (in 1828) for some years out of print: “scarcely a copy (as I am informed) can be procured, either here [in England] or in the colonies”. That alone, Henry judged, was enough reason for a new translation, but also because then the “want of technical precision” and the “inaccuracies of language” in the earlier one could be corrected. Another reason was that the Ceylon translation of Van Leeuwen’s *Het Rooms Hollands Recht*, likewise evidently by a person but little acquainted with either English law or language, was also out of date and “no longer a safe book of reference, however valuable at the time” as it had never been updated. As Van der Linden’s work, published in 1806, brought the ancient law of Holland, which still prevailed in the colonies ceded by the Dutch, up to that date, it was the ideal one for translation.

Henry recommended Van der Linden’s work “to those who wish to acquire a competent knowledge of the civil law, to qualify them to hold judicial appointments in our foreign Colonies”. The translation was specifically aimed at the expanding number of English lawyers, civil servants and colonial administrators increasingly being sent out to serve in former Dutch possessions where Roman-Dutch law still obtained. No doubt with this audience in mind, the translation contained numerous observations by Henry on the differences between the common and civil (Roman-Dutch) legal systems, as well as a lengthy chapter on the “Formation of a Select Law Library”, which was an invaluable survey of legal source material for those who wished to acquire further knowledge.<sup>57</sup>

Henry’s translation of Van der Linden’s *Koopmans Handboek* became one of the most widely used source of Roman-Dutch law in British colonies for most of the remainder of the nineteenth century. Only in 1884 did a new English translation appear, in Cape Town by Henry Juta,<sup>58</sup> under the title *Institutes of Holland, or Manual of Law, Practice and Mercantile Law*.<sup>59</sup> Unsurprisingly, Juta reckoned that a new translation was due as Henry’s earlier attempt, then in any case rapidly going out of print, was “not entirely free from inaccuracies” and as difficulties of copyright had prevented the correction and republication of that translation. And even if not the

57 Henry could not resist pointing out that most of them, in the choicest editions, were once in his possession, “at the cost of nearly a fortune”, before they were lost by shipwreck on a passage to Corfu with almost everything else he owned: see n 40 *supra*.

58 Henricus Hubertus (Sir Henry Hubert) Juta (1857-1930) was at the time practising at the Cape bar. He later went on to become attorney-general of the Cape in 1894, speaker of the Cape House of Assembly from 1896 to 1898, judge president of the Cape Provincial Division from 1914, and judge of appeal from 1920: see further Roberts 1942: 366; and Davis 1915 who points out at 7 that Juta’s translation of Van der Linden had “almost completely supplanted that of Henry”. See also W[essels] 1907: 21, considering Juta’s translation the “more correct one”.

59 Further editions appeared in 1891, 1897 and 1906, and an abridged student edition entitled *Van der Linden’s Manual, commonly known as The Institutes* in 1920.

last one,<sup>60</sup> Juta's translation of Van der Linden's *Koopmans Handboek* is even today the one best known.

But, were it not for a not completely explicable quirk of history, yet another, earlier local translation too may have had some claim to notoriety.

## 6 The Borchers translation of book II of Van der Linden's *Koopmans Handboek*

Petrus Borchardus Borchers (1786-1871)<sup>61</sup> was the son of the well-known *dominee* Meent Borchers of Stellenbosch. He was taught first by his father and then by Dr Dolling, chaplain of admiral Sir Hugh Cloberry Christian, commander-in-chief of the Cape naval station. In 1800, at the age of fifteen, he was appointed as temporary clerk to the office of the district secretary of Stellenbosch, the notary Johannes Wege. From October 1801 to January 1802 he accompanied Dr PJ Truter,<sup>62</sup> on his travels into the interior to conclude trade deals with indigenous tribes. In March 1803 Borchers moved to Cape Town. There, through the intercession of the then president of the Court of Justice during the Batavian interlude, Dr Lambert CH Strubberg, who had studied with his father at Groningen, he was appointed as clerk to the Court, first under acting secretary (and later fiscal) Dr Daniël Denyssen, and then under his successor, Dr Gerrit Buyskes. He stayed on in this post after the return of the British government in 1806. At the end of 1809, he was appointed secretary of Stellenbosch and in March 1813 he was promoted to the post of deputy fiscal under his former boss, fiscal Denyssen. Borchers remained in that post for almost ten years.

In 1823, after having occasionally taken a seat, Borchers was appointed as a member of the Court of Justice.<sup>63</sup> At the time the Court was comprised of some highly qualified lawyers and even the non-lawyers, such as Borchers himself, had considerable practical legal experience.<sup>64</sup> He had acquired his legal knowledge by

60 In 1914, yet another translation, of books I and II, and selections from books III and IV, by the Scotsman George Thomas Morice (1858-1930), at the time practising and teaching law in South Africa, appeared under the title *Institutes of the Laws of Holland*; a second edition followed in 1922. On Morice, see Roberts 1942: 392; and Anon 1929, who has it that this translation, accompanied as it was with notes, appeared because of Morice's involvement with law students.

61 On Borchers, see the entry under his name in the *Nieuw Nederlandsch Biografisch Woordenboek* part 4 (1918), available at <http://www.dbnl.org> (accessed 15 Nov 2017). His autobiography (see text at n 70 *infra*) is also a rich source of information. We could not obtain copies of the following: C Borchers *Genealogy of the Borchers Family* (1964), and C Borchers *A Borchers Tapestry: Addendum to Borchers Memoirs by PB Borchers* (196?).

62 On Petrus Johannes Truter (1775-1867), medical doctor, civil servant and later, in 1819, member of the Court of Justice, see further *DSAB* vol IV: 663-664.

63 Borchers was appointed in the place of Clemens Matthiessen, who had retired on pension; in his place, WC van Ryneveld was appointed deputy fiscal: see 22 Feb 1823 *Cape Town Gazette*.

64 At the time of Borchers' appointment, the Court consisted of Dr Johannes Andreas (Sir John Andrew) Truster as president, Dr William Hiddingh, Dr Walter Bentinck, Dr Johannes Henoeh Neethling, Frans Rynard Bresler, Johannes Christiaan Fleck, Petrus Stephanus Buisinne, and Petrus Johannes Truter jnr. Dr Daniël Frederick Berrangé was the Court's secretary, and both the fiscal (Denyssen) and the deputy fiscal, Johannes Lind, were also doctors of law.

copying court records in long hand and after hours while keeping the protocol of Gerrit Buyskes, then an advocate and notary public. His legal bible was Van der Linden's *Koopmans Handboek*, to which he had been introduced by Strubberg.<sup>65</sup>

In 1828, after the Court of Justice had been replaced by the newly constituted Supreme Court, which was manned by imported British judges, Borchersds was redeployed and appointed to the office of Judge of Police, for Cape Town and its district, and for the Cape District.<sup>66</sup> He later became a civil commissioner and magistrate until his retirement in February 1857 at the age of seventy-one.

As a prominent civil servant and well-connected<sup>67</sup> Cape Angloman, Borchersds was from early on active on government business. Notably, in the early 1820s, he collected materials for the Commissioners of Eastern Inquiry.<sup>68</sup> In addition, Borchersds was active as an author and editor,<sup>69</sup> and is best known today for his autobiography entitled *An Autobiographical Memoir*, which appeared in Cape Town in 1861.<sup>70</sup>

It is therefore unsurprising that when, in the early 1820s, the question of the accessibility of Roman-Dutch legal sources at the Cape and the possibility of translation was raised, Borchersds should have become involved. Under the guidance and with the assistance – or maybe just the encouragement – of the president of the Court of Justice, Sir John Truter,<sup>71</sup> Borchersds set out to translate a portion of Van der Linden's *Koopmans Handboek*, more specifically the part – book II – on criminal law. This portion was no doubt chosen because that was the area of law where the need for a translation to assist local legal administrators and others unfamiliar with the applicable Roman-Dutch law, was most keenly felt.<sup>72</sup> Referring to his translation

65 See Borchersds 1861: 287, 482; Cowen 1959: 7.

66 See 17 Jan 1828 *Cape Town Gazette*.

67 He had married Janette Johanna Blankenberg in 1806.

68 See Ross 1999: 48 n 36.

69 It was probably Borchersds himself, and not his father Meent, who edited Jan van Riebeeck's *Dagverhaal*, which was serialised in *Het Nederduitsch Zuid-Afrikaansch Tijdschrift* from 1824 to 1840; Borchersds also published several historical articles in that periodical: see Ross 1999: 48-49.

70 It was reprinted in 1963. The *Memoir* has the distinction of containing an early reference in Dutch to “colf” and “kolf” at 194, where there is a description of the “kolfbaan” in Stellenbosch as about 100 feet long and 30 feet across and covered and shaded by leaves and branches; see the KNKB [Koninklijke Nederlandsche Kolfbond] Webmuseum, available at <http://www.colf-kolf.nl> (accessed 15 Nov 2017) and also Stander 2000: 21, referring to the *Memoir* and Borchersds' recounting that at the turn of the century school children went to the Braak where they played “kite” and ball games.

71 For the involvement of Sir John, see Borchersds 1861: 308 (referring to Truter's “guidance”) and 487 (his “assistance”). In the preface to his translation, Borchersds acknowledged “the kind indulgence” of Truter in revising his work.

72 Borchersds 1861: 487 wrote that he undertook to translate Van der Linden's “criminal code” “for the information of the number of strangers who had settled in the colony and for general use”. The same sentiments appeared in the preface to his translation. The aim was to give that part of Van der Linden's work relating to criminal jurisprudence “an English Dress”, though without departing from “the genuine sense” expressed by the author “or giving any thing but what is truly Dutch Law”. The translation was therefore “free rather than strictly literal”. It was “intended chiefly for the use of my English Friends” who were desirous to be acquainted with the general principles of Dutch criminal procedure and would also like to compare it “with their own excellent and comprehensive” system. Lastly, “as a Foreigner”, Borchersds acknowledged the assistance of a unnamed friend in casting his translation in idiomatic and stylish English.

as being of Van der Linden's *Code of Criminal Law*,<sup>73</sup> the work was already for the most part typeset by the Government Press in Cape Town<sup>74</sup> on the instruction of governor Somerset – to whom it was also dedicated – when, in 1822, its intended publication was cancelled.

The reason, Borchersds explained in his *Memoirs* many years later, was that an edition had arrived at the Cape “of a translation of the whole of the author’s work by mr Henry, so that mine was not necessary”.<sup>75</sup> So, the completed translation, partly printed, was never published.

But this cannot be right. Henry’s translation of the (whole of the) *Koopmans Handboek* only appeared some years later, in 1828. What had arrived at the Cape, around 1822, it may be surmised, was either a copy of Van Braam’s 1814 translation of Van der Linden, or, more likely, a copy of Henry’s English translation of the Criminal Ordinance of Philip II that had appeared in 1821;<sup>76</sup> or maybe not even an actual copy of the latter work, but simply news of its publication. In all probability, Borchersds’ memory simply failed him all those years later when, in his old age,<sup>77</sup> he recalled in his *Memoirs* why his translation had never seen the light. Whatever the explanation, it appears that the publication of Borchersds’ translation may have been cancelled for insufficient a reason. Had it appeared, it may well have been the first legal text published at the Cape of Good Hope.

73 Roberts 1942: 191 n refers to it as a translation in English of the “‘Code of Criminal Law’ as comprised in the second book of a work on the *Laws of Holland* by Johannes van der Linden”.

74 After an initial private initiative (messrs Walker and Robertson were in 1800 appointed as the sole printers to the Cape government), the printing press soon reverted to governmental control. That remained the position until the arrival of the Scots printer George Grieg in Mar 1823, all printing in Cape Town being done by the government. Unfortunately there is no complete record of what publications were undertaken on behalf of the general public (as opposed to official publications), but the first such appears to have been a religious pamphlet written by father Meent Borchersds, published in 1801. The actual typesetter of the translation was probably Andreas Richert (1763-1830), who had arrived at the Cape in 1803, and was superintendent of the Printing Office from Aug 1821 until Aug 1825: see further Lloyd 1914: 35, 37, 41-42; Smith 1971: 23-24.

75 Borchersds 1861: 308, and see also at 488: printing was ceased when Mr Henry’s translation of the whole treatise arrived in the colony and Borchersds found that his was not necessary, “and hence it was not completed for publication”.

76 Fine 1991 vol 2: 469-470 explains that Borchersds was instructed to compile an English translation of the criminal-law section of Van der Linden’s *Koopmans Handboek*, but that, although (partly) printed in 1822, it was not distributed (published), presumably because the translation of Van Leeuwen’s *Het Rooms Hollands Recht* had been introduced as authority at the Cape. We have already suggested that such introduction was unlikely and is in any event not supported by any available evidence: see text at n 25 *supra*.

77 Murray 1894: 97, 98 describes Borchersds as “the old gentleman, who was one of the most patient and amiable of men and certainly one of the most just and impartial of magistrates who ever sat upon the magisterial bench” and as “a grand old man in every respect, grand in appearance and in character, always ready to do a good turn for any one in need or in trouble, respected by the Government and revered by the public”. “He must have been a fine, handsome man in his younger days”, Murray concludes, for “[h]e was handsome even as he was venerable in his old age”.

## A TALE OF TWO TRANSLATIONS



A portrait of Borcherds, in his old age, appearing as the frontispiece to his *Memoirs*

Although never published, Borcherds' translation, partly typeset in print and partly still in the form of the hand-written manuscript, did feature in the transformation of the law at the Cape. In their *Report on Criminal Law and Jurisprudence*, dated 18 August 1827,<sup>78</sup> the then Commissioners of Eastern Inquiry – John Thomas Bigge, William MG Colebrooke, and William Blair – referred<sup>79</sup> to a “meritorious attempt

78 See Theal RCC vol 33: 1-129.

79 *Idem* at 5, 29-31.

[that] was recently made to furnish an explanation of the leading principles of the Dutch Criminal Law, and to introduce them to the knowledge of the English part of the Community, by the translation of a treatise on the Criminal Law [*sic*] published in Holland in 1806 by an eminent Dutch Jurist [Van der Linden]”. They continued that it was “to be regretted that circumstances should have retarded the completion of a work which was peculiarly calculated to supply information to the magistrates and the secretaries of the country Districts, both of whom act as Public prosecutors”.

Their *Report* contains several references to the views of Van Leeuwen and Van der Linden on aspects of criminal law.<sup>80</sup> Quite possibly the commissioners made use of Borchers’ translation, for among the enclosures to their *Report* is contained, as enclosure 31, the “Translation into English of *Code of Criminal Law, as comprised in the Second Book of a Work on the Laws of Holland* by Johannes van der Linden, LLD, by PB Borchers. Printed at the Government Press, Cape of Good Hope, in 1822”.<sup>81</sup> Although not reproduced with the *Report* by Theal at the end of the nineteenth century, the translation is still extant in the National Archives in London as part of the holdings containing the Commission’s Report.<sup>82</sup>

Borchers’ translation, in the form of a transcription of both the typeset part and the hand-written manuscript part, appears, just shy of almost two centuries after it should have been published, as an appendix to this article. We have resisted the temptation to edit the translation and to cast it in a modern idiom and format, and have intervened (by way of squared brackets) only where it appeared necessary for the sake of clarity, to avoid misunderstanding, and to eliminate patent errors and omissions. In short, we have largely left Borchers’ translation as it would – should – have appeared in 1822.

## 7 Conclusion

The “remarkable survival” of Roman-Dutch law in Southern Africa in the nineteenth century was due to the presence of qualified lawyers practising at the Cape, and to the translation into English of the main sources of that legal system. Locally such translation<sup>83</sup> commenced with the work of Borchers in 1822, and continued

80 There are references, eg, to Van der Linden “in his [law] Manual”, to him “in his Practical Law Handbook”, and to him as “a Modern Author of repute”: see Theal RCC vol 33: 207, 219.

81 See Theal RCC vol 33: 130-387 (the enclosures) at 340 (enclosure 31). However, for understandable reasons enclosure 31 is not one of those reproduced by Theal.

82 See NA, CO 48/129 (Commissioners of Eastern Enquiry, Appendix to Report on Criminal Law and Jurisprudence, Part 2), folios 325-354: the typeset part appears in folios 325-334a, the manuscript part in 345-354. Part 1 of the appendices is in CO 48/128, while the Report itself is in CO 48/120.

83 The continued relevance of the old Roman-Dutch authorities in modern South African law drawing upon its common-law roots – as to which see, eg, Farlam 2007 – was greatly facilitated by a remarkable efforts of mainly local lawyers in translating those authorities from Latin or Dutch into English or Afrikaans. On these endeavours, until relatively recently (but no longer) supported by the South African Law Reform Commission, see especially Hewett 2000; and Veen 2001.

apace throughout that century and for the whole of the next. Roman-Dutch sources, or at least the most prominent of them, became and remain available in modern translations, often with commentaries and notes.

Sadly, though, that alone will not suffice to prevent the steady decline of the influence of Roman-Dutch law in South Africa. There are historical precedents aplenty for such a decline, most pertinently in the two jurisdictions that featured earlier, Ceylon<sup>84</sup> and Guiana.<sup>85</sup> And the reason, or at least one of the main reasons, for it, is probably no different here: the dearth of local lawyers qualified in and passionate about that system. Woefully inadequate legal training, strong sentiments of anti-colonialism, and the fact that large swathes of the common law are continuously being supplanted

84 In Ceylon (today Sri Lanka), a British colony from 1802, Roman-Dutch civil and criminal law was and remained the subsidiary common law for Europeans and the indigenous populations alike: see Cooray 1974; and Van den Horst 1985. However, the local courts were said to have had a somewhat “eclectic attitude” to adopting and applying only those common-law principles that suited local civilisation and conditions: see Tambiah 1972: 128-130. Deficiencies in the common law, perceived or otherwise, were often made good by the adoption of English legal principles, more accessible to those trained in that system and enhanced by the fact that English had become the language of administration and the law: the English model was followed in legislation, judgments and pleadings, as well as in forms, conventions and traditions, and ceremonies. This resulted in a divergence between Roman-Dutch law as it applied in Ceylon and Roman-Dutch law as it prevailed in the Netherlands: Nadaraja 1972: 229. Further, indigenous systems of customary law gained recognition and, as far as these applied, Roman-Dutch law was relegated to a subsidiary law. And then the Roman-Dutch common law was superseded by English maritime and commercial law (in 1852 and 1866 respectively) and by English criminal law (in 1883). In the course of time, especially after 1820, a number of (English) judges and advocates in Ceylon did become profound civilian, Roman-Dutch lawyers (see Renton 1932: 173), but this did not last and soon, and for many decades later, there was a dearth of professional lawyers, qualified in (Roman-Dutch) law, untrained civil servants being appointed to administer justice in the lower courts: see Nadaraja 1972: 79 n 2, 87 n 143.

85 In Guiana (today, Gyana), a British colony from 1815 (it comprised Demerara, Essequibo and, from 1831, Berbice, when it became British Guiana), Roman-Dutch law likewise remained the subsidiary common law: see Lee 1914: 11-12. This irked immigrating British settlers and merchants, causing them “the most tortuous legal and economic frustrations”, the more so as the continued use of the Dutch language and law allowed remaining Dutch interests, despite political control being vested in British hands, to seek “through the machinery of the law to re-establish and confirm Dutch economic power”: see Farley 1955: 43, 45. In part as a result of Henry’s Report (see n 41 *supra*), the existing criminal procedure was in 1828 and 1829 replaced by English procedure and court rules, while the civil procedure was gradually changed and approximated to English procedure: see Lee 1914: 13-14; and Ledlie 1917: 211. The unsuitable Roman-Dutch criminal law itself was replaced in 1846 by a series of ordinances introducing English principles; and English commercial law was introduced in 1864: Lee 1914: 15. In Guiana, too, a familiar problem arose, that of English-trained lawyers in charge of the administration of a legal system largely foreign and inaccessible to them: Ledlie 1917: 212. Ultimately, and although resisting assimilation more successfully than elsewhere in the West Indies (eg, in Trinidad where Spanish law was soon abolished), in 1917, the Civil Law of British Guiana Ordinance 1916 came into force and largely replaced the Roman-Dutch law by English common law so that, today, only isolated vestiges of the old system remain: see Glenn 2008: 53, 66.

by legislative enactment will, it may be surmised, probably sooner rather than later, result in the “unremarkable demise” of Roman-Dutch law in its last stronghold.

## BIBLIOGRAPHY

- Anon (1929) “Mr GT Morice” *SALJ* 46: 137-139
- Borchers, PB (1861) *An Autobiographical Memoir* (Cape Town)
- CJG (1935) “The Privy Council” *SALJ* 52: 277-285
- Cooray, LJM (1974) “The reception of Roman-Dutch law in Sri Lanka” *Comparative and International Law J of Southern Africa* 7: 295-320
- Cowen, DV (1959) “The history of the Faculty of Law in the University of Cape Town, 1859-1959” *Acta Juridica*: 1-19
- Cundall, Frank (1909) *Bibliography of the West Indies (excluding Jamaica)* (Kingston, Jamaica)
- Davis, RPB (1915) “The honourable Sir Henry Juta” *SALJ* 32: 1-10
- Davis, Natalie Zemon (2011) “Judges, masters, diviners: Slaves’ experience of criminal justice in colonial Suriname” *Law & History Review* 29: 925-984
- Dekkers, René (1951) *Bibliotheca Belgica Juridica. Een bio-bibliographisch overzicht der rechtsgeleerdheid in de Nederlanden van de vroegste tijden af tot 1800* (Brussels)
- Dictionary of South African Biography [DSAB]* 5 vols (1968-1987) (Pretoria)
- Egerton HE (1925) “The seventeenth and eighteenth century Privy Council and its relations with the colonies” *J of Comparative Legislation & International Law* 3rd Series 7: 1-16
- Erasmus, HJ (2015) “The beginnings of a mixed system, or, advocates at the Cape during the early nineteenth century, 1828-1850” *Fundamina. A J of Legal History* 21(2): 219-233
- Eybers, GW (1918) *Select Constitutional Documents Illustrating South African History 1795-1910* (London)
- Farlam, Ian (2007) “The old authorities in South African practice” *Tijdschrift voor Rechtsgeschiedenis* 75: 399-408
- Farley, Rawle (1955) “The economic circumstances of the British annexation of British Guiana (1795-1815)” *Revista de Historia de América* 39: 21-59
- Fine, Hilton Basil (1991) *The Administration of Criminal Justice at the Cape of Good Hope 1795-1828*, 2 vols (DPhil thesis, University of Cape Town)
- Fischer, DR (2006) “Grant, Sir William”, in *Oxford Dictionary of National Biography* (2006 online edition, accessed 2 Feb 2018)
- Fletcher, Ian F (2005) *Insolvency in Private International Law* 2nd ed, available online at <https://www.insol.org> (accessed Nov 2017)
- Freund, William F (1989) “The Cape under the transitional governments, 1795-1814” in Richard Elphick & Hermann Giliomee (eds) *The Shaping of South African Society, 1652-1840* (Cape Town and London): 324-357
- Glenn, Jane Matthews (2008) “Mixed jurisdictions in the Commonwealth Caribbean: Mixing, unmixing, remixing” *J of Comparative Law* 3: 53-76

## A TALE OF TWO TRANSLATIONS

- Graham, David (2001) "Discovering Jabez Henry – Cross-border insolvency law in the 19th century" *International Insolvency Review* 10: 153-166
- Graham, David (2005) "In search of Jabez Henry – Part II: The readership of Foreign Law" *International Insolvency Review* 14: 223-234
- Graham, David (2006) "Henry, Jabez" in *Dictionary of National Biography* (2006 online ed, accessed 10 Nov 2017)
- Hawke, Joanna (2006) "Horne, Thomas Hartwell", in *Dictionary of National Biography* (2006 online ed, accessed 21 Nov 2017)
- Hewett, Margaret (2000) "Old wine in new bottles, or: The story of translations of the 'old authorities' produced by South Africans" *Pro Memorie. Bijdragen tot de Rechtsgeschiedenis der Nederlanden* 2(1): 92-108
- Hodgins, Thomas (1895) "The Judicial Committee of the Privy Council and colonial judges" *Canadian L Times* 15: 133-142
- Howell, PA (1979) *The Judicial Committee of the Privy Council, 1833-1876, Its Origins, Structure, and Development* (Cambridge)
- Kahn, Ellison (1985) "Solution to a mystery about the earliest South African law reports" *SALJ* 102: 187-190
- Keene, HG, revised by Roger T Stearn (2006) "Johnstone, Sir Alexander", in *Oxford Dictionary of National Biography* (2006 online ed, accessed 21 Nov 2017)
- Ledlie, JC (1917) "Roman-Dutch law in British Guiana and a West Indian Court of Appeal" *J of the Society of Comparative Legislation NS* 17: 210-222
- Lee, RW (1914) "Roman-Dutch law in British Guiana" *J of the Society of Comparative Legislation NS* 14: 11-23
- Lee, RW (1915) *An Introduction to Roman-Dutch Law* (Oxford)
- Le Quesne, CT (1952) Book review (of Joseph Henry Smith *Appeals to the Privy Council from the American Plantations*) *Modern LR* 15: 382-386
- Lloyd, ACG (1914) "The birth of printing in South Africa" *The Library: A Quarterly Review of Bibliography and Library Lore* 5: 31-43
- Lorenzen, Ernest G (1934) "Story's Commentaries on the Conflict of Laws – One hundred years after" *Harvard LR* 48: 15-38
- Murray, RW (1894) *South African Reminiscences ...* (Cape Town)
- Nadaraja, T (1972) *The Legal System of Ceylon in Its Historical Setting* (Leiden)
- Nadelmann, Kurt H (1961a) "An International Bankruptcy Code: New thoughts on an old idea" *International and Commercial LQ* 10: 70-82
- Nadelmann, Kurt H (1961b) "Joseph Story's contribution to American conflicts law: A comment" *American J of Legal History* 5: 230-253
- Oliver, VL (ed) (1914) *Caribbeana, being Miscellaneous Papers Relating to the History, Genealogy, Topography, and Antiquities of the British West Indies* vol 3 (London)
- Renton, A Wood (1890) "Work of the West Indian commissioners III" *Juridical Review* 2: 357-365
- Renton, A Wood (1932) "The Roman-Dutch law in Ceylon under the British regime" *SALJ* 49: 161-182

- Roberts, AA (1942) *A South African Legal Bibliography* (Pretoria)
- Rodway, James (1918) "The Press in British Guiana" *Proceedings of the American Antiquarian Society* 28(2): 274-290
- Roos, J de V (1897) "The Plakkaat Books of the Cape" *Cape LJ* 14: 1-23
- Roos, J de V (1906) "The statute law of the Cape in pre-British days, and some judicial decisions in relation thereto" *SALJ* 23: 242-254
- Ross, Robert (1999) *Status and Respectability in the Cape Colony 1750-1870. A Tragedy of Manners* (Cambridge)
- Sampson, Victor (1887) "Sources of Cape law" *Cape LJ* 4: 109-119
- Smith, Anna H (1971) "South Africa" in Colin Clair (ed) *The Spread of Printing: Eastern Hemisphere* (Amsterdam) 1-171
- Stander, GB (2000) *Die Geskiedenis van Matie-Krieket 1865-2000* (MA, University of Stellenbosch)
- Swinfen, David B (1987) *Imperial Appeal. The Debate of the Appeal to the Privy Council, 1833-1986* (Manchester)
- Stephen, Leslie, revised by Patrick Polden (2006) "Stephen, Henry John", in *Oxford Dictionary of National Biography* (2006 online ed, accessed 7 Feb 2018)
- Taitz, Jèrold Leonard, Ina Ackerman, & Owen Barrow (eds) (1997) *Juta Privy Council Reports* (Cape Town)
- Tambiah, HW (1972) *Principles of Ceylon Law* (Colombo)
- Theal, George McCall (ed) (1897-1905) *Records of the Cape Colony [RCC]* 36 vols (Cape Town)
- Van Boven, MW "Linden, Joannes van der" in *Biografisch Woordenboek van Nederland 1780-1830*, available at <http://resources.huygens.knaw.nl> (accessed 8 Nov 2017)
- Van den Bergh, Rena (2012) "The remarkable survival of Roman-Dutch law in nineteenth-century South Africa" *Fundamina. A J of Legal History* 18(1): 71-91
- Van der Burg, Martijn (2011) "De integratie van Kaap de Goede Hoop in het Britse rijk, ca 1795-1825" *Pro Memorie. Bijdragen tot de Rechtsgeschiedenis der Nederlanden* 13(2): 190-205
- Van der Burg, Martijn (2015) "The age of revolutions at the Cape of Good Hope, 1780-1830: Contradictions and connections" *J of Colonialism and Colonial History* 16 (accessed from the Project MUSE database, 14 Aug 2018)
- Van der Horst, Marleen HJ (1985) *The Roman Dutch Law in Sri Lanka* (Amsterdam)
- Van der Merwe, PJ (1986) "Verwikkelinge gedurende die twintigerjare van die 19de eeu wat die Suid-Afrikaanse regsweese beïnvloed het" *Kronos* 11: 37-66
- Van Niekerk, Gardiol (2015) "Multilingualism in South African courts: The legislative regulation of language in the Cape during the nineteenth century" *Fundamina. A J of Legal History* 21(2): 372-392
- Van Zyl, DH (1983) *Geskiedenis van die Romeins-Hollandse Reg* (Durban)
- Veen, Theo (2001) "Rechtsgeleerde boeken uit Zuid-Afrika" *Pro Memorie. Bijdragen tot de Rechtsgeschiedenis der Nederlanden* 3(2): 329
- Visagie, GG (1954) *Regsveranderinge aan die Kaap tussen 1823 en 1838* (MA thesis, University of Cape Town)

## A TALE OF TWO TRANSLATIONS

- Waddams, SM (2006) “Lushington, Stephen” in *Oxford Dictionary of National Biography* (2006 online ed, accessed 6 Feb 2018)
- Welsh, RS (1950) “The Privy Council Appeals Act, 1950” *SALJ* 67: 227-230
- W[essels], JW (1907) “Notes on the history and development of the Roman-Dutch law (continued)” *SALJ* 24: 13-21
- Wildenboer, Liezl (2015) “The Thirty-Three Articles and the application of law in the Zuid-Afrikaansche Republiek” *Fundamina. A J of Legal History* 21(2): 457-476
- Wilkinson, David (2006) “Adam, William” in *Oxford Dictionary of National Biography* (2006 online ed, accessed 6 Feb 2018)

### Case law

- Balston v Bird* (1828) 1 Knapp 121, 12 ER 266
- Craig v Shand* (1830) 1 Knapp 253, 12 ER 315
- Frankland v M’Gusty and Pearce* (1830) 1 Knapp 274, 12 ER 324
- Freyhaus v Cramer and Cantzlaar* (1829) 1 Knapp 107, 12 ER 261
- Nieuwerkerk v Reynolds* (1829) 1 Knapp 151, 12 ER 278
- Odwin v Forbes* (1817) 1 Buck 57 (PC)
- President and Members of the Orphan Board v Van Reenen* (1829) 1 Knapp 83, 12 ER 252
- Simpson v Forrester and Bach* (1829) 1 Knapp 231, 12 ER 306

**CODE**  
OF  
**CRIMINAL LAW,**

AS COMPRISED IN

THE SECOND BOOK OF A WORK ON

**The Laws of Holland,**

By **JOHANNES VAN DER LINDEN, L. L. D.**

*Published in 1806;*

BEING

A **JUDICIAL AND PRACTICAL MANUAL,**

PARTICULARLY RECOMMENDED TO THE NOTICE OF

**JUDGES, and PRACTITIONERS of the LAW;**

INDEED OF ANY WHO ARE DESIROUS OF OBTAINING

GENERAL INFORMATION ON THIS BRANCH OF

JURISPRUDENCE.

---

TRANSLATED INTO ENGLISH, BY

**P. B. BORCHERDS, Esq.**

*One of His Majesty's Deputy Fiscals, at the Cape of Good Hope.*

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*Qui bene distinguit, bene docet.*

**CAPE OF GOOD HOPE:**

PRINTED AT THE GOVERNMENT PRESS.

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1822.

HIS EXCELLENCY THE RIGHT HONOURABLE GENERAL

Lord CHARLES HENRY SOMERSET,

GOVERNOR AND COMMANDER IN CHIEF,

AT THE CAPE OF GOOD HOPE,

*Whose anxiety for the general and individual Welfare, particularly of our New Colonists, has been lately so publicly expressed, this Translation of DR. VAN DER LINDEN's Treatise on the Criminal Law of Holland, is, with gratitude, most respectfully inscribed, by*

*His Lordship's most obedient, and*

*most humble Servant,*

**P. B. BORCHERDS.**

## PREFACE

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*THE Motto in the Title Page, is justly applicable to Dr. Van der LINDEN's perspicuous Treatment of the whole Code of Dutch Law. My endeavour, in the present Translation of that part of his Work, relative to Criminal Jurisprudence, has been to give it an English Dress, in a manner, so far as my abilities would allow, clear and familiar; yet without departing from the genuine sense expressed by the Author, or giving any thing but what is truly Dutch Law.*

*I have used, therefore, a free rather than a strictly literal Translation, and have made some alteration in the arrangement of some particular heads and clauses, which, I think, if seen by the Author himself, he would approve.*

*The Translation, indeed, is intended chiefly for the use of my English Friends, (my Dutch ones can study it more satisfactorily in the Original,) many of whom are desirous, not only to be acquainted with what are the general principles of Criminal Procedure in the Dutch Law, but would like also to compare it with their own excellent and comprehensive National Work; and should they look for a happy coincidence in the general principles of distributive Justice, they will not be disappointed.*

*It is not to be expected, that, as a Foreigner, I should be so much a Master of the Niceties of the English Tongue, (however correct I may be found as to the general technical sense or meaning of the Law,) so as to translate it free from blemish, in many points of composition, as to style and other particulars: it is a duty, therefore, I have to acknowledge, that I have been greatly indebted to the aid of a particular Friend, in giving to the Work its last polish, its more easy and familiar style and character.*

*I send it forth, therefore, with the humble confidence, that it may not only be found useful, but divested in some measure, of that dryness or technical harshness, which so often attends Treatises on Law.*

*The revision of the whole has been afforded, by the kind indulgence of His Honor Sir JOHN TRUTER, who now presides at the head of the Law Department, in this Colony. His Name will be sufficient in recommendation of my little Work; and I am sure, I shall not be blamed for taking that advantage, which such distinguished aid is naturally calculated to produce.*

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# JUDICIAL and PRACTICAL MANUAL, &c. &c.

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## PART I

### *Code of Criminal Jurisprudence*

#### CHAPTER I

##### *Of Crimes in general*

#### SECT. I

##### *Of the division of Crimes*

By Crimes, (speaking of the Laws of one's Country,) are to be understood those voluntary and injurious acts, which are not only contrary to the Law, but to which, also, the State has affixed some penalty. Illegal acts committed through malice or design, are the most culpable: those through neglect or omission, less so; whilst those acts, which occur through misfortune or accident, cannot justly be imputed to the persons committing them, as Crimes.<sup>1</sup>

#### SECT. II

##### *Of perfect and imperfect Crimes*

In the commission of all Crimes, it ought to be considered, whether the perpetrator acted to the full extent of his intentions. Hence arises the distinction of Crimes into *perfect* and *imperfect*. With respect to those of the latter kind, it is further necessary to be considered, whether the Crime consist only in the intention of the Perpetrator, or whether this intention be already designated by some overt act; and, if so, the criminal extent of this act.<sup>2</sup> It is also important to consider, whether the Perpetrator has persevered in his Crime by subsequent acts, and also, whether he has repeated the criminal act.

1 J.C. von Quistorp, *Grundsätze des Deutschen Peinlichen Rechts* 1 Th. § 25.

2 Boehmer, *ad Const. Crim. Carol. ad Art. 131 § 38 & Art. 178 § 6.*

## CHAPTER II

*Of Guilt in Acts*

## SECT. I

*Of the Law Penal*

Every act, deemed criminal, supposes a Law prescribing punishment for a commission of the same. Where this penalty is wanting, the act does not amount to a Crime, in the eye of the Law, though it may be a Crime severely punishable in other Countries.<sup>1</sup>

## SECT. II

*Of voluntary criminal Acts*

The mere *intention* to commit a punishable act, does not constitute Crime.<sup>2</sup> It must be designated or manifested by some overt act, and this clearly *proved* to have been committed. Simple suspicion will not do; and when the overt act, or acts, are clearly proved, it is then necessary to enquire, with what view they were committed; with what *consciousness* of their being criminal,<sup>3</sup>; for the consciousness of having committed Crime in what we have done, constitutes, in reality, the Guilt.<sup>4</sup> Its being done voluntarily, is implied by the fact, the innocence of which, must be determined by other means.<sup>5</sup> In determining the punishment necessary to be inflicted for the commission of a Crime, the different degrees of malice or neglect, discoverable in the intention of the person offending, are well to be considered by the Judge.<sup>6</sup>

## SECT. III

*Criminal Acts, as they arise from neglect*

If a Crime appear to arise, more from a want of exercising a due judgment, attention, or discretion, than from the will or intention, it is then denominated a criminal neglect. If the Law inflict corporal or capital punishment for a Crime, a clear distinction should be made betwixt voluntary or wilful commission in the Crime, and mere neglect,<sup>7</sup>; for Crimes of neglect must never be punished by death, and seldom by the ordinary corporal punishment.<sup>8</sup>

1 Quistorp, § 32.

2 L. 18 ff. de Poen.; L. 225 ff. de Verb. Sign.

3 L. 41 in fin. ff. ad Leg. Aquil.; L. 39; L. 53 pr. ff. de furt.; L. 79 ff. de Reg. Jur.

4 L. 4 § 1; L. 7 ff. ad Leg. Corn. de Sicar.; L. 1; L. 5 C. eod.

5 L. 1 C. ad Leg. Corn. de Sicar.; L. 5 C. de injur.

6 G. Fielangiri, *Science de la Legislation* Tom. 4 Chap. 14.

7 L. 4 § 1; L. 7 ff.; L. 1; L. 5 C. ad Leg. Corn. de Sicar.

8 Boehmer, ad Carpzovii, *prax. Crimin. quaest. 27 obs. 1.*

## SECT. IV

### *Those arising from chance or accident*

If the act, neither originated in the design, nor imprudence of the perpetrator, but only fell out by chance, or unintentionally, it is then termed accidental: consequently, guilt will not be imputed to the person who committed it; nor can punishment, or legal requisition for indemnification ensue, or be demanded.<sup>1</sup>

## SECT. V

### *Of Acts, committed by insane Persons*

Acts, committed by persons extremely deficient in intellect, such as insane persons, or those deranged in their minds, or idiots, cannot be deemed criminal, and are, consequently, not punishable.<sup>2</sup> It is the duty, however, of the Judge, when this deficiency is pleaded, to make every due enquiry, whether it exclude, in the perpetrator, all consciousness of crime in the act, and whether he may not possess, at intervals, moments of sane understanding; in order to determine, according to circumstances, whether punishment, ordinary or extraordinary, is to be inflicted.<sup>3</sup>

## SECT. VI

### *Distinction to be made between Lunatics, and those of imbecile Minds*

Distinction must be made betwixt Lunatics, or persons deranged in mind, and those merely of weak intellect, simpletons, or those childish in their acts, (acts, indeed, sometimes to be considered not less than Lunatic or idiotical,)<sup>4</sup> and who may be said to form a class betwixt infants and sensible men.

These can commit real crimes, and are persons upon whom corporal punishment may be inflicted, and even death, according to circumstances; for the act, constituting crime or guilt, does not depend so much upon a quick and penetrating mind, or perfect knowledge of the Law, as upon the consciousness of acting culpably and unlawfully.<sup>5</sup> Nevertheless, there is a degree of simplicity, which, if properly proved, would form an important ground of defence, even in capital crimes, and principally in those founded upon neglect, or, in which the circumstances carry no appearance of particular wilfulness, or the liberation in the Agent.<sup>6</sup>

1 § 5 *Inst.*; L. 31; L. 51 ff. *ad Leg. Aquil.*; *Boehmer, ad Const. Crimin. Carol.* Art. 146.

2 L. 12 ff. *ad Leg. Corn. de Sicar.*; L. 13; L. 14 ff. *de offic. Praesid.*; L. 40 ff. *de Reg. Jur.*; L. 9 § 2 ff. *ad Leg. Pomp. de parric.*

3 *Matthaeus, de Crim. in Proleg. Cap. 2 n. 6.*

4 *Quistorp*, § 39.

5 *Leyser, Med. ad Pand. Tom. 9 Spec. 599.*

6 *Leyser, d. 1.*; *Quistorp*, § 39.

## SECT. VII

*Acts, committed by those of a melancholy Disposition*

It is more difficult to determine, how far melancholic or low-spirited persons merit exculpation.

In general, much allowance cannot be made for such, if they possess the use of their senses, independently of their melancholy. There is, however, no doubt, that persons may, sometimes, be afflicted with such an extreme degree of melancholy and depression of spirits, as to be considered in the light of mad persons; and, in actions committed by them, when in this state, crime is hardly to be imputed; such persons, however, to prevent accident, are condemned to confinement.<sup>1</sup> Such, moreover, are to be distinguished from those, who commit a crime from an aversion to life, upon whom the ordinary punishment should be inflicted.<sup>2</sup>

## SECT. VIII

*By deaf and dumb People*

In the estimating of crime in acts, deafness and dumbness may become objects of consideration: that is, where such defects are innate, or originally deeply grounded, or seated, and there is reason to doubt the possibility of malicious design.

To prevent, however, the repetition of the injurious acts of such persons, they should be kept in safe durance for the remainder of their lives. If the culprit become deaf and dumb accidentally, and the maliciousness of the design be sufficiently apparent, he is then, in the eye of the Law, certainly amenable, and subject to punishment.<sup>3</sup>

## SECT. IX

*Of criminal Acts, committed in a state of Drunkenness or Inebriety*

Drunkenness, being in itself a misdemeanour, especially in military men,<sup>4</sup> cannot, therefore, strictly speaking, afford any ground of exculpation, for an offence committed by a person in that state. However, circumstances may exist, where the Judge is obliged to take the state of the man into consideration; and, herein, distinction is to be made, whether a person has voluntarily or unwillingly become intoxicated. If he has been enticed by others to drunkenness, it may sometimes form a plea in mitigation of punishment; but, if the culprit became intoxicated voluntarily,

1 Boehmer, *ad Const. Crim. Carol.* Art. 179 § 6; Carpzovii, *prax. Crim. quaest.* 145 *ibique* Boehmer, *in observ.* V. Hall & Hamelsveld, *Harmen Alfkens*, Amsterdam, 1798.

2 Boehmer, *ad Constit. Crim. Carol.* Art. 137 § 23.

3 Carpzovii, *prax. Crim. quaest.* 147.

4 G. Feltman, *Military Regulations, (Articul Brief.)* Art. 67.

in order to commit the crime more boldly, it cannot tend, in any degree, to exculpate him; but, on the contrary, to enhance his guilt.<sup>1</sup>

If Drunkenness, although voluntary on the part of the man, has occasioned in him a total mental derangement, and there be no appearance of a design to commit evil, but, on the contrary, the culprit afterwards exhibit every mark of repentance, then, sometimes, there may be room for granting a mitigation of the punishment prescribed for the offence. All this, however, depends upon circumstances, which may occur, more or less, in favour of the prisoner; for a Judge should not, in general, easily admit drunkenness as a ground of defence, or in extenuation of any criminal act, committed whilst in that state.<sup>2</sup>

## SECT. X

### *Of Anger, as a plea in criminal Cases*

The plea of anger, or great irritation of mind, cannot be admitted, unless there be circumstances of a very extenuating nature accompanying the act; as, should it appear, per example, that lawful reason for the offender's anger has been given, or, that he was not the author of the quarrel; if, immediately after the commission of the act, he show contrition, and a desire to make amends; if there be no appearance of a premeditated evil, or malicious design or intention; if he be a very young person; such circumstances may then be allowed to operate in mitigation of punishment.<sup>3</sup>

## SECT. XI

### *Of ignorance of the Law, as a plea*

If the culprit plead ignorance of the Law Penal, it is necessary to observe, whether the criminal character of the act he has committed, was not clearly apparent to every person, even to the most ignorant and uneducated; in which case, his pretended ignorance cannot be admitted as a plea.<sup>4</sup> But if there be ground to suppose, that, on account of the unfrequent commission of the crime, or, for other reasons that might be adduced, the Law against it may not have reached his notice, then the Judge, upon the ground of such deficiency, may mitigate the punishment, but must not wholly remit it.<sup>5</sup> This defence will be the more admissible, if the Law should be local, and the offending person a stranger, or foreigner; but, if he be an inhabitant of the Country, and the Law has been long and duly promulgated, and has not become obsolete, or

1 Leyser, *Med. ad pand. Tom. 1 Spec. 59 Th. 3 & Tom. 5 Spec. 348.*

2 Carpzovii, *prax. Crim. quaest.* [146]; Quistorp, § 42[-]44.

3 Carpzovii, *prax. Crim. quaest.* 6, *quaest.* 18 No. 5 *Seqq. quaest.* 147 No. 41 *Seqq. ibique* Boehmer, *in observ.*

4 *L. 2 C. de in jus voc.*; *L. 11 § 10. ff. ad Leg. Jul. de Adult.*; *L. 37 ff. de minor.*; *L. 7 C. unde vi.*

5 Boehmer, *ad Const. Crim. Carol.* Art. 179 § 12.

grown into disuse, the plea of ignorance is not admissible.<sup>1</sup> It will also little avail the offender to urge, that, although he was not ignorant of such a Law existing, yet, that he did not consider it as applicable to his case; for such error, between the Law and the fact, cannot well exist; and if it does, it will be very evident, from circumstances, whether it can at all serve to exculpate him from the offence.<sup>2</sup>

## SECT. XII

### *Of criminal Acts, committed by those in a state of Infancy*

To Children, under seven years of age, crime, in acts contrary to the Law, are not to be imputed, as they cannot be supposed to have a due use of their reason, or understanding,<sup>3</sup>; and are, consequently, not liable to the ordinary public punishments, annexed to such acts, by the Law, in the manner that others are,<sup>4</sup>; but, in order to correct, or counteract any mischievous or malicious conduct in them, they are to be punished, but only by their Parents, Guardians, or Masters.<sup>5</sup> If Children are above seven years of age, though not yet arrived at the age of puberty, or fourteen years, then, the punishment for inferior crimes, is left to the discretion of the Parents, &c.<sup>6</sup> But, if they commit any great crime, and there is ground to suppose in them, sufficient reason to discern between right and wrong, or, if they exhibit a wilfulness of design, superior to their age, then, instead of the ordinary public punishments being inflicted on them, they are punished with rods, by Police-men, (Geregts-dienaars,) or by imprisonment for a certain period, or by some other mode of correction, adapted to their age and condition.<sup>7</sup>

## SECT. XIII

### *Of the criminal Acts of Minors*

In Persons, above the age of fourteen years, but who are yet in their minority, this minority may be pleaded in mitigation of punishment,<sup>8</sup> more particularly as relating to crimes of incontinence, and others of no serious consequence. But if it be an aggravated or atrocious species of crime; if it be often repeated; if the perpetrator be nearly of age; or, if there be ground to suppose in him malicious design, the plea of minority will be of little avail to him.<sup>9</sup> But if, on the other hand, there be no absolute

1 Quistorp, § 48.

2 Quistorp, § 49.

3 L. 23 § 2 ff. *de aedil. edict.*; L. 22 ff. *ad Leg. Corn. de fals.*; L. 12 ff. *ad Leg. Corn. de Sicar.*

4 L. 7 C. *de poen.*

5 Boehmer, *ad Const. Crim. Carol.* Art. 179 § 1.

6 Boehmer, *d. L.* Art. 164 § 1.

7 L. 37 ff. *de minor.*; L. 6 pr. ff. *ad Leg. Jul. pecul.*; L. 1 § 32 ff. *ad Sat. Silan.*

8 L. 1 C. *si adv. del.*; L. 37 § 1 ff. *de minor.*; L. 108 ff. *de Reg. Jur.*; L. 16 § 3 ff. *de poen.*

9 L. 9 § 2; L. 37 § 1 ff. *de minor.*; L. 38 § 4 ff. *ad Leg. Jul. de adult.*

appearance of design, of malicious or criminal determination; if genuine contrition, or sincere repentance be shown; if the act be more the result of unruly passion, than cool and premeditated design or malice aforethought; if there be a sufficient prospect of amendment in future: in such cases, his minority may be allowed to stand him in some avail, in determining the degree of punishment to be inflicted; and even with respect to those crimes which are ordinarily subject to corporal or capital punishment.<sup>1</sup>

## SECT. XIV

### *Of involuntary Crimes*

As a free or voluntary intention to commit, constitutes crime in the agent, no offences can be considered as criminal, which are committed by persons in their sleep, or by those who are termed Sleepwalkers.<sup>2</sup>

## CHAPTER III

### *Of Accessories or Accomplices*

## SECT. I

### *Of Aiding or Abetting, in general*

Those who are aiding or abetting crimes to the extent, that they would not have been committed without such co-operation, are named *Accomplices*.

If this participation in crime, is formed with an engagement or plan to execute certain criminal intentions, it is then called a conspiracy, and the actors in it a gang. If they are all in a situation mutually to aid, or assist, in the joint commission of a criminal act, or have acted as spies or sentries, to guard against detection, all are deemed equally guilty; although the act, (murder for instance,) may have been committed by some of them; unless such peculiar circumstances be exhibited, as to cause a difference in the application of punishment, that is, – should persons become accomplices through compulsion or timidity; or, if by different<sup>3</sup> parties of the same gang, crimes of a different nature, unconnected and separate are committed at one period, each act is to be considered distinctly, although the perpetrators may be common parties in the general plot.<sup>4</sup> If, again, the participation in the crime does not point out a conspiracy, but only a mere support in the criminal act, distinction must be made between those who directly aided or assisted in the crime, and those, who

1 L. 108 ff. de Reg. Jur.; L. 16 § 3 ff. de poen.; Cocceji, exerc. curios. Tom. 2 Dispu. 41.

2 Boehmer, ad Const. Crim. Carol. Art. 179 § 7.

3 Boehmer, d. L. Art. 148 § 1; Quistorp, § 54.

4 Quistorp, d. L. in not.

at the time of commission, or afterwards, are guilty of culpable acts, by which the perpetration of the crime is facilitated, or by which the crime committed is concealed. The first are considered as real accessaries, or accomplices, *socii criminis*, who are to be punished corporally or capitally, according to the nature of the offence; the others are called accessaries, (*Anglice*,) “after the fact,” and are commonly less, or extraordinarily punishable.<sup>1</sup>

Further, with respect to this aiding or abetting crimes, the degree of participation ought to be accurately ascertained. – This is *perfect* or *less* so, and punishment is to be inflicted accordingly; to wit, if a person should furnish the instruments to commit a crime, the intention of doing which was known to him, although he may not be acting in the execution of the same, yet the participation is complete.<sup>2</sup> Support, as before mentioned, may also be given after the commission of a crime, viz. by harbouring or concealing the perpetrator, or by sharing the profits acquired by the crime.<sup>3</sup>

## SECT. II

### *Of the commissioning of others to execute a criminal intention, including the non-prevention, or concealment of Crimes*

A person may be *particeps criminis*, in commissioning others to execute crimes. In deciding, with respect to the degree of culpability in this matter, a few circumstances are to be taken into consideration, namely, whether, in commissioning others so to act, the mode of execution was prescribed; as also, whether the person so commissioned, was forced to obedience, or one subject to the power or authority of the person urging him to such commission.<sup>4</sup>

A person also, may be deemed *particeps criminis*, in *advising* another to the commission of a crime, and in this, likewise, there are circumstances to be taken into consideration, namely, whether the advice given was general, or stipulatory, relative to the manner of execution; whether the perpetrator had a previous intention to commit the crime, and afterwards received more encouragement from the *advisor*; or whether this advice gave the first inducement to commit the crime.<sup>5</sup> Not preventing the perpetration of a crime, when in our power so to do, may afford just ground for punishment, particularly if it be proved that the opportunity of exercising this prevention was favourable, or dutiful.<sup>6</sup>

1 Boehmer, *d. L.* Art. 177 § 1 & 2.

2 Quistorp, § 56.

3 *L. 1 C. de his, qui latron*; Boehmer, *d. L.* Art. 177 § 9; Quistorp, § 57 & 58.

4 Boehmer, *d. L.* Art. 177 § 4; Putman, *Opuscul. Jur. Crim.* No. 1.

5 Quistorp, § 60.

6 Quistorp, § 61.

In short, it is evident from what has been stated, that a full view of the case, and all its concurrent circumstances, founded upon the general knowledge and experience of mankind, must be the Judge's chief guide, in estimating the guilt of the culprit. The *concealment*, also, of intended or projected crime, renders a man *particeps criminis*; this ought to be punished in an extraordinary manner. But, after the crime is committed, the keeping it a secret, is not punishable; unless, indeed, the welfare and safety of the State depends upon the disclosure, or an established Law, or official duty, requires it.<sup>1</sup>

### SECT. III

#### *Of estimating the degree of atrocity, or guilt in Crimes*

In considering this, we are generally to be determined by the following Rules: –

1. The guilt becomes the more enhanced, by its being opposite to the higher obligations of our performing, or omitting to perform, some action. Upon this ground, the crime, by which the safety of the State becomes endangered, is greater than that, by which an individual only suffers.<sup>2</sup>
2. The more the crime is committed with deliberation, and a consciousness of guilt, the greater will be the atrocity. A repeated crime is, therefore, greater than one committed for the first time. The guilt, also, of a repeated crime, is increased, if the perpetrator has been before *punished* for the same.<sup>3</sup>
3. The more danger or injury also, there is attending the perpetration of a crime, the more flagitious it is. Upon this principle, a crime *committed*, is more atrocious, than if only *attempted*. The evil character, moreover, of a crime, is increased, if accompanied by other crimes.

By these Rules it is, that we may estimate the extent of the guilt, in crimes relative to accomplices. The guilt, therefore, in the accomplice of a conspiracy, is greater than when accidental, without previous deliberation, or agreement, or in one single instance. Actual aid and co-operation are more criminal, than simply counselling or advising; and the imputation of crime is less, as to the degree of guilt, if inducement be given by Parents, or others, to whom obedience is peculiarly or especially due.<sup>4</sup>

1 Boehmer, *de obligatione ad revelandum occulta in Exercit. ad pand. Tom. 6 Exerc. 97.*

2 Grotius, *de J. B. ac P. Lib. 2 Cap. 20 § 29.*

3 *L. 28 § 3 ff. de poen.*

4 *L.157 pr. ff. de Reg. Jur.; Leyser, Medit. ad pand. Tom. 9 Spec. 580 Th. 8.*

## PART II Of Punishment

### CHAPTER I *Of Punishment in general*

#### SECT. I

##### *Definition of Punishment, and its objects*

By Punishment, is commonly meant, that pain or penalty, inflicted by the Supreme Authority in the State, upon any person, for not complying with the duties, or obeying the injunctions, imposed by that Authority.

The first great object of punishment is, the prevention of crime, by its producing that impression, which will deter others, as also the individual himself, from committing those injurious and illegal acts, which disturb the peace, safety, and welfare of the community.<sup>1</sup>

In punishments, not capital, there is another important principle to guide us, viz. the reformation of the individual himself;<sup>2</sup> to which we may add, when possible, satisfaction or restitution, to the injured person or persons.

#### SECT. II

##### *Of the different kinds of Punishment*

These may be denominated *severe* and *slight*. In the higher or more aggravated species of crime, divided into *capital* and *corporal* punishments; and these last again, subdivided into *simple*, and those augmented by the necessity of additional severity. They may also be classed into *ordinary*, which are inflicted for all transgressions of the Law, which are of the same degree; and into *extraordinary*, which are adjudged according to the nature and degree of the guilt in the crime committed.

The different modes and degrees of punishment, as they relate to those of a corporal kind, including those which are capital, may be traced to the feudal times of darkness, ignorance, and superstition.

A sort of cruel and ferocious pleasure was then indulged in the infliction of punishment for crime.<sup>3</sup> But the nearer we approach to more enlightened and improved times, when learning began to revive, and the mental faculties became consequently more enlarged, we find these cruelties proportionably disapproved of; and that [the] Judge was deemed to act most consistently with his character, whose awards, though sometimes necessarily severe, were yet without any mixture of cruelty.<sup>4</sup>

1 *L.1 C. ad Leg. Jul. repetund.*

2 *L. 20 ff.; L. 14 C. de poenis.*

3 Heineccii, *Elem. Jur. Germ. L. 2 Tit. 30*; Putman, *Elem. Jur. Crim. L. 1 C. 2 § 66 Seqq.*

4 Seneca, *de Ira Lib. 1 Cap. 5, 14, 15 & 16, L.11 pr. ff. de poenis.*

The capital punishments which remain in force, are,

1. Breaking upon the wheel, with or without decapitation.†
2. The gallows.
3. The sword.
4. Strangling, with or without scorching.

Quartering, burning, drowning, &c. are not now in practice. That, also, of exposing dead bodies upon the wheel, or leaving them to hang on the gallows, to be consumed by the air, or devoured by birds, have been some years since, abolished.<sup>1</sup>

The corporal punishments, at present in force, are,

1. Scourging, with or without a rope round the neck, and with or without branding.
2. Confinement in a house of correction.
3. Condemnation to the public works.
4. Waving of the sword over the head.
5. Exposing upon the scaffold, with or without rods.
6. Praying for pardon, from God and their Judges, upon their bare knees.
7. Restriction for a certain time, to bread and water.

Punishments, which consist in maiming the limbs, have long been disused, as savouring of cruelty. There are only some few instances of piercing the tongue with a pin, cutting the face, and some others.

To these may be added, punishments, which, though not directly affecting the culprit's person, are yet thought proper to be inflicted.

To this belong,

1. Banishment for life, or for a certain term of years, from the Country, District, or Place.<sup>2</sup>
2. A denunciation of infamy.
3. Forfeiture of office or appointment.

Finally, it is no incompetent remedy, to punish the culprit in his means or property, by imposing the payment of great or small fines; and, if not paid within a certain time, to direct a proportionate corporal punishment to be inflicted upon him.<sup>3</sup>

1 *Publ. Holl.* 6th March, 1795. The Author here gives in consideration, whether it ought not to have been less limited.

2 Concerning the serious question, whether Judges in Holland can banish beyond their Territories, the Author refers to Bynkershoek, *Quaest. Jur. Publ. L. 2 C. 17*; V. D. Wall, *Publications of Dordrecht V. 2 pag. 700 & 701.*

3 *L. 1 § 3 ff. de poen.*; *L. 4 C. de Serv. fugit.*; *Gener. Ordonn.* of Aug. 28, 1749, Art. 4, *Public.* March 2, 1751, and Jan. 23, 1753.

† This punishment is no longer in use in this Colony, *vide* Appendix, Letter A.

## SECT. III

*Degrees of Punishment*

Although it be the duty of men and of christians, to banish from their tribunals every thing barbarous or cruel, yet, it would be absurd, to punish all crimes with the same corporal or capital punishments.<sup>1</sup>

Crimes admit of considerable degrees both of aggravation and alleviation; and this is well to be regarded in the application of punishment. For, it would be unreasonable, to punish murder and pure homicide or manslaughter, robbing on the highway, and petty larceny, with the same degree of punishment.

In former times, the capital punishment was augmented by the additional penalty of confiscation of goods; but since the year 1732, this is abolished by the laws,<sup>2</sup> and very properly so; as all laws, by which the innocent suffer, as in the case of the delinquent's family and children, should be abrogated.

## SECT. IV

*Rules for the application of Punishment*

It is a general maxim, that there should be no punishment without crime. –

A Judge, therefore, will do well to consider, in the first instance, every thing relative to the nature and degrees of crimes, as indeed we have above stated. Fully to apply the punishment directed by the Law, it is necessary that the crime should be wilfully committed. If the crime be not wholly, but only partially perpetrated, then the ordinary punishment by the Law for such crime, cannot be inflicted.<sup>3</sup>

Another maxim of Law is, that the punishment for crime can only affect the perpetrator, his accessaries, or accomplices;<sup>4</sup> consequently, parents are not punishable for the crimes of their children, – children for those of their parents, – nor masters for those of their servants, &c.; unless they can be shewn to be *participes criminis* in any way.<sup>5</sup>

Heirs cannot be punished for the crimes of those to whose estates they succeed.<sup>6</sup> They, however, will be made answerable for forfeited fines, and for those pending in Law, if the condemned should die before payment.<sup>7</sup>

1 This remark is of weight, against the introduction of the Guillotine; some delinquents were dressed in a red shirt, others not.

2 *Resol. of Holl.* May 1, 1732, *Gr. Book of Placc.* Vol. 6 pag. 577, V. 7 p. 844, and V. 9 p. 458, 459, 460 & 462.

3 Quistorp, § 83.

4 *L. 22 C. de poenis.*

5 *Juridical Observ.* of De Groot, part 1 *observ.* 75.

6 *L. 26 ff. de poen.*

7 *L. ult. C. si reus vel accus. mort. fuer.*

If a person have committed *several crimes*, consideration should be had, whether they are of a different or similar nature. On the first face of the matter it may appear, that the whole of the punishments for the different species of crime committed, should be inflicted so far as they can be combined in the execution:<sup>1</sup> but it is customary in these cases, to use such additional severe corporal punishment, as may serve, as nearly as possible, to counterbalance *all* the different punishments.<sup>2</sup> And if a person commit a crime subject to simple corporal punishment, and he afterwards perpetrate one of a capital nature, it is evident that the simple punishment merges in the more severe one; notwithstanding, to meet this, (*viz*: both crimes,) a capital punishment of the severer kind may be inflicted.

If a person, by the commission of several crimes, become subject to different punishments, which cannot be inflicted at one time, then the punishment for the crime that is most atrocious, should be inflicted; but no capital punishment can be inflicted in place of several corporal ones.

If the several crimes are of the same class, as to importance or degree, then, how far the Law awards peculiar punishments upon repeated crimes, should be attentively considered and followed; – if not, the ordinary punishment must be inflicted, which, where circumstances of an aggravated nature appear, may be somewhat increased.<sup>3</sup> If the same crime be committed by several persons in concert, they form with regard to damages, (as our ancient Law expresses it,) one guilty person, (*eenen baarschuldigen man*.)<sup>4</sup> But in the infliction of punishment, (if the participation in the crime causes no alteration,) each should be accountable only for his own actions in the peculiar share he may have had in the crime perpetrated.<sup>5</sup>

In crimes of great enormity, with respect to which, for the better preservation of the public peace and welfare, a general impression of abhorrence is to be produced, it has been customary to punish the perpetrator in effigy;<sup>6</sup> but this, at present, is very seldom done. Something similar to this, is affixing the names of fugitive delinquents on the gallows, as a notice and warning to others.<sup>7</sup> The execution of punishment upon the dead bodies of criminals, belongs to the barbarity of former times, and is no longer practised, than by burying them in some customary ignominious manner.<sup>8</sup>

1 Boehmer, *ad Carpzovii, prax. Crim. quaest.* 132 *observ.* 1.

2 *L. 17 C. de poenis.*

3 Quistorp, § 88-90.

4 De Groot's *Intr.* B. 3 part 34 § 6, *Jurid. Observ.* B. 2 *observ.* 89.

5 *L. 22 C. de poen.*; *L. ult. ff. ad Leg. Corn. de Sicar.*; Boehmer, *ad Carpzovii, prax. Crim.* part 1 *quaest.* 25 *observ.* 1 *tom.* 1 page 158.

6 Putman, *Advers. Jur. lib.* 1 *cap.* 14 *lib.* 2 *cap.* 25.

7 Feltman, *Milit. Reg.* page 255.

8 Boehmer, *ad Carpzovii, prax. Crim.* part 3 *quaest.* 131 *observ.* 3.

## SECT. V

*By what Laws Punishments should be inflicted*

In punishing crimes, the Laws of the place in which they have been committed should determine the sort of punishment to be inflicted; notwithstanding, the culprit may be *elsewhere apprehended*, and the proceedings against him should have been *there* instituted and carried on.<sup>1</sup>

The Law has prescribed punishment for almost every possible species of crime; but it has not determined, nor indeed well could prescribe, the punishment for one that has been partially committed; – that is, which has commenced, but has not been completed. This then must necessarily be left to the discretion of the Judge to determine, according to its progress and circumstances; and how far the attempts of the culprit have been effectuated, becomes a matter of consideration; and for this, so much of it as is made out by evidence, and in which the designs of the offender are rendered manifest, some adequate punishment of the extraordinary kind must be awarded.<sup>2</sup>

## CHAPTER II

*Of Arbitrary Punishments*

## SECT. I

*Of altering, augmenting, and mitigating Punishment*

It is not allowable in the Judge to alter, augment, or mitigate the punishment which the Law prescribes for crimes, in cases where the evidence and circumstances which confirm the guilt, are complete, where nothing occurs to prevent the operation of the Law, and there can be no doubt of the propriety of the *ordinary* punishment being inflicted. The lawful grounds for discretion in the Judge, as to altering, augmenting, or mitigating the punishment, appear to be these:<sup>3</sup>

If the purposed end of the punishment established by Law, cannot be thereby obtained; if it be impossible, or at least very difficult, to inflict the prescribed punishment upon the person of the culprit; if the grounds of the Law, in application to the crime, are dubious or obscure; if the infliction of the punishment will, in any way, be injurious to others, who are wholly innocent persons; and if the peculiar situation or circumstances of the person render an exception as to the Law necessary:<sup>4</sup> in such cases then, where the determination of the punishment is in a great measure left to

1 Voet, *ad Tit. ff. de poen.* No. 11.

2 Quistorp, § 96 and 97.

3 *L. 11 pr. ff. de poenis; L. 15 C. eod.*

4 Quistorp, § 99.

the discretion of the Judge, and the crime to be adjudged is not of an aggravated nature; he is at liberty to alter the punishment according to the circumstances of the person or case, and direct a fine, or the like, in lieu of imprisonment, denouncement of infamy, and even corporal punishment. This discretionary power of the Judge, relative to the sort of punishment to be inflicted, as varying from the prescribed form in ordinary cases, takes place also when the Law does not appear sufficiently decisive as to the case; or when, from the nature of the evidence produced, it is doubtful whether the punishment prescribed by the Law for the crime is justly applicable. This power, thus vested in the Judge, is not, however, to be capriciously or incautiously exercised, – it has its bounds, which it must not exceed.<sup>1</sup> The Judge must, therefore, observe in what manner similar crimes are, according to the laws and customs of other tribunals, generally punished.

Again, this discretion of the Judge is, for the most part, limited to corporal punishments, and cannot be extended to capital ones, notwithstanding the multifarious complexion of the crime, and other weighty reasons, might make it appear necessary to the welfare of the State, so to extend it. In all these cases, then, of a higher nature, it is requisite to make the matter known to the Legislature, upon whose authority the Judge will be better able to determine.<sup>2</sup>

## SECT. II

### *Reasons for the Mitigation of Punishment*

It will be necessary, likewise, to enquire into those reasons which may induce the Judge to mitigate the punishment; though they are generally supposed to exist in the consideration of the greater or less degree of moral guilt perceptible in the different cases, and the consequential injury.<sup>3</sup> This mitigation of punishment is often found in a composition of a penal action by leave of the Judge, when the case is declared to be of a civil nature, and capable of compromise or commutation; or, in the culprit's submitting to the discretion of, and his being admitted to do so by, the Judge; on which subject, however, we shall have a better opportunity of treating hereafter.

Crimes cannot be compromised, except in cases of defamation and petty misdemeanors.<sup>4</sup>

*Repentance* for a crime intended to be committed, but only partially executed, or if witnessed immediately after the perpetration, may serve to shew an inferior or less malignant degree of design. Immediate reparation of damages, too, if accompanied by other favourable and alleviating circumstances, may afford ground

1 L. 78; L. 79; L. 80 ff. *pro Socio*.

2 Quistorp, § 100 & 101.

3 C. J. Heils, *Judex et defensor in processu inquisit* Cap. 6 pag. 335-546.

4 L. 36 ff. *de dol. mal.*; L. 39 ff. *Sol. matr.*

for a mitigation of punishment. However, it should be well considered, whether this repentance may not be a pretended one, (*galgen berouw*.) and arising more from a dread of punishment, than real contrition for the wickedness of the offence, or the love of virtue, especially in great or completely perpetrated crimes.<sup>1</sup>

The old age of the culprit, (if it be not accompanied with a childishness, equal to insanity,) is in itself, no sufficient reason for the mitigation of punishment: for aged persons ought to calculate the moral nature and consequences of their actions, with more certainty and precision than young persons. However, in deciding upon the description and degree of punishment to be inflicted, great consideration is to be had, (particularly in corporal punishments,) to the age of the delinquent, and to the infirmity or debility that may be connected with it. Under this idea indeed, it often happens, that the severer punishment, by flogging, &c. is commuted to confinement in a house of correction.<sup>2</sup>

Weakness in the female sex, is sometimes a motive for punishing women with less severity than men; unless they are guilty of a breach of the public peace and of open violence in their conduct; which, in women, carries with it a higher degree of moral offence.<sup>3</sup>

When a woman is declared to be in a state of pregnancy, no capital punishment can be inflicted on her, until after the birth has taken place, nor corporal punishment of any kind; which, in such case, is altered, if practicable, to some other mode of punishment.<sup>4</sup>

A bad education, and the incapacity it produces of judging of what is right or wrong, may tend to mitigate the punishment, if the crime be not of a very atrocious nature; if no aggravating circumstances be connected with it; and there are hopes of future amendment in the conduct of the individual.<sup>5</sup>

Previous good conduct, and where there may have been enticement to commit evil, by sufficient force or influence, and this clearly proved, – or by little design or premeditation being discoverable in the act, – are, in inferior cases, matters to be taken into consideration by the Judge. But if the person, thus wrought upon, be of age, and he continue giving way to seduction in the commission of crimes, he cannot, upon the plea of being influenced or enticed, be longer deemed innocent, or have further claims to indulgence.<sup>6</sup>

Illness of the culprit may suspend, but cannot do away, or make any alteration in, the punishment prescribed by the Law; unless the disorder be of such a nature that

1 Leyser, *Medit. ad ff. T. 10 Spec.* 645 *Th.* 7 and 8.

2 Boehmer, *ad Capzovii, prax. Crim.* part 3 *quaest.* 144 *observ.* 1.

3 Quistorp, § 108.

4 *L. 3 ff. de poenis; L. 18 ff. de stat. hom.*

5 Quistorp, § 109.

6 Quistorp, § 110.

corporal punishment could not be inflicted, without putting him in imminent danger of his life.<sup>1</sup>

The question, whether a long imprisonment is to afford ground for mitigation of punishment to the offender, cannot well be answered, without making a peculiar distinction of circumstances. If the imprisonment, not owing to the prisoner, has been unusually long, and the crime not capital, it not only affords ground for mitigation, but even, in crimes of a less nature, is often considered as partly, or wholly, in itself, of sufficient punishment: but in crimes meriting *capital* punishment, no length of time in the imprisonment can compound for the punishment being capital.<sup>2</sup>

There are other grounds to be offered, as affording room for the mitigation of punishment; such as the intercession made in favour of the culprit by the injured party; and the declaration, that the accused is a person of considerable talent and merit; that the greatest instigation to the commission of the crime was real poverty; that the offender has a large family of children; that he made a voluntary confession of his crime; that, though the time limited for the prosecution of the crime has not fully expired, yet a great length of time has elapsed since its commission; that the offended or injured party, had given the first cause of offence; with other similar reasons.

But, to whatever extent we may allow the above causes to be valid, it is clear that a strict regard should be paid to the nature of the crime, and to the concurrence of all its particular circumstances; and it is then, that the truth or fallacy of such reasons will be evident to a Judge of discernment, who will be able to decide accordingly.<sup>3</sup>

### PART III

#### ***Of the Distinctions of Crimes***

Having treated of Crimes in general, and their Punishments, we now proceed to examine the different Species of Crime. They may be classed systematically under the following heads: –

1. Crimes relative to Religion.
2. Crimes against the State or public Security.
3. Crimes against the Life, Limb, Honour, or Reputation of our Fellow Creatures.
4. Crimes against the Property of another.
5. Crimes of an Immoral or Licentious Nature.

1 Quistorp, § 111.

2 *L. 25 ff.; L. 23 C. de poenis; Leyser, Medit. ad pand. tom. 10 spec. 645 th. 12; Boehmer, ad Carpzovii, prax. Crim. part 3 quaest. 149 obs. 2.*

3 Quistorp, § 113-117 b.

## CHAPTER I

*Of Crimes against Religion*

The farther we go back to the times of ignorance, superstition, and religious intolerance; of that bigotted zeal which guided the more formidable religious sects, – the greater and more extensive do we find this class of crimes, as cognizable by the Law, to be.<sup>1</sup> But as mankind became more enlightened, and gradually emerged from a state of ignorance, superstition, bigotry, and intolerance, with respect to religious matters, declined; and the list of crimes, as they regarded religion, became proportionably diminished. The unhappy period, when heretics were persecuted by an inquisition, and the crime of witchcraft (so cruelly and absurdly charged upon the individual) was capitally punished by the Law, is past, and the like cases are at present not subject to judicial enquiry; unless, from the pretensions of those calling themselves *conjurers* or *diviners*, the public peace is likely to be influenced or disturbed; in which cases, there are sufficient grounds for a discretionary correction by the Judge.<sup>2</sup> Our Laws, at present, are in a manner limited to two species, – *Blasphemy* and *Perjury*.

## SECT. I

*Of Blasphemy*

By Blasphemy is meant those words or actions, by which the Supreme Being (and we may include his Holy Word) is insulted and irreverenced.<sup>3</sup> In this are included, the wilful propagation of the denial of his existence; the contemptuous attribution or assumption to God of acts contrary to his nature to perform; cursing also, and defaming the name of God; or ridiculing and disturbing his public Worship. It is evident, that this crime rests upon the degree of wilfulness in the insults offered, which varying in the degree of guilt or atrocity, may leave room, or not, for a mitigation of the punishment ordinarily denounced.<sup>4</sup> The punishment inflicted for Blasphemy was formerly capital; and also some exemplary corporal punishment was inflicted, as piercing the tongue with a pin;<sup>5</sup> but, in the present more tolerant and liberal times, this crime is punishable more in regard to its being considered as disturbing the public peace. It is a general rule now, therefore, to make the punishment for this crime discretionary in the Judge. It is usually punished by corporal punishment, fine, or imprisonment.<sup>6</sup>

1 Damhouder, *Prax. Rer. Crim. Cap.* 61.

2 Montesquieu, *l'Esprit des Loix L.* 11 *Cap.* 4.

3 Meister, *Princ. Jur. Crim.* § 433.

4 Quistorp, § 126 and 127.

5 Boehmer, *ad Const. Crim. Carol.* Art. 106.

6 Voet, *ad Tit. ff. ad Leg. Jul. Majest.* No. 1.

## SECT. II

### *Of Perjury*

*Perjury* is the violation of the solemn oath, that we take before God in our appeal to him for the truth of what we say, or are about to say, or for the due performance of some act. If the duties to which we are bound by this oath are violated; or if to the prejudice of our fellow creatures, we declare upon oath that to be the truth, which *we know* to be false, – this is Perjury. The latter kind is certainly of a more aggravated nature than the former; and it is more or less so, according to the degree of malice, or self-interest exhibited in the design, as also, the degree of consequential injury attached to it.<sup>1</sup>

By our ancient Law, Perjury was punished by marking the face with a hot iron;<sup>2</sup> and also, by cutting off the joint of the forefinger.<sup>3</sup> But punishments, by which the body is maimed, are, at present, almost entirely disused; and scourging, confinement, banishment, &c. have been substituted.<sup>4</sup>

Perjury is certainly a crime of a very atrocious nature, both as to the daring insult it offers to the Majesty of Heaven, and to the extensive injury it does to society; its wilfulness too is very apparent. The Judge, therefore, who neglects to visit this offence with a proper degree of severity, is certainly deficient in his duty, and very especially so, if he award a slight punishment.

## CHAPTER II

### *Of Crimes against the State, or Public Safety*

To this class of crimes belong High Treason, or *Crimen Perduellionis*; Lese-Majesty; Counterfeiting Money; Public Violence; Private Violence; Arson; Extortion; and Bribery.

## SECT. I

### *Of High Treason, or Crimen Perduellionis*

This crime is committed by those, who, with an inimical design, endeavour to subvert the State, or disturb its interests or independence, or endanger its safety;<sup>5</sup> Eg. in their endeavour to bring it under foreign subjection; in treacherously surrendering of castles, towns, and other property of the State; in divulging its secrets with a disloyal,

1 Boehmer, *ad Const. Crim. Carol.* Art. 107.

2 *Placc. of Zealand Cap.* 4 Art. 11.

3 J. v. d. Eyck, *Placc. of South Holland* page 199.

4 Voet, *ad Tit. ff. de Jurejur.* No. 32 – (sentence of the Supreme Court, in the case of the *Procurator General versus Marytje Blanken* of Oct. 15th, 1756).

5 Boehmer, *ad Const. Crim. Carol.* Art. 124 § 5.

rebellious intention; in favouring, by unjust privileges or advantages, the enemy in time of war, to the injury of the State; in *inimically concealing* the limits of the State.<sup>1</sup> All may be guilty of high treason towards a State, even those temporarily residing in it.<sup>2</sup> Every person acquainted with treasonable designs or practices, is bound to discover them, under certain penalties for not so doing; they are otherwise guilty of what is termed Misprision of Treason.<sup>3</sup> The punishment for this crime is, for the most part, capital; the sort and manner of the execution being determined, according as circumstances may be more or less aggravated.<sup>4</sup>

## SECT. II

### *Of the Crime of Lese-Majesty*

The crime of Lese-Majesty, or where the dignity and honour of the Crown becomes affected or insulted, corresponds so far with High Treason, that it is shewn by acts tending to endanger the safety of the State; but differs in that it does not require the circumstance or presence of inimical design, which must always be the case with High Treason.<sup>5</sup>

It is clear, by this, that the crime is seldom punishable with death. The degree of punishment varies, nevertheless, according to the degree of culpable design apparent; a greater or less prejudice or injury consequent to the State; and the different relations in which the perpetrators may stand to the State, or society. Thus, the punishment may be either, waving the sword over the head, confinement, or banishment.<sup>6</sup>

## SECT. III

### *Of Counterfeiting Money*

This crime may be committed in various ways: –

1st. – By imitating the coin of the country; the counterfeit not bearing the real or intrinsic value.

2dly. – By diminishing the value of the true coin, by clipping, filing, or washing it with *aqua fortis*.

3dly. – By coining money without legal authority so to do, although it may possess its intrinsic value.

1 *Projects of the Criminal Code* Ch. 2 § 1 Art. 1 and 2-20.

2 Voet, *ad Tit. ff. ad Leg. Jul. Majest.* No. 4.

3 Voet, *ad L. T.* No. 11; Boehmer, *ad Carpzovii, Prax. Crim* Part 1, *Quaest.* 41, *Obs.* 9.

4 Voet, *ad L. T.* 1 No. 6.

5 Boehmer, *Elem. Jur. Crim. Cap.* 5 § 72.

6 Quistorp, § 158.

4thly. – By unlawfully transporting the money of the State out of the country, by melting it down, or breaking it.<sup>1</sup>

Accordingly, to the different species of this crime, (as more or less productive of injury to the State,) a punishment more or less serious may be inflicted. Coiners of base money, however, who have committed this crime in its most extensive bearing, are punishable with death.<sup>2</sup>

Those who are only guilty of clipping, or a less degree of falsifying, are punished corporally, or otherwise, as circumstances may direct.<sup>3</sup>

The counterfeiting of public notes, (or what is commonly called forgery,) bonds, or obligations, redeemable annuities, receipts, &c. is punished (and very equitably so) capitally, as for false coining, in consequence of the prejudicial results to the community in the transaction. If mitigating circumstances appear, corporal or some punishment extraordinary, is inflicted.<sup>4</sup>

## SECT. IV

### *Of Public Violence*

In the first and principal degree, the crime of *Mutiny* comes under this head. This is the application of violent or forcible means, by which the public peace and order are endangered, or the power of constituted Authorities and public Functionaries is attacked.<sup>5</sup> As this crime exhibits itself in various sorts of acts, the punishment for it is made the more distinct and various, both in degree and manner. When of a kind very atrocious, the punishment of death is awarded. It is, however, generally punished by corporal punishment, imprisonment, or banishment.<sup>6</sup> In times of public disturbance, when this crime is the more prevalent, the Government meets the evil, by enacting separate Laws, and providing punishments suitable to the exigency. Of this, during our own times, we are not deficient in examples.<sup>7</sup> The *ground* of this crime, however, often lies in the various conceptions people may entertain, of what may be a just form of Government, – especially if the State have received a shock by recent revolution. In such case, there is no crime which more forcibly calls for due circumspection in the Judge; to the end that he may, on the one hand, pay every just attention to the preservation of peace and good order in the State; and on the other, be

1 *Project of the Crim. Code* Chap. 4.

2 *L. 2 C. de Fals. Monet.*; Voet, *ad Tit. ff. ad Leg. Corn. de Fals.* N. 8.

3 Voet, *ad D. T.* No. 8.

4 *Project of the Criminal Code* Ch. 5.

5 Boehmer, *ad Const. Crim. Carol.* Art. 127 § 1.

6 Boehmer, *D. L.* § 3; Quistorp [§] 183.

7 Several Proclamations on this subject are to be seen in the *Gr. Placc. Book*, vol. 9 B. 3 § 4, – to which may be added, *Publ.* of March 4th, 1795, March 1st, 1797, Nov. 4th, 1798, – and others.

careful, lest by an unmeasured severity in the infliction of punishment for the crime, he make an unhappy sacrifice to the errors, prejudices, and misconceptions, which so commonly attend State divisions.†

## SECT. V

### *Of the different Species of Public and Private Force or Violence*

Exclusive of exciting mutiny, the crime of using unlawful force attaches to all acts which are done to disturb the public peace and tranquillity, or where it is used in the encroachment on the rights, liberties, and property of others.<sup>1</sup>

In the more extensive sense, it is the practice to divide unlawful force into *public* and *private*; and to proportion the punishment in relation to the persons, upon whom the violence is committed; the circumstances of place, and the means employed.<sup>2</sup> The nature of these offences is such, that no common and always adequate punishment can be prescribed; the sort and measure, therefore, must necessarily be arbitrary, and depend upon the discretion of the Judge, who will determine according to circumstances.<sup>3</sup>

In some cases, it is necessary to make the punishment capital; – such as robbing the mail.<sup>4</sup> In many other cases, slight punishments, or corrections, will answer the end of justice.

We may comprehend, under the foregoing head, the liberation of a prisoner from confinement. The most aggravated species of offence in this particular, is, where the jailor or keeper of the prison wilfully liberates a prisoner of consequence, or who is in durance for high crimes; – in which case, even capital punishment may sometimes be inflicted.<sup>5</sup> But if the liberation arises from inattention or neglect on the part of the jailor, then the punishment is discretionary, varying according to circumstances.<sup>6</sup> If the liberation be by the act of a third person, or more, (in which case it is commonly called *a rescue*,) regard is to be had, whether it was accompanied by tumult; whether any sort of violence or force was used; and of what nature; and accordingly, as circumstances are found more or less criminally aggravated, the punishment may be made more or less severe.<sup>7</sup>

If the prisoner have made his escape by his own means, then distinction is to be taken, whether he was imprisoned merely for safe custody, or for punishment. In

1 Matthæus, *de Crim. Lib.* 48 *Tit.* 4 *Cap.* 1 No. 3.

2 Pothier, *in Pand. Justin. ad Tit. ff. ad Leg. Jul. de vi Pub. & Priv.*

3 Groenewegen, *de Legib. Abrog. ad § 8 Inst. de Pub. Jud.*

4 *Gener. Placc.* 6th Dec. 1646, – in the *Great Book of Placc.* vol. 1 page 527.

5 Boehmer, *ad Const. Crim. Carol.* Art. 180 § 1; Voet, *ad Tit. ff. de Cust. & Exhib. Reor.* No. 8.

6 Leyser, *Medit. ad Pand. Tom. 8 Spec.* 564 *Th.* 8 *Seqq.*

7 Boehmer, *ad D.* Art. 180 § 4; Quistorp, § 193.

† A wise, humane, and liberal caution.

the first instance, correction must be awarded according to circumstances; – saving, however, the punishment for the crime for which he was committed. In the second case, the escape is also punished distinctly, – generally by prolonging the time of confinement, flogging with rods, &c.; unless, indeed, any violence used by him in effecting his escape, should merit a more serious treatment.<sup>1</sup>

## SECT. VI

### *Of Arson*

Which is, where fire is designedly laid down near buildings, or other immoveable property, by which such property takes fire and damage is done thereby.<sup>2</sup> In judging of the enormity of such an act,<sup>3</sup> we are to observe, –

1st. – The extent of the danger; as where a whole town, for instance, becomes endangered. In this case, the crime is of a more aggravated nature, than if fire is laid merely to some solitary or remote building.

2d. – The *design* of the incendiary is to be considered, though the *result* may not be commensurate with the wicked intention.

3d. – Aggravating circumstances; such as, if the setting on fire was done with a murderous intent, or fire-murder, (*moord brand*, an ancient Law,) or for the sake of plunder,<sup>4</sup> the crime is then greater than if committed simply from a principle of revenge, or with a view to create damage to the premises only.

The punishment for wilful incendiaries is, in our country, Death. The culprits are usually strangled and scorched; or, under aggravating circumstances, burnt alive.<sup>5</sup> If a person occasion a fire through negligence, it does not come under the crime of *Arson*; but some punishment is awarded, according to the degree of incautiousness or neglect, over and above his being obliged to compensate for the damage sustained by the owner, through his carelessness.<sup>6</sup>

## SECT. VII

### *Of Extortion and Bribery*

Extortion is where a person from interested motives, taking undue advantage of his situation, or power over another, compels him, often by threatenings, to consent

1 Voet, *ad D. Tit. ff. N. 9*; Quistorp, § 194.

2 Quistorp, § 196.

3 Boehmer, *ad Const. Crim. Carol. Art. 125*.

4 V. d. Wall, *Regul. of Dordrecht* 1st vol. page 202, *Regul. of Vlaardingen* page 36.

5 Voet, *ad Tit. ff. de Incend. [Ruin.] Naufr. N. 5*.

6 Quistorp, § 203 and 204.

to what he wishes.<sup>1</sup> Such are among the worst pests of civil society, and merit the severest correction. The punishment for this crime is discretionary. There must be restitution made of the property extorted, besides the loss of their situations, – fine or imprisonment, &c.<sup>2</sup> Several Laws have been enacted against military extortion.<sup>3</sup>

*Bribery* by Public Functionaries, is, when by unlawful and prohibited means, they endeavour to obtain dignified or advantageous situations. Many with us, who are appointed to such situations, are previously obliged to take the oath against Bribery and Corruption, (*Eed van Zuivering*;) <sup>4</sup> with this additional clause, “that they will act hereafter with *clean hands*;” that they will, in the execution of their office, not be bribed by gifts or presents; – if they transgress their oath, they incur the usual penalties of perjury.

### CHAPTER III

#### *Of Crimes against the Life, Limb, and Reputation of our Fellow Creatures*

##### SECT. I

#### *Of Homicide*

†*Homicide* is the act of taking away the life of any rational being. Homicide, in its legal acceptation, is divided into justifiable, excusable, and felonious. Of felonious, the worst is that which constitutes Murder.

##### SECT. II

#### *Of Murder*

‡Murder, then, is that act by which a fellow-creature is unlawfully deprived of his life, through the wilful design of another. With respect to this crime, there are several material points of consideration, which we shall inquire into, in their due order.

\*To constitute murder, it is requisite,

1. That a person is killed or mortally wounded.
2. That it is committed with malice prepense, – a wilful and premeditated design.

1 Futman, *Elem. Jur. Crim.* § 194.

2 Meister, *Princ. Jur. Crimin.* § 2 part 2 cap. 19 § 222-225.

3 Voet, *ad Tit. ff. de Concuss.* N. ult. in fin.

4 Voet, *ad Tit. ff. de Leg. Jul. Ambit.*

† Translator's Note.

‡ *Vide orig.* § 1.

\* *Vide orig.* §10.

3. That the perpetrator had either a view to obtain some profit or advantage by it,<sup>1</sup> or was thereto excited by a spirit of hatred or revenge.

The punishment for this crime is every where capital, (formerly the wheel.)<sup>2</sup>

†The enormity of murder depends upon a greater or less degree of *premeditation* in the act; upon a clear knowledge of the heinousness of the crime, and its consequences; upon the relation in which the murdered stands to the murderer; upon the base and wicked object the murderer had in view, when he perpetrated the deed; and upon those promotive causes of reason and humanity, which, upon due reflection given, could, and ought to have deterred him from the commission of the crime.

### SECT. III

#### *Upon whom Murder may be committed*

‡It may be committed upon all living and rational beings, without distinction of age or sex;<sup>3</sup> also, upon those that are sick, though there be no hopes of recovery.<sup>4</sup> Upon what are termed monsters, or mis-shapen conformations, brought into the world, no murder can be committed. It is, indeed, customary to smother them, but not without the consent of some superior authority.<sup>5</sup> We may commit murder, too, on the mad or insane; upon notorious villains, heretics, &c.<sup>6</sup> It is sufficient according to our definition, if we take the life of any fellow creature, in an unlawful, or unjustifiable way.

### SECT. IV

#### *By whom Murder may be committed*

\*By all persons found to have occasioned the unnatural or violent death of another; although, in a literal sense, he did not commit himself any actual violence.<sup>7</sup> Thus, a murder is committed, if we cause a person's death by depriving him of the necessaries of life; and generally, if any *illegal* act be the immediate cause of death, it is deemed *murder* in the person having so caused it.

1 Boehmer, *Elem. Jur. Crim.* § 2 cap. 17.

2 S. van Leeuwen, *Cens. For.* part 1 lib. 5 cap. 12 and 13.

3 L. 1 § 2 ff. *ad Leg. Corn. de Sicar.*; Leyser, *Medit. ad Pand. tom. 9 spec. 597 th. 5.*

4 Boehmer, *ad Const. Crim. Carol.* art. 137 § 2.

5 De Groot's *Introd.* b. 1 ch. 3 § 5, *Jurid. Observ.* ch. 1 *observ.* 7.

6 Boehmer, *d. L.*

7 Boehmer, *ad d.* art. § 1.

† Origin. § 5.

‡ Origin. § 2.

\* Origin. § 3.

## SECT. V

*Of the Qualifications relative to wilful premeditated Homicide, or Murder*

†Wilful Homicide or Murder may be differently qualified. The place *where*, and the time *when*, are often matters of serious import. The appearance, also, of the murdered person, and the *cruel manner* in which the murder shews itself to have been committed, are points of serious consideration; the malice prepense with which the act appears to have been committed, &c.<sup>1</sup>

The malicious design in Homicide is considered to be proved, when a person resolving to commit the crime, shews his intention, by his manner of execution, and other circumstances. Where violent attacks, for instance, are made by him upon a person during the night season, or in the dark; where repeated blows are given by him upon dangerous parts of the body, which cause death; when the whole collected conduct of the Homicide, or Murderer, bears proof of his malicious intentions *to kill*; especially when his attempts are aimed at the head, or any other very vulnerable part of the body.

Yet, to establish a murder, at least to incur its penalty, a direct intention is not always necessary to be proved; an indirect design is sufficient: as in the case where a person has unlawfully attacked another, viz: with a dangerous weapon, and with a view only to wound him, and that wound, however contrary to the inflictor's design, should occasion death.<sup>2</sup>

## SECT. VI

*Of Poisoning*

*Poisoning* is a very aggravated species of murder. By it, we understand all such administrations of drugs, &c. which may affect the life of another. But a wilfulness to deprive a Person of health or life by it, must be shewn in the act.<sup>3</sup> The punishment is capital; and usually, on account of the ensnaring subtlety and artfulness displayed in this abominable species of murder, it meets with the severer kind of death; such as breaking alive on the wheel.<sup>4</sup>

However enormous the attempt to commit this crime may be, yet mitigating circumstances may sometimes attend it. If by giving assistance, the mortal effects

1 Quistorp, § 221.

2 Boehmer, *ad Const. Crim. Carol.* art. 137 § 4-7.

3 Leyser, *Medit. ad Pand.* tom. 9 spect. 609.

4 Boehmer, *ad Const. Crim. Carol.* art. 130; Voet, *ad tit. ff. ad Leg. Corn. de Sicar.* N. 14. *Vide Appendix*, letter A.

† Origin. § 5 part 2.

of the poison are prevented; if the poison should be prepared by him, but not yet administered, &c.<sup>1</sup>

## SECT. VII

### *Of Parricide and Infanticide*

†In times even the most remote and barbarous, *Parricide* and *Infanticide* were deemed peculiarly horrid crimes. In an extended view, the murder of relations is included under the term *Parricide*, which relationship always aggravates.<sup>2</sup> To establish the crime of *Infanticide*, it is necessary that the child killed was born alive, and full grown; and this must be determined by the apparent evidential marks.<sup>3</sup> Great weight, (where there is any suspicion of murder having been committed on the body of a child), has been attached to an experiment, to ascertain the fact of its having been born alive or not: the lungs are thrown into water; if they sink, the child is accounted to have been born dead; if they swim, or float on the surface of the water, the child must have breathed, and have been born alive. With all this, however, although the experiment may form a ground for exculpation, yet it is of too uncertain and indecisive a nature to form one, (unattended with other strongly corroborating circumstances,) for *accusation* and *condemnation*.<sup>4</sup>

Besides the direct killing of a child, the crime may be committed through wilful neglect; – such as not purifying the child, but suffering it to smother in its own dirt; by withholding nourishment from it; by not tying up, (or rightly breaking or dividing) the navel string, &c.<sup>5</sup>

Infanticide may be committed not only upon children already born, but with respect to those also in the mother's womb; as in the case where a living birth is prevented by any violent means having been made use of to procure abortion.<sup>6</sup>

To this crime also belongs the dangerous exposure of children as foundlings. If this be done with a view that they should perish, it is murder. When the child dies under the exposure, without any such design being manifested, it comes under the head of culpable homicide.<sup>7</sup>

1 Quistorp, § 264-266.

2 Boehmer, *ad Const. Crim. Carol.* art. 131 § 1 and 2.

3 Boehmer, *ad d.* art. 131 § 3.

4 P. Camper on the *Signs of Life and Death in New-born Children* [(Leeuw, 1774)].

5 Boehmer, *ad Carpzovii, prax. Crim.* part 1 *quaest.* 9 *obs* 5.

6 Boehmer, *ad Const. Crim. Carol.* art. 133.

7 Boehmer, *d. l.* art. 132.

† Origin. § 12.

## SECT. VIII

*The Law with respect to Mortally Wounding*

†In a murder, or violent death, this is the great leading distinction, – that the wounds or bruises are the *true and only cause* of the subsequent death; and not merely that they *contributed* to terminate life.<sup>1</sup> Nor is the mortality of the wound to be determined by the nature of the instrument employed; a blow with the fist may inflict a mortal wound;<sup>2</sup> but it depends in these cases, upon the manner of wounding, and the place where the wound, &c. is given.<sup>3</sup>

If any person whatever, or a person of the same constitution as the one killed, would, according to the usual course of nature, have died of the wounds, then it is *absolutely* mortal, and the perpetrator is guilty of murder. If the wound be but accidentally mortal, or presumed so to be, viz: not absolutely by its nature, but by consecutive circumstances; then, inquiry is to be made, how the case actually stands; as, whether death was owing to an effusion of blood, fever, convulsions, gangrene, and similar incidents, not occasioned by any wilful or perverse conduct on the part of the wounded, – it will then exculpate the inflictor of the wound from the charge of murder; but only, if such accident be occasioned by some wilful or imprudent conduct on the part of the wounded person, whereby the wound, which was not absolutely mortal, becomes so, and the person dies.<sup>4</sup>

That the person should live some days after the infliction of the wound, (some say nine,) does not make the wound accidentally mortal; but it may amount, with other concurrent circumstances, to a probability that the wound gave rise to the person's death, though it did not *absolutely*, or *solely*, cause it.<sup>5</sup>

‡Wounds not mortal are punishable in the inflictors, in various places, by various regulations. In many towns and villages, by pecuniary fines,<sup>6</sup> over and above the payment of legal damages. So far as those wounds are attended with aggravating circumstances, and can be brought under the charge of *violence*, it may afford ground for the infliction of more or less punishment of the arbitrary kind, or at the discretion of the Judge.

1 Quistorp, § 219.

2 *L. 7 § 1; L. 27 § 23 ff. ad Leg. Aquil.*

3 Upon absolute and accidental Mortal Wounds, see the Writers on *Medicina Forensis*, viz: Ludwig, Hebenstreit, Plenck, Schlegel, and others.

4 Quistorp, § 220.

5 De Groot's *Introduction* 3 b. ch. 34 § 8, *Jurid. Obs.* 1 ch. obs 93.

6 S. van Leeuwen, *R. Dutch law* b. 4 ch. 35 No. 2 and 3.

† Orig. § 4.

‡ Orig. § 15 page 1.

SECT. IX

*Of Suicide, or Self-Murder*

†Although Suicide be indubitably an unjustifiable act,<sup>1</sup> yet it does not, at present, in the eye of the Law, come under that class of wrongs, which are to be vindicated by public punishment.<sup>2</sup> By an ancient custom of this country, (Holland,) the bodies of those that committed suicide were directed to be dragged upon a sledge to a gibbet, and there hung, and their goods to be confiscated; but this custom is now in disuse.<sup>3</sup> They are only buried quietly, and without any ceremony being used.

SECT. X

*Of Duelling*

‡With respect to Duels, several laws have been enacted;<sup>4</sup> and in particular, a *placcaat* of the States of Holland, of the date of the 22d of March, 1657, thus determines:<sup>5</sup> –

It says briefly: –

1. That no person shall call out another to fight a duel, or being called upon, shall go, under penalty of forfeiting his office, or situation, and being subject to fine.
2. That the bearers of the challenge, and seconds to the parties, shall be liable to the same punishment.
3. That every person acquainted with a challenge is bound to give information thereof.
4. That they who actually fight a duel and survive, and their seconds, shall be banished out of Holland for six years.
5. That the body of a person killed in a duel shall be buried in the evening, or at night, without any attendance.
6. That if the person killed shall have been the challenger, then the body shall be exposed.

1 T. [Dumas], *Traité du Suicide* Amst. 1773.

2 Concerning the Causes of Suicide, reference is made to L. Avenbrugger on *Internal Insanity, or the Desire to commit Suicide, considered actually as a Malady*: printed in Dordrecht 1788.

3 De Groot's *Introd.* b. 2 ch. 1 § 44, *Jurid. Observ.* ch. 2 *observ.* 23.

4 *Placc.* July 1st, 1637, *Gr. Placc. B.* 2 vol. col. 458; *Placc.* May 20th, 1641, *Gr. Placc. B.* vol. 1 col. 391; *Placc.* March 31st, 1684, *Gr. Placc. B.* vol. 4 page 162.

5 *Gr. Placc. B.* vol. 2 col. 459.

† Orig. § 14.

‡ Orig. § 15 page 2.

7. That he who has killed another in a duel shall be punished with death; and that no pardon, or remission of the punishment, shall in anywise be granted him.

## SECT. XI

### *Of Excusable Homicide*

{What is here meant by the word *excusable*, is, that the person so acting is not excusable in *foro conscientiae*, at all times, or in a moral view; but rather, that the Law considers him as *excusable*, at least of any murderous intention; and though such species of homicide be not subject to capital punishment, yet it attaches some degree of culpability to the person committing it.}

†This species of Homicide may be committed where there is no direct intention either to kill or wound, but where the act done causes death, which, with sufficient care and caution might have been avoided.<sup>1</sup> If, for instance, in doing certain work, a person acts so incautiously that he causes the death of another.<sup>2</sup> When, again, wild animals are kept carelessly confined, which are accustomed to kill, bite, or devour.<sup>3</sup> When also, in play, blows are given which cause death; or in bestowing correction, the bounds of moderation are exceeded, and thereby homicide ensues. When a person, moreover, is killed by another imprudently throwing, or cutting down, something. When, though attacked unlawfully, the bounds of that defence which is necessary for protection, are exceeded, and death ensues.<sup>4</sup> When a person, without having given cause or provocation for it, is insulted by another, and this gives vent, in the person so insulted, to immoderate rage and passion, which causes him to commit homicide.

Generally, the crime of what is called Excusable Homicide comes under this idea, that a person might have calculated that his act would deprive another of his health or life, and consequently attaches some degree or other of culpability to him.

Although that incautiousness which causes the violent death of another, differs considerably in degree of culpability, and therefore, in one case may be more punishable than in another; yet, the homicides which are caused by any degree of it, are so far of an excusable nature, as never to be considered punishable to the extent that wilful homicides are, and consequently, never visited with the *ultimum supplicium* (punished with death).<sup>5</sup>

1 Quistorp, § 6.

2 *L. 31 ff. ad Leg. Aquil.*

3 Boehmer, *ad Const. Crim. Carol.* art. 136.

4 Boehmer, *d. l.* art. 142.

5 Quistorp, *d.* § 224.

† Orig. § 6.

SECT. XII

*Of Accidental Homicide*

†By Accidental Homicide is understood those cases which originate, neither in the wilfulness, neglect, nor incautiousness, of the perpetrator or agent; and yet, contrary to what was expected, the act has caused the death of another. Such are inculpable acts, but they are rare; for mostly, some degree or other of incautiousness or neglect, may be traced in the act.<sup>1</sup>

SECT. XIII

*Of Justifiable Homicide*

‡A principle of defence will, in many cases, render a homicide justifiable; that is, where a homicide takes place in defence of one's life or person; but then, it must be admitted as justifiable, on the following conditions only: –

1. Where there is an unexpected and unjust attack.
2. A clearly existing danger, that the defender may lose his life by such attack.
3. The impossibility of saving his own life, but by taking that of the aggressor.<sup>2</sup>

The defence merely of one's honour gives no ground to commit homicide, upon a principle of self-defence, unless, perhaps, in persons who, in their peculiar situation of life, would by flight ruin themselves.<sup>3</sup>

There is certainly one exception, on the ground of honour, to the above rule. If a woman, for instance, find no other means of defending her honour, or virtue, against the assaults of a ravisher, than by killing him, she would certainly be justified in so doing.<sup>4</sup>

Defence of one's *property* against a thief, or robber, may sometimes be admitted as a plea for the homicide in killing the thief, being considered of a justifiable nature; that is, if he could not be prevented in any other manner.<sup>5</sup> But in these cases, we must be guided very much by circumstances; and it behoves us to consider, whether the case does or does not come under that class of acts, which we have before termed *excusable*, though culpable, homicide.

The necessary sort of defence which will justify homicide, is not confined to the preservation of a person's own life; but extends also to the life, honour, and property of his children, wife, relations, friends; indeed to every person who is unjustly and dangerously attacked.<sup>6</sup>

1 Boehmer, *ad Const. Crim. Carol.* art. 146.  
 2 Boehmer, *ad Const. Crim. Carol.* art. 140.  
 3 Leyser, *Medit. ad Pand. tom. 9 spec. 600 th. 22.*  
 4 Putman, *Elem. Jur. Crim.* § 320.  
 5 Putman, *d. l.* § 321.  
 6 Boehmer, *ad Const. Crim. Carol.* art. 150 § 1.

† Orig. § 7.  
 ‡ Orig. § 9.

As all murder carries the presumption of a wilful intention in the commission of it, if the person who is presumed to be guilty thereof, should allege necessary personal defence in the commission, as the cause, he must, either by direct evidence, or at least by proofs deduced from the circumstances of the case, shew that he comes under that species of homicide in the act, which the Law considers as justifiable.<sup>1</sup>

## SECT. XIV

*Of the Punishment for Murder*

†The punishment for this crime, according to all Laws, both human and Divine, if wilfully committed, is *death*;<sup>2</sup> the kind varying according to the aggravating or extenuating circumstances accompanying the commission of the deed. If wilful homicide be effected by a combination of persons, who made a common engagement to perpetrate the murder, and co-operated in the same, they all must suffer death.<sup>[3]</sup>

If a murder be committed in the presence of different persons, who were all participators in the quarrel which gave rise to it, then only the person who gave the mortal wound is the murderer, and to be punished with death. The rest are punished arbitrarily, or discretionally. This last mode must be resorted to, where a death has happened, and it cannot be ascertained who the person was that inflicted the mortal wound.<sup>4</sup>

The reasons for mitigation of punishment, in cases of homicide of the different species, are easily collected from the principles of Law as above given.<sup>5</sup>

With respect to murder, it may be added, that persons of skill differ sometimes a good deal with regard to the mortality of wounds, where death has ensued some time after the wounds have been inflicted, – so as to occasion some doubt, whether the wounds were the sole cause of the person's death, or not;<sup>6</sup> and consequently, whether the punishment is to be considered capital or not.

Homicide occasioned by neglect or incautiousness, is subject to the punishment extraordinary, moderated according to circumstances.<sup>7</sup>

1 Carpzovii, *prax. Rer. Crim. quaest.* 33 *Ibique* Boehmer, in *Observ.*

2 The Author refers to a case of the *Attorney General in Amsterdam v. J. B. F. van Gooch*, art. 250-320; and asks, whether any person can question the correctness of capital punishment for this crime? He states, that Schepenen, at Rotterdam, offered their doubts in 1798, but that they were briefly contradicted by Memorial of the Supreme Court of Holland, inserted in the Records of the first Chamber of the Representatives, under date of 17th August, 1798.

[3 Voet, *ad tit. ff. ad Leg. Corn. de Sicar.* n. 9.]

4 Boehmer, *ad Const. Crim. Carol.* art. 148.

5 Reference is made to [part 2] sect. [7] of van der Linden's Book [p. 221 *Seqq.*].

6 Quistorp, § 235.

7 Boehmer, *ad Const. Crim. Carol.* art 140.

† Orig. § 8.

## SECT. XV

*Punishment in Particular for Parricide and Infanticide.*

†The punishment for Parricide was very severe among the Romans. The culprit was sewn up in a sack, with a live dog, a cock, an adder, and an ape; and being left to the vengeance of those animals, he was thrown with them into the nearest sea or river.<sup>1</sup> We have no such punishment with us; but wilful Parricide is punished by breaking on the wheel‡; and where it is not directly intended, but follows in consequence of some unlawful attack, or wounding, then the punishment of the sword, or gallows, is inflicted.<sup>2</sup>

*Infanticides* are strangled; and if death has been caused by imprudence or neglect, the extraordinary punishment of imprisonment is awarded.<sup>3</sup>

The punishment for *procuring Abortion*, or destroying the fruit in the womb, depends greatly upon circumstances. It is to be inquired, how old the fruit was, or whether it had given any sign of life; – what means were resorted to, to procure abortion; – has the mother done it of her own sole accord, or was she moved thereto by the persuasions of others. The degree of punishment, mostly corporal, will follow the distinctions to be made, according to those circumstances.<sup>4</sup>

It is the same relative to the exposure of infants, as *Foundling*. If the exposure be made with the intent to destroy the child, it is direct murder, and the punishment capital; but if such design is not evident, the punishment extraordinary is inflicted, which may be either imprisonment, corporal punishment, or banishment.<sup>5</sup>

## SECT. XVI

*Crimes against the Honour or Reputation of our Fellow Creatures*

\*Those termed Defamations (*injuriæ*) have the consequences of a civil action, to obtain an honorable and profitable redress (*l'amende*, honorable and profitable).<sup>6</sup>

It is seldom that mere defamation will become a subject of criminal inquiry, unless accompanying circumstances give rise to it: as in cases where a person has published libels, wherein the Supreme Power, or the Members of the Government

1 J. F. Ramos, *Errores Triboniani de Poena Parricidii* (L. B. 1728).

2 Voet, *ad Tit. ff. ad Leg. Pomp. de Parric.* N. 4.

3 Voet, *d. L.*; Boehmer, *ad Const. Crim. Carol.* art. 131 § 20-22.

4 Boehmer, *d. l.* art. 133 § 7 *Seqq.*; S. V. Leeuwen *Cens. For.* part 1 *lib.* 5 ch. 15 No. 5.

5 Boehmer, *ad Const. Crim. Carol.* art. 132; J. Moorman's *Treatise on Crimes and Punishments* b. 2 ch. 7.

6 Reference is made to Van der Linden, 1st book, sec. 16 § 4.

† Orig. § 13.

‡ *Vide* Appendix, Letter A.

\* Orig. § 16.

are defamed or injured.<sup>1</sup> In the cases too, where the defamatory words have been accompanied by acts of violence;<sup>2</sup> or when they are of that nature, that the public peace becomes disturbed by them (as is often the case with those who choose to be their own judges).<sup>3</sup>

## CHAPTER IV

### *Of Crimes relating to the Property of Others*

Persons guilty of this species of offence are those coming under the description of *Thieves, Robbers, Persons guilty of Fraud, Peculators, Prevaricators, and Traitors; Gamesters, Bankrupts, Usurers*. We will treat briefly of each in order.

### SECT. I

#### *Of Theft*

Theft, or stealing, is when a person possesses himself of the moveable property of another, without the knowledge or consent of the owner, with a view of appropriating the same to his own use or advantage.<sup>4</sup>

Theft is either *simple* (or *petty larceny*) or *qualified*, which means aggravated by circumstances attending it. *Burglary, or house-breaking*, for instance; if the thief come armed with guns and other weapons; if the theft be committed twice, thrice, or oftener; if the property stolen was deposited in some closed place, – such as fish stolen out of a private fish-pond, the stealing of fruit out of gardens and orchards, the stealing of wood, cutting up or destroying plantations, stealing cattle out of the field; if the theft also be committed by people or servants belonging to the house, to whose care the articles have been entrusted; if it be committed by soldiers, as guards over the property; if the goods be stolen from persons busily employed in securing the same from fire or flood. All these are termed so many *qualified* species of *theft*.

With respect to the punishment for thieving, it is established by the Dutch Law:<sup>5</sup> –

1. That all theft should be punished for the *first* time, by scourging and branding; for the *second* time, by scourging, branding, and banishment from the Province of Holland and West Frisia; and for the *third* time, by hanging.
2. That thefts committed with violence, and burglary, should be punished with death, *i. e.* by hanging.

1 *Placc. of Holland* March 1st, 1754, *Gr. B. of Placc.* vol. 8 page 570.

2 Voet, *ad Tit. ff. de Injur.* No. 18.

3 Groenewegen, *de Leg. abr. ad § 1 Inst. de vi Bon. Rapt.*

4 Quistorp, § 341.

5 *Placc. of Holland* December 16, 1595, March 19, 1614, *Gr. Book of Placc.* vol. 1 col. 482 & 485.

3. The stealing of *cattle*, robbing of *mills*, *pole work*, *the materials of sluices*, of *bridges*, and other *works*; stealing *ploughs*, *waggon*s, and the like; being modes of stealing particularly injurious to the public good, should be punished with death.

4. That a similar punishment should be awarded against purchasers of stolen goods.†

It is, however, certain, that custom, in conformity to many decrees, both of the Superior and Inferior Courts, has mitigated, in some degree, the severity of the above regulations; and many instances occur, where *simple* theft is punished by scourging, or even with less punishment, and *qualified* theft not always with death; but in lieu, severe corporal punishment.<sup>1</sup>

With respect to the stealing of cattle, the punishment varies in different places. In some they are very severe, and the punishment is always hanging; in others it is only severe corporal punishment.<sup>2</sup>

## SECT. II

### *Of Robbery*

Robbery differs from theft; it is stealing by force.<sup>3</sup> The sort and degree of violence used, may considerably vary. It is clear, however, when this crime is committed on the public road, or in a person's house, it merits capital punishment; yet, there are in these, some cases that allow of mitigation, when a corporal punishment, or flogging, is judged sufficient.<sup>4</sup>

*Sacrilege* and *Kid-napping* are two aggravated species of robbery.

*Sacrilege* is a robbery committed relative to goods or property appropriated to religious purposes, and particularly heinous with respect to alms that have been collected for the poor. However superstitious notions with respect to religious matters may have caused some excess formerly in the prosecution for this offence, the punishment *now* is moderated by better reason and judgment; yet it is a crime sufficiently heinous, comes under the term of one *qualified*, and is to be punished by severe corporal punishment, according to circumstances.<sup>5</sup> *Kid-napping* (*plagium*) takes place, where a person is forcibly concealed for some interested purpose. The punishment for this crime is usually scourging and branding; and under some

1 Reference is made to a certain Juridical Treatise in Letters, respecting F. G. Meyer, by Dr. J. Schaap [Van der Linden referred here to J. Scharp's *Brieven over F.G. Meijer*] (Rotterdam, 1797,) page 128.

2 Voet, *ad Tit. ff. de Abig.* No. 4.

3 Boehmer, *ad Const. Crim. Carol.* art. 126.

4 Ley[s]er, *Medit. ad Pand. tom. 8 spec.* 539; Voet, *ad Tit. ff. de vi Bon. Rapt.* No. 4.

5 Quistorp, § 386-390; Voet, *ad Tit. ff. ad Leg. Jul. Pecul.* No. 5.

† Knowing them to be so.

circumstances of an aggravated nature, which are to be judged from the design of the concealment, a capital punishment would be awarded.<sup>1</sup>

### SECT. III

#### *Of Frauds (Falsiteit)*

A wilful and designed concealment of the truth, tending to injure another, is termed a fraud or a fraudulent act. To establish the guilt of such an act, two things are requisite: –

1. A wilful and malicious design,<sup>2</sup> which ought to be fully proved; at least, to a great degree of probability such designs should be apparent;<sup>3</sup> for without such design the act may be an *error* or *misconception*, and consequently not punishable.<sup>4</sup>
2. There must be some actual injury done to another person;<sup>5</sup> simple lying or falsehood not having either of these requisites, is therefore out of the reach of penal law.<sup>6</sup>

Frauds may be committed both by acts and by neglect; also, by words, writing, &c.<sup>7</sup>

It speaks for itself, that according to the greater or less degree of malice observable in the design, the greater or less injury occasioned by the fraud, the crime may very considerably vary in degree of atrocity or criminality. The crime, for instance, is considered of greater enormity, where design is shewn to defraud the Government, by imitating Government or other public stamps, – the signatures of public functionaries.<sup>8</sup>

The vigilance, indeed, of the Judge is often exercised, in endeavouring to detect the imitation of the signatures of *private* persons; and it is well employed in so doing, on account of the mischievous consequences to the community at large attending such sort of fraudulent actions.

It is impossible accurately to point out the great number of cases, the very many instances, in which fraud may be committed.<sup>9</sup> It extends also to defrauding the public revenue;<sup>10</sup> and consequently, to all fraudulent acts, whether of a public or private nature.<sup>11</sup>

1 Voet, *ad Tit. ff. de Leg. Fab. de Plag.*

2 *L. 1 pr.; L. 2; L. 23; L. 32 pr. ff. ad Leg. Corn. de Fals.*

3 *L. 18 § 1 ff. de Probat.; L. 20 C. ad Leg. Corn. de Fals.*

4 *D. L. 20; C. L. 31 ff. eod.*

5 *Arg. L. 23 ff. ad Leg. Corn. de Fals.; Boehmer, ad Const. Crim. Carol. art. 112 § 1.*

6 *Ley[s]er Medit. ad Pand. tom 9, spec. 594.*

7 *Boehmer, Elem. Jur. Crim. sect. 2 p. 324.*

8 *Quistorp, § 410.*

9 *Voet, ad Tit. ff. de Leg. Corn. de Fals. No. 6.*

10 This fraud is punished by fine only; in case of poverty, by corporal punishment. *Gen. Ord. August, 1749 art. 4*, – unless it should be combined with other crimes, such as Perjury, Falsifying Notes, Passports, &c.

11 *D. D. ad Tit. ff. Stellionat.*

The degree of punishment for fraudulent acts, will, of course, be commensurate with the degree of guilt, and the injurious consequences belonging to them. The Emperor (Charles V.), however, made the punishment, generally, to be hanging;<sup>1</sup> and even now, many cases of an aggravating nature may occur, so as to make the crime capital;<sup>2</sup> yet, the simple rule of common justice seems to require, that the punishment for fraud should be arbitrary, or discretionary; and that it should be punished according to its magnitude, either by scourging, with or without branding, imprisonment, banishment, or pecuniary fine.<sup>3</sup>

## SECT. IV

### *Of Peculation*

This is a species of public fraud. It is when a person purloins the public money entrusted to his care or custody, and instead of employing it to its proper purpose, converts it to his own private use.<sup>4</sup>

The punishment for this crime, over and above refunding what has been peculated, is, generally, the loss of situation, imprisonment, banishment, &c.<sup>5</sup>

It will tend greatly to aggravate the offence, if such functionary shall have, previous to his entering into office, taken an oath not to act fraudulently or unjustly, as he has thereby incurred the additional stigma and penalty of perjury.

It is highly culpable in those holding situations under Government, and other public functionaries, if, unmindful of the duty they owe to themselves and the State, they suffer themselves to be bribed by presents and donations;<sup>6</sup> and as the circumstances of this crime are more or less aggravated, the punishment, which is arbitrary or discretionary, will be more or less severe. Loss of office, proclamation of their guilt, banishment, pecuniary fine, &c. will, according to circumstances, be the adjudged penalties.<sup>7</sup>

## SECT. V

### *Of Treachery, Chicanery, and Prevarication, among the Practitioners of the Law*

Those Attorneys or Law Agents are truly deserving of punishment, who, instead of promoting and defending the interests of their clients, side with their opponents

1 *Edict* January 30, 1545, *G. B. of Placc.* vol. 1 col. 383.

2 Boehmer, *ad Const. Crim. Carol.* art. 112 § 6; [Boel] *Privil. of Amsterdam* p. 27.

3 S. van Leeuwen *Cens. For.* part 1 lib. [5] *cap.* 6 No. 4; Voet, *ad Tit. ff. ad Leg. Corn. de Fals.* No 4.

4 *Crimen Residui* L. 4 § 4 *ff. ad Leg. Jul. Pecul.*

5 Quistorp, § 417; Voet, *ad Tit. ff. ad Leg. Jul. Pecul.* No. 6.

6 *Tit. ff. de Leg. Jul. Repetund.*

7 Voet, *ad d. t.* No. 3.

for some pecuniary advantage, and betray their cause.†<sup>1</sup> According to the treachery displayed, and the loss sustained by the injured party, in such nefarious cases, the punishment for this crime will be greater or less. This is usually by suspension from their offices, cancelling their admission to them, banishment, fines, &c.<sup>2</sup>

## SECT. VI

### *Of Gaming, Cheating therein, and of Games of Hazard*

Among offenders particularly obnoxious to a civil community, we reckon Gamesters, especially those guilty of fraudulent practices, or cheating; – according as their conduct is more or less atrocious, – the former are punished with corporal punishment, imprisonment, or banishment.

With respect to playing for money at games of mere hazard, independent of the nullity of actions to recover what was lost or promised,<sup>3</sup> local and general laws have been applied in different places. The punishment is arbitrary, mostly by fines, not only against the offenders, but also against those who lend their houses to carry on such practices.<sup>4</sup>

## SECT. VII

### *Of Bankruptcy*

Against persons failing in business, and becoming bankrupts, or insolvent, no direct penal law exists with us. The capital punishment decreed by the Emperor (Carl. Quint.)<sup>5</sup> against such, has, from its evident absurdity, (setting aside the cruelty and harshness of such a law) never been in force. It were very desirable, however, that by some judiciously framed law<sup>6</sup> provision were made against such encumbering members of society. Those who are found guilty of fraud, or other known crimes, are, however, liable to various modes of prosecution.<sup>7</sup>

1 *T[i]t. ff. de Praevar.*

2 Voet, *ad T.* No. 3.

3 De Groot's *Introd.* b. 3 ch. 3 § 49.

4 *Placc. of the Court of Holland* 27th April, 1723, 18th January, 1732, 10 March, 1749; *Regul. of Amsterdam* vol. 1 p. 115 and vol. 2 p. 506; *of the Hague* 22d Dec. 1704; *of Beverwyk* art. 18.

5 *Edict* October 4, 1540 art. 2, *Gr. B. of Placc.* vol. 1 col. 311.

6 Such a Law was framed in Zealand, dated June 27, 1776, *G. B. of Placc.* vol. 9 page 529, – in Holland it was not put in practice; V. Zurek *Code Bat. Art. Bankeroietiers*, [Van der Linden: *Zurck Cod. Bat. Art. Bankeroutiers*] § 2 No. 3. But it has lately become a subject in the Plan for a *Crim. Code*, b. 4 ch. 4, under the title Criminal Bankrupt (*Misdadige Bankbreuk*).

7 Quistorp, § 442; *Ord. for the Chamber of Insol. Estates at Amsterdam* art. 24, 36, 39.

† There is hardly any thing more base.

SECT. VIII

*Of Usury and Swindling*

Against *Usurers*, namely, persons taking immoderate and illegal interest for monies lent by them, and those termed *Swindlers*, who cajole or trick people out of their money; – as their offences come under the head of laws enacted against frauds in general, punishments adapted to their different degrees of culpability, will be there found.<sup>1</sup>

CHAPTER V

*Of Crimes of a Licentious or Immoral Nature*

To this fifth and last species of crime, viz: of Incontinence, or habits of licentious indulgence, we bring *Adultery, Polygamy, Rape, Fornication, Concubinage, Sodomy, and Incest.*

SECT. I

*Of Adultery*

*Adultery* is carnal connection between a married person, man or woman, and any other not the partner in wedlock.<sup>2</sup>

Adultery may be committed between two married persons, and this is called *double* Adultery; when one of the parties only is married, it is termed *simple*.

The culpability arises from its being a breach of that mutual faith, which is pledged by married persons to each other respectively, at the time of entering into the state of wedlock. Thus, it cannot take place with persons who are only [†]engaged or betrothed to each other;<sup>3</sup> but it may, relative to those married persons, who are separated from bed and board;<sup>4</sup> as this act, though mutual, does not dissolve the marriage tie.

The crime of Adultery is committed, when those acts or means are employed, which nature has ordained for the conjunction of the sexes, although that which is the cause of pregnancy, may not have occurred.<sup>5</sup>

The punishment for Adultery between two married persons, or *double* adultery, is the banishment of both for 50 years, and a fine of 1000 Guilders. The man is declared dishonored, and thrown out of his situation, and rendered incapable in

1 Quistorp, § 449; Voet, *ad Tit. ff. de Usur.* No. 5.

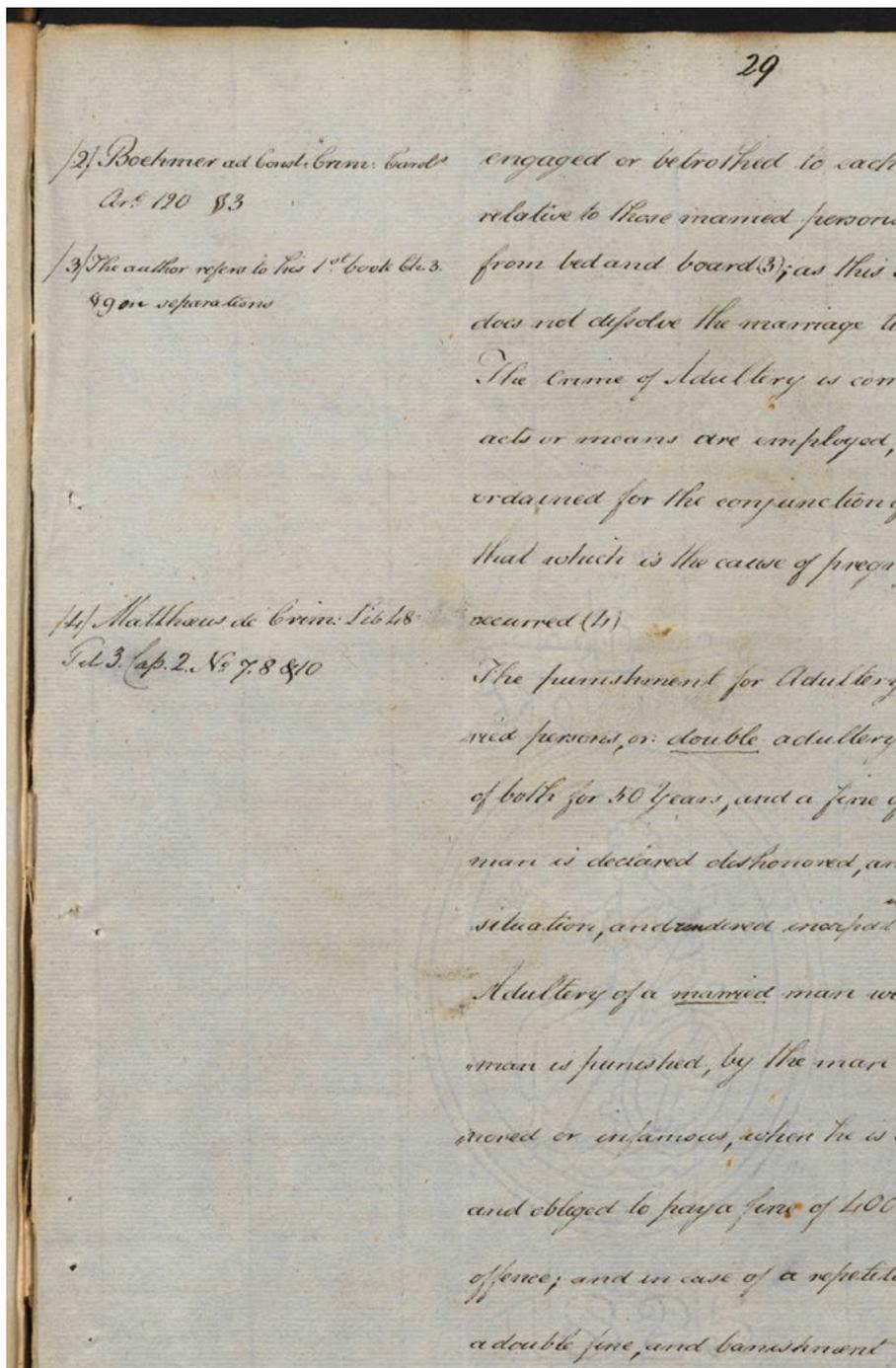
2 *C. 15 caus. 32 qu. 5.*

3 Boehmer, *ad Const. Crim. Carol.* Art. 120 § 3.

4 The author refers to his 1st book Ch. 3 § 9 on separations.

5 Matthaeus, *de Crim. Lib. 48 Tit. 3 Cap. 2* No. 7, 8, & 10.

[† The typeset document ends here.]



Reproduction of the first page of Borchers' manuscript that had not been typeset

future of holding any such. Adultery of a *married* man with an *unmarried* woman is punished, by the man being declared dishonored or infamous, when he is deprived of his office, and obliged to pay a fine of 400 Guilders for the first offence; and in case of a repetition of the crime, with a double fine, and banishment for 50 years. And with respect to the woman, she is to be confined for 14 days upon bread and water, and, in case of repetition, to be banished for 50 years.

If the adultery be committed between a *married woman* and an *unmarried man*, the man is confined for 14 days upon bread & water, and he pays a fine of 400 Guilders, and repeating the offence, is banished for life –. The woman, in that case, is banished for 50 years.<sup>1</sup> In consequence of the difficulty, sometimes, of proving this crime<sup>2</sup> it has been allowed to public prosecutors to enter into some sort of composition relative to the punishment.<sup>3</sup>

## SECT. II

### *Of Polygamy*

If any person during a former marriage, premeditatedly solemnize a marriage with another, and carnal conversation ensue, it is called *bigamy*; and *Polygamy*, if with more than one.<sup>4</sup> The punishment for this crime, under aggravating circumstances, is sco[u]rging, and banishment; or otherwise, the offenders are publicly exposed upon a scaffold, and banished.<sup>5</sup>

## SECT. III

### *Of Rape*

Under this crime we comprehend, not only ravishing, or carnally knowing by force, but the forcibly carrying away of a woman, or girl, against their own consent. Our criminal estimation of this offence, will depend greatly, on circumstances of aggravation, or extenuation evidenced in the Act. Under the former, we reckon those cases, where the rape has been committed under threatening circumstances, with

1 *Political Orders* of 1580 Art. 15, 16, & 17; *Placc. of Holland* Sept. 11th, 1677, *Great Book of Placc.* Vol. 3 page 507.

2 De Groot's advice in the *Holland. Consultations* vol. 3 Ch. 2 Pag. 707.

3 *Resol. of Holland* 29 July, 1679, *Gr. Book of Placc.* 7 Vol. Page 960; Van Alphen's *Papegaay* (Parrot) 2 Vol. page 523. This would be a wise and prudent regulation if the manner of settlement were limited to the exact boundaries of equitable moderation. But unfortunately, to how many public prosecutors could we with sorrow and sensation address these words, *quid non mortalia pectora cogis, aura sacra fames* – we ought therefore not to be surprised that the plan for a criminal code does not mention any thing of fines or compositions. But this perhaps again is an Extremity.

4 Boehmer, *ad Const. Crim. Carol.* Art. 121.

5 *Juridic. Observ.* Vol. 1 *Obs.* 10; V. d. Keessel, *Thes.* 62.

arms or weapons, on the public road; – when the attack is made on a married woman, or an unmarriageable girl; – or upon a girl not possessing her due mental faculties, by her Guardian, Tutor, or Overseer, whose duty it was to protect her from any thing of the kind.<sup>1</sup> According to these circumstances, the punishment for the crime will vary. Under any aggravating circumstances, the crime is Capital; under others, subject to corporal punishment, proportioned to the Offence.<sup>2</sup>

## SECT. IV

### *Of Fornication*

Under this, head considered as a punishable crime, is comprehended, the manner of living of those, who, for lucre's sake, or mere lewdness, lend or hire their bodies for carnal purposes. – Those who are in the habit of seducing women for the lewd purposes of *others* are called *pimps*. When they let out their houses for such purposes, and thereby obtain a livelihood, they are *bawds*. In many places in our country, the offence is connived at, although there are laws existing against such licentious practice.

In the crime of Fornication, the Law seems to content itself, by checking its extravagancies, which it is the particular province of the police to guard against; these, acting usually without much formal process, taking care to remove such disturbers when they are too glaring in their conduct, and they become nuisances to the neighbourhood; and correcting these bawds and whores, for their irregularities, by confinement or banishment, for a certain time.<sup>3</sup>

## SECT. V

### *Of Concubinage*

If two unmarried persons agree to live together, and cohabit as man and wife, it is termed a state of *concubinage*<sup>4</sup> although, by the law of nature, there is nothing criminal in such transaction,<sup>5</sup> and with the Romans it was deemed a lawful connexion;<sup>6</sup> yet, according to our law, both for moral and political reasons, it is forbidden; and a fine of 50 Guilders is levied upon persons, thus living together, for the first month; for the second 100; & for longer concubinage, a banishment of 10 years, and arbitrary

1 Boehmer, *ad Const. Crim. Carol.* Art. 118 & 119, & *in observ. ad Carpzovii, prax. Crim.* part 2 *Quaest.* 75.

2 Voet, *ad tit. ff. ad Leg. Jul. de adult.* n. 2.

3 Voet, *ad d. t.* no. 1; Zurck, *Cod. Bat.* Art. *Hoererye* (fornication); S. van Leeuwen, *R. dutch law* B. 4 Ch. 37 no. 11.

4 Leyser, *Medit. ad ff. Tom. 9 Spec.* 585.

5 Authors mentioned by Meister, *in Biblioth. Jur. Nat. & Gent. Tom. 1 pag.* 82.

6 Heineccius, *ad Leg. Jul. & Pap. L. 2 C.* 4.

pecuniary fine.<sup>1</sup> Due warning however, is usually given to the parties, and they are admonished to dissolve the illicit connection; to which caution, if they neglect attending, they are of course punished.<sup>2</sup>

## SECT. VI

### *Of Sodomy*

An unnatural connexion of Man with Man, or Man with Beast, constitutes the abominable crime in question;<sup>3</sup> a crime so contrary to every ordinance of Nature, of the divine Law, of the welfare of Civil Society, that by express statute<sup>4</sup> it is every where made Capital<sup>5</sup> and punished publicly: and with us, moreover, the bodies of those executed for it are to be burnt to ashes; thrown into the sea, or exposed upon scaffolds.

## SECT. VII

### *Of Incest*

We consider in the last place, the crime of incest, as under the head of incontinence.

By this we understand the contracting of a marriage, or forming of a carnal connection, between persons, whose intermarrying, on account of consanguinity or affinity, is forbidden by the law.

The punishment for this crime varies, according to the degree of Relationship between the parties: – Incest committed between parents and children, is often punished with death – with respect to persons collaterally connected by blood, or marriage, corporal punishment, banishment etc. are made use of.<sup>6</sup>

## PART IV

### ***Of the law of evidence; and in what manner crimes may become null or extinct***

What we have already advanced in a former book,<sup>7</sup> relative to the different kinds of evidence of human transactions requisite in *civil* cases, is almost equally applicable

1 *Political Ordin.* of 1580 Art. 3.

2 Groenewegen, *de Legib. abrog. ad L. 2 C. de Natur. Lib. N. 7*; Brouwer, *de jure Connub. Lib. 1 Cap. 27 N. 30*; Voet, *ad tit. ff. de connub.* no. 3.

3 A. van Goudoever, *dissert. de nefanda libidine* (Traj. 1731).

4 *Placc. of Holland* July 21st, 1730, *Gr. Book of Placc.* Vol. 6 pag. 604.

5 Though no one of good principle will not agree with Montesquieu, *Esprit des Loix*, Liv. 12. Ch. 6, A Dieu ne plaise, que je veuille diminuer l'horreur, que l'on a pour un crime, que la Religion, la Morale, & la Politique condamnent tour-à-tour: – Yet some times it has been doubted and not groundlessly; whether capital punishment should be just and adequate. Reference as made to a certain treatise on the punishment for this crime printed at Amsterdam 1777.

6 S. van Leeuwen, *Cens. For.* part 1 L. 5 C. 28 no. 6 *ibique* De Haas, *in not.*; Leybrechts, *Treatise discussing the office of a Notary* Vol. 1 Chap. 11 No. 10.

7 1st Book Section 17 Page 175 & *Seqq.* Vide appendix for B.

to *criminal* cases. There is, however, a distinction often necessary to be observed, which merits a separate consideration.

## CHAPTER I

### *Of Proof or evidence in general*

According to the general rule that a complete proof is required to condemn a person in a criminal process, it is necessary that these two circumstances appear:

- 1st. That a crime has actually been committed.
- 2ly. That it should be absolutely known, who the perpetrator of the crime is.

## SECT. 1

### *Of the Corpus delicti*

The reasons for criminal inquiry, principally rest upon the certainty that a crime has actually been committed; or, as it is commonly expressed, that the *Corpus Delicti* be evident.<sup>1</sup>

This proof may be established by following into and examining the traces and remains left by the supposed crime. In the matter of homicide, for instance, the corpse of the person killed constitutes the *Corpus delicti*. In case of Frauds, the instrument or writing.

It is therefore, the first duty of the Judge, to trace and examine with scrupulous attention, (and, if required, to call in the aid of scientific persons), the *Corpus delicti*. This is particularly necessary in the examination of dead bodies, where a homicide has been committed; – an inspection of the tenements in which Burglaries have been committed, and matters of similar nature.† But, if the crime be of such a nature, that, after the perpetration, no traces are left to guide the Judgment, as in many cases of incontinency; then, it must be substantiated by other modes of evidence, or clear proof.<sup>2</sup>

## SECT. II

### *Of Confession*

After the actual perpetration of the crime has been duly made manifest, the second question follows; namely, Who is the perpetrator. –

1 L. 1 § 24 *ad SCt. Silan.*; L. 16 C. *de poen.*; Boehmer, *ad const. crim. carol.* Art. 6 § 10 *Seqq.*

2 Leyser, *Medit. ad ff.* Tom. 8 *Spec.* 561 & Tom. 9 *Spec.* 598.

† And also the instruments of destruction.

The means of proof by which this fact is established, are *Confession, personal evidence*, writings, or other species of *demonstrative evidence*. –

The free *confession* of the criminal, is of the first species of evidence in criminal matters;<sup>1</sup> with the proviso, that the truth is supported by other evidence, and the whole course of the transaction. – A complete or valid confession in Law requires

1st. That the perpetration of the crime is sufficiently apparent.

2ly. That the confession has been made before a competent judge: extrajudicial confession affords presumption but not sufficient proof.<sup>2</sup>

3rly. That it is simple and distinct; not clouded with obscurities; and that it be voluntary.<sup>3</sup> It is, therefore, not to be obtained by any ensnaring questions; by putting words into the mouth of the accused; or to be exacted from him, by any threatening, or violent means.

4ly. That the informations, or other collateral evidence, collected by the judge, relative to the crime, should correspond with the confession.

5ly. That the particular circumstances, stated by the accused in his confession, are substantiated by further inquiry.<sup>4</sup>

6ly. That the confession contain such circumstances as the accused could not know, by any possibility, if he were innocent.<sup>5</sup>

### Sect. III

#### *Of other species of Evidence*

If the accused person deny the accusation, either totally, or with respect to leading circumstances, or in his defence refer to matters which must appear elsewhere; then, the best and only resort, is to personal evidence. – In this, so far as regards corporal punishment, the following points ought to be taken into consideration:

1st. How far a witness is credible, is, or is not to be rejected; and this is to be determined, by a sensible and impartial judge himself.<sup>6</sup> He will more easily overlook a defect in a witness, if his evidence be given in defence of the accused, or in mitigation of punishment, than if it be intended to bear accusatively upon the prisoner.

1 *L. 1. ff. de Confess.*

2 Boehmer, *ad const. Crim. Carol.* Art. 32.

3 Boehmer, *d. L.* Art. 60.

4 Boehmer, *d. L.* Art. 54.

5 J. G. Heineccii, *exercit. de religione judicantium circa reorum confessiones*, in *opusc. var. Syll.* page 650-695.

6 *L. 3 § 2; L. 13 ff. de testib.*; Leyser, *medit. ad. Pand. Tom. 4 Spec.* 283.

2ly. All witnesses, unable to support their evidence by stating how the facts, or circumstances related, came to their knowledge; or who are at all *non compos mentis*, are totally inadmissible.

3ly. Though there may be a sort of indirect and dubious statement given by a witness in his evidence, and though his credit as such, be in some degree affected; yet it does not disqualify him from giving it; as the judge afterwards, by the strength of other evidence produced, and examination into circumstances, will be able to determine, how far his evidence is to be considered credible or admissible.<sup>1</sup>

4ly. In criminal cases no evidence of a person under 20 years of age, can be admitted as full proof.<sup>2</sup> Persons under that age may be heard; as their evidence may tend to throw light upon the case, and corroborate less acceptable evidence.<sup>[3]</sup>

Although evidence, which is termed negative, has not the strength of positive proof; yet in some cases, the contrary may be admitted: viz. when a concurrence of circumstances shows that had the crime really been committed some traces of it must have been within the witness's knowledge, and that he could not have had any interest in concealing it.<sup>4</sup>

5ly. In criminal cases of any serious import, no evidence is valid, which has not been taken before the judge, who is in the habit of examining witnesses by interrogation: each question containing a separate point, or circumstance; which question, if necessary, should be more particularly explained, in case the witness does not, in the first instance, sufficiently understand its meaning. The answers of the witness are, as nearly as possible, to be taken down in his own words.

6ly. No evidence can be admitted as valid unless verified upon oath.<sup>5</sup> Mere [assertion] can only, at the most, be termed presumptive evidence; thus, sometimes a degree of caution is to be exercised, whether you ought to put a man on his oath or not.

## SECT. IV

### *Of proof by Indicia*

The different media of proof by *presumptive evidence*, *strong appearances*, *demonstrative evidence*, or *indicia*, have often been a subject of controversy among jurists; some admitting fully what others reject.<sup>6</sup> These contradictory opinions

1 Boehmer, *ad const. crim. carol.* Art 66.

2 *L. 20 ff. de testib.*

[3 Carpzovii, *prax. Crim.* part 3 *quaest.* 114 No. 41. *Seqq.*]

4 [Leyser, *Medit. ad Pand. Tom. 4 Spec.* 286.]

5 Boehmer, *ad const. crim. Carol.* Art 70 § 4.

6 Leyser, *medit. ad pand. Tom. 4 spec.* 257; Boehmer, *ad const. crim. carol.* Art. 22 § 4 & Art. 23 & 24. Trial of J. B. F. van Goch *Deduction in Revision* Art. 143, 461 & on the part of the *Law Officer of Amsterdam* Art. 203-863.

however, appear to be easily reconciled, if we take care to make a due distinction between what are *suspitions*, or *presumptive indicia*; and those *indicia*, which are limited to such facts, as are each distinctly proved, and which could not be true, without the guilt of the accused flowing from them, as a necessary consequence.

Such sort of proof as the last, is quite sufficient, in our view of the question, to determine the punishment ordained by the law for the crime.<sup>1</sup>

## SECT. V

### *Of written Evidence*

However useful, & indeed necessary, the admission of written evidence may be in *civil cases*, it is yet necessary to admit it with every degree of caution in criminal cases; and the reason is, that the acts passed of a criminal nature are of a more positive, and demonstrative kind, tending mostly to prove the *Corpus delicti*. However, sometimes, extracts out of protocols relative to the trials and sentences of accomplices; also, letters of the accused, or of others in correspondence with him, where the hand writing & signatures are duly proved, may be admitted as evidence.<sup>2</sup>

## CHAPTER II

### *In what manner crimes may become null or extinct*

The manner in which crimes become extinct and all proceedings relative to them stopped, may be reduced to the following heads: *By Punishment inflicted*; *By Pardon Granted*; *By Composition and submission*; *By Prescription*; and by *Death*.

## SECT. I

### *By Punishment Inflicted*

If the delinquent, after due trial, and sentence passed, has suffered the awarded punishment he immediately becomes liberated from all further censure and prosecution for that crime:<sup>3</sup> as justice cannot allow a man to be punished more than once for the same offence:<sup>4</sup> – However, though the crime may be generally considered as extinct, in consequence of the penalty for it having been suffered; yet it is not so complete, but that if the delinquent were to commit the same offence again,

1 Reference is made to that memorial and the Sentence of death in that case which was confirmed when revised.

2 Quistorp, 10 part 12 Ch. § 707-709.

3 *L. 7 § 1 ff. de jur. Patron.*

4 *L. 23 C. de poenis.*

regard would be had, or a retrospect to that circumstance, so as to affect the future punishment by rendering it more severe.<sup>1</sup>

With respect to thieves, highwaymen, vagrants, and such like culprits of the more notorious kind, no appeal would avail.<sup>2</sup>

## SECT. II

### *By Pardon Granted*

Crimes may become extinct also from pardon being granted by the supreme authority.

Sometimes the pardon, for wise political reasons, is granted to delinquents of a certain class, whose acts arise solely from a state of civil discord; the number often being too great to be punished with the ordinary punishment, without danger or injury to the state. This is termed an *amnesty*.<sup>3</sup> Sometimes it is granted to particular persons; not on account of any discretion any mercy that might be exercised in common cases; but for peculiar reasons of equity, which could not allow the operations of the law to take place in such cases without some peculiar hardship accruing to the guilty party.<sup>4</sup>

The sorts of pardon granted for crimes committed by individuals are as follows: 1st. Pardon may be granted for all crimes except murder, with the reservation of damages, or remuneration, to the party injured. 2ly. By a remission of the Offence granted to homicides (not murderers), or for manslaughter; on condition of making amends to the Sovereign by a pecuniary fine. 3ly. Abolition, a free and sweeping pardon, or sort of acquittance for the offence, founded upon a concurrence of very favourable circumstances relative to the person or conduct of the perpetrator, or with respect to the act committed. 4ly. By *Landwinning*: By which a person, who, in selfdefence has killed another, is permitted to remain unmolested within the Country.<sup>5</sup>

## SECT. III

### *By Composition and Submission*

Though granting pardon for crimes is the privilege of the Sovereign, and though the Judge, in ordering punishment, is bound to take into consideration every aggravating, or mitigating circumstance; yet he is equally bound, to keep within the limits of

- 1 *L.* 28 § 3 and 10 *ff.*; *L.* 22 *C. de poenis; pol. Ord.* Art. 3 & 16; *placc. of Holl.* March 19, 1614 Art. 1 & 4 & a number of other laws.
- 2 *Placc. of Holland* June 17th, 1718, *Gr. Book of Placc.* Vol. 5 pag. 764.
- 3 Several instances are to be found in the *Gr. Book of Placc.* Vol. 2 Col. 2397, Vol. 3 page 189, 517 & 518, Vol. 7 pag. 840, Vol. 9 pag. 420, 430, 433, 441, 444, 446, 448, 576, 578 & 816.
- 4 Carpzovii, *prax. Crim.* part 3 *Quaest.* 150 *ibique* Boehmer, *in observ.* The court's opinion of Dec. 8, 1784 in the author's *Judicial practice*, Book 2 pag. 257 & *Seqq.*
- 5 *Jud. Pract. d. L.* pag. 272-274.

the law<sup>1</sup> and not, in his decision, to oppose the dictates of mercy to the plain and necessary rules of strict justice.<sup>2</sup> Yet in the *execution* of Justice, means have been introduced of *ex arbitrio* mitigating the punishment decreed or diverting the culprit's adjudged fate. –

1st. By having his case declared to be of a *civil nature*, and subject to *composition*. This declaration of the judge is necessary with respect to crimes, on which the law passes a heavier judgement than that of fines;<sup>3</sup> or, where such compounding by the public prosecutor is not allowed expressly; as in cases of adultery.<sup>4</sup>

The Judge's power, too, is confined within certain limits, and such composition is never allowed in great crimes wilfully committed; such as murders, where the victims have been waylaid; or otherwise qualified; false evidence; false coining; rape etc.<sup>5</sup>

The Judge, moreover, previous to his declaring a case civil, or compoundable, [ought] to examine carefully and cautiously, whether some traces may not be discovered, which would tend to determine, that the perpetrator was actuated by malicious motives, rather than that he committed the deed through negligence, or inadvertency. If through the former, it would be a great injury to society, and subversive to every rule of strict necessary justice, to let such a person escape; for though it is of the greatest importance that the innocent should not suffer, yet it is not less so, that the villain, or perpetrator of atrocious crimes, should not go unpunished; but, on no account, is it either in the power, or consistent with the solemn and imperious duty of a judge, to allow pecuniary composition for crimes or felonious acts, which the law, for the necessary maintenance of Public peace and security, has decreed should be punished with corporal, or capital punishment, as the case may require.<sup>6</sup>

2ly. The punishment becomes extinguished by what is termed the submission of the judge; which is resorted to when a case is so very doubtful, that he cannot determine whether it is compoundable or not, and scruples to come to a determination either way. He then leans to the merciful side which the law allows him to do, and this is termed “an escape by the *submission* of the Judge”. But for reasons above given, he should be scrupulously careful, in his scrutiny of the case, that an artful designing villain does not, by this species of discretional, and humanely devised Lenity, escape the just punishment of the law.<sup>7</sup>

1 *L. 1 § 4 ad Sct. Turpil. Crim. ord.* of 1570 Art. 56.

2 *Resol. of Holland* September 27, 1668, *Gr. Book of Placc.* Vol. 3 page 85.

3 *Ord. of Empr. Charles* of May 19th, 1844 Art. 3 & 4; *Ampliations of the Courts Instruct.* 1644 Art. 30.

4 *Resol. of Holland* July 29, 1679, *Gr. Book of Placc.* vol. 7 pag. 960.

5 *Instruction of the Court* Art. 9.

6 *Jurid. Observ.* in de Groot, *Introd.* Vol. 4 *Observ.* 40.

7 The author's *Judic. Pract.* Vol. 2 B. 4 Ch. 5 § 18-20. – *Vide* further on this subject Art. 88 of the crim. Trial published at The Cape of Good Hope on the 4th of Dec. 1819. Translator.

## SECT. IV

*By Prescription*

The prosecution in criminal cases sometimes become null, by what is termed *jus prescriptionis*; that is, where, after the commission of the crime, a certain time has elapsed before the prisoner is publicly accused or prosecuted.

In all cases of crime,<sup>1</sup> 20 years is the allowed period of prescription;<sup>2</sup> no action or accusation can therefore, be brought against a person after a period of 20 years has elapsed before legal accusation. There is some peculiar distinction with respect to the crime of adultery: in which case the time of prescription is limited to five years.<sup>3</sup>

## SECT. V

*By Death*

Death puts a stop to legal actions, both criminal and civil. *Actio personalis cum personâ moritur*. No prosecution on the body of the defunct, except in cases of high treason and in some of peculation<sup>4</sup> can take place; and if the criminally accused person die, during trial, before sentence passed, the trial is at an end, and all further prosecution ceases;<sup>5</sup> nor can it be extended to his heirs, even to obtain remuneration for the law expenses on the part of this prosecution to the death of the accused person on trial; for to establish the obligation on the prisoner to pay it, it is necessary, that he be criminally convicted; and consequently it cannot be forced upon his heirs<sup>6</sup> any more than upon him till his guilt [has] been determined by due Judgment of Law.

1 Leyser, *medit. ad Pand. Tom. 7 Spec.* 515; Boehmer, *in observ. ad Carpzovii, prax. crimin.* part 3 *Quaest.* 141 *Obs.* 1.

2 *L. 12 C. ad Leg. Corn. de Fals.*; *L. 3 ff. de requir. reis.*; *L. 13 pr. ff. de div. tempor. praescr.*; Matthaei, *paroem.* 9 n. 14.

3 *L. 29 § 5, 6 & 7 ff.*; *L. 5.*; *L. 28. C. ad Leg. Jul. de Adult.*; Voet, *ad d. t. ff.* no. 22.

4 Matthaeus, *de Crim. Lib. 48 Tit. 19 Cap. 3* n. 4-6.

5 *L. 15 § 4 ff. ad SCt. Turpil.*

6 The author's treatise on two interesting criminal cases (Utrecht 1791) & B. Voorda's *Notes on the Crim. Ordin.* Art 67.