

PERFICIO EMPTIONIS IN CASE OF A SALE OF WINE IN ROMAN LAW

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ABSTRACT

Sale of things determined by weight, number or measure was regarded as a specific kind in Roman law. In order to establish an obligation, the object of sale had to be physically measured out, weighed or pointed out by counting. Still, it was debated among classical lawyers when exactly such a contract becomes perfect and thus binding for both contractual parties. The article attempts to pinpoint the moment of *perficio emptionis* of generic things, using the example of a sale of wine. Due to the character of such a thing, the sources mention a special set of rules for this kind of sale that require measuring out the wine sold (*mensura*) and contain an option to taste the wine (*degustatio*), as well as to spill out the wine sold (*effundere vinum*). All of these may be used in the analysis of the *perficio emptionis* as an indication of legal effects that take place at the moment of *mensura* and *degustatio*.

Keywords: Roman law; sale; generic things; wine; amphorae; *dolia*; perfection of sale; *perficio emptionis*; liability; *mensura*; *degustatio*; *conditio*

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According to Gaius, there were special legal rules for the sale of those things *quae pondere numero mensurave constant* (which are determined by weight, number or measure), such as corn, wine, oil, silver, as well as for some “other things”.¹ One such characteristic that makes a sale of these kinds of things different is the moment when the contract is deemed perfect. Gaius mentions two ways in which generic goods, such as wine or oil, could be sold, namely: (1) by setting up a single overall price for the whole object, regardless of the amount, as for example “all the wine in my cellar”, or “a hundred amphorae from my house” – this kind of sale being called *per aversionem* or *uno pretio*; or (2) by determining the price by unit, as for example “five *sestercii* for each pound”, or with the clause *in singulas libras quas adpenderis* (“for every pound you weigh out”).² In the first case, there is a regular sale, and therefore the contract is made when the parties reach *consensus* regarding the price and clearly specify the object.³ However, in the second case, when “wine was sold by the jar, oil by the gallon, corn by the peck, or silver by the pound”,⁴ the sole agreement about the object and the price determined per unit was not enough; therefore, it did not have a legal effect.

In general, the Roman contract of *emptio venditio* was used primarily for the sale of individually determined items, namely things that were specific enough to become an object of a legal transaction. Yet, a purely generic uniform sale was unknown to Roman law.⁵ This is why an agreement to buy “a slave”, “two pounds of silver” or “a hundred pounds of olives” without further specification, did not create any legal obligation. This might come as a surprise since grain, oil and wine were in fact three essential commodities of the Roman trade and market. It is clear from the sources that in order to create a legal effect, the agreement had to contain a provision regarding the quantity, measure or weight, and had to be followed by an act that *de facto* separated the specified goods from the whole. Let us observe the way Roman jurisprudence thought about the specific features of the sale of generic goods, using the example of the sale of wine.⁶

1 Gai D 18 1 35 5; Inst 3, 14pr. Even though the term “generic thing” is not explicitly used in the sources and there is a reason to distinguish them from things *quae pondere numero mensurave constant*, for the purpose of this article we will refer to things determined by weight, number or measure simply as to generic things. The link between the two categories of *res* may be seen in Paul D 12 1 21.

2 Gai D 18 1 35 5–7.

3 Ulp D 18 1 2 1; Pomp D 18 1 3pr; Ulp D 18 1 9pr.

4 Gai D 18 1 35 3: “Si vinum ita venierit, ut in singulas amphoras, item oleum, ut in singulos metretas, item frumentum, ut in singulos modios, item argentum, ut in singulas libras.” (See trl by Watson *The Digest of Justinian* vol 1.)

5 See Zimmermann 1996: 236ff. This is why *stipulatio* was considered more appropriate for the sale of generic goods. See, also, Yaron 2004: 59ff.

6 As for generic sale, see Ernst 1997: 272.

A number of questions were raised by classical lawyers, one of them being *quando videatur emptio perfici*, when does the sale become perfect?⁷ Gaius attempts to answer it by referring to the school of the Sabinians who held the view that the sale became perfect only once the generic object was physically measured out, weighed or pointed out by means of counting. This rule would also apply in some other cases, such as when a flock or herd of animals (*universitas rerum*),⁸ especially cattle, was sold. If the whole herd of cows should be sold for a single price, the contract was perfect at the moment of agreement. But if the price was fixed per beast (with the clause *in singula corpora quae adnumeraveris*),⁹ the contract was deemed perfect only when all the animals had been counted. The logic behind this statement was that both the price and the object of the sale had to be certain enough for the agreement to cause legal effect, and the measuring, weighing or counting was clearly a way for doing so.¹⁰ In other words, without measuring, weighing or counting it is not clear what exactly is being sold and what may be demanded by the *actio empti*.

In D 18 1 35 7, Gaius again makes his point about the *perficio emptionis* in the case of generic objects by stating that the *periculum* passes only after the object had been measured out, regardless of whether the price was set per unit, or whether a lump sum was agreed for the whole.¹¹ To explain this rule, Gaius uses wine as an example of a generic object of sale, and it is the sale of wine that we look into more closely, since the rules for the sale of wine are explained in the sources in detail, especially in the sixth title of Digest 18 *De periculo et commodo rei venditae*.¹²

Before we go any further, it needs to be said that in principle there were two ways in which wine was usually sold at the market of ancient Rome: in amphorae (*vinum amphoriarum*), or in *dolia* (sing *dolium*; also called *seriae* or *cupae*).¹³ Amphora is quite well known: a clay jar with a narrowed throat whose shape and size, with the capacity of approximately 26 liters, made them relatively easy to handle. *Dolia*, on the other hand, were large clay vessels that could contain up to 1 000 liters of liquid or dry products and were usually two-thirds embedded in the ground and therefore not intended for transport or handling (although in some cases they were used on ships).

Better, and therefore more expensive wine, was usually sold directly in amphorae, while wine of poorer quality was stored in large *dolia* and sold in parts defined by quantity that was to be poured from the vessel according to an agreement. Storing wine after it was sold in amphorae was much easier, since every container was

7 Gai D 18 1 35 5.

8 Gai D 18 1 35 6.

9 Gai D 18 1 35 5. In a similar fashion, *si grex venierit*; see Gai D 18 1 35 6.

10 On certainty of price in a conditional sale, see Thomas 1967: 77–89.

11 Gai D 18 1 35 7.

12 See, also, D 33 6: “De tritico vino vel oleo legato”.

13 When reading the sources, it is necessary to distinguish amphora as a vessel (approx. 26 liters) from amphora as a Roman unit for measuring liquids.

secured against the penetration of air in order to minimise the risk of wine spoilage. Amphorae were usually carefully plugged and sealed with resin.¹⁴ *Dolia*, on the other hand, had a considerably wider throat that did not allow it to be closed that well, thus making it less resistant to the penetration of air. This is why *vinum doliare* changed its taste and quality much faster than *vinum amphoriarum*, and for this particular reason it became an important topic for Roman jurists. As storage containers, *dolia* were used repeatedly, while amphorae were usually sold together with its contents and were sometimes even specially designed for a particular customer.¹⁵

As for the terms used in legal sources, Iulianus makes it clear that the term *vasa vinaria* is used for wine-making vessels (for wine-pressing). *Dolia* were therefore considered to be wine containers only if the wine was stored in them, otherwise they may have had other uses (such as for the storage of grain). In a similar manner, amphorae were not considered to be wine containers either if they did not contain wine at a particular moment.¹⁶ Proculus states in this regard that the same applies to sale. Amphorae were therefore often considered an accessory to wine (akin to barrels) in case of sale, while the *dolia* in which the wine was stored were not: “Et scilicet id vendimus cum his amphoris et cadis: in dolia autem alia mente coicimus”.¹⁷

In general, whether wine was sold by the whole *dolia* or by individual amphorae, the contract was made by *consensus*, as has namely just been explained.¹⁸ The same was true when the wine was sold *per aversionem*, namely only a part of the wine contained in the *dolia* (that is, “half of the wine contained in your *dolium*”) for a lump sum. However, the perfection of the sale was more complicated when the price for the *vinum doliare* was defined only per unit. The key moment for the transaction was the measuring of the agreed quantity of wine in the same manner as had been stated before regarding all generic goods. Due to the specific character of wine, Roman jurisprudence had made numerous points regarding this kind of sale. They focused namely on liability, especially for the *periculum* and the *acor etmucor*,¹⁹ on liability for the wine turning sour or for being spoilt after completion of the sale.²⁰

14 See Dorrego, Carrera & Luxan 2004: 369–374.

15 Also, in case of inheritance, Roman jurists debated whether the vessels are part of their contents; see Ulp D 33 6 3 1. Ulpianus and Celsus agree that if wine is bequeathed, the amphorae in which the wine is stored are considered to be bequeathed as well – not because of their nature or purpose, but because there is an assumption that the testator wanted this to be so (*voluerit accessioni esse vino amphoras*). This was, however, not the case if the wine was contained in *dolia*.

16 Iul D 50 16 206.

17 Procul D 33 6 15. 18

Gai D 18 1 35 5.

19 Recently Pennitz 1994: 251–296.

20 Liability for *periculum* is particularly important in case of the sale of wine due to biochemical processes that are typical for this food product. The quality of wine naturally changes with time and the speed of this process may depend on many factors, some of which may be influenced by the way the wine is stored and handled in the containers, while others may not. In legal terms we are therefore dealing with an object of sale that naturally changes over time and does it more rapidly than most other food commodities, such as grain or olive oil.

In this article, however, we focus on the actual moment of perfecting the sale when *vinum doliare* was sold per unit. However, we use the remarks of classical lawyers concerning liability for *acor et mucor* in order to look into our topic, since liability is one of the indicators of a sale being perfect.

According to Ulpianus, in his commentary to Sabinus (D 18 6 1pr), if *vinum doliare* was sold and it went sour afterwards (just as when it got lost due to cracks in the wine containers), it was the buyer who was liable: “Si vinum venditum acuerit vel quid aliud vitii sustinuerit, emptoris erit damnum”.²¹ This would, of course, be in accordance with the generally accepted rule of *periculum est emptoris*.²² The same view is confirmed by Gaius.²³ However, the question remains when exactly wine as a generic object is considered to be sold, since only at that very moment may contractual liability be established. Gaius – in another fragment (D 18 1 35 5) – states that the sale of generic things is made only after the wine had been measured out. In D 18 6 1 1, Ulpianus confirms that “before measuring the wine, it is almost as though not yet sold” (*priusquam admetiatur vinum, prope quasi nondum venit*). He also says that the “wine is regarded as *completely sold* only when it has been tasted” (*videlicet quasi tunc plenissime veneat, cum fuerit degustatum*, D 18 6 1pr). How are we supposed to understand Ulpian’s statement when he seems to indicate that the wine is sold even before it is measured out, when, according to Gaius, the measuring of the wine is necessary for the perfection of the sale? Ulpian once again confirms: “Custodiam ad diem mensurae venditor praestare debet” – even before the measuring takes place, the seller must take care of the wine, which means that there must be some legal effect given prior to the measuring, since without an obligation there can be no contractual liability. Clearly, by measuring, *periculum* passes to the buyer: “Post mensuram factam venditoris desinit esse periculum”.²⁴ But why does the seller have *custodia* even before the measuring takes place when there is no contract – that is, at least according to Gaius.

To find the answer, we should take a closer look at the two special elements of the sale of wine: the measuring (*mensura*) and the tasting (*degustatio*) of the wine sold.²⁵

The word *mensura* signifies the actual division of the agreed quantity of wine from the whole contained in the particular *dolium*, regardless of whether it was done by the seller or buyer. The agreed amount of *vinum doliare* was poured from the *dolium* into amphorae or any other container as result of an obligation based on the contract established earlier. The buyer had an option to either carry away the purchased wine or to seal the *dolium* containing the wine and to keep it with the

21 Ulp D 18 6 1pr.

22 Paul D 18 6 8pr: “Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptione periculum ad emptorem respiciet.”

23 Gai D 18 6 16.

24 Ulp D 18 6 1 1.

25 On both elements, see Jakab 2009: 210ff and 227.

seller until later. If the buyer had sealed the container with the wine sold (*si dolium signatum sit ab emptore*), while still at the seller's site, there was a difference in opinion among Roman lawyers about the legal effects of such an act. Trebatius understands the sealing of the containers by the buyer as an act by which the wine is delivered to him. Ulpianus, on the other hand, supports the view of Labeo who perceives the sealing only as a precaution against the wine turning sour or spoiled (*accor et mucor*), providing that the actual delivery will only be done later.²⁶ In other words, according to Trebatius the sealing of the barrels causes transfer of ownership, while according to Ulpian and Labeo, the seller remains the owner of the wine.

Gaius, in fact, shares the same view as Ulpianus as to the effects of measuring out the wine when he says that if part of the wine in *dolia* was sold, then until the wine had been measured out (*antequam admetiatur*), the risk remained on the seller (*omne periculum ad venditorem pertinet*).²⁷ It didn't matter whether a single price had been fixed for the whole amount, or the price had been set per unit.²⁸ Even though Gaius talks about passing of the risk and not the perfection of the contract, we may assume that since he makes no explicit distinction between the sale *uno pretio* and the sale "per unit", he considers the sale to be perfect by the measuring, and not earlier. This view is confirmed also by Paulus, who states that the risk remains on the vendor until the wine had been measured: "Donec admetiatur omne periculum venditoris est".²⁹

Another important indication of the sale of wine becoming perfect is the option of the seller to spill out the wine sold (*effundere vinum*) in case the buyer delays in collecting the wine sold from the seller.³⁰ He is therefore given an option to destroy³¹ the object of sale even though the buyer has a contractual right to it. However, he was allowed to do so only *si diem ad metiendum praestituit nec intra diem admensum est*, if the date for measuring was set, but did not in fact take place within the specified period. Therefore, the right of the buyer to *effundere vinum* essentially depended on *mensura*, the measuring as well.

In view of Gaius' opinion as expressed in D 18 1 35 5, where he states that the sale of wine requires measuring out of the object of sale for the contract to be perfect, we are tempted to conclude that the seller is given the right to destroy the wine sold,

26 Ulp D 18 6 1 2.

27 Gai D 18 1 35 7 and Gai D 18 6 16: "Si quidem de bonitate eorum adfirmavit venditor". According to Ulp D 18 6 1 1, prior to the measuring, the seller has *custodia*, while according to Gai 18 1 35 7, he has *periculum*. Even though in the second fragment there is room for arguing that the seller remains liable due to the principle *casum sentit dominus*, Gaius still speaks of the liability of the seller.

28 Gai D 18 1 35 7.

29 Paul D 18 6 5.

30 See, recently, Hausmaninger 2001: 73ff; Jakab 1999: 73ff; Reetz 2015: 404ff.

31 See D 9 2 27 15: "Effusum et acetum factum corrupti appellatione continentur".

due to the simple fact that there is no contract where the generic object (wine) had not been measured out. If there is no contract without measuring, then the seller remains owner of the wine and he is therefore free to do whatever he would like to with his wine. However, the sources seem to indicate that this is in fact an issue of liability based on a contract, since we learn that *licet venditori vel effundere vinum*,³² the seller is “allowed” (*licet*) to spill the wine sold. There would not be a need to allow him to destroy the wine if he was the owner without any liability to a third person. Therefore, this again indicates that even before the measuring of the wine takes place, the agreement alone already imposes duties on the seller.

The procedure that followed after expiry of the date set up for measuring resembles that of regular *mora*. First of all, the seller had to call on the buyer again in order to collect the wine sold and to give him an explicit warning that would make him understand that if he failed to collect the wine, it could be spilled out by the seller. Such a warning had to be given in the presence of witnesses. In addition, the buyer may have charged rent for the containers in which the wine sold was stored, or he could have rented other containers for storing his own wine and charged the buyer for the costs of such storage. Alternatively, the seller may sell the wine to a third person and such sale is considered to be performed in good faith. With all the given options, however, Ulpianus recommends that the seller, if possible, uses the possibility to rent other containers and to keep the wine for the buyer as long as possible. This is in order to minimise the costs or potential damage that the buyer may incur – *ut quam minime detrimento sit ea res emptori*.³³ This statement again confirms that according to classical jurisprudence, the buyer must have had some kind of legal interest in the wine sold, even though it had not yet been measured out and it had not been delivered to him. In other words, the right of the seller to *effundere vinum* is yet another argument in support of the view that even before measuring the wine, the agreement between the seller and the buyer alone about the sale of wine per unit already causes some legal effect.

As we have seen, besides the measurement, another important moment in the sale of wine was *degustatio*. Ulpian states that it is difficult to believe that one would buy wine without having an option to taste it.³⁴ According to Cato the Elder, the usual time for tasting was three days after the purchase: “In triduo proximo viri boni arbitrato degustato, si non ita fecerit, vinum pro degustato erit” (“after three days it was tasted by an honest man and if not, it was considered as tasted”).³⁵ It appears that already in the second century BC, it was customary to let the buyer taste the wine,

32 Ulp D 18 6 1 3.

33 Eventually, if the seller is forced to pour out the wine, he should measure it beforehand to see how much damage the buyer will suffer. See Ulp D 18 6 1 4: “Per corbem venditorem mensuram facere et effundere”.

34 Ulp D 18 6 4 1.

35 Cato *De agricultura* 157, 148.

and the period given for such an option was “within a few days”. What Cato also tells us here, is that the tasting of the wine sold went hand in hand with the actual delivery of the wine. And what is most important, according to custom, is that there was a presumption that after three days the wine was considered tasted, and thus delivered. We do not find any similar remarks about the length of the period for tasting in legal sources of the classical period, but Cato lets us assume that it was most probably set in days rather than in weeks.³⁶

Degustatio was therefore an essential point in the sale of wine and in practice it played just as important a role as *mensura*. According to Ulpian, only *degustatio* finally completes the sale.³⁷ Therefore, if the seller agreed to carry the risk for *periculum* he had to bear it until the agreed date or until the wine was tasted (*fuerim degustatum*).³⁸ There was no strict deadline for tasting. If the parties agreed on a specific date for tasting and the buyer failed to taste it within the agreed period, the seller remained liable for *periculum* until the actual tasting. Therefore, if the tasting did not take place within the specified period of time without any fault on the part of the seller, he was relieved from liability for damage on the object of sale.³⁹ As a result he was allowed to *effundere vinum*.

There was much discussion among scholars about the situation where the contract did not contain any provision about the *degustatio*. Yaron summarises the three most frequent opinions about the option to taste the wine in such a case: (a) the buyer had the option in any case, it was simply a custom; (b) the buyer had the option only if it was made part of the agreement; and (c) the buyer had the option to taste if not mentioned in the contract only in the case of *vinum doliare*, but not in the case of *vinum amphorarium*.⁴⁰

Jakab points out (with reference to Ulpian and Cato) that, in fact, two types of tasting with two different types of legal effects should be distinguished when reading the sources – initial (*anfängliche*) and subsequent (*nachträgliche*).⁴¹ The “initial” *degustatio* (as in Ulp D 18 6 4*pr*) allowed the buyer to examine the purchased wine on a short-term basis (three days according to Cato) in order to check the quality that

³⁶ See, also, Paterson 1982: 155.

³⁷ Ulp D 18 6 1 1.

³⁸ Ulp D 18 6 1*pr*: “Si vinum venditum acuerit vel quid aliud vitii sustinuerit, emptoris erit damnum, quemadmodum si vinum esset effusum vel vasis contusus vel qua alia ex causa. Sed si venditor se periculo subiecit, in id tempus periculum sustinebit, quoad se subiecit: quod si non designavit tempus, eatenus periculum sustinere debet, quoad degustetur vinum, videlicet quasi tunc plenissime veneat, cum fuerit degustatum.” See, also, Yaron 1959: 71ff; Zimmermann 1996: 284ff; Frier 1983: 257ff.

³⁹ Pomp D 18 6 18: “Cum moram emptor adhibere coepit, iam non culpam, sed dolum malum tantum praestandum a venditore”; Paul D 18 6 5: “Si per emptorem steterit, quo minus ad diem vinum tolleretur, postea, nisi quod dolo malo venditoris interceptum esset, non debet ab eo praestari.”

⁴⁰ See Yaron 1959: 71.

⁴¹ Jakab 2009: 216, 221 and 225.

was promised by the seller or at the auction. This was usually the case if the wine was not present when the sale was contracted. On the other hand, Jakab describes *degustatio* as “subsequent” if it constitutes part of the seller’s long-term obligation if the wine remained stored with the seller after the sale and could change its quality in the course of time. The “initial” *degustatio* is the one that follows shortly after the perfection of the sale and the buyer is given the right to withdraw from the contract due to objective defects, while only “subsequent” *degustatio* was directly linked to the liability for *acor et mucor* and other possible defects depending on the agreement of the parties or commercial custom.⁴²

In any case, *degustatio* in general allowed the customer to make sure that the wine did not acidify (*acor*) or is otherwise spoiled (*mucor*). However, in legal terms, the word *degustat* used in D 18 6 signifies an option based on the liability of the seller that the buyer received with *perficio emptionis*. Tasting was therefore not required for the contract to become perfect; on the contrary, the option to taste the wine could be given only with the perfection of the sale. The difference between measuring and tasting is clearly stated by Paulus (*alia causa est degustandi, alia metiendi*): “[T]asting is one thing, measuring out another, for tasting affords the possibility of rejection (*improbare licet*), while measuring serves ... to determine how much is being sold.”⁴³ *Degustatio* was therefore directly linked to liability for *acor et mucor*, while measuring finalised the agreement about the object of sale. If the parties reached the agreement about the sale, the tasting did not allow the buyer to refuse the wine simply because he did not like the taste of it anymore. However, it gave the buyer the option to refuse the wine sold in case the wine turned sour or otherwise got bad as a result of the seller’s liability. Pomponius, referring to Proculus, says that even if the purchaser is willing to accept wine that had turned sour or bad after having agreed that he has an option to refuse it, he should not be compelled to do so.⁴⁴

All that has just been discussed regarding the special character of the sale of *vinum doliare* when sold per unit leads us to the conclusion that such a sale was considered conditional. The tasting functioned as a *conditio* that was established by the agreement of the seller to remain liable for *acor et mucor* even after the completion of the sale, that is, after measuring out the wine.

The word *quasi* in D 18 6 1 1 (*priusquam admetiatur vinum, prope quasi nondum venit*), as well as in D 18 6 1pr (*videlicet quasi tunc plenissime veneat, cum fuerit degustatum*), when referring to the legal significance of *mensura* and *degustatio*, seems to confirm it. This is why Ulpian asks a rhetorical question – if someone sells wine and specifies a date by which it should be tasted and then prevents the tasting from taking place, is the sale null – *emptio sit soluta*? He attempts to answer: “Quasi

42 *Idem* at 225–226.

43 D 18 1 34 5.

44 Pomp D 18 6 6.

sub condicione venierint”, it is as if it was conditional,⁴⁵ even though it depended on the agreement between the parties. But if there was none, the sale was deemed good (*emptio manet*).⁴⁶ It is therefore clear that regardless of whether tasting takes place or not, the sale was deemed perfect and could place liability on the seller. Only a perfected sale would entitle the buyer to taste the wine. The tasting clause therefore functioned as a *conditio resolutive* – the contract remains valid until the tasting is done – the contract is effective, but the result of the tasting may lead to an end to the contract. *Degustatio* therefore gives the buyer an option to reject the wine and to withdraw from the contract in case the wine turned sour, as is declared in D 18 1 34 5. This explains why Ulpian considers wine to be “completely sold” (*plenissime veneat*) only once the tasting had taken place. He links tasting only to liability, which is possible only as a result of the contract becoming perfect. Therefore, the agreement on the *degustatio* is to be perceived as a *conditio resolutive casualis* where *acor* or *mucor* causes the contract to become void (see D 18 6 6) regardless of the buyer’s will. Consequently, the meeting of the condition is linked to the deterioration of the quality of the wine, not only to the act of *degustatio*. On the other hand, the measuring out of the wine after the agreement may be regarded as *conditio suspensiva potestativa*,⁴⁷ which postponed the effects of the contract to the moment of measurement.

The effect the tasting clause had on the contract was therefore twofold: (1) the risk for *periculum* remained on the seller, and (2) it allowed the buyer to withdraw from the contract in case the wine sold turned sour. The main purpose of the tasting was therefore to confirm the sale.

It is clear, however, that what was said about some of the specific rules of the sale of wine does not concern other generic goods, such as oil or grain. Not only was there naturally no need for liability for *acor et mucor*, but these goods did not change their quality over time as rapidly and therefore the clause about *degustatio* was unnecessary. On the other hand, *mensura* was always required in the sale of all goods *quae pondere numero mensurae constant*.

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⁴⁵ Ulp D 18 6 4; Jakab 2009: 220.

⁴⁶ *Ibid.*

⁴⁷ Gai D 18 1 35 5.

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FORTY-FIVE YEARS OF CLINICAL LEGAL EDUCATION IN SOUTH AFRICA

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ABSTRACT

In the fourth century BC, Socrates and Aristotle – and in the thirteenth century AD, Roger Bacon – viewed “induction or experimentation as the *sine qua non* of all knowledge”. In the nineteenth century, John Dewey proposed that true education is derived from reflective life experience, rather than from merely memorising facts. These views, over centuries, still underscore the clinical legal education (CLE) methodology. A comparative analysis indicates the development of legal education and CLE in the USA and South Africa.

This contribution discusses the establishment and evolution of CLE at South African universities from the 1970s, through the client-centred focus during the 1980s, the accreditation of university law clinics by the South African Law Society in 1993, and the establishment of AULAI (now SAULCA), whose primary focus is to promote clinical programmes in South Africa.

In particular, this contribution looks at the development of CLE at the Wits Law Clinic, currently aligned with global best practices in CLE, and at student education

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and scholarship, whilst assisting the poor and marginalised. The diversity in our multicultural society impacts on students' receptivity to particular forms of CLE, which were accentuated during student campaigns in 2015 to decolonise curricula. The challenges and the processes of decolonising the CLE curriculum may lie in focusing on culture, language, professional ethics and on the clients served by the clinic.

Keywords: Clinical legal education; CLE; university law clinics; clinical programmes; Wits Law Clinic; access to justice; live-client clinic; academic scholarship; decolonisation of the curriculum

1 Introduction

It has been argued that ancient Greek philosophers, such as Socrates and Aristotle in the fourth century BC, and medieval philosophers, such as Roger Bacon in the thirteenth century AD, all had the same view regarding education, namely the "induction or experimentation as the sine qua non of all knowledge".¹ In the nineteenth century,² John Dewey embraced genuine education as being derived from life experience to be discussed and reflected upon,³ rather than from merely memorising facts. These views, over centuries, today still underscore the Clinical Legal Education (CLE) methodology.

A comparative analysis indicates the development of legal education and CLE in the United States of America (USA) and in South Africa. The establishment and traditional focus of university law clinics in South Africa are discussed, focusing on the Wits Law Clinic (based at the University of the Witwatersrand) (WLC), and on the University of Pretoria Law Clinic (UPLC). The progression of their CLE programmes and current developments in CLE are discussed against a global backdrop, but with a focus on the South African context.

The diversity of the South African multicultural society impacts on students' receptivity to particular forms of CLE. These were accentuated during a campaign by students and a number of progressive academics in 2015 to decolonise curricula.⁴ The final part of this contribution indicates that the new challenge and the processes of decolonising the CLE curriculum may lie in focusing on culture, language, professional ethics and the clients served by the clinic.

1 Landman 1930: 27. Aristotle described knowledge in three forms, namely theory, productive action and practice.

2 Smith 2004: 727.

3 Dewey 1922: 7 further held that experience without reflection can potentially lead to miseducation or a faculty interpretation of experience.

4 Molefe 2016: 30–37.

2 The development of legal education: A comparative analysis

2.1 The United States of America (USA)

Prior to the unification of America's northern colonies,⁵ legal education was effected through clerkship by apprentice placement at law firms, subsequently replaced by law schools – known as proprietary law schools – that focused on legal practice in an attempt to remedy the apparent lack of conformity in training at the various law firms.⁶ During the 1820s, theoretical training was provided exclusively by universities, while practical training was provided by proprietary law schools.⁷ The election of President Jackson,⁸ who focused on anti-elitism and the social upliftment of Man,⁹ caused a decline in legal education, which was only remedied when William Langdell became the dean of Harvard Law School in 1870, separating legal education from the profession.¹⁰ Langdell introduced the case method of study as pedagogy, defining the study of law as a science,¹¹ the ideal being that a law student should be taught to think like a lawyer rather than act like one. This caused much discussion on whether law should be viewed as a science, as opposed to being an art.¹² Langdell's model entailed the continual study of appeal court cases.¹³ His pedagogy was criticised for failing to teach students the practical application of the law,¹⁴ and specifically from the start of the realist movement in the 1930s,¹⁵ when the demand for realistic and

5 Franklin 1990: 56; Steenhuisen 2006: 263.

6 Franklin 1990: 56. By 1800, twenty such schools had been established.

7 *Ibid.*

8 *Ibid.*; Steenhuisen 2006: 263.

9 Jackson's policies caused educational and apprenticeship policies to be struck down and meant that "the practice of law was opened to those with little or no formal preparation". See Franklin 1990: 57.

10 *Ibid.*

11 Landman 1930: 18–19 describes the casebook (textbook) method as follows: "The student would familiarize himself with the principles of law included in the assignment. The teacher would quiz the student on its content for a part of the succeeding period and then explain, illustrate, and present problems to the class. This method of instruction imparts the law to the student dogmatically as a system of unified, logically arranged principles of unalterable law." See Finley 2011: 163, who suggests a development of the casebook method by using literature to complement the case method, which should help students gain a more complete understanding and should better prepare them for the practice of law. For a full discussion of the casebook method, see Toller 2010: 21–65 and Konop 1931: 275–283.

12 Spiegel 1987: 581.

13 Barnhizer 1979: 68.

14 See Roach 1994: 673, who refers to a student commenting that "using the Case Method is like studying a forest one tree at a time".

15 Steenhuisen 2006: 264.

practical teaching methods increased. Between 1920 and the 1940s, a clinical legal education methodology within an in-house clinic start to develop.¹⁶

2 2 South Africa

In 1652, the Dutch colonialists brought the Roman-Dutch Law from the Netherlands to South Africa,¹⁷ recognising the customary or indigenous law of the African inhabitants of the Cape colony as a subsidiary and inferior system only to be applied between the inhabitants.¹⁸ The British assumed control over the colony in 1806 and many aspects of English law were adopted.¹⁹ The Cape Supreme Court was established in 1828 and new advocates and judges were required to be trained in England. The Cape's hybrid system of law was taken to the other territories by the colonisers and was eventually adopted as the law of the Union of South Africa in 1909.²⁰

A Law Certificate,²¹ introduced in the Cape in 1858, was the first South African legal qualification offered. In 1859, the first law school based at a university was opened in Cape Town, where the LLB degree was introduced in 1874.²² As university teaching progressed over time, the main form of student instruction was through the lecture-and-textbook method, accompanied by the Socratic dialogue.²³

In 1973, Professors Kahn and Dugard debated the status of legal education in South Africa,²⁴ with Kahn arguing that law schools should continue promoting "academic training".²⁵ Dugard argued in favour of the reform of legal education through the introduction of clinical law or legal-aid schemes as educational tools.²⁶ These sentiments were echoed by Chaskalson a decade later.²⁷

16 Amsterdam 1984: 616.

17 Iya 2001: 356.

18 *Ibid.*

19 See Greenbaum 2009: 6, where she states that English law "shaped the existing South African procedural law and all branches of commercial law".

20 *Idem* at 6, 7. The Union of South Africa was formed when the four colonies, namely the Cape, Natal, the Orange Free State and Transvaal, were united as one state.

21 *Ibid.*

22 *Idem* at 8.

23 Fedler 1993: 999–1003.

24 Described in McQuoid-Mason 1974: 149.

25 *Ibid.*

26 *Idem* at 163.

27 At a legal education conference held at the University of the Witwatersrand in 1983: "Law students can leave a university with an LLB degree without ever having seen a client, without ever having been in court, without knowing how to interview a witness or draft a contract, or prepare an argument or address a court. The result is that law graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law. I do not believe that there is any profession other than the law in which students leave university as ill-equipped as this to pursue their chosen career." See Chaskalson 1985: 116. See, also, De Klerk 2006a: 935–939.

3 The development of Clinical Legal Education: A comparative analysis

3 1 The United States of America

The first wave of CLE programmes in the USA started during the late 1890s and early 1900s,²⁸ initially as voluntary student programmes for learning lawyering skills and as access to justice for the poor. Between 1920 and the 1940s, John Bradway and Jerome Frank pursued the cause for a CLE methodology within an in-house clinic.²⁹ In 1921, The Carnegie Foundation for the Advancement of Teaching, (Carnegie Foundation) funded a study, called the *Reed Report*, which identified three components necessary to prepare students for the practice of law, namely general education, theoretical knowledge of the law, and practical skills training.³⁰ By the end of the 1950s, a number of accredited law schools had established CLE programmes with varying standards; many were considered as voluntary.³¹

In 1946, and during the latter part of the first wave of CLE programmes, Edgar Dale developed a learning theory, commonly referred to as the “Cone of Experience”,³² indicating that learning is best achieved through doing. According to Dale, the least effective method included reading text and listening to lectures. A four-phase learning circle, developed by David Kolb and Roger Fry in the 1970s, during the second wave, expanded on this theory of learning by doing.³³

The second wave of CLE programmes started in the 1960s and continued until the 1990s. It integrated CLE programmes into the mainstream legal curricula,³⁴ catapulted by funding from the Ford Foundation.

The third wave, from the 1990s, saw CLE programmes at various universities advancing at a rapid pace, encouraged by the findings of the 1992 *MacCrate Report*.³⁵ In 2007, the Carnegie Foundation compiled a recommendation report, which included an integrated three-year curriculum that incorporated theory and practice,³⁶ prompting all accredited universities in the USA to engage in some form of CLE programme.

28 Bloch 2011: 5.

29 Amsterdam 1984: 616.

30 Sonsteng *et al* 2007: 42.

31 Bloch 2011: 5.

32 “In the Cone of Experience, the base of the cone represents the learner as a participant in actual or simulated experience and the top of the cone represents the learner as a mere observer of symbols that represents an event (e.g., reading words on a page)” – see Sonsteng *et al* 2007: 68.

33 *Idem* at 72. The four phases include experience, reflection, theory and application. Kolb and Fry also indicated that learning by doing is only effective if what has been learnt is reflected on. This view is supported by Stuckey 2006–2007: 807–838.

34 Bloch 2011: 7. See, also, Sonsteng *et al* 2007: 20.

35 Findley 2006–2007: 306.

36 Sullivan *et al* 2007 (hereinafter referred to as the “Carnegie Report”).

3.2 CLE programmes in SA

After law schools introduced full-time legal programmes during the 1970s, some progressive academics began responding to social equality.³⁷ This period in the South African history was motivated by the political circumstances, and was marked by very little commitment from the state towards providing legal aid for disadvantaged persons.³⁸ Law students in particular began to take it upon themselves to bridge the gap.³⁹

A number of South African universities established legal aid clinical programmes in the 1970s,⁴⁰ first at the University of Cape Town (UCT) and soon thereafter at the Universities of the Witwatersrand (Wits)⁴¹ and Natal.⁴² In 1973, after a conference sponsored by the Ford Foundation, more university legal aid programmes were established.⁴³ The primary purpose of these clinical programmes was to increase access to legal services for the poor and the vulnerable, as only limited state legal aid facilities were available at the time.⁴⁴

The opposition to the apartheid government's policies created increased unrest. Hundreds of activists were detained and journalists were banned from certain areas.⁴⁵ Foreign donor support secured the creation of organisations, such as the Legal Resources Centre and the Centre for Applied Legal Studies at Wits, focusing on litigation to confront apartheid.⁴⁶ During the 1980s, university law clinics assisted the poor, while the more progressive clinics dealt with cases involving breaches of fundamental human rights.⁴⁷ The focus of the clinics at that time was on access to justice, rather than on student education. By 1981, fourteen universities had established law clinics.⁴⁸

37 Kentridge 1974: 87–89.

38 *Ibid*; Haupt 2006: 229.

39 Haupt 2006: 229.

40 De Klerk 2006a: 930.

41 Initially called the Practical Legal Training Programme (1973); later Practical Legal Studies (1983). Presently, the CLE programme offered at the Wits Law Clinic is known as Practical Legal Studies.

42 De Klerk 2006a: 930. See, also, McQuoid-Mason & Palmer 2013: 8–9.

43 McQuoid-Mason 1986: 189. See, generally, McQuoid-Mason 1982: 139–163.

44 Haupt 2006: 229. See, also, McQuoid-Mason 2004: 28–51; McQuoid-Mason 2005: 1–16; McQuoid-Mason 2008b: 8–9.

45 De Klerk 2006a: 939.

46 *Ibid*.

47 *Idem* at 940.

48 McQuoid-Mason, Ojukwu & Wachira 2011: 24–25. These include the Universities of Cape Town (1972), the Witwatersrand (1973), Natal (Durban) (1973), Port Elizabeth (1974), Natal (Pietermaritzburg) (1974), Western Cape (1975), Stellenbosch (1975), Durban-Westville (1978), Zululand (1978), Rhodes (1979), the North (1980), Pretoria (1980), South Africa (1981) and Rand Afrikaans University (1981).

The 1990s saw an increase in legal aid programmes. This was motivated by a number of factors, including an increase in the development of state legal aid systems,⁴⁹ the accreditation of law clinics by the South African Law Society in 1993,⁵⁰ funding from the Attorneys Fidelity Fund (AFF) – specifically for the educational development of clinical programmes⁵¹ – and the establishment of the Association of University Legal Aid Institutes (AULAI), whose primary purpose was to promote clinical programmes in South Africa.⁵²

4 Traditional focus of law clinics and the evolution of CLE programmes

The idea of access to justice dates back to at least the end of the fifteenth century, with England's King Henry VII ordering judges to assign counsel to the poor in need of help.⁵³ During the 1960s and 1970s, progressive lawyers and academics raised the awareness of injustice, indicating that the justice system “was merely a formal right, with little substance and limited practical effect. The reality was that most people rarely engaged with the legal system and those that did were often denied access to representation and advice because of financial reasons”.⁵⁴

Globally, universities traditionally structured their CLE programmes with a view to provide access to justice to the poor and marginalised,⁵⁵ defining the CLE programmes as such and underscoring it as an isolated course.⁵⁶ In his discussion of the experiences of students at Yale University in the 1920s, Bloch notes that “[t]he academic faculty allowed the students to work in the legal aid offices but refused to award academic credit, considering the work to be outside the academic domain”.⁵⁷ Earlier, authors did not view CLE as forms of pedagogy or as a teaching methodology that could be incorporated into traditional law school courses.⁵⁸ The

49 The Legal Aid Board provided funding to clinics subject to certain conditions and it increasingly relied on law clinics to provide access to justice. See De Klerk 2006a: 931–940.

50 The Attorney's Act 53 of 1979 was amended to recognise law clinics, allowing the employ of candidate attorneys to complete their articles. See McQuoid-Mason 2000: 123. See, also, Steenhuisen 2006: 264.

51 Since 1988. Steenhuisen 2006: 264; De Klerk 2006a: 931. AULAI was subsequently renamed SAULCA (South African University Law Clinics Association) – see the general website at <http://www.saulca.co.za/home> (accessed 5 Oct 2019).

52 De Klerk 2006a: 931. On 30 Jun 1998, the AULAI Trust was formed specifically in response to funding received from the Ford Foundation (FF), who required a legal entity to be established to administer and manage the funding received.

53 See Bloch & Noone 2011: 153–166 for a discussion on the history.

54 *Ibid.*

55 *Ibid*; McQuoid-Mason 1977: 343–358; De Klerk 2006a: 929. For a full discussion, see Bloch 2011: 4–400.

56 Bloch & Noone 2011: 153–166.

57 Bloch 2011: 4.

58 Steenhuisen 2006: 265.

clinical experience was to simply provide access to justice, allowing students to learn lawyering skills in the process.

Over the last century, a marked change in the definition of CLE occurred, shifting the focus from an access-to-justice driven perspective to teaching students lawyering skills in a live-client clinic. This resulted in an advancement to a more pedagogical definition, establishing CLE as a teaching methodology producing a variety of legal skills and different methods that can be applied to teach these skills.⁵⁹ It was argued that the integration of CLE in the core curriculum of the law school will acknowledge its value as a teaching methodology.⁶⁰

In 1917, William Rowe already had the vision of promoting the integration of clinical programmes into mainstream doctrinal courses, which resembled the current externship programme or hybrid clinic.⁶¹

Clinics globally grapple with the competing demands of students and clients. The Clinical Legal Education Organisation, United Kingdom (CLEO), holds that the principal aim of clinical programmes is educational and that the student and supervisor competence must dictate the clients to be assisted and in what areas.⁶² This view is echoed in the USA, Australia and South Africa.⁶³ There are currently numerous justice centres and legal aid clinics in South Africa that render free legal services to the indigent communities⁶⁴ and provide access to justice; their primary focus is on client services as they are not charged with educational demands. The pressure on university law clinics to service the poor is therefore relieved and they can focus on their primary goal of education.⁶⁵

59 Haupt 2006: 231; Ellmann, Gunning & Hertz 1994–1995: 6.

60 Du Plessis 2016b: 18. It was further argued that where CLE “remains a separate enterprise from the core teaching of law it is vulnerable to being undermined due to ideological opposition, changing educational fashions or resource cuts”. See Hall & Kerrigan 2011: 30.

61 Barry, Dubin & Joy 2000: 16–17.

62 Du Plessis 2016b: 22; MacFarlane & McKeown 2008: 65.

63 Findley 2006–2007: 310, 311; Du Plessis 2016b: 22; Giddings 2010: 297–309; Du Plessis 2008b: 14.

64 See Du Plessis 2016b 23: “There are many NGOs, NPOs and government institutions, such as Lawyers for Human Rights, the Legal Resources Centre, Black Sash, Provincial consumer agencies, Ombuds servicing various industries, Attorneys’ *pro bono* centres, *ProBono.com*, Public Defenders’ offices, a myriad of legal call centres attached to insurance companies and Legal Aid South Africa’s (‘LASA’) many justice centres.”

65 *Ibid.* For South Africa, Du Plessis 2008b: 14 states that “[i]n planning the clinical curriculum, clinicians have to define the parameters within which the clinic should operate. Only types of cases that will satisfy the goals of clinical legal education should be considered, and [clinicians] should limit the volume of cases taken on ... to ensure that students derive the best possible training ...” In the USA and the UK, CLE is about the student experience and it should therefore be the student who conducts a case, not the clinician. MacFarlane & McKeown 2008: 65; Wizner 2001–2002: 1929–1937; Stuckey *et al* 2007: 195–197. Furthermore, mostly all university law clinics have CLE programmes in place, focusing primarily on student training while providing access to justice. See <http://www.saulca.co.za> (accessed 5 Oct 2019).

5 Current developments in CLE

Contemporary learning theory for the study of law, also in clinical context, was advanced in the 2007 report of the Carnegie Foundation entitled *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Report).⁶⁶ Students are required to engage in six tasks if they were to reap the benefit of effective professional education, all of which were applicable to clinical training.⁶⁷ The Carnegie Report recognised that the practical skills of lawyering are most effective in small group settings.⁶⁸

The focus of CLE is increasingly seen as a fundamental aspect of undergraduate law students' education in both developing countries and in Africa.⁶⁹ In focusing on education, clinicians must develop approaches to realise the goal of developing qualified practicing lawyers.⁷⁰ The clinician should therefore not only practise, but also train the student to practise.⁷¹ When the focus of CLE as a core course in the LLB curriculum is on student training,⁷² the role of clinicians as fully fledged academics is acknowledged.⁷³

Kift, an Australian scholar, indicates that legal education reform did not keep pace with the demands of modern practice. Legal graduates enter professional environments very different from those of a decade ago,⁷⁴ and these environments are "transformed by external drivers such as globalisation, competitiveness and competition reform, information and communications technology and by a determined move away from

66 For a discussion, see Sullivan *et al* 2007: *passim*.

67 These tasks include: "[1.] Developing in students the fundamental knowledge and skills, especially an academic knowledge base and research; 2. Providing students with the capacity to engage in complex practice; 3. Enabling students to learn to make judgments under conditions of uncertainty; 4. Teach students how to learn from experience; 5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community; and 6. Forming students able and willing to join an enterprise of public service." See Burch & Jackson 2009: 57.

68 See Du Plessis 2016b: 110–120 for a discussion of students collaborating in firms in a clinical setting. In a live-client (practical) environment, such as in which CLE is generally taught, students can, in their respective pairs or firms, apply and broaden their knowledge, as well as hone the practical skills taught in the clinical course.

69 Dickson 2000: 33–34; Iya 2000: 13–32.

70 Goode 2000: 223–279.

71 "Practice" in this context refers to the total of the practice in that specific case, excluding the court appearance. The student should, ideally, with the supervision of the clinician, prepare a case from the initial consultation until the case is ready to go to trial. Students in South Africa do not have the right of appearance in courts and there are no student practice rules. For a discussion of student appearances and practice rules in the USA, see Sarkin 1993: 231. Practice rules regarding final-year law students enrolled in clinical courses representing clients in court were drafted in 1975, and again in 1982 and 1985, but have, to date, never been legislated. For a full discussion, see McQuoid-Mason 2008a: 580–595.

72 As Giddings 2010: 301 explains: "Even when clinics are well-ensconced, it takes a long time to influence the rest of legal education."

73 Findley 2006–2007: 310–311.

74 See Kift 2003: 1–13, who also indicates that "the content, methods and foci of legal knowledge are now also changing so rapidly that, in many areas of practice, the doctrinal law learnt at Law School is no longer current, even on graduation".

the adversarial system as the primary dispute resolution method”.⁷⁵ In 1992 already, the American MacCrate Report indicated that legal education should focus on “what lawyers need to be able to do” as opposed to “what lawyers need to know”.⁷⁶ Clinics should therefore identify their primary constituencies. Potential constituencies were identified to include “the public served, students, employers of law graduates, law schools, applicants for admission, taxpayers, alumni, courts, all the role players in the legal profession and the university to which the clinic is attached”.⁷⁷ The British scholars, Marson, Wilson and Van Hoorenbeek, hold that students are invigorated when focusing on the needs of the competitive commercial law sector, with leading law firms commending realistic training.⁷⁸ They propose that a clinic should function in the same way as a real law firm, with the students as actors in the legal process, rather than as mere observers, and with the academic ability to extract a theoretical base from the practical experience. This will allow the full benefits of CLE to be extracted, reflected upon, and to be reinvested into the student cohort.⁷⁹

Globally, academic scholarship on CLE is vibrant, with the most recent comprehensive study published by Australian Clinical Legal Education (ACLE). This study is a research-based examination of CLE pedagogy in Australia.⁸⁰ In South Africa, the third edition of a clinical textbook and a textbook on curriculum design and assessment tools in CLE were recently published.⁸¹

6 An overview of the development of CLE at the Universities of the Witwatersrand and Pretoria

6 1 Wits Law Clinic (WLC)

6 1 1 Development from 1973 to 1989

In 1969, an informal clinical programme was initiated at the University of the Witwatersrand in response to socio-political circumstances.⁸² A small number of

⁷⁵ *Ibid.*

⁷⁶ American Bar Association 1992: *passim* (MacCrate Report).

⁷⁷ Du Plessis 2016b: 17. See, also, Munro 2002: 231–232.

⁷⁸ Marson, Wilson & Van Hoorenbeek 2005: 31.

⁷⁹ *Ibid.*

⁸⁰ Available at <http://press.anu.edu.au/publications/australian-clinical-legal-education> (accessed 5 Oct 2019), comprising: Clinics and Australian law schools approaching 2020; Australian clinical legal education: Models and definitions; Course design for clinical teaching; Teaching social justice in clinics; The importance of effective supervision; Reflective practice: The essence of clinical legal education; Clinical assessment of students’ work; Resourcing live client clinics; and Australian best practice – a comparison with the United Kingdom and the United States.

⁸¹ See, in general, Mahomed *et al* 2015; Du Plessis 2016b; Bodenstein *et al* 2018; Du Plessis 2019.

⁸² De Klerk 2006a: 930.

students of this programme assisted the Johannesburg Legal Aid Bureau,⁸³ in addition to managing their own advice office in a so-called coloured township in Riverlea two nights per week.⁸⁴ Full-time and final-year students assisting *pro deo* counsel visited the Supreme Court, the magistrates' courts and the Bantu Affairs Commissioners' court, whereafter the cases were discussed.⁸⁵

After the 1973 conference on legal aid in South Africa,⁸⁶ a law clinic with a clinical programme, as an elective credit-bearing course, was established on the Wits campus. This clinic was open during lunch every day of the week for staff and students, and functioned mainly as an advice office.⁸⁷ By 1983, the pedagogy and teaching purposes of the Wits legal aid clinic were confirmed,⁸⁸ although a marked absence of the educational objectives of the legal aid programme was noted.⁸⁹

In 1986, a team of professors visited the University of the Witwatersrand, recommending that a new structure be devised for the clinic "to guarantee the pedagogical goals which justify the clinic's prominence in the new curriculum".⁹⁰ Between 1986 and 1989, a diverse range of lawyering skills were incorporated in the teaching curriculum of the clinical course, Practical Legal Studies (PLS).⁹¹

6 1 2 Development from 1990 to 1999

In 1990, Clinton Bamberger, a PLS teacher at the clinic, called for a refocus of the clinic, to teaching as opposed to mere access to justice, noting that "a teaching law clinic is not an efficient provider of proper service to clients. Teaching is its primary function. Teaching takes time, resources, and the energy from the practice".⁹²

83 Dugard 1974: 162.

84 Kahn 1974: 148. Students practised in Riverlea and not in Soweto due to restrictions imposed by the Group Areas Act 41 of 1950 and the Bantu (Urban Areas) Consolidation Act 79 of 1961.

85 *Idem* at 147, 148. Members of the profession, including judges, magistrates and prosecutors, lectured on the practice of law. Student participation was aimed towards promotion of access to justice, without pedagogical purpose, and their participation carried no credit towards any courses in their law degree.

86 See discussion in par 3 2 *supra*.

87 The course was incepted during the period of statutory segregation when black students were only allowed to participate with ministerial permission.

88 See Pretorius 1983: 85–93, who identified goals, teaching methods and students' clinical work, as well as challenges.

89 *Idem* at 91: "In other words mere participation in the clinic from an educational point of view is not going to give any results unless it is accompanied by a carefully designed teaching programme."

90 Iya 1995: 270.

91 See the Practical Legal Studies course outlines of 1986, 1987 and 1988, archived at the Wits Law Clinic. These include instructions on interviewing and statement taking, drafting, labour law, ethics, dispute resolution and litigation skills.

92 Du Plessis 2016b: 21. Bamberger 1990: 21 observed that "[c]linical faculty and students everywhere are pulled in opposite directions by the demands of service and teaching. The tension is worse in South Africa. There are so few providers of legal assistance for the poor. There are more clients at the clinic's door than can be admitted, if the staff and students did nothing else. The students do not increase the capacity for service. On the contrary, if they are to learn in the experience of law practice, fewer clients can be served".

However, when the Attorneys Act⁹³ was amended in 1993,⁹⁴ WLC, like most of the clinics, entered into partnership with the Legal Aid Board (LAB), who placed salaried attorneys at the clinic,⁹⁵ as well as candidate attorneys employed by LAB. The candidate attorneys were assigned to the clinic with a maximum ratio of ten candidate attorneys to one supervisor.⁹⁶ The funding received from LAB promoted the access-to-justice mission of the clinic. Funding from foreign donors was also aimed at the improvement of access to justice. The only external grant for the educational component of the clinic was received from the then Attorneys Fidelity Fund (AFF).⁹⁷ Despite a structured clinical course, the focus of the clinic remained largely on access to justice.

In 1995, Iya expressed concern that “[t]he critical issue is that many of the clinical programmes are said to focus their emphasis only on the perspectives of service rather than education”.⁹⁸ In 2006, De Klerk warned that “the role that clinics have assumed in access to justice has tainted their image as educational institutions”, referring to Woolman, who, in 1997, had already branded university law clinics as “‘ersatz legal-aid clinics’ that do little reflective teaching”.⁹⁹

During the mid to late 1990s, as more justice centres were established by Legal Aid South Africa (LASA),¹⁰⁰ the focus started to move away from access to justice.¹⁰¹ A need developed among the clinicians to specialise, rather than to operate as a general litigation clinic. Towards the end of 1999, the WLC was restructured in specialised units.¹⁰² Four specialist units were created, namely a family law unit, a labour law unit, a criminal law unit and a law of delict unit, whilst a small general law unit was retained.¹⁰³

6 1 3 From 2000 onwards

Currently, the live-client clinic operates daily and accommodates walk-in clients, who are served on a first-come-first-serve basis,¹⁰⁴ resulting in a huge number of

93 Attorneys Act 53 of 1979.

94 These amendments concerned recognising university law clinics accredited by provincial law societies, and allowed them to contract as principals to candidate attorneys, the latter who may appear in the district courts. See McQuoid-Mason 2000: 123–125 for a full discussion.

95 De Klerk 2006a: 931.

96 *Ibid.*

97 *Ibid.*

98 Iya 1995: 270.

99 De Klerk 2006a: 942, referring to Woolman, Watson & Smith 1997: 32.

100 Formerly known as the Legal Aid Board (LAB).

101 See De Klerk 2006a: 947.

102 For a full discussion, see De Klerk & Mahomed 2006: 306–318.

103 *Idem* at 311, 312.

104 Du Plessis 2016b: 40.

consultations and cases taken on. With the focus predominantly on student education and with clinicians teaching in specialised units,¹⁰⁵ the CLE programme was restructured to accommodate a three-fold pedagogical focus, namely the clinical experience, the classroom component and tutorial components.¹⁰⁶ The role of the clinician within academia was defined,¹⁰⁷ culminating in scholarship,¹⁰⁸ international conference papers and publications,¹⁰⁹ as well as PhD studies in the field of CLE.¹¹⁰ With student education as focus,¹¹¹ educational challenges were identified and addressed,¹¹² and client cases suitable for student training were selected.¹¹³ The CLE curriculum was tested against international standards,¹¹⁴ and assessment challenges were identified and addressed.¹¹⁵ The challenge of large student numbers culminated in the introduction of collaboration in the form of student firms.¹¹⁶

The clinic currently operates in seven specialisation units, each focused on a different subject field, namely that of the law of family, gender and child, labour, property, criminal and delict, refugees, as well as a general litigation unit.

6 2 The University of Pretoria Law Clinic

During May 1980,¹¹⁷ student volunteers at the University of Pretoria started rendering free legal advice, one night per week for two hours, to the indigent in the so-called coloured community of Eersterus, a township to the east of Pretoria.

105 For discussion of the processes in specialised units, see Du Plessis 2006: 284–294; Du Plessis 2007: 44–63.

106 See Du Plessis 2015c: 64–80 for a full discussion.

107 Du Plessis & Dass 2013: 390–406.

108 De Klerk 2006b: 244–251; De Klerk 2006a; De Klerk 2007: 95–104; De Klerk & Mahomed 2006: *passim*; Du Plessis 2006: 284–294; Du Plessis 2007: *passim*; Du Plessis 2008a: 121–138; Du Plessis 2008c: 24–33; Du Plessis 2008b: *passim*; Du Plessis 2009: 91–117; Du Plessis 2011: 25–57; Du Plessis & Dass 2013: *passim*; Du Plessis 2013: 17–37; Du Plessis 2014a: 283–297; Du Plessis 2014b: 67–91; Du Plessis 2014c: 73–104; Du Plessis 2015c: *passim*; Du Plessis 2015a: 2778–2802; Du Plessis 2015b: 312–327; Du Plessis 2016a: 1–22; Du Plessis 2018: 140–162; Du Plessis 2016b: *passim*; Du Plessis 2019: *passim*; Mahomed 2008: 53–70; Mahomed & Kruger 2009: 105–134; Nkosi 2016a: 147–157; Nkosi 2016b: 1–24; Singo 2016: 554–574; Theophilopoulos & Tuson 2016: 161–180; Singo & Raymond 2018: 295–313; Dass & Raymond 2017: 26–42.

109 Du Plessis 2008a: 121–138; Du Plessis 2014c: 73–104; Mahomed & Kruger 2009: 105–134; De Klerk 2007: 95–104.

110 See, in general, Du Plessis 2014d: *passim*; Mahomed 2014: *passim*.

111 Du Plessis 2015b: 312–327; Du Plessis 2008b: 1–19.

112 Du Plessis 2014c: 73–104.

113 Du Plessis 2008c: 24–33.

114 Du Plessis 2011: 25–57; Du Plessis 2016a: 1–22.

115 Du Plessis 2009: 91–117; Du Plessis 2014a: 283–297; Du Plessis 2014b: 67–91; Du Plessis 2015a: 2778–2802.

116 Du Plessis 2013: 17–37; Du Plessis 2014b: 67–91.

117 Haupt 2006: 232–233.

The law students referred people and their matters to the LAB.¹¹⁸ During September 1980, the faculty board established a committee, whereafter a constitution for the law clinic was drafted and adopted in 1981. However, by 1984, the original volunteers had graduated and lecturer involvement had not yet materialised. The clinic's constitution ceased to exist when the clinic was incorporated in the Department of Procedural Law and Evidence. The introduction of an elective final-year course in 1987, known as Practical Law, led to the formalisation of the law clinic as part of the law faculty and clinical work became part of the mainstream curriculum.¹¹⁹ With the appointment of the first clinical supervisor and later clinical director, the emphasis shifted from client-centred service to student-centred teaching.¹²⁰ This focus was maintained through funding by the then Attorneys Fidelity Fund, who refused that its grants be used for clinical operations.¹²¹ The 1993 amendment to the Attorneys Act ensured increased manpower with candidate attorneys serving their articles at the clinic.¹²² Specialist units,¹²³ such as the Debt Relief Clinic, the Woman and Child Clinic and the Hatfield Community Court Clinic, were introduced in 2001, whilst also retaining a general practice clinic.

The CLE course is currently offered as a final-year elective course in the LLB, with students working initially in firms, later in pairs and, towards the end of the course, individually.¹²⁴ The combination of CLE as an elective course and of clients consulting by appointment only, creates better control and allows for the focus being on students' educational needs.

7 New challenges: Decolonisation of the curriculum

The diversity in the South African multicultural society impacts on students' receptivity to particular forms of CLE. Students encounter diversity and differences attributed to a "myriad of factors of race, gender, class, culture, religion and language [which] all impact on the way students experience their world, and hence on the context in which their learning takes place".¹²⁵ These were accentuated during a campaign by

118 *Ibid.* Some law lecturers assisted on an unorganised and informal basis.

119 *Idem* at 233, 234.

120 *Idem* at 234, 235.

121 *Idem* at 237; McQuoid-Mason 1982: 164.

122 Haupt 2006: 237, 238.

123 The factors leading to this development were: "(a) The individual clinician-attorney's preference, experience and knowledge in teaching and practising; (b) the unmet needs of the clients; (c) the tendency of donors to fund specific projects rather than general clinic costs and overheads; and (d) co-operation with other specialist legal aid agencies and the resultant improved system of referrals to and from these agencies." See Haupt 2006: 239.

124 Du Plessis 2016b: 42.

125 Vawda 2006: 296.

students and a number of progressive academics in 2015 to decolonise curricula.¹²⁶ Heleta agrees that, since the end of the apartheid system in 1994, curricula at most South African universities have not considerably changed and that they remain largely Eurocentric.¹²⁷ The current challenge facing university law clinics is the decolonisation of the CLE curriculum. Much has been written on decolonisation.¹²⁸ For purposes of this contribution, however, the reference to decolonisation is merely to identify and suggest ways in which the process of decolonisation can commence.

7 1 Application of the CLE methodology to diversity challenges

The pedagogy of the CLE methodology, focusing on skills and the practical application of the law, comprises of three basic components, namely clinic duty, classroom teaching and student tutorial sessions with their clinicians.¹²⁹ In addressing the diversity challenges, it is submitted that clinics should focus on culture, language, professional ethics and the clients served by the clinic.

7 1 1 Culture and language

It was indicated that culture “is not something static and immutable, but is rather moving, dynamic [and] flexible”¹³⁰ and that language and culture play a large role in preparing students to enter the profession.¹³¹ Language controls thought and actions, and people from different cultures who speak different languages will see the universe and respond to it differently; they will not perceive the same reality, unless they have a similar culture.¹³² Students should be grouped in student firms that reflect different cultures and languages, and they should be encouraged to consult with clients comprising a variety of cultures and languages.

126 Molefe 2016: 32.

127 Heleta 2016: *passim*.

128 To name but a few: Molefe 2016: *passim*; Heleta 2016: *passim*; Zulu 2017: *passim*; Smith & Tvaringe 2018: 41–43; Davis 2015: 172–188; Quinot 2012: 411–433; Anonymous 2017: *passim*; Letsekha 2013: 5–18; Naidoo 2016: *passim*; Sayed, Motala & Hoffman 2017: *passim*; Le Grange 2014: *passim*; Le Grange 2014: 1283–1294; Modiri 2015: 224–273; Mnyongani 2009: 122–134; Murove 2005: 339–347.

129 Du Plessis 2016b: 26.

130 Smith & Tvaringe 2018: 42.

131 The view is expressed that Western philosophy embraces individual autonomy, whereas African philosophy focuses its reality on the whole. These two different views have an effect on students entering the profession, as Western norms may not be easily embraced by all.

132 Mnyongani 2009: 124.

7 1 2 Professional ethics

Researchers identified a link between culture and ethics, acknowledging the role of culture in informing someone's sense of morality and ethics.¹³³ In understanding professional ethics, Mnyongani suggests that the profession “embark on a journey of ‘decolonising’ their minds”, by debating what it means to be African in a profession with a Western approach, ethos and orientation.¹³⁴

Professional ethics is developed as a skill in clinical courses. The CLE methodology promotes an understanding of ethics on a deeper level, where a student is not limited to understanding a theoretical ideal. In the sheltered clinical environment, students will be able to interrogate the impact of their decisions, specifically in relation to their clients and the legal profession, affording them the opportunity to develop their professional identities and to consider their roles within the legal profession.¹³⁵

7 1 3 Clients of the clinic

Modiri, in discussing poverty in South Africa, opines that the architecture, framework and logic of colonialism-apartheid remain, despite considerable changes to the country's laws.¹³⁶ Clients frequenting university law clinics mainly comprise of the indigent in the community, who often live in abject poverty.¹³⁷ Not only are the clients poor, but they may also represent communities where their cultures differ from those of the students who represent them.

Modiri further indicates that the poor are marginalised and are often dependent on a variety of welfare services where they may be treated arbitrarily.¹³⁸ For these purposes, university law clinics may be viewed as welfare services, and clinicians and students should deal with clients' matters meticulously, recognising that poverty should be understood as a problem of moral recognition.¹³⁹ Ultimately, clinics

133 Murove 2005: 339.

134 See Mnyongani 2009: 133–134, who considers the African ethical components to be on the periphery due to mainstream voices ignoring the would-be contributions of African values. He holds that African values, which have been relegated to the periphery of the profession, should be considered when making these choices, whilst acknowledging the context within which it operates.

135 Giddings 2013: 59–61.

136 Modiri 2015: 225.

137 Du Plessis 2016b: 136. The typical profile of a clinic client was described by De Klerk 2007: 97 as “when consulting, clinic clients ‘tend to present to the clinic lawyer a rather large package of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract’ and ‘(f)ormulating the mandate is only half the battle won’”.

138 Modiri 2015: 233.

139 *Idem* at 242. Modiri concludes that the “conditions of powerlessness, marginalisation and cultural imperialism tend to affect Blacks irrespective of their class or position” (at 239).

representing the poor must strive to empower their clients to be ethically and politically self-representing and self-defining.¹⁴⁰

8 Conclusion

A comparative analysis shows the development of legal education and CLE in the USA and in South Africa, and tracks the progression of CLE programmes at South African university law clinics.

The contribution discusses the evolution of clinical programmes at South African universities from the 1970s, through the client-centered focus during the 1980s, the accreditation of university law clinics by the South African Law Society in 1993 and the establishment of AULAI (now SAULCA),¹⁴¹ whose primary focus was to promote clinical programmes in South Africa. Specific attention is paid to the development of CLE at the WLC, currently aligned with global best practices in CLE, and with a focus on student education and scholarship, whilst assisting the poor and the marginalised.

It is suggested that the process of decolonising the CLE curriculum may commence by focusing on culture, language, professional ethics and on the clients served by the clinic.

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¹⁴⁰ Van Marle 2002: 299–308.

¹⁴¹ AULAI was subsequently renamed as SAULCA (South African University Law Clinics Association) – see their website at <http://www.saulca.co.za/home>.

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CRIMINALISATION OF DAMAGE TO PROPERTY BY SOUTH AFRICAN COMMON-LAW CRIMES

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ABSTRACT

This contribution examines the common-law crimes of malicious injury to property and arson. The current definitions of the crimes are set out, before the historical development of each crime is critically evaluated. In the concluding part, the nature and structure of the crimes are explored in the context of the rationales underpinning the crimes. It is submitted that despite the expansion of the crime of arson through case law not being in accordance with the purpose of the crime, the current definition of this crime has been settled. It is, however, contended that the wider definition of malicious injury to property, flowing from certain cases and academic interpretation, is not similarly entrenched in South African law and that any similar extension to the ambit of this crime therefore should not form part of the current definition.

Keywords: malicious injury to property, arson, damage to property, case precedent

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1 Introduction

Damage to property has been subjected to criminal sanction in terms of two common-law crimes in South Africa: malicious injury to property and arson.¹ It has been argued that since the elements of arson are all contained within the crime of malicious injury to property, there is no need for the crime of arson.² It is, however, contended that the crimes are sufficiently distinguishable to merit the separate independent existence of arson. Both crimes are not merely defined in terms of punishing intentional and unlawful direct harm to the property of another, but also retain the possibility that criminal liability can extend to harm to the accused's own property, where that harm is accompanied by an intention to harm the proprietary interests of another. It was held in the recent authoritative judgement of the Supreme Court of Appeal in *S v Dalindyebo*,³ that it is indeed appropriate for the intentional burning of the accused's own property to be regarded as arson where he foresees the possible risk of harm to others arising from his actions. In the light of this finding, the basis for the expansion of the crimes of malicious injury to property and arson into the context of self-inflicted damage, coupled with the intent to institute an associated insurance claim, which development has been subjected to criticism,⁴ is examined below.

Each of the crimes are defined in its current form,⁵ before proceeding to an evaluation of the historical development of each crime. In the final part of the contribution, the rationale for these crimes are further discussed, along with an evaluation of the validity of the extension of the ambit of these crimes.

2 Defining malicious injury to property

As indicated above, an issue of nomenclature needs to be resolved before this crime can be discussed, namely should the crime be described as “malicious *injury* to property”⁶ or as “malicious *damage* to property”?⁷ The former appellation is

1 As discussed below, some writers describe the first-mentioned crime as “malicious *damage* to property”, and this alternative nomenclature has also been used in some cases. For the reasons that are explained here, this contribution will use the traditional terminology of “malicious *injury* to property”. See part 2 *infra*.

2 Burchell 2016: 761 comments that “it is difficult logically to justify the existence of a crime separate from the crime of malicious injury to property (of which it is a species)”.

3 *S v Dalindyebo* 2016 (1) SACR 329 (SCA).

4 This extension has been criticised by both De Wet 1985: 288–289, 294 and Snyman 2014: 540, 542 in respect of these crimes.

5 Since the focus of this contribution is on the basis of the extension of the ambit of the crimes, the elements of the crimes are necessarily dealt with briefly.

6 As do Snyman 2014: 539 and Milton 1996: 765.

7 The preferred choice of Burchell 2016: 757 and Kemp *et al* 2018: 455.

incontestably more ancient. In the 1874 Cape case of *R v Reikert*,⁸ the Attorney General argued that “indictments had been laid and convictions obtained in this Colony for the crime of malicious injury to property” since 1837. Moreover, this term remains in frequent use to this day.⁹ The latter appellation is of much more recent vintage,¹⁰ although it has been used in some recent case law,¹¹ and has been described by Burchell as “more accurate” and “favoured by the courts”.¹² With respect, neither of these justifications is entirely compelling. “Injury” and “damage” are synonyms, after all,¹³ and it is simply not true that the courts favour the term “malicious damage to property”, as a brief overview of the case law reveals.¹⁴ The use of the term “malicious damage to property” may derive from the fact that it is a more direct translation from the Afrikaans term “saakbeskadiging”,¹⁵ that it is one of the crime-reporting categories used by the South African Police Service,¹⁶ that it is due to the inconsistencies of case reporting,¹⁷ or that it is due to legislative inconsistency.¹⁸

- 8 *Queen v Reikert* (1874) 4 Buch 142 at 143. For examples of early cases in other jurisdictions confirming the existence of the crime of malicious injury to property, see *Queen v Johannes* (1880–1881) 1 EDC 93; *Queen v Charlie Shangaan* (1883) 2 HCG 433; *Stewart & Willis v Rex* 1903 TS 456; *JJ Raw v Clerk of Peace, Pietermaritzburg County* (1884) 5 NLR 292.
- 9 See, for example, *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC); *S v Tonkin* 2014 (1) SACR 583 (SCA); *S v Phetoe* 2018 (1) SACR 593 (SCA).
- 10 First seen, it seems, in the reported case law in *R v Manuel* 1959 (1) SA 677 (C).
- 11 See, for example, *S v Thebus* 2003 (2) SACR 319 (CC); *S v Le Roux* 2010 (2) SACR 11 (SCA); *S v Mlungwana* 2019 (1) SACR 429 (CC).
- 12 Burchell 2016: 757. Kemp *et al* 2018: 455 does not indicate any reason for preferring this name for the crime.
- 13 In *S v Phetoe* 2018 (1) SACR 593 (SCA), the terms “malicious damage to property” (par 1) and “malicious injury to property” (par 18) appear to be used interchangeably. Similarly, in *S v Kola* 1966 (4) SA 322 (A) at 328B–C, the court (inaccurately) describes the conviction in *R v Mashanga* 1924 AD 11 as “malicious damage to property” rather than as “malicious injury to property”. Further, in the *Concise Oxford Dictionary of Current English*, “damage” is defined as “harm or injury” (my emphasis) and “injury” as “harm or damage” (my emphasis).
- 14 At its strongest, the most that can be said for Burchell’s argument is that the courts employ both formulations. See, for example, the cases cited in nn 9–11 *supra*.
- 15 See *Arnold v Terblanche* 1961 (4) SA 229 (T) at 231C–F.
- 16 *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC) par 44 n 32.
- 17 See, for example, *S v Fielies* 2006 (1) SACR 302 (C), where the term “malicious damage to property” is employed in the headnote, despite the term “malicious injury to property” being used (par 11) of the judgement. Similarly, in *S v Langa* 2010 (2) SACR 289 (KZP), the term “malicious damage to property” is used in the headnote, despite the term “malicious injury to property” describing the count in question in the judgement (par 1).
- 18 Whereas the primary procedural statutes, namely the Criminal Procedure Act 51 of 1977 (at s 262 and Schedules 1 and 7) and the Child Justice Act 75 of 2008 (at Schedules 1 and 2), along with the Prevention of Organised Crime Act 121 of 1998 (at Schedule 1) and the Immigration Act 13 of 2002 (at Schedule 2) all refer to “malicious injury to property”, the term “malicious damage to property” appears in other legislative instruments, such as the Game Theft Act 105 of 1991 (at s 7), the Firearms Control Act 60 of 2000 (at Schedule 2), the Private Security Industry Regulation Act 56 of 2001 (at the Schedule), and the Explosives Act 15 of 2003 (at Schedule 2).

It is submitted that there is no need for the use of differing terms to describe the crime. Although the word “damage” is perhaps more likely to be used in current speech than “injury”, this should not be determinative. While terms such as “burglary” and “blackmail” are frequently used in popular parlance and in the media to describe (respectively) the crimes of housebreaking with intent to commit a crime and extortion, there is no question of them replacing the nomenclature of the actual crimes. Moreover, even though “malicious damage to property” has crept into judicial and legislative usage, “malicious injury to property” was not only the original name for the crime, but has been used in all the leading judgements in which the law giving rise to the present crime has developed.¹⁹ As indicated, it is still employed today in the most important procedural statutes and in numerous judgements, and thus is used for purposes of this contribution.

A final comment on nomenclature: if it is indeed the purpose of the courts or the legislature to adjust the description of the crime for the sake of clarity, as well as to accord with modern discourse, then the qualifier “malicious” ought to be dispensed with. In signifying that the crime can only be committed where the accused acts out of ill-will or some improper motive, it only serves as a possible source of confusion,²⁰ and a violation of the principle of fair labelling, which requires that offences are so labelled so as to “ensure that the stigma (label) attaching to the accused by virtue of his conviction is a fair and accurate reflection of his guilt”.²¹ The word “malicious” offers no guidance to the court, which simply assesses whether the conduct is intentional.²²

The crime of malicious injury to property may be defined as “unlawfully and intentionally damaging the property of another”.²³ Alternative definitions accommodate the extension of the crime by adding that the crime may also be committed by the unlawful and intentional damage of the accused’s “own insured property, intending to claim the value of the property from the insurer”,²⁴ or of “property belonging to [the accused] in which [another person] has a substantial interest”.²⁵

There is unanimity among scholars as to the elements of the crime.²⁶ These fall to be listed concisely. First, the conduct must be *unlawful*, in that it does not fall

19 See, for example, *R v Malamu Nkatlapaan* 1918 TPD 424; *R v Mashanga* 1924 AD 11; *R v Maruba* 1942 OPD 51; and *S v Mtetwa* 1963 (3) SA 445 (N).

20 Snyman 2014: 541; Milton 1996: 772–773.

21 Kemp *et al* 2018: 23.

22 *R v Mashanga* 1924 AD 11 at 12; *R v Shelembe* 1955 (4) SA 410 (N) at 411D; *S v Mnyandu* 1973 (4) SA 603 (N) at 605H.

23 Milton 1996: 765; Burchell 2016: 757; De Wet 1985: 288; *R v Mashanga* 1924 AD 11 at 12.

24 Snyman 2014: 539.

25 Kemp *et al* 2018: 456, following *S v Mnyandu* 1973 (4) SA 603 (N) at 606A.

26 Milton 1996: 765ff; Burchell 2016: 757ff; De Wet 1985: 288–290; Snyman 2014: 539–541; Kemp *et al* 2018: 456–457; Hctor 2017: pars 383–387.

within the ambit of a justification ground (such as, for example, private defence, necessity, superior orders or consent), or be something that the accused is entitled to do in terms of the law of property or the provisions of a statute.²⁷ Secondly, it must cause *damage*, which incorporates any injury to property – including property with mere sentimental value – only limited by the application of the *de minimis non curat lex* rule.²⁸ The concept of damage for the purposes of the crime includes tampering with property in such a way as to require some cost or effort to restore it to its original form.²⁹ Thirdly, the damage must be inflicted on *property*. In this regard, it is clear that the property, whether movable or immovable, must be corporeal in nature, and must not be a *res nullius*.³⁰ The controversy in respect of this element has arisen in the context of whether the crime can ever be committed in relation to a *res sua*: can one ever be held criminally liable for malicious injury to one's own property? As Snyman correctly points out, in principle this appears indefensible,³¹ given that an owner is entitled to dispose of her property as she chooses. However, on the basis of the 1913 case of *R v Gervais*, it has been concluded that liability for damage to one's own property might follow where the purpose of damaging the property was to claim its value from the insurance company.³² Fourthly, the harm must be committed *intentionally*. As indicated above, it is not required that the intention be in any way qualified ("malicious"), and consequently this requirement can be satisfied by any form of intention, whether direct intention, indirect intention or *dolus eventualis*.³³

3 Defining arson

The crime of arson³⁴ may be defined as "unlawfully setting an immovable structure on fire with intent to injure another".³⁵ Snyman defines arson as being committed where a person unlawfully and intentionally sets fire to (i) immovable property belonging to another or (ii) to his own immovable insured property, in order to claim the value from the insurer.³⁶ However, as will be noted below, Snyman's definition does not encompass the authoritative ambit of the crime as set out in the recent Supreme Court Appeal decision of *S v Dalindyabo*.³⁷ A further definitional

27 Milton 1996: 769; Burchell 2016: 758.

28 Snyman 2014: 540; De Wet 1985: 288; Milton 1996: 770–771.

29 *R v Bowden* 1957 (3) SA 148 (T) at 150G.

30 Snyman 2014: 540; Burchell 2016: 759.

31 Snyman 2014: 540.

32 *R v Gervais* 1913 EDL 167. Damaging jointly-owned property can also fall within the ambit of the crime – Milton 1996: 772; De Wet 1985: 289.

33 Burchell 2016: 760; De Wet 1985: 289.

34 For a more extensive discussion of the nature, sources and elements of the crime of arson, see Hoctor 2013: 321.

35 Milton 1996: 777; Burchell 2016: 761.

36 Snyman 2014: 542.

37 *S v Dalindyabo* 2016 (1) SACR 329 (SCA).

option is that arson is committed “where X unlawfully and intentionally sets fire to the immovable property of Y, or to the immovable property of X in which Z has an interest”.³⁸ This definition is also deficient in certain aspects, as will be discussed below.

Despite the variation in definition, there is unanimity among scholars regarding the elements of the crime of arson (although there is not complete agreement as to the content of each of these elements). These constituent parts of the crime may be briefly listed. First, there must be a *setting on fire*. With regard to this element, the structure must actually be set on fire, and some part of the structure must burn and be damaged by the burning, even if the damage is slight.³⁹ It follows that damage caused by the smoke emanating from the burning does not suffice for liability for this crime.⁴⁰ Secondly, such burning must be of *immovable property*. The category of immovable property is not limited to buildings, and can include other forms of immovable property, such as, for example, a field of unharvested grain.⁴¹ Burchell expresses doubt that immovable property other than buildings (whether used for habitation or storage of property) will indeed be held to fall within the ambit of the crime in South African law,⁴² although he cites no case authority for this view. Thirdly, the setting on fire must be *unlawful*, that is, there must be no justification ground or statute that excludes the unlawfulness of the conduct.⁴³ Fourthly, mere negligence does not suffice for the crime. In order for liability to be established, the accused must have the necessary *intention*: he must intend to set the structure on fire, and he must intend to cause proprietary injury to another by means of the burning.⁴⁴ Such proprietary injury has typically been characterised as either the direct injury to another’s immovable property by burning, or the claim of the value of the damage inflicted on his own insured property from the insurance company.⁴⁵

Recent developments in case law have further clarified the ambit of the crime of arson. In the recent case of *S v Dalindyebo*,⁴⁶ the Supreme Court of Appeal was required to hear an appeal relating, *inter alia*, to convictions on three counts of arson (relating to three dwellings) in the High Court. The appellant, the then paramount chief of the AbaThembu tribe, argued in respect of two of the arson counts that the

38 Kemp *et al* 2018: 457.

39 Milton 1996: 782; Snyman 2014: 542.

40 Burchell 2016: 763.

41 De Wet 1985: 294; Snyman 2014: 542; and, *inter alia*, the Appellate Division cases of *R v Mavros* 1921 AD 19 at 21–22 and *R v Mabula* 1927 AD 159 at 161.

42 Burchell 2016: 763. Milton 1996: 784 apparently agrees with Burchell that this may well be the position in terms of South African practice, although he proceeds to state that if this is the case, it is “unnecessarily restrictive” (at 785).

43 Milton 1996: 781.

44 Snyman 2014: 542; Milton 1996: 786; De Wet 1985: 294; see, also, *R v Kewelram* 1922 AD 213.

45 As in *R v Mavros* 1921 AD 19.

46 *S v Dalindyebo* 2016 (1) SACR 329 (SCA).

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incidents of the burning of the houses, after removal of the complainants' personal belongings, were not simply a crude form of eviction, but took place at the behest of the community, which had taken severe umbrage at the wrongful conduct of the complainants.⁴⁷ Whilst the appellant admitted setting fire to these two houses,⁴⁸ he claimed that he was not involved in the conduct implicated in the third count of arson.⁴⁹

Despite the appellant's argument that, since the two houses set on fire were his own property, he could not be convicted of arson,⁵⁰ he was not only convicted on these counts, but also on the third count, on the basis of the available evidence.⁵¹ The trial court's rationale for this finding was that not only could the eviction by burning not be linked to a community decision,⁵² but further, in the light of the right to housing contained in the Constitution,⁵³ along with the decision of the Appellate Division in *S v Mavros*,⁵⁴ a person could be guilty of arson upon setting fire to his or her own property with the intent to injure the interests of another person.⁵⁵

On appeal, the Supreme Court of Appeal examined the defence raised by the appellant, namely that the destruction of one's own property does not amount to arson, and that the burned structures had acceded to the land owned by the appellant, thus confirming his ownership.⁵⁶ The court held that in the role of hereditary monarch the appellant exercised his title on behalf of and for the benefit of his subjects and his tribe, and that a proper understanding of the crime of arson allowed for only one conclusion: that the appellant had acted contrary to the law.⁵⁷ The court came to this finding, having examined⁵⁸ the cases of *R v Hoffman*; *R v Saachs & Hoffman*⁵⁹ and *R v Mavros*,⁶⁰ as well as the views of Milton⁶¹ and Hoorcar,⁶² and held that "one can be guilty of arson when one wrongfully and/or maliciously sets fire to one's own immovable property, either with the intention to injure another person or to defraud

47 *Idem* pars 28–29 and 34–35.

48 *Idem* par 6.

49 *Idem* par 39.

50 *Idem* par 6.

51 *Idem* pars 55–57. It was open to the appellant to argue that this house also belonged to him, but in this instance he simply denied any part in the burning.

52 *Idem* par 52.

53 Section 26 of the Constitution, 1996.

54 *R v Mavros* 1921 AD 19.

55 *S v Dalindyebo* 2016 (1) SACR 329 (SCA) par 58.

56 *Idem* par 61. The appellant did not dispute that the complainants had constructed their dwellings themselves, with materials that they had resourced (par 29).

57 *Idem* par 62.

58 *Idem* pars 63–66.

59 *R v Hoffman*; *R v Saachs & Hoffman* (1906) 2 Buch AC 342.

60 *R v Mavros* 1921 AD 19.

61 Milton 1996: 777ff.

62 Hoorcar 2013: 321.

another person”.⁶³ The convictions on the three counts of arson were consequently confirmed.⁶⁴

The *Dalindyebo* judgement confirms or clarifies a number of aspects of the crime of arson. First, the court confirmed the importance of the accused’s intention in the commission of arson. While the act of destroying one’s own property by fire may not be unlawful in itself, the intention with which the accused acts may transform an ostensibly lawful act into an unlawful act.⁶⁵ Similarly, in the crime of extortion, a lawful act may become unlawful, where the accused’s intention is unlawful. Thus, for example, in the case of *R v K*,⁶⁶ a policeman was convicted of extortion for suggesting to the complainant, who was being arrested for being involved in illegal gambling, that it would be better to pay a smaller sum of money at that point, than a larger sum at the police station. The complainant paid the smaller sum mentioned by the policeman, and the policeman was held to have extorted the money. As Milton states, the exercise of the pressure in extortion must be unlawful, and this means that “it must be unlawful to use that pressure *for the purpose for which X uses it*”.⁶⁷ Where the unlawful purpose is established, it is of no consequence that the act threatened is something that the accused has, in law, the power to do.⁶⁸ In the same way, where the accused burns his own property, but either foresees the possibility of physical harm to others, or does so with a view to claiming insurance, the crime of arson is committed.

Secondly, the judgement confirms that the crime can be committed by burning down one’s own immovable structure with the intention of claiming the value from insurance. It seems that this aspect of the crime derives from English law, specifically section 3 of the Malicious Damage Act of 1861, at least on the basis that this provision established liability where a person set fire to a house or building with intent to injure or defraud.⁶⁹ There are no traces of this aspect of the crime in Roman-Dutch law, and Innes CJ’s extension of the crime in *Mavros*, by way of reliance on writers who emphasise that the crime exists to punish those with the intent to prejudice another by burning any building, has been criticised by De Wet in particular, as “a forced and unjustified interpretation of what the writers said”⁷⁰ in order to bring South African law in line with the English law.⁷¹ However, the Supreme Court of Appeal has authoritatively confirmed the approach adopted in *Mavros*.

63 *S v Dalindyebo* 2016 (1) SACR 329 (SCA) par 64.

64 *Idem* par 66.

65 This accords with the dictum in *R v Mavros* 1921 AD 19 at 22, namely that “the essence of the crime is the intent with which the act is committed”.

66 *R v K* 1956 (2) SA 217 (T).

67 Milton 1996: 687.

68 *R v N* 1955 (2) SA 647 (T) at 652H.

69 Milton 1996: 785.

70 The original text: “n [G]eforseerde en ongeregverdigde uitleg van wat die skrywers gesê het.”

71 De Wet 1985: 294. See, also, Snyman 2014: 542, who agrees that it is better to punish such conduct as fraud, rather than as arson.

Thirdly, the *Dalindyebo* judgement establishes a new perspective on the crime of arson. Whereas arson has always been categorised as a crime against damage to property⁷² or human habitation,⁷³ the clarification of the ambit of the crime in *Dalindyebo* means that it also encompasses the protection of the interests of the community. As noted, arson has previously been seen as merely a species of malicious injury to property, which has led to its independent existence as a crime being called into question.⁷⁴ However, the court's confirmation that the crime can be committed in respect of one's own property – where the accused at least foresees the possibility that in setting the fire damage could result to another's property, and continues in his course of conduct – distinguishes this crime from malicious injury to property, which, by definition,⁷⁵ involves damaging the property of *another*.⁷⁶

4 The historical development of malicious injury to property

The destruction of property was punished in terms of the Lex Aquilia as *damnum injuria datum*, a *delictum privatum*.⁷⁷ Thus, damage to property could give rise to a civil action aimed at damages, while still retaining a criminal aspect; the Lex Aquilia being partly penal and partly reipersecutory.⁷⁸ However, it seems that the *actio legis Aquiliae* was losing its penal character by the time of Justinian, and unlike other *delicta privata*, *damnum injuria datum* never developed into a *crimen extraordinarium*.⁷⁹ Milton states that *vis* was the most important Roman law antecedent for the crime of malicious injury to property, “for texts dealing with the *lex Julia de vi* make it clear that many cases of malicious injury to property were dealt with under that statute”.⁸⁰ In making this assessment, Milton refers⁸¹ to the cases of *JJ Raw v Clerk of Peace, Pietermaritzburg County*⁸² and *AJ Bruyns v Regina*,⁸³ as well as referring to D 48 6, entitled *Ad Legem Iuliam de vi publica* (with regard to the Lex Julia on *vis publica*).

72 Milton 1996: 763, 778; Snyman 2014: 539, 542; De Wet 1985: 286, 290.

73 Burchell 2016: 761.

74 *Ibid.*

75 Milton 1996: 765; Snyman 2014: 539; Burchell 2016: 757.

76 The crime of malicious injury to property has also been extended to include damage inflicted to one's own insured property, and intending to claim the value of the property from the insurer (Snyman 2014: 539), but this extension of the crime, which is the focus of this piece, is debated and criticised below.

77 De Wet 1985: 286; Milton 1996: 767.

78 De Wet 1985: 286; Milton 1996: 767. See, further, Zimmermann 1990: 969ff.

79 De Wet 1985: 286.

80 Milton 1996: 767.

81 *Ibid.*

82 *JJ Raw v Clerk of Peace, Pietermaritzburg County* (1884) 5 NLR 292.

83 *AJ Bruyns v Regina* (1901) 22 NLR 75.

The *Raw* case arose out of the shooting of a dog at the house of the complainant, and the court unhesitatingly classified the charge as one of “violence”, given that “all use of arms or weapons for spoliation of property, seems to, be included under this head”.⁸⁴ It is, however, clear that not all instances of malicious injury to property are related to the use of a weapon, and it is consequently doubtful whether *vis* is indeed the most likely antecedent of malicious injury to property. In the *Bruyns* case, the court affirmed that the cutting down of a fence does indeed amount to a crime, as “such an act comes within the Roman Law definition of the crime of violence”.⁸⁵ However, it is by no means clear that this statement is correct. The conduct that is described in D 48 6 (relating to public violence) and D 48 7 (relating to private violence)⁸⁶ certainly has application to the common-law crime of public violence,⁸⁷ along with, *inter alia*, robbery⁸⁸ or even arson, where this is committed by a group of people.⁸⁹ However, there is no indication that destruction of property that does not occur violently, falls within the ambit of criminal liability for *vis*.⁹⁰

In the light of the fact that *vis* does not appear to provide a general foundation for the crime of malicious injury to property, it is submitted that the better approach is that favoured by De Wet, which avers that while there was no crime of malicious injury to property as such in Roman law, the earliest antecedents for this crime are based on the Lex Aquilia.⁹¹ The absence of a clear crime dealing specifically with intentional damage to property in Roman law not unexpectedly gave rise to the lack of such a crime in Roman-Dutch law.⁹² Instead, it seems that the “conception of the crime as known in English law” was introduced into South African law through the decided cases,⁹³ and that the emergence of the crime can be traced to case law, rather than to any common-law source. The English authority in question, undoubtedly influential though generally unacknowledged, took the form of the Malicious Damage Act of 1861,⁹⁴ “a rather primitive piece of legislation which penalized

84 *JJ Raw v Clerk of Peace, Pietermaritzburg County* (1884) 5 NLR 292 at 293.

85 *AJ Bruyns v Regina* (1901) 22 NLR 75 at 77.

86 Robinson 1995: 29 makes the point that the problem with the Digest is to decide why the compilers produced two titles, but then “failed to differentiate between the two concepts”.

87 See Milton 1996: 73.

88 D 48 6 3 5.

89 D 48 6 5 *pr.*

90 See *R v Ndaba* 1942 OPD 149 at 153. Moreover, Van den Heever J points out that cases of *vis* typically involved concerted action by a crowd. Once again, such conduct may result in liability for malicious injury to property, but this would not be a necessary feature of the crime.

91 See, also, *R v Maruba* 1942 OPD 51 at 54 for further support for this view.

92 *Idem* at 55; *S v Solomon* 1973 (4) SA 644 (C) at 648A–C; Milton 1996: 767; De Wet 1985: 287–287. Hence, it may be submitted, the reliance by the court in *Queen v Reikert* (1874) 4 Buch 142 on Matthaëus 47 3 is misplaced, for, as De Wet 1985: 287 points out, this work simply refers to a number of instances where criminal liability could follow for damage to property, rather than establishing that intentional damage to property was generally regarded as criminal.

93 *R v Maruba* 1942 OPD 51 at 55. 94

(24 & 25 Vict c 97).

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numerous ways of causing damage ‘unlawfully and maliciously’⁹⁵. The prolixity of this Act is evident in its attempt to include all manner of damage within its scope. The acts of damage criminalised in this statute included setting fire to all manner of buildings or goods therein;⁹⁶ causing damage to buildings or goods therein by explosive substances;⁹⁷ causing damage to buildings or machinery in the course of a riot;⁹⁸ causing of damage to buildings by tenants;⁹⁹ destruction of machinery or goods in the manufacturing process;¹⁰⁰ causing damage or destruction to corn, trees and vegetable productions;¹⁰¹ damaging fences;¹⁰² setting fire to or causing damage in a mine;¹⁰³ causing damage to sea or river banks, or to fixtures on canals or rivers;¹⁰⁴ causing damage to ponds;¹⁰⁵ causing damage to bridges, viaducts and toll bars;¹⁰⁶ causing damage to railway carriages and telegraphs;¹⁰⁷ causing damage to works of art;¹⁰⁸ causing damage to cattle or other animals;¹⁰⁹ setting fire to or damaging ships;¹¹⁰ sending letters threatening damage;¹¹¹ making gunpowder to commit offences;¹¹² and causing any other damage not already specifically mentioned in the Act.¹¹³ It is clear that the Act encompasses the conduct criminalised in the South African common-law crimes of arson and malicious injury to property.

It is particularly noteworthy that the Act specifically extended the criminalisation of the burning and other damage caused, to include damage caused with the intent to defraud another person. The Act specifically provides for this in relation to the

95 Milton 1996: 767–768.

96 Sections 1–8.

97 Sections 9–10.

98 Sections 11–12.

99 Section 13.

100 Sections 14–15.

101 Including setting fire to crops or stacks of corn (ss 16–18); destroying hopbinds (s 19); destroying trees and shrubs (ss 20–22); and destroying fruit and vegetables (ss 23–24). See, also, s 53 (damage to trees).

102 Section 25.

103 Sections 26–29.

104 Sections 30–31. The obstruction of navigation is also targeted in these provisions.

105 Section 32.

106 Sections 33–34.

107 Sections 35–38.

108 Section 39.

109 Sections 40–41.

110 Including setting fire to a ship (s 42); setting fire to a ship so as to prejudice the owner or underwriter (s 43); attempting to set fire to a vessel (s 44); placing gunpowder near a vessel with intent to damage it (s 45); damaging ships otherwise than by fire (s 46); exhibiting false navigational signals (s 47); removing or concealing buoys or other sea marks (s 48); and destroying wrecks or any articles belonging thereto (s 49).

111 Section 50.

112 Section 54.

113 Sections 51–52.

setting on fire of a house or other building listed in section 3,¹¹⁴ and in relation to the setting on fire of a ship or vessel in section 43, by specifically referring to insurance underwriters.¹¹⁵ Moreover, and importantly for the crime of malicious injury to property, the Act specifically extended its protection to persons who are in possession of the property that they damage, and who act with either intent to injure or defraud.¹¹⁶

Every Provision of this Act not herein-before so applied shall apply to every Person who, with Intent to injure or defraud any other Person, shall do any of the Acts herein-before made penal, although the Offender shall be in possession of the Property against or in respect of which such Act shall be done.

It was further provided that an intent to injure or defraud particular persons need not be stated in any indictment.¹¹⁷

While the existence of the crime of malicious injury to property was acknowledged by South African courts from at least the first half of the nineteenth century,¹¹⁸ an

114 “Whosoever shall unlawfully and maliciously set fire to any House, Stable, Coach-house, Outhouse, Warehouse, Office, Shop, Mill, Malthouse, Hop-oast, Barn, Storehouse, Granary, Hovel, Shed, or Fold, or to any Farm Building, or to any Building or Erection used in farming Land, or in carrying on any Trade or Manufacture or any Branch thereof, whether the same shall then be in the Possession of the Offender or in the Possession of any other Person, *with Intent thereby to injure or defraud any Person*, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, – or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement, and, if a Male under the Age of Sixteen Years, with or without Whipping” (emphasis added).

115 “Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any Ship or Vessel, with Intent thereby to prejudice any Owner or Part Owner of such Ship or Vessel, or of any Goods on board the same, or any Person that has underwritten or shall underwrite any Policy of Insurance upon such Ship or Vessel, or on the Freight thereof, or upon any Goods on board the same, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, – or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement, and, if a Male under the Age of Sixteen Years, with or without Whipping.”

116 Section 59.

117 In terms of s 60: “It shall be sufficient in any Indictment for any Offence against this Act, where it shall be necessary to allege an Intent to injure or defraud, to allege that the Party accused did the Act with Intent to injure or defraud (as the Case may be), without alleging an Intent to injure or defraud any particular Person; and on the Trial of any such Offence it shall not be necessary to prove an Intent to injure or defraud any particular Person, but it shall be sufficient to prove that the Party accused did the Act charged with an Intent to injure or defraud (as the Case may be).”

118 As noted above, the Attorney General stated in *Queen v Reikert* (1874) 4 Buch 142 at 143 that indictments had been laid and convictions obtained in the Cape Colony since 1837. The indictment was upheld in this case. The existence of the crime was further confirmed in other nineteenth-century judgements, namely in the Cape in the case of *Queen v Enslin* (1885) 2 Buch AC 69 at 71; in the Eastern Districts in *Queen v Johannes* (1880–1881) 1 EDC 93; in Natal in *JJ Raw v Clerk of Peace, Pietermaritzburg County* (1884) 5 NLR 292; and in the Transvaal in *Gourlie & Verkouteren v The State* (1896) 3 Off Rep 68.

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authoritative definition of the crime was first stated in the Appellate Division decision of *R v Mashanga*, where the crime was described as the “intentional wrongful injury to the property of another”.¹¹⁹ This definition was followed in numerous cases thereafter,¹²⁰ and is still authoritative today.¹²¹ Indeed, as reflected earlier, it forms the basis of the definition employed in all the leading texts.¹²² How then did it come to be that the definition of the crime of malicious injury to property has been extended to include causing damage to one’s own insured property, with the intent to claim the value of the damage from the insurer?

The basis for this development may be found in *R v Gervais*,¹²³ decided in the Eastern Districts Local Division about a decade before the Appellate Division decision in *Mashanga*. The accused was charged with malicious injury to property, on the basis that he had set on fire a wood-and-iron structure, which he used as a café, with the intent of burning the structure, and with the further intent “to defraud a certain insurance company”. Counsel for the accused excepted to the indictment on the grounds that the facts alleged did not constitute the crime charged, as there could be no malicious injury to one’s own property where the harm was self-inflicted.¹²⁴ It was noted by counsel for the accused that there was authority for the burning of one’s own property to constitute arson, and that the case of *Hoffman*¹²⁵ – which related to arson – did indeed involve the application of the crime to an insurance claim.¹²⁶ It is evident that counsel was putting to the court that, whatever the position was in respect of *arson*, the charge before the court related to *malicious injury to property*, where there was no authority to similarly expand the ambit of the crime. The recorded response of Sheil J in the judgement seems instructive: referring to the case of *Queen v Enslin*,¹²⁷ the judge remarked that “[i]f the indictment in this case had been for arson, exception would probably have been taken to that also”. With respect, this does not address counsel’s argument at all. The *Enslin* case turned on the fact that the court did not regard the accused’s burning of stacks of barley belonging to the complainant as arson, as it was held that the stacks of barley could not be

119 *R v Mashanga* 1924 AD 11 at 12.

120 See, for example, *R v Blore* 1934 OPD 62 at 63; *Woodburn v Rex* 1944 NPD 1 at 2; *R v Mandatela* 1948 (4) SA 985 (E) at 991; *R v Ncetendaba* 1952 (2) SA 647 (SR) at 650H; *R v Bhaya* 1953 (3) SA 143 (N) at 148F–G; *R v Pope* 1953 (3) SA 890 (C) at 894D–E; *R v Mohale* 1955 (3) SA 563 (O) at 564D–E; *R v Maritz* 1956 (3) SA 147 (GW) at 151F; *R v Bowden* 1957 (3) SA 148 (T) at 150B–C; *R v Mtshiselwe* 1957 (3) SA 313 (E) at 314H; *S v Kgware* 1977 (2) SA 454 (O) at 455D–E.

121 De Wet 1985: 287–288; Milton 1996: 765; Snyman 2014: 539.

122 See n 23 *supra*.

123 *R v Gervais* 1913 EDL 167.

124 *Idem* at 168.

125 *R v Hoffman*; *R v Saachs & Hoffman* (1906) 2 Buch AC 342.

126 *R v Gervais* 1913 EDL 167 at 168.

127 *Queen v Enslin* (1885) 2 Buch AC 69, cited in *R v Gervais* 1913 EDL 167 at 168.

regarded as immovable property (or a house) for the purposes of an arson conviction. The court in *Enslin* held that the appropriate indictment was one of malicious injury to property, which it later held that the accused could be charged with.¹²⁸ Whether exception would have been taken to a charge of arson on the facts before the court in *Gervais* is not of any consequence, and is merely of academic interest. The question is whether the facts of the present case constituted the crime of malicious injury to property. Nevertheless, without prosecuting counsel being called upon, and without any citation of any authority, Sheil J ruled, in a single-sentence judgement, that the exception must in his opinion be overruled, although his possible recognition of the somewhat tenuous basis for the ruling is reflected in the statement that “the point will be reserved in case of conviction for the consideration of the Court of Criminal Appeal”.¹²⁹ The accused was, however, acquitted,¹³⁰ and so there was no need to revisit the question of the extension of the ambit of the crime of malicious injury to property.

As the synopsis of the judgement makes plain, there is no significant precedent created by the *Gervais* decision, at least not in respect of the crime of malicious injury to property. The judgement in *Gervais* has, however, been cited as authority for the proposition that in order for a conviction for *arson* to ensue, the property that has been burnt must be immovable,¹³¹ and that “a movable structure can in everyday parlance be a building”.¹³² In the first edition of Gardiner and Lansdown,¹³³ the *Gervais* judgement was cited as authority for the proposition that the burning of movable property does not constitute arson,¹³⁴ and as authority for the proposition that where damage is done to his own insured property by the accused, who subsequently claims from the insurer, this could constitute *arson* (where the damage is done by burning).¹³⁵ The judgement is cited in relation to the same propositions in the sixth and final edition of this work, once again in the context of arson.¹³⁶ Writing in 1949, De Wet and Swanepoel discuss *Gervais* in the context of malicious injury to property, but are extremely critical of the effect of the court overruling the exception: that the

128 *Queen v Enslin* (1885) 2 Buch AC 119.

129 *R v Gervais* 1913 EDL 167 at 168.

130 *Ibid.*

131 *S v Motau* 1963 (2) SA 521 (T) at 522H. The *Gervais* decision also arose in argument before the Appellate Division in *R v Mavros* 1921 AD 19 and in *R v Mabula* 1927 AD 159, although it was not mentioned in the judgements of these cases, which both dealt with appeals against convictions for arson. Similarly, the *Gervais* decision was mentioned in argument, but not the judgement, in *R v Paizee* 1916 SR 130.

132 *R v Innocent* 1966 (2) SA 362 (R) at 363F–G.

133 Gardiner & Lansdown 1919: *passim*.

134 *Idem* at 1163.

135 *Idem* at 1165.

136 Lansdown, Hoal & Lansdown 1957: 1780, 1783 respectively.

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ambit of the crime would be expanded to include damage to one's own property along with an insurance claim.¹³⁷

The *Gervais* judgement was, however, cited in one case that dealt exclusively with malicious injury to property, namely the 1963 Natal case of *S v Mtetwa*.¹³⁸ The court reasoned, citing Gardiner and Lansdown, that, for a conviction of malicious injury to property, "it is not necessary that the complainant should be the full and unencumbered owner of the property injured", but that what is required "is that the intentional and unlawful act be an injury to the rights of another person in and to that property".¹³⁹ The citation from Gardiner and Lansdown relates to the proof of the intent requirement for this crime,¹⁴⁰ rather than seeking to define the ambit of the crime.¹⁴¹ The court then proceeded to cite the *Gervais* case as authority for the proposition that "[j]ust as a person may be guilty of theft of property of which he is owner (e.g. of pledged property belonging to him) so too he may be guilty of malicious injury to property of which he is, in law, the owner but in which other persons have rights".¹⁴²

The court (per Harcourt J) relied on two further cases in support of this approach.¹⁴³ In *Kohrs v Rex*, the accused was convicted of malicious injury to property where he set three huts alight, even though there was no proof that the huts were owned by the complainant.¹⁴⁴ Harcourt J cited the statement of the court¹⁴⁵ (per Jarvis AJ) to the effect that "property" is capable of covering "physical objects as well as rights of all kinds in and to physical objects". This statement is, however, not bolstered by reference to any sources, or further elaborated upon. The cited statement

137 De Wet & Swanepoel 1949: 323–324 argue that this approach is clearly wrong, and that it constitutes indefensible reasoning – the fact that property is insured does not entail that it belongs to someone else. Moreover, they reason, even if, for example, one kills one's own insured cattle, that in itself cannot be malicious injury to property. A later insurance claim may well be criminal, but then on the basis of fraud. These arguments are carried through to the fourth and last edition of this work – see De Wet 1985: 288–289.

138 *S v Mtetwa* 1963 (3) SA 445 (N).

139 *Idem* at 449D–E.

140 "Where, from the nature of an intentional and unlawful act, it would appear to any reasonable person doing it that its result would be injury to the rights of another person, the court will infer that the accused contemplated such injury and therefore that the act was done intentionally" (Lansdown, Hoal & Lansdown 1957: 1786). Whilst it bears noting *en passant* that this statement is, in itself, problematic, this has no bearing on the present argument.

141 In fact, Lansdown, Hoal & Lansdown (1957: 1784) indicate that the term "injury" bears a restricted meaning, and does not encompass every infringement of a right. They state that the meaning of injury ("the loss or destruction of ... property") "is obviously distinct from that wider sense in which the word is used in law to denote an unlawful infringement of a right".

142 *S v Mtetwa* 1963 (3) SA 445 (N) at 449E–F.

143 *Idem* at 449F–H.

144 *Kohrs v Rex* 1940 NPD 11.

145 *Idem* at 14.

of Jarvis AJ continued, indicating that “property” includes “any goods which may reasonably be believed to be in that structure”,¹⁴⁶ before asserting that it was not in dispute that the appellant “had good grounds for believing that there was personal property of the complainant in one or more of the huts”.¹⁴⁷ Hence the presence of the personal property was apparently deemed probative of the complainant having some right, albeit unspecified, over the huts. The second case, *Njokweni v Rex*,¹⁴⁸ held that the accused could be convicted of malicious injury to property for damaging his customary-law wife’s personal property. Despite the general custom that women were incapable of private ownership, it was held that customary law could recognise that the “personal wearing apparel” of the wife could be regarded as her own property.

The conviction in *Mtewa* was confirmed on the basis that the cattle destroyed by the accused were the personal property of the complainant,¹⁴⁹ although the court added, perhaps *ex abundanti cautela*, that even if this were not so, the rights that the complainant had in the property were sufficient to found a conviction of malicious injury to property based on the killing of the cattle.¹⁵⁰ The approach apparently adopted in *Gervais* – to accord protection in terms of the crime of malicious injury to property to the rights of an insurer – can, it is submitted, be distinguished from the *Mtewa* case and the cases cited therein that deal with this question. In none of these cases did the damaged or destroyed property belong to the accused: the accused in *Kohrs* was merely a lessee of the farm on which the destroyed huts were situated;¹⁵¹ the personal property in question in the *Njokweni* case was held to belong to the complainant in terms of customary law; and the claim by the accused in *Mtewa* to have rights to the cattle he destroyed were firmly rejected by the court.¹⁵²

Could it nevertheless be argued that the crime of malicious injury to property protects rights other than ownership, such that the crime can be committed by the owner in respect of his own property? It is submitted that, just as with theft,¹⁵³ the crime of malicious injury to property is committed by the owner in relation to his own property, provided that the complainant who is in possession of the property has a right of retention over the property. The rationale for this, as with *furtum*

146 *Idem* at 14–15.

147 *Idem* at 15.

148 *Njokweni v Rex* 1946 NPD 400. The correctness of this decision was doubted in *S v Swiegelaar* 1979 (2) SA 238 (C).

149 *S v Mtewa* 1963 (3) SA 445 (N) at 451D–E. The court further remarked that the witnesses in the case all accepted in terms of local custom that the cattle had passed into the ownership of the complainant (at 451H).

150 *Idem* at 451G–H.

151 *Kohrs v Rex* 1940 NPD 11 at 13.

152 The court further held that not only did the accused not have any right to the cattle, but it was quite clear that he knew that he did not have any such right (*S v Mtewa* 1963 (3) SA 445 (N) at 452C–G).

153 Snyman 2014: 492; Milton 1996: 604.

possessionis, is that “[o]ur criminal law, intended to preserve order and keep the peace, cannot allow *de facto* possession to be disturbed with impunity except by one who himself has a claim as of right against the possessor”.¹⁵⁴ It follows that, just as “where possession or custody is accompanied by some interest or right to retain such as against the person depriving the possessor or custodian of such possession or custody, the unlawful deprivation amounts to theft”,¹⁵⁵ the same rationale would apply to the violation of the possessory right of the complainant where the owner damages his own property.

This conclusion accords with the statement in *Mtewa* (cited above) drawing an analogy between theft of pledged property that belongs to him and a conviction for malicious damage to property by an owner of property “in which other persons have rights”. However, while *Gervais* is cited in support of this proposition, the rights contemplated and protected in the crimes of theft and malicious injury to property are real rights, predicated on the unlawful interference in the possession of the complainant, who by virtue of, at least, a right of retention, is entitled to enforce his right against anyone else, including the owner.¹⁵⁶

On the other hand, the right of the insurer is a personal right, enforceable against the insured party, and based on the contractual relationship between the insurer and the insured party. While the insurer’s right of salvage in the case of total loss of the insured property amounts to a real right,¹⁵⁷ it seems clear that at the point at which liability is assessed in terms of the extension of the ambit of malicious injury – damaging one’s own insured property with the intent to claim its value from the insurer – there is no question of a real right on the part of the insurer. In short, the crime of malicious injury to property does not encompass the protection of “rights of all kinds in and to physical objects”, as per the dictum in *Kohrs* (cited above), but rather the injury to the rights of another person to the property in question must, in accordance with the analogous rationale and practice of the law of theft, be limited to real rights. As reflected in the law of theft, there is a key difference between actually depriving a person of his or her control over property and the violation of someone’s personal right in terms of a contract. *Gervais* cannot be supported on this basis.

In the case of *S v Mnyandu*,¹⁵⁸ a further definition of malicious injury to property was offered, namely the unlawful and intentional damaging of a thing belonging to somebody else or in which another person has a substantial interest.¹⁵⁹ While the first part of the definition derives from *R v Mashanga*, which is cited as a source in

154 *R v Twala* 1952 (2) SA 599 (A) at 606.

155 *R v Rudolph* 1935 TPD 79 at 84.

156 See the discussion, in the context of *furtum possessionis*, in *R v Janoo* 1959 (3) SA 107 (A) at 110–112.

157 On the right of salvage, see Reinecke, Van Niekerk & Nienaber 2013: pars 84–87.

158 *S v Mnyandu* 1973 (4) SA 603 (N).

159 This is the translation provided in the headnote of the case of the dictum, in Afrikaans, at 606A: “[D]ie wederregtelike en opsetlike beskadiging van ’n saak van iemand anders of waarin ’n ander ’n wesenlike belang het.” The author in Kemp *et al* 2018: 456 favours this definition.

the text,¹⁶⁰ the court does not indicate the source for the extension of the *Mashanga* definition, so as to include within the crime damage to property in which another person has a “substantial interest”. It is submitted that this definition can best be clarified and contextualised within the framework of the protection afforded the possessor who holds a *ius retentionis* over property, and thus that the reference to a “substantial interest” should refer to the holder of such a possessory right.

Even though *Gervais* is not consistent with this approach, it is evident that, despite De Wet and Swanepoel’s disdain for the approach adopted there, the majority academic view is that the ambit of the crime of malicious injury to property has been expanded to include damaging one’s own property with a view to claiming its value from the insurer. Following De Wet and Swanepoel’s concerns, in 1970, Hunt concluded that, on the basis of the *Gervais* decision, and on the basis that the courts are “unlikely to differ from the rule which applies in arson”, the definition of malicious injury to property must be taken to have been expanded.¹⁶¹ While critical of this development, Snyman agrees that the definition has been expanded, for the same reasons set out by Hunt.¹⁶² Both Burchell¹⁶³ and Milton¹⁶⁴ acknowledge the authority of the *Gervais* case, although neither author develops the argument any further. In the absence of any more recent authoritative decision in this regard, this is then the *status quo*.

5 The historical development of arson

Despite there being a number of Roman law texts dealing with fire-setting (*incendium*),¹⁶⁵ it is doubtful whether arson was ever regarded as an independent crime with its own characteristics.¹⁶⁶ It follows that classification of this type of criminal conduct in Roman law is difficult. It is submitted that there is value in Milton’s view that arson was considered as an offence against both property and the safety of the community, and was punished severely especially where the arson endangered the community.¹⁶⁷

160 At 606A, where Lansdown, Hoal & Lansdown 1957: 1785 and Hunt 1970: 784 were also cited. It seems that all three sources were cited in support of the court’s approach to intention, rather than in relation to the definition of the crime.

161 Hunt 1970: 779.

162 Snyman 2014: 540. See, also, Kemp *et al* 2018: 456–457, who also accepts that the owner of property who inflicts damage to his own property can be liable for the crime in these circumstances.

163 Burchell 2016: 759.

164 Milton 1996: 772 n 75.

165 Some as early as the Twelve Tables – see D 47 9 9.

166 De Wet 1985: 290.

167 Milton 1996: 779. See D 48 8 1*pr*, where intentional fire-setting, which falls into the category of either danger to property or danger to others, is punished under the *lex Cornelia de sicariis*. The greater severity of punishment for urban fire-setting is reflected in D 47 9 12, D 48 19 28 12 and D 48 8 10, and the more severe punishment of some types of fire-setting in certain provinces is reflected in D 48 19 16 9. Liability could also follow where a group of persons committed arson in the context of public violence: see D 48 6 5*pr*.

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Despite the Roman-Dutch writers apparently regarding arson as both a crime against property and as a crime against the community, these dual interests did not result in separate crimes, but rather in one single crime (*brandstichting*).¹⁶⁸ However, Carpzovius had a more detailed treatment of *brandstichting*, where he indicated that there is no distinction between the locality or the type of building for the purposes of liability.¹⁶⁹ He further stated that the damage caused by burning need not be extensive to trigger liability;¹⁷⁰ that the motive for the burning is irrelevant;¹⁷¹ and that the crime may be committed by someone who sets his own house on fire intending to prejudice someone else.¹⁷² Moorman also engaged in a detailed discussion of *brandstichting*, taking the view that the crime is directed against property.¹⁷³ The crime is complete as soon as damage to the building ensues as a result of the fire, and the extent of the damage is not determinative in respect of liability.¹⁷⁴ Moreover, Moorman stated that the crime is committed by someone who, in order to prejudice someone else, sets fire to his own house.¹⁷⁵

Van der Linden classified the crime of *brandstichting* as a crime against the state, thus highlighting the value of the safety of the community, and defined the crime in the following terms:¹⁷⁶

This crime is committed when a person with the wilful intention of injuring others, has set fire to buildings or other immovable property, whereby such property has caught fire and damage has been occasioned.

Milton's synopsis of the views of the Roman-Dutch writers is very useful:¹⁷⁷ that in respect of the crime of *brandstichting* there had to be intentional fire-setting with the intent to injure another,¹⁷⁸ that some damage caused by the fire had to be established,¹⁷⁹ and that even setting fire to one's own house suffices for liability where the accused's

168 Milton 1996: 779. The crime does not receive systematic treatment among writers, with discussion of the elements of the crime often being rather superficial. Writers, such as Voet *ad* 47 9 5 at 200; Van Leeuwen *ad* 4 38 10 at 492; Matthaeus 48 5 6 and 48 5 7 14; and Van der Keessel 48 8 25 and 26, limit their treatment of the crime to the Roman law texts, as well as to the punishment imposed for the offence at the time of writing.

169 Carpzovius ch 35.

170 *Idem* ch 35 10, indicating that even minimal damage ('zeer geringe schade') will suffice.

171 *Idem* ch 35 15. 172

Idem ch 35 11–12.

173 Moorman 3 1 7 stated that the crime can be committed in respect of "Huizen, Pakhuizen, Schuren, Wynperssen en diergelyk gebouw".

174 *Idem* 3 1 8.

175 *Idem* 3 1 10.

176 Van der Linden 2 4 7. The severity of the crime is determined by the locality in which it occurs and the danger that results from it.

177 Milton 1996: 779.

178 Van der Linden 2 4 7; Van der Keessel 48 8 25.

179 Moorman 3 1 1, 7 and 8; see, also, Carpzovius ch 35 10.

intention in doing so was to harm another.¹⁸⁰ While the writers did not agree as to the nature of the property that was protected by *brandstichting*, Van der Linden's statement that it was required that the burning occur in respect of "buildings or other immovable property"¹⁸¹ was authoritatively adopted by the Appellate Division.¹⁸²

In *Queen v Enslin*,¹⁸³ the court refused to entertain the notion that "arson" was equivalent to the Roman law crime of *incendium* or to the Roman-Dutch law crime of *brandstichting*, instead adhering to the English common-law conception of the crime.¹⁸⁴ The case of *R v Hoffmann; R v Saachs & Hoffmann*, however, saw the equation of "arson" and *brandstichting*, and the consequent application of Roman-Dutch antecedents (instead of English common-law sources, in terms of which the setting on fire of one's own property was not a crime):¹⁸⁵

Where a person attempts to set fire to the house of another person he is guilty of an attempt to commit arson, whether there is any intent to fraudulently obtain insurance money or not. Where a person burns his own house, the question whether he is guilty of "brandstichting", or arson, must, under our law, depend upon the further question whether the deed was done with the object of injuring others ... If the object be to defraud an insurance company the intent would certainly be to injure another so as to bring the offence within the definition.

By aligning with Roman-Dutch rather than English authority, the court provided for the South African crime to be broadened to include the burning of one's own building in certain circumstances. This indeed took place where an accused was charged with burning down his own building with intent to defraud an insurance company in *R v Paizee*,¹⁸⁶ and it was held by the court, approving the dictum in *Hoffmann*, that he was properly charged with arson.¹⁸⁷

Shortly thereafter, the Appellate Division, in the case of *R v Mavros*, was called upon to assess the ambit of the crime of arson.¹⁸⁸ In this case, similarly to *Paizee*, a shopkeeper was convicted of arson, in that he set fire to his store with the intention

180 Moorman 3 1 10; Carpzovius ch 35 11–12.

181 Van der Linden 2 4 7.

182 *R v Mavros* 1921 AD 19 at 21–22.

183 *Queen v Enslin* (1885) 2 Buch AC 69. It was argued before the court that the "malicious burning of the barley stacks of another" constituted arson, given that "arson" in essence shared the content of its common-law antecedents, which would include burning movables, such as barley stacks. Given the lack of unanimity between the common-law sources regarding the type of property included in the crime of arson, the court preferred to rely on the English approach.

184 See the discussion of English law in Milton 1996: 780.

185 *R v Hoffmann; R v Saachs & Hoffmann* (1906) 2 Buch AC 342 at 346–347. The court relied on Van der Linden 2 4 7 in this regard. The English Malicious Damage Act of 1861 was, however, amenable to this interpretation – see s 3.

186 *R v Paizee* 1916 SR 130 at 131, where Hopley J takes the view that the crime of arson includes within its ambit the Roman law crime of *incendium* and the Roman-Dutch crime of *brandstichting*.

187 *Ibid.*

188 *R v Mavros* 1921 AD 19.

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to defraud an insurance company. Innes CJ noted the variability of the Roman-Dutch writers as to whether *brandstichting* would cover intentionally burning a building with intent to injure or defraud another.¹⁸⁹ However, Carpzovius¹⁹⁰ and Moorman¹⁹¹ were cited¹⁹² as authority for the view that *brandstichting* includes the setting on fire of one's own house with intent to burn one's neighbour's house. The court held that the key aspect for these writers is the intention to injure or destroy the building of another.¹⁹³ The court concluded that given that *brandstichting* and "arson" are synonymous terms, the accused was correctly convicted of arson.¹⁹⁴

This matter arose for consideration once again some years later, in the 1987 case of *S v Van Zyl*,¹⁹⁵ which involved an appeal against a conviction of arson where the appellant had burnt down a house belonging to himself, which was inhabited by the complainant. The conviction was contested on the basis that the common-law crime of arson did not extend to a person burning down his own immovable property. The court held that Van der Linden's passage cited above was amenable to the interpretation that *brandstichting* could also be committed where a person, with intent to cause damage to another, sets fire to his own building.¹⁹⁶ Having examined the judgement in *Mavros*, and the sources cited therein (notably Carpzovius and Moorman), the court held that it was correctly decided.¹⁹⁷ The court therefore confirmed that arson can be committed where a person sets fire to his own immovable property with the intention to prejudice the property interests of another person.¹⁹⁸

189 *Idem* at 22. Innes CJ notes that a number of writers only dealt with the matter in general terms, referring, *inter alia*, to Matthaeus, Kersteman and, notably, Van der Linden. However, this was explicable on the basis that fire insurance was yet to come into being, according to the Chief Justice. As the court noted, the English common law of arson would not be applicable to these facts, although an application of the English Malicious Damage Act of 1861 would indeed result in liability (at 21).

190 Carpzovius ch 36.

191 Moorman 3 1 10.

192 *R v Mavros* 1921 AD 19 at 22.

193 *Idem* at 22–23.

194 *Idem* at 23. Despite the court overtly seeking to apply the Roman-Dutch law, De Wet 1985: 294 has criticised this judgement for unacceptably imposing a forced and unjustified interpretation on the writers in order to bring South African law in line with the English Malicious Damage Act of 1861, and opined that the conduct concerned should simply be prosecuted as fraud. For a similar approach, see Snyman 2014: 542. This point was further affirmed in *R v Mabula* 1927 AD 159 at 161; and in *R v Mataung* 1953 (4) SA 35 (O) at 36.

195 *S v Van Zyl* 1987 (1) SA 497 (O).

196 *Idem* at 502I–503A. The court also found that further indications in Van der Linden 2 4 7 in support of this interpretation are the example relating to sentence, namely that where a whole town or community was placed in danger, this would render the crime more serious, and the focus on the intention of the arsonist to commit the harm even where such intention was not achieved.

197 *S v Van Zyl* 1987 (1) SA 497 (O) at 503D–504J.

198 *Idem* at 505C. See Labuschagne 1987: 340.

It has further been held in *S v Solomon*,¹⁹⁹ correctly, it is submitted, that the crime of *conflagratio* (the unlawful and intentional creation of a fire dangerous to the community) was unknown in our law.²⁰⁰ The court pointed out that the Roman law crime of *incendium* protected not only the interests of life and property, but also that of community safety.²⁰¹ It follows that the crime of arson, which derives from the Roman-Dutch crime of *brandstichting* (and which in turn is derived from the crime of *incendium*) therefore includes in its ambit the protection of life, property and community safety.

6 Rationale and structure of discussed crimes

Having examined the current state of the South African law in respect of the crimes of arson and malicious injury to property, and the closely related developmental paths that have given rise to the current manifestations of these crimes, an analysis of the present position may be attempted. In terms of the rationale for each of the crimes, it is clear that the crime of malicious injury to property is correctly classified as a crime against property,²⁰² and more particularly as a crime involving damage to property.²⁰³ Arson has traditionally been similarly categorised. However, these crimes require more detailed scrutiny. In this part of the contribution, the discussion of arson, which has seen more extensive development and application in South African law, precedes that of malicious injury to property, to facilitate comparison.

6 1 Arson

The recent authoritative judgement of the Supreme Court of Appeal in *Dalindyebo*, in approving the approach of the Appellate Division decision in *Mavros*, has confirmed that arson not only protects property, but also functions to protect the community against the danger associated with fires. This rationale may be masked by the rationale involving protection of property where the burning is of immovable property belonging to another; however, the rationale of protection of property plays no role where the object of the arson is the accused's own property. As was stated in *Paizee* –

[i]f a person has a dislike to his house, he has the right to burn it down if he chooses, but there is one other condition before he can claim to be perfectly guiltless of any crime, and that is in

199 *S v Solomon* 1973 (4) SA 644 (C).

200 Followed in *S v Van Zyl* 1987 (1) SA 497 (O) at 504. See, also, Richings 1974: 149. However, see De Wet 1985: 295.

201 *S v Solomon* 1973 (4) SA 644 (C) at 649A–B.

202 See Burchell 2016: 685

203 See De Wet 1985: 286; Milton 1996: 763; Snyman 2014: 539.

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doing so he is doing no damage or harm to anyone else. The moment he does wilful damage to any other person by such act, then he commits the crime of arson.²⁰⁴

The tension in these differing rationales underpinning a single crime of arson has been noted by Hunt:²⁰⁵

The crime of arson compounds elements of protection of property and of the community. If an ideal code were drafted, it might well be found desirable to split arson into two crimes, one crime concerned with protection of the community, and the other with protection of property.

This statement has met with judicial approval in *S v Solomon*²⁰⁶ and *S v Van Zyl*.²⁰⁷ It is therefore evident that the crime of arson cannot simply be regarded as being a particular form of malicious injury to property,²⁰⁸ but rather that, whilst these crimes may well overlap, they are not the same, as they protect differing interests. As is evident from its developmental path, malicious injury to property has never been regarded as a crime protecting the interests of the community, as does arson in particular factual scenarios.

If one accepts the validity of the distinction between malicious injury to property and arson, then this inevitably impacts on the question whether it is valid to extend these crimes to include intending to claim from insurance the value of self-inflicted damage to insured property. Despite the principled objections of De Wet and Snyman, the extension of the crime of arson to incorporate the intention to commit insurance fraud is well established, and any doubts that the approach adopted in *Mavros* would be followed have been categorically dismissed in *Dalindyebo* (albeit without any discussion directed towards this particular issue). In his judgement in *Mavros*, Innes CJ notes that the Roman-Dutch writers were “neither as definite nor as unanimous as one would wish” insofar as the question whether the common-law crime of *brandstichting*, the antecedent of arson, covered the act of “wrongfully and maliciously setting fire to one’s own house with intent to injure or defraud another”.²⁰⁹ However, pacified by the fact that these texts were written before the advent of fire insurance, and emboldened by, in particular, the statements of the writers Carpzovius and Moorman to the effect that a person who sets fire to his own building “with no other purpose than that the conflagration may destroy the house of his neighbour” commits *brandstichting*,²¹⁰ Innes CJ concluded as follows:²¹¹

204 *R v Paizee* 1916 SR 130 at 131.

205 Hunt 1970: 767.

206 *S v Solomon* 1973 (4) SA 644 (C) at 649D–F.

207 *S v Van Zyl* 1987 (1) SA 497 (O) at 505A–B.

208 As held in *S v Motau* 1963 (2) SA 521 (T) at 523D–E; see, also, Burchell 2016: 761.

209 *R v Mavros* 1921 AD 19 at 22.

210 *Ibid.*

211 *Idem* 22–23.

The authority of the last two writers [Carpzovius and Moorman] certainly supports the view that to set fire to one's own house with intent to burn the house of one's neighbour is *brandstichting*. And the intention to injure or destroy the building of another is what they point to as an incriminating element. Now the essence of crime is the intent with which the act is committed; and it is a very short step from the conclusion reached by Carpzovius and Moorman to the position that the owner of a house who sets fire to it wrongfully, maliciously and with intent to injure or defraud an insurer, commits the crime of *brandstichting*.

It is not entirely clear why the court favoured the views of these authors, as opposed to, for example, Van der Linden, whose work served as authority for the *Hoffman* decision, which was in turn relied upon by the court in *Paizee* (to which Innes CJ referred). It also seems plain that Carpzovius (along with Moorman, who relied extensively on Carpzovius's work in his own discussion of the law²¹²) was referring to the aspect of arson that protects the community against the danger of fire. The new rule extending the ambit of arson to include the protection of the insurer in its contractual relationship with the accused, in respect of the structure burnt by the accused, is thus founded on the aspect of the crime that seeks to protect the community from being harmed by the fire itself, rather than from any consideration underscoring the protection of private property. In short, the *Mavros* decision to recognise the criminalisation of setting fire to one's own property with the intent to harm the property of another is well established and uncontroversial. This approach simply recognises the danger that a fire poses to the habitation and well-being of those in its vicinity. However, to translate that principle into protection of an insurer in terms of the crime of arson, particularly where the crime of fraud in any event finds application, is considerably more shaky in terms of both logic and Roman-Dutch jurisprudence.

Whatever the principled problems, and, it is submitted, misapplication of the Roman-Dutch writings on the point,²¹³ this issue is merely of academic importance insofar as the law of arson is concerned, where the ambit of the crime has been conclusively settled by *Dalindyebo*, and where there is strong precedent for the extension of the crime. In policy terms, this misshapen proscription is arguably the price we must pay for having a broadly framed crime that not only protects property interests, but also the interests of the community against the profound and pernicious damage that can be wrought by fire. In this regard, as argued above,²¹⁴ arson has developed, like extortion, into a crime where the intention with which the accused acts will serve to convert an ostensibly lawful act into an unlawful one. In this way, the crime provides the broadest protection against possible threats to community safety; even if the fire that has been set to the accused's property does not spread to

212 Burchell & Hunt 1970: 13 point out that Moorman's work relied heavily on Carpzovius and Matthaeus.

213 Similar criticism can be levelled at the cases of *Hoffman* and *Paizee*.

214 See text accompanying nn 65–68 *supra*.

his neighbours, liability will follow because of the centrality of the intent element in respect of the crime.²¹⁵

In the wake of the *Dalindyebo* judgement, it seems that we have the following legal position in respect of arson: where the setting on fire occurs in respect of the property of another, the standard definition of the crime pertains, namely the unlawful and intentional setting on fire of an immovable structure belonging to another. However, where the burning takes place in respect of the accused's own property, and the basis of criminalisation is the protection of the community from the danger created by the accused, the intention of the accused becomes very important. Since the burning of one's own property is not in itself unlawful, it is the intention with which the accused sets his own immovable structure on fire that transforms what would ordinarily be a lawful act into an unlawful act. In this regard, liability for this form of arson functions in the reverse manner to the justification ground of *negotiorum gestio*. In respect of *negotiorum gestio*, the accused's *prima facie* unlawful act is regarded as *lawful* on the basis of his intention to act in the interests of the other party.²¹⁶ With regard to this form of arson, the ostensibly lawful conduct is rendered *unlawful* by the accused's intention to harm others through the burning (or at least, in the form of *dolus eventualis*, foreseeing the possibility of harm occurring to another, and reconciling himself to the risk of this occurring). The predominance of intention in determining unlawfulness in relation to the form of arson protecting community interests would also suggest a difference in the test for attempt. Arson in relation to the property of another would be assessed on the basis of the standard objective "commencement of the consummation" test,²¹⁷ which assesses whether the accused has gone beyond the stage of preparation into the stage of consummation, in the context of the burning of another's immovable structure.²¹⁸ However, the assessment of whether the form of arson that protects community interests has been attempted may involve a more subjective application of this test, with a stronger focus on what the accused intends, as opposed to his actual progress towards causing physical harm.

Insofar as the specific form of the crime of arson pertaining to insurance fraud is concerned (which, as we have seen, derives from the form of the crime protecting

215 See *R v Mavros* 1921 AD 19 at 22, where the court states that "the essence of crime is the intent with which the act is committed".

216 Burchell 2016: 248 defines *negotiorum gestio* as occurring where "a person voluntarily performs an act in the interest of another with the intention of benefiting that other, but without the latter's knowledge or consent". There are objective constraints on this justification ground: the defence is only available where the consent of the other party could not be obtained before the accused acted; there must be reasonable grounds at the time of acting for believing that the other party would indeed consent; and the intrusion should not be excessive (Snyman 2014: 127–128).

217 See Burchell 2016: 551; Snyman 2014: 279; Hoorntje 2015: 363.

218 See, for example, *R v Schoombie* 1945 AD 541 for the application of this test leading to a conviction of attempted arson.

community interests), it may be noted that this crime is in theory easy to commit, in that the elements of the crime are satisfied at the moment of setting on fire, provided the intent to commit insurance fraud is present. Nevertheless, the crime would seem to be difficult to prove. The probative difficulties relate to establishing the intention of the accused at the time of the commission of the act. Finding that the accused intended to set fire to the property of another typically does not present much difficulty, and in relation to the danger that setting one's own property alight holds for others, this too could generally be easily inferred. However, proof that the accused intended insurance fraud at the time of setting his own property alight presents more problems. The mere fact that the property is insured cannot suffice, and until the insurance claim is submitted, there would typically be little evidential foundation of the accused's criminal intent.

6 2 Malicious injury to property

While the extension of the ambit of the crime of arson has been accepted, whatever doctrinal qualms may be raised, it is submitted that the position in respect of malicious injury to property should be very different, for the following reasons.

First, as has been discussed, neither the case of *Gervais*, nor any of the decisions that have cited *Gervais* as authority, provide an authoritative basis for the extension of the ambit of malicious injury to property. Instead, the most formidable logic for extending the crime to include the intention to claim from an insurer the value of insured property that the accused (the insured party) damaged himself, is the doctrinal proximity of the crime of arson. This seems evident from the comments of Hunt that, whatever the illogicality of the extension of the ambit of malicious injury to property, "the matter seems to be settled for malicious injury to property by the arson cases",²¹⁹ and Snyman's comment that in *Mavros*, the Appellate Division "held that conduct similar to that in *Gervais* does amount to arson (which is but a species of malicious injury to property)" and that since *Mavros* is an appeal court decision, "it is unlikely that the courts will depart from it".²²⁰ As stated above, a better view is that malicious injury to property and arson are distinct crimes, and therefore, despite their similarities, they are not bound to the same developmental path. If this point is accepted, given the weak authority in support of the *Gervais* line, the courts would not be bound by strong precedent, and would be at liberty to depart from this approach.

Secondly, there is no evidence in either the common-law sources of the crime, or in any of the jurisprudence before South African courts, that the crime of malicious injury to property was ever intended to protect community interests. Where destruction

219 Hunt 1970: 779.

220 Snyman 2014: 540.

of property takes place during violent protests, for example, charges of malicious injury to property acknowledge the harm to proprietary interests, while the typical accompanying charges of public violence are directed at protecting the interests of the community.²²¹ It can hardly be argued that to fraudulently claim the value of one's own insured property damaged by self-inflicted harm constitutes a crime against community interests, although it clearly amounts to fraud. The extension to the crime of arson, flowing from a broader protection of not only property, but also community protection, should therefore not apply to malicious injury to property. Fire-setting is clearly an activity that may have consequences for the wider community; not so damage to the property of another individual. To base the extension of the ambit of malicious injury to property on the wider conception of criminality in the context of arson, is simply incorrect.

Thirdly, it is important to consider a variety of constitutional aspects that come into play in the context of criminalisation. It is essential that the blunt power of the state, imposed through the operation of the criminal law, is duly restrained by considerations that operate to protect the individual. A central concern is that of fair labelling, which seeks to ensure that "widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law", and that where people "reasonably regard two types of conduct as different, the law should try to reflect that difference".²²² The operation of this principle helps to ensure proportionality in terms of the response to law-breaking, assisting the educative or declaratory function of the law and ensuring fairness, in that offenders are "labelled and punished in proportion to their wrongdoing".²²³ While the basis of both arson and malicious injury to property – damage to physical property and real rights in property – may be said to be in accordance with the principle of fair labelling, the extraneous punishment of fraud under arson and malicious injury to property seems a far cry from what people would reasonably expect to reside within the ambit of these crimes. Again, despite this concern, it is unlikely that the definition of arson will be altered in the teeth of authoritative endorsement in *Mavros* and *Dalindyebo*, but there is no reason on grounds of policy (as the crime of fraud covers this form of wrongdoing) or principle (as argued above) why the crime of malicious injury to property should sustain this ill-fitting extension.

221 Burchell 2016: 777 classifies public violence, "the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions that are intended to forcibly disturb the public peace or security or to invade the rights of others", as a crime against community interests, while Milton 1996: 71 categorises public violence as a crime against public order.

222 Ashworth & Horder 2013: 77. This concern was noted earlier with regard to the use of the word "malicious" in the nomenclature of the crime.

223 *Ibid.*

7 Concluding remarks

It is therefore submitted that the definition of the crime of malicious injury to property should be “unlawfully and intentionally damaging the property of another, or one’s own property in respect of which another person has a right of possession or special interest”.²²⁴ Furthermore, it is submitted that since the extension to the crime based on the *Gervais* case and the uncritical identification with the crime of arson are mistaken, the definitions that seek to encompass such extension ought not to be followed.²²⁵

In respect of arson, for the reasons discussed, the definition of this crime has been confirmed in the *Dalindyebo* case, rendering further detailed analysis thereof redundant. The court cites Milton’s definition with approval:²²⁶ “[a]rson consists in unlawfully setting an immovable structure on fire with intent to injure another.” Nonetheless, it is submitted that the further qualifying statement of the Supreme Court of Appeal in *Dalindyebo* requires some modification. The court, somewhat curiously, states that the crime is committed where a person “wrongfully and/or maliciously” sets fire to his own immovable property with the requisite intention. This is problematic. “Wrongfully” should really be “unlawfully”,²²⁷ and “wrongfully” is not an alternative term for “maliciously”, which in its own right creates terminological difficulties, not least in the context of the crime of malicious injury to property.²²⁸ The definition in *Dalindyebo* serves to correct the definition offered by Snyman, who, while including setting the property of another alight, and setting his own property alight in order to claim the value from the insurer, does not include setting one’s own immovable property alight with the intention to harm another as a result of the burning (the basis of the decision on the facts in *Dalindyebo*).²²⁹ The definition of Kemp *et al* is also incomplete. It correctly covers the unlawful and intentional setting alight (by “X”) of the property of another (“Y”), and further includes the unlawful and intentional setting alight of “the immovable

²²⁴ This definition amplifies the definition favoured by scholars, such as Milton, Burchell and De Wet, and by the leading case of *R v Mashanga* – see n 23 *supra* – to explicitly indicate that the crime also protects the possessor’s right of possession (in the same way as does the crime of theft).

²²⁵ It is submitted that the second leg of Snyman’s (2014: 539) definition (namely intentionally and unlawfully damaging one’s “own insured property, intending to claim the value of the property from the insurer”) ought to be dispensed with. The definition in Kemp *et al* 2018: 456 is more acceptable, but it is submitted that including “property belonging to himself in which [another person] has a substantial interest” also does not avail, as this begs the question as to what a “substantial interest” entails.

²²⁶ *S v Dalindyebo* 2016 (1) SACR 329 (SCA) par 63.

²²⁷ Whereas “wrongfulness” refers to the causing of legally reprehensible or unreasonable prejudice in the context of the law of delict (see Neethling, Potgieter & Visser 1999: 35), all crimes require “unlawfulness” (see Hكتور 2017: par 37).

²²⁸ See the text accompanying nn 20–22 *supra*.

²²⁹ Snyman 2014: 542.

property of X in which Z has an interest".²³⁰ However, what about the setting alight of X's own property with the intent of damaging the property of another?

And so, having followed developmental paths from somewhat indirect and unclear Roman and Roman-Dutch law origins, through the influence of English law in the form of the Malicious Damage Act of 1861 – nowhere directly acknowledged, but no doubt influential – the crimes of arson and malicious injury to property continue to play an important role in modern South African criminal law. Based on its twin rationales of protection of property and protection of the community, arson operates as a broadly defined crime of serious import. The focus on the accused's state of mind in the application of this crime underscores the policy concerns of the gravity and danger associated with intentional fire-setting, not only for the person directly associated with the structure, but also for the community generally. Malicious injury to property, on the other hand, for all its significance as a primary basis for protection of property, has no focus on the protection of the community. Primarily as a result of its perceived (and in part, actual) doctrinal proximity to arson, and not based on common-law sources or solid judicial precedent, malicious injury to property has been regarded as having been extended in its ambit, in the same way as has arson. However, as a clearly distinguishable crime, based on its own rationale, this is neither a necessary nor a welcome development. It is submitted that fraudulent wrongdoing should be punished as fraud, and that the only development of the crime that should be welcomed is the recognition of the protection of the rights of the possessor of property.

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²³⁰ Kemp *et al* 2018: 457.

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CRIMINALISATION OF DAMAGE TO PROPERTY

United Kingdom

Malicious Damage Act, 1861 (24 & 25 Vict c 97)

RACE, ETHNICITY, DISCRIMINATION AND VIOLENCE IN “COLOUR-BLIND” FRANCE

Kamban Naidoo*

ABSTRACT

The Universalist ideals of the French Revolution, which proclaimed that all men are born equal, inspired a principle that crystallised during the nineteenth-century Republican period. This principle asserts that racial and ethnic differences have to be minimised. Race and ethnicity are, therefore, theoretically not recognised in France. The only recognised distinction in France is between a French citizen and a foreigner. As a result of this principle, a vestige of the late nineteenth century, any laws, government policies, data and research that are based on race or ethnicity, are prohibited in France. There is consequently a paucity of comparative research and data on racial and ethnic groups in France. Adherence to this principle has also stymied honest debates about racism and racial discrimination in France. Since the twentieth century, however, there has been a tendency to depart from this principle, as evidenced by several government policies and practices that tacitly recognise race and ethnicity. A departure from the principle is also evident in several laws that make explicit reference to race and ethnicity. Such laws include anti-discrimination laws, laws that prohibit incitement to racial violence and laws that are akin to hate-crime laws in the Anglo-Saxon world. This contribution examines some of these laws and government policies, as well as the historical circumstances that led to their enactment and implementation. It focuses on migration to France from the

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mid-twentieth century, and on the social and economic conditions of migrants. A departure from the Universalist principle, which espouses the non-recognition of race and ethnicity, was inevitable, since by the mid-twentieth century, France had become a racially and ethnically-diverse country, in which racial and ethnic discrimination and violence were widespread. In the conclusion, some consideration is given to the relevance of the principle that espouses the non-recognition of race and ethnicity, and which inspired the adoption of a “colour-blind” assimilationist model in present-day France.

Key words: France; race; ethnicity, Universalist principles; discrimination; violence

1 Introduction

Prior to the French Revolution, French citizenship was restricted to certain classes of men who enjoyed full political and economic rights.¹ It is widely accepted that the French Revolution inspired the Universalist ideals of the equality of all men and a common French citizenship, which recognized no hierarchy or differentiation based on class, race or origin.² These Universalist ideals may be traced to *La Déclaration des Droits de l'Homme et du Citoyen de 1789*,³ which is regarded as a solemn declaration of the natural, inalienable and sacred rights of man.⁴ From the late eighteenth century onwards, a principle which dominated French government policies was the minimisation of racial and ethnic differences,⁵ in order to establish a united nation.⁶ The post-Revolution French Republican model was based on the notion of a nation-state which emphasised universalism, detribalisation, allegiance

1 Tilly 1995: 227.

2 Dubois 2000: 19; Schor 2001: 44; Tilly 1995: 228; and Brubaker 1990: 380.

3 *La Déclaration des Droits de l'Homme et du Citoyen de 1789* available at <http://www.egifrance.gouv.fr/Droit-français-Constitution/Déclaration-des-droits-de-l'homme> (accessed 1 Apr 2019) and hereinafter referred to as the Declaration of the Rights of Man and of the Citizen of 1789. It should be noted that as a French second-language speaker, all French to English translations in this submission are the writer's own.

4 Article 1 of the Declaration of the Rights of Man and of the Citizen of 1789 proclaims that all men are born free and remain free and equal in law. However, Schor 2001: 47 and Brubaker 1990: 380, point out that women and slaves, who constituted a large segment of the French population, were left out of the 1789 Declaration. Slavery was abolished in French colonies in 1848. Women in France were permitted to vote in the mid-twentieth century.

5 The writer would like to note that the term “race” in this submission refers to the inherited physical and biological characteristics of human beings, which include skin colour, facial features and hair texture. These characteristics have often been used to deny rights and privileges to certain groups. While the term “ethnicity” may include common racial origins, it is a wider concept than race since it refers to shared historical origins, a common culture and language, and to shared religious values.

6 Body-Gendrot 2008: 93; Schor 2001: 58; and Barou 2014: 644.

to the nation-state and the ideals of the Revolution.⁷ This model was based on a notion of citizenship that, theoretically, took no cognisance of race and ethnicity, since all humans were regarded as belonging to one race.⁸ According to the present French Constitution, the French Republic is a single and indivisible entity, where all citizens are equal before the law without distinction as to race, origin or religion.⁹ Racial and ethnic groups are not recognised in French law since such recognition could fragment the unity of the state.¹⁰

France has consequently been described as a “colour-blind” state where laws, government policies, research and statistics that are based on race and ethnicity are prohibited.¹¹ A 1978 law prohibits the recording and storage of any data that may reflect the racial or ethnic origins of French citizens.¹² The only officially recognised distinction is between a French citizen and a foreigner.¹³ A common French adage is therefore, *Il n’y a que des citoyens*.¹⁴

Notwithstanding the non-recognition of race and ethnicity in France, several French laws make explicit reference to race and ethnicity – an ostensible departure from the Universalist principle of the non-recognition thereof.¹⁵ The French Constitution, for example, originally referred to the principle of equality of all citizens before the law without distinction as to origin, race or religion.¹⁶ Reference to race and ethnicity also exists in a 1972 law against racism and in a 1990 law against racism, anti-Semitism and xenophobia. In 2003 and 2004, laws were passed that allow for the imposition of enhanced penalties on offenders convicted of specific crimes motivated, *inter alia*, by the race or ethnicity of the victim.¹⁷ Several

7 The post-Revolution French nation-state thus subjugated the languages and cultures of several ethnic minorities in France including Basque, Catalan, Breton, Corsican and Occitan. See Weil & Crowley 1994: 112; and Safran 1984: 461.

8 Ndiaye 2005: 97; Dobbin 2001–2002: 835; Bonnet 2014: 1278; and Safran 1984: 447.

9 Article 1 of the French Constitution of 1958. As will become apparent in the conclusion of this contribution, this article of the French Constitution was amended in 2018.

10 Diémert 2005: 112.

11 Vourch, De Rudder-Paurd & Tripier 1996: 146; Möschel 2011: 1656; Bleich 2000: 52; and Dobbin 2001–2002: 833.

12 *La loi Informatique et Libertés no. 78–17 du 6 janvier 1978* prohibits the recording and storage of personal data that reflects race, religious affiliation, political beliefs, trade union membership and health status, unless it is with the express consent of the person concerned or in exceptional cases allowed by law. The provisions of this law have been codified in art 226-19 of the French *Code Pénal*, hereinafter referred to as the French Penal Code.

13 Bleich 2000: 52 and Vourch, De Rudder-Paurd & Tripier 1996: 146. Consequently, policies that specifically protect ethnic-minority groups and provide for racial quotas, such as the policy of affirmative action, are rejected in France. See, further, Möschel 2011: 1656; and Costa-Lascoux 1994: 372.

14 Which is translatable into English as “There are only citizens”. See, further, Pager 2008: 380.

15 Costa 1992: 342; and Bird 2000: 407.

16 Article 1 of the French Constitution of 1958 (see n 9) *supra*.

17 These laws, which allow for the imposition of enhanced penalties, may be regarded as the equivalents of hate-crime laws in France. Hate-crime laws specifically criminalise conduct motivated by prejudice towards personal victim characteristics, such as race and ethnicity. Once convicted, perpetrators of such conduct could be subjected to enhanced or aggravated penalties. See, further, the UK Crime and Disorder Act of 1998 (c. 37), which is a British hate-crime law.

government policies and initiatives also take cognisance of race and ethnicity, albeit not explicitly. Such departure from the principle of the non-recognition of race and ethnicity was necessary in order to accommodate the problems of discrimination and racial and ethnic violence in a country that had become increasingly diverse from the mid-twentieth century.¹⁸ These laws and government policies, and the historical circumstances that led to their enactment and implementation, form the central focus of this submission. In this regard, particular emphasis has been placed on migration to France in the twentieth century and on the social and economic conditions of migrants. The relevance of the Universalist principles in twenty-first century France is considered in the conclusion. The submission commences, however, with a brief consideration of some of the negative consequences of the non-recognition of race and ethnicity in France.

2 The negative consequences of the non-recognition of race and ethnicity in France

While the French “colour-blind” approach is regarded as a strategy to counter racism,¹⁹ France’s colour-blindness in relation to race and ethnicity has had several negative consequences. Black Africans,²⁰ in particular, have become invisible as a social group in France.²¹ The limited available data about ethnic and minority groups in France has had a negative effect on comparative studies focusing on ethnic and racial groups.²²

Moreover, many French social scientists, writers and academics frequently deny the existence of racism in France.²³ According to Waughray, the French have often claimed that “[their] record in matters of race and colour [is] better than the British and compared with that of the United States ... it is excellent”.²⁴ A similar belief is

18 Laplanche-Servigne 2009: 60.

19 Bonnet 2014: 1278; and Paradies 2016: 6.

20 The use of the term “Black African” is deliberate, since other peoples from the African continent, particularly North-African Arabs and Berbers, who are not “African” in a racial sense, were also subjected to French colonial rule.

21 Ndiaye 2005: 91 laments the non-recognition of racial and ethnic groups and maintains that it has contributed to the absence of studies on Black Africans as a social group in France. He opines that it is easier to find research on African Americans in France than on the history of Africans in France.

22 Roché 2007: 510; Möschel 2011: 1656. Pager 2008: 376 writes that it is impossible to assess whether crime-prevention and -enforcement strategies are formulated according to the ethnic composition of a specific area. According to Bruce-Jones 2007–2008: 439, the non-recognition of race and ethnicity makes it difficult to assess racism and to identify indirect and institutional racism in France. He is also of the opinion that the non-recognition of race inhibits all truthful and open discourse about racism in France.

23 Schneider 2008: 140.

24 Waughray 1960: 70.

evident in accounts of its colonial history,²⁵ where it is sometimes proclaimed that unlike other European colonial powers, the French upheld the principle of racial equality in their colonies.²⁶ However, Cohen's study of French colonial history reveals a dominant tradition of racial inequality, particularly in relation to French colonies in Africa.²⁷

Shortly after the Napoleonic Wars, during which the old French Colonial Empire was liquidated and French domination in Europe ended, most of France's old colonial possessions reverted to French rule by the Treaty of 20 November 1815.²⁸ The French people and military felt the need to avenge France's wartime humiliations by expanding French influence beyond Europe, to Africa and the non-European world.²⁹ French colonial policy was premised upon a strategy that would export the French language and culture, thereby integrating and assimilating all colonial subjects and turning "foreigners into Frenchmen".³⁰ French colonisers of the nineteenth century justified colonialism on the basis of a civilising mission to uplift inferior races.³¹

The conquest of Algeria in 1830 marked the beginning of a new French Colonial Empire in North Africa that was followed by colonial expansion in West Africa and Central Africa.³² Algeria was colonised in order to increase French influence and power in the Mediterranean, to restore French prestige and to convert Algerians to Christianity.³³ However, France's assimilationist colonial strategy, which required renouncing one's culture, language and customs, was resisted in Algeria – a predominantly Muslim nation.³⁴ At the time of French colonial occupation, the Algerian population included indigenous Berber peoples, Arabs, Jews and a Black African minority.³⁵ The French colonisers implemented a hierarchical system in Algeria that considered Berber and Jewish Algerians closer to the French, and easier to assimilate into French schools and to recruit as migrant labourers to mainland France.³⁶ According to Silverstein, Arabs were described in French colonial discourse

25 It should be borne in mind that the French Empire included colonies in Africa, the Caribbean, South America, India, the Indian Ocean and Indochina.

26 Cohen 1980: ix–x.

27 *Ibid.*

28 *Idem* at 263; and Priestley 1966: 1–14.

29 Cohen 1980: 263 opines that French colonial ambitions were motivated to some extent by French traders and officials in Africa, and by geographers, explorers and missionaries.

30 Lloyd & Waters 1991: 51.

31 Griffiths 2006: 453; and Conklin 1998: 420. According to Conklin, the upliftment of inferior races often masked the true motives of French colonialism, which were "greed, national pride ... and the quest for power" (at 421).

32 Priestley 1966: 15–29.

33 Cohen 1980: 270–276.

34 Lloyd & Waters 1991: 52. 35

Priestley 1966: 16–17.

36 Dobbin 2001–2002: 836; Duncan 1965: 264; and Silverstein 2008: 8. The Berbers were not, however, eligible to acquire French citizenship. Algerian Jews were regarded as more assimilable and allowed to acquire French citizenship from 1870.

as lazy, hostile, violent and intellectually inferior.³⁷ Arabs were thus regarded as unassimilable into the French nation and ineligible for French citizenship.

The establishment of the French West African Federation in 1895 with its headquarters in Dakar, Senegal, marked the commencement of French colonial expansion in West Africa.³⁸ Cohen opines that the attitudes of French colonial officials, administrators and military officers towards Africans were influenced by the old myths and stereotypes perpetuated in French literature and popular thought, which portrayed Africans as lazy, savage, heathen and in need of European guidance.³⁹ The establishment of a system of native justice in French West Africa maintained two parallel systems of courts. In the cities, courts were presided over by professional French magistrates. However, in native courts, French administrators, who had no legal training, were permitted to try serious crimes and to act as prosecutor, judge and investigator. This was clearly a violation of the principle of the separation of powers.⁴⁰ Notwithstanding the abolition of slavery in France in 1848, African colonial subjects were subjected to forced labour in order to build railways, roads and public works.⁴¹ The policy of forced labour often included the use of the elderly and children, who could be assaulted for their refusal to work.⁴² Labourers were often not allocated any food rations.⁴³ While African colonial subjects were initially regarded as ineligible to acquire French nationality, in 1912 a naturalisation law permitted a select group of West Africans to acquire French citizenship.⁴⁴ Some evidence suggests that certain groups of Africans were accorded special privileges. One such group was the Fulahs of West Africa, who were accorded a privileged “White status” by nineteenth-century French colonisers in order to have racial allies in Africa.⁴⁵

Many of the myths and beliefs about racism and the colonial period resonate in the belief that France is a country without racial prejudice and that, once assimilated,⁴⁶ one would be treated as an equal.⁴⁷ Schor,⁴⁸ however, disparages the French

37 Silverstein 2008: 6.

38 Conklin 1998: 419. From their colonial headquarters in Dakar, the French administered the territories of Guinea, Côte d’Ivoire, French Sudan, Dahomey, Niger and Mauritania.

39 Cohen 1980: 283.

40 Conklin 1998: 433–436.

41 Griffiths 2006: 527; and Conklin 1998: 437. According to Conklin, the system of forced labour that was implemented in French West Africa violated the spirit of Republican ideals.

42 Griffiths 2006: 527.

43 See *ibid*, who refers to the practice of some labourers buying themselves out of forced labour by the payment of fees or taxes that placed an additional financial burden on them.

44 Conklin 1998: 434–435. According to the law of 1912 (*Arrêté No. 907 promulguant en Afrique Occidentale Française (AOF) le décret du 25 mai 1912 fixant les conditions de l’accèsion des indigènes de l’AOF d’accéder à la qualité de citoyen français*), the African colonial subject had to be morally upright, have no criminal record, no history of bankruptcy, possess a certificate of primary school studies and possess evidence of payment of taxes.

45 Prum, Deschamps & Barbler (eds) 2007: 5.

46 Castles 1995: 297–298; and Brubaker 1990: 387–388.

47 Stovall 1993: 55.

48 Schor 2001: 56.

assimilationist model since it compels foreigners to renounce “their otherness” in order to become French. According to Body-Gendrot,⁴⁹ while allegations of racism in France are commonly met with some degree of scepticism, this attitude is gradually changing.

3 A brief overview of migration to France in the post-Second World-War period and the passing of an anti-racism law (the 1940s to the 1970s)

A demand for labour in France’s expanding economy prompted the arrival of waves of European and non-European colonial workers in the post-Second World War period.⁵⁰ The French government preferred recruiting European workers from Italy, Spain, Portugal and Yugoslavia, since they were regarded as more assimilable.⁵¹ A French law, passed in 1945, had facilitated access to French citizenship for many European immigrants.⁵² In 1947, Algerians, who were still subject to French colonial rule, were granted a special category of French citizenship known as “French Muslims”.⁵³ Pursuant to the granting of French citizenship to Algerians, their numbers in France increased from 20 000 in 1947 to 200 000 by 1955.⁵⁴ Many Algerians came from rural, peasant backgrounds and were lured by the prospects of employment, regular salaries, social benefits and educational opportunities for their children.⁵⁵ Despite their status as French citizens, Algerians were regarded as an alien minority since they were predominantly Muslim, practised polygamy and were largely illiterate.⁵⁶

From the mid-1960s, France began recruiting migrant labourers from its other former colonies in North and West Africa, particularly Morocco, Tunisia, Mali, Mauritania and Senegal.⁵⁷ Most North-African and African migrants who arrived in France settled for unskilled jobs in French industry.⁵⁸ A “threshold of tolerance”⁵⁹ principle applied in France in terms of which only certain quotas of migrants and foreigners were housed in a specific location, to avoid the creation of ghettos. From the late 1960s, the French government began constructing low-income housing

49 Body-Gendrot 2008: 104.

50 Webber 1991: 17.

51 Lloyd & Waters 1991: 53; and Hansen 2003: 27.

52 *L’ordonnance du 18 octobre 1945*.

53 Waughray 1960: 62; Schneider 2008: 142; and Lloyd & Waters 1991: 54.

54 Schneider 2008: 142.

55 *Ibid.*

56 Waughray 1960: 64.

57 Lloyd & Waters 1991: 55; and Schneider 2008: 143.

58 Zauberman & Levy 2003: 1070; and Hansen 2003: 28.

59 The “threshold of tolerance” principle or *seuil de tolerance*, was first used by the writer Alain Girard in the late 1960s to refer to the stage at which most French would leave an area due to the presence of too many foreigners. See, further, Pettigrew 1994: 90; and Horowitz 1992: 25.

estates or *cités* on the peripheries of most cities.⁶⁰ By the 1970s, most North-African and African migrants were housed in peri-urban *cités*, firmly entrenching a system of racial and social segregation in French society.⁶¹

The oil crisis of the early 1970s had a negative impact on the French economy. Most North-African and African workers were directly affected by job losses in the textile, automotive and construction industries.⁶² Several writers have referred to the formation of the *Front National*, a right-wing political party, during this period of economic and social change.⁶³ France was plagued by a spate of violent racist crimes.⁶⁴ North-African Arabs were targeted by right-wing paramilitary groups in attacks that were reminiscent of the French-Algerian war.⁶⁵ Fifty North-African Arab workers were killed and 300 sustained injuries in attacks that commenced in Marseilles and rapidly spread throughout France.⁶⁶ Groups of White French men engaged in *ratonnades*, a colloquial French term for “rat-hunts”, to find North-African Arab men to assault and murder. The identity documents and pay slips of the victims were often stolen to create the impression that the victims were illegal migrants.⁶⁷ Despite many North-African Arab workers holding French citizenship, they were regarded as illegal migrants who were a burden on the state, the cause of crime and disorder, culturally inassimilable and a reminder of the French-Algerian War.⁶⁸

Following France’s signature and ratification of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) on 10 November 1971, an anti-racism law was unanimously passed by the French Parliament in 1972.⁶⁹ The anti-racism law of 1 July 1972⁷⁰ criminalised several forms of racist conduct, which included:

Acts of provocation to discrimination, hatred or violence against a person or a group of persons by reason of their ethnicity, nationality, race or religion. Such conduct is subject to a fine and/or a period of imprisonment.⁷¹ The act provides that such conduct could be committed by speech or threats, by written or spoken words or by drawings, paintings or images that are exposed to the public and if provocation to discrimination, violence or hatred occurs.⁷²

60 Wacquant 1993: 369; and Schneider 2008: 143.

61 Wacquant 1993: 369; and Schneider 2008: 143.

62 Zauberman & Levy 2003: 1070–1072; and Pettigrew 1994: 83.

63 Lloyd & Waters 1991: 57; Hansen 2003: 29; and Pettigrew 1994: 92–93.

64 Lloyd & Waters 1991: 56; and Costa-Lascoux 1976: 182.

65 Body-Gendrot 2008: 95.

66 Gastaut 1993: 71; Silverstein 2008: 11; and Lloyd & Waters 1991: 56.

67 Silverstein 2008: 11.

68 Lloyd & Waters 1991: 57; and Gastaut 1993: 61.

69 Costa-Lascoux 1976: 181–182; Agostinelli 2002: 47; and Errera 1989: 49.

70 *La Loi No. 72-546 du 1er juillet 1972 relative à la lutte contre le racisme* and hereinafter referred to as the 1972 law.

71 *Idem* art 1.

72 *Idem* art 2.

Defamation of a group on the basis of ethnicity, nationality, race or religion.⁷³

The creation of a specific crime of racist, ethnic or religious injury.⁷⁴

The prohibition of acts of racial, ethnic or religious discrimination by public authorities and functionaries and by private employers.⁷⁵

According to Agostinelli,⁷⁶ the crimes of provocation to discrimination, hatred and violence and racist injury both have common requirements, which include an act of publication that should reveal the intention of the perpetrator, and a racial element directed towards a group based on origin, ethnicity, race or religion.⁷⁷ However, the crime of defamation of a group based on race, ethnicity, origin or religion requires an allegation against a group, or the imputation of facts that attack the honour of the person concerned.⁷⁸ The 1972 law was successfully invoked by migrants and anti-racist organisations in cases where newspapers had published advertisements for employment that was reserved only for Europeans or that had advised North Africans that they were ineligible for employment. The 1972 law has been criticised as having very limited effect since it was interpreted to apply only to overt acts of racial and ethnic discrimination.⁷⁹

4 The *cités* in decay, discrimination, racist crimes and the enactment of a second anti-racist law (the 1980s–1990s)

By the early 1980s, most French *cités* were plagued by high levels of unemployment, overcrowded living conditions due to the high birth rate amongst North-African and African communities, a high dropout rate from schools and the greater visibility of youth on the streets.⁸⁰ Wacquant⁸¹ refers to the delinquency, vandalism and moral degradation associated with the *cités* because of the sense of indignity experienced by most North-African and African youth who felt that they were discriminated against in their search for work, considered deviants by the criminal justice system, and subjected to constant police checks and harassment. According to French law,

73 *Idem* art 3.

74 *Idem* art 4.

75 *Idem* art 6. Discrimination was therefore criminalised by the 1972 law.

76 Agostinelli 2002: 49.

77 According to *idem* at 51, the crime of racial injury requires an expression of scorn or invective against a defined group.

78 *Idem* at 50.

79 Naidoo 2015: 398. The 1972 law was invoked in several provincial French towns against bars, restaurants and hotels that had refused to allow Arabs and Africans the right of entry.

80 Hansen 2003: 33; Vouch, De Rudder-Paurd & Tripier 1996: 148–149; and Zauberman & Levy 2003: 1070–1072.

81 Wacquant 1993: 370.

a legal obligation is imposed on any person found on French national territory to submit to an identity check by the police.⁸² Police officers may ask a person to provide proof of identity where reasonable grounds exist to believe that the person committed or attempted to commit an offence or may be able to provide information to the police regarding a crime.⁸³ If the person is unable to provide proof of identity, provision is made for a short period of detention in police custody in order to conduct a verification of the person's identity.⁸⁴ While youth in the *cités* are mostly French citizens, special provisions in French law require foreigners to carry proof of identification at all times.⁸⁵

In most public-sector employment vacancies in the Paris region, applicants were regarded as "undesirable" based on their residential addresses and identity photographs that usually accompanied work applications. This practice impacted most negatively on the children of migrants who resided in the *cités*.⁸⁶

After a Socialist government led by President François Mitterand came to power in 1981, the formation of associations by foreigners was legalised, prompting the establishment of numerous ethnic-based organisations and North-African Arab youth groups.⁸⁷ In a break with past practice, the French government began directing resources to ethnically-based organisations and youth groups.⁸⁸ In accordance with Universalist principles, these groups were recognised as "culturally-based" organisations and not as racially or ethnically-based groupings. In areas with a high density of migrants, additional educational resources were granted in order to address inequalities in schools.⁸⁹ From the 1980s, therefore, the French government

82 Article 78-1 of the French *Le Code de Procédure Pénale*, hereinafter referred to as the Code of Criminal Procedure.

83 *Idem* art 78-2.

84 *Idem* art 78-3. The period of detention may not exceed four hours. In the event of a minor (a person under the age of eighteen years) being unable to provide proof of identity, the District Prosecutor must be notified of the minor's detention.

85 Foreigners are governed by a separate law, *Le Code d'Entrée et du Séjour des étrangers et du Droit d'Asile* (the Code governing the Entry and Residence of Foreigners and the Right to Asylum), which has been in force since 1945. According to art L611-1 of this code, a police official does not need to have grounds for suspicion before stopping a foreign person in order to perform an identity check. According to a decision of the *Conseil Constitutionnel*, the highest constitutional court in France, the police have to base their decision to stop a person on all surrounding circumstances (*Decision No. 93-323 du Conseil Constitutionnel du 5 août 1993*). In a further judgement, the *Conseil Constitutionnel* held that the police may not make use of discriminatory indicators on which to base their decisions to stop foreigners (*Decision No. 93-323 du Conseil Constitutionnel du 13 août 1993*). French police should thus not use physical appearance or race and ethnicity as indicators of foreignness.

86 Vourch, De Rudder-Paurd & Tripier 1996: 156.

87 Silverstein 2008: 11; Safran 1984: 447; and Bleich 2000: 59.

88 Lloyd 1991: 66; and Safran 1984: 447.

89 Zauberman & Levy 2003: 1084. According to Joppke 2007: 264, these areas are referred to as *zones d'éducation prioritaires* (ZEPs) or priority-education areas and were identified on the basis of "socioeconomic need" but never in terms of race and ethnicity.

gradually began to recognise the existence of different racial and ethnic groups, particularly Arab⁹⁰ and Jewish groups, and their right to differ from mainstream French culture.⁹¹ However, the increased visibility of racial and ethnic groups and the rise of migrant politics led to more public debates on race and immigration and to the growing appeal of the *Front National*, which garnered its first electoral victory in a 1983 by-election.⁹² Several sources have referred to a number of murders during this period, in which North-African Arab youth were shot by ‘snipers’ from high-rise buildings in French *cités*.⁹³ According to Schneider,⁹⁴ seven Arab youths were killed by sniper fire in the *cités* of Paris⁹⁵ – a method of killing often used against Arab targets in the French-Algerian war.⁹⁶ Body-Gendrot⁹⁷ suggests that several of these murders were perpetrated by racist French police officials and sheriffs. The murders gave rise to numerous protests and marches for equality by North-African Arab youth and ethnic organisations, and resulted in heightened tensions with the police.⁹⁸ By the late 1980s, increased conflict between youth and growing tensions in the *cités* were exploited by the *Front National*, which blamed North-African Arabs for crime and unemployment, and garnered more support in the 1988 Parliamentary elections.⁹⁹

In an interview conducted with Fausto Giudice,¹⁰⁰ he mentioned the hundreds of unsolved murders of North-African Arabs in France, which he referred to as *Arabicides*.¹⁰¹ According to Giudice:

There have not been hundreds of Africans or Indochinese murdered in France because they were Africans or Indochinese ... but hundreds of Arabs have been killed in the last twenty years ... principally because they were known as ... or looked like Arabs.¹⁰²

90 It should be noted that the term *Arabe* in contemporary French, or the colloquial French term, *Beur*, are collective descriptions that could refer to North-African Arabs of Algerian, Moroccan or Tunisian origin. The terms could also apply to the indigenous Berber peoples of these countries who speak a distinct language and adhere to different cultural practices. A common thread amongst all these peoples, however, is their adherence to the Islamic faith. See, further, Safran 1984: 423.

91 Safran 1984: 447.

92 Pettigrew 1994: 92–93; Bleich 2000: 59–60; and Lloyd & Waters 1991: 49.

93 Woodall 1993: 29; Silverstein 2008: 11; Schneider 2008: 143.

94 Schneider 2008: 143.

95 Abdallah 2014: 257.

96 Woodall 1993: 29.

97 Body-Gendrot 2008: 96.

98 Silverstein 2008: 11–15; Abdallah 2014: 257; and Laplanche-Servigne 2009: 61.

99 Body-Gendrot 2008: 96; Laplanche-Servigne 2009: 60; and Schneider 2008: 144.

100 Fausto Giudice is a French journalist and author of the book *Arabicides: Une Chronique Française, 1970–1991*, in which he chronicled the murders of 200 Arabs in France over a twenty-year period.

101 See Woodall 1993: 21.

102 Fausto Giudice quoted in *idem* at 23.

Since French criminal law did not recognise racially or ethnically-motivated crimes,¹⁰³ police investigations of such crimes often overlooked the existence of a racial or ethnic motive.¹⁰⁴ A racist, anti-Arab motive thus escaped detection.¹⁰⁵ According to Woodall,¹⁰⁶ until the early 1990s, French public prosecutors were disinclined to consider a racist motive as an aggravating circumstance in a case of premeditated murder.¹⁰⁷

By the 1990s, several North-African Arabs and Africans had been killed in police custody¹⁰⁸ or in instances of mistaken identity, while being pursued by the police. These killings led to violent confrontations between the police and youth in the *cités*.¹⁰⁹ The government responded by increasing the presence of police in *cités*, making use of unwarranted stops and searches, and increasing the surveillance of youth.¹¹⁰ When charges were dismissed against the police, as was the norm in cases where the police had killed North-African Arabs and Africans, violent clashes ensued between *cité* youth and the police.¹¹¹ Constant discriminatory checks by the police created the impression amongst North-African Arab and African youth in the *cités* that they were being persecuted by the police.¹¹² By the mid-1990s, the *Front National*, whose policies focused on anti-immigration, had steadily attracted nine to sixteen per cent of the French vote, and had become established in mainstream politics.¹¹³ Despite some recognition by the former Minister of the Interior, Jean-Pierre Chevènement, that the composition of the French police did not reflect the

103 *Idem* at 1993: 23–24; and Costa-Lascoux 1994: 376. While the 1972 law, referred to earlier, made specific reference to race and ethnicity, it was an anti-discrimination law, which criminalised certain acts of discrimination, defamation and hate speech. This law could not be invoked in, for example, a racially-motivated murder.

104 It is the writer's submission that a lack of emphasis on race in French criminal law at the time contributed to police officials overlooking racist motives in such crimes.

105 Woodall 1993: 23–24. A similar observation has been made by Costa-Lascoux 1994: 376.

106 Woodall 1993: 23.

107 It is possible that the lack of emphasis on race in French criminal law contributed to the reluctance of French public prosecutors to consider a racist motive as an aggravating factor in cases of premeditated murder.

108 As regards the law governing police custody or *la garde à vue*, art 63 of the Code of Criminal Procedure provides that, where it is necessary for an inquiry, a police official may arrest and detain a person whom s/he reasonably suspects to have committed a crime, for a maximum period of twenty-four hours. Under exceptional circumstances, however, arts 706-23 and 706-29 of the Code of Criminal Procedure allow a person suspected of involvement in crimes related to terrorism or drugs to be held in police custody for a maximum period of ninety-eight hours.

109 Schneider 2008: 144–145.

110 Wacquant 1993: 377.

111 Schneider 2008: 146.

112 Zauberman & Levy 2003: 1073.

113 Pettigrew 1994: 92–93.

diverse reality of French society, no evidence exists to suggest that efforts to recruit more youth from migrant backgrounds into the police were successful.¹¹⁴

After several attacks on synagogues and violent anti-migrant crimes, the French Communist Party proposed a new anti-racist law that would criminalise hate speech and racist crimes and provide for harsher penalties for convicted perpetrators.¹¹⁵ Ever since a public statement made in 1987 by Jean-Marie Le Pen, the then leader of the *Front National*, where he stated that the Holocaust was merely a detail of history,¹¹⁶ the French Socialist Party had been lobbying for a new law that would prohibit “negationism” and history “revisionism”.¹¹⁷ Despite opposition from right-wing parties, the new law, which was named after a Communist Party Member of Parliament, Jean-Claude Gayssot, was passed in 1990.¹¹⁸ The 1990 law¹¹⁹ prohibits discrimination based on ethnicity, nationality, race or religion.¹²⁰ This provision of the Gayssot law merely reiterates the same provision of the 1972 law. The Gayssot law also criminalised racial defamation, Holocaust denial and the denial of crimes against humanity. According to Thirion,¹²¹ the Gayssot law aimed to combat the “verbal manifestations” of history revisionists. However, it also prohibited a variety of manifestations of such opinions, including the written form. The Gayssot law may be considered as a limitation on the right to freedom of speech and expression in France. The Gayssot law was successfully invoked in several cases that dealt with Holocaust denial in France.¹²² However, the problem of violent racially and ethnically-motivated crimes, or hate crimes, was still not addressed by French law.

114 Zauberman & Levy 2003: 1087–1089.

115 Bleich 2000: 61; and Boyle 2001: 498.

116 Bleich 2000: 61; and Errera 1991: 15.

117 According to Bloch 2005–2006: 629–630, the term “negationism” was coined in 1987 by the French historian, Henry Rousso, to refer to the falsification of historical events and the discrediting of evidence, especially in relation to the Holocaust and Nazi atrocities of the Second World War. Negationists often try to pass themselves off as revisionists of history in order to acquire legitimacy. Bloch opines that in the process of revising history, they often distort authentic and established facts. Kahn 2000: 4 writes that most negationists and deniers of the Holocaust are “right-wing activists, pseudo-scholars and anti-Semites” who would like Holocaust denial to be established as a respected academic discipline.

118 Bleich 2000: 51; Body-Gendrot 2008: 97; and Geddes 2004: 339.

119 *La Loi 90-615 du 13 juillet 1990, tendant à réprimer tout acte raciste, anti-Semite ou xenophobe* and hereinafter referred to as the “Gayssot law”.

120 *Idem* art 1.

121 Thirion 2013: 101.

122 Naidoo 2015: 412–416. The Gayssot law was successfully invoked to prosecute and convict several academics and magazine editors who questioned the numbers of Jews who had been killed during the Second World War or who argued that Jews had died from starvation and disease in German concentration camps and not in gas chambers.

5 Events that culminated in the passing of new laws to govern racially and ethnically-motivated crimes (the twenty-first century)

Coinciding with the second *Intifada*¹²³ in 2000, France experienced an increase in violent anti-Semitic attacks against persons and property.¹²⁴ Bleich¹²⁵ refers to a “surge in anti-Jewish crimes”, which included throwing stones at Jewish schoolchildren, launching Molotov cocktails at synagogues and vandalising Jewish daycare centres. Most of these crimes were perpetrated by North-African Arab youth who regarded themselves as oppressed in France and the rest of the world, and who wanted to express solidarity with the oppressed Palestinians.¹²⁶ Jews in France were specifically targeted, since they were considered to be the agents of international Imperialism and as collaborators with the anti-Muslim French state.¹²⁷ Pro-Palestinian rallies in France often degenerated into attacks on Jews.¹²⁸ According to Goodey,¹²⁹ the increase in anti-Semitic attacks in France in the twenty-first century is illustrative of how international conflicts can have an influence on conflicts at the local level.

The perpetration of several terrorist attacks in the United States of America on 11 September 2001, have, however, also been linked to an increase in anti-Muslim crimes in France.¹³⁰ The French government initially responded by introducing several measures to restore law and order. Over 1 000 police officials were deployed to sensitive locations that included mosques and synagogues.¹³¹ The implication of Zaccarias Moussaoui, a French national of Moroccan origin, in the terrorist attacks of 11 September 2001, exacerbated fears in France that North-African Arab youths from the *cités* were susceptible to a radical form of Islam.¹³² According to Haubrich: “An angry, disaffected, mainly immigrant youth population lives in depressed big city suburbs which are already prone to violent crime levels. That is likely to be a breeding ground for extremism.”¹³³

123 The first *Intifada*, which commenced in Dec 1987, refers to the popular Palestinian uprising against the Israeli military occupation of the Palestinian territories. See Cobban 1990: 208. The second *Intifada* commenced in the latter half of 2000. See, further, Usher 2003: 22.

124 Bleich 2009: 367; Mayer 2005: 144; Goodey 2008: 23; Bleich 2008: 12; Peace 2009: 108; and Safran 1984: 449.

125 Bleich 2007: 157.

126 Silverstein 2008: 19; Peace 2009: 106; Bleich 2007: 157; and Mayer 2004: 91.

127 Silverstein 2008: 19.

128 Safran 1984: 439–441. According to Safran, the attacks by North-African Arabs on Jews also provoked counter-attacks by extremist Jewish groups in France.

129 Goodey 2008: 23.

130 Kassimeris 2011: 17; and Silverstein 2008: 22.

131 Bleich 2008: 12.

132 Silverstein 2008: 17; and Haubrich 2003: 6.

133 Haubrich 2003: 6.

While most youths of North-African Arab origin are French citizens, Cesari¹³⁴ opines that they were never fully accepted in France based on their religion, ethnicity and poverty.¹³⁵ According to Bleich,¹³⁶ while Muslims were increasingly targeted after the terrorist attacks of 11 September 2001, there was also a growing tendency to associate Muslims with violence. This led to several policy and legal changes across Europe that were not overtly anti-Muslim, but were conceived of with Islamic extremism in mind. Many European states responded by introducing neutral laws, with no mention of religious beliefs or practices, but with Islamic extremism in mind.¹³⁷ Danet¹³⁸ refers to the issue of “insecurity” in France that influenced the passing of several laws and policies after the terrorist attacks on 11 September 2001. The French government initially passed a counter-terrorism law¹³⁹ that empowered the police to stop and search vehicles in order to detect terrorist activities.¹⁴⁰ According to Haubrich,¹⁴¹ the law was debated in parliament for a mere two weeks before being adopted.

In 2002, crime statistics from the French Human Rights Commission¹⁴² revealed an increase in crimes against property and persons that were motivated by race. Significantly, the statistics showed that 62 per cent of these racist crimes were anti-Semitic in nature.¹⁴³ In 2003, the statistics revealed that 72 per cent of racist crimes were anti-Semitic.¹⁴⁴ In 2002, the Minister of the Interior and the Minister of Justice began advocating stricter law-and-order measures to increase arrests and the severity

134 According to Cesari 2001: 107, since the second war in Iraq, the loyalties of North-African Arabs has been questioned in France. Cesari also suggests that the use of the term “second generation” in relation to the children of North-African Arab migrants is discriminatory since the term is never used in relation to the children of Portuguese, Italian and Polish migrants who are considered as “French”. See, further, Peace 2009: 106.

135 Bruce-Jones 2007–2008: 449 also writes that, irrespective of their citizenship status, most people of colour in France are regarded as migrants. A similar view has been expressed by Oppenheimer 2008: 744.

136 Bleich 2009: 362–363.

137 Within the context of France, Vanderlin 2008: 400 refers to Islam as the “number one” threat to the security of the country.

138 Danet 2003: 288.

139 Goris, Jobard & Levy 2009: 45.

140 *La Loi No. 2001-1063 du 15 novembre 2001 relative à la sécurité quotidienne*. Unlike art 78-2 of the Code of Criminal Procedure referred to above (see n 83 *supra*), the new law gave police the right to stop and search without reasonable grounds to believe that the person concerned had committed, or had attempted to commit, a crime. The law empowered the police not to request permission from the District Prosecutor to extend periods of detention in police custody.

141 Haubrich 2003: 10.

142 Referred to in French as *la Commission Consultative de Droits de l’Homme* (CCDH).

143 Kassimeris 2011: 15–17; and Silverstein 2008: 22.

144 Kassimeris 2011: 17; and Silverstein 2008: 22.

of sentences, and to heighten policing in the *cités*.¹⁴⁵ The French government began monitoring the practices of certain Islamic communities, increasing the surveillance of mosques and stop-and-search practices in Muslim-dominated areas, and deporting radical Muslim clerics.¹⁴⁶ Within this environment of increased security and the threat of extremist, fundamentalist practices of Islam, a new law was proposed by Pierre Lellouche, a Member of Parliament.¹⁴⁷ In his proposal to the French National Assembly on 7 November 2002, Lellouche referred to a wave of unprecedented violence in France, which included attacks on schools and places of worship, the desecrations of graves, assaults and insults that affected national cohesion and violated the values of the nation, the murder of a young Frenchman of Moroccan origin and an attack on a Jewish primary school in Paris.¹⁴⁸ He pointed to a *lacuna* in French criminal law that failed to consider racially and ethnically-motivated crimes against persons and property. His subsequent recommendation was that a racist motivation should be considered in the imposition of an enhanced penalty for certain offences.¹⁴⁹ A new law was passed by the French government in 2003 with minimal parliamentary debate and a virtually unanimous vote in both houses of the French Parliament.¹⁵⁰ The new law¹⁵¹ imposes harsher penalties for certain existing violent offences when they are motivated by the ethnicity, race, religion or nationality of the victim. The motive of the perpetrator serves as an aggravating factor for the imposition of a harsher penalty.¹⁵² According to the Lellouche law,¹⁵³ the normal penalties incurred for serious crimes are aggravated when the crimes are committed because of the victim's actual or perceived ethnicity, nationality, race or religion. The aggravated penalties are imposed when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of any nature, that attack the honour or reputation of the victim, or the victim's group, because of the victim's actual or supposed ethnicity, nationality, race or religion.¹⁵⁴ Several serious

145 Schneider 2008: 147; and Silverstein 2008: 18. According to Danet 2003: 276, the issue of insecurity became more prominent after the 2002 presidential elections.

146 Bleich 2009: 368–369.

147 Bleich 2007: 158.

148 Lellouche 2002: *passim*.

149 *Ibid*.

150 Bleich 2008: 12; Peace 2009: 107; and Bleich 2009: 368–369.

151 *La Loi No. 2003-88 du 3 février 2003* and hereinafter referred to as the "Lellouche law".

152 Body-Gendrot 2008: 98. There are many similarities between the approach adopted in the Lellouche law in France and the British Crime and Disorder Act of 1998, which created aggravated penalties for several pre-existing crimes.

153 Article 1 of the Lellouche law.

154 This general provision relating to aggravated penalties for serious crimes/felonies and misdemeanours can be found in art 132-76 of the French Penal Code. According to the wording of art 132-76, the racist or discriminatory motive for the offence can consist of various forms of human behaviour and can be present before, during or after commission of the offence.

crimes are subject to the provisions of the Lellouche law and include¹⁵⁵ murder,¹⁵⁶ torture¹⁵⁷ and damage to property.¹⁵⁸

The enactment of a further new law in 2004¹⁵⁹ widened the scope of serious offences that are susceptible to aggravated penalties when racist motives are present and include, *inter alia*, the crimes of threats to commit a serious offence against the person¹⁶⁰ and extortion.¹⁶¹ Bleich lauds the highly symbolic nature of the Lellouche law since it affirms the French Republic's commitment to equality and serves to reassure vulnerable groups.¹⁶²

6 Further laws, government policies and initiatives recognising race and ethnicity

Despite the adoption of a "colour-blind" model, some evidence suggests that the French state presently acknowledges the existence of racial and ethnic divisions in their society. As has been discussed above, since the 1980s, the French government has recognised the existence of ethnically-based organisations and youth groups who received funding in the name of culture. The French government also recognised priority education area that received additional funding and resources for schools on the basis of socio-economic need. In the 1990s, efforts were made to recruit more youths with immigrant origins into the police force. Irrespective of the use of the terms "culture", "socio-economic need" or "immigrant origins", these are in effect

155 The relevant articles of the French Penal Code that contain the serious crimes will be cited, as will the articles of the French Penal Code that contain the penalty amendments following the enactment of the Lellouche law.

156 The crime of murder is defined in art 221-1 of the French Penal Code as the voluntary causing of death of another person and is punishable by a thirty-year period of imprisonment. The crime of murder is punishable by life imprisonment when it is committed because of the victim's actual or supposed ethnicity, nationality, race or religion. See art 221-4 of the French Penal Code.

157 The crime of subjecting a person to torture or inhumane acts is normally punishable by a fifteen-year period of imprisonment. The penalty for torture is increased to a twenty-year period of imprisonment when it is committed because of the victim's actual or supposed ethnicity, nationality, race or religion. See art 222-3 of the French Penal Code.

158 According to art 322-2 of the French Penal Code, the offence of destroying, defacing or damaging property belonging to another person is punishable by a two-year period of imprisonment and a fine of €30 000. However, the offence of damage to property is punishable by a three-year period of imprisonment and a fine of €45 000 when the offence is committed because of the ethnicity, nationality, race or religion of the owner or the user of the property. See art 322-6 of the French Penal Code.

159 *La Loi 2004-204 du 9 mars 2004 portant sur l'adaptation de la justice aux évolutions de la criminalité*, which is also referred to as the "Perben II" law.

160 See arts 221-17 to 221-18-1 of the French Penal Code.

161 See arts 312-1 to 312-2 of the French Penal Code.

162 Bleich 2007: 158–159.

replacement or “proxy” terms¹⁶³ for race and ethnicity. The further use of “proxy terms” is also evident in the French Labour Code, which recognises the existence of direct and indirect discrimination on the basis of race and ethnicity, but also includes alternative grounds for discrimination on the basis of “origin”, “physical appearance” and “family name”.¹⁶⁴

Several other French government initiatives indirectly recognise racial and ethnic differences, namely¹⁶⁵ –

- the introduction of special courses by the French government since 2000 to prepare citizens from underprivileged areas who wish to enter the public service;
- the introduction of quotas in 2001 by the *Institute d’Etudes Politiques* (IEP)¹⁶⁶ to benefit students from priority education areas;¹⁶⁷ and
- the increased recognition of the “children of migrants”¹⁶⁸ who are never referred to in terms of their race or ethnicity.

7 Conclusion

The enactment of several French laws that explicitly recognise race and ethnicity may be considered as a departure from the Universalist ideals that inspired the principle that race and ethnicity are not recognised and the adoption of a “colour-blind” model. While the 1972 law, which was passed as a result of France’s international human rights obligations, outlawed discrimination, it has had very limited effect due to it being interpreted to apply only to overt acts of racial discrimination.¹⁶⁹ The 1990 Gayssot law, which was enacted after a surge in anti-Semitic attacks and incidences of anti-Semitic speech, prohibits discrimination on several more grounds and criminalises the defamation of a group of people, as well as Holocaust denial. This law has been successfully invoked in the prosecution of history revisionists and Holocaust negationists. In 2003 and 2004, laws akin to hate-crime laws were passed with Islamic extremism in mind and within an environment of heightened security.

163 Bruce-Jones 2007–2008: 432; and Joppke 2007: 263.

164 Article L1132-1 of the French Labour Code or *le Code du Travail*.

165 Joppke 2007: 264–265. An attempt by Nicolas Sarkozy, the former President, to introduce a national policy of affirmative action and racial quotas, was vehemently opposed in France.

166 IEP or the Institute of Political Studies is a prestigious *grande école* or school of higher learning in France.

167 According to Oppenheimer 2008: 744, the extent of residential segregation is sufficient in France for the IEP quota system based on economically-disadvantaged areas to serve as a proxy for race and ethnicity.

168 This is a close translation of the French expression, *les jeunes issues de l’immigration*.

169 The 1972 law did not, for example, address the more insidious forms of discrimination, such as institutional discrimination.

These laws subject specific crimes motivated by race and ethnicity to enhanced penalties. Several government policies and initiatives tacitly recognise race and ethnicity. These policies have been used, *inter alia*, to fund ethnically-based groups, to award additional educational resources to disadvantaged areas and to prepare underprivileged students for the public service.

In 2007, following a recommendation from the *Commission Nationale pour l'Informatique et les Libertés (CNIL)*,¹⁷⁰ the French National Assembly attempted to pass a law that would have permitted the collection of racial and ethnic data of French citizens in order to measure the levels of discrimination and integration in France.¹⁷¹ More than sixty members of the French Socialist Party opposed the law on the basis that it was unconstitutional and requested a review of the law by the *Conseil Constitutionnel*.¹⁷² The *Conseil Constitutionnel*¹⁷³ found that the law would have allowed for studies to be conducted on the ethnicity and race of citizens to determine the levels of discrimination and integration in France. While the *Conseil Constitutionnel* accepted that such studies could be based on objective facts, which could include a person's surname, geographical origin and their nationality prior to obtaining French nationality, it could not explicitly be based on race or ethnicity. If such studies revealed a person's race and ethnicity, it would conflict with article 1 of the French Constitution.¹⁷⁴ The *Conseil Constitutionnel*, in effect, strictly interpreted Article 1 of the French Constitution and did not allow for any derogation from the principle of equality. The proposed law was therefore declared to be unconstitutional by that Court.¹⁷⁵

Faced with the increased recruitment of young French nationals by the terrorist group Islamic State,¹⁷⁶ the French government passed a counter-terrorism law

170 CNIL may be translated into English as the National Commission for Information Technology and Civil Liberties, and is the French agency responsible for the maintenance of privacy.

171 Oppenheimer 2008: 746.

172 *Ibid.*

173 *Décision No. 2007-557 du 15 novembre 2007* available at <https://www.Conseil-constitutionnel.fr/decision/2007/2007557DC.html> (accessed 1 Jun 2019).

174 Refer to nn 9 and 16 *supra*, where reference has been made to art 1 of the French Constitution of 1958. This article of the French Constitution, which provides for equality before the law without distinction as to race, ethnicity or religion, has been traced to the principles enunciated in the Declaration of the Rights of Man and of the Citizen of 1789, which provides that all men are born equal. The explicit recognition of race and ethnicity is regarded as anathema to the Universalist ideals of the French Revolution and the idea of a united, undivided nation.

175 The judgement of the *Conseil Constitutionnel* in *hoc casu* could be criticised as being rather brief, particularly if compared to the comprehensive judgements of courts in common-law jurisdictions. In deciding that the law concerned was unconstitutional, the *Conseil Constitutionnel* simply said that such law was in conflict with art 1 of the French Constitution. It, however, should be noted that the brevity of French law reports has been referred to in several sources. See, further, Elliot 2001: 228; Steiner 1995–1996: 51.

176 Popularly referred to as the “Islamic State in Syria” (ISIS) or the “Islamic State in Iraq and the Levant” (ISIL).

in 2014¹⁷⁷ that prohibits French citizens from leaving France to receive terrorist training in a foreign country and from defending or inciting acts of terrorism. The perpetration by young French citizens of several terrorist attacks in France between 2012 and 2017 confirms the fears expressed by French politicians and writers of angry, marginalised Arab and African youths, most of whom are the children of migrants and are susceptible to a radical form of Islam and recruitment by terrorist groups.¹⁷⁸

In 2018, the French National Assembly unanimously voted to remove the word “race” from the French Constitution and to replace it with the word “gender”, since race was regarded as an unfounded concept with no scientific value.¹⁷⁹

In its reluctance to acknowledge the existence of race and ethnicity, the French state denies the social realities of its many citizens of colour.¹⁸⁰ According to Oppenheimer,¹⁸¹ the French practice of “colour-blindness” masks the colour-consciousness of French society where discrimination and inequality are closely linked to race and ethnicity.¹⁸² Barou¹⁸³ also opines that there is a crisis in France with the “colour-blind” model since many of the children of migrants are socially and economically excluded. The “colour-blind” model has also been the subject of negative criticism since it presupposes equal opportunities across all races and because it does not end racist practices in society.¹⁸⁴

Several writers have therefore advocated for the greater recognition of race and ethnicity in France, and for the collection of racial and ethnic data to enable the state to determine how race and ethnicity affects the lives of its citizens.¹⁸⁵ According to Zauberman and Levy,¹⁸⁶ there is a need to adapt sacrosanct Republican principles by highlighting characteristics that the French state wants to ignore and render insignificant.

A greater recognition of race and ethnicity in France could facilitate the collection of data that would shed light on the extent of discrimination and racial violence in France. It would also enable comparative studies to be conducted on race and ethnicity in France, which could inform future government policies and laws. Bruce-Jones¹⁸⁷ compares the non-recognition of race and ethnicity in France

177 *La Loi No. 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.*

178 Joshi 2015: *passim*.

179 Mohdin 2018: *passim*; and Fassassi 2018: *passim*. Since this constitutional amendment, art 1 of the French Constitution of 4 Oct 1958 now refers to the equality of all citizens before the law, without distinction as to “origin, gender or religion”.

180 Bruce-Jones 2007–2008: 469.

181 Oppenheimer 2008: 742.

182 A similar view has been expressed by Schneider 2008: 152.

183 Barou 2014: 644.

184 Modica 2015: 398; and Paradies 2016: 6.

185 Zauberman & Levy 2003: 1091; Bruce-Jones 2007–2008: 470; and Oppenheimer 2008: 747.

186 Zauberman & Levy 2003: 1091.

187 Bruce-Jones 2007–2008: 470.

to its explicit recognition in the United States of America where such recognition enabled the expression “Black is beautiful” and the coining of the hybrid category “African American”, which, while denoting difference, still claims belonging to a multicultural American identity.

The Universalist ideals were first articulated during the period of the French Revolution in the late eighteenth century. These ideals crystallised into several principles during the Republican period of the nineteenth century, one of which was the principle that racial and ethnic groups are not recognised in France. Adherence to this principle was undoubtedly significant during the nineteenth century when the French nation state was in its infancy and the emphasis was on a common French citizenship that recognised no hierarchy or divisions. It led to the adoption of a “colour-blind” model of assimilation that was meant to counter racism and racial discrimination. It is the writer’s submission that allegiance to this principle, which espouses the non-recognition of race, ethnicity and “colour-blindness”, appears somewhat out of sync in the twenty-first century, particularly in a multicultural state that needs to be more inclusive, and to fully recognise and embrace its diverse population.

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- La loi Informatique et Libertés no. 78-17 du 6 janvier 1978* (The French Data Protection and Individual Freedom Law No 78-17 of 6 Jan 1978)

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La Loi No. 72-546 du 1er juillet 1972 relative à la lutte contre le racisme (The Anti-Racism Law No 72-546 of 1 Jul 1972)

La Loi No. 90-615 du 13 juillet 1990, tendant à réprimer tout acte raciste, anti-Semite ou xenophobe (The Anti-Semitism and Anti-Xenophobia Law No 90-615 of 13 Jul 1990)

La Loi No. 2001-1063 du 15 novembre 2001 relative à la sécurité quotidienne (Law No 2001-1063 of 15 Nov 2001 relating to daily security)

La Loi No. 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe (Law No 2003-88 of 3 Feb 2003 to increase penalties for racist, anti-Semitic and xenophobic crimes)

La Loi No. 2004-204 du 9 mars 2004 portant sur l'adaptation de la justice aux évolutions de la criminalité (Law No 2004-204 of 9 Mar 2004 on the adaptation of justice to evolutions in crime)

La Loi No. 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme (Law No 2014-1353 of 13 Nov 2014 reinforcing provisions relating to the fight against terrorism)

Le Code d'Entrée et du Séjour des Étrangers et du Droit d'Asile, 1945 (The Code Governing the Entry and Residence of Foreigners and the Right to Asylum of 1945)

Le Code de Procédure Pénale, 1958 (The French Code of Criminal Procedure, 1958)

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Le Code Pénal, 1994 (The French Penal Code, 1994)

L'ordonnance du 18 octobre 1945 (Ordinance of 18 Oct 1945)

PRIVATE SCHOOLS IN SOUTH AFRICAN LEGAL HISTORY

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ABSTRACT

Following the British model, the education laws of the Colony of the Cape of Good Hope (later the Cape Province) and the Transvaal historically recognised a basic distinction between public schools and private schools. The churches played a leading role in the development of private schools, which made a significant contribution to education in South Africa, especially for black children. Private schools enjoyed a high degree of independence in the colonial and pre-apartheid period. However, these schools were brought to heel during the apartheid era, with admissions policies, *curricula* and language medium of instruction being brought under state control, thus impairing their independence and enforcing racial segregation.

Keywords: Education law; education history; Cape Colony; Cape Province; Zuid-Afrikaansche Republiek; Transvaal; private schools; church schools; mission schools; racial segregation

1 Introduction

South Africa's constitutional and statutory dispensation pertaining to basic (primary and secondary) education contemplates a dichotomy between public schools and

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independent schools.¹ The provenance of this bifurcation is to be found in the historical development of the South African education system, which was profoundly influenced by the British approach to education. This is a function of the fact that the education system in South Africa is, to a large extent, a product of the British colonial period: it was largely during the era of British imperial control over South Africa that the foundations of the country's education system were laid. Schools and universities established in South Africa were deliberately designed along British (especially English) lines. Aspects of the British foundations of the South African education system were dismantled during the apartheid era. However, even today the British impact on the South African education system remains discernible. One of the legacies of British colonialism is an extensive system of private schools.

Against this background, this article explores the development of primary and secondary education in South African legal history. The focus is on private schools (especially church schools) that were established in the erstwhile Cape and Transvaal territories, and on the legal framework in which they developed. Attention is given to the extent to which these schools were controlled and regulated by the state or, conversely, were able to govern their own affairs. Attention is also given to the manner in which racial segregation came to be institutionalised in South African schools.

2 Nomenclature: Public schools and private schools

In keeping with the situation prevailing in many anglophone countries, the South African legal system draws a fundamental distinction between public schools and independent schools. Public schools are colloquially called “state schools” or “government schools”, while independent schools are known as “private schools” in common parlance. This terminological farrago is compounded by the fact that the terms “public school” and “private school” have different – indeed, opposite – connotations in South Africa and the United Kingdom.

In South Africa, the term “public school” refers, at the highest level of generality, to a school that is owned, controlled and funded by the state. (This is not a definitive description. Some public schools have a degree of autonomy, charge fees and own their facilities. Conversely, some private schools are partially funded and controlled by the state.) By contrast, in the United Kingdom some independent schools have traditionally been known as “public schools”. Under the Public Schools Act of 1868,² only seven schools – all of them ancient boys’ boarding schools – were originally

- 1 Constitution of the Republic of South Africa, 1996, s 29; South African Schools Act 84 of 1996, chs 3 and 5.
- 2 Public Schools Act, 1868 (31 & 32 Vict c 118), enacted pursuant to the proceedings of the Clarendon Commission (1861–1864). See Levi 1865: 297; Gray 1913: 31; Seldon & Walsh 2013: 10; Shrobsbree 1988: passim; Stephen 2018: 75; Turner 2015: 118; Warner 1946: 10, 30.

regarded as “public schools”: Charterhouse (est 1611), Eton (1440), Harrow (1571), Rugby (1567), Shrewsbury (1552), Westminster (1561) and Winchester (1382). In time, the term came to be understood more expansively to include, *inter alia*, Cheltenham (1841), Clifton (1862), Haileybury (1862), Lancing (1848), Malvern (1865), Marlborough (1843), Merchant Taylors’ (1561), Oundle (1556), Radley (1847), Repton (1557), Rossall (1844), St Paul’s (1509), Sherborne (1550), Tonbridge (1553), Uppingham (1584) and Wellington (1859). The list is not – and, by virtue of the nebulous nature of the term “public school”, cannot be – exhaustive. One can add many other schools, for example Ampleforth (1802), Haberdashers’ Aske’s (1690), North London Collegiate School (1850), Cheltenham Ladies College (1853), Christ’s Hospital (1552), Downside (1617), Dulwich (1619), Sedbergh (1525) and Stonyhurst (1593). Ultimately, the term “public school” came to encompass a large group of independent schools forming part of the Headmasters’ and Headmistresses’ Conference. These schools are not funded by the state, but from benefactors’ endowments and fees paid by pupils (although they have some “foundation” pupils who are entitled to education that is wholly or partly gratuitous). Ownership of a public school’s property is vested in its governing body, which has no pecuniary interest in the school but controls its expenditure, and has power to appoint (and remove) the headmaster, and to determine admissions policies, fees, salaries and the curriculum. How the curriculum is taught is left to the headmaster, who has control over the administration of admissions, studies and internal discipline of the school, and who appoints all staff.³

These English public schools were not set up by the state, which had little involvement in education until the 1830s. Rather, these schools were founded by pious and philanthropic bequests as charitable grammar schools intended to educate indigent children in particular localities. As the reputation of some of these schools began to spread beyond their immediate environs, they began to attract pupils from further afield. Parents who could afford to pay residential fees, rather than local parents only, sent their children to these schools, which in that sense became “public” institutions. Victorian parents tended to send sons rather than daughters to these schools, and so public schools became synonymous with boys’ boarding schools.⁴ The process by which these local schools became “public” schools is described by WM Thackeray in his novel, *Vanity Fair* (1848):

His lordship extended his good-will to little Rawdon: he pointed out to the boy’s parents the necessity of sending him to a public school; that he was of an age now when emulation,

3 Halsbury 2015: par 370; Harwood 2012: 5, 21; Hughes 1879a: 352ff; Hughes 1879b: 37ff; Kenway *et al* 2017: 17ff; McCulloch 1991: 14ff; Shrosbree 1988: 12; Turner 2015: xii *et seq.* Interesting historical sketches of several famous English public schools are collated in Various Authors 1893.

4 Harwood 2012: 10, 29; Malim 1948: *passim*; McConnell 1985: 7–8; Turner 2015: 1ff; Warner 1946: 10ff.

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the first principles of the Latin language, pugilistic exercises, and the society of his fellow-boys would be of the greatest benefit to the boy. His father objected that he was not rich enough to send the child to a good public school; ... but all these objections disappeared before the generous perseverance of the Marquis of Steyne. His lordship was one of the governors of that famous old collegiate institution called the Whitefriars. It had been a Cistercian Convent in old days ... Henry VIII, the Defender of the Faith, seized upon the monastery and its possessions, and hanged and tortured some of the monks who could not accommodate themselves to the pace of his reform. Finally, a great merchant bought the house and land adjoining, in which, and with the help of other wealthy endowments of land and money, he established a famous foundation hospital for old men and children. An extern school grew round the old almost monastic foundation ... and all Cistercians pray that it may long flourish.

Of this famous house, some of the greatest noblemen, prelates, and dignitaries in England are governors: and as the boys are very comfortably lodged, fed, and educated, and subsequently inducted to good scholarships at the University and livings in the Church, ... there is considerable emulation to procure nominations for the foundations. It was originally intended for the sons of poor and deserving clerics and laics; but ... [t]o get an education for nothing, and a future livelihood and profession assured, was so excellent a scheme, that some of the richest people did not disdain it ... Rawdon Crawley, though the only book which he studied was the Racing Calendar, and though his chief recollections of polite learning were connected with the floggings which he received at Eton in his early youth, had that

... reverence for classical learning which all English gentlemen feel, and was glad to think that his son was to have a provision for life, perhaps, and a certain opportunity of becoming a scholar.

In the course of a week, young Blackball had constituted little Rawdon his fag, shoe-black, and breakfast toaster; initiated him into the mysteries of the Latin Grammar, and thrashed him three or four times; but not severely. The little chap's good-natured honest face won his way for him. He only got that degree of beating which was, no doubt, good for him; and as for blacking shoes, toasting bread, and fagging in general, were these offices not deemed to be necessary parts of every young English gentleman's education? ... Rawdon marvelled over his [son's] stories about school, and fights, and fagging. ... He tried to look knowing over the Latin grammar when little Rawdon showed him what part of that work he was "in". "Stick to it, my boy," he said to him with much gravity, "there's nothing like a good classical education! Nothing!"

The same process is described in EM Forster's novel *The Longest Journey* (1907):

Sawston School had been founded by a tradesman in the seventeenth century. It was then a tiny grammar-school in a tiny town, and the City Company who governed it had to drive half a day through the woods and heath on the occasion of their annual visit. In the twentieth century they still drove, but only from the railway station; and found themselves not in a tiny town, nor yet in a large one, but amongst innumerable residences ... which had gathered round the school. For the intentions of the founder had been altered ... instead of educating the "poore of my home", he now educated the upper classes of England. The change had taken place not so very far back. Till the nineteenth century the grammar-school was still composed of day scholars from the neighbourhood. Then two things happened. Firstly, the school's property rose in value, and it became rich. Secondly, ... it suddenly emitted a quantity of bishops. The bishops, like the stars from a Roman candle, were all colours, and

flew in all directions, some high, some low, some to distant colonies, one into the Church of Rome. But many a father traced their course in the papers; many a mother wondered whether her son, if properly ignited, might not burn as bright; many a family moved to the place where living and education were so cheap, where day-boys were not looked down upon, and where the orthodox and the up-to-date were said to be combined. The school doubled its numbers. It built new class-rooms, laboratories and a gymnasium. It dropped the prefix "Grammar". ... And it started boarding-houses. It had not the gracious antiquity of Eton or Winchester, nor, on the other hand, had it a conscious policy like Lancing, Wellington, and other purely modern foundations. ... It aimed at producing the average Englishman, and, to a very great extent, it succeeded.

As the concluding sentence of the Thackeray extract quoted above indicates, public schools' curricula traditionally focused on the classics, especially Latin and Greek grammar and literature.⁵ Gradually, though, it came to be appreciated that "education" had to extend beyond academic instruction to "gentlemanly virtues", leadership, "moral character" and the ideal of *mens sana in corpore sano*.⁶ Not infrequently these attributes were imparted in a maladroit manner. Aspects of the methodology adopted by public schools of yore certainly seem unduly spartan to modern sensibilities; even a century ago that system reminded one writer of "quasi-Norman feudalism".⁷ That notwithstanding, so distinctive – if not revered – an institution did the public school become in the upper echelons of British (especially English) society and culture that, over time, a whole corpus of public school fiction developed. The most famous, but not the first (and not the most verisimilar or the most meritorious from a literary perspective) of these prose works was Thomas Hughes' *Tom Brown's Schooldays* (1857), which is set at Rugby School in the time of its renowned headmaster, Dr Thomas Arnold (who is generally regarded as the father of the English public school in its Victorian incarnation). It is testimony to the social standing of public schools that references to such schools, fictional and real, abound in works of literature produced in England and elsewhere.⁸

Although "public schools" are often treated as one monochromatic category, many of them developed their own idiosyncratic traditions, games and, in some cases, even argot – so much so that it was said that the ritual of a great public school was "as intricate and finely woven as a Beethoven sonata". Even houses within schools – microcosms of the greater institutions – acquired unique customs and identities. As

5 Gray 1913: 85ff, 111–112; Levi 1865: 395ff; Seldon & Walsh 2013: 15; Shrosbree 1988: 25–33; Turner 2015: 71ff. On the social role of the classics in English public schools, see Waquet 2001: 212–218; Jones 2008: 26ff; Stephen 2018: 247; Brooke-Smith 2019: 117–119.

6 Brooke-Smith 2019: 142; Levi 1865: 340; Mangan 2000: passim; O'Neill 2014: passim; Russell 1823: 203ff; Seldon & Walsh 2013: 19–23; Shrosbree 1988: 7–8; Turner 2015: 91ff.

7 Gray 1913: 168.

8 See, for example, Kilner *First Going to School, or the Story of Tom Brown and His Sisters* (1804); Dickens *Nicholas Nickleby* (1839 – Dotheboys Hall) and *David Copperfield* (1849 – Dr Strong's School); Thackeray *The Newcomes* (1854 – Grey Friars); Farrar *Eric, or, Little by Little* (1858 – Roslyn); Baines Reed *The Fifth Form at St Dominic's* (1881); Malan *Schooldays at Highfield House* (1898); Kipling *Stalky & Co* (1899 – the College); Richards *Billy Bunter*

such, generations of public-school boys retained an abiding sense of allegiance to house, school, God and country (in that sequence, it was sometimes said).⁹

In England, “public schools” came to be distinguished from “private schools”, which were privately-owned ventures run for profit, with the owner often also being the principal. By contrast, “public schools” were incorporated associations, not operated for financial gain.¹⁰ But schools of the type that in England are known as “public schools” have historically been called “private schools” in South Africa, even though there were significant parallels between them, and even though many South African “private schools” deliberately modelled themselves on the English “public schools” (as, indeed, did not a few South African state schools).¹¹

3 Private schools in South African legal history

South Africa, as we know it today, is an agglomeration of four polities, amalgamated in 1910 to constitute the Union of South Africa.¹² These were the Colony of the Cape of Good Hope, the Zuid-Afrikaansche Republiek (which became Transvaal Colony after the Second Anglo-Boer War, 1899–1902), the Orange Free State (which became Orange River Colony after that war), and Natal. There were marked differences between the education systems in these four territories. For present purposes, we shall focus on the two largest territories, the Cape and the Transvaal. In both instances, the provision of public (state) education was deficient, especially

(1908 – Greyfriars); Wodehouse *Tales of St Austin's* (1903), *Mike at Wrykyn* and *Enter Psmith* (1909 – Wrykyn and Sedleigh); Harcourt Burrage *The Idol of St Moncreeth* (1925); Waugh *Decline and Fall* (1928 – Llanabba); Hilton *Goodbye Mr Chips* (1934 – Brookfield); Blyton *Malory Towers* (1946); Buckeridge *Jennings* (1950 – Linbury Court); Willans *Nigel Molesworth* (1953 – St Custard's); Spark *The Prime of Miss Jean Brodie* (1961); Waugh *Charles Ryder's Schooldays* (1982 – Spierpoint); Rowling *Harry Potter* (1997 – Hogwarts). On the phenomenon of British public school fiction, see Brooke-Smith 2019: 11–15, 62–71; Musgrave 1985: *passim*; Quigly 1982: *passim*; Reed 1964: *passim*; Reed 1974: *passim*; Richards 1988: *passim*; Stephen 2018: 171ff; Turner 2015: 178, 202. American examples include Salinger *The Catcher in the Rye* (1951 – Pencey); Knowles *A Separate Peace* (1959 – Devon); Tartt *The Secret History* (1992 – Hampden); Wolff *Old School* (2003). South African examples include Smith *Leon* (1963 – Clan College); Blakemore *Maasdorp* (1932) and *Keurboslaan* (1941); Wessels *Die Nuwe Seun* (1964); Van de Ruit *Spud* (2005).

- 9 Brooke-Smith 2019: *passim*; Farmer 1900: *passim*; Gray 1913: 197–198, 360; Heywood 1899: 286; Mangan 2000: 146ff, 170; Marples 1940: *passim*; McConnell 1985: 8; Mount 2013: *passim*; Seldon & Walsh 2013: 16; Stephen 2018: 24–28; Taylor 2019: 17, 100, 104.
- 10 Gray 1913: 33; Smurthwaite 1981: 2; Turner 2015: 48; *Hayman v Governors of Rugby School* (1874) LR 18 Eq 28; *Dilworth v Commissioner of Stamps* [1899] AC 99; *The General Committee for Ackworth School v Betts* (1915) 6 TC 642; *The Girls' Public Day School Trust v Ereaut* [1931] AC 12.
- 11 See Ashley 1971: 34, 38; Heilbuth 1992: *passim*; Peacock 1972: *passim*; Randall 1982: *passim*; Smurthwaite 1981: 1–4.
- 12 South Africa Act, 1909 (9 Edw VII c 9); Hahlo & Kahn 1960: 118ff.

(but not only) for black children; in both instances, private schools (notably church schools) played a major role in remedying the deficiencies. By the 1930s, there was “an enormous benevolent empire” of church schools, which employed nearly 8 000 teachers and taught in excess of 370 000 children. By 1953, 4 827 of the 5 819 schools in the entire country, teaching about 800 000 children, were being run by the churches. The Catholic Church alone was running 662 schools, educating 111 361 pupils.¹³

3 1 The colony / province of the Cape of Good Hope

The shortcomings of the education system during the Dutch administration of the Cape (1652–1806) are well documented and require little expatiation. At least until the Batavian interlude (1803–1806), education was much neglected by modern standards. This was so in the case of the relatively privileged white colonist children, and even more so in the case of Khoi and slave children. Such education as was provided by the authorities was largely restricted to the Cape peninsula.¹⁴ Further afield, it was left to Christian missionaries to provide a rudimentary level of education. In 1737, Moravian brothers set up a mission school for Khoi children at Baviaanskloof (Genadendal). It only remained in operation until 1743, but was reopened in 1792. In 1799, the London Mission Society (LMS) began to work in the eastern frontier districts among Khoi, San and Xhosa people. By 1803, forty children were attending the LMS mission school at Bethelsdorp. But the education administered at these mission stations was a double-edged sword: it was inextricably bound up with the adoption of Christian and European culture and values, with the concomitant subversion of indigenous cultures and social structures.¹⁵

By 1806, when the Cape became a British colony, education was in a dire state. In 1812, the Governor, Sir John Cradock, began to implement measures designed to organise education on a more systematic basis. He instituted “free schools”, along the lines of English charity schools, intended to provide the “lower orders” with Christianity, morality, and the Protestant work ethic. Cradock’s successor, Lord Charles Somerset, continued the free school programme. In principle, these schools were open to all races. In practice, enrolment at English-medium schools was mostly white, while students at schools that used Dutch as medium of instruction often

13 See Abraham 1984: 91; Allen 2007: 43; Collins & Gillespie 1994: 29; Landis 1962: 489; Macquarrie 1956: 33–34; Ntantala 1960: 46; Sundkler & Steed 2004: 823.

14 Babb-Bracey 1984: 36; Behr 1952: 64ff; Board of Education 1901: 3ff; Du Toit 1940: 41ff; Leonie 1965: 44ff; Le Roux 1998: 95ff; Loram 1917: 46ff; Malan 1922: 1ff; Malherbe 1925: 49ff; Marais 1957: 171, 269; Squelch 1997: 23.

15 Babb-Bracey 1984: 51ff; Behr 1952: 86ff; Leonie 1965: 53; Mahuma 2004: 45–46; Mashale 2009: 18–19; Molteno 1988: 48–51; Sales 1975: 42ff; Saule 1985: 31ff; Sundkler & Steed 2004: 66, 325–326, 331–339.

were racially mixed. Free schools established at Uitenhage and Wynberg during Somerset's era eventually evolved into Muir College and Wynberg Boys' High School, both of which still exist. On the whole, however, the free school initiative foundered, mainly due to a shortage of qualified teachers.¹⁶

In an effort to address this problem, an ecumenical group of Cape Town clergymen set up a non-denominational school in 1829. From this initiative developed the South African College School (SACS) and the University of the Cape of Good Hope.¹⁷ This augured well for education in Cape Town, but the situation in the country districts remained dismal. In 1839, Sir George Napier appointed James Rose Innes as Superintendent General of Education and mandated him to implement a new three-tier system devised by the astronomer, Sir John Herschel. First-class schools provided primary and secondary education (including Latin, Greek and French), and in some cases tertiary to boot.¹⁸ Scottish teachers were appointed to start first-class schools at Wynberg, Stellenbosch, Paarl, Worcester, George, Grahamstown, Port Elizabeth, Graaff-Reinet, Uitenhage and Somerset East. In smaller towns, second-class schools provided only primary education. English was the medium of instruction in the first- and second-class schools. In the rural areas, third-class mission and farm schools taught basic literacy and arithmetic. These schools could obtain grants-in-aid. By 1859, there were nineteen so-called established schools and 178 so-called aided schools in the colony. The official policy remained that government schools were accessible to all classes and races without distinction. *De facto*, however, many schools were reserved for white children. In the poorer areas, schools were integrated; white children attended mission schools in the countryside.¹⁹

Thus, public education in the Cape Colony acquired a more solid footing. Meanwhile, the foundations of "private" education were also being laid. In 1848, the first Anglican Bishop of Cape Town, Robert Gray, founded St George's Grammar School, partly to serve as a feeder for the Cathedral choir. The next year, Gray opened a Collegiate School, charging fees of £50 *per annum*, which would become known as Diocesan College (Bishops). In 1855, the inaugural Anglican Bishop of

16 Babb-Bracey 1984: 80–82; Behr 1952: 177ff; Board of Education 1901: 11–16; Coates 1975; Du Toit 1940: 56ff, 64–75; Hawthorne & Bristow 1993: 18–20, 44; Leonie 1965: 63–66; Le Roux 1998: 158ff; Malan 1922: 6–16; Malherbe 1925: 58–68; Peacock 1972: 167; Thomson 1961; Veitch 2016: *passim*.

17 Board of Education 1901: 16–17; Du Toit 1940: 76; Linnegar 1979: *passim*; Walker 1929: *passim*.

18 SACS, Diocesan College, Victoria College (Stellenbosch), Huguenot Seminary (Wellington), Gill College (Somerset East), Grey Institute (Port Elizabeth), St Andrew's College (Grahamstown) and Graaff-Reinet College eventually acquired the status of university colleges: Board of Education 1901: 50; Metrowich 1929: 5–8; Walker 1929: 31–32, 35. On the Huguenot Seminary, founded in 1874, see, in general, Duff 2006; Pierson 1894.

19 Babb-Bracey 1984: 82ff; Behr 1952: 191ff; Board of Education 1901: 18ff; Chase 1843: 142–143; Cross 1994: 81; Du Toit 1940: 82–88; Leonie 1965: 65–67; Malan 1922: 7ff; Malherbe 1925: 72ff; Marais 1957: 270–271; Ferguson & Immelman 1961: *passim*; Ruskin 2004: *passim*.

Grahamstown, John Armstrong, founded St Andrew's College. Other schools in Cape Town followed, such as St Joseph's College (founded by the Marist Brothers in 1867), Springfield Convent (Dominican Sisters, 1871) and St Cyprian's Diocesan School for Girls (Anglican, 1871).²⁰

By that time, Christian churches had embarked on a process of establishing schools at mission stations stretching from Namaqualand through the Overberg and the Karoo to the Colony's eastern frontier and "British Kaffraria".²¹ In time, this process produced prominent private schools for black pupils. There were particularly good mission schools in the eastern districts, primarily (but not exclusively) intended for Thembu and Mfengu children. One of the oldest of these schools was at Clarkebury, a Wesleyan mission station near Mthata, dating back to the 1830s. By 1847, its day-school was being attended by eighty students. It grew into a large boarding school with impressive grounds and buildings.²² The Glasgow Missionary Society founded Lovedale, at Alice in the Ciskei, in 1841. It was a multiracial school until the 1890s, and offered a liberal education (including cricket) equal to that at any British public school.²³ Shawbury mission school, a Wesleyan institution, also dated back to the 1840s.²⁴ Healdtown, a Wesleyan school near Fort Beaufort, was established in 1855. It was to become, with Lovedale, the most celebrated of the Cape mission schools.²⁵ The next year, Bishop Armstrong started St Matthew's Anglican mission school at Keiskammahoek.²⁶ Lesseyton Methodist mission school, near Queenstown, was opened in 1857.²⁷ The Free Church of Scotland's Blythswood Institution was set up at Butterworth in 1877, funded largely by money raised by the local Mfengu community.²⁸ And in 1858, Bishop Gray had founded Zonnebloem College in Cape Town. It was "a sort of black Haileybury", where the children of Xhosa chiefs, such as Sandile and Maqoma, were educated and taught to play cricket. Two sons of the Sotho king, Moshoeshoe, attended Zonnebloem, as did a son of the Rolong chief, Moroka.²⁹

It was not only in Cape Town and environs and in the eastern districts of the Cape Colony that famous mission schools came to be centred. Perhaps the most

20 Broekmann & Weldon 1996: *passim*; Chase 1843: 144–145; Coyne 1997: *passim*; Currey 1955: *passim*; Gardener 1997: *passim*; McIntyre 1950: *passim*; Pascoe 1901: 783; Peacock 1972: 33, 223, 241; Poland 2008: *passim*.

21 See Church Missionary Society 1846: 21ff; Hoole 1847: 345ff.

22 Coggin 1930: 8ff; Hoole 1847: 361; Skota 1932: 398; Whiteside 1906: 292–295.

23 Duncan 2000: *passim*; MacKenzie 2007: 109–113; Saule 1985: 99ff; Schoeman 2015: 184; Stewart 1894: *passim*; Shepherd 1940: *passim*; Sundkler & Steed 2004: 326, 355, 359.

24 Hoole 1847: 363; Skota 1932: 409.

25 Skota 1932: 399; Sundkler & Steed 2004: 359; Webster 2013: *passim*; Whiteside 1906: 283–285.

26 Goedhals 1979: 18; Pascoe 1901: 785; Sundkler & Steed 2004: 353.

27 Duncan 2018: 1; Whiteside 1906: 285–286.

28 Gibbs 2017: 12, 77–78; MacKenzie 2007: 114; McGregor 1977; Rodger 1977; Saule 1985: 121; Sundkler & Steed 2004: 359.

29 Hodgson 1975: *passim*; Hodgson 1987: *passim*; Odendaal 2003: 22–27; Pascoe 1901: 784; Sundkler & Steed 2004: 356. Haileybury was a public school in England where pupils were prepared for the civil service, especially in India: Malim 1948: 43; McConnell 1985: 165ff.

notable example of an excellent mission school situated in the more remote regions was the LMS's Moffat Institution at Kuruman in Bechuanaland, founded in 1879 as a seminary, and reincarnated as a school, Tiger Kloof Educational Institution, at Vryburg in 1904.³⁰

Arguably, the growth of schools modelled on English public schools was integral to the process of empire-building. These "British-type schools became hegemonic institutions that sought to create subjects who possessed modes of interpreting the world that were loyal to colonial interests and ... to the class relations ... that underpinned such interests".³¹ As it transpired, though, many of the leaders of the anti-colonial independence movement, both in South Africa and elsewhere on the continent, were products of these selfsame schools.³²

In 1863, a commission chaired by Mr Justice Watermeyer recommended that the "established" or "free" schools (which were badly administered and were losing pupils to private schools) be phased out, and that "aided" schools be developed and named "undenominational public schools". A new Education Act³³ provided for three types of schools, namely undenominational public schools, mission schools and aborigines schools, each in the first, second and third class. By 1873, there were 346 aided mission schools and aborigines schools, and 169 public schools.³⁴

The Dutch Reformed Church (DRC) imported Scottish teachers. The inaugural rector of Stellenbosch (later Paul Roos) Gymnasium, set up by the DRC's Theological Seminary in 1866, was a Scotsman named WEW Braid.³⁵ The first headmaster of the first-class public school established at Paarl in 1868, where the white population was predominantly Dutch-speaking, was a Scotsman, the Reverend George Jeffries. He was succeeded in 1876 by the Reverend Dr Thomas Walker from Edinburgh, who later became a professor at Victoria College. Members of the DRC's Strooidakkerk congregation were instrumental in founding and administering this school (later known as Paarl Boys' High School). The establishment of this school indicates that many Dutch-speaking burghers of Paarl felt that the local gymnasium, founded by GWA van der Lingen in 1858, with Dutch as its medium of instruction, did not satisfy the educational demands of that day and age, and that there was a need for an English-medium school. It was probably a sign of the times that, in 1872, the

30 Hoole 1847: 371; Sundkler & Steed 2004: 429ff; Volz 2014: *passim*; De Gruchy 2009: 80–81. Tiger Kloof's *alumni* included Sir Seretse Khama, Sir Ketumile Masire and Ruth Mompati.

31 See, for example, Jones 2008: 102ff; Kenway *et al* 2017: 1ff; Molteno 1988: 50.

32 Gibbs 2017: 11, 18; Winterbach 1994: 1.

33 Act 13 of 1865. See Board of Education 1901: 33, 37 and 42; Du Toit 1940: 96ff; Le Roux 1998: 178ff, 191–192; Loram 1917: 49–50; Malan 1922: 7–8; Malherbe 1925: 95ff; Malherbe 1939: 4; Walker 1929: 34–35.

34 Babb-Bracey 1984: 97, 106; Board of Education 1901: 44.

35 Brummer 1918: 139; Du Toit 1940: 102.

gymnasium itself became an English-medium school.³⁶ In due course, there was a relatively straight historical line between first-class schools such as these and the so-called Model C schools of the 1980s and 1990s.

By the 1890s, only a third of European children of school age in the Cape Colony were attending school. Some 10 000 white children were attending mission schools; a third of the total number of white children at school in the Cape Colony attended mission schools in which there was no colour bar.³⁷ The authorities perceived this state of affairs with disquiet, so the School Board Act³⁸ made it compulsory for white children between the ages of seven and fourteen to attend school, and “encouraged” parents of coloured children to send their children to school, but did not enforce this. Thus the level of education of white children was raised, but black children were left behind. But for the existence of church-run mission schools, the situation would have been a great deal worse. In this sense, these private schools contributed to combating the increasing racial inequality in education, and in filling the vacuum that arose from the colonial administration’s sins of omission in respect of the education of black children. Still, the situation remained woeful. In 1917, Lovedale was the only black first-class school in the Colony (and the only high school in South Africa preparing “native” students for matriculation to university on a systematic and sustained basis).³⁹

The Education Ordinance of 1921⁴⁰ introduced a degree of regulation of private schools, which had to be registered with the Superintendent General, who was authorised to inspect any private school “for the purpose of ascertaining the condition of such school, including the premises, furniture and equipment, the nature of the instruction given and the manner in which the school is conducted”. This law expressly provided for separate schools for “European” and “non-European” children in the Cape Province, making school attendance compulsory for the former category, but not for the latter.⁴¹ The 1921 Ordinance was superseded by the Education

36 De Villiers 1924: 38ff; Du Toit 1940: 103; Mentz 1941: 360ff; Goosen 1984: 16; Engela 1992: 6–9.

37 Babb-Bracey 1984: 84; Cape of Good Hope 1891: 4–7, 13, 213–214; Cross 1994: 81; Malan 1922: 3; Marais 1957: 271; Smurthwaite 1981: 209.

38 Act 35 of 1905. See *Colonial Secretary v Molteno School Board* (1910) 20 CTR 159; *Molteno School Board v Molteno Municipal Council* 1912 AD 772; *Wellington Boys’ High School Committee v Wellington School Board* 1920 CPD 522; Malan 1922: 8; Malherbe 1939: 4; Le Roux 1998: 201ff; Squelch 1997: 26. Bedwell 1909: 331 described this Act as “the first statutory enactment that deals seriously with the subject of education” in the Cape Colony.

39 Loram 1917: 129–130. Even by the 1940s, the provincial authorities had little involvement in education for black children: see *Cape Provincial Administration v Xabanisa* 1941 AD 203 at 208.

40 Cape Consolidated Education Ordinance 5 of 1921, ch 25. See *MEC for the Eastern Cape Department of Education v Playways Pre-Primary School* [2018] ZAECELLC 4 par 121ff.

41 See *Cape Provincial Administration v Xabanisa* 1941 AD 203; *De Gouveia v Superintendent-General of Education* 1954 (3) SA 1009 (C) 1012A–G. See, also, *Superintendent-General of Education (Cape) v Fife* 1955 (2) SA 279 (A).

Ordinance of 1956,⁴² section 240 of which largely replicated the provisions of the 1921 Ordinance pertaining to private schools. It stated expressly that these provisions applied to private schools “for European children”, thus enforcing racial segregation in respect of private schools’ admissions policies.

3 2 The Zuid-Afrikaansche Republiek / Transvaal

In the early years of the Boer settlement of the Transvaal, education was “haphazard and uncertain”. There was only perfunctory state involvement in education for white children; no provision was made for formal education of black children. The general perception was that education was not the concern of the state, and that it was the domain of the established church, the Dutch Reformed Church. Only from 1859 did the state assume responsibility for education of white children. A School Commission was set up, and a framework for education was created, but this was largely in the realm of aspiration. By 1864, there were only seven state-employed teachers in the ZAR.⁴³

Under the presidency of TF Burgers (1872–1877), a new education statute⁴⁴ created an education department. Schools were divided into three categories according to their location and their curricular scope, namely: (i) “ward schools”, usually one-teacher farm schools providing elementary instruction; (ii) “district schools”, situated in bigger towns, providing more advanced elementary education; and (iii) a gymnasium at Pretoria, where secondary and higher education were to be provided. This system, too, failed. By 1877 (when the ZAR was annexed by Britain), only about 8 per cent of white children in the ZAR were attending school.⁴⁵

During the British annexation, a new education law was enacted.⁴⁶ A system of state aid to private schools was instituted as a parallel to the existing system of state schools (such as it was). This facilitated the founding of Pretoria schools, such as Prospect Seminary, Loreto Convent (Catholic, 1878), St Birinus Diocesan School (Anglican, 1879) and St Etheldreda’s School, later known as St Mary’s Diocesan School for Girls (Anglican, 1879). By 1880, there were eleven government schools and twelve state-aided private schools in the Transvaal.⁴⁷

42 Cape Education Ordinance 20 of 1956. See *MEC for the Eastern Cape Department of Education v Playways* par 134ff.

43 Bot 1951: 3; Le Roux 1998: 302–316; Lugtenburg 1925: 62ff; Malherbe 1925: 224ff; Squelch 1997: 29ff.

44 Act 4 of 1874.

45 Council of Education 1916: 3; Bot 1951: 7; Le Roux 1998: 316–320; Lugtenburg 1925: 89ff; Malherbe 1925: 241–249.

46 Act 10 of 1880. See Bot 1951: 12; Le Roux 1998: 320–323; Lugtenburg 1925: 116ff; Malherbe 1925: 250–255.

47 Addison 1979: *passim*; Anon 1913: *passim*; Lugtenburg 1925: 110, 118, 124–125, 137, 172; Randall 1982: 97; Smurthwaite 1981: 74, 133; 8 Jun 2018 *Pretoria News*.

The First Anglo-Boer War, in which the British were defeated at Majuba (1881), led to restoration of an autonomous ZAR, under British suzerainty. In 1881, SJ du Toit was appointed as Superintendent of Education. Yet another Education Act was passed the following year.⁴⁸ It contemplated that the state's primary role in education was to incentivise private initiative by means of subsidies or grants-in-aid. Schools were classified as either elementary, intermediate or higher institutions, with the value of grants ascending according to the level of the school. Whereas the 1874 Act had provided that instruction was to be in Dutch or English, at the will of parents, the 1882 Act restricted subsidies to schools using Dutch as medium of instruction. However, this restriction was not enforced rigidly: until 1892, English-medium schools experienced little difficulty in obtaining subsidies. Although the administration of education improved under Du Toit's superintendence, the standard of education remained mediocre.⁴⁹

The discovery of gold on the Witwatersrand in 1886 provided impetus to the growth of education in the ZAR. The first government school in Johannesburg was opened in July 1887. The Dutch Reformed Church set up two others schools in Johannesburg during the course of 1887.⁵⁰

Catholic religious orders played a leading role in launching schools in Johannesburg. In July 1886, the Rt Reverend Odilon Monginoux OMI, the first Prefect Apostolic of the Transvaal, acquired land in central Johannesburg for a chapel, a convent and a girls' school. The Bishop of Natal, Monsignor Charles Jolivet OMI, sent six French Holy Family sisters to take charge of this school, which opened on 1 October 1887. By the end of 1887, the convent had seventy-five pupils. The school moved to Doornfontein in 1895, and became known as the East End Convent. In 1905, the Holy Family sisters also founded Parktown Convent School (now Holy Family College).⁵¹

The Reverend John Darragh, the first Anglican priest to be stationed on the Rand, was a pioneer of education in Johannesburg. He initiated St Mary's College for Girls, which commenced instruction in the hall of St Mary's Church, Eloff Street, on 6 January 1888. The school later moved to Belgravia and then to Waverley. At the same time, Darragh set up St Mary's School for Boys as a choir school for St Mary's Church. Based on the model of British grammar schools, the school had 160 pupils by 1890, when the principal was the Reverend HB Sidwell (later Bishop of George).⁵²

48 Act 1 of 1882. See Lugtenburg 1925: 130ff.

49 Basson 1956: 89ff; Bot 1951: 15; Council of Education 1916: 3–4; Horton 1968: 6; Le Roux 1998: 324–329; Malherbe 1925: 259–266; Marais 1961: 55; Ploeger 1952: 40ff; Smurthwaite 1981: 176; Venter 1950: 25–26.

50 Venter 1950: 32–34.

51 Basson 1956: 137; Smurthwaite 1981: 80–82, 90; Venter 1950: 35–40.

52 Grainger 2013; Smurthwaite 1981: 134; Sundkler & Steed 2004: 404ff; Venter 1950: 44–50.

Marist Brothers' Sacred Heart College, near Joubert Park, started with fourteen boys in October 1889. "Here there was not only good schooling, but cricket, football and other team games were encouraged. The moral standing was high." The school acquired such a good reputation that some officials of the staunchly Protestant ZAR government enrolled their sons at this Catholic school. By 1897, Marist Brothers' had 500 pupils. It was Johannesburg's premier boys' school.⁵³

On 11 April 1890, Chief Justice (later Sir John) Kotzé laid the foundation stone of St Michael's College, an Anglican Church school in Commissioner Street. The driving force behind the creation of St Michael's was the vicar of St Mary's Church, the Reverend Darragh. A Jewish school was opened in 1890, and the *Deutsche Schule* was started in Edith Cavell Street in 1897.⁵⁴

In 1892, the education law was amended to provide that all teachers in aided schools had to be members of a Protestant church; schools also could not receive subsidies in respect of Jewish and Catholic pupils. All textbooks had to be in Dutch. These changes led to some schools losing their grants. School enrolments in the bigger towns (where there were concentrations of English-speaking, Catholic and Jewish people) dropped. In response to these developments, a group of *uitlanders* established the Witwatersrand Council of Education (WCE) in 1895. The WCE's objects were to promote elementary education "suited to all nationalities and creeds" and to counter the exclusive use of Dutch as medium of instruction. In 1897, the WCE bought St Michael's College and renamed it Jeppestown Grammar School – the progenitor of Jeppe High Schools for Boys and Girls.⁵⁵

According to a report published by the WCE in 1895, there were fifty-five schools for *uitlander* children in Johannesburg and environs. Of the 187 teachers, only forty-six held professional qualifications. It was estimated that nearly a third of white children of school-going age were not attending school. This dire situation persisted: by 1897–1898, fewer than fifty white children (out of a total school attendance of 15 000) in the entire ZAR were in or above Standard VI, and only forty per cent of the 687 white teachers in the country had any formal qualifications.⁵⁶

By 1896, there were seven mission schools for black children in Johannesburg. The Reverend Darragh founded two of these schools: St Cyprian's School (started in 1890) and Perseverance School (1891). Both schools were initially granted a government subsidy on the understanding that they would enrol only white children. When inspections revealed that black children were in attendance, the subsidies

53 Oct 1929 *Maristonian*; Paola 1967: 56–58, 114; Venter 1950: 40–42.

54 Hawthorne & Bristow 1993: 199; Venter 1950: 51, 79.

55 Basson 1956: 97ff, 137ff; Council of Education 1916: 4–7; Horton 1968: 7, 15, 29–31; Lugtenburg 1925: 221, 243; Malherbe 1925: 267ff, 290ff; Marais 1961: 56; Ploeger 1952: 73, 76ff, 101ff; Venter 1950: 84ff.

56 Council of Education 1916: 5; Horrell 1970: 25; Horton 1968: 22–26; Malherbe 1925: 290–291; Venter 1950: 174.

were withdrawn. Although Perseverance eventually succumbed to the pressures of impecuniosity, St Cyprian's somehow survived.⁵⁷ Darragh continued his educational endeavours through his involvement in the establishment of St John's College in 1898.⁵⁸

However, the progress on the schools front over the preceding decade nearly came to naught when the Second Anglo-Boer War broke out in October 1899. It caused an exodus of civilians from the ZAR and necessitated the closure of most schools. There was a hiatus in educational activities until civilians returned once the British had taken control of Johannesburg and Pretoria. Schools reopened from 1901 onwards, while the guerrilla war continued in the veld.

Once Lord Milner's colonial administration had taken power, his "kindergarten" set about implementing education policies quite different from those of the defunct ZAR. Whereas the pre-war Boer government (which had not been favourably disposed towards English-language private schools) had paid grants to such schools, subject to strict conditions, the British authorities deprived such schools of any subsidisation. This policy proceeded from a determination to have all education under state control to facilitate the dominance of British culture and ideology over those of the Boers. Vast resources were invested in undenominational state schools offering free or heavily subsidised tuition and superior facilities that made them more alluring than private schools. A by-product, if not the objective, of the Milner system was to undermine private schools.⁵⁹

So came into existence the famous "Milner schools": King Edward VII School (KES), the Jeppe, Pretoria and Potchefstroom boys' high schools, and Johannesburg, Jeppe and Pretoria girls' schools. (The Parktown schools followed later.) There was no doubting the need for good schools such as these, but the policy was antagonistic, in effect if not in intention, to private education. It resulted in the closure of St Birinus School in Pretoria, and nearly caused the demise of St John's College (saved from extinction only by the charitable intervention of the Anglo-Catholic Community of the Resurrection, which ran the school from 1905 until 1934).⁶⁰ In Johannesburg, the struggle between the state and the ecclesiastical schools found expression in a protracted dispute about the location of the state schools, culminating in the proceedings of the Secondary Education Commission.⁶¹

The Education Ordinance of 1903⁶² introduced comprehensive regulation of private schools. Private schools were required to be registered, and to submit quarterly returns to the Transvaal Education Department (TED) of the number,

57 Behr 1952: 287ff; Cross 1986: 53; Horrell 1970: 26; Venter 1950: 51–56.

58 Lawson 1968: *passim*; Randall 1982: 99.

59 Basson 1956: 144ff; Bot 1951: 55; Council of Education 1916: 10–11; Cross 1986: 35; Le Roux 1998: 341; Malherbe 1925: 315ff; Smurthwaite 1981: 177; Venter 1950: 408.

60 Agar-Hamilton 1928: 80–81; Lawson 1968: 30–32; Malim 1948: 109–111; Randall 1982: 43, 102; Venter 1950: 381; Winter 1970: 33.

61 *Report of the Transvaal Secondary Education (Johannesburg) Commission* (1906).

62 Ordinance 7 of 1903. See Manson & Bisschop 1905: 407; Bedwell 1909: 446; Squelch 1997: 31.

names and qualifications of teachers employed and of pupils' attendance. Teachers were required to hold certificates, and private schools were subject to inspection by the TED. The Ordinance contemplated that "native" education would be provided mainly through state-aided mission schools, which were to emphasise training for industrial and manual labour. By implication, the principle of racially separate schools was introduced. A survey of mission schools disclosed that only 10 per cent of African children of school age were enrolled in schools. In a letter to the Superintendent of Education, a Swiss missionary charged that the education policy set out "to make the native an English speaking boy or girl for the use of the white man, rather than a man capable of thinking by himself and of leading intelligently his life".⁶³

In 1905, the Earl of Selborne succeeded Milner as Governor of the Transvaal and Orange River colonies. The Selborne Minute (Nov 1905), loosened the shackles of the centralised bureaucratic system imposed by Milner, by allowing white local communities more influence in educational matters through the creation of school committees and district school boards.⁶⁴ After General JC Smuts became Minister of Education in 1907, a new Education Act⁶⁵ expressly decreed racially segregated schools. It was specifically provided that a "coloured" child may not be admitted to a school for white children.⁶⁶ School attendance became compulsory for white children between the ages of seven and fourteen.⁶⁷ Private schools remained subject to regulation. A private school could be closed by the Director of Education if it appeared to him that the school was being conducted in a manner "calculated to be detrimental to the physical, mental or moral welfare of the pupils attending thereat".⁶⁸ Although this very subjective criterion posed a potential threat to the existence of private schools, in practice the departure of Milner, the arrival of the relatively liberal Selborne and the appointment of Smuts as Minister of Education signified a slight relaxation of the colonial administration's suspicious attitude towards private schools.

The rapprochement between the authorities and private schools was symbolised by the fact that Lord Selborne visited St John's College in 1907 and 1924, as did Smuts in 1928.⁶⁹ A *modus vivendi* developed between the state and private schools. It endured until the apartheid era, when the state adopted an attitude of undisguised

63 *Annual Report by the Commissioner for Native Affairs* (1903) A10–A11; Cross 1994: 83–84; Cross 1986: 55–60.

64 Bot 1951: 61; Le Roux 1998: 343–344; Malherbe 1925: 325–335; *Macintosh v Pretoria School Board & Sunnyside School Committee* 1908 TS 872.

65 Act 25 of 1907. See Babb-Bracey 1984: 85; Bedwell 1909: 477–478; Bisschop 1908: 471–473; Bot 1951: 63; Cross 1994: 84; Cross 1986: 64; Le Roux 1998: 351–358; Malherbe 1925: 331–341.

66 Section 29.

67 Section 19.

68 Chapter 8, s 36.

69 Lawson 1968: 69, 191, 208; Winter 1970: 39–40.

animosity towards private schools, especially in the Transvaal. The MEC for Education, Dr T Wassenaar, articulated the government's attitude: "Private schools really no longer have the right to exist. We regard the government school as the proper school." On another occasion, he said: "[G]overnment schools are the best for our children. There is also the advantage that there can be a greater degree of uniformity ... and that no difference in thought will result. ... Private schools are only a relic today, a relic of former times." In the 1970s, the hostility found expression in disputes between the state and private schools about the admission of black pupils to historically white private schools.⁷⁰

We have seen how the churches played an instrumental role in establishing schools for black children in the Cape. The same pattern emerged in the Transvaal, where the state made no provision for schools for black children until after the Anglo-Boer War, and then only on a limited and segregated basis. Milner articulated the British objective: "I do not mean that ['natives'] should be educated like Europeans, for their requirements and capacities are very different, but that they should be trained and develop their natural aptitudes for their own good and that of the community." The role of Milner's administration in "native" education was restricted to the subsidisation of mission schools. By 1912, there was not a single government high school for "native" children in the entire Transvaal; by 1917, there was only one such school. So it was incumbent on the churches to answer the educational needs of the "native" population. This they did – to an extent. In 1906, there were 177 unaided mission schools in the Transvaal with an enrolment of 8 492 pupils, and 197 aided schools with 11 730 pupils. By 1915, there were 267 aided mission schools in the Transvaal, educating 15 428 pupils.⁷¹

A striking example was St Peter's School. The Community of the Resurrection, which ran St John's College, founded St Peter's Theological College in Rosettenville, south of Johannesburg, in 1904 as a seminary for training black Anglican clergymen. The Community also started St Agnes' School for African girls (1908) and St Peter's School for African boys (1922) in Rosettenville. St Peter's was the only secondary boarding school for Africans in the Transvaal. It had a "grandness of atmosphere"; it became known as a "Black Eton". Its pupils went on to acquire prominence in the emerging black middle class; in the 1940s and 1950s they became a veritable "who's who" in the influential and respected ANC Youth League. St Peter's alumni included men as diverse as Fikile Bam, Jonas Gwangwa, Lucas Mangope, Hugh Masekela, Todd Matshikiza, Joe Matthews, Congress Mbata, Zephania Mothopeng, Bertram Moloi, Es'kia Mphahlele, Duma Nokwe and Oliver Tambo. After having graduated from Fort Hare University, Tambo returned to teach physics at St Peter's

70 Heilbuth 1992: 1; Randall 1982: 151, 186; Smurthwaite 1981: 187–195.

71 Cross 1986: 38–39; Leonie 1965: 75–78; Loram 1917: 63, 65.

(1943–1947). St Peter’s School was closed in 1956 after the Bantu Education Act⁷² had made state funding of mission schools subject to stringent conditions devised to promote apartheid policies. (Most mission schools elected to close down rather than accept these conditions. The Catholic, Seventh-Day Adventist, United Jewish Reform Congregation and Congregational churches and, to an extent, the Anglican Church, continued without state aid.) St Peter’s Theological College remained in existence; Archbishop Emeritus Desmond Tutu studied there, graduating in 1960.⁷³

Many other private schools for black children in the Transvaal were set up by church bodies at a time when the state declined to do so. In many of these schools the calibre of education was poor, with teachers lacking adequate qualifications. The highest level to which pupils could aspire in many schools was Standard III or IV. However, several schools flourished against all odds, with little or no state aid. The first of these schools was set up by the Hermannsburg Evangelical Lutheran Society at Phokeng, near Rustenburg, in 1857.⁷⁴ Other good mission schools and colleges in the Transvaal included Kilnerton teacher training and theological school near Pretoria (established by Wesleyan missionaries in 1884);⁷⁵ Grace Dieu College near Pietersburg (Anglican, 1906);⁷⁶ Lemana Training Institution near Elim in the northern Transvaal (Swiss Mission Society, 1906);⁷⁷ Botšhabelo Training Institution near Middelburg in the eastern Transvaal (Berlin Mission Society, 1906);⁷⁸ and Medingen mission school near Modjadjiskloof in the northern Transvaal (Berlin Mission Society, 1881).⁷⁹ Most of these institutions were closed down during the so-called Bantu education era, when control of “native” schools was transferred from the provincial governments to the national government. “Native” schools not under direct government control had to be registered; registration could be refused if the responsible Minister believed that the school was “not in the interests of the Bantu people ... or is likely to be detrimental to the physical, mental or moral welfare of the pupils”. It was a criminal offence to conduct an unregistered private school for “native” children.⁸⁰

72 Act 47 of 1953.

73 Allen 2007: 63ff; Callinicos 2004: 67ff; Collins & Gillespie 1994: 26–27; Landis 1962: 495; Malan 2008: 50ff; Mphahlele 1959: 124ff; Ntantala 1960: 46; Skota 1932: 411; Sundkler & Steed 2004: 415; Wilkinson 1992: 212ff; Winterbach 1994: *passim*; Woeber 2000: 183–214.

74 Behr 1952: 281ff; Bot 1951: 155; Sundkler & Steed 2004: 367, 419–420. See, also, Cross 1994: 85; Mahuma 2004: 56, 74; Mathabatha 2005: *passim*.

75 Sundkler & Steed 2004: 407. Kilnerton’s alumni include former Deputy Chief Justice Dikgang Moseneke, John Marks, Oliver Matsepe, Miriam Makeba and Lilian Ngoyi. Stanley Mogoba and Sefako Makgatho taught at Kilnerton.

76 Mokwele 1988: *passim*; Winterbach 1994: 64.

77 Mashale 2009: 20; Seroto 1999: 44–45, 77; Skota 1932: 401.

78 Seroto 1999: 83ff; Sundkler & Steed 2004: 390.

79 Hahlo & Kahn 1960: 811–812; Landis 1962: 494–496.

80 Hahlo & Kahn 1960: 811–812; Landis 1962: 494–496.

3 3 The Orange Free State and Natal

The authorities in the OFS and Natal were less hostile to private schools than in the Transvaal, but did not encourage the development of private schools for black children, even though the need for such schools was clamant: there was not one government high school for “native” children in the OFS and Natal by 1912. In Natal, private schools set up for white children included Hilton College (non-denominational, 1872), Holy Family Convent (1875), St Charles Grammar School (Order of Mary Immaculate, 1875), Durban Collegiate (non-denominational, 1877), St Anne’s Diocesan School for Girls (Anglican, 1877), Michaelhouse (Anglican, 1896), St John’s Diocesan School for Girls (Anglican, 1897) and Maris Stella Convent (Holy Family sisters, 1899).⁸¹ Notable mission schools for African children in Natal included Adams College at Amanzimtoti (Congregationalist American Board of Commissioners for Foreign Missions, 1853), Inanda Seminary for Girls (American Board, 1869), St Francis College, Marianhill (Catholic Trappists, 1882) and John Langalibalele Dube’s Ohlange Institute (American Board, 1901).⁸² There were a few mission schools for Indian children, for example St Aidan’s (Anglican, 1886) and St Anthony’s (Holy Family, 1888).⁸³ In the OFS, schools such as St Andrew’s School (Anglican, 1863), Greenhill Convent (Holy Family, 1871) and St Michael’s School for Girls (Anglican, 1874) were set up for white children, as were schools like St Philip’s, Good Shepherd and St Patrick’s for black children.⁸⁴

4 The “independence” of private schools in South African legal history

During the colonial period, governmental regulation of private schools varied from one territory to another. In the Cape, regulation was largely limited to the conditions attached to grants-in-aid.⁸⁵ This *laissez-faire* attitude extended to admissions policies. From the late 1800s, however, racial segregation became institutionalised in public

81 Babb-Bracey 1984: 123ff; Barrett 1969; Board of Education 1901: 197ff; Hattersley 1945: *passim*; Leonie 1965: 72; Le Roux 1998: 207; Loram 1917: 53ff, 72; Malherbe 1925: 181ff; Malim 1948: 101ff; Pascoe 1901: 786; Peacock 1972: 81; Smurthwaite 1981: 72–73, 113; Squelch 1997: 27.

82 Babb-Bracey 1984: 151, 251–256; Du Rand 1990: *passim*; Gibbs 2017: 12; Grant 1957: *passim*; Hoole 1847: 365; Khandlhela 1993: *passim*; Moore 1990: 21ff, 37–38; Skota 1932: 395–407; Sundkler & Steed 2004: 363ff, 823; Wood 1972.

83 Hawley 2008: 65.

84 Damant 1963: *passim*; Gunn 1905: 27ff; Leonie 1965: 79ff; Le Roux 1998: 251ff; Le Roux 2016: 125; Loram 1917: 65; Malherbe 1925: 351; Malherbe 1939: 4; O’Connor 1974: 8ff; Smurthwaite 1981: 73–74, 113, 131–132. In 1907, there were about one hundred church and mission schools in the Orange River Colony, educating 8 933 black children, but receiving a total subsidy of only £1 700 from the state: Schoeman 2015: 183.

85 Chase 1843: 144.

schools, and by the 1920s a segregation policy was also applied to private schools. In the ZAR, subsidies were available to private schools, including mission schools, but only if they were operated on a racially segregated basis. After the Anglo-Boer War, private schools in the Transvaal were subjected to regulation through registration requirements. Similar requirements were gradually extended to other territories, but were not as stringent in the Cape as they were in the Transvaal.⁸⁶

The state's "hands-off" approach towards private schools (especially in the Cape Province) was reflected in the judiciary's attitude as articulated in a number of cases dealing with the question whether private church schools fell to be regarded as "public schools" (effectively state schools) for purposes of exemption from municipal rates assessments. There was a long line of cases dealing with questions of this nature.⁸⁷ These cases were decided with reference to particular provincial ordinances and municipal by-laws, rather than national legislation. As such, they did not articulate general principles applicable to all private church schools across the board. Nevertheless, they do provide a general indication of the official approach adopted towards private schools.

The most significant of these cases was the decision of the Appellate Division of the Supreme Court in *Marist Brothers Trustees v Port Elizabeth Municipality*.⁸⁸ This case was concerned with the question whether St Patrick's School in Port Elizabeth, a private school run by the Marist Brothers, was a "public school" for purposes of exemption from municipal rates. This judgement elucidates the *laissez-faire* attitude towards private schools in the Cape. Innes CJ and De Villiers JA outlined the historical development of public education in the Cape Colony, including the three-tier system of public schools (undenominational, mission and aboriginal schools), referred to above. The integration of these public schools in the state education system, and their control by the state, was contrasted with the legal status of private schools, such as St Patrick's. These private schools, said Innes CJ, were "outside the system". They were managed by churches or religious bodies, received no grants, and "were not subject to state inspection or control". Compared to state schools, which were supervised by public authorities, "schools like St Patrick's stood in a very different position" in that "they were free from public supervision; and whatever practical policy they might find it expedient to adopt, they were legally free in important respects in which aided schools were bound".⁸⁹ In law there was "no limit to the power of exclusion" that these private schools had in respect of their admissions policies. Although a school

⁸⁶ See, generally, Behr 1952: 200ff, 315ff; Cross 1994: 81–82; Squelch 1997: 35–36.

⁸⁷ See, for example, *Council of The Diocesan College v Rondebosch Municipality* (1901) 18 SC 112; *Dominican Convent v South Shepstone Local Board* (1923) 44 NLR 391; *Alice Municipality v Lovedale Missionary Institution* (1938) 44 EDL 160; *Wellington Municipality v Huguenot Seminary* 1939 CPD 15; *De Aar Divisional Council v Convent of the Holy Cross* 1952 (1) SA 495 (C).

⁸⁸ 1924 AD 487.

⁸⁹ At 496–498.

like St Patrick's was "subject to the exercise by the Superintendent-General of the authority to inspect private schools" for purposes of monitoring pupils' compulsory school attendance, it was "[i]n no other sense, and to no greater extent, ... liable to Government supervision and inspection". A school such as this was "free from any trace of public control".⁹⁰ De Villiers JA stated that St Patrick's, which had "never been under the control of any school board", was "the property of and is controlled and managed by" the Institute of the Marist Brothers, and the school's "curriculum is in the discretion of the Institute".⁹¹

Thus, private church schools in the Cape were largely free from governmental supervision, and could determine their own admissions policies (within the racial constraints of the time) and curriculum. However, the narrow definition of the term "public school" in Cape legislation meant that private schools did not qualify for the benefit of exemption from municipal rates. So favourably disposed towards private church schools were the provincial authorities in the Cape that, shortly after the Appellate Division's decision in the *Marist Brothers* case, the definition of the term "public school" was amended to include any school not conducted for private pecuniary benefit. The courts construed the amended definition to mean that private church schools not operated for financial gain were to be treated as "public schools", and so became exempt from municipal rates.⁹²

However, in the apartheid years official attitudes towards these schools changed, as emerged in the Appellate Division's decision in *Swart NO v De Kock*.⁹³ This matter dealt with the question whether the Transvaal Provincial Council was entitled to enforce, by ordinance, mother-tongue instruction in private schools. A Flemish girl enrolled at Loreto Convent in Pretoria was receiving instruction through the medium of English. The TED had notified the Mother Superior of the Convent that the girl's home language had been determined to be Afrikaans and that the school's conduct in educating her in English contravened the Ordinance. The Mother Superior and the Bishop of Pretoria had then obtained an order in the Transvaal Provincial Division of the Supreme Court to the effect that the Ordinance had been enacted in excess of the powers of the Provincial Council, which was empowered by section 85 of the South Africa Act to make ordinances relating to "education other than higher education". It was contended that these words did not extend to private schools, and that section 85

⁹⁰ At 491–493.

⁹¹ At 500–501, 506. See, also, *Springfield Public School v Baumgarten* (1906) 16 CTR 22 at 25, where it was intimated that the managing body of a private school would have "absolute control" of that school.

⁹² See *Christian Brothers College v Kimberley Municipality* 1935 GWLD 37; *Christian Brothers College v Kimberley Municipality* 1936 AD 220; *Marist Brothers v Port Elizabeth Municipality* 1948 (4) SA 698 (A).

⁹³ *Swart NO & Nicol NO v De Kock*; *Swart NO & Nicol NO v Garner* 1951 (3) SA 589 (A).

conferred no power on the provinces to legislate as to the language to be used in private schools. On appeal, this contention was rejected by Centlivres CJ:

[O]nce it is clear, as I think it is clear that the State has the right to compel parents to send their children to school to be educated, it also has the right to prescribe how the children should be educated. It is, in my view, entitled to say that the provision in regard to compulsory education shall not be regarded as having been satisfied in the case of a child sent to a non-State-aided private school unless that private school in educating that child uses methods approved by the State.⁹⁴

On this basis it was held that, although private schools had not been brought “completely under control” of the state, there was no reason why a Provincial Council “should not ordain that the child must be educated through the medium of its home language, whether that education takes place in a public or private school”. The word “education” in section 85 was construed as including “to a certain extent education in a private school”.⁹⁵ Fagan and Van den Heever JJA concurred, the latter stating that the fact that “the state hardly interfered with private schools prior to Union [was] an accident of history”.⁹⁶ However, Schreiner JA (with whom Hoexter JA agreed) dissented:

Whatever regulations may properly be introduced in respect of private schools, and I assume for the purposes of the argument that such regulations may cover methods of teaching, ... the teachers in such schools as well as the children attending them are entitled to be protected against regulations that infringe the freedom to use either [official] language. ... I have approached the consideration of this case from the angle of the parent’s right to make any arrangement that he wishes for the satisfactory education of his child. The State may provide safeguards to ensure that a proper standard of education is given to the child. But it is not entitled to ... require that, where the parent chooses to send his child to a private school, the child must there be taught through a particular one of the official languages. ... [N]o practical or theoretical considerations could operate to require restriction of the free choice of a parent who wishes at his own expense to send his child to a private school.⁹⁷

Commenting on this “great constitutional case” in which judicial opinion had been “curiously divided”, a youthful Ellison Kahn (a KES old boy) noted that “the

94 At 605G–H. Centlivres CJ was educated at SACS, UCT and New College, Oxford: see E K 1966: *passim*; Corder 1984: 31.

95 At 609B–H. Mother-tongue instruction was a slightly bizarre notion in circumstances where in excess of 40 per cent of white South African children came from bilingual homes: Fleisch 2007: *passim*. See, also, *De Bruin v Director of Education* 1934 AD 252.

96 At 620H. In the Cape, the authorities had historically not required private schools to comply with official policy regarding the medium of instruction: see Cape of Good Hope 1908: vii–viii and xiii–xiv.

97 At 617G–618A, 618H. Schreiner JA was educated at Rondebosch BHS, SACS, UCT and Trinity College, Cambridge: Kahn 1980: 566. Hoexter JA was educated at Grey College and Emmanuel College, Cambridge: Corder 1984: 33.

majority Judges drew no distinction” between private and public schools, whereas “Schreiner and Hoexter, JJ.A., did draw a very sharp distinction between the two types of school”. He continued:

If the present reviewer be permitted to make a choice between the two views ... he would fall on the side of the minority. To him the majority opinion contains a fatal flaw With due respect, it is submitted that the judgment of Schreiner, JA, will go down in history as one of the great dissenting opinions; of the company of those two immortal minority judgments ... of Lord Shaw of Dunfermline ... and Lord Atkin.⁹⁸

Despite the virtues of Schreiner JA’s dissenting judgement, it is apparent from a comparison of the Appellate Division’s decisions in *Marist Brothers* and *Swart NO v De Kock* that, by the 1950s, private schools were subject to a much more intrusive level of state regulation than had historically been the case. Throughout the apartheid era, private schools enjoyed less independence than previously, and their autonomy to govern their own affairs was significantly impaired.

5 Racial segregation institutionalised in South African schools

In the insidious manner described above, racial segregation became integral to the South African education system. Unlike in the United States of America, where the Supreme Court’s decision in *Brown v Board of Education of Topeka*⁹⁹ proscribed statutory racial segregation in state schools, our judiciary did not intervene to rectify the situation that had arisen here. A case originating in the remote Gordonia region of the northern Cape presented an opportunity for our courts to intervene, but thrice they declined to do so.

The factual situation that gave rise to *Moller v Keimoes School Committee*¹⁰⁰ was not uncommon in the Cape Province of a century ago. The applicant, Carel Moller, was a general dealer in the town of Keimoes. His wife, Magdalena Moller (née Green), was the daughter of “a pure bred Englishman” (Mr Moller’s description of his father-in-law)¹⁰¹ or “a white man of pure breed” (per Hopley J). Mrs Moller’s mother was “an aboriginal native of this country”.¹⁰² In South African racial terminology,

⁹⁸ Kahn 1951: 358–359. See, also, McWhinney 1954: 45, 58–59.

⁹⁹ 347 US 483 (1954). Ironically, *Brown* was effectively overturned by the US Supreme Court itself in *Parents Involved in Community Schools v Seattle School District No 1* 511 US 701 (2007). See Isaacs 2010: 364ff.

¹⁰⁰ 1911 CPD 673. This section is an expanded extract from my PhD thesis, *The Functus Officio Doctrine in South African Administrative Law* (University of the Witwatersrand, 2004) 188ff. See, also, Babb-Bracey 1984: 84; Loveland 1999: 134ff; Suzman 1960: 343.

¹⁰¹ Replying affidavit, Appellate Division court bundle 44 § 8. Searle J used the same description: 1911 CPD 673 at 686.

¹⁰² 1911 CPD 673 at 683; AD bundle 59. Lord de Villiers said that “we may fairly take it that her mother was a black or native woman”: 1911 AD 635 at 642. However, Searle J said “we must assume that her mother was a coloured woman”: 1911 CPD 673 at 686; AD bundle 61–62.

Mrs Moller was “coloured”. So Mr and Mrs Moller’s children were “quadroons” (a term used by counsel for the respondents).¹⁰³ Their children did not attend the local third-class undenominational public school, the pupils of which were exclusively white. However, Mr Moller received accounts for payment of School Board rates. On 6 December 1910, he sent an objection to the Uppington divisional council, saying that he failed to see why he should pay the rates “as I have not the same right for schooling my children as some parties have”. The divisional council secretary (who also happened to be the chairman of the Gordonia School Board) replied by letter dated 21 December 1910: “The School Board Act says that all Europeans are liable for school rates You can send your children to the Keimoes Public School as long as you pay the school fees.”¹⁰⁴

So, in January 1911, Mr Moller took his two children to be enrolled at the public school. He showed the principal (the second respondent) the letter from the divisional council’s secretary. The principal then admitted the children, and Moller paid a term’s school fees in advance. A week later, Moller received a letter from the principal, returning the school fees as he had “received instructions from the Local School Committee to refuse your children to attend the Public School any longer”.¹⁰⁵ Moller also received a letter from the school committee, notifying him that they had been informed by the Superintendent of Education “dat het in de belange van de School is eenig kind te weigeren op te nemen, tegen wien zij eenig objectie hebben moge. Zij hebben dus besloten, & de School-Meester gelast Uwe kinderen niet verder op te nemen”.¹⁰⁶ When the school refused to reinstate the two children, Moller launched proceedings in the Cape Supreme Court, seeking an order compelling the respondents to admit his children to the school.

The school committee averred that several parents of white pupils had complained about the admission of Moller’s children to the school; some had withdrawn their children in protest. The committee opposed admission of the Moller children (who, so they claimed, were “very noticeably coloured”) because it was “against the interests of the School to allow bastard children therein” as there would then “be no white children left” in the school, and “the European child will be entirely ousted, and will receive no education”.¹⁰⁷ The School Board secretary said that “once the principle of admitting coloured and bastard children in the Public Schools is allowed, all the

103 1911 CPD 673 at 679. If Mrs Moller’s mother was “coloured” rather than “native”, as Searle J thought, then the Moller children would have been “octoroons” and not “quadroons” (to use that archaic, if not derogatory, terminology).

104 Annexures “A” and “B” to the founding affidavit, AD bundle 7, 8; replying affidavit, AD bundle 42 § 2.

105 Annexure “E” to the founding affidavit, AD bundle 11.

106 Annexure “F” to the founding affidavit, AD bundle 12 (“that it was in the interest of the school to refuse to receive any child against whom they might have any objection. They had therefore decided and directed the principal no longer to admit your children”).

107 Keimoes school committee’s answering affidavit, AD bundle 20–21 § 12–16.

Schools of the district would be in danger of being overrun by coloured children”.¹⁰⁸ The School Board alleged that “the class of Europeans who intermarry with coloured women are mostly of low character and consequently their children cannot but have an undesirable influence over white children if they be allowed to mix”.¹⁰⁹ Mr Moller took issue with claims of this nature:¹¹⁰

I deny that the men who married coloured women are mostly of low class, most of them having done so [due to] the fact that during the [previous] regime in ... this District prior to annexation, no man could become a landed proprietor unless he were a burgher, and he could not become such unless he were either a coloured man or had married a coloured woman, the country having been given to the Bastards by the late Colonial Government. Many of these men hold extensive properties and many of their coloured wives have been thoroughly educated and are superior to many Europeans.

He said that many of those who objected to his children’s presence in the school “have no better status than I have, on the contrary many of them are very low class poor whites, and their children may be seen daily associating with coloured and native children as companions”.¹¹¹ The Corporal in charge of the Cape Mounted Police at Keimoes deposed to a supporting affidavit:

I deny that the Applicant’s children are noticeably coloured. I often see children bathing in the river and Applicant’s son strips quite white. ... [A]t the recent general vaccination done by the District Surgeon ... at which I assisted, the son [of one of the objecting citizens] was classed as a coloured child while the children of Applicant were classed as Europeans Applicant’s children would pass for Europeans where they are not known.¹¹²

In the Cape Supreme Court, the matter came before Maasdorp JP. To him, the question was whether the fact that Moller’s children were “not of pure European extraction” disentitled Moller from claiming as of right that they be admitted to the school, even though the 1905 School Board Act did not provide “in express terms for the establishment of schools for European children exclusively”.¹¹³ That notwithstanding, the Judge President thought that the Act contemplated the existence of separate schools for children “of European parentage or extraction” and evinced a “clear intention” that “children of other than European extraction shall only attend schools established for such children.” Thus, Moller was not entitled to have his children admitted to the school. Turning to the question whether the children could

108 Gordonia School Board secretary’s affidavit, AD bundle 37 § 6.

109 Annexure to affidavit of School Board secretary, AD bundle 39.

110 Replying affidavit, AD bundle 44 § 8.

111 Replying affidavit, AD bundle 45 § 9.

112 Affidavit of Corporal Harry James Skipper, AD bundle 46–47.

113 1911 CPD 674–675; AD bundle 52. As explained above, the subsequent Education Ordinance 5 of 1921 (C) expressly provided for separate schools for “European” and “non-European” children in the Cape Province.

be expelled from the school having been already admitted, Maasdorp JP declined to order specific performance of the contract between Moller and the school.¹¹⁴

On appeal to the full bench of the Cape Supreme Court, it was contended for Moller that the School Board Act did not talk about *pure* European children, and that his children were “more European than anything else”. Buchanan J said that in South Africa “coloured people are generally understood to be those whose parents are not both white, but it is difficult to say exactly where the line should be drawn”. The Act distinguished between those “who have coloured blood in their veins” and those who do not. Moller’s children were not “of European parentage, because one quarter of the blood in their veins was coloured”.¹¹⁵ He held that, although there was nothing to prevent a school board from admitting coloured children into schools established for white children, a parent of coloured children had no right to force the board to admit his children to such a school. In the absence of such a right, and in the absence of *mala fides* or want of reasonable grounds for the committee’s actions, the court would not grant mandamus upon the school committee.¹¹⁶

Hopley J concurred. He said that the words “of European extraction” should be read as though they were “of *pure* European extraction”. In his view, it was not the policy of the Act “that children of pure European extraction should be associated as schoolmates with children of mixed or pure native descent”. Although a school committee could admit children who were not “of pure European extraction”, *in casu* there was no indication that the committee had not acted *bona fide* and to the best of their discretion in the interests of the school.¹¹⁷ Searle J said that, although there was “no section of the Act which distinctly says [so] in unqualified terms”,

114 At 676–677; AD bundle 53–54. Christian George Maasdorp went to school at Graaff-Reinet and Grey College, Bloemfontein. He held an MA from the University of the Cape of Good Hope. He was called to the Bar by the Inner Temple in 1871 and was admitted to the Cape Bar in the same year. He was Attorney General of the Transvaal during the British annexation (1877–1881), a judge of the Eastern Districts Court from 1885, and a judge of the Cape Supreme Court from 1896: Anon 1907: 129; Anon 1914b: 426.

115 1911 CPD 681; AD bundle 56. In my PhD thesis, referred to above (n 100), I wrote that Buchanan J was Sir James Buchanan (apropos of whom, see F St L S 1933: 137). In fact, the Buchanan J who sat in the *Moller* case was Sir James’ cousin, Sir Ebenezer John Buchanan: see Anon 1900: 109; Kahn 1999: 67–68; Van Niekerk 2013: 117–118.

116 At 682–683; AD bundle 57–58. When the author’s grandfather was a junior schoolboy at Paarl Gymnasium soon after the Anglo-Boer War, he did not have coloured boys among his fellow pupils. However, in his senior years (1906–1910) at the first-class Boys’ High School in Wellington (where the author’s great-grandfather was the secretary of the school board, 1906–1921) he did count coloured boys among his fellows; the last “non-European” boys were removed from the school only in 1939. See Malan 1948: 10; Le Roux 2002: 16–33. A generation later, the situation had changed. When the author’s grandfather was principal of the second-class public school and deputy chairman of the Coloured School Committee at Naauwpoort in the Great Karoo in the 1930s and 1940s, the education of white and coloured children occurred on a completely segregated basis.

117 1911 CPD 673 at 684–685; AD bundle 59–60.

the “whole tenor” of the Act was “in the direction of drawing a clear distinction between the two sets of children and the two sets of schools”. While it was not illegal to receive a “non-European” child into a school for “European” children, the Act allowed a school committee “legally to exclude one class of children from the other class of school”. The Moller children were “not of European parentage, because their mother is admittedly coloured”. The committee had acted *bona fide* in exercising its “inherent power ... to exclude any children, if this proved to be in the best interests of the school”.¹¹⁸

Eventually, the matter came before the Appellate Division (sitting in Cape Town, as it sometimes did in those days).¹¹⁹ Schreiner QC, appearing for Moller, argued that the School Board Act should not lightly be presumed to take away existing rights (as it would if construed in the manner adopted by the court *a quo*, in that there had never previously been any legal restriction on the right of black children to attend public schools in the Cape). He also argued that the Moller children were “of European extraction” on both sides, and that the interests of the school could not be allowed to prejudice the individual children.¹²⁰ The Appellate Division gave short shrift to these arguments. Lord de Villiers CJ held that the Act envisaged the establishment of separate public schools for children of European parentage or extraction and for other children. There was a “principle of separation for purposes of education”, and the Keimoes school was intended for children of European parentage.¹²¹ Turning to the fact that Moller had been assured by the divisional council’s secretary that he could send his children to the school, the Chief Justice held that it was a case of great hardship on Moller, but the divisional council could not bind the school

118 1911 CPD 673 at 685–687; AD bundle 61–62. Malcolm William Searle was a Bishops old boy. He graduated from St Catherine’s College, Cambridge, before being admitted to the Bar at the Inner Temple. He was made a QC in 1893 and was elevated to the Cape bench in 1910: Anon 1885: 78; Anon 1919: 1.

119 The Appellate Division granted special leave to appeal on account of the matter’s “public importance”: *Moller v Keimoes School Committee* 1911 AD 585.

120 1911 AD 635 at 636–638. William Philip Schreiner graduated from London University and Downing College, Cambridge. He was called to the Bar at the Inner Temple in 1882. He was elected MP for Kimberley in 1893, becoming Attorney General in Cecil John Rhodes’ cabinet. He became Prime Minister of the Cape Colony in 1898. He was a vocal champion of native rights: Anon 1906: 117; Anon 1909: 7.

121 1911 AD 635 at 639–640. John Henry de Villiers (1842–1914) was a student at SACS. He became Chief Justice of the Cape Colony in 1873, aged thirty-one. He administered the oath of office to himself, à la Napoleon, thus averting a potential crisis arising from rumours that the more senior puisne judges, to whom he had been preferred for appointment, might refuse to administer the oath to him. He was knighted in 1877, and was made a member of the Judicial Committee of the Privy Council in 1896. In 1910, as Lord de Villiers of Wynberg, he was appointed Chief Justice of the Union of South Africa: Anon 1901: 1; Rose Innes 1914: 422; Bisschop 1915: 2; McGregor 1922: 52; Wessels 1931: 459; Kahn 2005: 263.

committee.¹²² The question was whether Moller's children were "of European parentage or extraction". In this regard, Lord de Villiers stated the following:

When once it is established that one of a man's nearer ancestors ... was black, like a negro or Kafir, or yellow like a Bushman or Hottentot or Chinaman, he is regarded as being of other than European descent. ... [T]hese prejudices ... are ... deeply rooted at the present day among the Europeans in South Africa We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges ... ignore the reasons which must have induced the legislature to adopt the policy of separate education. ... It is regrettable that there should be this social chasm between the races, but it undoubtedly exists, and it has had its effect on legislation [*sic*].¹²³

As, in terms of the Act, the school had been established for children of "European parentage or extraction", and as the Moller children were not of unmixed European parentage or extraction, they had no right to be admitted to the school, and so Lord de Villiers dismissed the appeal.

Innes J followed the same line of reasoning. In his view, the legislature's intention to bring about separate school accommodation could be clearly gathered from the wording of the Act. The Keimoes school had been established for white children of purely European extraction. This was a policy which might "inflict great hardship on deserving members of the community", especially in circumstances where "the machinery of the Act for the education of children of other than European extraction seems inadequate". But that was "what the Legislature has thought right to enact".¹²⁴

Laurence J said that nothing prevented a public school from admitting children who were not of "European parentage or extraction", but it was under no obligation to do so. He acknowledged that the matter involved hardship for people like Moller, especially as only nine public schools for "non-European" children had been established in the Cape Province, and those were confined to a mere four districts: "[T]he problem of promoting the education of such children, beyond the curriculum of the mission schools, is one of which so far we have barely touched the fringe." All of that notwithstanding, the appeal had to fail.¹²⁵ De Villiers JP and Sir John Kotzé JP came to the same conclusion. Kotzé JP said that "a certain amount of sympathy must naturally be felt for the innocent children", and acknowledged the argument that "the

¹²² At 641–642.

¹²³ At 643–644.

¹²⁴ At 645–650. James Rose Innes was educated at Gill College, Somerset East and UCT. He was called to the Cape Bar in 1878 and became a QC in 1890. Having been an MP and also Attorney General in two Cape cabinets, he was knighted in 1901 and appointed Chief Justice of the Transvaal in 1902. He was elevated to the Appellate Division upon its establishment in 1910 and served as Chief Justice from 1914 until 1927. After his retirement, he devoted the remaining years of his life to the cause of the Non-Racial Franchise Association: Anon 1902: 1; Wessels 1931: 461.

¹²⁵ At 650–652. By implication, Laurence J acknowledged the role of mission schools in providing education for black children.

prejudice of a section of the community should not be adopted as indicative of the law”, but said that only the meaning of the legislature, as expressed in the Act, could be taken into account.¹²⁶

And so, ultimately, nine judges had unanimously upheld the system of segregated public schools. “No excuse can lessen the harmful effects of this case, both in terms of the weight of precedent in future disputes involving race, and in the wider community, as an encouragement to just such racial prejudice as several judges purported to denounce.”¹²⁷

History having a propensity to repeat itself, *Moller’s* case found an echo in *Seneque v Natal Provincial Administration*.¹²⁸ The principal of a school for “European” children had admitted the appellant’s three children to that school. The children had attended the school for periods ranging from four years to eighteen months, when a newly appointed principal required the appellant to provide proof that his children were of “pure” European descent for three generations on both sides. The appellant having been unable to provide such proof, his children had been excluded from the school. He had then applied for a mandamus compelling the respondent to re-admit his children to the school. Watermeyer JA (Tindall and Centlivres JJA concurring) held that the applicable regulations did not make the first principal’s decision final and binding on the respondent, who could “set matters right” if it thought that he had been “wrong”. De Wet CJ dissented, stating that the respondent, having delegated the discretion to decide the question of fact (ie whether the children were of “pure” European descent), to the first principal, was bound by his decision unless and until such decision was shown to be erroneous in fact or in law.¹²⁹

126 At 656. Sir John Gilbert Kotzé LLB (London), another SACS old boy, was called to the Bar in 1874, having been proposed by Lord Halsbury. He was appointed a judge of the Transvaal High Court at the age of twenty-seven (which earned him the epithet “the boy Judge”). He became Chief Justice of the ZAR in 1881. In 1897, after a dispute about the courts’ power to test laws against the *Grondwet*, he was removed from office by President Kruger. In 1900, he was appointed Attorney General of Southern Rhodesia, and in 1903 became a puisne judge of the Eastern Districts Court: Anon 1898: 58; Anon 1903: 101; Thompson 1954: 65–68. In 1904, he became Judge President of the Eastern Districts Court. He sat on the Cape bench from 1913, was knighted in the same year and was elevated to the Appellate Division in 1922: Corder 1984: 27, 37.

127 Corder 1984: 159. Also see Dyzenhaus 1991: 55–61, 82; Hahlo & Kahn 1960: 812; McWhinney 1954: 71.

128 1940 AD 149 at 160. See Corder 1984: 159–161. The situation that arose in *Seneque’s* case was not without precedent in Natal: see Swartz & Wassermann 2016: 881.

129 At 157. Nicolaas de Wet was educated at Victoria College, Stellenbosch, and Cambridge. He was admitted to the Cape and Pretoria Bars in 1896, soon becoming acting assistant State Attorney of the ZAR. During the Anglo-Boer War, he was General Louis Botha’s military secretary. After the war, he returned to the Pretoria Bar, becoming a KC in 1912. A year later, he was appointed Minister of Justice in Botha’s Union cabinet. He was appointed to the Transvaal bench in 1932 and to the Appellate Division in 1937. He became Chief Justice and a member of the Privy Council in 1939. After the death of Sir Patrick Duncan in 1943, De Wet served as Officer Administering the

Although these cases, establishing the principle of racially segregated schools, were decided with reference to public schools, the same principle was enforced in respect of private schools. The matter was put beyond doubt by the Blacks (Urban Areas) Consolidation Act,¹³⁰ which prohibited the admission of African pupils to any school outside the so-called locations. Accordingly, private schools were precluded from determining their own admissions policies – at least as far as race was concerned – and had to comply with apartheid laws in that regard. This form of state interference in the affairs of private schools eventually led to conflict between the authorities and private schools in the 1970s. Ultimately, Catholic private schools, such as Springfield Convent, Holy Rosary Convent and St Dominic's Priory, took the lead in defying educational apartheid in the mid-1970s.¹³¹

The National Party government continued to enforce control over private schools even as the apartheid edifice began to crumble in the 1980s. The “tricameral” Parliament enacted the Private Schools Act (House of Assembly),¹³² one stated object of which was to provide for “control over” private schools. Such control was exercised by means of registration regulations,¹³³ which, in a circuitous way, retained the government's power to dictate admissions policies.¹³⁴ Registration conditions also conferred power on government to control employment of teachers in private schools and to dictate the curriculum of private schools.¹³⁵ In addition, provincial education departments were given broad powers to inspect various aspects of private schools' operations, and the Minister of Education was empowered to withdraw a private school's registration if the school was “managed or maintained in a manner ... that could, in his opinion, be harmful to the physical, intellectual or spiritual well-being of the pupils attending such school”.¹³⁶ Thus, tight control of private schools remained a hallmark of the apartheid regime till the very end.

Government for three years. After his retirement, he was a leader of the Torch Commando, which opposed the NP's proposed removal of coloured people from the common voters' roll. See Corder 1984: 41; Anon 1914a: 369; Tindall 1943: 275; Kahn 1960: 133.

130 Act 25 of 1945, s 9. See Squelch 1997: 40.

131 Heilbuth 1992: 72ff; Randall 1982: 191–192; Smurthwaite 1981: 229; Squelch 1997: 48ff.

132 Act 104 of 1986. See Squelch 1997: 55; *MEC for the Eastern Cape Department of Education v Playways Pre-Primary School* par 141.

133 Regulations Regarding the Registration of and Financial Grants to Private Schools, GNR 2281 GG 10502 of 31 Oct 1986.

134 Regulation 2(2)(f) provided that registration of a private school was subject to the condition that the admission of pupils to such a school was subject to items 2 and 14 of Schedule 1 to the Republic of South Africa Constitution Act 110 of 1983 (the “tricameral” Constitution). This meant that admissions to private schools were regulated as an “own affair” by the white House of Assembly, which, in that manner, regulated such admissions on a racial basis: Squelch 1997: 56.

135 Regulations 2(2)(i) and 2(2)(l)(ii).

136 Regulations 4(1) and 6(2)(a).

6 Concluding remarks

Education did not escape the ravages of South Africa's colonial and apartheid past. While a small number of good state schools can trace their origins back to the colonial era, public education during that era was inadequate; state education for black children, to the extent that it was provided at all, was deplorable. Private schools, especially church schools, made a significant contribution towards alleviating the shortcomings of public education. In the nineteenth century and the first half of the twentieth century, these schools enjoyed a significant degree of independence. In the Cape Colony (later the Cape Province) in particular, these schools had a high degree of freedom to carry on their educational activities without state regulation or interference. Even in the early 1900s, however, the state began to enforce racial segregation in private schools. During the apartheid era, state regulation of private schools intensified significantly, eroding the independence of these schools and undermining the extent to which they could have a beneficial social impact. This state of affairs has largely been rectified in the post-apartheid era, with the Constitution now guaranteeing the independence of private educational institutions.¹³⁷

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¹³⁷ On the regulation of independent schools under the Constitution and the South African Schools Act, see Pretorius 2019: *passim*.

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A HISTORICAL EXPOSITION OF SPATIAL INJUSTICE AND SEGREGATED URBAN SETTLEMENT IN SOUTH AFRICA

Margot Strauss*

ABSTRACT

Spatial injustice and urban residential segregation represent significant dimensions in the historical development of the settlement patterns of South Africa's urban poor, which have strong links to colonialism and apartheid. A myriad of political, economic, legal and social factors contributed to the legacy of spatial injustice and socio-economic exclusion that characterises contemporary towns and cities. This contribution provides a historical exposition of the leading causes of spatial injustice and segregated urban settlement in South Africa during colonialism and apartheid, and adopts a spatial perspective in its analysis of relevant legislation, case law and academic literature. Advancing this critical spatial awareness is essential, as it remains elusive in current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor.

Keywords: Spatial injustice; segregated urban settlement; South Africa; legislation; housing; planning; land

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Fundamina
Volume 25 | Number 2 | 2019
pp 135–168

DOI: 10.17159/2411-7870/2019/v25n2a6
Print ISSN 1021-545X/ Online ISSN 2411-7870

1 Introduction

A myriad of political, economic, legal and social factors contributed to the legacy of spatial injustice and exclusion that characterises South Africa's contemporary urban areas and segregated settlement patterns.¹ This contribution provides a historical exposition of the leading causes of spatial injustice and segregated urban settlement in South Africa during colonialism and apartheid. Furthermore, it adopts a spatial perspective in its analysis of relevant legislation, case law and academic literature. Advancing this critical spatial awareness is essential, as it remains elusive in current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor.²

The historical analysis consists of three main parts that correspond to distinct periods between 1652 and 1990.³ Part one examines the colonial roots of spatial control and residential segregation in South Africa's earliest towns (1652–1910). Part two reviews the post-Union or pre-apartheid period (1910–1948) and investigates the use of law as an instrument to legitimate and advance the systematic dispossession, spatial segregation, political control and socio-economic exclusion of the majority black population. The final part of this contribution explores the apartheid state's use of legislation between 1948 and 1990 to consolidate spatial control, entrench segregated housing settlement and facilitate the spatial restructuring of urban areas.

2 Pre-colonial African settlement patterns

Prior to the colonial occupation of southern Africa, sizeable settlements developed as strategically located agrarian and economic nodes along prominent trading routes.⁴ Stone-walled structures often demarcated the spatial organisation and main settlement features, which included administrative courts and the homesteads of prominent figures.⁵ Settlement patterns also evinced political hierarchies and advanced social

1 Pienaar 2002b: 337; National Planning Commission 2012: 259–276.

2 Strauss & Liebenberg 2014: 428; Strauss 2017: 181–243.

3 In South Africa, colonialism officially commenced in 1652, when the Dutch founded a permanent settlement at the Cape. On 31 May 1910, the amalgamation of four British colonies (the Cape of Good Hope, Natal, Transvaal and Orange River) established the Union of South Africa in terms of the Union of South Africa Act of 1909. This date marks the end of the colonial period and the beginning of the post-Union or pre-apartheid period. See, further, Terreblanche 2002: 199; Van Wyk 2012: 25.

4 The location of these early settlements facilitated access to agricultural and mineral resources, which stimulated regional trade and increased the political influence and economic power of their inhabitants. The Zimbabwean capital of Mapungubwe (1075–1220), for instance, developed along a trading route through the Limpopo River valley that extends from Botswana to the Indian Ocean. Mapungubwe provided the foundation for the establishment of the pre-colonial Kingdom of Zimbabwe (1220–1450). See Huffman 1992: 676–680; Harrison, Todes & Watson 2008: 19.

5 In addition to built structures, rights of way distinctly separated the living environments in these pre-colonial indigenous settlements; their particular spatial layout is evident in, for example, the villages of the Tswana chiefdoms and the capitals of the Zulu Kingdom. See Mabin 1992b: 13; Van Wyk 2012: 26.

structures: while most residents lived within the enclosure, prominent families occasionally resided outside built-up areas.⁶ At the height of their development, complex political, economic, legal and social relations characterised the organised and functional living environments of strategically located African settlements.⁷

From the mid-seventeenth century, a series of significant events severely disrupted the settlement patterns and livelihood strategies of southern African communities. Most notably, prolonged periods of ethnic warfare, major droughts and famine resulted in large-scale forced migration.⁸ The advent of colonialism and the development of early European settlements contributed to conditions that exacerbated the spatial displacement of African populations due to an increased scarcity of arable land and livestock, demands for slave labour, and trade in valuable resources.⁹

Spatial segregation represents a significant dimension in the historical development of urban settlement patterns in South Africa and is deeply rooted in the colonial period.¹⁰ The next section examines the origins and impact of the formal establishment and administrative control of spatially segregated residential settlements in South Africa's earliest major colonial towns.¹¹

3 Colonial origins of spatially segregated urban settlement (1652–1910)

3.1 Administering spatial control through separate residential “locations”

Upon arriving in the Cape in 1652, the Dutch introduced their system of land registration and planning in the earliest colonial settlements established predominantly for administrative and agricultural purposes.¹² These initial approaches to land-use management were informed by the notion that the land inhabited by indigenous communities was *res nullius*.¹³ After the British invasion and conquest of the Cape in 1795, they maintained the Roman-Dutch legal system, but introduced their own

6 These political and social hierarchies and structures are evident in both the regional distribution of residential complexes and the layout of administrative capitals. See Huffman 1992: 678–679.

7 Laburn-Pearl 2002: 269.

8 Eldredge 1992: 29–31; Harrison, Todes & Watson 2008: 19–20.

9 Van Wyk 2012: 28; Pienaar 2014: 54–55.

10 Maylam 1995: 22.

11 For an account of the origins and impact of urban residential segregation in the Boer republics of the Transvaal and Orange Free State during the late nineteenth century, see Parnell 1991: 273; Maylam 1995: 23.

12 Van Wyk 2012: 27.

13 Badenhorst, Pienaar & Mostert 2006: 32; Van Wyk 2012: 27.

administrative practices.¹⁴ Authorities did not recognise any immediate need for formal planning or restrictive measures, as land-use segregation trends in early colonial towns reflected low property values and the slow nature of development.¹⁵

Founded as a British colonial port, the town of Port Elizabeth represents one of the primary sites in South Africa where spatially segregated urban development occurred along racial lines.¹⁶ As the initial spatial design of the colonial outpost catered exclusively for European needs,¹⁷ missionaries founded a so-called location or separate residential area near the town centre for indigenous persons under their care in 1834.¹⁸ An influx of black labourers seeking access to livelihood opportunities over the next two decades prompted the municipality in 1855 to establish the Native Strangers' Location adjacent to the 1834 location.¹⁹

The development of the Native Strangers' Location is historically significant, as it provides insight into early colonial approaches that used segregated residential development as a mechanism of urban administration and spatial control.²⁰ Due to the participation of colonial officers, the spatial relocation of black residents to the Native Strangers' Location also represents one of the first authorised forced removals in a South African urban area.²¹ Black labourers who, for instance, were not housed

14 In *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) pars 32, 45, 62 and 68–77, the South African Constitutional Court considered the nature and content of an indigenous community's land rights before and after the British acquisition of the land in 1847. The case dealt with a claim for restitution of land by the Richtersveld community under the provisions of the Restitution of Land Rights Act 22 of 1994. Central to the claim was the question whether the Richtersveld community was dispossessed of its land rights after 19 Jun 1913 as a result of discriminatory laws or practices. The court found that the real nature of the community's title was a right of communal ownership under indigenous law, which included the right to the exclusive occupation and use of the land. The court concluded that there was nothing in the events preceding the annexation of the Richtersveld that suggested that annexation extinguished the community's land rights.

15 Van Wyk 2012: 28.

16 By the mid-nineteenth century, Port Elizabeth was the town with the second-largest population in South Africa after Cape Town. See Kirk 1991: 295. The colonial settlement of East London represents another prominent site where racially segregated development occurred in as early as 1849. However, military considerations largely determined its spatial organisation. See Nel 1991: 60–68.

17 Mabin 1991: 9.

18 The London Missionary Society Outstation or location was located less than a kilometre from the Port Elizabeth town centre, but was separated from it by cemeteries and open land. See Christopher 1987: 197; Baines 1990: 72.

19 The Native Strangers' Location was intended exclusively for black labourers, who were considered as temporary residents. The landholding system in the settlement was based on an extended leasehold period, which could be renewed annually. Although the land was not individually owned, some tenants lived on their plots long enough to attain common-law rights or tenure through occupancy. See Kirk 1991: 304.

20 Joyce Kirk argues that, contrary to studies indicating that urban residential segregation originated during the 1880s – when the closed compound housing system developed in Kimberley – it commenced with the establishment of the Native Strangers' Location. See *idem* at 294.

21 *Ibid.*

by their employers were required to relocate to this regulated area and to construct their own housing.²² Despite the proximity of the Native Strangers' Location to urban amenities and opportunities, its occupants faced significant challenges. Local authorities prohibited tenants from improving or adapting their homes, which rendered structures unsafe and contributed to poor living conditions. Harsh restrictions also affected fragile livelihood strategies, as inhabitants were prevented from supplementing their income by renting out rooms or allowing others to erect structures on their plots. As a result, they frequently built structures or accommodated boarders without obtaining permission from local authorities. The establishment of the Native Strangers' Location thus provides valuable insight into the resolve and efforts of marginalised black urban inhabitants to overcome the political, social and spatial challenges associated with their living environments in order to meet their particular needs – despite the formal restrictions and criminal sanctions imposed by colonial authorities.²³

Although Port Elizabeth's black labour force initially resided in different types of well-located accommodation,²⁴ local authorities eventually established additional residential locations beyond the urban boundary as the town expanded.²⁵ This decision was ostensibly aimed at alleviating overcrowding and poor living conditions in the Native Strangers' Location.²⁶ In practice, however, it ensured greater colonial control over new residential areas reserved for black urban inhabitants.

Towards the end of the nineteenth century, the prime geographical placement of the Native Strangers' Location near Port Elizabeth's town centre began to impede the development of areas earmarked for Europeans. In response, the white population increasingly demanded the removal of the black settlement from its proximity to their new neighbourhoods.²⁷ The value of the land occupied by the location also increased significantly and the site was earmarked for commercial and industrial

22 Black persons squatting on private land or on the town commonage were also forced to relocate to the Native Strangers' Location. See Christopher 1987: 197; Baines 1990: 74–75.

23 Kirk 1991: 305.

24 In addition to the residential locations, black inhabitants resided in rental accommodation and housing provided by employers. See *idem* at 295.

25 These locations included Dassiekraal (1850), Cooper's Kloof Location (1877) and the Reservoir Location (1883). All the locations were established on municipal land. The regulations applicable to these new locations differed, however, from those governing the Native Strangers' Location. In Cooper's Kloof, for instance, the municipality limited the leasehold period to three years and retained the right to remove tenants at any time within the terms of the lease agreement. This had a significant impact on residents' economic and social position, as they had the status of short-term tenants and were subject to evictions. Notably, Port Elizabeth's local authorities did not administer the Gubbs Location, as it developed on privately owned land. This allowed its inhabitants greater freedom to maintain aspects of traditional life.

26 In addition to overcrowding and poor living conditions, there was limited access to essential services (such as water standpipes) in the Native Strangers' Location. See Kirk 1991: 304–306, 310.

27 Christopher 1991: 44.

development.²⁸ In 1883, the Port Elizabeth municipality attempted to introduce legislation authorising the removal of the Native Strangers' Location and the relocation of its residents.²⁹ This approach was modelled on the use of legislation in the Cape Colony, where British officials enacted the Native Administration Act 3 of 1876 and the Native Locations, Lands and Commonages Act 40 of 1879 in order to exercise greater control over black persons residing on public and private land. In particular, the Native Reserve Locations Act 40 of 1902 granted British authorities the power to establish black residential areas on the outskirts of urban areas.³⁰

The residents of Port Elizabeth's Native Strangers' Location resisted their relocation, as it would exacerbate their marginalisation, affect their livelihood strategies and social networks, and deprive them of existing access to employment opportunities and facilities, such as schools and churches. Although the Native Strangers' Location Bill was ultimately unsuccessful, the municipality's attempt to introduce legislation aimed at evicting and relocating black inhabitants fuelled a broader and prolonged dispute between them and the town's authorities.³¹

In 1901, an outbreak of the bubonic plague provided the necessary impetus for health authorities to evict and relocate the occupants of the Native Strangers' Location to an outlying area. The decision to relocate these black urban inhabitants, instead of providing them with access to housing in town, was deliberate and aligned with the municipality's broader strategy of advancing urban residential segregation. Stated differently, colonial officials maintained control over the presence of black labourers in the town without addressing their unsafe housing and unhealthy living conditions. Many evictees relocated to Korsten, a mixed-race freehold village, where they purchased land.³² In the following year, the Port Elizabeth municipality implemented the Native Reserve Locations Act 40 of 1902 to establish New Brighton – the first official urban so-called township (or separate residential area for black inhabitants).³³ In doing so, New Brighton became both a physical, spatial expression and legal precedent for the future development of racially segregated urban residential settlement in South Africa.³⁴

28 Kirk 1991: 294, 312–313.

29 Local authorities in Port Elizabeth introduced the Native Strangers' Location Bill in 1883. See *idem* at 295, 300, 314.

30 In terms of the Native Reserve Locations Act 40 of 1902, black residents from District Six and other parts of Cape Town were forcibly relocated to the outlying area of Ndabeni.

31 The members of an emerging black middle class were particularly opposed to the strategy of forced removal and its impact on their status, specifically in relation to their prescriptive land rights in the location. See Kirk 1991: 314–317.

32 *Idem* at 306, 319–320.

33 During this period, two similar statutes were passed in Natal. The Native Locations Act 37 of 1897 enabled the heightened administration of locations, while the Native Reserve Locations Act 2 of 1904 enabled local authorities to establish locations. See Van Wyk 2012: 48.

34 Kirk 1991: 320. See, further, Mabin & Smith 1997: 199.

Advancing political, economic, social and spatial control through the physical demarcation and administration of separate black locations represent prominent features of the colonial period. The role of the law in facilitating spatially unjust settlement patterns, urban residential segregation, the privileging of white minority property and economic interests, as well as legitimising the forced removal of black urban inhabitants to remote sites beyond the urban boundary, is equally conspicuous. Despite considerable challenges, the analysis of the Native Strangers' Location in Port Elizabeth illustrates that locations also represented sites of political contestation, where black residents undermined and challenged colonial authorities' attempts at spatial control through their daily lives and collective activities.

As noted above, public health administration played a role in exercising spatial control and facilitating segregated urban development and housing deprivation during the colonial period. The use of the law to address the causal connection between the presence of black persons in urban areas and perceived threats to the white population's health and safety is considered in the next section.

3 2 The role of public health legislation in the spatial organisation of colonial towns

At the turn of the twentieth century, the spread of infectious diseases throughout colonial towns resulted in a powerful societal metaphor, which influenced the establishment of institutions and legal frameworks that heightened spatial segregation and racial tensions. Authorities' attempts to control infectious diseases reveal important insights into two sets of relationships in urban areas. The first encompassed the social interaction between inhabitants of different racial groups, while the second concerned urban residents' relations to their physical surroundings.³⁵ The "sanitation syndrome"³⁶ explains spatial control and exclusionary urban development in terms of the "moral panic and racial hysteria" of white residents who increasingly equated the presence of black persons in urban areas with poverty, disease and crime.³⁷ As a result, a causal connection developed between perceived threats to the white population's health and safety, and the imperative to achieve racially motivated spatial quarantines through the forced removal of black communities from urban areas.³⁸

In Cape Town, for instance, the eruption of the plague in 1901 resulted in the swift relocation of more than 6 000 black persons from the urban centre to temporary

35 Swanson 1973: 160; Swanson 1977: 387.

36 Emphasising the metaphorical significance of the syndrome, Swanson 1977: 409 explains that urban race relations were "widely conceived and dealt with in the imagery of infection and epidemic disease". See, further, Swanson 1973: 160.

37 Maylam 1995: 24.

38 *Ibid.*

accommodation in the outlying area of Ndabeni.³⁹ Similarly, in Port Elizabeth, the onset of the plague prompted the municipality to demolish the Native Strangers' Location and to establish the segregated township of New Brighton.⁴⁰ Local authorities in Johannesburg also used the outbreak of the plague to justify the removal of so-called Indian inhabitants from the inner city "Coolie Location" to the peripheral township of Klipspruit.⁴¹ Ultimately, the use of public health legislation to establish and manage separate, peripheral housing spaces for black inhabitants formed part of a broader strategy aimed at promoting spatially unjust urban development and the political, economic and social exclusion of certain communities and individuals.

The subsequent section examines the use of town planning and land-use management practices to justify and facilitate the forced removal, spatial displacement and dispossession of black communities.

3 3 Facilitating spatial displacement through planning and land-use management

Under colonial rule, formal planning methods were either superimposed on indigenous settlement patterns and land-use systems, or implemented alongside pre-existing historic urban centres.⁴² Municipal officials also strictly regulated housing development in the separate residential locations, while implementing limited or unsuitable town planning practices. In contrast, neighbourhoods where white persons resided were increasingly characterised by low-density layouts, public spaces, green belts and access to superior infrastructure and municipal services.⁴³ In practice, planning practices in areas reserved for black inhabitants accordingly differed significantly from those applied to white residential areas. Settlement plans applicable to black residential areas were not, for instance, sensitive towards the particularly complex domestic and economic responsibilities of women. The uncritical implementation of European planning norms also incorrectly assumed that black people would have nuclear families and that they preferred to keep their places of residence and employment separate. Moreover, local planning practices failed to accommodate the religious or culturally specific needs of black, Indian, and so-called coloured families and communities living in urban areas. Planning approaches in black residential areas were thus wholly incompatible with the particular employment patterns and with the domestic, social and cultural needs of their inhabitants.⁴⁴ Stated differently, municipal planning approaches largely failed to adequately respond to the diverse housing needs of growing, heterogeneous urban populations, which further

39 Swanson 1977: 392; Maylam 1995: 24.

40 Swanson 1977: 400; Christopher 1987: 197.

41 Parnell 1991: 273; Maylam 1995: 24–25.

42 Hardoy & Satterthwaite 1989: 20.

43 Rakodi 1986: 201.

44 Hardoy & Satterthwaite 1989: 22–23.

exacerbated the economic, social and spatial exclusion of already marginalised black inhabitants. As a result, housing deprivation, overcrowding and unsafe and unhealthy living conditions afflicted these areas.⁴⁵

Introducing planning legislation to improve the living conditions of black urban residents proved ineffectual. This was largely due to the fact that these legal frameworks were based on Western models and designed for economies and societies that were entirely distinct from the actual contexts in which they were implemented.⁴⁶ In particular, statutory planning frameworks failed to recognise non-European conceptions of divisions between public and private spaces, as well as the specific transportation needs of black persons. The extent of the impact of colonial planning practices on black settlement patterns remains evident in many of the social power imbalances and spatial inequalities inherent in contemporary South African urban areas.⁴⁷

From the mid-nineteenth century, industrial and economic development, coupled with the mineral revolution, added a further dimension to spatial control and urban segregation in the colonies.⁴⁸ An influx of investment and the expansion of economic and mining activities resulted in rapid and unrestrained urbanisation, which had a profound impact on the spatial organisation of urban areas.⁴⁹ Industrial, commercial and residential sites often developed adjacent to one another. The haphazard nature of urban development spurred the need for formal town planning in relation to residential areas, ports, transportation networks and commercial centres.⁵⁰ Local planning authorities drew inspiration from British land-use management practices in their efforts to spatially reconfigure colonial towns.⁵¹ The spatial settlement patterns that developed during the 1880s in industrial or mining towns, such as Kimberley, represent an important source of urban residential segregation in South Africa. This is due to the fact that the housing compounds and hostels near mines that accommodated black labourers represented a rigid form of residential segregation, which structured the development of South African cities.⁵² In the British colony of Natal, for example, racially discriminatory housing policies only permitted black persons to access urban areas as single workers, housed in either municipal or private dormitories.⁵³

The rise of industrialisation coincided with substantial population migration towards economic opportunities in towns. Aggressive labour recruiting practices

45 Rakodi 1986: 201.

46 Hardoy & Satterthwaite 1989: 21–22; Mabin 1992b: 15–17.

47 Gugler 1996: 221–225; Hardoy & Satterthwaite 1989: 22–23.

48 Maylam 1995: 23.

49 Rapid urbanisation in South Africa was due to a combination of natural increase and large-scale migration to urban areas. See Van Wyk 2012: 21.

50 Mabin 1992b: 14; Van Wyk 2012: 21.

51 Van Wyk 2012: 21.

52 Mabin 1986: 22. See, further, Pirie 1991: 120–128.

53 Christopher 1990: 425.

for emerging industries attracted people of different races and classes.⁵⁴ This process perpetuated existing class differentiation and entrenched racial and spatial inequalities in residential areas. Although both white and black labourers were susceptible to changing trends, their migratory patterns differed vastly. The combined pressure of land deprivation, forced displacement and deepening levels of poverty and inequality had a profound impact on black persons. As a result, struggling rural black communities increasingly attempted to access the small urban economy. The settlement patterns of black migrants in urban areas varied according to the period they spent in towns and the participation of their households in the migratory process. For example, entire families often did not migrate to urban areas in order to maintain a home in the rural reserves.⁵⁵ Significantly, this trend illustrates that even though market conditions contributed to the control of the spatial settlement patterns of black labourers in urban areas, the white-minority dominated economy relied heavily on rural areas for a consistent supply of migrant labour.⁵⁶

Land-use planning and management further entrenched the spatial control and dispossession of black communities,⁵⁷ as applicable legal frameworks provided that land could not be registered in the name of a “native”, “Bantu” or “Black”.⁵⁸ The exclusionary nature of land ownership was justified on the basis of article 13 of the Pretoria Convention of 1881.⁵⁹ Subsequent legislation also provided for a variety of restrictions on the use and occupation of land by black persons.⁶⁰ The enactment of the Glen Grey Act of 1894, for instance, brought an end to black communal land

54 Harrison, Todes & Watson 2008: 21.

55 Mabin 1992b: 14–15.

56 Harrison, Todes & Watson 2008: 22.

57 The *Grondwetten van de Zuid-Afrikaansche Republiek* (Constitutions of the South African Republic) of 1858, 1889 and 1896 all advanced the principle of non-equality, which provided that black persons could not have equal rights with white people. See, further, Van Wyk 2012: 30.

58 Colonial authorities used the terms “Native”, “Bantu”, and “Black” interchangeably. Accordingly, the names of statutes were subsequently amended to coincide with the official use of these terms. For example, the Natives Land Act 27 of 1913 was amended to the Bantu Land Act 27 of 1913 and later became known as the Black Land Act 27 of 1913. See Van Wyk 2012: 30. On the use of constructed race terms in law during the colonial and apartheid periods, see, further, Bunting 1964: 159–160 and 189. For an analysis of the use of race and racial categories as historical and unscientific social constructs, see Smedley & Smedley 2005: 16. Any reference to race or racial categories made in this contribution is made with this in mind.

59 Article 13 of the Pretoria Convention of 1881 stated that “[n]atives will be allowed to acquire land, but the grant of transfer of such land will in every case be made to and registered in the name of the Native Location Commission ... in trust for such natives”. See, also, *Tongoane v Minister of Agricultural and Land Affairs* 2010 (6) SA 214 (CC) par 10.

60 Article 9 of the 1858 *Grondwet van de Zuid-Afrikaansche Republiek* provided, for instance, that the “people will not permit any equalisation of ‘Coloured’ persons with white inhabitants, neither in Church nor State”. See, further, Lewis 1985: 251; Van Wyk 2012: 30.

rights in the Cape colony.⁶¹ In the Transvaal, the Precious and Base Metals Act 35 of 1908 also restricted the occupation of certain land by black families and individuals.⁶² In 1905, *Tsewu v Registrar of Deeds*⁶³ held that article 13 of the Pretoria Convention of 1881 did not have the status of law and that black persons could register land titles in their own names.⁶⁴ Between 1905 and June 1913, black individuals purchased approximately 399 farms.⁶⁵ However, the enactment of the Black Land Act 27 of 1913 fundamentally changed this situation, as it restricted the rights of black persons to own or occupy land outside the legally defined rural reserves or homelands.⁶⁶

Spatial control and segregated urban development thus represent significant dimensions in the historical development of South African towns, which are deeply rooted in the colonial period. The next section analyses the use of legal frameworks to produce the foundations for the spatial control of urban settlement in the post-Union period between 1910 and 1948.

4 Establishing the pre-apartheid foundations of spatial control and segregated urban development (1910–1948)

4 1 Advancing spatial segregation through land dispossession

The amalgamation of the four British colonies established the Union of South Africa in 1910. Between 1910 and 1948, the Union government developed legal mechanisms aimed at effecting spatial control in the areas of land-use management, town planning, housing and public administration. These measures gradually entrenched the segregation and socio-economic exclusion of the majority black population, while establishing the legal foundation for segregated urban development during apartheid.

61 The Glen Grey Act of 1894 (Cape) regulated African settlement patterns in the Cape colony through the introduction of labour taxes and the limitation of individual land holdings. The Act resulted in the forced displacement of thousands of black persons. It also sought to undermine the traditional chieftains system, as tribal authorities represented an independent political voice that resisted changes imposed by colonial authorities. See Davenport & Saunders 2000: 129–193. See, further, Bouch 1993: 1–24.

62 Harrison, Todes & Watson 2008: 20–21.

63 1905 TS 130.

64 In *idem* at 135, the court cited art 13 of the Pretoria Convention of 1881 and stated that “[l]eave shall be given to natives to obtain ground, but the passing of transfer of such ground shall in every case be made to and registered in the name of the Commission for Kafir Locations ... for the benefit of such natives”. See, further, *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 11; Loveland 1999: 76.

65 Feinberg 1995: 50; Davenport & Saunders 2000: 129–156.

66 *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 11.

The Black Land Act 27 of 1913 laid the foundation for dispossession by demarcating the spaces within which black residents could legally settle.⁶⁷ By deliberately restricting areas where black persons could lawfully purchase, hire or occupy land to scheduled reserves in rural areas,⁶⁸ the Act excluded them from accessing vast portions of land in South Africa.⁶⁹ Additionally, it reduced the status of black labourers who remained in areas designated for the exclusive benefit of white employers to that of labour tenants or squatters.⁷⁰ These restrictions assisted in advancing the economic participation of white labourers who struggled to compete with skilled and semi-skilled black labourers.⁷¹ In urban areas, the Black Land Act 27 of 1913 further regulated spatial settlement patterns by limiting the livelihood opportunities of black labourers, who were only accommodated as members of a temporary workforce.

The Development Trust and Land Act 18 of 1936 extended the application of the Black Land Act 27 of 1913 by providing for the acquisition of additional scheduled areas or rural reserves designated for black inhabitants.⁷² The Development Trust and Land Act 18 of 1936 integrated land identified by the Black Land Act 27 of 1913 into these reserves and formalised the racial segregation of rural areas through the mechanism of the South African Native Trust.⁷³ Although the land held by the Trust was intended for the “exclusive use and benefit” of black communities, the

⁶⁷ Van Wyk 2012: 43.

⁶⁸ Sections 1 and 2 of the Black Land Act 27 of 1913. In terms of s 10 of the Act, a “scheduled native area” was any area in a province or homeland listed in the Schedule to the Act. These scheduled areas were the forerunners for the establishment of the Bantustans or independent homelands during apartheid.

⁶⁹ Section 1(1) of the Black Land Act 27 of 1913 prohibited the sale of land located outside the scheduled areas listed in the Act between a black person and a person “other than a native”. Section 1(2) of the Act provided that, in exceptional circumstances, the Governor General could approve the sale of land to black persons in terms of the Black Administration Act 38 of 1927. This land was, however, not registered in the name of the purchaser. Instead, the Minister of Native Affairs held the land in trust and recognised the permanent use and occupation rights of the purchaser in respect of the land. See *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) pars 12–13; Van Wyk 2012: 43.

⁷⁰ Section 6 read with s 2 of the Black Land Act 27 of 1913. In order to remain on land outside of the scheduled reserves, while avoiding criminal prosecution in terms of s 5 of the Act, black persons concluded labour tenant contracts with white farmers. The Black Service Contract Act 24 of 1932 regulated labour tenancy in South Africa during the pre-apartheid period. See Van der Walt 2009: 135; Van Wyk 2012: 43.

⁷¹ Maylam 1995: 26. See, further, Parnell 1993: 473–476.

⁷² *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) pars 12–15; Van Wyk 2012: 31.

⁷³ Sections 4 to 9 of the Development Trust and Land Act 18 of 1936. In terms of s 6 of the Act, all land that was set aside for the use and occupation of black persons vested in the South African Native Trust. Tribal authorities administered the land held by the Trust in terms of s 4(3) of the Act. See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 (4) BCLR 347 (CC) pars 76–77.

amount of land that it could acquire was restricted.⁷⁴ In particular, section 10(1) of the Development Trust and Land Act 18 of 1936 established control over spatial settlement patterns by limiting land allocated for black persons to 13 per cent of the country's total surface area.⁷⁵ In doing so, it secured the remaining 87 per cent of the land for the white minority's unfettered use and occupation. At local level, the Act facilitated the spatial exclusion and socio-economic marginalisation of black persons by requiring them to settle in remote townships in the reserves.⁷⁶

During the pre-apartheid period, the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 facilitated dispossession by restricting land allocated for black occupants to the rural reserves, which were important sources of migrant labour. In practice, this legislative framework thus placed extensive restrictions on the use, occupation and ownership rights of black inhabitants and limited their participation in urban society to meeting the functional needs of the white economy.⁷⁷ These statutes also legitimated the government's control over the settlement patterns, and demarcated areas where black persons were forced to reside.

The government's use of legislative instruments to enhance spatial control and segregation at the intersection of planning and housing is analysed in the next section.

4 2 Enhancing spatial control at the intersection of planning and housing

The Black (Urban Areas) Act 21 of 1923⁷⁸ enabled the development of separate residential areas for black residents in the vicinity of urban centres. In particular, the Act regulated the housing spaces where black inhabitants could legally settle by

74 Section 48(1)(g) of the Development Trust and Land Act 18 of 1936 authorised the South African Native Trust to "grant, sell, lease or otherwise dispose of land" to black persons on certain conditions. Additionally, the provision empowered the Governor General to issue regulations prescribing the conditions under which black persons could purchase, hire or occupy land held by the Trust. Section 48(1)(i) provided for the allocation of land held by the Trust for residential purposes. See *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 14.

75 *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 (4) BCLR 347 (CC) par 2. See, further, Ross 2008: 95–96; Robertson 1990: 128–129.

76 Van Wyk 2012: 31.

77 This legislative framework also established the foundation for subsequent legislation that entrenched the dispossession and spatial exclusion of black persons during apartheid. See *MEC for KwaZulu-Natal Province, Housing v Msunduzi Municipality* 2003 (4) BCLR 405 (N) at 412–413; Van Wyk 2012: 31.

78 According to its long title, the aim of the Black (Urban Areas) Act 21 of 1923 was to provide for "improved conditions of residence for natives in or near urban areas and the better administration of native affairs". In 1922, the Transvaal Local Government appointed the Stallard Commission to investigate the presence of black persons in urban areas. The Black (Urban Areas) Act 21 of 1923 was enacted based on the Commission's recommendations. See Transvaal Local Government 1922: par 267.

authorising local authorities to demarcate, plan and develop separate locations.⁷⁹ As alternative settlement options, the Act provided for the lease of municipal plots to black tenants⁸⁰ and endorsed hostel accommodation for single black men working in urban areas.⁸¹ A prominent rationale underlying the accommodation of black persons in pre-apartheid urban areas was the need for steady access to affordable labour to advance the economy. Urban residential segregation thus enabled local authorities to implement influx control measures and to administer stricter pass laws.⁸²

Although the housing options provided for by the Black (Urban Areas) Act 21 of 1923 enabled access to employment opportunities, they also enhanced the government's control over the spatial settlement patterns of black residents.⁸³ In 1925, for instance, the Johannesburg Municipality used the provisions of the Act to evict black tenants from a portion of the Malay Location. Despite provisions in the Black (Urban Areas) Act 21 of 1923 requiring displaced persons to be rehoused, the municipality did not have the financial resources to provide evictees with access to alternative accommodation.⁸⁴ Evictions instituted in terms of the Act therefore frequently aggravated the spatial exclusion, housing deprivation and socio-economic marginalisation of black urban inhabitants.

The Regulations for the Administration and Control of Townships in Black Areas⁸⁵ established limited conditions for black persons to lawfully purchase, rent or occupy land in the scheduled areas beyond pre-apartheid towns.⁸⁶ The townships governed by the regulations differed from the formal residential locations established in or near urban areas,⁸⁷ as they were consigned to the reserves and subject to the provisions of the Development Trust and Land Act 18 of 1936. However, the proximity of these townships to urban areas was significant, as they represented sources of labour for the urban economy.⁸⁸ Significantly, black communities

79 Section 1(1)(a) of the Black (Urban Areas) Act 21 of 1923 provided local authorities with the power to “define, set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives”, which were called “locations”. See, further, Van Wyk 2012: 48.

80 Section 1(1)(b) of the Black (Urban Areas) Act 21 of 1923.

81 *Idem* s 1(1)(c).

82 Maylam 1995: 29.

83 Harrison, Todes & Watson 2008: 24.

84 Parnell 1991: 284.

85 Promulgated in terms of Proc R293 GG 373 of 16 Nov 1962 and adopted in terms of ss 6(2) and 25(1) of the Black Administration Act 38 of 1927 and s 21(1) of the Development Trust and Land Act 18 of 1936.

86 During the pre-apartheid period, black land tenure was traditionally divided into rural and urban categories. Van Wyk 2012: 45 explains that this distinction was largely arbitrary and technical. In essence, the term “rural” applied to land governed by the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936. However, the term “urban” also applied in areas that, in the ordinary sense of the word, would have been categorised as rural.

87 The formal residential locations established for black persons in or near urban areas were governed by the provisions of the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945.

88 Wilson 2011: 6.

who resided in these townships did not enjoy tenure security in the form of ownership rights.⁸⁹

Increased levels of urbanisation during the 1940s resulted in the proliferation of informal settlements.⁹⁰ The Union government responded by enacting the Black (Urban Areas) Consolidation Act 25 of 1945,⁹¹ which enabled the implementation of formal influx-control policies.⁹² The provisions of the Act, in conjunction with the Regulations Concerning the Control and Supervision of an Urban Black Residential Area,⁹³ were eventually used to establish formal townships for black inhabitants in urban areas under apartheid.⁹⁴ In particular, section 2(1) of the Black (Urban Areas) Consolidation Act 25 of 1945 empowered local authorities to demarcate and plan spaces for black occupation. These areas included locations, vacant municipal land or buildings, and hostels.⁹⁵ The settlement options provided for in the Act were subject to the approval of the Minister, who had to be satisfied with the planning and layout of the location, the suitability of the land, the condition of buildings, and the provision of essential services.⁹⁶ Section 2(1) did not, however, require the Minister to consider the adequacy of the location or the quality of the housing spaces created in terms of the Black (Urban Areas) Consolidation Act 25 of 1945.

The next section examines the use of the Black Administration Act 38 of 1927 by the pre-apartheid government to control the spatial settlement patterns of black urban inhabitants through the practice of forced removals.

4 3 Spatial displacement through forced removals

Through the implementation of the Black Administration Act 38 of 1927,⁹⁷ the pre-apartheid government accelerated the large-scale spatial displacement and control

89 *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 16.

90 Harrison, Todes & Watson 2008: 25.

91 According to the long title of the Black (Urban Areas) Consolidation Act 25 of 1945, the aim of the Act was to consolidate the laws that provided for “improved conditions of residence for natives in or near urban areas and the better administration of native affairs”. This Act was later repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

92 In 1946, the state appointed the Native Laws Commission to investigate and recommend potential changes to the system of spatial and racial segregation. The Commission’s recommendation in favour of permanently accommodating African settlement in urban areas was rejected. See Native Laws Commission 1946: *passim*.

93 The Regulations Concerning the Control and Supervision of an Urban Black Residential Area, GN 1036 GG 2096 of 14 Jun 1968 were issued in terms of s 38(3)(a) of the Black (Urban Areas) Consolidation Act 25 of 1945. These regulations had a long-term impact on the spatial settlement patterns of black persons, as they remained in force for many years in terms of s 66 of the Black Communities Development Act 4 of 1984. Section 72(1) of the Abolition of Racially Based Land Measures Act 108 of 1991 repealed the Black Communities Development Act 4 of 1984.

94 Van Wyk 2012: 48–49.

95 Section 2(1)(a)–(d) of the Black (Urban Areas) Consolidation Act 25 of 1945.

96 *Idem* s 2(2).

97 The Black Administration Act 38 of 1927 provided for the “better control and management of Black affairs”. That Act was later repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

of the majority black population. Section 5(1)(b), in particular, was a powerful mechanism for managing and reconfiguring urban space through the forced removal of black inhabitants.⁹⁸ In *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government*,⁹⁹ the Constitutional Court encapsulated the role of the Black Administration Act 38 of 1927 in facilitating spatial displacement:

The Native Administrative Act 38 of 1927 appointed the Governor-General [later referred to as the State President] as “supreme chief” of all Africans. It gave him the power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called “white areas” into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of “a colossal social experiment and a long term policy”.¹⁰⁰

In practice, the Black Administration Act 38 of 1927 enabled the comprehensive spatial control and relocation of the black population¹⁰¹ and the administration of land tenure and land use in the scheduled reserves.¹⁰² It also established separate courts with the authority to apply indigenous laws.¹⁰³ By appointing the Governor General as the “supreme chief” of all black people,¹⁰⁴ the Act granted him extensive legislative, executive and judicial powers, which included the authority to evict and remove groups and individuals from any place.¹⁰⁵ The provisions of the Black Administration Act 38 of 1927 thus enabled the pre-apartheid government to both control the presence of black persons in urban areas and to achieve the spatial reconfiguration of towns through the forced removal of thousands of black families and individuals to the scheduled reserves.¹⁰⁶ These processes of spatial displacement and socio-economic marginalisation resulted in immense suffering and dispossession.¹⁰⁷ The land dispossession and evictions initiated under the Black

98 Section 5(1)(b) of the Black Administration Act 38 of 1927 stated that the “Governor-General may whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine”. Section 1(1) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 repealed s 5(1)(b) of the Black Administration Act 38 of 1927.

99 2001 (1) SA 500 (CC).

100 *Idem* par 41.

101 Sections 3–5 of the Black Administration Act 38 of 1927.

102 *Idem* ss 6–8. See, further, *Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) par 41; Van Wyk 2012: 43–44.

103 Section 11 of the Black Administration Act 38 of 1927. See, further, *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 23.

104 Section 1 of the Black Administration Act 38 of 1927.

105 *Idem* s 5(1)(b).

106 Marcus 1990: 18–20.

107 *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) par 41. See, further, O’Regan 1989: 361–394; Van der Walt 2009: 137–138.

Administration Act 38 of 1927 also officially excluded black persons from urban areas for several years.¹⁰⁸ The Act has accordingly been described as a “cornerstone of racial oppression, division and conflict” in South Africa.¹⁰⁹

During the period preceding apartheid, the separate system of land-use management that applied to spaces occupied by black communities was subordinate to the planning schemes implemented in towns inhabited by white persons. The Black (Urban Areas) Act 21 of 1923 and the Black Administration Act 38 of 1927 reinforced these dual planning approaches and implemented spatial segregation in urban areas by facilitating the development of peripheral locations. Ultimately, confining black residents to separate settlements enabled local authorities to administer pass laws and influx control policies, while enhancing their political and socio-economic exclusion.

Between 1910 and 1948, the implementation of other forms of town planning furthered the spatial segregation, displacement and control of black residents. The next section examines some of the most prominent spatial consequences of the implementation of public health and safety legislation in urban areas during this period.

4 4 Impact of health and safety legislation in urban areas

The outbreak of bubonic plague in South Africa in 1901 sparked a powerful social metaphor that associated the presence of black persons in urban areas with poverty, disease and crime. Between 1910 and 1948, heightening paranoia increasingly equated the spread of infectious diseases with a growing number of multiracial inner city slums and urban black townships.¹¹⁰ Promoting the public health and safety interests of the white minority population accordingly became a driving force behind the government’s broader imperative of advancing the spatial segregation and control of black urban dwellers.¹¹¹ In 1918, for instance, the influenza epidemic focused the attention of health officials on the appalling living conditions in settlements, such as Ndabeni in Cape Town.¹¹² The white residents responded by demanding that Ndabeni be demolished and its residents relocated to a more distant area.¹¹³ In Johannesburg, the 1918 epidemic also highlighted the unhealthy living conditions in that city’s Malay Location. In order to manage overcrowding and the spread of disease in the area, the Johannesburg municipality established the Western Areas Native Township,

108 *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) par 25.

109 *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) par 61.

110 Parnell 1993: 483.

111 Maylam 1995: 24–25.

112 The Ndabeni settlement was established in 1901 to accommodate black persons who were forcibly expelled from Cape Town as a result of the bubonic plague.

113 Maylam 1995: 25.

where limited housing was made available to black residents. The construction of the township contributed to the gradual spatial segregation of black inhabitants in Johannesburg.¹¹⁴

The evolving causal connection between these ostensible public health concerns and the imperative of spatial separation also informed the reports of government commissions.¹¹⁵ As a result, municipal health officials increasingly focused on the health concerns associated with the spaces where black urban inhabitants resided.¹¹⁶ In turn, the notion that spatial segregation would solve problems associated with unhealthy living conditions, overcrowding and disease among black communities in urban areas increased support for racial and spatial segregation.¹¹⁷

The Public Health Act 36 of 1919 was enacted to regulate overcrowding, as well as the location and density of housing settlements in urban areas.¹¹⁸ The implementation of the Act illustrates how the use of state planning practices in South Africa contributed to spatial, racial and social segregation.¹¹⁹ This is due to the fact that the Public Health Act 36 of 1919 facilitated the spatial displacement of black persons by providing for their removal from urban centres to peripheral sites under the guise of public health care. Once overcrowding was identified as a factor that exacerbated the spread of infectious diseases, municipalities began constructing segregated housing for black residents in remote parts of urban areas. In practice, however, these measures largely failed to address difficulties associated with providing safe and affordable housing for black urban inhabitants, as well as the broader impact of disease on affected communities.¹²⁰

The provisions of the Public Health Act 36 of 1919 were also used in conjunction with, for example, the Housing Act 35 of 1920 to advance segregation, racialised urban planning and the eviction and removal of black inhabitants from urban areas. These legislative mechanisms proved invaluable in achieving segregated residential development in urban areas, as many of the regulations applicable to black urban settlements were incomplete, ineffective or ignored.¹²¹ The intersection between planning, public health administration and housing thus represented a key area where local authorities could regulate the living spaces and participation of black persons in urban life, while managing spatial development along racial lines.

114 Parnell 1991: 274, 282.

115 For instance, the 1914 Tuberculosis Commission identified and condemned black locations and urban slums as a health menace. See Union Government 1914: *passim*. See, further, Maylam 1995: 25.

116 Swanson 1977: 390; Parnell 1993: 487.

117 Parnell 1993: 483; Maylam 1995: 24–25; Harrison, Todes & Watson 2008: 24.

118 Harrison, Todes & Watson 2008: 24.

119 Parnell 1993: 472.

120 *Idem* at 483.

121 Parnell 1991: 273–274. `

In addition, increased social and racial differentiation in urban areas during the early twentieth century resulted in planning approaches that encouraged the eradication of urban slums.¹²² English law inspired the provisions of the Slums Act 53 of 1934,¹²³ as well as the development of local planning approaches to slum clearance and relocation.¹²⁴ Although planning practices in England required local authorities to rebuild housing on the site of slum clearance schemes,¹²⁵ South African municipalities frequently relocated black inhabitants to the urban periphery, where land and construction costs were lower.¹²⁶ In Cape Town, for instance, the provisions of the Slums Act 53 of 1934 were used to remove multiracial inner-city slums and to develop housing schemes for so-called coloured persons on the Cape Flats.¹²⁷ The Act also contained criteria and procedures for identifying, repairing, evacuating or demolishing housing spaces demarcated as slums.¹²⁸ In conjunction with other legislation applicable to planning, health, and housing in urban areas, the provisions of the Slums Act 53 of 1934 were thus instrumental in effecting the large-scale eviction and peripheral relocation of black persons during the pre-apartheid period.

Pre-apartheid statutory measures thus facilitated the control and assignment of black inhabitants to racially segregated reserves.¹²⁹ This process began with the creation of legislative assemblies, which turned into self-governing territories and ultimately into independent states, and was conducted in accordance with a broader plan to exclude black persons from spaces designated for the exclusive use and benefit of white persons.¹³⁰ The final section of this contribution examines the use of legal frameworks to advance the colonial template and pre-apartheid foundations of spatial control, segregated urban development and housing deprivation during the apartheid period.

122 Parnell 1993: 478.

123 The long title of the Slums Act 53 of 1934 stated that it aimed to make “better provision for the elimination of slums within the areas of jurisdiction” of certain local authorities. Section 1 of that Act defined a “slum” as “any premises or any part of any premises which has been declared a slums under the provisions” of s 4 of the Act.

124 Parnell 1993: 481.

125 Dyos 1967: 5–40.

126 Parnell 1993: 481.

127 Maylam 1995: 27; Harrison, Todes & Watson 2008: 24.

128 Sections 4–16 of the Slums Act 53 of 1934. Section 4(1) described a slum as a place where a medical officer indicated that a “nuisance” existed, which could be effectively remedied by applying the provisions of the Act.

129 *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) par 42.

130 *Ex Parte Moseneke* 1979 (4) SA 884 (T) at 889–890.

5 Consolidating spatial segregation during apartheid (1948–1990)

5.1 Entrenching spatial control and segregated urban development through law

The election of the National Party in 1948 heightened the spatially unjust and racially discriminatory legislative and policy approaches of the colonial and pre-apartheid governments. Between 1948 and 1990, the apartheid state developed extensive legal mechanisms to implement racially based spatial segregation in urban areas.¹³¹ Most notably, these included the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950, the Black Education Act 47 of 1953, the Reservation of Separate Amenities Act 49 of 1953, the Group Areas Act 36 of 1966, the Black Local Authorities Act 102 of 1982, the Community Development Act 3 of 1966 and the Black Communities Development Act 4 of 1984.¹³² These statutes all contributed, in one way or another, to constructing the legacy of spatial injustice into South Africa's contemporary towns and cities by either demarcating or controlling black urban settlement. In essence, the state utilised this legal framework to regulate the use and development of land designated for black occupiers and to consolidate apartheid-based principles applicable to land, planning and urban settlement.¹³³ In the area of land-use management, for instance, legislative and policy measures were key to eroding the remaining land rights (such as labour tenancy) that black persons had in sectors reserved for white persons.¹³⁴

At national level, the apartheid legislative framework facilitated the creation of ethnically defined homelands and enabled the physical displacement of thousands of black persons, who were prohibited from living in areas other than the rural reserves.¹³⁵ The spatial reconfiguration of South Africa's majority black population resulted in concentrated pockets of severe inequality, poverty and deprivation in the homelands and independent states.¹³⁶ These spatial contradictions were magnified when the rapid economic development of the 1960s and 1970s dwindled.¹³⁷ This

131 Parnell & Mabin 1995: 41.

132 For an account of the myriad political, legal, social and cultural institutions that further entrenched racial inequality in South Africa during apartheid, see Van Reenen 1962: 323–328; Terreblanche 2002: 334–339.

133 Ross 2008: 126; Van Wyk 2012: 25. See *Abrams v Allie NO* 2004 (9) BCLR 914 (SCA) for examples of practices in terms of which these statutes established a framework of race classification.

134 For a description of the legal and institutional mechanisms that effected the dispossession of black people during apartheid, see the judgement of Moseneke DCJ in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

135 Budlender 1990: 74.

136 See, generally, Noble & Wright 2012: 187–201.

137 Harrison, Todes & Watson 2008: 33.

is due to the fact that, for example, the movement of black labourers further away from the core of the urban economy contributed to severe transportation costs that required government subsidisation.¹³⁸ Concurrently, the apartheid state prioritised economic development through a combination of discriminatory labour, market and educational policies. Jeremy Seekings and Nicoli Nattrass accordingly observe that no other “capitalist state (in either the North or the South)” structured income inequalities as methodically and severely as South Africa during apartheid.¹³⁹

Due to their intersectional nature, racial discrimination deepened class divisions between 1948 and 1990.¹⁴⁰ Accordingly, racial discrimination represented another dimension that advanced the spatial and social contradictions produced under apartheid, which remain largely unresolved in contemporary South Africa. The material consequences, severe poverty, and structural inequality produced under apartheid remained largely unresolved after the deracialisation of legal and policy frameworks in the late- and post-apartheid periods.¹⁴¹ Terreblanche aptly summarises this problem by explaining that although South Africa introduced a political-economic system of democratic capitalism, it still represented “a system of democratic *capitalism*, legitimised by the ideology of liberal capitalism”.¹⁴² In practice, state and market influences therefore retained their dominance over the development of urban space and settlement patterns.

The ensuing section examines the impact of key components of the extensive legislative framework that consolidated spatial control and facilitated the restructuring of apartheid urban areas.

5 2 Restructuring the spatial form of apartheid urban areas

Under apartheid, a variety of statutes applicable to land and planning demarcated and controlled urban black settlement and entrenched the insecure tenure status and poor location of housing of South Africa’s black urban population. The Group Areas Act 41 of 1950, the Prevention of Illegal Squatting Act 52 of 1951, and the Physical Planning Act 88 of 1967 were all particularly instrumental in facilitating the restructuring of apartheid urban areas. The Group Areas Act 41 of 1950, which was modelled on the provisions of the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945,¹⁴³ was a powerful mechanism

138 Maylam 1990: 60.

139 Seekings & Nattrass 2005: 2.

140 *Idem* at 4.

141 Liebenberg 2010: 3.

142 Terreblanche 2002: 18 (emphasis in original).

143 Mabin 1992a: 406 argues that a number of existing segregatory measures converged in the Group Areas Act 41 of 1950. The implementation of the Act depended on existing municipal planning structures that were put in place by legislation, such as the Housing Act 35 of 1920, the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945.

for facilitating the spatial restructuring of apartheid urban areas.¹⁴⁴ The Act enabled spatially segregated urban development through establishing land-use zones according to different racial groups,¹⁴⁵ while controlling the tenure status, use and occupation of land within towns and cities. In practice, the Group Areas Act 41 of 1950 prohibited the multiracial use or occupation of urban land.¹⁴⁶ The Act thus divided urban areas into segregated zones where only members of a particular race could reside and work.¹⁴⁷ In doing so, it clearly designated urban spaces for the exclusive ownership and occupation of a particular group.¹⁴⁸ Additionally, that Act made it possible to institute criminal proceedings against a person from one race who either owned or occupied land in an area designated for the exclusive use of another racial group.¹⁴⁹

The implementation of the Group Areas Act 41 of 1950 had significant consequences for land-use management, municipal planning and settlement development in urban areas. It undermined, for instance, municipal autonomy by centralising or shifting state control over racial segregation to the national sphere.¹⁵⁰ This process paved the way for long-term racialised approaches to land-use planning, hampered the exercise of property rights, and facilitated the development of state housing for poorer segments of the urban population.¹⁵¹ Moreover, that Act extended compulsory spatial segregation to the so-called coloured population.¹⁵² Significantly, its application resulted in the large-scale eviction and spatial displacement of thousands of black urban dwellers from well-located multiracial settlements in inner cities during the 1950s.¹⁵³ These forced removals coincided with the development of massive peripheral townships,¹⁵⁴ which have become a defining feature of South African urban areas due to their location and standardised layouts. The location of these separate residential areas further enhanced the state's control over black urban inhabitants,¹⁵⁵ as they were surrounded by industrial buffer zones or vacant land.¹⁵⁶

144 Dodson 1990: 137–161.

145 Section 12(1) of the Group Areas Act 41 of 1950 characterised different racial groups as “white”, “black” and “coloured”.

146 Dodson 1990: 145–147.

147 Thompson 1990: 194.

148 Christopher 1994: 105. See, further, Christopher 1992: 561–582.

149 Dyzenhaus 1991: 71.

150 Mabin 1992a: 407.

151 *Ibid.*

152 *Ibid.* See, further, Trotter 2009: 49–78.

153 Van der Walt 2009: 60.

154 Harrison, Todes & Watson 2008: 26.

155 *Idem* at 27.

156 By the late 1960s, the emphasis on development in South Africa's major urban areas shifted to the construction of towns in the African rural reserves. See, further, Harrison, Todes & Watson 2008: 27.

The Prevention of Illegal Squatting Act 52 of 1951 was equally instrumental in effecting the spatial restructuring of apartheid towns and cities.¹⁵⁷ The Act regulated the unlawful occupation and use of public and private land¹⁵⁸ by authorising the Minister of Native Affairs to compel black urban dwellers living on public or private land to relocate to established resettlement camps and by imposing severe criminal sanctions.¹⁵⁹ It also had a particularly detrimental impact on local authorities' approaches to informal settlement development.¹⁶⁰

The Prevention of Illegal Squatting Act 52 of 1951 was amended in 1977.¹⁶¹ In 1986, a further amendment in terms of the Abolition of Influx Control Act 68 of 1986 provided for an alternative type of informal settlement area for black urbanites, which was commonly referred to as a "designated area".¹⁶² In practice, the legislative amendment introduced a form of controlled squatting in urban areas that was directly linked to influx-control policies.¹⁶³ The amendment also enabled portions of state-owned land to be allocated for the housing needs of poor segments of the urban population who were incapable of accessing alternative accommodation.¹⁶⁴ Unlike the transit camps developed during apartheid for accommodating evictees,¹⁶⁵ these designated areas provided more permanent access to housing options. In the case of both transit camps and designated areas, the ordinary township planning rules and provisions of the Group Areas Act 36 of 1966 and the Slums Act 76 of 1979 did not apply.¹⁶⁶ Additionally, the designated areas provided a more flexible tool for accommodating the influx of black persons into urban areas and a potential alternative to instituting forced evictions and relocations.¹⁶⁷

157 O'Regan 1989: 362.

158 O'Regan 1990: 163.

159 Sections 1 and 2 of the Prevention of Illegal Squatting Act 52 of 1951.

160 Section 3 authorised the eviction of illegal occupants and the demolition of any structures erected on unlawfully occupied public or private land. Section 4 prohibited municipalities from exercising authority over informal settlements, while ss 5 and 8 sanctioned the removal of unlawful occupiers.

161 The Riekert Commission of Inquiry into Manpower Utilisation was established in terms of GN 1673 GG 5720 of 26 Aug 1977. The Commission recommended that African labourers be afforded access to urban areas on condition that adequate accommodation was made available for them. See, further, O'Regan 1989: 373.

162 Section 6A(1) of the Abolition of Influx Control Act 68 of 1986 amended the Prevention of Illegal Squatting Act 52 of 1951.

163 O'Regan 1989: 367.

164 *Idem* at 393.

165 Section 6(5) of the Prevention of Illegal Squatting Act 52 of 1951 provided a local authority with the power to make regulations for the establishment of transit camps. Local authorities could use land they owned for purposes of establishing transit camps.

166 Different versions of the Group Areas Act 41 of 1950 were enacted, including the Group Areas Act 77 of 1957 and the Group Areas Act 1936 of 1966. These statutes consolidated the compulsory principle of developing segregated urban settlements. See, further, Pienaar 2014: 106–107.

167 O'Regan 1989: 393.

However, neither the Prevention of Illegal Squatting Act 52 of 1951 nor the Abolition of Influx Control Act 68 of 1986 addressed the need for integrated housing settlement opportunities for black inhabitants who could not access formal housing in urban areas. Instead, the 1988 amendment to the Prevention of Illegal Squatting Act 52 of 1951 introduced further measures to control “squatters” or persons residing unlawfully in urban areas. In particular, the Prevention of Illegal Squatting Amendment Act 104 of 1988 empowered local authorities and private landowners to demolish housing structures and forcibly remove black dwellers.¹⁶⁸

The effective implementation of the Prevention of Illegal Squatting Act 52 of 1951 in urban areas was guaranteed by the enactment of a comprehensive framework of equally discriminatory legislation.¹⁶⁹ These included the Black Laws Amendment Act 54 of 1952,¹⁷⁰ the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 and the Black Service Levy Act 64 of 1952. Moreover, the Prevention of Illegal Squatting Act 52 of 1951 was implemented in conjunction with the Slums Act 76 of 1979, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977 to control issues associated with health, safety and housing in the areas occupied by black urban inhabitants.¹⁷¹

The Prevention of Illegal Squatting Act 52 of 1951 thus regulated the unlawful occupation and use of public and private land by authorising the removal of black urban dwellers to established resettlement sites or transit camps. Moreover, it enabled the allocation of portions of state-owned land for accommodating the housing needs of the urban and urbanising poor. After 1986, the Act facilitated the creation of designated areas. This alternative type of informal settlement area provided access to more permanent housing alternatives for black migrants and represented an alternative approach to managing the growing urban black population. However, the need for spatially integrated urban settlement options remained unaddressed.

Within this complex legislative framework, the Physical Planning Act 88 of 1967 was vital in guiding the apartheid spatial segregation of South African urban areas. Throughout the 1950s and 1960s, the state attempted to centralise control over local planning processes associated with the increased urbanisation of black persons.¹⁷² The Physical Planning Act 88 of 1967 authorised the state to control and prescribe local planning practices through the preparation of master guide plans for local areas approved in terms of section 6A(10) of the Act.¹⁷³ In other words, the Act

¹⁶⁸ *Idem* at 362.

¹⁶⁹ *Idem* at 369.

¹⁷⁰ The Black Laws Amendment Act 54 of 1952 amended the Black (Urban Areas) Consolidation Act 25 of 1945.

¹⁷¹ The Prevention of Illegal Squatting Act 52 of 1951 was repealed by s 11(1), read with Schedule 1, of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

¹⁷² Harrison, Todes & Watson 2008: 29.

¹⁷³ Mabin 1992a: 407.

contributed to spatially segregated development by enabling the apartheid state to centralise the control of municipal planning processes and the management of black urban townships.

In 1972, the administration and management of black urban townships shifted from municipalities to centralised state-controlled administration boards. Planning practices implemented in terms of the Physical Planning Act 88 of 1967 comprised ambitious spatial reconfiguration programmes aimed at both the local and regional levels. In practice, these planning approaches were largely ineffectual and contributed to the proliferation of informal settlements on the urban edge. This is due to the fact that many black migrants resorted to accessing urban areas and resources by adapting their basic survival strategies through the occupation of vacant plots of land or open spaces in or near towns and cities.¹⁷⁴ For many black urban inhabitants, vacant plots of land or open spaces and buildings were thus the only spaces where they could secure a fragile foothold in towns and cities.

During late-apartheid, the townships represented powerful sites where black urban inhabitants challenged the political status quo.¹⁷⁵ Accordingly, the apartheid state became increasingly concerned with how to address the growing presence of black inhabitants in urban areas. The final section of this article examines the abolition of influx-control measures and the state's attempt at facilitating "orderly urbanisation" in South African towns and cities towards the end of apartheid.

5 3 "Orderly urbanisation" and the abolition of urban influx controls

During the 1980s, the apartheid state investigated alternative strategies to address the effects of rapid urbanisation and the migration of black people to towns and cities. In 1985, a report by the Constitutional Affairs Committee called for the abolition of influx-control measures in urban areas. In particular, the report proposed that racially defined controls over black settlements be replaced with neutral measures in the form of planning and health and safety legislation.¹⁷⁶ These recommendations were incorporated into the White Paper on an Urbanisation Strategy for the Republic of South Africa (hereafter White Paper on Urbanisation).¹⁷⁷ The notion of "orderly urbanisation" was central to the White Paper on Urbanisation and entailed accommodating the presence of black inhabitants in urban areas through the establishment of a middle class with secure tenure rights. This new policy approach introduced measures to ensure that urbanisation happened in a planned and controlled manner in parts of towns and cities designated for black settlement – most often at

174 Royston 1998: 146; Soni 1992: 43.

175 Maylam 1990: 83.

176 Hindson 1987: 78.

177 Constitutional Affairs Committee 1985: *passim*.

the urban periphery.¹⁷⁸ Stated differently, the White Paper on Urbanisation set out a strategy to contain the unlawful occupation of land and to manage the development of informal settlements. In turn, this strategy authorised the state to plan and demarcate spaces where the growing urban black population could be accommodated.¹⁷⁹ The policy approach advanced by the White Paper on Urbanisation therefore enhanced, rather than challenged, the spatial imbalances in urban residential settlement.

The policy of orderly urbanisation was enforced through various legal measures and other more subtle forms of restrictions applicable to black urban inhabitants.¹⁸⁰ The strategy also allowed for controlled squatting on demarcated land through the upgrading of invaded land or the orderly development of uninhabited land – primarily through the involvement of the private sector.¹⁸¹ In practice, however, the strategy caused ambiguity regarding development approaches to informal settlements, which ranged from demolition to upgrading.¹⁸² During this period, the state's predominant development approach was to afford selected informal settlements the status of transit camps until a site-and-service project was ready for implementation and the affected community could be relocated.¹⁸³ Localised solutions that prioritised the upgrading of an existing occupied site were only considered in cases where affected black communities vehemently contested their relocation.¹⁸⁴ Additionally, local authorities retained the power to relocate poor urban inhabitants, whose homes had been subjected to eviction or demolition on one informal site, to an approved albeit equally informal location.¹⁸⁵

The strategy of orderly urbanisation was unsuccessful insofar as the apartheid state's extensive legal framework could not prevent land invasions or the continued growth of informal settlements on the peripheries of urban areas.¹⁸⁶ As black migrants continued to defy influx-control measures in favour of settling in rapidly growing informal settlements, the government enacted the Abolition of Influx Control Act 68 of 1986.¹⁸⁷ Informal settlements thus became vital housing spaces for the urban poor that existed outside of legal and planning frameworks. Evictions and forced relocations were instrumental in advancing spatial and racial segregation through the planning of land use.¹⁸⁸ Forced removals and restrictions on migration

178 Harrison, Todes & Watson 2008: 33.

179 Sutcliffe, Todes & Walker 1990: 91.

180 Budlender 1990: 74; Huchzermeyer 2004: 1.

181 Huchzermeyer 2004: 1.

182 Harrison 1992: 18.

183 Huchzermeyer 2004: 1–2.

184 *Ibid.*

185 O'Regan 1989: 393.

186 Hindson 1987: 98; Harrison, Todes & Watson 2008: 33.

187 For a discussion of the Abolition of Influx Control Act 68 of 1986, see Schoombee & Davis 1986: 208–218.

188 Bundy 1990: 6; Van der Walt 2009: 60–62.

also led to dense settlements on the periphery of urban areas, where many of South Africa's urban poor still reside today.¹⁸⁹ This has serious consequences for advancing development in areas such as infrastructure, transport, housing, health and labour in contemporary towns and cities.

During the final years of apartheid, black residential townships represented powerful spaces of political contestation. The township uprisings of 1984, for instance, contributed to the end of attempts to establish viable black local authorities in urban areas. Cumulatively, the political contestation in the townships, international economic sanctions and a flailing economy contributed to the eventual demise of apartheid.¹⁹⁰

6 Conclusion

Spatial injustice and urban residential segregation represent significant dimensions in the historical development of the segregated settlement patterns of South Africa's urban poor, which have strong links to colonialism and apartheid. This contribution contextualises the myriad political, economic, legal and social factors underlying the legacy of spatial injustice and socio-economic exclusion that characterise the housing crisis afflicting South Africa's contemporary urban areas. The housing needs of South Africa's urban poor are inextricably linked to this complex system of factors.¹⁹¹ Acknowledging this interrelationship is essential before seeking possible solutions or alternative approaches to meeting the housing needs of vulnerable and marginalised urban inhabitants.¹⁹²

The historical exposition in this contribution examines the colonial origin and apartheid foundation of spatially segregated urban settlement in South Africa. Part one provides an overview of the spatial organisation and settlement patterns of indigenous populations prior to the colonial occupation of southern Africa and considers how municipal and public health administration, planning, land-use management and industrialisation contributed to segregated urban development in the earliest major colonial settlements. Part two spans the pre-apartheid period and investigates the use of legal mechanisms to legitimate and enable the systematic dispossession, spatial segregation, political control and socio-economic marginalisation of the majority black population. In particular, that section explores the role of the state in enabling spatial control, segregation, displacement and dispossession through land-use management, planning, public health and safety administration, evictions and forced removals. Cumulatively, these measures established the foundation for spatially segregated urban development during apartheid. The final part of this contribution

189 Smit 2006: 111–115.

190 Harrison, Todes & Watson 2008: 33.

191 Pienaar 2002a: 16.

192 Van Wyk 2012: 592.

examines the use of legal frameworks by the apartheid state to consolidate spatial control and segregated settlement development in towns and cities. In doing so, it provides insight into the extensive legislative framework, as well as the political, economic and social contexts that contributed to the spatial restructuring of apartheid urban areas and entrenched the spatially unjust settlement patterns that characterise contemporary urban South Africa.

This contribution also draws attention to the dominant role of the state in constructing and sustaining spatially and racially segregated urban settlement patterns at the national, regional and local levels through the implementation of various administrative, political and legal mechanisms. In doing so, it illustrates the significant function of the state as the primary developer of space at the intersection of land, planning and housing, which represents a further prominent dimension and source of spatial injustice and segregated urban development in South Africa.¹⁹³ Moreover, it discloses the role of law in legitimating this function through regulations, prohibitions and sanctions that enabled the state to establish and sustain spatial injustice and inequality in towns and cities.¹⁹⁴

South Africa's history of land, planning, housing and the development of informal settlements is deeply rooted in a legacy of spatial injustice that was entrenched by a plethora of discriminatory legislation.¹⁹⁵ As a result, the legal system used to develop urban space in the areas of land-use management, planning and housing has historically operated on a spatially and racially exclusive basis.¹⁹⁶ Accordingly, black South Africans inherited a mixed legacy of disparities in access to urban opportunities and the housing spaces they were consigned to during centuries of oppression. Developing comprehensive legal and policy responses that address the complex nature of spatial injustice and exclusion in urban areas thus represents an important dimension of future initiatives aimed at enabling South Africa's urban poor to access integrated and sustainable settlement and livelihood opportunities in towns and cities.

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Grondwet van de Zuid-Afrikaansche Republiek, 1896
Group Areas Act 41 of 1950
Group Areas Act 77 of 1957
Group Areas Act 36 of 1966
Health Act 63 of 1977
Housing Act 35 of 1920
Native Administration Act 3 of 1879 (Cape)
Natives Land Act 27 of 1913
Native Locations Act 37 of 1897 (Natal)
Native Locations, Lands and Commonages Act 40 of 1879 (Cape)
Native Reserve Locations Act 40 of 1902 (Cape)
Native Reserve Locations Act 2 of 1904 (Natal)
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THE DEVELOPMENT OF RACIALLY DEFINED PUNISHMENT IN COLONIAL NATAL: THE EARLY HISTORY OF DURBAN'S POINT PRISON

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ABSTRACT

This article traces the early history of the Point Convict Station situated near the entrance to Durban's harbour. Contained in the history of this building are a number of themes that are unique to the penal history of KwaZulu-Natal and, more widely, southern Africa. With its origins dating back to the turn of the twentieth century, this particular building symbolises the expression of a penal ideology, which we call "racially differentiated punishment". The building represents a particular regime of punishment that was reserved for non-European prisoners in particular. It is argued that, within the context of colonial Natal, a number of central themes distinguished the punishment of non-European prisoners from that of European prisoners at ideological level. White colonial authorities regarded labour as an extremely important element in the punishment of black offenders in particular. Further, there was a clear policy to push for complete racial segregation in the penal system of the colony of Natal around the turn of the twentieth century. In relation to this theme,

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we explore the development of a penal ideology based explicitly on the separation of different racial groups – the significance of this lies in the fact that these policies were implemented almost half a century before the advent of apartheid in South Africa.

Keywords: Colonial Natal; Durban harbour; penal history; racially differentiated punishment; segregation

1 Introduction

This contribution is concerned with the early history of a relatively small and somewhat unremarkable building in the coastal city of Durban on the east coast of South Africa. Situated in the Point area near the entrance to Durban's harbour, the building falls within what is termed the Point Waterfront Development Area. Today, the building consists of a number of upmarket apartments, surrounded by a series of picturesque canals and is within easy walking distance of Durban's beaches, as well as major tourist attractions, such as Ushaka Marine World. Below the surface of the building's present genteel facade and surroundings, however, lies a somewhat darker, but fascinating, history. This building, today known as The Point Bastille, used to be Durban's Point Prison, and before that, it was known as the Point Convict Station. In the past, the building was occupied by – often dangerous – convicted offenders, rather than by well-to-do members of the bourgeoisie.

The building is, however, interesting for more than the mere fact that it used to be a prison. For tied up in the history of this particular building are many themes that are unique to the peculiar penal history of southern Africa in general and of KwaZulu-Natal in particular. With its origins dating back to the turn of the twentieth century, the building symbolises the articulation of a penal ideology which – for want of a better descriptive term – we call “racially differentiated punishment”. To be somewhat more precise, the building represents a particular regime of punishment reserved for non-European prisoners in particular. It is contended in this contribution that, within the context of colonial Natal, a number of central themes or characteristics distinguished the punishment of non-European prisoners from that of European prisoners at ideological level. Among these distinguishing themes or characteristics two of the most important were the following: first, labour was regarded by the white colonial authorities as an extremely important element in the punishment of black offenders in particular. Convict labour was not only useful as a practical means of alleviating chronic shortages of so-called free labour in the colony. For the white colonists, convict labour performed by black prisoners was ideologically important, since a crucial pillar upholding and advancing the colonial project was the successful coercion of the indigenous black population into the habit of performing regular hard labour in service of their white colonial masters. The fact that – as is discussed in detail below – Durban's Point Prison was first conceived as

a “Convict Establishment” to provide labour – in particular black labour – for the Harbour Works, is ideologically significant. This contribution explores a range of issues surrounding the theme of black prison labour.

Secondly, the punishment of black offenders in colonial Natal was inextricably bound up with resistance on the part of the indigenous population to oppressive colonial laws designed to enforce white colonial control. The prisons of the colony were not only expected to deal with criminals in the normal sense of the term, but also with offenders against social control legislation. The essentially political nature of many of the offences that landed a large number of the indigenous population in prison meant that “normal” penal theories did not give clear-cut answers as to how these prisoners should be treated. The early origins of the Convict Station at Durban’s Point are intimately bound up with the crisis caused by the prosecution of large numbers of so-called rebels following the 1906 Bambatha Rebellion.

Both the above themes are explored in the context of the early history of Durban’s Point Prison. It is the contention of this contribution that the establishment of the Convict Station at the Point was an important early stepping stone in the development of a system of “racially differentiated punishment”. The fact that a penal ideology based on race was being developed at the turn of the twentieth century, which called for the complete and clinical separation of European prisoners from all non-European prisoners, is clearly significant, if for no other reason than that this took place almost half a century before the inception of the notorious apartheid system in South Africa. If the buildings which make up today’s Point Bastille could talk, it is contended that they would reluctantly acknowledge their place within South Africa’s cruel history of racial segregation and suffering.

2 The social, political and economic context in Natal at the turn of the century

Durban’s Point Prison was established shortly after the start of the twentieth century. It is important, therefore, to understand the social, political and economic context within which the establishment of the prison took place. In particular, it is important to appreciate the manner in which the social, political and economic conditions of the time impacted upon the conceptions of race held by most members of the white colonial ruling class.

Towards the end of the nineteenth century, Natal’s settlers became increasingly more independent of Britain. The colony attained responsible government in 1893 and this was accompanied by accelerated racial division.¹ In particular, more legal obstacles for blacks were put in place in order to increase their social distance from white settlers.² Economically, the discovery of gold on the Witwatersrand meant

1 Bundy 1979: 183–192.

2 Kline 1988: 230–235.

that the future of Natal became dependent on the economy of southern Africa as a whole. At the same time, the economy became increasingly racially skewed with the consolidation of settler agriculture.³

The years between the discovery of gold and the outbreak of World War I were characterised by increasing economic development in Natal. In particular, the desire to capture the trade of the Transvaal for Durban encouraged the modernisation of the harbour and the extension of the railway line to the Reef in 1895. As the railway line reached northern Natal, it became economically feasible to export coal.⁴ Before the 1890s, commercial farming had been restricted to the coastal sugar plantations and market gardens near Durban and Pietermaritzburg. During this decade, there was a transformation of settler agriculture in the midlands and coastal districts.⁵ Crucially, the development of the goldfields also resulted in increased white immigration to southern Africa, including Natal, and by 1893, the white population had risen to 44 000.⁶

Urban development stimulated the emergence of a white capitalist agricultural class. Agricultural organisations and farming members of the legislature argued the case for their protection and state support. With time, it became apparent that it was state intervention rather than market forces that gave them economic security.⁷ Over time, a sugar and coal alliance emerged as the principal economic unit in the colony. This period also saw the emergence of a white artisan class as a force in colonial politics.⁸

The growing self-confidence of the settlers shaped a separate ethnic consciousness. Politically, this meant greater settler control of the colonial administration. The defeat of the Zulu kingdom in 1887 put to rest fears of invasion, and between 1888 and 1893, Britain and the Natal legislature negotiated a new constitution. Important safeguards for black interests were included, but were allowed to lapse in practice.⁹ Responsible government in 1893 meant a transfer of power to the settler community. Even though urban voters were in the majority, the delimitation of constituencies ensured a majority of farmers' representatives. As a consequence, their demands dominated government policy.¹⁰

After 1893, there was a deterioration of race relations. White fear combined with racist attitudes towards blacks.¹¹ These attitudes spread to the law, where many magistrates and judges were racially biased. During this period, Natal was influenced

3 Lambert & Morrell 1996: 63.

4 Brookes & Webb 1965: 162–163.

5 Richardson 1982: 526–527.

6 Lambert & Morrell 1996: 64–65.

7 Graves & Richardson 1980: 226.

8 Lambert & Morrell 1996: 66–67.

9 *Idem* at 67.

10 *Ibid.*

11 Brookes & Webb 1965: 181–188.

by the development of a segregationist ideology in the southern states of the United States of America. A dominant white consciousness developed, influenced by Social Darwinism. Part of this was the development of a theory of black inferiority. As a result, they were regarded as being incapable of assimilation. By 1897, the Indian population outnumbered the white population. As it gradually became a political and economic threat to certain settlers, the ethnic superiority of the latter was emphasised and the concomitant stereotype of the so-called dishonest Indian trader developed.¹²

The transfer of power to men with little sympathy for the aspirations of the black population contributed to the widening of the racial gulf.¹³ Between 1893 and 1910, forty-eight laws affecting Africans were passed. The Masters and Servants Law was tightened in 1896. In addition, the police force was expanded in 1894. In general, the sentences imposed on blacks by magistrates were harsher than they had been before responsible government. Courts frequently imposed the death penalty and bowed to settler demands for increased flogging.¹⁴

All of this explains why there was a push for a “formally racially divided” penal system – a move away from informal separation, which was always in place, to a formal separation. The main economic and political developments in Natal towards the end of the nineteenth and beginning of the twentieth centuries demonstrate why the colonists were so determined to create a racially exclusive prison for Europeans at this time.

3 Early history of convict labour near the Point – 1850 to 1901

The earliest reference to the idea of establishing a Convict Station at Durban’s Point, dates back to the early days of the colony, when John Milne, Durban’s first harbour engineer, accepted a tender for the construction of an “iron convict house” to accommodate a small work gang in 1850. As was to happen over many years to follow, however, these plans did not materialise.

From the 1860s onwards, convict labour was used on the Durban harbour works. It is important to note that there was a perennial shortage of labour in the colony. The constant complaints of white farmers about the shortage of labour were echoed by government officials in Durban, where there was a continuous need for labour to carry out public works. These public works included ongoing and crucial work on the construction of Durban’s harbour. The use of convict labour for this purpose was frequently the only option available to government at a time when free labour was in short supply.¹⁵

12 Lambert & Morrell 1996: 68.

13 Lambert 1995: 65.

14 Lambert & Morrell 1996: 69–70.

15 Peté 1984: 18.

Clearly, imprisonment in Natal was deeply affected by the prevailing economic and political situation in the colony. In general, the major shortage of free black labour influenced penal labour policy. In particular, gang labour on public works – particularly the Durban harbour works – became an important form of penal labour.¹⁶ In 1868, the assistant resident magistrate of Durban stated that the facilities at Durban Gaol were inadequate to allow strictly penal labour to be carried out within the walls of the prison, stating that:

The change of air daily to the quarries and Harbour Works has the effect of keeping the prisoners in health and I question whether any greater punishment can be inflicted on Kafirs than having to work in chains regularly at the Harbour Works where they are continually exposed to salt water ... To white prisoners the exposure of having to appear in public amongst the Convict Gang is a greater punishment than any labour inside the walls of the Gaol could be.¹⁷

In speaking about “labour inside the walls of the Gaol”, the assistant resident magistrate was referring to what was termed “strictly penal labour”, which involved economically useless labour – that is labour designed purely to punish and to reform the prisoner. It was performed inside the prison walls and usually involved walking on a treadmill, grinding a crank or performing “shot drill” with iron balls. Policy required the first three months of any sentence that included “hard labour” to consist of such “strictly penal labour”. In practice, however, this policy was not applied in a sustained manner in the colony. To the prison authorities “on the ground”, strictly penal labour was a waste of a precious resource – labour power and, in particular, black labour power – which was sorely needed on the public works of the colony. Clearly, the assistant resident magistrate wanted to assure the colonial authorities that “strictly penal labour” in the context of colonial Natal need not be performed inside a prison at some economically useless task. Such tasks included grinding a crank or walking endlessly on a treadmill that was put there purely for the purpose of punishment.¹⁸

In 1872, the Durban Gaol Board recommended that hard labour of the first class in Durban should comprise labour at the harbour works, at the Umgeni quarry and for public works.¹⁹ Generally, prisoners housed in the Durban Gaol did not experience a period of strictly penal labour, but were employed on the harbour works or other sites of public labour. Indeed, convict labour on the public works came to be regarded as crucial by the Natal penal authorities.²⁰

16 *Idem* at 23.

17 Pietermaritzburg Archives Repository (hereafter NAB) CSO (Colonial Secretary’s Office, Natal) 314/2265: Report of Assistant Resident Magistrate of Durban, 8 Oct 1868.

18 Peté 2006: 100–112 and Peté 2007: 111–125.

19 NAB CSO 405/307: Meeting of Durban Gaol Board, 6 Feb 1872.

20 Peté 1984: 49.

Overcrowding was a common problem in Natal's prisons and the construction of a prison at the Point was suggested by the District Surgeon, Dr Gordon, in 1883. He supported the "construction of a separate establishment in the neighbourhood of the Point ... to be called the 'Convict Establishment' in which all long sentenced prisoners be kept and where Government work is always carried on [i.e. harbour works]".²¹

According to Dr Gordon, the treadmill, crank and shot drill were undesirable and had fallen out of favour with prison authorities in England. Instead, English convicts were employed on large public works. The Harbour Board in Durban, however, believed that a separate convict station near the harbour was not feasible. In 1883, the Board estimated that fewer than 100 convicts working at the harbour would be required and suggested that, instead of at the Point, the proposed convict station be situated near a large quarry. This, it was thought, would provide sufficient work for the inmates.²² It is not clear, however, if such a convict station was ever established.

The idea of establishing a convict station near the harbour works at Durban's Point again came to the fore in 1887. In that year, Edward Innes, the harbour engineer, observed that a prison at the Point would be advantageous as the Durban Gaol was nearly two miles away. The Breakwater Gaol in Cape Town was cited as an example of a gaol built to house convicts close to their place of work. The following year, Cathcart William Methven, Innes's successor as harbour engineer, identified a site on reclaimed land near a location known as the Back Beach. Once again, the idea was stillborn and no construction was actually carried out.²³

As for the nature of the labour performed by convicts in connection with the Durban harbour works, much of it involved working with stone. In order to fulfil the requirements of prison sentences which included "hard labour", convicts in the main worked with stone that was produced at a quarry overlooking the Umgeni river. Blocks of stone were broken into smaller pieces and then transported by rail to the Point. Upon arrival, gangs of convicts unloaded the blocks and moved them to the North Pier, the breakwater or to the large concrete block yards. Convicts not employed at the quarry or at the Point were still involved with stone breaking, but this was carried out within the Durban Gaol.²⁴ The hardest form of labour was considered to be working with stone. Accordingly, much of the work performed by convicts at the harbour concerned breaking, crushing or carting stone.²⁵ When the large block yard near the beaches was extended in 1906, convicts were used to remove the sand hills.

21 NAB CSO 897/858: District Surgeon, Pietermaritzburg, to Resident Magistrate, Pietermaritzburg, 14 Apr 1883.

22 NAB CSO 879/858: Report of Resident Engineer, 6 Jul 1883.

23 Kearney 2013: 1239.

24 *Idem* at 1233.

25 *Idem* at 1221.

From 1905, convicts were also involved in levelling the ground and preparing the building sites for new quays and warehouses on the Maydon and Congella wharfs.²⁶

Together with road construction, the harbour works were generally considered an appropriate place for prisoners sentenced to imprisonment with hard labour. Successive harbour engineers called for increased convict labour, since convict labour supposedly cost half the amount of that paid for contract workers. Few officials spoke out against convict labour, with one rare example being the assistant commissioner of police and inspector of prisons, Mardell, who commented in 1909 that “instead of being a valuable asset, convict labour is in reality a burden on the Colony”.²⁷

A final strand in the early history of convict labour at Durban’s Point worthy of discussion, is linked to the Second Anglo-Boer War, which raged between October 1899 and May 1902. During the war, large numbers of Africans had collaborated with the Boers.²⁸ Soon after the turn of the century, some were incarcerated on the Bluff, the peninsula that lies just across the mouth of the harbour from the Point. During the course of the war, procedures were developed to deal with prisoners taken by the British army. Citizens of the Transvaal and Orange Free State were treated as POWs. Persons who held allegiance to the colony of Natal and who had collaborated with the Boers were charged with high treason. Ultimately 409 men were convicted, 14 of whom were Africans. The longest sentence handed down to an African was three years with hard labour. However, Africans in Natal could also be charged under martial law for collaborating with the Boers.²⁹ In addition, a large number of Africans were held in prisons across Natal on suspicion of collaborating with the Boers, but who had not yet been tried.³⁰

In deciding what to do with these men, Major General James Wolfe-Murray of the British army approached the Natal colonial government about using the men as public labourers, since the war had resulted in a major labour shortage at the Durban harbour. It was agreed that the harbour works in Durban would be the most practical site to put the men to work. However, a plan to accommodate these men within the Durban Gaol did not materialise. Instead, the men were accommodated in a separate building on the Bluff, which, it was believed, would make escape difficult.³¹ Clearly, the authorities did not wish to treat these men as criminal prisoners in the strict sense of the word, but at the same time wanted them to be kept under control and under surveillance in order to prevent them from deserting. In the end, guards were provided by the Harbour Works Native Police. It was agreed that the men would be

26 *Idem* at 1235.

27 See *Nongqai* II (12), 377 as cited in *idem* at 1221. *Nongqai* was the Natal Police journal at the time.

28 Warwick 1980: 198–199.

29 Wassermann 2011: 28.

30 *Idem* at 29.

31 Wassermann & Wohlberg 2002: 125.

paid thirty shillings a month minus deductions for food and accommodation. After deductions, the men only received half this amount. Administratively, the men were treated as POWs. Legally, however, they did not have this status.³² The Minister of Lands and Works, AH Hime, recognised the special status of these men when, in 1900, he stated in an instruction to the harbour engineer as follows:

All that is necessary, I think, is to keep a general watch over these men by day so as to prevent their trying to desert. They must not be treated as prisoners and, therefore, I think that they had better not be put in gaol at all. If special guards have to be employed, they will have to be paid for by the Military Authorities.³³

This lack of status allowed the authorities to exploit the men as forced labour. The labour performed by the men was equivalent to the most severe punishment reserved for criminal convicts, namely work on the harbour breakwater. By December 1901, 215 men were imprisoned and employed on the Bluff. Crucially, the urgent needs of the government at this time for labour were linked directly to the search for a “native policy” that would satisfy this need for workers.³⁴

By 1901, the total number of convicts working at the harbour, including the “suspects” imprisoned as a result of the war, had reached over 400. This was the highest number of labourers employed at the harbour works up to that time.³⁵ It is important to note that, during that period, the prisoners accused of collaboration with the Boers had not been charged with high treason in the civilian courts, nor had they been charged under martial law. They were merely arrested under suspicion of collaborating with the Boers and then used for purposes of forced labour. This without any proper trial in a court of law.

The employment of these men as forced labourers is a serious indictment of the attitudes of the military authorities and the colonial government at the time. If they were legitimately suspected of having committed treason, they should have been subjected to a court martial, or else properly charged and tried in a civilian court. However, they were neither properly tried and convicted, nor were they set free, but simply designated as “suspects” and made to perform hard labour at the harbour works. Significantly, certain district magistrates became concerned about the welfare of these men and, from June 1901 onwards, were involved in a process of securing their release.³⁶ What emerges clearly from this particular strand in the early history of convict labour at Durban’s Point, is the attitude of the white colonial authorities in relation to “Native” prisoners. Uppermost in the minds of these authorities was

32 Wassermann 2011: 27–39.

33 NHD II/1/25, Natal Harbour Department, Engineer’s Correspondence, 10–18 Apr 1900, cited in Kearney 2013: 1227.

34 Wassermann 2011: 27–39.

35 Kearney 2013: 1231.

36 *Ibid.*

the potential labour these prisoners could perform in service of the white colonial project. Of much less importance was the precise legal status of these prisoners. Furthermore, there was no notion that the work performed by these men might be necessary to reform any criminal tendencies they might harbour. As in the case of many non-European prisoners confined within the gaols of colonial Natal, everyone knew that these men were not criminal in any real sense of the word, but simply members of the indigenous population who had dared – in some way or other – to defy the white colonial order.

4 The 1904 campaign for prison reform in the *Natal Witness* and the appointment of a commission of inquiry

In May 1904, the editor of the *Natal Witness* – F Horrace Rose – launched a campaign in his newspaper aimed at bringing about prison reform in the colony of Natal. The main focus of the campaign was on what the white colonists thought to be the many deleterious effects of confining white and black prisoners in the same gaols. Although European prisoners in colonial Natal had always been confined in cells separate from those in which prisoners of other races were confined, Rose's campaign called for complete separation, with the establishment of a new type of prison designed specifically for the confinement of European prisoners. This prison was to be entirely separate from the other prisons of the colony, which would then cater exclusively for non-European prisoners. The penal ideology underpinning the punishment to be meted out in the proposed new and exclusive European prison, was to be completely distinctive from that which informed the punishment of non-European prisoners.

As Rose's campaign began to gain strength within the white colonial community, questions were asked in the Natal parliament about what the government intended to do in relation to prison reform. The Minister of Justice promised to look into the matter, which resulted in information being obtained from England, Australia and the United States. On 29 December 1904, the *Natal Witness* reported that proposals had been drawn up that were to be presented to parliament. The newspaper stated as follows: "One of the most important reforms which will be instituted is the complete segregation of European prisoners, thus doing away with the scandal of herding black and white prisoners in the same gaols."³⁷

It was proposed that the Central Gaol in Durban, which stood on a valuable site in the centre of the city, be sold. The proceeds were to be used to build a new prison near Pietermaritzburg for Europeans – which was to be focussed on industrial training – as well as a new prison at the Point for non-Europeans. The new prison

37 29 Dec 1904 *Natal Witness* "Prison reform".

at the Point was to be focussed on the provision of labour for government projects and was to be situated as near as possible to the harbour works. This proposal clearly indicates the different penal ideologies underpinning the punishment of white and black prisoners. The proposed new “industrial prison” for Europeans would be geared to the reform of its inmates by training and education. In contrast, the new prison at the Point would be focussed on harsh punishment by means of hard manual labour. Not only would this new prison for non-Europeans teach the lesson that the indigenous inhabitants of the colony should reconcile themselves to performing menial labour in service of their white colonial masters, but it would be practically useful in providing a convenient and secure source of forced labour for the Durban harbour works. All talk of ‘reform’ and the ‘treatment of the criminal disease’ was not applicable to black prisoners. The control of an unwilling and repressed black labour force was dependent upon a system of harsh punishment, which would deter opposition to white colonial authority and bolster white colonial power. There were fears among certain white colonists, particularly those who employed black labour, that all the talk of prison reform at this time would lead to excessive leniency being shown towards black prisoners. Many white employers felt that the penal system was already too lenient towards black prisoners. This matter was brought up in Parliament on 28 June 1904, with one of the members stating as follows:

We know very well, all of us who are employers of Indian labour, what the Indians opinion of the gaols of Natal is. They think they are the finest places in the world to go to, that they are far less hard worked there than they are on the estates of their employers, and the same remark applies to Natives ... Although I am in favour of doing as much as possible to improve the condition of the white prisoners ... I certainly, Sir, am not in favour of relaxing in any way the punishment of the Indians and the Natives.³⁸

Clearly, the fact that the government proposed to build completely separate prisons for black and white prisoners – to be run along completely different lines – indicates that the above argument was indeed taken seriously. The proposals put forward by the government did not, however, end the agitation for prison reform. It was felt by many that a full-scale parliamentary commission was required to investigate a matter so complex and important. On 10 February 1905, several prominent white colonists petitioned the government to appoint such a commission.³⁹ Just over two weeks later, on 28 February 1905, the *Natal Witness* announced that a Prison Reform Commission was to be appointed.⁴⁰ The commission was officially appointed on 16 September 1905 and completed its final report on 28 May 1906;⁴¹ it cast a wide net during its

38 Legislative Assembly Debates (1904) vol 37 at 320: Mr Smythe 28 Jun 1904.

39 11 Feb 1905 *Natal Advertiser* “Prison reform”.

40 28 Feb 1905 *Natal Advertiser* “Prison reform”.

41 Report of Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906.

investigations, taking evidence from sixty-two witnesses on twenty-three separate occasions and visiting the central gaols (Durban, Pietermaritzburg and Eshowe), as well as certain of the more accessible district gaols of the colony.⁴² Copious documentary evidence was solicited by means of a wide-ranging questionnaire, which was sent to a large number of officials throughout the colony who were in any way involved in the administration of the penal system.⁴³ In addition – apart from the district surgeons of Pietermaritzburg and Durban who gave verbal evidence before the Commission – a separate list of questions was sent to all district surgeons who were in medical charge of the gaols of the colony.⁴⁴ Finally, advertisements were published, inviting any members of the public who wished to do so, to give evidence before the Commission.⁴⁵

5 The report of the Prison Reform Commission of 1905–1906: A blueprint for racially differentiated punishment

The report of the Prison Reform Commission provides fascinating insights into the political and economic challenges facing the colony of Natal at the turn of the previous century, as well as the manner in which the racist ideology of the white colonial ruling class shaped official responses to broad issues of prison reform. The scope of the enquiry was framed in very broad terms, with the Commission being instructed “to enquire into, and report upon the whole question of Prison Reform and Penology in Natal”.⁴⁶ At a practical level, the main problem facing the penal system at the time was constant and serious overcrowding.⁴⁷ The issue of race immediately entered the picture, since the problem of overcrowding was exacerbated by the fact that – as far as possible – European prisoners had to be kept apart from prisoners of other races – in other words, prisoners could not be spread evenly among available cells.⁴⁸ As will be made clear later in this section, there had always been a (somewhat informal)

42 *Idem* pars 3 and 8.

43 *Idem* par 4.

44 *Idem* par 5.

45 *Idem* par 3.

46 *Idem* par 1.

47 In relation to overcrowding, the report stated, *inter alia*, as follows: “In the ... [Durban] Gaol the pressure upon cell space has at times been so great that numbers of prisoners, (as many as eighty on one occasion), have had to occupy the corridors. Considering merely the factors of amount of floor space, cubic capacity, and number of inmates, the cry which has been going up for years of overcrowded gaols is, having regard to existing conditions, undoubtedly well founded ... [I]t is sufficient to say that the gaols as a whole are inconveniently, and at times dangerously, overcrowded.” See *idem* par 22.

48 Referring to the Central Gaols, the Commission pointed out that the separate confinement of European prisoners had a deleterious effect on the overcrowding of prisoners of other races: “[I]n cells of similar dimensions to those in which one European was confined were found three, and sometimes five, Natives or Indians.” See *idem* par 22.

separation of prisoners of different races in the gaols of colonial Natal, but the turn of the century marked an inflection point at which this separation was to become more formalised and carefully articulated within official policy. The recommendations of the Prison Reform Commission, it is argued, represent an important early expression of official policies of racial segregation and separation within the penal sphere. The fact that these policies were being articulated at the turn of the twentieth century, half a century before the adoption of the notorious apartheid system, is worthy of note.

The basic logic underpinning the various recommendations made by the Commission was that many of the problems being experienced within the penal system of colonial Natal at the time – with overcrowding being chief amongst these problems – could be solved if the prison population could be separated into a number of carefully defined categories, each of which would then be dealt with accordingly.

Not surprisingly, the primary division would be along lines of race, with European inmates being separated, removed from the system, and dealt with on a completely different basis to all other prisoners. This step alone would take a certain amount of strain off the overcrowded penal system, but it was possible to reduce the strain even further by removing a substantial group of so-called native prisoners from the overcrowded prisons. This was the large group of native offenders in Natal's gaols who had been imprisoned, not because they were real criminals, but because they had fallen foul of some or other article of social control legislation – that is, colonial legislation designed to keep Natal's indigenous population under firm white colonial control. Once this large group of petty political offenders had been removed from the system (since they did not belong in a real prison in any event), along with the European offenders, the pressure on Natal's penal system would be greatly relieved.

These proposals require closer investigation, since the manner in which they were framed by the Commission provides fascinating insights into white colonial ruling class ideology at the time. Together, they amount to what we have referred to as a “blueprint for racially differentiated punishment”. The subsections that follow examine first, the proposals of the Commission in response to the problem of tightening up the manner in which various racial groups were defined, in order to ensure that only “pure blooded Europeans” were singled out for preferential treatment. Secondly, the proposals related to the preferential treatment to be provided to European prisoners are studied. Thirdly, the contribution takes a look at the proposals related to the separation and treatment of so-called native petty offenders, in particular the obsession of the white colonists with the control and exploitation of native labour.

5 1 The problem of defining and separating different races

As alluded to above, a primary point of departure of the Prison Reform Commission was that the penal system of colonial Natal was plagued by excessive overcrowding

and that it exercised a corrupting influence on all those who came into contact with it. It was pointed out that the system made no attempt to differentiate between various types of criminals. The gaols were “used alike for the detention of the convicted and un-convicted of all races and ages, of both sexes, and of all degrees of criminality, from the mere offender against an artificial prohibition to the most villainous transgressor of human and divine law”.⁴⁹ This did not mean, of course, that there was no separation within the prisons. No matter how small the gaol, female prisoners were always separated from male prisoners, although it would seem that female prisoners were few and far between. More importantly, European prisoners were always separated from prisoners of other races.⁵⁰

The distinction between European and non-European prisoners was the one that really mattered to the white colonists in general and to the white prison authorities in particular. The trouble – according to many of the white colonial officials who administered Natal’s penal system – was that the existing definition of “European”, as it applied in the prisons of colonial Natal, was not exclusive enough. The Commission pointed out that the definition of “European” in terms of the prison rules was tied up with prison diet: “Broadly, the rules recognise, for dietary purposes, three races, viz.: Europeans, Indians, and Natives. Included among the first are Eurasians, natives of St. Helena and the Cape (excluding Kafirs), American Negroes, French Creoles, and West Indians.”⁵¹

The white colonial prison authorities were strongly opposed to this extended definition of “European” and argued strongly for a more exclusive definition. The Commission agreed with the need for more precise racial distinctions to be made within the penal system of the colony, particularly when it came to who was and who was not classified as a “European”:

The above divergent races, now classified alike as Europeans, may be found confined in the same cell, simply because they are supplied with the same kind and quantity of food. These inexact distinctions were universally condemned; and this notice of the matter, in conjunction with other points more less patent, should lead to an immediate revision of the rules. As regards racial distinctions, a re-classification was strongly urged, excluding so-called “Coloured” people from the category of Europeans, and placing them in a class by themselves.⁵²

49 *Idem* par 25.

50 When describing the overall state of the colony’s prisons, the Commission made it clear that, despite constant problems with overcrowding, there was strict separation between European prisoners and prisoners of “other races”: “Europeans by themselves or in single cells so far as space permits, other races three or more in a cell, according to certain ideas regarding health and morality.” See *idem* par 22.

51 *Idem* par 26.

52 *Ibid.*

Thus, the first step towards ensuring the separate treatment of European prisoners was to exclude all non-Europeans, hence the proposed addition of a catch-all racial category termed “Coloured” to the existing categories “European”, “Indian” and “Native”.⁵³ It was thought that this would avoid anomalies in classification since, if a prisoner did not fall clearly under one of the three principal categories, he would automatically fall under the “Coloured” category. Only “pure blooded white men” would be entitled to treatment under the proposed industrial reformatory system.⁵⁴

Clearly, the white colonial ruling class wished to prevent any mixing between Europeans and non-Europeans, thereby preserving a strict social distance between these two groups. The maintenance of white colonial authority and sovereignty demanded that whites – even in prison – be seen as belonging to the white master class and therefore completely separate from the indigenous population.⁵⁵ Perceptions of white superiority and supremacy had to be jealously guarded, if firm ideological control over the indigenous population was to be maintained.

5 2 Separate treatment for Europeans

Having tightened up the definition of “European” so as to allow only “pure blooded white men” to take advantage of this category, it would become possible to extract the European prisoners and to place them in their own special prison where they would get special treatment, as befitted representatives – albeit wayward ones – of the white colonial ruling class. As a matter of the “first order of importance”, the Commission suggested “the erection, outside any of the towns, of a separate gaol for Europeans, at which industrial work and reformatory methods could be carried on simultaneously”.⁵⁶ This formed an important piece of the puzzle in the overall picture of a system of racially differentiated punishment being proposed by the Commission.

The Commission also pointed out that “the main object of the institution [namely the proposed new prison for Europeans] would be reform”.⁵⁷ The Commission made it clear that the formal racial segregation of prisoners, which would be effected if

⁵³ *Ibid.*

⁵⁴ NAB CSO 2847/Précis of Evidence at 1.

⁵⁵ The attitude of the colonists towards the perceived dangers of racial inter-mixing – even amongst prisoners – is well illustrated in the following extract from the précis of evidence presented to the Commission: “Several witnesses have commented on the exceeding difficulty of keeping the races apart when in the same building; and it would appear that even the white man, when in prison, tends to make friends with those other prisoners who he might be expected to look upon as belonging to the inferior race.” See *ibid.*

⁵⁶ Report of Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906 par 30.

⁵⁷ *Idem* par 30. In this same paragraph of its report, the Commission went on to state that: “An independent prison for Europeans, with its different sections for Adults and Juveniles, Inebriates and Vagrants, must be the foundation of any attempt by the State to protect Society through the reclamation of the fallen and the criminal.”

the new European prison was established, would simply be building on the *de facto* racial segregation that already existed in the prisons of the colony:

The erection of such a prison in itself involves no revolution of our gaol system; for the aim and policy of the present management is, as regards diet and so far as accommodation permits, to separate the White from the Black, allowing only that which is unavoidable, their association in the labour gangs and workshops.⁵⁸

Thus, in terms of the Commission's proposals, the *de facto* racial segregation that had always existed in the prisons of the colony, was to be sharpened up, formalised and taken to its logical conclusion, that is, by establishing a completely separate prison for Europeans.

The complete racial segregation of the prisoners would also apply in the case of juvenile offenders. The Commission suggested that a "special and independent Reformatory for Juveniles" could eventually be established as a separate section of the proposed "General Reformatory" – that is, as part of the proposed prison exclusively for Europeans discussed above.⁵⁹ Until such time as numbers justified a separate reformatory for European juvenile offenders, the Commission suggested that "Natal might follow the example of the Transvaal and Orange River Colony, in sending her [European] juvenile offenders to the Reformatory near Cape Town, where they are received at a charge of two shillings and sixpence per head per diem".⁶⁰ The Commission was clearly concerned with keeping white juvenile offenders far away from the corrupting influences of the colony's prisons and stated as follows:

Many of these youths are not brought before the Courts at all, and such as may be are generally warned or birched and then discharged. Under a First Offenders' Act, operating in conjunction with a system of benevolent supervision by specially qualified 'probation officers', and with other forms of corrective treatment suited to the perversity of youth, under the supervision of the Education Department, elsewhere alluded to, it may be possible to defer for many years the establishment of a Reformatory for Juvenile Europeans.⁶¹

Thus, when it came to the treatment of European juvenile offenders, it was all about "education", "training" and "reform". In preference to "penitentiary incarceration", the Commission stated that "it is desirable that other and less rigid disciplinary methods should have preference in the training of disorderly and neglected youths".⁶²

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.* It was clear that these sentiments only applied in the case of European youths, with the following course of action being recommended by the Commission for so-called native youths: "As regards Native youths of lawless tendencies, the Judiciary should be granted a discretionary power, in dealing with First Offenders, to free towns from their presence by ordering them back to their kraals, as a substitute for police or probation surveillance."

THE DEVELOPMENT OF RACIALLY DEFINED PUNISHMENT IN COLONIAL NATAL

One reason advanced for restricting industrial training to white prisoners was the resistance that could be expected from white labour if black prisoners were trained:

The needs of the Public Works and the Harbour Departments afford ample outlet for all Coloured Convict Labour; and the industrial training of Native and Coloured Convicts would be probably resented as likely to cause unfair competition with white skilled labour.⁶³

The above reasons were only mentioned in the evidence presented to the Commission, however, and did not appear in the final report. Instead, the report justified restricting reformatory methods to white prisoners in purely racist terms:

Pride of race alone ought to rouse us from our indifference and lethargy ... Several reasons may be suggested for limiting the proposed innovation to Europeans; of a higher average intelligence, and possessing a higher moral basis, with a better knowledge of the claims of society, and of the advantages of being reconciled thereto, they offer a more promising field for reform than would be presented by individuals of other races.⁶⁴

It is worth emphasising that the establishment of a reformatory or industrial prison for Europeans was regarded as an absolute priority by the Commission, which stated that: “The opinion was universal, and in it your Commissioners most emphatically share, that one of the first measures of reform should be a separate prison for Whites.”⁶⁵ Although, as will be discussed in due course, this recommendation was never fully implemented at the time, its nature and scope are important for a proper understanding of penal ideology of the white ruling class in the colony during the early part of the twentieth century. The idea that punishment affected blacks and whites differently, and that the penal system should be divided along lines of race, was fundamental to the findings of the Commission. The treatment of the European prisoners in the proposed industrial prison was to be geared towards education and reform, which would enable that prisoner to re-enter white colonial society upon their release.

5 3 Social control, labour and the treatment of “native” prisoners

In the case of so-called native prisoners, the main concern of the Commission was the overcrowding of the prisons with black petty offenders against social control legislation. If at all possible, these offenders – who were not really criminals in the true sense of the word – had to be kept out of prison. At the same time, however, white colonial sovereignty and authority had to be protected against these rebellious natives. An ideal solution was to place these recalcitrant members of the indigenous

63 NAB CSO 2847/Précis of Evidence at 6.

64 Report of the Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906 par 67.

65 *Idem* par 69.

population into labour camps, where they could be reconciled to performing menial hard labour in service of their white colonial masters. The remaining hardcore criminals within the native prison population would be left behind in the prisons – now much less crowded – to be dealt with accordingly.

In order to properly understand the Commission's approach to the treatment of native prisoners, it should be noted that, from the time that they were first established, the prisons of the colony had always performed a dual role. On the one hand, they were instruments of social control – many of the inmates detained in these prisons were there because of resistance on the part of the indigenous population to white colonial control. On the other hand, they were instruments for the suppression of crime in the strict sense of the word. This dual role was apparent in the design – or lack thereof – of many of the gaols in the colony. In commenting on the manner in which many of the “country gaols” in the colony had been constructed, the Commission pointed out that “they were not erected in accordance with any general and approved scheme of gaol construction”, but had “mostly grown by a process of accretion in irregular additions, varying in description, appearance, and stability according to individual fancy, the pressing needs of the locality, or the financial necessities of the time”.⁶⁶ As if to emphasise that the prisons of the colony were not designed simply to suppress crime and criminals, but to enforce colonial power in the face of a rebellious indigenous population, the Commission pointed out that many of the country gaols were designed to be “defensible positions”:

Considerations of defence had to be studied in their erection and in enlargement; the Gaol, in conjunction with the Public Offices of the Division, forming the principal and possibly the only defensible position within most Magistracies; and for this reason also they were generally, and still are, at these places used as arsenals for the storage of arms and ammunition.⁶⁷

The Commission made clear in its report that many black prisoners – who made up the vast majority of Natal's prison population – had ended up in prison because of what were – essentially – political offences against social control legislation:

The Natives are not only subject to their own special laws, of which there are many contraventions, but also to a number of artificial restraints and disabilities, chiefly when in towns, which go to swell the number of offences committed by them.⁶⁸

Thus, the prison authorities clearly understood that the overcrowding in the prisons of the colony was largely the result of sending to prison black offenders against legislation, such as the Native Code, Pass Laws, as well as the Master and Servants

⁶⁶ *Idem* par 13.

⁶⁷ *Ibid.*

⁶⁸ *Idem* par 67.

Law, as they could “in no sense of the word ... be said to be criminals”.⁶⁹ In its final report, the Commission commented that it was not desirable to sentence petty offenders to short sentences of imprisonment, and noted that: “[m]any of such cases, perhaps the majority from the towns, do not indicate any particular moral depravity, arising from nothing worse than a breach of artificial restraints and prohibitions”.⁷⁰ The Commission proposed a number of ways in which such offenders could be kept out of the existing overcrowded prisons. These included banishing such offenders to their kraals; punishing by means of corporal punishment rather than by short sentences of imprisonment; and sentencing petty offenders to work on the roads or other public works.

It was in relation to the proposal that black petty offenders be sentenced to forced labour on the roads and other public works, that the Commission made one of the most consequential recommendations of its report. This was the recommendation that a number of “movable” or “portable” prisons be established. These movable prisons would be similar to road construction camps, but would be designed to ensure the safe custody of short-sentence black prisoners when they were not working on the roads. They would consist of “portable iron pent-houses, similar to those in use by the Railway for construction work” and would be surrounded by barbed wire entanglements.⁷¹ Prisoners would be employed for road construction and -repair during the day, and confined within this fortified camp at night. The prison would be moved as the work progressed. The Commission pointed out that the advantages

69 NAB CSO 2847/Précis of Evidence at 2. In par 44 of its report, the Commission stated as follows: “The system of advancing money to Natives, in order to secure their services, is said to be responsible for many cases of imprisonment under the Masters and (Black) Servants’ Act. The contract, which was purely civil in its inception, becomes quasi-criminal in its developments, and lands the defaulting debtor in gaol as a defaulting servant.” See Report of Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906 par 44. Examples of such laws include the Natal Native Code of 1891, the Identification of Native Servants Act 49 of 1901 and the Masters and (Black) Servants Act 40 of 1894.

70 *Idem* par 45. A good example of the “artificial restraints and prohibitions” that the black indigenous population were subject to in colonial Natal, were the many restrictions put in place by the Masters and (Black) Servants Act 40 of 1894. Contraventions of this piece of legislation were frequent, and in great part responsible for the overcrowding in the colony’s gaols. In order to secure black labour, white employers or their labour agents would loan money to members of the indigenous population, on condition that the debt was repaid by means of labour service to the particular employer. The labourer would become tired of working for no wage, and would desert. This would render him liable to imprisonment under the Master and Servants Act. Thus, a contract which was “purely civil in its inception”, became “quasi-criminal in its developments”. See *idem* par 44. Another example of “artificial restraints and prohibitions” was the infraction by members of the indigenous population of the “Borough by-Laws”. The Commission pointed out that in such cases a curious anomaly arose: “If the delinquent pays the fine, the Corporation benefits; if he does not, the Government has to bear the cost of his imprisonment, receiving a poor returned from his labour.” See *idem* par 46. Clearly the criminal law was not being used merely to combat crime, but also as an instrument of civil oppression and control. Imprisonment as a response to essentially civil infractions was both unnecessary and expensive in the eyes of the Commission.

71 NAB CSO 2847/Précis of Evidence at 4.

of establishing such movable prisons throughout the colony was that they “would in a short time repay their cost by obtaining better results in labour, and improved sanitary conditions in all the gaols [namely by reducing overcrowding in existing gaols]”.⁷² To sum up, these prisons were to be a cost-effective way of dealing with the large number of non-European prisoners who were “not criminals in the proper sense of the word”, but who had been caught up in the penal system because they had fallen foul of racist social-control legislation, or had more actively resisted colonial control.⁷³ Petty offenders of this kind did not need to be reformed. Rather, they had to be taught a simple lesson, which was to obey white colonial authority and to perform hard labour in support of the colonial state. Clearly, education, reform and “scientific treatment” were not priorities when it came to the punishment of the large majority of black prisoners.

It is clear from the overall tone of the Commission’s report, that a central concern of the white colonial authorities was the quality and quantity of the labour performed mainly by black prisoners. In the first stages of its report – in its overview of the overall state of the penal system of the colony – the Commission made special mention of “the manner of employing prisoners on Public Works in the country districts”.⁷⁴ After pointing out that such prisoners were generally employed doing work on the roads in small gangs under the control of “Native guards”, the report makes the following telling comment:

The Native makes an excellent guard, but a poor ganger; and to expect men, lacking the directing and organising faculty, to manage a gang of labourers is the incipient and innate fault of the system, and is largely accountable for its indifferent results. To the employment of Native prisoners under the sole supervision of Native guards, as is generally the rule throughout the Colony, is to be attributed the common belief that a sentence to hard labour, at a District Prison, is a misnomer and almost a farce. Even when a European is in charge of the gang, the amount of road-work performed is much below possibilities. The more profitable use of prison labour is a point requiring special consideration.⁷⁵

As pointed out above, the Commission regarded the establishment of movable or portable prisons – essentially forced labour camps for non-European prisoners – as a means of relieving the serious and persistent problem of overcrowding. Describing the establishment of such prisons as “one of the great desiderata in prison reform

72 Report of the Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906 par 29. It is interesting to note that, in the discussion of the industrial prison for Europeans, the principle of reformation and the sympathetic treatment of the white criminal was seen to override objections of excessive cost. On the other hand, the concept of movable prisons seems to have been inspired primarily by economic considerations – namely at reducing the costs of maintaining short-term black prisoners, while at the same time effectively utilising black prison labour.

73 The Bambatha Rebellion took place in 1906.

74 Report of Prison Reform Commission, GN 344 *Natal GG* no 3542A of 5 Jun 1906 par 16.

75 *Ibid.*

in order to relieve the prevailing and ever-growing congestion of our gaols”, the Commission set out the following reasons in support of its opinion:

Their construction and equipment would be comparatively inexpensive, and they would be the means of improving the sanitary conditions of the gaols, and at the same time securing a higher return from ordinary unskilled prison labour ... [I]n view of the urgent need for reducing the number of inmates in many of the country gaols, the establishment of this class of prison should have immediate attention. Those sent to them should be Natives and Indians under short sentences, including all those who are not criminals in the proper sense of the word, as well as those who are unable to pay their fines.⁷⁶

It is not difficult to perceive – just beneath the surface of these words – the nagging obsession of Natal’s white colonists with securing and effectively controlling the power of black labour. The above passage also makes it clear that all those involved in the Commission understood full well that – to a significant extent – the penal system of the colony operated as a method of social and political control, rather than as a mechanism for the suppression of crime and criminals. In other words, it was clearly understood by all that the prisons were being used as a political tool to secure the compliance with colonial authority and domination of a reluctant and rebellious indigenous population. Hence the telling phrase in the above quotation that “all those who are not criminals in the proper sense of the word” should be sent to the proposed movable or portable prisons, perhaps more accurately described forced labour camps for, essentially, political opponents of the colonial project.⁷⁷

An important point emphasised by the Commission in relation to prison labour was that it should be economically valuable. The labour shortages that had plagued the white colonists over the years, as well as the long and difficult struggle of the white colonial state to prise increasing numbers of indigenous African people off the land and into wage labour for the white colonists, left little appetite for “useless” prison labour solely punitive in nature. Labour was simply too valuable a commodity to waste on purely punitive penal labour.⁷⁸

76 *Idem* par 29. It was not only the overcrowding of the country gaols that the Commission believed would be relieved by the establishment of “movable” prisons. Later in its report, the Commission indicated that overcrowding in the Central Gaols would also be relieved “if the scheme of establishing ‘Movable Prisons’ were adopted, the Central Gaols could also, if necessary, be relieved of their short-sentenced blacks by contributing their quota to the nearest Camp”. See *idem* par 32.

77 One of the recommendations of the Commission was that: “Power be given to Magistrates to order a Native or Indian to be sent direct to a Labour Camp, in preference to committing him to a District Prison.” See Report of Prison Reform Commission, GN 344 *Natal GG* of 5 Jun 1906 par 74.25.

78 A good example of the Commission’s attitude towards the value of prison labour is to be found in its criticism of the stone-breaking work that took place in the Pietermaritzburg Gaol just after the turn of the century: “At Maritzburg the principal work carried on within the gaol precincts is stone-breaking within wired partitions, presenting a distressing spectacle of caged humanity and misapplied energy, crude and archaic methods, and a disregard of the economic value of even prison labour.” See *idem* par 31.

5 4 The implementation of the Commission's recommendations

The recommendation of the Commission for the establishment of a completely separate prison for Europeans was never implemented during the colonial period. Despite the assurance of the Minister of Justice on 25 July 1906 that £5 000 had been placed on the estimates "for the purpose of commencing the erection of an industrial gaol for Europeans", such an institution had not been built by the time the colonial period came to an end with the establishment of the Union of South Africa in 1910. An important reason for this failure was the heavy financial costs that would have been involved.⁷⁹

More importantly for the purposes of this contribution, certain of the recommendations of the Commission relating to native offenders – involving much less financial cost – were implemented. These included the establishment of a number of movable prisons that "were set up in various parts of the Colony"; the creation of "a separate class ... for half casts"; and the sending of "short sentence prisoners of good conduct ... on to road parties instead of being made to serve their sentence in Gaol".⁸⁰

The establishment of the movable prisons was a particularly important development. It must be noted that, in the same year that the Prison Reform Commission delivered its report, the colony was shaken to its core by the Bambatha Rebellion. This made the establishment of the movable prisons particularly urgent in order to relieve massive overcrowding in the gaols, which resulted from a huge influx of "rebel" prisoners following the Rebellion. The use of "movable prisons" to deal with "rebel" prisoners is evidenced by the following extract from a report of the assistant Commissioner of Police:

Four Movable Prisons have been established in which rebel Native Prisoners are confined. 50 Convicts in each prison. Three of these Prisons are on the main roads of the Colony and the convicts are employed road making. The fourth Movable Prison is in the Government Experimental Farm at Cedara ... Prisoners have been doing good work and shew no inclination to escape. No prisoner with a sentence exceeding two years is sent to a Movable Prison.⁸¹

79 Legislative Assembly Debates (1906) vol 40 at 753: Minister of Justice 25 Jul 1906. In Jan 1907, the Colonial Secretary in Cape Town asked the Natal government to what extent the Commission's recommendations had been adopted. The Minister of Justice replied that "with a few exceptions the recommendations of the Commission involve legislation and up to the present nothing has been decided in respect thereof." See NAB CSO 1827/1124: Minister of Justice to Colonial Secretary 22 Feb 1907. Then, in Aug 1907, when the government was asked in parliament if any of the Commission's recommendations had been adopted, it replied as follows: "The recommendations mostly necessitate fresh legislation. Other recommendations involve very heavy expenditure in the way of new Prisons for Industrial purposes, or Reformatories." See NAB PMO 67/978: Reply to question by Mr Jameson in the Legislative Assembly on 21 Aug 1907 – Tabled in the Legislative Assembly on 29 Aug 1907.

80 NAB PMO 67/978: Reply to question by Mr Jameson in the Legislative Assembly on 21 Aug 1907 – Tabled in the Legislative Assembly on 29 Aug 1907.

81 NAB CSO 1827/1124: Report of Assistant Commissioner of Police 13 Feb 1907 par 14.

Although not strictly speaking a movable prison, the Convict Station at the Point which was established at this time, was precisely the same type of institution as the movable prisons. The penal ideology that determined the establishment and use of the movable prisons was equally applicable to the establishment and use of the Convict Station at the Point. As in the case of the movable prisons, the Point Convict Station was meant solely for native prisoners, and was used to accommodate large numbers of native rebels. It is to the link between the Bambatha Rebellion and the establishment of the Convict Station for native prisoners at the Point that we now turn.

6 The 1906 Bambatha Rebellion as catalyst for the construction of the Point Convict Station

The origins of the Bambatha Rebellion were deeply rooted in the racist and oppressive structures that had been put in place in the colony of Natal by the turn of the century. In 1906, the Natal government pushed matters to a breaking point by imposing a poll tax on all unmarried males. Such a tax was imposed regardless of economic status. In January of the same year, the authorities began to collect the tax and met with resistance in certain areas. There is no doubt that Africans were infuriated by the tax, by the way it was announced, and by the manner in which the collection was implemented.⁸² The government struggled to contain and suppress the rebellion and ultimately did so only with assistance from the Cape colony and the Transvaal. This had a bearing on the decision of the Natal settlers to join the Union in 1909.⁸³

Tension was created in the colony by widespread social and economic change, and it was only a matter of time before there was an outbreak of violence between black and white in the colony. This indeed happened on 8 February 1906, on a farm named Trewigie, near Richmond.⁸⁴ Following a confrontation in which a group of policemen made some arrests, an altercation resulted in the deaths of two policemen. Martial law was declared the next day by the governor, Sir Henry McCallum.⁸⁵ Twenty-four men were subsequently tried before a military court in Richmond between 12 and 19 March, twelve of whom were sentenced to death. Others received long prison sentences and floggings.⁸⁶

Although initially most attention was focussed on Richmond, there was also trouble in the Maphumulo district on the southern side of the Thukela river valley. The local magistrate had begun to collect the poll tax in January 1906 and had met with resistance.⁸⁷ By March, the military mistakenly believed it had saved Natal from

82 Guy 2006: 21.

83 Thompson 2003: 533.

84 Guy 2006: 24.

85 *Idem* at 37.

86 *Idem* at 39.

87 *Idem* at 53.

an uprising, but the rebellion had only just begun. A police patrol was subsequently attacked in the Mpanza valley and four policemen were killed. The attackers were led by a chief known as Bambatha kaMancinza Zondi.⁸⁸

After the attack, Bambatha moved to the protection of the forests of the Nkandla district.⁸⁹ Over 4 000 colonial troops were mobilised and around half of these were dispatched to the Nkandla region.⁹⁰ By the end of May, the conflict had reached a stalemate.⁹¹ On 13 June, however, troops investigated a report that the body of Bambatha was lying among the dead after a decisive massacre in the Mome Gorge. They cut off his head and took it to the military camp where it was identified by Zulu men who had known him. It was returned to the Mome Gorge the next day and buried with the body. However, there were subsequent reports that they had been deliberately misidentified to mislead the troops, allowing Bambatha to go into hiding. In the following months and years, there were many reports that the chief was still alive.⁹²

The rebellion continued in Maphumulo, towards Stanger, and finally ended in July.⁹³ The death of Bambatha was officially verified on 16 June 1906. As mentioned above, evidence of his death was presumptive, but it was now conclusive. Of the four ringleaders, three were now dead and one had surrendered to the colonial authorities.⁹⁴ Martial law was finally lifted on 2 September. The rebellion had cost the government £650 000, a sum which increased to £778 360 by June 1907. White losses numbered twenty-four, with thirty-seven soldiers wounded. Losses by the Zulus were far higher: between 3 000 and 4 000 were killed during the rebellion.⁹⁵

Most of the men accused of rebellion were tried by magistrates under martial law. They were convicted in batches and sentenced to two or three years' hard labour, often with flogging, and sent off to labour on government projects. An official estimate is that 4 700 of the "rank and file" received sentences lasting approximately two years' hard labour and flogging. However, late in 1906, an official estimated that 7 000 were imprisoned.⁹⁶ Of the 7 000 in gaol, a large number were hired out by the government to the Public Works Department, the Natal Harbour and Railway works, and to municipalities and collieries.⁹⁷

88 *Idem* at 55.

89 *Idem* at 88.

90 *Idem* at 102.

91 *Idem* at 118.

92 *Idem* at 128.

93 *Idem* at 140.

94 16 Jun 1906 *Natal Mercury*.

95 Marks 1970: 237–238.

96 Guy 2006: 170.

97 Marks 1970: 237–238.

THE DEVELOPMENT OF RACIALLY DEFINED PUNISHMENT IN COLONIAL NATAL

The influx of rebel prisoners captured during and after the rebellion into the prisons of the colony clearly created a major problem in terms of overcrowding. In order to help address this problem, a sitting of the Natal Legislative Assembly on 2 July 1906 discussed, *inter alia*, a Bill designed to facilitate the hiring out of convicts.⁹⁸ The Bill that sought to amend the Gaol Law of 1887 was put before the legislature on an urgent basis. According to the *Natal Advertiser*, the Minister of Justice “explained that it was a matter of great urgency, because at the present time the Natal gaols were overflowing, and there were surrendered prisoners and others in large numbers now being dealt with, and the intention of the Government was to ask Parliament to consider this Bill for the purpose of enabling the Government to hire out certain convicts so that they might be useful”.⁹⁹ It would seem that convicts hired out in terms of the proposed Bill would be treated more as indentured labourers than as prisoners. The Minister of Defence explained to parliament that:

The Bill would empower the Government to enter into a contract with any municipality, Town Council or other public body or individual for the employment of prisoners who have been sentenced to terms of imprisonment exceeding three months, and it was further provided that the place where the employment is to take place shall constitute a place of confinement or prison within the meaning of the Gaol Law.¹⁰⁰

The Gaol Law of 1887 was duly amended in 1906 and a set of regulations were approved by the governor in council for the employment of convicts in terms of the amendment.¹⁰¹ In terms of regulation 7:

The Government will put to the credit of, or pay to, each convict who works satisfactorily the sum of 3s. *per mensem*, and in the case of a convict working underground in a mine the sum of 6s. *per mensem*, with an additional sixpence in respect of each Sunday on which the convict has worked. The Chief Commissioner of Police may stop any such payment to a convict in case of misbehaviour or breach of discipline.¹⁰²

The above regulation seems to indicate that convicts who were hired out in terms of the above scheme were not considered to be criminals in the normal sense of the word, but rather as political offenders who needed to be taught that their proper role in colonial society was to perform hard labour in service of the white colonists in return for menial wages.

Following the rebellion, hundreds of rebels were also imprisoned at the Point. Initially, these men were temporarily held in municipal labourers’ barracks at Bell Street, near the Point, which was declared a prison by government proclamation.¹⁰³

⁹⁸ 3 Jul 1906 *Natal Advertiser* “The Gaol Law” at 2.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ GN 497 *Natal GG* of 28 Aug 1906 at 1436.

¹⁰² *Ibid.*

¹⁰³ Kearney 2013: 1239.

Essentially, the rebels were divided into four large gangs – the largest of which was stationed at the Point – and used as labour on various public works programmes. A second gang was situated at the concentration camp at Jacobs, south of Durban, and the remaining two gangs were “housed in wood and iron huts and compounds surrounded by barbed wire” elsewhere in the colony.¹⁰⁴

By August 1906, there were 370 rebels alongside 240 regular convicts and 896 contract workers on the Point and the Bluff. During 1906, an average of 1 477 worked at the Point, which resulted in a significant reduction in the number of contract workers. As the rebels were classed as political prisoners, no wages were paid by the Natal Harbour Department. From 1907, their numbers began to decrease although there were still 907 by the end of that year. In 1908, many of the remaining rebels were moved to Congella to work on the new wharfs being constructed at that site.¹⁰⁵

The proposals of early harbour engineers Milne and Innes were remembered and a decision was made to house the new prisoners at the Point. In August 1906, £30 000 was made available for the construction of the new Point Convict Station, other facilities and portable gaols in the colony.¹⁰⁶ A year later, the *Weekly Mercury* reported that the foundation was being prepared for a new gaol for rebels at the Point, which was to be constructed from wood and iron and which would accommodate 1 500 prisoners.¹⁰⁷

The construction of the prisons was described in the *Weekly Mercury* as a Public Works Department “rush job”.¹⁰⁸ While gangs of rebel prisoners engaged in levelling reclaimed land at the end of the Point, a large number of artisans worked day and night in the erection of a series of wood and iron barracks. The site, near Durban’s south beaches, was considered to be a healthy one for the prisoners. One of the main reasons why the prison was built was because the colonial government had received instructions to clear the compound situated at Jacob’s as it was needed by the Transvaal Chamber of Mines to temporarily house Chinese labourers. The Point Prison consisted of four blocks to house the prisoners, with additional blocks for stores, offices, warders’ quarters and kitchens. A large amount of “old harbour material” had been used in the construction to save costs. Just over 100 white artisans and several hundred rebel prisoners worked on the project.¹⁰⁹

The Natal Harbour Department workshops were well-equipped and the department assisted in the construction of the new prison.¹¹⁰ In 1907, there were reports that second-hand pine logs were sawed in preparation for the building of the

104 See KCL, Native Affairs Commission, 1906–1907, 110 as cited in *idem* at 1231.

105 *Idem* at 1233.

106 *Idem* at 1239.

107 9 Aug 1907 *Weekly Mercury*.

108 *Ibid.*

109 *Ibid.*

110 Kearney 2013: 1241.

prison and that the department provided “large amounts of timber, rubble, sand and binding for the prison”.¹¹¹

The total cost of the wood-and-iron building as well as its running costs were paid out of the Native Rebellion Expenditure account.¹¹² With time, the wood-and-iron structure required additional ventilation, and to improve thermal conditions, the Public Works Department lined the cells with an additional layer of corrugated iron sheeting in 1908.¹¹³ The new Convict Station was officially proclaimed as a central gaol in the *Government Gazette* on 24 August 1907.¹¹⁴

During the first two years of its operation, the prison held a total of 2 316 prisoners. The facility was designed to house 1 150 prisoners at a time in twenty-one cells. The daily average number of prisoners was 1 381 and the greatest number held on any one day was 1 691. Clearly, there was a problem with overcrowding from the earliest years of its operation. During the period when the prison housed rebels, 165 men died, many from old age and sickness, and two escaped. In 1906, the Department of Health noted a high incidence of tuberculosis among rebels in general and there was a special section in the prison for tuberculosis patients. The rebels held at the Point mainly worked on removing sand hills, on building roads and on assisting with the construction of stone retaining walls. In addition to the Point prison, over 1 000 rebels were incarcerated in the old Anglo-Boer War concentration camp in Jacobs and on a prison farm at the south coast.¹¹⁵ On 1 January 1908, 1 503 prisoners were housed in the gaol.¹¹⁶ A year later, by contrast, this number had been reduced to 524 (of which 100 were Indian and 424 African) and the average daily number of prisoners housed in the facility was 478. By 1909, there were 106 separate cells, an increase of eighty-five, with a total floor space of 22 180 square feet.¹¹⁷

Possibly because of the political implications there are scarcely any official records of the Point Convict Station. A few references to the prison can be found in the Natal Police journal, *Nongqai*. It was reported in 1907 that Inspector Deane, who had been appointed governor of the new prison, was “converting the hitherto barren sandbanks into a really smart and clean gaol”.¹¹⁸ As a large number of prisoners had not been convicted of any crime, the authorities decided to declare the new prison a branch court.¹¹⁹ It is likely that the environmental conditions were worse than those prevailing in the Durban gaol. Though the lightweight wood-and-iron structure was

111 See PAR NHD II/8/8, Natal Harbour Department, Press Cuttings, Dec 1907 as cited in *idem* at 1241.

112 *Idem* at 1239.

113 *Idem* at 1241.

114 GN 495 *Natal GG* of 27 Aug 1907.

115 Kearney 2013: 1239.

116 Colony of Natal 1909.

117 Colony of Natal 1910.

118 *Natal Government Gazette*, No. 3, 672, 5 May 1908, as cited in Kearney 2013: 1241.

119 Section 5 of Act 22 of 1896, cited in *idem* at 1241.

appropriate for the humid coastal climate, it only worked effectively with sufficient ventilation, which was unlikely in a prison of this kind.¹²⁰ Hence the decision to improve thermal conditions being carried out in 1908. Some rebels were still being held at the Point as late as 1908; this was confirmed in a sardonic statement by one of the warders stating that “[o]ur health resort is well patronised by a fairly representative gathering of the inhabitants of the districts in Natal and Zululand”.¹²¹

What is clear from the above is that, as the colonial period drew to a close and the colony of Natal began its transition to becoming part of the Union of South Africa in 1910, the Point Convict Establishment had well and truly begun its life as one of South Africa’s major prisons, with a unique set of penal ideologies already encoded within its historical DNA.

7 Conclusion

This contribution set out to examine the early history of a building situated in Durban’s upmarket Point Waterfront Development Area. Before the overall gentrification of this area, the building used to operate as Durban’s notorious Point Prison. As explained, the overall genesis of the Point Prison can be traced back to colonial times at the turn of the twentieth century, when this institution was known as the Point Convict Establishment or Station. We claim in the introduction that this building is of interest for more than the mere fact that it used to be a prison, since tied up in its history are many themes that are unique to the peculiar penal history of southern Africa in general, and of KwaZulu-Natal in particular.

We show that the Point Convict Establishment was conceived at a time of increasing racial tension within the colony of Natal. Just after the turn of the twentieth century, there was increasing pressure from the white colonists for the establishment of a completely separate penal system for European prisoners. This general idea received overwhelming support from the white colonial authorities and became a central pillar of the recommendations put forward by the 1905–1906 Prison Reform Commission. On the other side of the coin, the white colonial authorities also believed that the manner in which Native and non-European prisoners were dealt with needed to be reformed. We illustrate above that the prisons of colonial Natal were used, to a significant extent, as instruments for exercising white colonial social control over the indigenous population. It was felt by many within the white colonial establishment that a large proportion of the non-European prisoners in the colony’s gaols – particularly those who had committed petty offences against social-control legislation – should be removed and accommodated in such a way that they could most effectively be put to work on public works within the colony,

¹²⁰ *Ibid.*

¹²¹ See *Nongqai*, II (12), 1909, 392 as cited in *ibid.*

such as the roads and the main harbour at Durban. The Point Convict Establishment was originally conceived as a cost-effective way of accommodating non-European convict labourers, who would supply cheap labour to the harbour works. Further, as pointed out towards the end of this contribution, the immediate catalyst for the construction of the Point Convict Establishment was the need to accommodate large numbers of rebel prisoners captured during the Bambatha Rebellion of 1906. This dovetails with our observation that, to a significant extent, the penal system of colonial Natal was not only designed to reduce criminality in the usual sense of the term, but to act as an instrument of white colonial social control over the rebellious indigenous population.

This contribution explains in detail both the practical (economic) and ideological importance of penal labour, particularly when it came to the punishment of non-European prisoners. On the ideological side of things, we point out that, for the white colonists, convict labour performed by black prisoners was considered crucially important, since a central pillar upholding and advancing the colonial project was the successful coercion of the indigenous black population into the habit of performing regular hard labour in service of their white colonial masters. The fact that the Point Convict Station was designed as accommodation for non-European convict labourers is, therefore, significant. Of further significance is the fact that the establishment of the Point Convict Station was part of a wider plan to completely separate the punishment of European from non-European prisoners – a process we term “racially differentiated punishment”.

It is worth reiterating the general point that the development – early in the twentieth century – of a penal ideology based explicitly on the separation of different racial groups, is clearly significant if for no other reason than that this took place almost half a century before the inception of the notorious apartheid system in South Africa. We conclude by affirming our contention that, if the buildings which make up today’s ‘Point Bastille’ could talk, they would reluctantly acknowledge their place within South Africa’s cruel history of racial segregation and suffering.

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LEGAL AND PUBLIC POLICY CONSIDERATIONS THAT JUSTIFY LEGISLATIVE DEVELOPMENT OF THE LAW OF DELICT

Bernard Wessels*

ABSTRACT

An evaluation of the different ways in which the South African legal system currently provides compensation for crime victims suggests that an alternative form of crime victim compensation should be considered. The most common solution adopted in foreign jurisdictions is the enactment of a statutory crime victim compensation scheme. The crucial question is whether such legislative development could be justified in South Africa. To investigate the justifiability of a crime victim compensation scheme, the following approach is suggested. First, a theoretical framework must be developed to provide an outline for justifiable statutory reform of the law of delict insofar as the compensation of victims is generally concerned. Only once this has been done, can attention be given to the more specific question, namely whether the potential enactment of a statutory compensation fund for crime victims could fit into such a framework. This contribution focuses on the first issue, namely setting out a theoretical framework for future justifiable statutory development of the law of delict. This is done by identifying legal and public policy considerations that the

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legislature have used in the past to develop the law relating to the compensation of specific categories of victims. This contribution therefore looks at the historical development of three major statutes that have developed the law relating to the compensation of specific categories of victims: the Road Accident Fund Act 56 of 1996, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Consumer Protection Act 68 of 2008.

Key words: Law of delict; crime victim compensation; statutory development of the law of delict; legal and public policy considerations

1 Introduction

The way in which the South African legal system seeks to repair the harm suffered by crime victims has been described and evaluated elsewhere.¹ In short, it was concluded that there are several theoretical and practical problems associated with crime victim compensation and that it was worthwhile to investigate alternatives. These difficulties may be summarised as follows:

First, it should be emphasised that the likely indigence of South African criminals presents a significant obstacle to securing compensation through the institution of common-law delictual remedies against the perpetrator.² As a result, those who have suffered harm arising from crime have had to adopt a different strategy.³ The recent past has seen these victims argue that it is the state, rather than the perpetrator of the crime, that should be held delictually liable for harm arising from crime.⁴ More specifically, they have argued that the state should be held vicariously liable in delict on the basis that its employees culpably and wrongfully caused the victim's harm, either by action or inaction. This strategy has proven to be remarkably successful and has led to the significant expansion of the state's liability for harm arising from crime.

- 1 See Wessels 2018: 31–127 for a description and evaluation of the current South African legal position regarding the compensation of harm suffered by crime victims. Attention is given to the compensation of harm via common-law remedies in the law of delict, as well as the current statutory response to compensating crime victims.
- 2 South African Law Reform Commission 2004: 74, 281–282. See, further, Wessels 2018: 15, 116–117, 177–183, 212–214.
- 3 See Wessels 2018: 37–105 for a detailed description of this strategy, as well as consequential expansion of state delictual liability for harm arising from crime.
- 4 Indeed, an overview of the South African law reports provide remarkably few examples of instances where a crime victim instituted a delictual claim against the purported criminal to repair the harm he suffered. For example, in the following cases the victim instituted the *condictio furtiva* for theft of his property: *Chetty v Italtile Ceramics Ltd* 2013 (3) SA 374 (SCA); *Crots v Pretorius* 2010 (6) SA 512 (SCA); *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 (4) SA 137 (D); *Clifford v Farinha* 1988 (4) SA 315 (W). In the following cases the victim instituted a claim arising from violent crime: *N v T* 1994 (1) SA 862 (C); *Mabaso v Felix* 1981 (3) SA 865 (A); *Schoultz v Potgieter* 1972 (3) SA 371 (E); *Manuel v Holland* 1972 (4) SA 454 (R); *Wessels v Pretorius, NO* 1974 (3) SA 299 (NC); *Mbatha v Van Staden* 1982 (2) SA 260 (N); *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA). However, most of the cases dealing with crime victim compensation involves the institution of a civil claim against the state.

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In this context, regard may be had to a report on the extent and impact of civil claims against the South African Police Services (SAPS). The report stated that, in recent years, the SAPS have “reported a substantial annual increase in civil claims filed for damages as a result of actions or omissions by its officials, and an even larger increase in claims pending. The 2014/2015 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget”.⁵ The report alleges that between 2007/08 and 2014/15, “claims made annually against the SAPS increased by 533% if considering the original rand valued, or 313% if adjusted to the same rand value”.⁶ Lastly, it records that, in a parliamentary reply, the Minister of Police indicated that “just under R570 million had been spent by the SAPS on legal costs relating to civil claims between 2011/12 and 2013/14”.⁷

This development presents theoretical and practical difficulties. Most significantly, on a practical level, it imposes a substantial financial burden on the state, which, in turn, threatens its overall ability to provide safety and security services and to prevent crime. This problem may be summarised in the following way: when the state employer is held vicariously liable for the culpable wrongdoing of an employee and is ordered to pay the crime victim’s damages, it is the taxpayer who ultimately has to bear the cost. However, if taxpayer money is used to pay compensation, then less money is available for performing the state’s ordinary tasks, namely, in the case of the police, preventing crime and promoting safety and security.⁸ Of course, this decreased ability to prevent crime only further serves to increase the likelihood of a higher crime rate and the accompanying litigation that may be instituted against the state on the basis that it failed to prevent crime. This means that the South African law of delict appears to be caught in a vicious circle of ever-expanding state delictual liability for harm arising from crime.⁹

5 Dereymaeker 2015: 29.

6 *Idem* at 31.

7 *Idem* at 34.

8 See, also, Wessels 2019: 8–10 for a discussion of the same problem within the context of harm arising from medical malpractice in the public healthcare sector.

9 The extension of state delictual liability for harm arising from intentionally-committed crimes (through judgements in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), as well as *F v Minister of Safety and Security* 2012 (1) SA 536 (CC)) have received particular criticism. Some of the theoretical concerns associated with this recent development include the following: First, it has been argued that future application of the reasoning in these judgements may produce arbitrary outcomes. This may produce legal uncertainty and lead to arbitrary conclusions being reached in similar cases. Secondly, these judgements interpreted each of the individual policemen’s actions involved in the crimes as simultaneously constituting both a positive, intentional delict, as well as a wrongful and negligent failure to comply with their legal duties to protect the victim from crime. This has apparently been done in an attempt to establish a sufficiently close connection between their employment and their wrongdoing for the sake of finding vicarious liability. However, this reasoning is not aligned with practical reality and may also lead to untenable outcomes from an employer’s perspective. Also, the Constitutional Court’s appeal to the constitutional rights referred to in these cases ultimately cannot assist a court in determining whether certain conduct occurred within the course and scope of employment. It may further be argued that the court’s

Furthermore, it has been pointed out that crime victims who want to institute common-law delictual claims directly against the state may likely face significant evidentiary difficulties in proving systemic negligence.¹⁰ This is particularly the case where the crime victim seeks to hold the state directly (as opposed to vicariously) liable. In addition, the assistance provided by the Criminal Procedure Act 51 of 1977 and the Prevention of Organised Crime Act 121 of 1998 in relation to crime victim compensation is unsatisfactory.¹¹

Against that background, it was proposed that an alternative method should be investigated to provide compensation for crime victims. One particular alternative that has been adopted in various foreign jurisdictions is the establishment of a statutory compensation fund for crime victims.¹² This would potentially amount to the statutory development of the law of delict, at least insofar as the compensation of crime victims is concerned. This presents a particular dilemma because, in this context, scholars, such as Atiyah and Cane, have raised their concern over the lack of a justifiable basis for this type of legislative intervention: “[T]he idea of selecting this group of injured and disabled people for special treatment is not easily defensible.”¹³ Indeed, academics have consequently emphasised a “fundamental problem”¹⁴ that confronts reformers of the law of delict/tort law in this context, which is that “it is

reliance on the role that trust played in establishing vicarious liability in these (and future) cases may be questioned on the basis that it allows for different outcomes being reached on similar facts. Lastly, the application of the vicarious liability doctrine in these cases undermine the balance that has traditionally been sought to achieve between the interests of the employer, employee and victim. Instead, the primary focus is on the compensation of the victim’s harm. However, if this is the case, it may be worthwhile to investigate alternative methods that may very well be more effective in achieving that goal. For a detailed discussion of these and related matters, see, further, Wessels 2018: 36–115.

10 See Wessels 2018: 105–112, 171–177 for a critical discussion of two cases (*Shabalala v Metrorail* 2008 (3) SA 142 (SCA) and *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)) in particular that illustrate this point.

11 For a detailed analysis of all of the aspects of these statutes that have a bearing on the issue of crime victim compensation, see, generally, Wessels 2018: 112–123.

12 New Zealand was the first jurisdiction to adopt a crime victim compensation scheme in 1963, shortly followed by the United Kingdom (UK), where such a scheme became operative in 1964. Thereafter, this solution was also endorsed in several European jurisdictions, as well as in various Australian, American and Canadian states and territories. A detailed description of the historical development leading to the enactment of these schemes and a discussion of the operation of the schemes in the respective jurisdictions fall outside the scope of this contribution. However, for a comprehensive discussion of these issues, see, in general, Scott 1967; Cameron 1963; Fry 1959; Goodey 2003; Greer 1996; McGillis & Smith 1983; National Center for Victims of Crime 2004; Canadian Resource Center for Victims of Crime *sd*; Miers 2014; and Wessels 2018: 226–237, 243–318 for a critical analysis of some of the existing policies and programmes that have a bearing on the position of crime victims in South Africa and for a detailed comparison between the crime victim compensation schemes in the UK and the Netherlands (including a discussion of the practical considerations that may have to be taken into account, should the South African legislature decide to enact such a scheme).

13 Cane 2013: 303–308.

14 SALRC 2004: 182–183. See, also, Scott 1967: 281; Cane 2013: 303–308.

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difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state”.¹⁵

The problem with justifying statutory development through the enactment of a crime victim compensation fund has also been highlighted in South Africa. It may be recalled that the South African Law Reform Commission (SALRC) examined this potential alternative and published a report on their findings in 2004 (SALRC Report),¹⁶ while a doctoral dissertation¹⁷ also examined the establishment of a compensation fund. However, neither of these research projects dealt with the issue of justification.¹⁸

Justifying the potential enactment of a statutory crime victim compensation fund is important for a number of reasons. Obviously, as the SALRC itself pointed out, “developing a motivation for the establishment of a [statutory compensation fund] in SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed”.¹⁹ Indeed, intervention of this kind, which necessarily requires taxpayer funding, would require a justifiable policy basis to explain why preferential treatment is being offered to crime victims as a specific category. Also, one would need a basis of this kind to inform the purpose, scope and extent of the statute, if it were to be enacted. A clear policy framework would further assist in guiding interpretation of particular provisions of the potential act. Without such a basis, the statute may present potential crime victims, administrators and courts with an undesirable level of uncertainty.

To investigate the justifiability of a crime victim compensation fund, the following approach will be adopted. This contribution will advance a theoretical framework that provides an outline for justifiable statutory reform of the law of delict insofar as the compensation of victims is generally concerned. This will be done by identifying legal and public policy considerations that the legislature have

15 SALRC 2004: 182.

16 *Idem passim*.

17 See Von Bonde 2007.

18 The SALRC’s report provides a summary of the violent crime situation in South Africa and of the impact of crime on South Africa; outlines the South African legal system’s compensatory regime, provides a comparative overview of the compensation funds for violent crime victims established in some foreign jurisdictions and deals briefly with the advantages and disadvantages of establishing a compensation fund for crime victims in South Africa; examines the role of the criminal justice system in addressing the harm done to the victim of crime. However, it does not set out the legal and public policy considerations that may justify the legislative development of the law of delict. Similarly, Von Bonde’s thesis focuses on the rationale underlying the restitution of crime victims; sets out the historical development of the compensation fund for crime victims in foreign jurisdictions; provides a comparative overview of the compensation funds that have been established in foreign jurisdictions (including England, India and New Zealand); and examines the role of the criminal justice system (both in South Africa and abroad) in providing compensation to crime victims. However, it does not provide a justificatory framework for the statutory intervention in the law of delict.

19 SALRC 2004: 318–319.

used in the past to develop the law relating to the compensation of specific categories of victims. Only once this has been done, can attention be given to the more specific question, namely whether the potential enactment of a statutory compensation fund for crime victims could fit into such a framework.²⁰

In surveying the historical development of specific South African statutes that have had a major impact on the common law of delict, attention will specifically be paid to the following statutes: the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), the Road Accident Fund Act 56 of 1996 (RAF Act), as amended by the Road Accident Fund Amendment Act 15 of 2005 (RAFA Act) and the Consumer Protection Act 68 of 2008 (CPA). Although there are several other statutes that have had a notable influence on the law of delict,²¹ the focus will be on these statutes because they predominantly deal with the compensation of a specific group of victims of harm: motor vehicle accident victims, victims of defective consumer products and those who suffer harm as a result of occupational injuries and diseases. In some way or another, all of these statutes have singled out a collection of individuals for preferential treatment while aligning themselves with the primary function of the law of delict, namely the compensation of harm.²² In addition, COIDA and the RAF Act have also established statutory compensation funds. Considering that the aim here is to investigate the feasibility of establishing a fund designed to compensate a different group of victims, it is appropriate to examine the legal and public policy considerations that have justified the enactment of these specific statutes.

The considerations that are discussed in greater detail include the following: First, the need to combat the risk of harm, the role of the Constitution of the Republic of South Africa, 1996 (Constitution) and the need to promote the constitutional right to social security, as well as evidentiary problems relating to the application of the common-law fault requirement will be given attention. Thereafter, an analysis follows of the general dissatisfaction with the high transaction costs and levels of under-compensation characteristic of the civil procedural system, the preference for statutory as opposed to judicial reform and the need to avoid arbitrary outcomes. In conducting this investigation, use is at times made of legal comparative methodology, which has proven to be an instructive tool to understand domestic law and to evaluate it in the light of the experiences of other jurisdictions.

20 This question has been dealt with in Wessels 2018: 189–239, where the author deals with the policy considerations in the specific context of crime victim compensation, and will form the basis for a separate article.

21 For example, the Apportionment of Damages Act 34 of 1956, which was described as being the “most important piece of law reform that has been carried out in the field of private law since Union”. See McKerron 1956: 1.

22 For overviews of the function of the law of delict, see Macintosh 1926: 1; Van den Heever 1944: 3; McKerron 1971: *passim*; Van der Merwe & Olivier 1976: 1–3; Neethling & Potgieter 2015: 3–17; Van der Walt & Midgley 2016: *passim*; Loubser & Midgley 2017: 9–15. These authors are in agreement insofar as compensation is regarded as being the primary function of this branch of the law.

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Lastly, it may be added that a similar problem regarding justification has also been identified in the context of the state's expanding liability for harm arising from medical malpractice in the public healthcare sector.²³ As a response to this development, the state has tabled the State Liability Amendment Bill of 2018, which, essentially, proposes the introduction of structured settlements and the making of periodic payments to certain victims of medical malpractice. When commenting on the Bill in its parliamentary submission, the South African Law Society argued that “[s]ingling out victims of wrongful medical treatment at the hands of the State for ‘structured payments’ and denying lump sums for future losses and expenses is clearly discriminatory [and] impermissibly differentiates between victims of medical wrongdoing and other victims injured by the State and in so doing it limits the right to equal protection and benefit of the law guaranteed by Section 9(1)”.²⁴ Therefore, the theoretical framework that this contribution seeks to establish may also be used to guide subsequent deliberation on whether the potential legislative development of the law of delict relating to medical malpractice compensation may be justified.

2 Legal and public policy considerations that have justified the statutory reform of the South African law of delict

2 1 The need to combat the risk of harm

Generally, the existence and extent of a risk of harm has played an important role in the South African legislature's decision to develop the law of delict.²⁵ This has especially been the case in the context of motor vehicle accidents, occupational injuries and diseases, and defective consumer products.

2 1 1 Motor vehicle accidents

The introduction of the motor vehicle towards the end of the nineteenth century had profound consequences of a technical, social, financial and legal nature.²⁶ One of the effects that accompanied its introduction to the marketplace was the increased risk of harm to especially bodily integrity and property. Arguably, this characteristic

23 For an overview of the expansion of state delictual liability within that context, see, generally, SALRC 2017; Wessels 2019: 1–23.

24 Law Society of South Africa 2018: 8.

25 See Loubser 1993: 3; Van der Nest 2003: 501–516; Olivier 2007a: pars 158–159; Loubser & Reid 2012: 4–5. For a comparative perspective, see, also, Cane 2013: 326–357, 459–487; Stapleton 1994: 6; Deakin, Johnston & Markesinis 2013: 51–60, 599–604; Markesinis & Unberath 2002: 714–717, 724–729.

26 Cooper 1996: 1.

of motor vehicles provided the dominant reason for legislative reform within this context.²⁷ Writing about the general impact that motor vehicles have had on the law of delict, Cooper states:²⁸

A motor car is a potentially dangerous machine. Its technical improvement, with the attendant increase in speed, and the increase in the volume of vehicular road traffic, with the inevitable increase in the number of accidents (which can be described as the materialization of the risk inherent in the operation of the motor car), have confronted the courts with a variety of delictual problems requiring judicial determination. In the process the motor car has become the single most potent instrument for the development and reform of the law of delict in the twentieth century.

More specifically, the rise of motor vehicles produced an increase of two types of risk. First, the rise in motor vehicle traffic has brought about a significant increase in risk to the bodily integrity and property of drivers, passengers and pedestrians.²⁹ This is substantiated by the available data in respect of the use of motor vehicles in South Africa.³⁰ Further, when this risk of injury materialises as the result of the culpable conduct of another, the victim may institute a delictual claim against the wrongdoer in search of compensation of his harm.³¹ Wrongdoers, however, are often unable to pay any or all of the damages required to repair the victim's harm.³² In *Law Society of South Africa v Minister for Transport*,³³ Moseneke DCJ remarked that, "[in his] view, the number of drivers and owners who would be able to pay would be very small".³⁴ In turn, this inability may expose a wrongdoer's victim to the further risk of receiving limited or no compensation in respect of the harm they suffered.³⁵ Nugent JA referred to the impact that risk has in this context as follows:³⁶

People need cars, cars knock people over, people are injured, we cannot bear the cost of knocking people over. It is inherently risky for those who knock people over and for those

27 *Idem* at 2–3.

28 *Idem* at 2.

29 Loubser 1993: 3; Van der Nest 2003: 501–516; Olivier 2007a: pars 158–159.

30 For an overview of all of the relevant data, see, generally, Wessels 2018: 136. For present purposes it would suffice to note that along with the rise in the number of motor vehicles between 1935 and 2000 (284 216 to 6 814 531), there has been a significant rise in the amount of people injured as a result of motor vehicle accidents (13 532 to 159 704).

31 *Law Society of South Africa v Minister for Transport and Another* 2011 (1) SA 400 (CC) par 50. Recent amendments to the RAF Act have, however, abolished the motor vehicle accident victim's common-law claim against wrongdoers. See, further, Wessels 2018: 291–295.

32 *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD) at 551; Loubser 1993: 3; Van der Nest 2003: 502; Olivier 2007a: pars 58–159; Olivier 2007b: pars 10–21.

33 2011 (1) SA 400 (CC).

34 *Idem* par 50.

35 Loubser 1993: 3; Van der Nest 2003: 502; Olivier 2007a: pars 158–159.

36 Road Accident Fund Commission 2002: 103.

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who are knocked over. The two problems are: People who are driving cannot afford the risk of knocking people over and the people who are using the roads cannot afford the risk of being knocked over.

To protect road users from the potential realisation of these risks and to ensure the compensation of motor vehicle accident victims, the South African legislature decided to intervene in the law of delict by enacting motor vehicle accident legislation. To a certain extent, the legislation that was introduced in this context was based on similar statutes enacted by the English legislature during the course of the 1930s.³⁷ It might therefore be worthwhile to reflect on the policy reasons that influenced the English legislature in this regard.

During the first part of the nineteenth century, under traditional “‘horse and buggy law’ ... the driver or rider was only liable in so far as he was at fault”.³⁸ Following the judgement in *Rylands v Fletcher*,³⁹ however, the theory of strict liability emerged, as a result of which it was held that damages could be payable when injury was inflicted in the course of conducting a business for profit, even if there was no question of fault.⁴⁰ It was argued that, if a car damaged people or property, the person who brought the car onto the highway should be held strictly liable.⁴¹ This development, however, came to a halt in *Wing v London General Omnibus Company*,⁴² when the Court of Appeal dismissed the notion that motor cars were, generally speaking, inherently dangerous things. The effect of this judgement was that the law of torts relating to motor vehicle accidents in the early twentieth century was made to rest “squarely upon the basis of fault liability upon which it has rested ever since”.⁴³

Although the number of motor vehicle accidents in the UK was initially small and ownership of vehicles was restricted to a limited, wealthy class, they gradually became cheaper, which meant that ownership became more widespread.⁴⁴ The significant rise in motor vehicles in the UK resulted in a substantial surge in the number of motor vehicle accidents.⁴⁵ The fact that the appeal for reform of the branch of law dealing with the compensation of harm caused by motor vehicle accidents reached a highpoint during this period is therefore unsurprising.⁴⁶ Bartrip describes the increased use of motor vehicles and its accompanying risk of harm as follows:⁴⁷

37 *Op’t Hof v SA Fire & Accident Insurance Co Ltd* 1949 (4) SA 741 (W) at 743.

38 Spencer 1983: 65–66.

39 [1868] UKHL 1.

40 Bartrip 2010a: 266.

41 Spencer 1983: 65–66.

42 [1909] 2 KB 652 at 666–667.

43 Spencer 1983: 66–73.

44 Merkin & Dzibion 2013: 307.

45 *Ibid.*

46 Bartrip 2010a: 263.

47 Bartrip 2010b: 45–46.

Whatever the perceived or alleged benefits of motorised transport, it cannot be doubted that motor vehicles took a tremendous toll of human life and limb in twentieth-century Britain. Official records for the years 1930 to 1939 (inclusive) indicate that 69 824 people died on Britain's roads, at an average rate of just over 7 000 per year. Between 1920, when records began, and 1930 the annual number of road deaths rose at a staggering rate from 4 886 to 7 305.

To address the issue of motor vehicle accidents and related matters, a Royal Commission was appointed in 1928. On the basis of its recommendations, a Bill was proposed and ultimately passed by the English legislature as the Road Traffic Act of 1930. Significantly, the Act introduced a system of third-party compulsory insurance, making it unlawful to use a motor vehicle unless an insurance policy in respect of "third party risks" was in force.⁴⁸ This system of compulsory third-party insurance has been maintained under the Road Traffic Act of 1988.⁴⁹

Similar to England, South Africa experienced a dramatic increase in the use of motor vehicles during the course of the 1930s, which brought with it an increase in motor vehicle accidents.⁵⁰ Analogous to the situation in England, this led to considerable pressure on the South African legislature to alleviate the plight of road accident victims.⁵¹ The need was expressed to protect motor vehicle accident victims against the possibility of limited or no recovery of harm, because the wrongdoer "was a 'man of straw' and unable to pay the road accident victim's loss or damage".⁵² Accordingly, the South African legislature followed the lead of the English legislature in 1939 when it decided to introduce the first Bill aimed at protecting motor vehicle accident victims. During a debate of the Bill, the Minister of Finance referred to the legal and public policy considerations underlying justifiable legislative reform of the law of delict within this context:⁵³

I am of the view that this Bill may be described as one which is designed to meet a long-felt want. Its object is to ensure the payment of compensation for injuries or death caused by negligence in the use of motor transport. I think honorable members are aware that there are a considerable number of motor vehicles in the Union driven by people who are not insured against what are known as third party risks. I think I shall probably be correct in saying that that is the case with the majority of the motor vehicles in the Union, and that, of course,

48 Deak 1936: 566.

49 See s 143 of the Road Traffic Act (c 52) of 1988.

50 See, also, the second reading of the draft Motor Vehicle Insurance Act 29 of 1942 in Parliament, where the Minister of Finance refers to this consideration as legal and public policy consideration justifying the Act: *Debatte van die Volksraad Deel 43* 1942: 1255–1259. For an overview of all the relevant data, see the table in Wessels 2018: 136. To illustrate the above point, however, it would suffice to note that along with the rise in motor vehicles between 1935 and 2000 (284 216 to 6 814 531), there has been a significant rise in the amount of people injured as a result of motor vehicle accidents (13 532 to 159 704).

51 Road Accident Fund Commission (RAFC) 2002: 108–112.

52 *Idem* at 108.

53 *Debatte van die Volksraad Deel 43* 1942: 1255–1259 (own translation).

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means that when harm is brought about through the negligence of an uninsured motorist and he is unable to meet a claim for compensation, the innocent victim is left without any redress.

The Motor Vehicle Insurance Act 29 of 1942 ultimately came into effect in 1946. Its aim, as stated in its preamble, was to “provide for compensation for certain loss or damage caused unlawfully by means of motor vehicles and for matters incidental thereto”. The Act introduced compulsory third-party insurance on a national scale and compelled the owners of motor vehicles, generally, to take out insurance so that motor vehicle accident victims may be properly compensated for the harm they suffered arising from the negligent and unlawful driving of a motor vehicle.⁵⁴

In *Rose’s Car Hire (Pty) Ltd v Grant*,⁵⁵ the Appellate Division confirmed that the intention behind the legislature’s decision was to ensure, through the compulsory insurance of motor vehicles, that injured persons or their dependants who might not be able to recover damages owing to the inability of the parties liable to pay, should receive full compensation from insurers in as many cases as possible. Shortly thereafter, in *Aetna Insurance Co v Minister of Justice*, the same court reaffirmed the purpose of the legislative intervention as follows:⁵⁶

The obvious evil that [the Act] is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance.

The 1942 Act underwent regular amendments and was replaced by the Compulsory Motor Vehicle Insurance Act 56 of 1972, which came into operation in 1972. The motivation behind the enactment of new legislation was not to pursue a purpose different to that outlined above, but rather to amend the mechanics by means of which the aim was sought to be achieved.⁵⁷ As is evident from a series of cases dealing with liability under the 1972 Act,⁵⁸ the legislature’s primary focus was still

54 Kloppe 2000: 3; Cooper 1996: 3. See, also, RAFC 2002: 110: The insurance would cover harm as a result of bodily injuries or death of a breadwinner arising from the culpable and unlawful driving of a motor vehicle, but did not cover property damage or other harm that may have been suffered as a result of the accident.

55 1948 (2) SA 466 (A) at 471.

56 1960 (3) SA 273 (A) at 285.

57 The Act required the insurance of the vehicle and not insurance of the owner or driver. It also provided cover (through the newly established Motor Vehicle Assurance Fund), for the first time, for loss occasioned by uninsured or unidentified motor vehicles. See, further, *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) par 20.

58 See *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (AD) at 518; *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (AD) at 738; *Webster v Santam Insurance Co Ltd* 1977 (2) SA 874 (AD) at 881; *Nkisiwane v Santam Insurance Co Ltd* 1978 (2) SA 430 (AD) at 435.

the protection of those who suffer harm⁵⁹ as a result of motor vehicle accidents and who might be unable to recover damages owing to the wrongdoer's inability to pay compensation.⁶⁰ Similar to its predecessor, the Act was based on the common-law principles of delictual liability, which required an accident victim to prove that his harm had been caused by the culpable and unlawful driving of a motor vehicle.

The 1972 Act was substituted by the Motor Vehicle Accident Act 84 of 1986 (MVA Act). The MVA Act, which came into operation in 1986, introduced a number of changes.⁶¹ Importantly, it replaced the former system of compulsory third-party insurance with a system of statutory assumption of liability in respect of harm suffered by road users as a result of the negligent and unlawful driving of a motor vehicle.⁶² To achieve this, the legislature established the Motor Vehicle Accident Fund (MVA Fund), financed by fuel levies, to fund the new statutory system of compensation of harm. Because the MVA Act was effective only in South Africa and Namibia, but not in the former so-called independent territories of Transkei, Bophuthatswana, Venda and Ciskei, the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (MMF Act) was enacted in 1986 with the view to bringing about a uniform system of third-party compensation.⁶³ The MMF Act remained applicable up to 1997, when the newly enacted RAF Act came into operation.

The RAF Act essentially has the same object as that of its predecessors, namely the "payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles".⁶⁴ It was based on the common-law elements for delictual liability and has retained fault as the basis for liability. Although it has been argued that the effect of the Act was to "suspend the common law delictual action against the wrongdoer and to compel the road accident victim to institute his claim against the Road Accident Fund",⁶⁵ the delictual claim of the victim was left intact and victims therefore had the option of instituting a claim against the wrongdoer in respect of harm that was not covered under the RAF Act.

⁵⁹ As was the case with its predecessor, the insurance policies taken out as a result of the Act would cover only harm arising from bodily injuries or the death or bodily injuries of a breadwinner.

⁶⁰ The preamble of the Act reads as follows: "To provide for the compulsory insurance of certain motor vehicles in order to ensure the payment of compensation for certain loss or damage unlawfully caused by the driving of such motor vehicles; for the payment of compensation where the loss or damage is caused by the driving of an uninsured or unidentified motor vehicle; and for incidental matters." See, also, Suzman, Gordes & Hodes 1982: 4–6.

⁶¹ *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) par 21; Klopper 2000: 4.

⁶² Klopper 2000: 4.

⁶³ *Ibid.*

⁶⁴ Section 3 of the RAF Act. See, also, RAFC 2002: 111–112: Not all damage caused by the unlawful and negligent driving of a motor vehicle can be recovered from the RAF. See Wessels 2018: 307–309 for a discussion of the limitation and exclusion of liability under the RAF Act.

⁶⁵ RAFC 2002: 111.

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In its 2002 report, the Road Accident Fund Commission (RAFC) described the fault-based compensation system established under the RAF Act as “unreasonable, inequitable, unaffordable and unsustainable”.⁶⁶ Among other things, the RAFC found that the Act’s insistence on fault-based liability contributed to its financial decline. The criticism of the RAF Act’s fault-based liability regime is discussed in further detail in part 2.3 below.

The victim’s common-law right to claim compensation from a wrongdoer for harm that is not compensable under the RAF Act was abolished by section 9 of the RAFA Act, which came into force on 1 August 2008. In *Law Society of South Africa v Minister for Transport*,⁶⁷ the Constitutional Court was requested to consider the constitutional validity of this amendment.⁶⁸

In its judgement, the Constitutional Court referred also to the dominant consideration that triggered the amendment – the need to compensate victims of harm that manifests when the risk created by motor vehicles materialises – as well as future reform of the system. In this context, reference was made to the legislature’s intention to ultimately replace the common-law system of compensation with a set of limited no-fault benefits that would form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable.⁶⁹

The amendments introduced by the RAFA Act provide further evidence of the primary consideration that underlies the enactment of motor vehicle accident legislation in South Africa, namely that it aims to provide compensation where the risk of harm associated with motor vehicle accidents materialises. As explained by the Minister of Transport, although the economic viability of the RAF is an important goal, the ultimate vision is that a new system of compensation for motor vehicle accident victims must be established and integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases.⁷⁰ To achieve the desired reform, the legislature therefore drafted the Road Accident Benefit Scheme Bill (RABS) in 2014. Should it be enacted, the current fault-based system of liability administered by the RAF will be replaced by a new social security scheme for road accidents.

The need to further the constitutional right to social security as a consideration justifying legislative intervention in the law of delict is analysed in part 2.2 below. For the purpose of this part of the contribution, it is sufficient to note here that the proposed RABS is aimed not only at continuing the achievement of the primary aim outlined by its predecessors, namely the protection of the victim’s interests by

⁶⁶ Department of Transport 2011: 13.

⁶⁷ 2011 (1) SA 400 (CC).

⁶⁸ *Idem* par 15. A detailed discussion of that judgement falls outside the scope and focus of this contribution. However, in this regard, see Wessels 2018: 291–297.

⁶⁹ 2011 (1) SA 400 (CC) pars 44–45.

⁷⁰ *Ibid.*

ensuring that he is properly compensated, but also at the promotion of the wrongdoer's interest insofar as the victim's common-law right to claim damages for residual harm has been abolished. In doing so, it may be argued that the legislature seeks to address not only the risk of no compensation to which road users are generally exposed, but also the risk of liability to which culpable road users may be exposed.⁷¹

It appears that motor vehicle accident legislation may be regarded as "social legislation"⁷² aimed at the "widest possible protection and compensation"⁷³ of road users by compensating them against harm that arises from the culpable and unlawful driving of a motor vehicle.

The RAF Act, its predecessors and its proposed successor provides for the substitution of a compensation fund or an insurance company in the place of a culpable wrongdoer to ensure compensation for a motor vehicle accident victim or his family.⁷⁴ These legislative developments resulted in a conceptual shift from protection of the wrongdoer to acceptance of the need to provide protection and support for all victims of road accidents.⁷⁵

The replacement of the wrongdoer by the RAF undermines the notion that the victim's harm should be compensated – or corrected – by the person who culpably and wrongfully caused it. The fund's existence is therefore arguably not aligned with the so-called corrective justice account for the South African law of delict.⁷⁶

Proponents of the corrective justice account highlight the fact that, properly understood, there must be correlativity between the person who has the duty to rectify the wrong and the person who has suffered the wrong. The corrective justice account of the law of delict may be contrasted with a distributive justice-based justification for this branch of the law. Whereas the latter is concerned with the allocation of resources throughout society as a whole and the criteria on which such an allocation occurs, the basic idea with the former is to do justice between two parties, namely, it is concerned with whether there should be any allocation and if so, to what extent and in what form and on what basis from one person back to another. In other words, from a corrective justice point of view, the law of delict is concerned with justice as between the plaintiff and wrongdoer. Likewise, it is not –

71 See the statement of Nugent JA referred to in n 36 *supra*.

72 *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) par 18 (footnotes omitted).

73 *Ibid.*

74 Olivier 2007a: par 159.

75 *Ibid.*

76 For a detailed discussion of this issue, see Fagan 2012: 130–155. For a discussion of corrective justice generally, see Weinrib 1995; Weinrib 2002: 34; Fletcher 1972: 537; Coleman 1982: 421–440; Coleman 1987: 451–470; Coleman 1992a: 427–444; Coleman 1992b; Coleman 1992c: 349–378; Coleman 1995a: 53–73; Coleman 1995b: 1148–1170. The issue is not specifically relevant to this contribution, but see Wessels 2018: 334–338 for commentary on the function of the contemporary South African law of delict and whether it may be understood as solely aimed at achieving corrective justice.

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and should not – be concerned with a global economic picture. Rather, the principles of bipolarity, correlativity and equality should obtain.

Nonetheless, the RAF may be said to fulfil the primary function of the law of delict (compensation of harm), remains based on delictual principles for the time being and is regarded by academics as constituting a part of the South African law of delict.⁷⁷

Lastly, it may be said that, although the legislative intervention did not result in the decrease of the risk of harm arising from the use of motor vehicles, namely in securing general road safety or deterring future motor vehicle accidents, or in deterring future motor vehicle accidents, it was successful insofar as addressing the risk of litigating “against drivers who often were not in a financial position to compensate accident victims for their losses”.⁷⁸

2 1 2 Occupational injuries and diseases

The exposure to risk of harm and associated risk of no compensation has also served as significant motivation for the enactment of legislation aimed at compensating employees who are injured or become diseased during the course and scope of their employment.⁷⁹ Generally, legislative intervention within this context may be justified on the basis that employers often expose their employees to risks specifically associated with their activities as employees, such as to suffer an accident at work or to sustain an illness that is related to a specific health risk of the task assigned to the employee.⁸⁰

Apart from exposing their employees to specific risks associated with their employment activities, an employer exposes the employee to the additional risk of no compensation in the event that the risk of harm materialises. Of course, the exposure to these risks occurs while the employer stands to benefit financially from the efforts of his employee.

Prior to legislative intervention, the position of South African employees who were injured at the workplace was similar to that of motor vehicle accident victims in the pre-legislation era in that they had to institute a common-law delictual claim against their employer to obtain compensation for the harm they had suffered.⁸¹ In doing so, they were required to prove that, amongst other things, their employer was at fault, which typically meant that they had to prove their employer’s negligence.

77 For example, a discussion of the salient provisions of the RAF is included in Loubser & Midgley 2017: 556–564.

78 Department of Transport 2011: 6.

79 See *Jooste v Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) at 1; Markesinis & Unberath 2002: 728–230; Deakin, Johnston & Markesinis 2013: 253–257.

80 Markesinis & Unberath 2002: 728.

81 *Workmen’s Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD) at 551.

As was the case with motor vehicle accident legislation, the South African statutes that were enacted to develop the law of delict in this context were based on similar English statutes enacted during the course of the late nineteenth and early twentieth centuries.⁸²

Despite it being possible for employees in nineteenth-century England to institute tort claims against their employers for personal injuries suffered in the workplace as a result of their employers' negligence, employees generally did not do so.⁸³ This may be as a result of a variety of legal considerations, including the difficulty in proving fault in the form of negligence,⁸⁴ and the existence of "several draconian defences",⁸⁵ such as the doctrine of common employment, contributory negligence and *volenti non fit iniuria*, which, to a large extent, enabled employers to evade tortious liability for harm caused to an employee during the course and scope of employment.⁸⁶ Additional social, political and economic considerations that made it problematic for English employees to institute tort claims against their employers have been described as follows:⁸⁷

[M]any workers never thought of suing because they were not even aware that a wrong had been done to them. An accident was an everyday occurrence and part of their way of life, and the risk of injury was seen as in the hands of Fate rather than the employer. If workers were aware that a wrong had been done, they were often ignorant of the possibility of bringing a claim. Those who knew of the tort system found it very difficult to get legal advice. If they did sue, they faced the prospect of incurring legal costs. A more significant deterrent was the likelihood that a tort claim would lead to the loss of work-related benefits such as employer's sick pay, or continued employment in an easier job, or medical treatment from work doctors. Suing an employer often meant antagonising the most powerful men in the region and jeopardizing not only one's employment prospects, but also one's housing, church membership and even access to town poor relief. Nor could workers easily endure the lengthy, complicated and uncertain litigation process itself. Their claims then were opposed by the best lawyers and by morally questionable defence strategies. The final difficulty faced by the workers was that they often needed what tort could not supply: urgent recompense to replace their wage loss.

Other policy considerations that influenced the English legislature to interfere with the *status quo* and to develop the law relating to harm suffered by employees in the course and scope of their employment, may be summarised as follows: the demand for workplace safety, the continuing pressure exerted by trade unions and industrial disputes, the courts' reaffirmation of workers' entitlement to a high

82 *Victoria Falls Power Co Ltd v Lloyd NO* 1908 TS 1164 at 1165, 1182; Select Committee of the House of Assembly 1904: 15, 17–18.

83 Stein 2008: 935 submits that, in England, the first reported decision of an employer being sued in tort by his employee for a personal injury suffered at the workplace may be traced to 1837.

84 See part 2.3 *infra*.

85 Lewis 2012: 138.

86 Deakin, Johnston & Markesinis 2013: 541–545; Deakin 2013: 253–257.

87 Lewis 2012: 139.

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degree of protection, the steady growth of litigation concerning workplace accidents that became an accepted part of the employment system and the fact that liability insurance became readily available for employers after 1880.⁸⁸ In addition, the industrial revolution in nineteenth-century England caused a significant increase in industrial accidents in the form of, among others, railroad crashes, coalmine explosions and steamboat fires.⁸⁹

The English legislature responded by enacting the Workmen's Compensation Act in 1897. It thereby introduced a no-fault based compensatory system outside tort.⁹⁰ The 1897 Act imposed a statutory duty on employers to make limited payments to the victims of industrial accidents, irrespective of whether those injuries resulted from the culpable wrongdoing of the employer – as long as the accidents arose out of and in the course of employment.⁹¹ The decision to hold the employer liable regardless of whether or not they acted culpably may be explained with reference to the concept of enterprise risk or enterprise liability.⁹² In this regard, Deakin writes:⁹³

The employer as “enterprise” has a duty of care to have regard for the safety and welfare of its employees and incurs liability to third parties injured by the negligence of those employees not simply because it has “deep pockets” or because of a supposed symmetry between risks and profits, but because its organisational capacity enables it to manage the risks of injury internally, through the bureaucratic structures of the firm, while its financial resources and position in the market make it possible for it to absorb and channel potential liabilities through insurance. Insurance ... makes it possible for firms to shift certain losses, but also sets implicit standards of care, which operate through the monitoring activities, undertaken by liability insurers.

The first local legislation aimed at addressing the issue of compensation for employees was the Cape Employer's Liability Act 35 of 1886, which was replaced by the enactment of the Workmen's Compensation Act 40 of 1905 (Cape of Good Hope).⁹⁴ Many of the policy considerations underlying the 1905 Act, as well as succeeding legislative interventions are reflected in the 1904 *Report of the Select Committee on Compensation to Workmen*.

From its report, it is clear that there was significant concern about securing compensation for injured employees and doing so as “quickly and as cheaply as possible”.⁹⁵ It was stated that one of the chief advantages of introducing statutory

88 Hedley 2013: 235–242.

89 Kleeberg 2003: 57–58.

90 Lewis 2012: 140.

91 *Ibid*; Brodie 2010: 2.

92 Brodie 2010: 2–7.

93 Deakin 2013: 254.

94 The Act is based on the English Act of 1897. See Select Committee 1904: 15, 17. See, also, Jansen van Vuuren 2013: 25.

95 Select Committee 1904: 2. See, also, at 9 and 14, where it is made clear that all relevant parties sought a way to deal with employer and employee disputes as quickly and cheaply as possible and that what is required is “simple machinery” for securing compensation for the injured employee.

reform would be that it would provide what the law of delict failed to do at the time, namely the speedy provision of a fixed amount of money *in lieu* of the lost wages and to “ensure that the sum shall be paid with as little litigation as possible”.⁹⁶

Another consideration that justified the legislature’s intended development of this branch of the law was the fact that, in “ninety-nine cases out of every hundred the workman does not know what he can demand, and if his employer pays him anything at all he considers it as an act of charity. In the great majority of cases he has an action, and does not bring it”.⁹⁷

It was also argued that the enactment of legislation would undermine the influence that the defence of contributory negligence had on an employee’s potential common-law delictual claim for damages, namely to give the employee an action despite the fact that his negligence contributed towards the accident.⁹⁸

Lastly, the employees sought to improve their safety:⁹⁹

From a workmen’s point of view the Bill is a most desirable one in every respect. At the present time workmen are entirely dependent on the generosity of their employers for compensation. Now, gentlemen, it is but natural that an employer of labour should desire to obtain the utmost amount of work for the least possible cost; in the pursuit of that object he is apt to overlook certain precautionary measures which he should take to ensure the safety of his workmen, and we maintain that there should be such an Act so based that it would compel the employer to take these precautionary measures.

Therefore, it seems that the decision by the legislature to develop the law of delict relating to the compensation of employees were motivated by similar policy considerations than those underlying the English legislature’s development of law of negligence regarding workplace injuries and diseases.

A similar statute, the Workmen’s Compensation Act 36 of 1907, was enacted in the Transvaal.¹⁰⁰ The Transvaal Act was “almost identical”¹⁰¹ to the English Workmen’s Compensation Act of 1906. The Act applied to the whole country after unification in 1910, but was replaced by the Workmen’s Compensation Act 25 of 1914, which, in turn, included a series of industrial diseases following an amendment in 1917 through the Workmen’s Compensation (Industrial Diseases) Act

⁹⁶ *Idem* at 12.

⁹⁷ *Idem* at 14.

⁹⁸ *Ibid.* It may be noted that the doctrine of common employment was not considered a part of the South African common law of delict: *Waring & Gillow v Sherborne* 1904 TS 340. Accordingly, unlike the position in England, it did not play the same role in motivating legislative change.

⁹⁹ Select Committee 1904: 64–65.

¹⁰⁰ Jansen van Vuuren 2013: 25.

¹⁰¹ *Victoria Falls Power Co Ltd v Lloyd NO* 1908 TS 1164 at 1172.

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13 of 1917.¹⁰² Importantly, both these Acts required employees to prove fault on the part of the employer.¹⁰³

In its early form, the Workmen's Compensation Act was ineffective at providing adequate compensation, because employers were not compelled to insure their employees against the risk of workplace injuries.¹⁰⁴ As a result, employers that did not have insurance could face insolvency if they were held liable for their employees' harm. Also, injured or diseased employees were exposed to the risk that the employer would not be in a position to provide compensation, thereby rendering the employee potentially unable to earn further income.¹⁰⁵

By 1930, and with the benefit of using the English statute as example, employees, industry and the South African government recognised the need for compulsory insurance.¹⁰⁶ The 1914 and 1917 statutes were accordingly replaced by the Workmen's Compensation Act 59 of 1934, which provided for a system of compensation to be paid by the employer if an employee suffered harm as a result of an accident arising in the course and scope of his employment. Pursuant to the passing of the Act, employees were no longer required to prove fault on the part of the employer to obtain compensation.¹⁰⁷ Importantly, the Act made insurance compulsory through private companies rather than a state fund favoured by workers and trade unions.¹⁰⁸ The office of the Compensation Commissioner was established and tasked with the mediation of compensation settlements between employees and employers that was ultimately funded through the compulsory insurance obtained by employers.¹⁰⁹

The Workmen's Compensation Act 30 of 1941 replaced the 1934 Act and introduced a new system of compensation by establishing a state "accident fund"¹¹⁰ to which all employers would contribute on the basis of employer's wage budgets¹¹¹ and from which employees were to be compensated.¹¹² Employees were entitled to compensation from the fund if they could prove that they had suffered harm as a result of an "accident arising out of and in the course of ... employment and resulting in a personal injury".¹¹³ While the Act established a compensation fund, it

102 Jansen van Vuuren 2013: 26; *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) pars 45–46. At that stage, similar statutes were also in place in France, Germany, New Zealand and certain Australian states. See Select Committee 1904: 14.

103 *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) pars 45–46.

104 Jansen van Vuuren 2013: 26.

105 *Ibid.*

106 See Budlender 1984: 22–41.

107 *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA) par 16.

108 United States Agency International Development 2008: 3.

109 Jansen van Vuuren 2013: 26.

110 See s 64 of the Act.

111 See s 68 of the Act.

112 *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA) par 17.

113 Section 2 of the Act.

also indemnified employers against potential delictual claims that employees may have had against them.¹¹⁴ In *R v Canquan*,¹¹⁵ the court summarised the purpose of the Act by stating that it was “designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common law rights of employers and to enlarge the common law rights of employees”.

COIDA repealed the Workmen’s Compensation Act and came into operation in 1994. It provides for the compensation of employees injured in accidents¹¹⁶ that arose out of and in the course of their employment,¹¹⁷ or who contracted occupational diseases.¹¹⁸ In accordance with section 15 of the Act, a statutory compensation fund was established to which employers are required to contribute¹¹⁹ and from which compensation and other benefits are paid to employees.¹²⁰ In addition to establishing a fund from which an employee may obtain limited compensation, section 35(1) of the Act abolished the employee’s common-law right to institute a delictual claim against his employer for any harm resulting from accidents suffered during the

114 Section 7: “(a) [N]o action at law shall lie by a workman or any dependant of a workman against such workman’s employer to recover any damages in respect of an injury due to accident resulting in the disablement or the death of such workman; and (b) no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death.”

115 1956 (3) SA 355 (E) at 368.

116 “Accident” is defined as an “accident arising out of and in the course of an employee’s employment and resulting in a personal injury, illness or the death of the employee”.

117 See *MEC for Health v DN 2015 (1) SA 182 (SCA)* for a discussion on the course and scope of employment requirement within the context of COIDA. It may be noted that, apart from COIDA and its antecedent legislation, which relates to the interests of all employees in industry generally (including commerce and services), another strand of legislative development concentrated specifically on the interests of mineworkers. The Occupational Diseases in Mines and Works Act 78 of 1973 (and its predecessors) was a legislative response to the deleterious diseases contracted by mineworkers. Its history may be briefly summarised as follows: The Miners’ Phthisis Allowances Act of 1911 was first enacted in 1911, and succeeded in 1912 by the Miners’ Phthisis Act of 1912. The 1912 Act was amended by the Miners’ Phthisis Amendment Act of 1914. The Miners’ Phthisis Amendment Act of 1914 was succeeded by the Miners’ Phthisis Act of 1916. It repealed parts of the 1912 Act and the whole of the Miners’ Phthisis Amendment Act of 1914. The Miners’ Phthisis Acts Consolidation Act of 1925 was enacted in 1925 and was in turn repealed by the Silicosis Act of 1946. The Pneumoconiosis Act of 1956 superseded the Silicosis Act. The 1956 Act was superseded by the Pneumoconiosis Compensation Act of 1962. In 1973, the Occupational Diseases in Mines and Works Act 78 of 1973 repealed previous legislation and consolidated the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and work. See, further, *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) pars 26–35.

118 See s 65 of COIDA.

119 *Idem* s 87.

120 *Idem* s 16.

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course and scope of the employment.¹²¹ When instituting his statutory claim against the compensation fund, an employee is not required to prove fault.¹²²

In the leading judgement on the matter, *Jooste v Supermarket Trading (Pty) Ltd*, the Constitutional Court described this development as follows:¹²³

The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute.

As was the case with motor vehicle accidents, the establishment of a statutory compensation fund appears to undermine the idea that compensation should be paid by the person who culpably and wrongfully caused it, in an attempt to thereby correct his wrong. The existence of a compensation fund in this context is therefore similarly not aligned with the so-called corrective justice explanation for the law of delict.¹²⁴ Notwithstanding, it is successful in achieving the function set out by the law of delict – compensation of harm. Arguably, more injured and diseased employees receive compensation from the fund than would otherwise have been the case if they were required to institute common-law delictual claims against their employers.

Against this background, it may be said that the development of the law of delict by the enactment of legislation that provides compensation for workplace-related injuries and diseases may be regarded as a response to the risk of injury to which the employee is exposed as a result of his employment, as well as the potential risk of not being able to recover any compensation for the harm that is suffered once the risk materialises. In *Jooste v Supermarket Trading (Pty) Ltd*,¹²⁵ the Constitutional Court confirmed the role of risk and remarked that, in the absence of any legislation “there would be no guarantee that an award would be recoverable because there would be

121 Section 36 of the Act preserves and regulates an employee’s rights against a third party who may incur liability to the employee.

122 Although the Act therefore continues its predecessor’s abandonment of the fault requirement, it does play a limited role. Section 56(1) of the Act provides that, if a person has met with an accident or contracted an occupational disease owing to his or her employer’s negligence, the employee may apply to the commissioner to receive increased compensation in addition to the compensation normally payable in terms of this Act.

123 1999 (2) SA 1 (CC) par 15. See, also, *MEC for Education, Western Cape Province v Strauss* 2008 (2) SA 366 (SCA) pars 11–12; *Healy v Compensation Commissioner* 2010 (2) SA 470 (E) par 11; *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) par 8; *MEC for Health, Free State v DN* 2015 (1) SA 182 (SCA) pars 6–7; *Thomas v Minister of Defence and Military Veterans* 2015 (1) 253 (SCA) par 6.

124 This issue falls outside the scope of the current contribution, but for an overview of some of the aspects related to the function of the contemporary South African law of delict, see Fagan 2012: 130–155. See, also, Wessels 2018: 334–338.

125 1999 (2) SA 1 (CC) par 15.

no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost”.

The exposure to risk has also played a significant role in the adoption of workplace legislation in foreign jurisdictions. The adoption of the no-fault based legislation to compensate injured and diseased employees is “consistent with a widespread moral idea that it is not unjust to impose a strict liability on those who cause loss while taking risks in pursuit of commercial profit, even where the risk is unforeseeable or cost-justified”.¹²⁶

In conclusion, it appears that the leading policy consideration underlying legislative development of the law of delict in this field is the attempt to ensure that employees will receive compensation, albeit limited, in respect of the materialisation of an employment risk during the course and scope of employment.¹²⁷ It appears that the notion of enterprise liability best explains the reason for imposing liability for harm on employers specifically.

2 1 3 Defective consumer products

The design, manufacture, distribution and sale of products and services are, generally, central to the wealth and welfare of any society, but bring about disease, injury and even death for a wide range of individuals.¹²⁸ The rise of industrialisation in the nineteenth century and consumerism in the twentieth century led to a substantial increase in the manufacturing and distribution of consumer products.¹²⁹ This meant that, more than ever before, consumers were being exposed to an unremitting series of manufactured goods. Because technology grew more sophisticated and was often coupled with expertise, consumers knew very little about the products that reached them. It is therefore unsurprising that many of these products posed a significant risk to the well-being of consumers who chose to make use of them.¹³⁰ Even where the risk of harm was not particularly great, it was accepted that, should it materialise, the harm suffered by the consumer would be severe.¹³¹

In response to the rise in consumer products, the growing risk of exposure to harm and the difficulty of holding manufacturers liable for the harm suffered by

126 Stapleton 1994: 195.

127 Cane 2013: 332.

128 Van Eeden 2013: 367. Some of the defective consumer products that have caused disease, injury and death within this context include pharmaceutical products and other defective medical devices, as well as manufactured products (such as motor vehicles, household items and military devices) and contaminated food products.

129 Stapleton 1994: 9–16.

130 Van Eeden 2013: 370.

131 Van Gerven, Larouche & Lever 2000: 599.

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consumers as a result of defective products, the South African legislature introduced a strict liability regime for harm suffered as a result of defective products when it enacted the CPA.¹³² Set out below is a brief overview of the historical development, which culminated in the statutory reform of the law of delict in this context.

As is the case with the rise of product liability as a distinct area of the law in a variety of other jurisdictions, this development in the South African law may be traced back to progress made by the courts in the United States of America (USA). Indeed, the judicial development of the law by US courts is generally regarded as the precursor to the global increase of legislative intervention aimed at compensating victims of defective consumer products.¹³³

As will be discussed in greater detail below, the American judicial innovations enabled these victims to litigate against the sellers and manufacturers of defective products through alterations of the existing tort or contract law.¹³⁴ The courts' approach was ultimately captured in the American Law Institute's Second Restatement of Torts in 1965, after which, as Reimann¹³⁵ describes –

in the 1960s and 1970s, the principle of strict product liability swept through the United States, and became the rule in most, though not all, states of the Union. European scholars and policy makers watched this development with great interest. In part, they were fascinated by the activism of the American courts, which fashioned a new consumer protection regime.

Because the rise of the strict liability regime is generally regarded as originating within the American courts,¹³⁶ special attention will be placed on the judicial expansion of liability for defective consumer products within this jurisdiction.

The economic expansion that industrialisation produced – in especially the USA – was accompanied by a significant increase in the volume of consumer transactions.¹³⁷ The types of products manufactured and sold by way of these transactions posed a significantly higher risk of bodily injuries or property damage than was the case earlier during the nineteenth century:¹³⁸

Sometimes the nature of the new type of good made inspection difficult or impossible at least without expert technical advice, which was often in short supply. Even if the intrinsic nature of the good did not produce this situation, the volume of transactions and the new forms in which products were packaged and delivered often did. But most importantly of all, inspection was often rendered difficult if not impossible – at least for commercial buyers

132 The Act came into effect in 2010.

133 Reimann 2015: 251. See, also, Van Eeden 2013: 1–5, 21–22; Reimann 2003: 756, 761; Stapleton 1994: 3–36.

134 Reimann 2015: 251.

135 *Ibid.* See, also, Van Eeden 2013: 1–5, 21–22; Reimann 2003: 756–761; Stapleton 1994: 3–36.

136 *Ibid.*

137 Stapleton 1994: 10.

138 *Idem* at 11.

in the chain – by the increasing number of contracts formed between parties acting at a distance, in some cases before the relevant goods had come into existence, and the speed at which goods were passed down the lengthening commercial chain.

Most American consumers who were harmed by manufactured products were faced with a stumbling block; because they were not contractually linked to the manufacturer in question, they lacked a contractual remedy.¹³⁹ In cases where a consumer did have the option of instituting a contractual claim against a manufacturer, there was the possibility that it did not have sufficient funds or insurance to compensate the injured consumer for the harm suffered. In other words, much like the victims of motor vehicle accidents or those who suffered from injuries or diseases sustained during the course and scope of their employment at the turn of the previous century, consumers were exposed to an increased risk of harm and its accompanying risk of receiving limited or no compensation.

To deal with this problem, American courts developed contract law in a series of cases in the early twentieth century¹⁴⁰ so that the requirement of privity of contract was partially relinquished and less reliance was placed solely on contract to protect consumers from harm as a result of defective products.¹⁴¹ The courts expanded the liability of manufacturers by relying on the idea of a transmissible warranty that goods are free of defects.¹⁴² As a result, the action for breach of warranty was ultimately made available not only to the immediate purchaser of a product, but also to other persons who may reasonably have expected to use, consume or be affected by the goods.¹⁴³

In *Greenman v Yuba Products*,¹⁴⁴ the Supreme Court of California took the first steps to move away from the contractual route and laid down a principle of strict liability in tort for defective consumer products.¹⁴⁵ The gradual development of the manufacturer's liability in American courts ultimately led to the adoption in 1965 of section 402A of the American Law Institute's Restatement (Second) of Torts, which purported to provide a strict liability regime for defective products.¹⁴⁶

139 See Stapleton 1994: 9–16; Loubser & Reid 2012: 4–9.

140 Deakin, Johnston & Markesinis 2013: 590–607.

141 See Loubser & Reid 2012: 24.

142 *Ibid.*

143 The abandonment of privity of contract in favour of protecting a broader consumer interest is reflected in the well-known judgement of Traynor J in *Escola v Coca-Cola Bottling Co of Fresno* 24 Cal 2d 453, where it was noted that privity should be abandoned and that the public policy considerations underlying the implied warranty of merchantability should be used to construct an independent and strict liability for defective products in tort. Further extension took place in *Henningsen v Bloomfield Motors Inc* 32 NJ 358, 161 A 2d 6 (1960). See, also, Loubser & Reid 2012: 24; Stapleton 1994: 21.

144 59 Cal 2d 57 (1963).

145 Howells 2006: 579.

146 Loubser & Reid 2012: 7.

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During this time, victims of defective consumer products in European jurisdictions generally had to seek refuge in the law of contract and tort law if they intended to seek compensation for their harm.¹⁴⁷ In the UK, for example, Stapleton writes that “[l]ittle changed in the relevant UK common law from the removal of the privity barrier to tort claims for physical loss in *Donoghue v Stevenson* (1932) until the turn of the 1960s”.¹⁴⁸

A victim of a defective product could thus sue a retailer for the harm to his person or property under the warranties as to the quality of the product implied under the Sale of Goods Act.¹⁴⁹ However, courts continued to give effect to the privity requirement in contract law, and a third party who suffered harm, regardless of the foreseeability thereof, was therefore not entitled to sue for breach of contract.¹⁵⁰

Further, consumers who intended to sue someone other than the immediate seller of the defective product, could do so only in the event that such a person had made an express warranty with regard to the quality of the product.¹⁵¹ Despite the House of Lord’s confirmation in *Donoghue v Stevenson*¹⁵² that the ultimate consumer had a tort claim against the ultimate manufacturer of the defective product, the plaintiff was still required to prove negligence.¹⁵³ The end result therefore was that, compared to the developments initiated by US courts, victims of defective consumer products in the UK received considerably less protection against the risk of harm that manufactured products carried with them.

The legal position was similar in Germany, where, prior to the legislature’s ultimate intervention in 1989,¹⁵⁴ liability for harm arising from defective consumer products was regulated by tort and contract law.¹⁵⁵ In 1956, the German *Bundesgerichtshof*¹⁵⁶ denied the driver of a new bicycle a remedy in tort when the handlebar broke because of the technical deficiency of the steel, resulting in the plaintiff’s bodily injuries. The court held that the weakness in the steel was practically undiscoverable and that the manufacturer had not breached its duty of care and was therefore not negligent. However, in 1968, the same court brought about a “fundamental change”¹⁵⁷ when

147 See, generally, Stapleton 1994: 37–45; Markesinis & Unberath 2002: 748–749, 881–883; Reimann 2015: 251–253.

148 Stapleton 1994: 37.

149 *Ibid*; Deakin, Johnston & Markesinis 2013: 590.

150 Deakin, Johnston & Markesinis 2013: 590.

151 Stapleton 1994: 37–38.

152 [1932] AC 562.

153 Deakin, Johnston & Markesinis 2013: 590.

154 The Products Liability Act, 1989.

155 Grote 2008: 111.

156 BGH VIZR 36/55 “Der Betrieb” 1956 at 592.

157 Fairgrieve 2005: 100.

it held that, “if the cause of the damaging factor can only be located within the premises of the producer, his negligence is presumed”.¹⁵⁸

This judicial attempt at developing the law to assist the victim of a defective consumer product in finding compensation for his harm was borne out of considerations related to fairness: “It would be unjust for the victim ... to be forced to prove circumstances within the enterprise which would only allow the conclusion that the producer was negligent. The factory of the manufacturer is not accessible to him. It is therefore the defendant who must show that he did not act negligently.”¹⁵⁹ This change in the legal position “was no doubt influenced by the developments in the USA ... and the adoption of s 402A of the Restatement of Torts Second”.¹⁶⁰

Despite the judicial development to assist victims of defective products in claiming compensation, Taschner maintains that the German courts provided only “half-way solutions [which] showed the need to change the law, [and that] they were not definite ways to reach a satisfactory result”.¹⁶¹ Similarly, writing about European jurisdictions generally, Reimann states that the “courts in Western Europe struggled to protect victims of defective products without openly breaking with the traditional rules of contract ... and tort”.¹⁶²

Dissatisfaction concerning the inability of existing liability regimes to provide redress for consumers therefore grew steadily.¹⁶³ The concern was amplified by the thalidomide drug disaster of the 1960s. During 1961, it was recognised that the pregnancy drug, thalidomide, had caused birth defects in the children of some of its users. Almost 8 000 children in over 30 countries were affected.¹⁶⁴ The difficulties that were experienced by the deformed children in obtaining compensation from the manufacturer assisted in focusing attention on the uncertainties and difficulties experienced when instituting a tort claim for negligence, as did the slow and expensive process of litigation.¹⁶⁵

Therefore, at the time that proposals for a European Community Directive on Products Liability were first considered in the 1970s, it was not possible to speak of product liability law as such in either Germany or England.¹⁶⁶ In both countries, the legislature intervened by adopting product liability legislation subsequent to the Member States of the European Community adoption of Council Directive 85/374/EEC on 25 July 1985. The Directive had the “dual aim of harmonising the conditions of

158 Taschner 2005: 155, 159.

159 *Idem* at 159. See, also, Reimann 2015: 252.

160 Fairgrieve 2005: 100.

161 Taschner 2005: 159.

162 Reimann 2015: 252.

163 Loubser & Reid 2012: 9.

164 Stapleton 1994: 42.

165 *Ibid.*

166 Deakin, Johnston & Markesinis 2013: 590; Markesinis & Unberath 2002: 748–749, 881–883.

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competition in the internal market and ensuring adequate protection for victims of unsafe products across the Member States”.¹⁶⁷ Broadly, the directive provides that, where someone can prove that his bodily integrity or property has been physically harmed by a defective product that was put into circulation in the ordinary course of business, he can institute a claim against its manufacturer, importer, own-brand supplier or a mere supplier, without having to prove negligence against any specific party or that the defendant caused the defect.¹⁶⁸

In England, the enactment of the Consumer Protection Act of 1987 can be traced back to this directive and the Act seeks to give effect to its principles. Generally, this Act, as read with the directive, imposes strict liability on manufacturers, distributors and retailers for harm arising from defective products. Similarly, in Germany, the Products Liability Act of 1989 followed the 1985 Directive and introduced a strict liability on manufacturers for harm arising from defective products.¹⁶⁹

In contrast to the US, UK and German legislatures, the South African legislature took significantly longer before it finally decided to develop the delictual principles relating to harm suffered as a result of defective products. The CPA was enacted in 2008 and only became operative in 2010. Section 61(1) of the Act introduced a framework in terms of which producers, importers, distributors or retailers may be held strictly liable for bodily injuries or property damage brought about by the supply of unsafe goods or by a product failure, defect or hazard, or by inadequate instructions or warnings for the use of certain goods.

Prior to its enactment, however, the legal position was that a consumer who suffered harm as a result of a defective product could institute either a contractual claim against the seller of the product in question or, alternatively, pursue a delictual remedy against a member of the supply chain. The South African law of contract, however, did not undergo a similar development with regard to the extension of warranties, and consumers who pursued this route remained bound by the principle of privity of contract.¹⁷⁰ In terms of the South African common law of contract, a manufacturer may be held liable to a purchaser for breach of warranty on the basis of agency or a contract for the benefit of a third party.¹⁷¹ However, these contractual mechanisms ultimately have limited practical effect in assisting consumers who have suffered harm as a result of a defective product against manufacturers.¹⁷²

On the other hand, a plaintiff who instituted a delictual claim¹⁷³ is bound to prove all of the common-law elements for delictual liability. In the context of defective

¹⁶⁷ Loubser & Reid 2012: 9.

¹⁶⁸ See Stapleton 1994: 49.

¹⁶⁹ Markesinis & Unberath 2002: 748.

¹⁷⁰ Hutchison & Pretorius 2012: 21–32. See, also, Van Eeden 2013: 73–87, 372; Loubser & Reid 2012: 23–35.

¹⁷¹ Loubser & Reid 2012: 24; Dendy 2014: par 175.

¹⁷² Loubser & Reid 2012: 24; Van Rensburg, Lotz & Van Rhijn 2014: par 425.

¹⁷³ Loubser & Reid 2012: 24: An action based on the manufacturer’s pre-contractual representations.

consumer products, the elements of fault (in the form of negligence), causation¹⁷⁴ and fault¹⁷⁵ are particularly difficult to prove. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd (Wagener)*,¹⁷⁶ the SCA was requested to develop the common law of delict by doing away with the requirement of fault.¹⁷⁷ However, the court refrained from doing so, stating that any reform of the law of delict in this context was better left to the legislature.¹⁷⁸

The apparent lack of an effective remedy to compensate harm suffered by a consumer may therefore be said to have been a convincing policy-based consideration for the legislative development of this branch of the law, both in South Africa and elsewhere. Of course, as stated above, a desire for an effective remedy was the result of the risk of harm consumers were exposed to by especially modernised, technologically-advanced manufacturers and the accompanying risk of potentially receiving no compensation should the harm materialise.

The legislative development of the delictual remedies in respect of harm caused by defective consumer products occurred through the introduction of a strict liability regime for producers, importers, distributors and retailers. The most convincing policy-based justification for the legislature's development of the law of delict may arguably be found in the notion of enterprise liability. Consumers are exposed to risks inherent to certain products from which manufacturers stand to make a profit. Therefore, the costs of accidents should be imposed on the manufacturers, who, additionally, often are best placed to take steps to avoid the risk of damage (by taking precautions at the design and manufacturing stages of production)¹⁷⁹ or to minimise its effects (through the adoption of insurance or through pricing of products).¹⁸⁰ This point has also been illustrated in the landmark US decision, *Escola v Coca-Cola Bottling Co.*¹⁸¹

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products

174 See *idem* at 53–55 for the difficulties relating to proving causation in this context.

175 See *idem* at 46–50 for the difficulties relating to proving fault in this context. See, also, *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA).

176 2003 (4) SA 285 (SCA) par 10.

177 *Idem* pars 17, 27–30.

178 See, also, part 2.5 *infra*.

179 Deakin, Johnston & Markesinis 2013: 590–591.

180 Loubser & Reid 1994: 5; Stapleton 1994: 162–184.

181 24 Cal 2d 453 (1944) at 462 (emphasis added).

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having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. *However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.*

In conclusion, it may be argued that, as was the case with statutory intervention in the area of motor vehicle accidents and workplace-related injuries and diseases, the most prominent underlying consideration for the development of the fault-based common law of delict in relation to harm suffered as a result of a defective product is the creation of a risk of harm and the additional risk that the injured consumer may not find compensation as a result of an insolvent manufacturer, evidentiary difficulties or ineffective legal remedies. The introduction of strict liability by the legislature has been justified by the notion of enterprise liability in the context of both occupational injuries and diseases, as well as defective consumer products.¹⁸²

At the advent of the previous century, the protection from the risk of potential harm was still largely assumed to be a matter that people had to attend to themselves. Upon the materialisation of such a risk, people were similarly presumed to take responsibility for obtaining compensation for their harm by instituting legal action against the wrongdoer.¹⁸³ In other words, those who suffered harm as a result of the culpable wrongdoing of others were largely dependent on the remedies available in the common law of delict. Generally, this meant that the victims of harm had to find the time and funds to institute legal proceedings against a wrongdoer and provide sufficient evidentiary proof that the wrongdoer's culpable conduct was indeed the cause of their harm.

However, over the course of the twentieth century, a shift gradually occurred and the law of delict was developed by the South African legislature. The shift originated in the context of accidents that took place in the workplace, which may be said to have been characterised by an initial reluctance to regulate the behaviour of employers,¹⁸⁴ and the court's original individualistic approach, which saw employers being held liable for workplace accidents only in the event that the victim could prove personal fault on the part of the employer.¹⁸⁵ The development of the law of delict, as driven by the South African legislature, ultimately led to a growing demand for workplace safety, legal certainty and, most importantly, a cheaper and quicker way of compensating employees who suffered harm when an employment-related risk of harm materialised. Although there were other compelling considerations, it

182 See Stapleton 1994: 20.

183 For a comparative perspective, see Hedley 2013: 235.

184 Select Committee 1994: 64–65. See, also, Hedley 2013: 236.

185 See, further, Hedley 2013: 237.

may be argued that, ultimately, the employees' exposure to an ever-increasing risk of harm and the accompanying risk of not being able to receive compensation provided the predominant consideration for the legislature's decision to intervene.

Similarly, as a result of the increase in the number of motor vehicles during the course of the twentieth century, the number and frequency of motor vehicle accidents grew significantly. Perhaps more than occupational accidents, this upsurge exposed road users to a substantial risk of harm and an accompanying risk of receiving no compensation in the event that the risk should materialise. Again, the legislature intervened by developing the law of delict. This was initially done by retaining the motor vehicle accident victim's delictual remedy against a wrongdoer while also introducing the notion of compulsory third party insurance.¹⁸⁶ In doing so, the legislature shifted the responsibility to compensate the motor vehicle accident victim to a source other than the wrongdoer. The legislature's desire to address the risk of receiving no compensation also saw it further develop the law relating to motor vehicle accidents by replacing the system of compulsory third-party insurance with a centralised compensation fund, financed through fuel levies.

Recently, the legislature abolished the motor vehicle accident victim's right to a common-law delictual remedy in respect of the harm not covered by the RAF Act. Although such a legislative development was held to be constitutionally valid, it arguably undermines the initial legislative project of ensuring the compensation of the victim's harm in the case of a risk eventuating, and is furthermore indicative of the legislature's attempt to offer protection also to the wrongdoer. The legislature has attempted to justify these amendments as constituting part of greater reform towards a comprehensive social security for all individuals.

The statutory development of the law of delict by the introduction of a strict liability regime in respect of producers, importers, distributors or retailers was also, to a great extent, driven by the dramatic increase in the production of consumer goods, which brought about an ever-increasing risk of harm associated with a modern, mechanised society that produces potentially hazardous products.

Although the utility of motor vehicle transport, increased labour forces and a growing manufacturing sector is clearly visible, the benefit is accompanied by an amplified risk of harm. The South African legal system produced a solution in which these activities was permitted, but only on condition that the most appropriate enterprise was saddled with the cost of the risks they produced.¹⁸⁷

Attention has already been drawn to the expansion of the state's delictual liability for harm that arises from crime.¹⁸⁸ The development is disquieting, also from a crime-prevention perspective because, with more of available tax-payer funds being spent

186 *Idem* at 243: "Third-party insurance was first offered to carriage drivers in 1875, and to motorists in 1896." Furthermore, compulsory insurance was introduced by the Road Traffic (Compensation for Accidents) Bill in 1934.

187 See, also, Markesinis & Unberath 2002: 716.

188 See the introduction to this contribution in part 1 *supra*.

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on litigation and the payment of full compensation to crime victims, less of the funds are directed to promoting safety and to preventing crime. In turn, this creates greater possibilities for the further extension of the state's delictual liability. In other words, the current judicial trend indirectly contributes to the increased risk of crime by diminishing available resources intended for crime prevention. At the same time, the recent development responds to the risk of receiving no or limited compensation in the event of suffering from crime – but only in respect of a limited number of crime victims who are able to institute litigious proceedings against the state. Therefore, the ongoing tendency to expand the state's delictual liability indirectly contributes to the increased likelihood of being a victim of crime, while it provides a compensatory solution only to those who are capable of proving liability in court.

Viewed against the background of statutory development, which highlights the potentially more effective victim compensation strategy that exists through the legislative reform of the law of delict, the current judicial development pertaining to crime victim compensation appears unattractive.¹⁸⁹

2.2 The role of the Constitution and the need to promote the constitutional right to social security

In this part of the contribution, attention will be given to the role of the Constitution of the Republic of South Africa, 1996 (Constitution) in justifying the statutory development of the law of delict. As discussed in greater detail below, the statutory development of the law of delict is examined to establish the role that the constitutional right to social security has fulfilled as a legal consideration justifying the legislative intervention in the law of delict. Particular attention is given to the development of the area of the law that relates to motor vehicle accidents and occupational injuries and diseases.

Before continuing, it would be appropriate to summarise the salient provisions of the Constitution and to explain how this consideration differs from the one discussed in part 2.1 above. The Constitution is the supreme law of the country,¹⁹⁰ central to the country's legal system and it determines the validity of all law, including the law of delict. The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.¹⁹¹ It also applies to the conduct of natural persons and juristic persons, when appropriate.¹⁹² The Constitution also enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when

189 Some of the negative aspects related to the expansion of state delictual liability for harm arising from crime has been highlighted in the introduction to this contribution – see part 1 *supra*. In this regard, see Wessels 2018: 31–127 for a thorough discussion of that development.

190 Section 2 of the Constitution.

191 *Idem* s 8(1).

192 *Idem* s 8(2).

interpreting any legislation and when developing the common law.¹⁹³ Section 7(2) of the Constitution imposes upon the state a positive duty to protect and promote the rights contained in the Bill of Rights. Importantly, section 27(1)(c)¹⁹⁴ refers to the right to social security and section 27(2)¹⁹⁵ imposes upon the state a mandatory duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Further, the promotion of social security as a policy consideration should be distinguished from the need to combat risk.¹⁹⁶ The promotion of social security is not only focused on addressing the risk of a specific type of harm and the accompanying risk of potentially receiving no or limited compensation. Legislation that is aimed at promoting social security typically casts the net wider and attempts to support individuals with no or low income, to provide adequate standard of living and to put in place a social safety net against destitution.¹⁹⁷ As alluded to in its policy paper regarding the proposed RABS, the right to a social security system does not focus only on compensating harm that arises within a specific context.¹⁹⁸ Instead, social security arrangements consist of a range of collective and individual social, fiscal, occupational and welfare measures of private, public and mixed origin, aimed at providing social cover to members of society.¹⁹⁹ In other words, the consideration discussed in this part of the contribution is not the same as the one discussed in part 2.1 above. While the latter concentrated solely on the issue of compensation of the victim's harm (once a particular risk has materialised), the promotion of the constitutional right to social security has a broader scope that embraces other non-compensatory objectives, including empowering the historically disadvantaged,²⁰⁰ promoting fundamental human rights (particularly human dignity),²⁰¹ addressing past injuries²⁰² and seeking to provide an adequate standard of life to all individuals.²⁰³

193 *Idem* s 39(2).

194 This section states that everyone has the right to access to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".

195 This section states that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

196 See, also, part 2.1 *supra*.

197 Department of Transport 2011: 7–8.

198 *Idem* at 5–6.

199 *Ibid*.

200 In doing so, the legislation addresses poverty and social exclusion, which may be regarded as a key to social protection. It also enhances other constitutional values and principles, such as equality, non-sexism and non-racism. See Olivier, Smit & Kalula 2003: 35.

201 *Idem* at 36: "There is some Constitutional Court authority for the view that social security-related rights are aimed at more than simply restoring material disadvantage. In *Grootboom*, the court emphasised the strong link between human dignity and the giving effect to access of adequate housing."

202 *Idem* at 53: "Fundamental reform of South Africa's social security system aims to redress past injustices, particularly the country's legacy of poverty and equality."

203 See Department of Transport 2011: 5–6.

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Referring to the statutory motor vehicle accident compensation scheme established to cover the risks to which road users are exposed, the Constitutional Court held that it “seems plain that the scheme arose out of the social responsibility of the State. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants”.²⁰⁴

During the parliamentary debate concerning the introduction of the 1942 Act and accompanying compulsory third party insurance scheme, it was stressed that, regardless of the accompanying cost that a compulsory third-party insurance system may bring, members of society should realise that the Act “aims at the protection of those who cannot look after themselves”.²⁰⁵ In particular, the “principle of security”²⁰⁶ was emphasised to ensure protection of the road users’ interests and safety. Those in favour of the legislation stressed the impact of injury and disability upon road users.²⁰⁷

Those people who were injured are suffering day in and day out in their work; they are unable to look after their families, and because those families have to endure great hardships while the children are young, they cannot enjoy their legitimate share in life. Those are the people we should primarily think of. They must be looked after. The people who are injured must first of all be nursed back to health, which means an enormous amount of work for the hospitals and for the nursing services, and also for the medical services of this country.

Because of its adherence to fault-based liability, the RAF Act, however, has been criticised as a failed system that is “unreasonable, inequitable, unaffordable and unsustainable”.²⁰⁸ As discussed elsewhere in this contribution,²⁰⁹ the requirement for fault has a significantly detrimental impact on the successful pursuit of compensation by a motor vehicle accident victim. In turn, it is argued, a significant amount of those victims are left uncompensated and without the ability to earn income. To deal with this concern, and to provide greater effect to the right to social security, the legislature has proposed the RABS. In *Law Society of South Africa v Minister for Transport*,²¹⁰ the purpose of the proposed scheme was described as follows:

[T]he ultimate vision is that the new system of compensation for road accident victims must be integrated into a comprehensive social security system that offers life, disability and health insurance cover for all accidents and diseases. [The Minister] acknowledges that a fault-based common-law system of compensation for road accident victims would be at odds with a comprehensive social security model. The intention is therefore to replace the common-law system of compensation with a set of limited no-fault benefits which would

204 2011 (1) SA 400 (CC) par 17.

205 RAFC 2002: 109.

206 *Ibid.*

207 *Ibid.*

208 Department of Transport 2011: 13.

209 See part 2.3 *infra*.

210 2011 (1) SA 400 (CC) pars 45–46.

form part of a broader social security net as public financial support for people who are poor, have a disability or are vulnerable. ... [The] new scheme is a first step to greater reform.

Furthermore, the policy paper for the RABS makes it clear that the proposed no-fault based compensatory scheme must be understood against the social and economic reality of South African society, which is characterised by great disproportions in income and lifestyle.²¹¹ The RABS is cognisant of historical disadvantages prevalent in the South African society and is a legislative attempt to develop the existing common law of delict as it relates to compensation of motor vehicle accidents, as well as an attempt to contribute to the state's broader social security reform process.²¹² By removing the requirement of fault, the legislature makes provision that social security benefits will be made available to a wider group of road accident victims,²¹³ in the process seeking to provide an adequate standard of life to all citizens. In doing so, the legislature strives to promote the principle of social inclusion, as well as the notion that the "risk of misfortune should become the comprehensive and collective responsibility of society as a whole".²¹⁴

Occupational-injury-and-disease schemes are generally considered to be the oldest form of social security coverage in the world.²¹⁵ It is also regarded as the most widespread system of social security, and if the "various branches of social security from different countries are examined it is clear that almost every country ... has an insurance scheme to cover these risks".²¹⁶ Generally, these schemes give effect to the right to social security by promoting workplace safety and providing compensation, medical care, vocational rehabilitation, and further benefits to employees, as well as survivors' benefits for families of victims of occupational accidents.²¹⁷

As noted above, COIDA introduced significant changes in respect of the protection of employees' rights and, although it did not intend to provide a kind of general health cover for every accident or disease which an employee may suffer from, it may nevertheless be regarded as social security legislation, aimed at the provision of a more equitable compensation dispensation in regard to injuries suffered and diseases contracted by employees.²¹⁸ Specifically, where earlier legislation was based on the principle of individual employer liability as covered by private insurance, the subsequent legislation introduced the principle of no-fault based liability and limited benefits covered by a public scheme.²¹⁹ The introduction of such a scheme, which does not require an employee to prove fault on the part of the employer, weakens

211 Department of Transport 2011: 6–7.

212 *Ibid.*

213 *Ibid.*

214 *Idem* at 7.

215 International Labour Office 2013: *passim*.

216 Olivier, Okpaluba, Smit & Thompson 1999: 312.

217 International Labour Office 2013: *passim*.

218 For example, the exclusion of higher-income earners was removed.

219 Olivier 2012: par 9.

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the likelihood of lengthy and costly legal disputes and provides a more streamlined administrative process for the effective compensation of injured employees. As such, this piece of “social legislation”²²⁰ promotes the social and economic welfare of employees.

Therefore, taking into account that it sought to promote workplace safety, rehabilitate injured or diseased employees and provide compensation to those who have fallen victim to accidents that have occurred during the course and scope of employment, it may be said that the legislative development of a no-fault-based compensation scheme for occupational injuries and diseases in South Africa is an example of the promotion of the constitutional right to social security.²²¹

In conclusion, it may be said that social security arrangements consist of a range of collective and individual social, fiscal, occupational and welfare measures of private, public and mixed origin, aimed at providing social cover to members of society and at combating certain risks. The statutory compensation schemes that provide compensation for harm arising from motor vehicle accidents and occupational injuries and diseases constitute a part of the broader social security project in South Africa. These schemes afford a variety of victims the possibility to obtain compensation in a relatively affordable and quick manner and without having to pursue a more costly, time-consuming litigious route. In doing so, they protect people from misfortune, distress and the significant risks to life caused by unemployment, illness, injury, disability and death of a breadwinner, and thereby give effect to the constitutional right to social security.

The Constitution has been particularly important in developing the law of delict by promoting the constitutional right to social security. It may be argued that COIDA and the RAF Act are aimed at giving effect to this constitutional imperative insofar as they afford victims of motor vehicle accidents, workplace injuries and diseases the fullest possible protection of their legal interests.²²² Furthermore, the proposed no-fault-based compensatory model sought to be introduced under the RABS has pertinently been justified on the basis that it seeks to give “effect to the [right to] reasonable access to social security and health care”.²²³

The South African legislature’s development of the law of delict pertaining to the compensation of accident victims is therefore justified insofar as it addresses

220 In *Molefe v Compensation Commissioner* [2007] ZAGPHC 365 par 5, Seriti J found that the “Compensation for Occupational Injuries and Diseases Act ... is a social legislation and according to section 39(2) of the Constitution, it must be interpreted in such a manner that the said interpretation promotes the spirit, purport and objects of the social security right as enshrined in section 27(1)(c) of the Constitution”.

221 Myburgh, Smit & Van der Nest 2011: 43.

222 Olivier, Khoza, Jansen van Rensburg & Klinck 2003: 49–119; Van Eeden 2013: 92; *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC).

223 *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC).

particular and pervasive social risks to which all members of society are exposed and responds to the broader constitutional project to promote social security.

2 3 Evidentiary problems with applying the common-law requirement of fault

Although the law of delict recognises exceptional circumstances where it is not required, a plaintiff must, generally, prove fault. This means that, first, the victim is required to prove that the wrongdoer had the capacity to be at fault.²²⁴ To do so, a plaintiff must prove that the defendant had the mental ability to distinguish between right and wrong and to act in accordance with that distinction.²²⁵ If the wrongdoer is shown to be accountable, the plaintiff must prove that the wrongdoer acted either intentionally or negligently. With regard to the former, it must be proven that the defendant had the direction of will to cause him harm and that the wrongdoer was conscious of the wrongfulness of his act.²²⁶ In respect of the latter, the plaintiff must prove that the wrongdoer's conduct failed to measure up to the standard of the objective reasonable person.²²⁷

Despite strong arguments that may be raised in support of the departure from fault-based liability, the South African courts have reiterated the requirement for proving fault when establishing delictual liability.²²⁸ Despite the fact that there may be convincing reasons in favour of such a general position, the South African legislature has nevertheless elected to develop the law of delict by abolishing the fault requirement in specific contexts. In this part of the contribution, consideration is given to the reasons that have justified the legislative development in these instances.

In its report, the RAFC, tasked with conducting an inquiry into and making recommendations regarding a “reasonable, equitable, affordable and sustainable system for the payment by the Road Accident Fund of compensation or benefits in the event of the injury or death of persons in road accidents in the Republic”,²²⁹ noted that it “is increasingly felt that fault cannot really be determined accurately and there is also a growing social concern for accident victims regardless of the role they played in causing the accident”.²³⁰

224 Neethling & Potgieter 2015: 131; Loubser & Midgley 2017: 138–177.

225 *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) at 511.

226 *Le Roux v Dey; Freedom of Expression Institute Amici Curiae* 2011 (3) SA 274 (CC).

227 *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA); *Kruger v Coetzee* 1966 (2) SA 428 (A); *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4.

228 *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC); *Jacobs v Transnet Ltd t/a Metrorail* 2015 (1) SA 139 (SCA); *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

229 RAFC 2002: 1.

230 *Idem* at 119.

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In the RABS policy paper dealing with the potential legislative intervention in the law of delict in the context of motor vehicle accidents, the Minister states that this requirement may lead to a delay in providing victim compensation, because it is often necessary to resort to litigation to obtain clarity on the question of fault.²³¹ This, in turn, results in extensive legal costs for both the accident victim and the RAF.²³² During the delay, victims have to pay for medical and other expenses themselves and, if they are disabled, they are not in a position to pursue gainful employment, which means that their families could also suffer.²³³ In a developing country, such as South Africa, “a significant proportion of road users have not had the financial means to pay for appropriate healthcare and rehabilitation themselves while waiting for the legal process to be finalised”.²³⁴ For these reasons, the fault-based system of liability under the RAF Act has been described as “unreasonable, inequitable, unaffordable and unsustainable”.²³⁵

In response to these difficulties, the RABS has been proposed. The preamble of the proposed legislation for motor vehicle accidents therefore states that “there is a need to expand and facilitate access to benefits by providing them on a no-fault basis”. The suggested no-fault model under the RABS will potentially ease the “administrative load ... and speed up service delivery. Long delays in the settlement of claims will be eliminated by the fact that possible disputes over the fault requirement and which frequently required legal intervention will be removed and by the resulting streamlined administrative process”.²³⁶

The proposal of a no-fault liability model under the proposed RABS provides an example of where the evidentiary difficulties in proving fault (in the form of negligence) has been used as a justifiable policy reason for legislative reform of the law of delict.²³⁷ It is envisaged that the proposed no-fault model will ease the administrative load regarding the process of statutory claims, increase the speed with which those claims are processed and prevent lengthy, costly legal disputes concerning the existence of negligence.

The introduction of a strict liability regime in the context of occupational injuries and diseases was similarly motivated by the desire to assist the victims of occupational injuries and diseases so that they are not required to prove fault.²³⁸

231 Department of Transport 2011: 13.

232 *Idem* at 1–7.

233 *Ibid.*

234 *Idem* at 7.

235 *Idem* at 6.

236 *Idem* at 5.

237 See *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) par 45; Department of Transport 2011: 5.

238 Markesinis & Unberath 2002: 727–731.

Upon tabling COIDA to the extended public committee in parliament, the Minister of Manpower aptly remarked:²³⁹

Under common law an injured employee or the dependents of a deceased employee may get compensation from his employer if it can be proved that the injury or death was due to the negligence of the employer, but in a modern industrial set-up in which, for example, a number of employees jointly use sophisticated machinery, it may be virtually impossible for an injured employee to prove negligence.

With the introduction of COIDA and by doing away with proving fault within this context, the employee is therefore able to obtain compensation from a solvent entity much easier and quicker.²⁴⁰ It may therefore be argued that the compensation fund more effectively compensates victims than a delict/tort system that requires proof of fault.²⁴¹

Proving fault, especially negligence, is difficult and places a burden on the plaintiff that is often hard or impossible to discharge.²⁴² This evidentiary difficulty has been a major policy consideration in favour of statutory intervention in the field of product liability, where the consumer is usually unable to analyse or scrutinise the products for safety.²⁴³ In *Wagener*, the SCA was requested to develop the rules of the common law of delict so that it was no longer required for victims of defective products to prove that the manufacturer had been culpable (in this case, negligent) in manufacturing the product in question. Although the court ultimately opted to leave the development of this branch of the law to the legislature, it took cognisance of the difficulty in proving fault:²⁴⁴

A plaintiff has no knowledge of, or access to the manufacturing process, either to determine its workings generally or, more particularly, to establish negligence in relation to the making of the item or substance which has apparently caused the injury complained of. And, contrary to what some writers suggest, it was urged that it is insufficient to overcome the problem that the fact of the injury, consequent upon use of the product as prescribed or directed, brings the maxim *res ipsa loquitur* into play and casts on the defendant a duty to lead evidence or risk having judgment given against it. The submission is that resort to the maxim is but a hypocritical ruse to justify (unwarranted) adherence to the fault requirement.

239 Proceedings of the Extended Public Committee 1994: col 12305.

240 For a German perspective on this point, see Markesinis & Unberath 2002: 727.

241 See, also, Stapleton 1986: 12, who writes about English legislation that provides an occupational injuries scheme: "The principal advantage the scheme has over tort ... is that fault in an identifiable wrongdoer need not be shown, nor, in most cases, need the claimant affirmatively prove medical causation, as he or she can take advantage of presumptions to this effect."

242 Loubser & Reid 2012: 4.

243 *Ibid.*

244 2003 (4) SA 285 (SCA) par 10.

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A by-product of a strict liability regime in this context is the fact that it assists in promoting consumer safety and deterring the manufacturing of dangerous products. In the product liability context, the abolition of the fault requirement appears to perform the instrumental function of creating safety incentives.²⁴⁵ Imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which sellers may escape their appropriate share of responsibility.²⁴⁶ In its 1985 Directive, the European Union also emphasised the fact that the imposition of a strict liability regime relating to defective products is the “sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production”.²⁴⁷

These considerations have prompted the South African legislature to shift the harm suffered by consumers due to defective products onto the risk creator who directly stands to benefit from the risk-taking.²⁴⁸ The introduction by the South African legislature of the strict liability regime for defective products under section 61(1) of the CPA practically assists consumers in protecting their legal interests in cases involving complex products and where it would otherwise have been difficult or impossible to attain expert evidence to prove the defendant’s fault.²⁴⁹

In conclusion, it may be said that the argument against fault (especially in the form of negligence) has been successful in both South Africa and foreign jurisdictions in spurring legislative development of the law of delict/tort in a variety of contexts, notably harm resulting from defective consumer products, workplace-related injuries and diseases and motor vehicle accidents.²⁵⁰ It is submitted that the requirement to prove fault, especially negligence, in some instances may place a burden on victims of harm that is very difficult, or potentially impossible to satisfy, thereby potentially leaving them without compensation.

2 4 The nature of the civil litigation process: Under-compensation and high transaction costs

From a comparative perspective, the common law of tort has been criticised as being ineffective in its principal aim of compensating harm resulting from especially personal injury, disease and death.²⁵¹ Dissatisfaction with the operation of the tort system received widespread academic attention during the 1960s and 1970s.²⁵²

²⁴⁵ Loubser & Reid 2012: 5.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ See, also, Stapleton 1986: 92.

²⁴⁹ Loubser & Reid 2012: 4.

²⁵⁰ See, also, Sugarman 1987: 804–805.

²⁵¹ Cane 2006: 461–499; Deakin, Johnston & Markesinis 2013: 51–59.

²⁵² See, in general, Ison 1967; Elliot & Street 1968; Atiyah 1970.

During the same time, mass tort litigation drew public attention to the clumsy, time-consuming and costly nature of obtaining compensation by instituting civil proceedings.²⁵³

The vigorous academic and public debates in the UK about the shortcomings of the tort system as a compensation mechanism was further buoyed by the enactment of the Accident Compensation Act in New Zealand in 1972.²⁵⁴ The Act abolished the tort system insofar as the compensation for harm resulting from personal injuries is concerned, and replaced it with a general compensation scheme that provided compensation for harm resulting from all accidents and some diseases.²⁵⁵ It was argued that such a legislative development would, *inter alia*, alleviate the concerns relating to the high transaction costs of the civil litigation system. Within this framework, the UK government established the Royal Commission on Civil Liability and Compensation for Personal Injury to investigate the need for reform of the common law of tort (Pearson Report).²⁵⁶

The Pearson Report revealed that out of the total number of some 3 million persons estimated to have suffered from personal injury each year, only approximately 1,7 million received financial assistance from any source, with some of the victims receiving compensation from more than one source.²⁵⁷ Significantly, it was found that:²⁵⁸

[Out of the] estimated 3 million persons suffering some injury in each year, only some 125,000 (approximately 7 per cent) received any compensation in the form of tort damages. However, the total value of the damages paid to this 7 per cent was almost half of the total value of the social security payments made to the 1.5 million recipients of those payments. When account is taken of the administrative costs of the differing compensation systems, the position is even more striking, because the tort system is much more expensive to administer ... of the total cost of compensation paid (on average in each of the years 1971–1976) some £1 billion, the tort system accounted for no less than £377 million. *Thus, 7 per cent of the accident victims accounted for perhaps 37 per cent of the total cost (payments plus administration) of the compensation paid out (making some allowance for the estimated administrative costs).*

The Pearson Report indicated the high costs associated with the tort system which, in relation to other sources of compensation, seemed “less significant if its importance is assessed not in relation to accident victims alone, but in relation to the tentimes larger group of people who are disabled from all causes, these predominantly being illness and disease”.²⁵⁹

253 Cane 2006: 459.

254 This Act has since been replaced by the Accident Compensation Act of 2001.

255 Cane 2006: 459.

256 The Pearson Report was published in 1978.

257 Cane 2013: 19–21.

258 *Ibid* (own emphasis).

259 Lewis 2013: 288.

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Although there are no up-to-date statistics to put alongside those provided in the Pearson Commission's report, it has been argued that "there is little reason to think that the basic picture is significantly different now".²⁶⁰ In addition, it has been stated that, although "[f]igures for South Africa are not known, they are likely to show similar trends".²⁶¹

In the South African context, it may be argued that, similar to the position in England²⁶² and elsewhere,²⁶³ civil litigation is expensive²⁶⁴ and only a limited number of plaintiffs can afford the accompanying legal transaction costs,²⁶⁵ thereby restricting the right of general access to justice.²⁶⁶ Legal costs and fees in South Africa are substantial, leading some to argue that "the major barrier to access to justice in South Africa remains the high cost of legal services".²⁶⁷ It is therefore unsurprising that in *EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly*,²⁶⁸ Mogoeng CJ recently emphasised the fact that "[l]itigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen".

To illustrate, in 2005, the average South African household would have had to use a week's income to afford a one-hour consultation with an average attorney.²⁶⁹

260 Cane 2013: 19–21.

261 Loubser & Midgley 2012: 9.

262 Lord Justice Jackson was appointed to carry out a fundamental review of the costs in civil litigation in England and Wales. He published his final report in 2010, in which he found that the costs relating to civil litigation (especially in respect of personal injuries) are excessive and has recommended substantial changes in this regard. See Jackson 2010: 14–18; Jackson 2011: 37–42. In their comparative study, analysing data from Australia, Austria, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Scotland, Singapore, Spain, Sweden, Switzerland, Taiwan and the USA, Hodges, Vogenauer & Tulibacka 2009: 3–9 note that, generally speaking, litigation costs are expensive and time-consuming and encourages further reform so as to improve access to justice.

263 Hodges, Vogenauer & Tulibacka 2009: 3–9. According to Sugarman 1987: 795, tort law is "an intolerably expensive and unfair system of compensating victims".

264 See Wallis 2011: 33–37; Klaaren 2014: 1–6.

265 In other words, costs relating to the investigation of claims and the overall litigious process. See Wallis 2011: 33–37; Klaaren 2014: 1–6. For a comparative perspective, see, also, Deakin, Johnston & Markesinis 2013: 53; Hodges, Vogenauer & Tulibacka 2009: 3–9. See, also, Sugarman 1987: 798: "The money available for compensation is paid into insurance companies as liability insurance premiums finds its way into the pockets of victims. The rest is ground up in lawyers' fees and the associated costs that litigation generates. The money also is consumed in the marketing, general overhead and claims administration costs of the insurers, as well as their profits in years when they make profits. Furthermore, there are public costs to the judicial system that the tort system imposes, both financial and through delay in the handling of other cases."

266 See SALRC 2004: 236; Wallis 2011: 33–37; Klaaren 2014: 1–6; Cane 2006: 461–499; Cane 1997: 231–237; Sugarman 1985: 73.

267 AfriMAP and the Open Society Foundation for South Africa 2005: 2, 108.

268 2016 (5) BCLR 618 (CC) par 52.

269 Klaaren 2014: 2.

More recently, in 2013, it was recorded that “clients with a monthly income of R600 ... are frequently charged fees in the region of R1 500 ... just for an initial consultation”.²⁷⁰ In accordance with the Rules Board for Courts of Law Act 107 of 1985, a 15-minute consultation may cost anything between R144 and R235, while the cost of drafting one page of a legal document may be charged at R50.²⁷¹ It also restricts access to justice for the poor, especially civil justice, which is largely not available from Legal Aid South Africa.²⁷² These fees restrict access to justice across the board for the not-so-poor, for instance persons in a household earning over R6 000 a month and thus not qualifying for Legal Aid.²⁷³

There are additional factors that may contribute towards the high cost of instituting a civil claim in a South African court. There are approximately 26 000 legal practitioners in South Africa, serving at least 53 million people.²⁷⁴ However, around 2 500 of these practitioners are advocates who rarely have direct interaction with clients, especially poor ones. Furthermore, the vast majority of these practitioners are situated in the urban areas, with relatively few practising in small towns or rural areas, which means that “the cost and distance required to physically access lawyers makes pursuing litigation an overwhelmingly impractical option”.²⁷⁵

Although the number of legal practitioners continues to grow, it has not led to greater competition, lower fees, more affordable legal assistance and greater access to justice.²⁷⁶ In addition, as noted above, the civil litigation process is time-consuming, resulting in many plaintiffs electing not to institute their claims at all.²⁷⁷ As a result, taking into account the high cost and time-consuming nature of litigation in this regard, private insurance has assumed an increasingly important role, relieving victims of loss of their financial burden.²⁷⁸ However, considering the levels of poverty in South Africa, the vast majority of citizens are probably not in a position to afford insurance.

270 Dugard & Drage 2013: 2.

271 See, also, Holness 2013: 129–130.

272 Klaaren 2014: 2.

273 *Ibid.*

274 Law Society of South Africa 2015: 25, 49.

275 Dugard & Drage 2013: 2.

276 Wallis 2011: 33–37.

277 Sugarman 1985: 558–622. See, also, Sugarman 1987: 796: “When someone now makes a tort claim, rather than obtaining swift justice, he often will wind up waiting years before his suit is resolved. Moreover, he frequently will come away from the experience far more frustrated than satisfied. A victim today rarely can expect to recover directly from the individual who injured him. Instead, he will recover from an insurance company or a large impersonal enterprise, such as a corporation or a government entity.”

278 Cane 2006: 461–499; Deakin, Johnston & Markesinis 2013: 51–59; Hedley 2013: 249.

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The concern over the costly and time-consuming nature of civil proceedings is not new to the South African legal landscape. In its *Report on Compensation to Workmen* in 1904, the Select Committee already took note of the problems raised by employees that the litigation process “has undoubtedly lengthened the time between the occurring of the accident and the receiving of the compensation”²⁷⁹ and that the proposed Workmen’s Compensation Act of 1905 had to provide compensation “to poor men quickly, and as cheaply as possible”.²⁸⁰ The same sentiment was echoed when the legislature decided to introduce a no-fault based compensatory system for occupational injuries and diseases via COIDA: “In exchange for [forfeiting his common-law claim against his employer, the employee] gets an immediate remedy in the form of a statutory right to compensation without having to prove negligence on the part of the employer.”²⁸¹

In its judgement relating to the constitutionality of the abolition of the motor vehicle accident victim’s common-law claim against a wrongdoer in *Law Society of South Africa v Minister for Transport*,²⁸² the Constitutional Court commented on the nature of the civil litigation process:

The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk.

The legislature has aimed to remedy this concern by, among other things, introducing a no-fault basis for compensation of harm arising from motor vehicle accidents. Furthermore, as the preamble to the proposed RABS indicates, the legislature has identified the “need to simplify claims procedures, reduce disputes and create certainty by providing defined and structured benefits ... and there is a need to establish administrative procedures for the expeditious resolution of disputes that may arise and to alleviate the burden on the courts”.

Lastly, the time-consuming nature and high transaction costs characteristic of the civil litigation process was also taken into account when drafting the provisions of the CPA that relate to its regulatory framework and access of justice.²⁸³ With the introduction of the CPA, the legislature has changed not only the substantive law relating to defective consumer products, but it also effected changes to the administration of justice insofar as the adjudication of consumer rights and disputes involving consumers and business are concerned. For example, under the new regulatory framework, the National Consumer Tribunal (NCT) and the

279 Select Committee 1904: 12.

280 *Idem* at 2.

281 Proceedings of the Extended Public Committee 1994: col 12306.

282 2011 (1) SA 400 (CC) par 17.

283 Van Eeden 2013: 93–105, 387–447.

National Consumer Commission (NCC) have important roles.²⁸⁴ While the NCT is an adjudicative body, empowered to adjudicate on applications and allegations of prohibited practice,²⁸⁵ the NCC is primarily an investigative body that aims to enforce the provisions by the Consumer Protection Act (CPA).²⁸⁶ The establishment of these bodies, as well as consumer courts, may be regarded as a response to the need for a cheaper, speedier, more flexible and informal regulatory system.²⁸⁷

It is argued that the nature of the civil litigation process, notably its potential under-compensation of harm and the accompanying high transaction costs, has played a significant role in justifying the legislative reform of the law of delict in the areas where the need for this type of reform is most pressing and where the effect of reform can be most widespread and cost effective.

2.5 The ability of the legislature to regulate liability more comprehensively than the judiciary

Another consideration that have justified the statutory development of the law of delict is the ability of the legislature to regulate liability more comprehensively than the judiciary. In *Wagner*, the Supreme Court of Appeal took account of the debate surrounding the potential introduction of a strict liability regime for harm caused by defective consumer products. The court noted that product liability reform in foreign jurisdictions had largely been achieved through legislation and ultimately concluded that South Africa should adopt the same route: “If strict liability is to be imposed, it is the Legislature that must do it.”²⁸⁸ In its judgement, it held that the legislature was better equipped to investigate the variety of questions that would have to be answered prior to introducing a strict liability regime in the context of defective products:²⁸⁹

1. What products should be included ... when it comes to determining the extent of the liability? 2. Is a manufacturer to include X, the maker of a component that is part of the whole article manufactured by Y; and which is liable if the component is defective? 3. Does

²⁸⁴ See s 69 of the CPA.

²⁸⁵ The NCT can make the following orders: grant interim relief, declare conduct to be prohibited, issue an interdict for prohibited conduct, impose administrative fines, confirm consent orders, condone non-compliance with its rules and procedures, confirm an order against an unregistered person to cease engaging in certain activities, cancel or suspend a registrant’s registration, require payment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement and any order required to give effect to a right set out in the Act.

²⁸⁶ It seeks to initiate and receive complaints, refer complaints for dispute resolution, investigate and evaluate alleged prohibited conduct and offences, conduct interrogations, issue and enforce compliant notices and make referrals to the NCC. In practice, however, many of these functions are now fulfilled by the industry ombuds.

²⁸⁷ Van Eeden 2013: 98–99.

²⁸⁸ 2003 (4) SA 285 (SCA) pars 30–36.

²⁸⁹ *Ibid.*

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defect mean defect in the making process only or, in the case of a designed article, also a defect of design? Should it include the failure, adequately or at all, to warn of possible harmful results? 4. Should the liability be confined to products intended for marketing without inspection or extend even to cases where the manufacturer does, or is legally obliged to, exercise strict quality control? 5. What relevance should the packaging have – should liability, for example, be limited to cases where the packaging precludes intermediate examination or extend to cases where the manufacturer stipulates that a right such as a guarantee would be forfeited if intermediate examination were made? 6. Is a product defective if used innocuously on its own, but which causes damage when used in combination with another's product? 7. What defences should be available? ... 8. Should the damages recoverable be exactly the same as in the case of the Aquilian claim or should they be limited, as in some jurisdictions, by excluding pure economic loss or by limiting them to personal injury?

The court held that single instances of litigation could not provide the opportunity for conducting the thorough investigation, analysis and determination that was necessary to produce a cohesive and effective structure by which to impose strict liability.²⁹⁰ The court's recommendation was ultimately heeded and the legislature, with the benefit of more empirical data, time and product liability expertise, enacted the CPA.²⁹¹

In addition to the CPA, COIDA and the RAF Act are further examples of where the legislature reformed major areas of the law of delict. The enactment of these statutes enabled major legislative reform of the law of delict, as opposed to incremental judicial development of an element of delictual liability. It is submitted that, whenever large-scale development of a specific area within the law of delict may be required by specific policy-based considerations as those discussed in parts 2.1–2.3 above, it appears more appropriate to follow the legislative route. Indeed, this much was also recognised by the Constitutional Court, which stated as follows:²⁹²

In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the following *dictum* ... “Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. ... In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. ... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”.

290 *Ibid.*

291 From a comparative perspective, see, also, *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 305: “I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts.”

292 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) par 36 (references omitted).

2 6 The need to avoid arbitrary outcomes

In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*,²⁹³ Brand JA reaffirmed the fact that any “legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose We therefore strive for certainty”. This part prompts us to consider how the need to avoid arbitrary outcomes in litigation, and thus to ensure legal certainty, could motivate law makers to develop the law of delict (or in common-law parlance, tort law).

Scholars have argued that the tort system is essentially a “lottery”²⁹⁴ and that it “produces arbitrary outcomes”.²⁹⁵ Sugarman summarises this argument as follows:

[W]hat count considerably are: the talents of the lawyer one happens to have; the tenacity of the defendant (or insurance adjuster) one happens to be up against; whether the defendant happens to be a motorist, a company, or a governmental entity; how attractive (but not too attractive) and how well spoken (but perhaps not too well spoken) the claimant happens to be; what race the claimant is; what state and community the victim lives in; how well one is able to hold out for a larger settlement; the whim of the jury if the case gets that far; and whether one is lucky enough to have available the right sort of witnesses or other evidence of the injury and the defendant’s wrongdoing. In short, our current tort system is not a system of justice; it is a lottery.

From this perspective, the imposition of tortious (or in our case, delictual) liability and the payment of damages are impacted on by considerations unrelated to what the parties deserve.²⁹⁶ The outcome of litigation may be substantially determined by contingent factors, including the availability of evidence, the quality of counsel, the limits of insurance coverage, the financing of litigation, the whims of judges (and, in common-law jurisdictions, juries), and many other factors that are not conducive to the consistent and principled application of law.²⁹⁷

The argument that the tort system is unfair and unpredictable has been advanced to justify reform proposals in some way or the other. For example, in New Zealand, these arguments eventually won the day and secured the development of the law relating to the compensation of personal injuries arising from accidents. In its 1967 report, the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand asserted that “[t]he toll of personal injury is one of the disastrous incidents of social progress”.²⁹⁸ The Commission identified a number of weaknesses with the mechanisms available for dealing with personal injury, including particular

293 2009 (2) SA 150 (SCA) pars 16–17.

294 Sugarman 1987: 796.

295 Franklin 1967: 774: “[T]he fault system is little more than an immoral lottery for both plaintiffs and defendants.” See, also, Atiyah 1996: 143.

296 Lytton, Rabin & Schuck 2010: 269.

297 *Idem* at 268–269.

298 New Zealand Law Commission 2008: 3.

problems with tort law. One of the problems with tort law in cases of personal injury included “the difficulty of establishing liability for loss and of attaching a monetary value to that loss, resulting in the law being seen as, at best, uncertain and in some cases arbitrary and capricious”.²⁹⁹ Eventually, the legislature introduced the Accident Compensation Act in New Zealand in 1972, thereby abolishing the tort claim for harm arising from accidents.

Arguably, the statutory development of the law of delict by the CPA, COIDA and the RAF Act has been motivated by similar considerations. For instance, with regard to the introduction of a strict liability regime for defective consumer products, the Supreme Court of Appeal implied that such a development should be driven by the legislature, because it could provide a more principled, logical and fair solution for the particular problem.³⁰⁰

Furthermore, in line with the arguments raised in foreign jurisdictions, the statutory development of COIDA and the RAF Act (and the proposed RABS) appears to be motivated by the general consideration to ensure that the outcome of litigation is not influenced by the contingent factors mentioned above. After all, the likelihood of a victim receiving compensation under those statutes is not dependent on the quality of counsel, the limits of insurance coverage, the financing of litigation, or the whims of a particular judge.

3 Conclusion

The legal position surrounding crime victim compensation may be described as unsatisfactory.³⁰¹ As indicated in the introduction to this contribution, the current compensatory regime is characterised by various theoretical and practical problems. From a practical and financial perspective, the continued state delictual liability for harm arising from crime means that more and more taxpayer funds, which were earmarked to be used in crime prevention campaigns, are used to satisfy civil claims. If this trend continues, less money will be available for combating crime, resulting in more litigation against the state. Ultimately, this cycle of ever-expanding state delictual liability threatens the state’s ability to combat crime and to comply with its constitutional obligations to protect its citizens. From a theoretical point of view, the expansion of state delictual liability is problematic, not the least because it may produce uncertainty and arbitrary outcomes in future litigation.³⁰²

299 *Ibid.*

300 *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) pars 28–31.

301 See, generally, Wessels 2018: 31–127.

302 A full and thorough analysis of the theoretical concerns associated with this development falls well outside the scope of this contribution. However, see the comments made in part 1 *supra*, as well as the sources cited in the footnotes there, for a detailed discussion of these problems.

Against this background, it may be considered whether there is an alternative method to provide compensation for crime victims. One particular alternative that has been adopted in a variety of foreign jurisdictions is the establishment of a statutory compensation fund for crime victims. Should such an alternative be adopted by the South African legislature, it will amount to the statutory development of the law of delict insofar as the compensation of a specific group of victims is concerned. However, for the reasons mentioned in the introduction to this contribution, the adoption of such an alternative and subsequent development of the common law requires a justifiable theoretical framework.

To establish such a framework, this contribution has examined the historical backgrounds of important statutory developments within the law of delict. This investigation has identified legal and public policy considerations that have justified the earlier instances of legislative reform. It is proposed that these considerations may also aid in providing the necessary theoretical framework on the basis of which the law of delict may justifiably be developed in the future, at least insofar as the issue of compensation is concerned.

The first consideration that was highlighted was the role played by the increased risk of harm and the associated risk of no recovery of compensation. This consideration was paramount in developing the law of delict's compensatory response to victims of motor vehicle accidents, defective consumer products and occupational injuries and diseases. Although there is an undeniable utility associated with motor vehicle transportation, enlarged labour forces and a growing manufacturing sector, these benefits were accompanied by a substantial increase in the risk of harm arising from those sectors. This required the South African legislature to produce a solution in which these activities were permitted, but only on the condition that the most appropriate enterprise was saddled with the cost of the risks it produced. Ultimately, it decided that, in order to more effectively secure the compensation of a victim's harm, the compensatory mechanism would have to be reconfigured within a statutory context.

The decision to do so was informed also by the significant desire to promote social security. Prior to the advent of the Constitution, the achievement of greater social security was already identified as a clearly pronounced goal that justified the statutory interference with the common law of delict. The legislature's desire to provide a variety of accident victims with remedies that gave quicker and more cost-effective access to compensation and to distribute the risk of certain risk-related activities throughout society may therefore be regarded as an important consideration that have justified the development of the law of delict in a variety of contexts.

With the enactment of the Constitution, and the entrenchment of the right to social security as a fundamental human right, the legislature has openly committed itself towards the notion of spreading risk to promote social inclusion and social solidarity. The statutory establishment of compensation funds in respect of motor vehicle accidents and occupational injuries and diseases – arguably two spheres in

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which most individuals are most frequently exposed to the risk of harm – achieves these goals.

Furthermore, the evidentiary difficulties involved in satisfying the common-law requirement of fault, specifically in the form of negligence, has been criticised as imposing a significant stumbling block on the pathway to obtaining compensation. Otherwise deserving victims of harm have been struggling to satisfy this requirement and, where the matter has been argued in court, a clear preference has been given for the reform to be driven by a legislative process. Statutory reform provides an advantage that single instances of litigation do not: it enables all the relevant stakeholders to partake in the thorough processes of investigation, analysis and determination that are required to produce a cohesive and effective structure for the development of the law of delict.

By removing fault as a requirement for obtaining compensation, victims of workplace injuries and diseases and defective consumers now have a greater theoretical chance in succeeding with finding redress for the harm they have suffered. Similarly, as indicated above, the proposed RABS will provide comparable opportunities. In addition to achieving greater compensation levels than the fault-based system of delictual liability, the statutory development of the law of delict have clearly been informed by considerations of time and money.

Other general considerations that have been used to justify the statutory development of the law of delict has also been considered justified where it has enabled a more time-efficient and cost-effective route to compensation and where it has succeeded in providing a principled, consistent approach to compensation.

It is proposed that the legal and public policy considerations identified in this contribution aid in providing a justifiable theoretical framework for the statutory development of the law of delict insofar as compensation of victims is generally concerned. However, by itself it does not yet justify why crime victims should be singled out as a specific category of victims that may come into consideration for statutory compensation (as opposed to any other category of victim). Indeed, as alluded to in the introduction of this contribution, where statutory compensation funds for crime victims have been enacted, some concern has been expressed about the singling out of this specific group of victims for preferential treatment.

Attention must now be given to the question whether the specific development of the law of delict through the enactment of a statutory compensation fund for crime victims can be justified on the basis of the considerations identified in this contribution.

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Road Traffic Act, 1988 (c 52)

Sale of Goods Act, 1979 (c 54)

Germany

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THE JUDICIAL OFFICERS OF THE TRANSVAAL HIGH COURT, 1877–1881

Liezl Wildenboer*

ABSTRACT

The Transvaal High Court was established in 1877. This was during the British annexation of the Transvaal (or Zuid-Afrikaansche Republiek), which ended in 1881 with the signing of the Pretoria and (and later) London Conventions. The first judge of this court, John Gilbert Kotzé, reported some of the judgements of this court for the period from 1877 to 1881, where he also mentions the names of the persons appointed as judicial officers of the court. This contribution takes a closer look at the official opening of the court and at the various persons who served the court during this period either as members of the bench, or in the capacity of Attorney General or of Registrar and Master.

Keywords: Zuid-Afrikaansche Republiek; Transvaal High Court; judicial officers; John Gilbert Kotzé; Jacobus Petrus de Wet; Lewis Peter Ford; Eduard Johan Pieter Jorissen; Christian George Maasdorp; William Boase Morcom; Hendrik Willem van Breda; Henry Rider Haggard; Richard Kelsey Loveday; Pretoria Bar; Attorney General; Registrar and Master of the Transvaal High Court

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1 Introduction

The first High Court of the Transvaal was established in 1877,¹ shortly after the first British annexation of the Zuid-Afrikaansche Republiek (for purposes of this contribution, “the Transvaal”)² that took place on 12 April of that year.³ It was eventually replaced with the “Hoog Geregts-hof, Z.A. Republiek” (the High Court)⁴ after the Republic regained its independence on 8 August 1881 as a result of the signing of the Pretoria Convention,⁵ which ended the First Anglo-Boer War (1880–1881).⁶ The first session of the High Court took place in May 1877.⁷ Judge John Gilbert Kotzé,⁸ who was appointed by Sir Theophilus Shepstone⁹ as the first judge of

- 1 In terms of art 1 of the Proc of 18 May 1877, published in Jeppe & Kotzé 1887: 703–707. Shepstone issued it in his capacity as Administrator, but the measure itself was drafted by Justice Kotzé: see Kotzé 1934: 422–427. On the Transvaal judicial system before 1877, see Hahlo & Kahn 1960: 228–233; Van der Westhuizen & Van der Merwe 1977a: *passim*.
- 2 This territory was also known as the South African Republic. See Wildenboer 2011: 339–340 n 2 for more details on the various names of this territory. Usually, I prefer to use the term “Zuid-Afrikaansche Republiek” or its abbreviated form “ZAR” to avoid confusion with the later province of the Transvaal and the Republic of South Africa after 1961. However, for purposes of this contribution, when referring to the territory or to the High Court of this territory, the term “Transvaal” will be used, since this was the name used during the annexation, even though the Boers reverted to the old name, the Zuid-Afrikaansche Republiek, after the signing of the Pretoria Convention.
- 3 Earlier that year, President Burgers had announced the intended establishment of the High Court as part of the reform of the judiciary. See Kew 1979: 27–28. However, before these plans could be implemented, Sir Theophilus Shepstone annexed the ZAR on 12 Apr 1877 on behalf of the British government. See Proc of 12 Apr 1877, published in Eybers 1918: 448–453 doc 198. See, also, Schulze 2010: 106–107; Van der Merwe 2017b: 153–158.
- 4 See Proc of 9 Aug 1881 in *Staats-Courant der ZA Republiek* of 8 Aug 1881. Both the 1877 (see n 1 *supra*) and the 1881 proclamations used the title “Hoog Geregts-hof”, which may be translated as “Supreme Court” or “High Court”. However, since Kotzé recorded its judgements as those of the High Court, this latter term will be used throughout this contribution.
- 5 For a copy of the Pretoria Convention, see *British Parliamentary Papers* 1971: 511–518, C 2998; Eybers 1918: 455–463 doc 200. In terms of the Pretoria Convention, “self-government [was] restored to the inhabitants of the Transvaal Territory, subject to the suzerainty of [Britain]”. The Convention was ratified by the Transvaal *Volksraad* on 25 Oct 1881, but was later replaced by the London Convention, dated 27 Feb 1884, which restored independence to the Transvaal. For a copy of the London Convention, see Eybers 1918: 469–474 doc 204. For more on the First Anglo-Boer War in general, see Grobler 2018: *passim*.
- 6 The English call it the Boer (or South African) War, while the Boers call it the English War or the First Freedom War. Seeing that both parties participated, “First Anglo-Boer War” is preferable. The Second Anglo-Boer War took place from 1899 to 1902.
- 7 See part 2 *infra*.
- 8 See part 3 1 1 *infra*.
- 9 For more on Theophilus Shepstone, see Gordon & Kotzé 1968: 746–753. Shepstone (1817–1893) was born near Bristol, England. He came to South Africa at an early age with his parents as part of the group known as the 1820 British settlers. His father’s missionary work with Reverend William Shaw enabled Shepstone to become fluent in both Xhosa and Zulu. This is one of the reasons why he was later appointed as the Natal Administrator of Bantu Affairs. He was knighted twice, in 1871 and in 1876. He retired in 1880 and died in Pietermaritzburg.

the court, reported its judgements delivered between July 1877 and June 1881 in a volume entitled *Cases Decided in the High Court of Transvaal Province, with Table of Cases and Alphabetical Index (Kotzé's Reports)*.¹⁰

Much has been written on the High Court of the Transvaal, its jurisdiction and powers,¹¹ and on the tension between the judiciary and the executive that eventually resulted in the constitutional crisis of 1897.¹² The purpose of this piece is not to reconsider these matters. Instead, this contribution briefly investigates the opening of the first High Court of the Transvaal and provides some insight into the lives of those members of the bench and other judicial officers who served in the court during this period. The intent here is not to compile a detailed biography of each of these judicial officers, but rather to provide an overview of the various personalities who were actively involved in the day-to-day activities of the court during the first four years of its existence.

2 The opening of the court

The first session of the High Court took place on Wednesday, 23 May 1877.¹³ A full account of the event was published at the time in a local newspaper, *De Volksstem*,¹⁴

10 Kotzé 1885: *passim*; Van Niekerk 2013: 134–135. See, also, n 57 *infra*.

11 See Proc of 18 May 1877, published in Jeppe & Kotzé 1887: 703–707. See, also, Van der Westhuizen & Van der Merwe 1977b: 240–243.

12 For a recent analysis of the constitutional crisis and the events leading up to it, see Van der Merwe 2017a; Van der Merwe 2017b; Van der Merwe 2018a; and Van der Merwe 2018b.

13 Kotzé 1934: 430 (and, following him, Roberts 1942: 367 and Van der Westhuizen & Van der Merwe 1977b: 241) incorrectly gives the date as 22 May. He may be forgiven this oversight since he wrote his memoirs only sixty years later. For a copy of the first page of the minutes of these proceedings in Kotzé's own handwriting, see Roberts 1955: 176.

14 See *British Parliamentary Papers* 1971: 488–489, C 2891, Despatch of Lanyon to Earl of Kimberley, 1 Feb 1881 at 488–489 for a description of the circulation of *De Volksstem* in 1881. Lanyon estimated that only around 1 000 copies of the newspaper were printed each week, and that only 3.5 per cent of the Dutch-speaking inhabitants read the paper each week. This he put down to various factors, including his suspicion that nearly half of the printed copies were sent to the outlying towns and to towns outside the borders of the Transvaal; to the non-existence of reading rooms; and to the logistical problems in distribution the newspaper due to the distances between farms. Despite this supposedly low number of readers, Lanyon still found “a series of seditious articles, culminating in a rebellious exhortation” published in the newspaper to have “contributed largely to bring about discontent and to sow the seeds of the rebellion that followed”. Theal 1919 vol 2: 114–115 provides more details on one of these “seditious articles”. He recounts that the editor, Celliers, was arrested after reporting that 110 inhabitants of Wakkerstroom had announced that they would not have any dealings with the British, nor pay their taxes. Celliers was tried for sedition in the Magistrate's Court in Pretoria. He was found guilty and sentenced to one month in prison, as well as to a fine of £25. However, Theal does not view this as the principal event that resulted in the war that followed. Rather, he blames the incident of Bezuidenhout's wagon, where a group of 300 burgers under Commandant Piet Cronjé forcefully removed the wagon on the morning that it was due for sale in execution to pay Bezuidenhout's outstanding taxes to the British government. Word of this incident spread fast and the number of protesters soon grew to 1 500. The matter culminated in a standoff between Kruger and the colonial secretary,

and is worth recounting here.¹⁵ The proceedings commenced at 10h00 at the *Volksraad* Hall,¹⁶ there not being an official court building at the time.¹⁷ Kotzé remembered¹⁸

George Hudson. For more on Celliers and the history of *De Volksstem*, see Nienaber 1972: 128–129; Behrens 1955: 335–342. Johannes François Celliers (1839–1895) was born in Paardenberg, Malmesbury. He received his basic education in the Paarl and became a journalist at *Het Volksblad* in Cape Town at the age of twenty-four. In 1872, President Burgers invited Celliers to establish a newspaper in Pretoria. Celliers arrived in Pretoria in Apr 1873, where he soon acquired the contract for the printing of the *Staats Courant* and other state publications from J Cooper Rouse. He established his own newspaper, *De Volksstem*, the first issue of which was published on 8 Aug 1873. Celliers was a fierce supporter of President Burgers, and *De Volksstem* was a pro-governmental publication. Due to his trial and the war, *De Volksstem* was not published between 20 Dec 1880 and Apr 1881. After the war, Celliers continued with *De Volksstem*, but also became increasingly involved in politics, and finally sold the newspaper to the government in 1888 for £20 000. He was married to Magdalena Bisseux and six children were born of the marriage. The eldest son was the well-known Afrikaans poet, Jan FE Celliers, and the second daughter, Susanna Wilhelmina Celliers, would later become the first wife of the well-known sculptor, Anton van Wouw.

- 15 See 30 May 1877 *De Volksstem*. All quotes in this part are taken verbatim from the newspaper.
- 16 Presumably, this is the so-called *Goewermentsgebou* (also known as the *Volksraad* building or government building, not to be confused with Government House, also referred to as the Presidency), which was built in 1865 (see Engelbrecht 1955: 15) and of which an image appears in Meiring 1955: 151 and Grobler 2018: 15. In the style of the time, the first *Goewermentsgebou* consisted of a simple rectangular, single-storey construction with a thatched roof and an open stoep or patio. It was situated on the south-western corner of Church Square, where the *Raadsaal* was erected in 1889: see Grobler 2018: 15. For a description of this and other structures, see Meiring 1955: 158–161. On the early architectural style of the Transvaal before the 1890s in general, and the philosophy behind the town planning at the time, see Holm 1998: 56–64. The early lay-out and architecture of Pretoria was based on that of Graaff-Reinet, from where many of the Voortrekker families had come (Holm 1998: 63; see, also, Meiring 1955: 157).
- 17 The Court would eventually be housed in a building known as the High Court of Justice, situated at the corner of Bureau Lane and Andries (today, Thabo Sehume) Street; a sketch of it appears in Roberts 1955: 188. In 1897, the building of the Palace of Justice, situated on the corner of the current Palace and Madiba streets, commenced. The architect was Sytze Wierda, who hailed from the Netherlands. The foundation stone was laid by Paul Kruger himself on 8 Jun 1897, under which was placed “a copy of the Constitution of the ZAR, a copy of each of the newspapers then in circulation in the Republic, a copy of the ‘Government Gazette’, a complete set of the coins of the Republic and a copy of the plans of the building”: see Picton-Seymour 1977: 277–278. The Palace of Justice was completed in 1899, although the interior was only completed after the Second Anglo-Boer War, during which the building was used as a hospital. See Meiring 1955: 162–163. For the floor plan and a sketch of the frontal view of the Palace of Justice, see Holm 1998: 76. For a more detailed description of the interior and exterior of the Palace of Justice, see Picton-Seymour 1977: 278–279.
- 18 This article draws extensively on the first of the two volumes of his memoirs, published almost sixty years later (Kotzé 1934). Apart from making entertaining reading, it is perhaps also good to know that these two volumes indeed reflect events and facts with sufficient accuracy. See Bergh 2013: 107 and 120, who, after analysing some of the judge’s reminiscences regarding Paul Kruger and finding that Kotzé may have been influenced in his views on Kruger due to personal biases, nevertheless concludes that the volumes provide “the researcher with valuable historical information” due to the fact that Kotzé “was meticulous in writing down his observations” and that he consulted other independent sources at the time of writing to confirm his memories.

that there was “neither pomp nor music on this occasion, for Themis delighteth not therein, but in truth in judgment”.¹⁹ The newspaper observed:

Of course, there was not much of a Bench yet, the Bench being a chair placed behind the desk of the Chairman of [the] Volksraad. In front of this desk a table was placed for the attorneys, of whom thirteen were present, including the Acting Attorney General.²⁰ The attendance of the public was not large. At the appointed hour His Excellency the Administrator²¹ and Aide-de-camp, Col. Brooke, entered the hall, followed by Mr. Justice Kotzé, who took his seat on what we shall by courtesy call the Bench.

Also present were HW van Breda²² in his capacity as the newly appointed Master and Registrar of the High Court, and CJ Juta²³ in his capacity as the newly appointed Sheriff of the High Court.²⁴ Van Breda read out the Proclamation of 18 May 1877 regarding the constitution of the Court, and then Justice Kotzé administered the oath to both Van Breda and Juta.

19 Kotzé 1934: 430.

20 LP Ford. See part 3 2 1 *infra*.

21 Sir Theophilus Shepstone. See n 9 *supra*.

22 See part 3 3 1 *infra*.

23 I could not find much on Coenraad Jacobus Juta. He was the younger brother of the better-known Cape Town bookseller and founder of the publishing company bearing the family name, Jan Carel Juta (for more on whom, see Arkin 1972: 352–353). Coenraad was born on 3 Apr 1827 in Zaltbommel, Gelderland, in the Netherlands. He married Renette (Reinetta) Johanna Margaretha Biccard on 12 Nov 1857 in Cape Town; ten children were born of this marriage. See *sv* “Coenraad Jacobus Juta” *Geni* (6 Jun 2019) available at <https://www.geni.com/people/Coenraad-Jacobus-Juta-SV-PROG/6000000021986566362> (accessed 8 Nov 2019); and *sv* “Coenraad Jacobus Juta” *Wikitree* (17 Jul 2019) available at <https://www.wikitree.com/wiki/Juta-4> (accessed 8 Nov 2019). He accepted the position of Secretary of State of the ZAR a week before the annexation, on 5 Apr 1877: see National Archives Repository (Public Records of Former Transvaal Province and its predecessors as well as of magistrates and local authorities (hereafter “TAB”)) SS 233 R1206B/77; and took his oath two days later: see TAB SS 233 R1207B/77 (dated 7 Apr 1877). The first official letter written in his new capacity as Sheriff of the High Court is dated 28 May 1877, and concerned his request for more information regarding his new position, namely on the duties of his office, on messengers of the courts and on fees: see TAB SS 237 R1996/77. A year after his appointment as Sheriff, he requested a raise: see TAB SS 278 R1343/78 (dated 1 May 1878). He repeated this request a year later: see TAB SS 341 R1533/79 (dated 29 May 1879). In Mar 1883 he appointed his son and namesake as clerk to his office: see TAB SS 800 R1334/83 (dated 29 Mar 1883). He acted as Registrar of the High Court on occasion: see TAB SS 843 R4051/83 (dated 29 Aug 1883) and TAB SS 1197 R1527/86 (dated 3 Apr 1886). In 1884, two locals named Simpson and Schappert sent a testimony that Coenraad had performed his duties well: see TAB SS 895 R485/84 (dated 29 Jan 1884). Other documentation sent in his official capacity concerned a request for permission to order a register for civil cases: see TAB SS 944 R2526/84 (dated 28 May 1884); and a request for office furniture: see TAB SS 986 R4536/84 (dated 26 Sep 1884). In 1887 and probably due to old age (Coenraad was almost sixty), he requested that his son stand in for him as acting Registrar in the criminal circuit court: see TAB SS 0 R1986/87 (dated 29 Mar 1887). He died in Pretoria two years later, on 8 Sep 1889.

24 Article 8 of the Proc of 18 May 1877 provided for the establishment of the office of the Master and Registrar, as well as for the office of the Sheriff (also known as the High Sheriff or the *Hoofdbaljuw*).

After this, the acting Attorney General, LP Ford, petitioned the Court on behalf of himself and each of the other attorneys present, to be admitted as advocates and/or attorneys.²⁵ All the lawyers present were then admitted and duly sworn in by the court in accordance with their petitions, either as advocates and attorneys (that is, as members of the Bar),²⁶ or as attorneys only (that is, as members of the Side- Bar).²⁷ At this point, Justice Kotzé felt it necessary to observe that “no reflection was cast upon those who had been admitted as Attorneys only” and that they had been recommended as such by the Board of Examination at its meeting the previous week.²⁸

- 25 Previously, the Transvaal had allowed for a dual-capacity legal system, meaning that attorneys could practise as advocates and *vice versa*. However, this changed after the annexation. In terms of art 9 of the Proc of 18 May 1877, a divided legal profession was established. Nevertheless, there were certain exceptions: first, those lawyers who had practised in both branches before this proclamation could apply for admission as both (art 10 of the Proc); secondly, members of the Bar and Side-Bar were permitted to move between the two branches subject to a six-month quarantine. See Wildenboer 2010: 219–220; Wildenboer 2011: 349–350.
- 26 The ten individuals sworn in as advocates and attorneys were Ford (see part 3 2 1 *infra* – here admitted as advocate, attorney, notary public, conveyancer and sworn translator); Stephanus Jacobus Meintjes (admitted as advocate, attorney, notary public, conveyancer and sworn translator); Abraham Isac Munnich (admitted as advocate, attorney, notary public and conveyancer); Julius Franck (admitted as advocate, attorney and notary public); Johannes van Eck (admitted as advocate, attorney and notary public); Johan Carel Preller (admitted as advocate, attorney, notary public, conveyancer and sworn translator); Henry William Alexander Cooper (admitted as advocate and attorney); Mauritz de Vries (admitted as advocate, attorney, notary public and conveyancer); Paulus Nijhoff (admitted as advocate, attorney and notary public); and Pierre Jean Louis Eckhout (admitted as advocate and attorney). See 30 May 1877 *De Volksstem*; Roberts 1995: 176–179.
- 27 The three individuals sworn in as attorneys only were Francis Frederick (Frank) Zeiler (also admitted as conveyancer); Adam Francis Schattenkerk; and Hendrik Willem van Rossem. See Roberts 1955: 179.
- 28 The Board of Examinations had also undergone a complete change of membership. Before the annexation, the previous members had been the State Attorney (EJP Jorissen), I Munnich and JC Preller. (Preller had resigned; Munnich was not available; and Jorissen had left the country in May 1877 for London as part of the two-man deputation – the other member being SJP Kruger – to petition the British government regarding the independence of the Transvaal: see Kruger 1975: 76–93; Leyds 1906: 271–272. They had five interviews with the British Minister of Colonies, Lord Carnarvon, but could not persuade him to host a referendum for or against the annexation, or that they represented the majority of the Transvaal inhabitants: see Grobler 2018: 12–13.) As their successors, the British government appointed Justice Kotzé as chairman of the Board, as well as SJ Meintjes and M de Vries. Their first meeting had taken place a week earlier, on Thursday, 17 May 1877: see 16 May 1877 *De Volksstem*. A year later, a new Board of Examiners in Law and Jurisprudence was established, and would constitute four members, namely the judge of the High Court, the Attorney General and two advocates to be nominated by the government: see GN 76 *Transvaal GG* of 4 Jun 1878, which also set out the rules for the examination, as well as the subjects that candidates would be examined on. The two advocates then appointed as members of the Board, namely SJ Meintjes and HWA Cooper, were announced two weeks later: see GN 79 *Transvaal GG* of 18 Jun 1878. For more on the Transvaal Board of Examiners, see Wildenboer 2011: 350–354.

Ford then read a short address on behalf of the Bar and Side-Bar, welcoming the new judge, and pledging their willingness to support him in order to “forward the ends of justice in this country”.²⁹ Kotzé responded with his own address, expressing gratitude for the welcome and remarking that the establishment of the new High Court was in accordance with the wishes of the community.³⁰ He then impressed upon those present the great responsibility resting on their shoulders:

The administration of Justice in this territory has, to a great extent, hitherto existed but in name. The old courts now abolished, were wholly unsuited to the growing wants and circumstances of the community; and in many instances, as I have been informed on good authority, there has been a gross miscarriage of justice. ... You occupy a very honourable position, and I have no doubt you will practice your calling with that integrity and ability, which are its due. An able bar is quite as necessary for the proper administration of justice as a well constituted bench is – the one without the other would practically be useless.

The court then proceeded with hearing its first motion, an *ex parte* application for restraining the respondent from removing wood from the farm, Louwsbaken, which was mortgaged to the Cape Commercial Bank.³¹ Kotzé J granted an interim order until its next sitting on 5 July, and the court was adjourned.

29 The full address appeared verbatim in the newspaper: “May it please your Lordship.— We the undersigned, members of the Bar and Side Bar of your hon’ble Court, beg respectfully to welcome your Lordship on this momentous occasion of the opening of the first High Court, an event long looked forward to and desired not only by us, but also by the enlightened portions of the community. The appointment of your Lordship as our first Judge has given us unbounded and heartfelt satisfaction on account not only of your Lordship’s birth and education, but also by reason of the golden opinion which your Lordship has already won in the Cape Colony. Although so short a time amongst us, we have already learnt to honour and respect you, and we sincerely trust that the good understanding which has arisen between us may continue. We pledge ourselves to support your Lordship in your endeavours to forward the ends of justice in this country, and hope that your Lordship will ever find us willing to submit to your wishes and desires in attaining that most desirable object. In conclusion we trust your Lordship may long be spared to us, and as you are about leaving for the Cape Colony for your wife and family, we wish you a pleasant and safe journey and a speedy return to our midst.— We have the honor [signed by the Bar and Side Bar].” See 30 May 1877 *De Volksstem*.

30 Similar to Ford’s reference to the “enlightened portion of the community” in his address (see n 29 *supra*), Kotzé also qualified this as being “the intelligent portion of the community”. This clearly implied that not everybody was in favour of the abolishment of the old courts or the establishment of the new High Court.

31 The case of *Durham v Fleischmann* is unreported. Advocate SJ Meintjes represented the applicant, who was the manager of the bank.

3 The first judicial officers of the Transvaal High Court

3 1 The bench

3 1 1 John Gilbert Kotzé³²

Kotzé was born in Cape Town on 5 November 1849. He was educated at the *Tot Nut van het Algemeen* Institute³³ and later at the South African College from 1864 to 1868. He then left for England to matriculate and to read for law at the University of London. He was admitted to the Inner Temple in 1872 and called to the Bar on 30 April 1874. He soon after returned to South Africa and was admitted to the Cape Town Bar on 18 August 1874. In June 1876 he moved his practice to the Bar of the Eastern Districts Court in Grahamstown. Less than a year later he was offered the position of Chief Justice of the Transvaal by President Burgers,³⁴ and was appointed the first judge of the High Court of the Transvaal on 19 May 1877. However, there is a bit more to this appointment than first meets the eye.³⁵

As part of his judicial reform programme, President Burgers had originally proposed a three-judge bench for the High Court. He had offered the position of Chief Justice to Kotzé, who accepted the position.³⁶ However, when Kotzé eventually arrived in Pretoria by train on 28 April 1877,³⁷ the Republic was no longer independent, and Burgers had been deposed.³⁸ Probably due to financial reasons,³⁹ Shepstone decided to ignore Burgers' plans and instead opted for a single-judge bench. He offered Kotzé the position of ordinary judge, who accepted on the understanding

32 See, in general, Kotzé 1934: *passim*; Kotzé 1949: *passim*; Hiemstra 1968: 458–461; and Roberts 1942: 367–368. There is an image of him as a young man in Scott 1982: 100.

33 Anonymous 1903: 101.

34 Kotzé 1934: 207; Van der Merwe 2017b: 165–166.

35 His appointment has been discussed in detail by various scholars. In general, see Kew 1979: 27–52; Schulze 2010: 106–111; and Van der Merwe 2017b: 166–167.

36 Burgers offered the other two justice positions to JC Preller and AI Munnich. Munnich accepted the position, but Preller declined. See Kew 1979: 32; Van der Merwe 2017b: 156 esp n 108.

37 Kew 1979: 34. His family eventually arrived in Pretoria only on Thursday, 19 Jul 1877. They had an accident on the way, when the wagon they had been travelling in capsized near Bamboesspruit. Mrs Kotzé sustained a few bruises to her face, and Kotzé himself received a cut on the head. The children and the nurse were luckily not injured. See 25 Jul 1877 *De Volksstem*; for Kotzé's own version of the event, see Kotzé 1934: 434.

38 Shepstone had sent a letter to Kotzé at Kimberley, hoping to forestall him there, but the letter missed Kotzé with a few hours. See Kew 1979: 34.

39 *Idem* at 34–48 mentions various other factors that also played a role in Shepstone's decision to offer the position to Kotzé. These factors included the uncertainty regarding the administrative consequences of the annexation of the Transvaal, the urgent need for the opening of the newly established High Court, the lack of other suitable and qualified candidates, as well as media pressure. Kotzé seemed to be the right man at the right time: he was by far the best qualified candidate available at short notice, and he was interested.

that he would later be made Chief Justice when additional judges were appointed.⁴⁰ Great was his dismay, therefore, when instead JP de Wet was named to be appointed as Chief Justice in May 1880.⁴¹ Despite protestations from Kotzé⁴² and members of the Bar,⁴³ De Wet's appointment was confirmed and Kotzé had to be content with the more junior position of first puisne judge. Nevertheless, he was redeemed not long after, when, on 8 August 1881, the reinstated ZAR government appointed him as the Chief Justice of a three-judge bench.⁴⁴

40 Kew 1979: 51 esp n 57; Schulze 2010: 107; Kotzé 1934: 417–420.

41 For a discussion of the reasons for the appointment of an outsider, see Kew 1979: 62–69. For a more detailed discussion of De Wet's appointment, as well as the response of Kotzé and the Bar, see Schulze 2010: 106–111, who speculates that De Wet's appointment and Kotzé's slighting was due to government and personal politics. See Schulze 2010: 117–118 for a discussion of De Wet's judicial experience at the time of his appointment, and of the political reasons behind the British government's choice to appoint him. Schulze points out that none of Kotzé's protestations regarding De Wet's appointment hinged on De Wet's lack of experience or ability as a suitable candidate. See, also, Van der Merwe 2017b: 170–171.

42 See Kotzé 1934: 702–712 for his own description of his response to De Wet's appointment, and 715–717 regarding the support he received from the Bar and the general public. However, what is less well known is that Kotzé and De Wet had met previously in Grahamstown, and that Kotzé, despite being eleven years younger than De Wet, had impressed the local court to such an extent on that occasion, that he had won the case in which they were involved. The (unreported) case was that of *Court v Jubb*; De Wet acted in his capacity as Solicitor General, and Kotzé represented the defendant. While De Wet saw the issue as a simple one, requiring no authorities to be cited, Kotzé that day brought with him to court a large number of books. Dwyer J then commented to Kotzé that surely he wasn't going to “quote from all those authorities on so simple a point?”, to which Kotzé responded that he indeed was. The judge then sat back, put his hands in his pockets and stared at the ceiling until he became persuaded by Kotzé's “well arranged and eloquent argument”, on which he eventually also complimented the young advocate. See Anonymous 1903: 102. The memory of this incident must have made it all the more difficult for Kotzé when De Wet was eventually appointed as Chief Justice, a position that Kotzé had believed was his.

43 The members of the Bar being JC Preller and SJ Meintjes. See Kotzé 1934: 715–716; Schulze 2010: 108–109.

44 See GN 3 *Staats-Courant der ZA Republiek* of 8 Aug 1881. The Government Notice is actually dated 8 Aug 1881, although it was only officially published the day after. The Proc, published in the same *Staats-Courant*, establishing the new post-independence High Court (*Hoog Geregtshof, Z.A. Republiek*) referred back to the original *Volksraad* decision (dated 7 Mar 1877) establishing the court before annexation. The 1881 court would therefore be a three-judge court, of which the two criminal law judges would be appointed later. Kotzé's appointment was but one of many governmental and judicial appointments officially announced in the same edition of the *Staats-Courant*: other judicial appointments included Henri van Rossem as Registrar and Master of the High Court and Cornelis Johannes Juta as the Chief Sheriff (*Hoofdbaljuw*) (GN 4); EJP Jorissen as Attorney General (*Staatsprocureur*) (GN 5); JPJ van Nickelen Kuijper as clerk to the Orphan Chamber (*Klerk in het Kantoort van den Weesheer*), as well as Johannes C Minnaar and ACH Lorentz as first and second clerks to the Deeds Office respectively (*Iste Klerk en 2e Klerk in het Registratie-kantoor*) (GN 6); for the district of Pretoria, Johannes Zulch de Villiers as magistrate, J Vogel as prosecutor, Fredrick H Taynay as acting magistrate's clerk and Gerard C van Dam as acting messenger of the court (GN 7); for the district of Potchefstroom, Theunis Johannes Krogh as magistrate, Herman Pieter Kluever as first magistrate's clerk and prosecutor, Frans Botha as second magistrate's clerk and assistant postmaster, GC Alexander van Dam as messenger of the court, and Isaac van Alphen as postmaster (GN 8); and, for the district of Rustenburg, Casper G Bodenstein as magistrate and JC Brink as magistrate's clerk and prosecutor (GN 9).

Much has been written about Kotzé.⁴⁵ He was a respected judge throughout his career, not only for his judicial activities on the bench, but also for his efforts at raising the quality of the bench and the Bar. He was critical of the Transvaal dual-practice system and was instrumental in its transformation into one divided into attorneys and advocates.⁴⁶ He further proposed changes to the composition of the Board of Examiners responsible for testing potential legal practitioners, and suggested changes to the contents of the material that candidates would be tested on.⁴⁷ One other factor that also contributed to the efficacy of legal representation in court, was the new law library established in 1878. It consisted of Roman-Dutch and English law books bought with funds made available by the British government, and was augmented by additional books sponsored by Kotzé and members of the Pretoria Bar.⁴⁸ Kotzé encouraged members of the legal profession to consult these works and even gave them access to his own private collection when necessary.⁴⁹ He also drafted regulations for the use of the library, and made sure that the library was housed near the court room to facilitate regular and easy access by the legal practitioners. This proved to be successful as the quality and efficiency of arguments heard by the court soon improved. Kotzé remembered:⁵⁰

The work of the Court was disposed of with reasonable dispatch. There was not much time wasted in needless examination and cross-examination of witnesses, which is rather a failing of the present day. There were, with perhaps one or two exceptions, no long-winded men at the local bar, for the Court had been careful from the first to impress upon the pleaders the necessity of paying due regard to the relevancy of evidence, and its effect upon the points in issue in the case. Hence several of the practitioners acquired an aptitude in handling witnesses, with the result that time and costs were saved. I still have pleasant recollections of my early experience on the bench during the period of annexation, and of the good service and loyalty of these old practitioners.

45 See, for example, Kew 1979: *passim*. See, also, Kotzé 1934: *passim* and Kotzé 1949: *passim*. During the siege of Pretoria (Dec 1880–Mar 1881), when the inhabitants were evacuated to military camps, Kotzé was appointed wardmaster, whose duties included the distribution of rations to the women and children in the camps, and seeing to their general health and comfort. See, Anonymous 1903: 103. There is a photo of Kotzé performing these tasks in Grobler 2018: 92. For more on the siege of Pretoria, see *idem* at 79–114.

46 Wildenboer 2011: 349–350 esp n 77. See, also, Kew 1979: 87–88.

47 See Wildenboer 2011: 351 n 87.

48 See Kotzé 1934: 540–541; Kew 1979: 85–86. The British government granted £300 for the acquisition of the law books in response to a request by EJP Jorissen during his trip to England as part of the first deputation to protest the annexation: see n 28 *supra*.

49 Kotzé 1934: 541.

50 *Ibid.*

He remained on the bench until February 1898, when he was controversially dismissed by President Paul Kruger after the court's judgement in the infamous case of *Brown v Leyds NO*.⁵¹

Kotzé's law career continued subsequent to his dismissal. After a trip to London, he returned to Pretoria where he set up a legal practice. In August 1900, he was appointed as the Attorney General of Southern Rhodesia and in this capacity also became a member of its Executive Council.⁵² In 1902 he became King's Counsel. The following year, he was appointed judge of the Eastern Districts in Grahamstown, and in 1904 he became Chief Justice of the same division. He was appointed judge of the Cape Provincial Division in 1913, and was raised to Judge President in 1920. He became a member of the bench of the Appellate Division in 1922, where he served until his retirement in 1927.

Although Kotzé's legal training was based on English law, he contributed much to the development of Roman-Dutch law in South Africa.⁵³ His English translation of Van Leeuwen's *Het Rooms-Hollands Recht* in the 1880s⁵⁴ made this source much more accessible to non-Dutch speaking lawyers. He was a member of the Grotius Society in London.⁵⁵ He also published two compilations of Transvaal

51 (1897) 4 Off Rep 17. The so-called constitutional crisis that developed as a result of this judgement involved Kruger's government protesting against the court's ability to declare legislation and *Volksraad* decisions invalid. This saga has been much written about and commented on by various scholars and lawyers. See, for example, the four-part article by Van der Merwe on the constitutional crisis of the ZAR (Van der Merwe 2017a; Van der Merwe 2017b; Van der Merwe 2018a; and Van der Merwe 2018b); and Bergh 2013: 115–116.

52 See, also, Anonymous 1900: 207.

53 At the opening of the Appellate Division's term on 16 Apr 1940, two weeks after Kotzé's death, the then Chief Justice, NJ de Wet, made the following comments regarding the start of Kotzé's career on the bench (as cited in Anonymous 1940: 160): "He was called at an early age to the Bench of the Transvaal Republic, and it is almost impossible for us to realise the difficulties under which he must have laboured. Modern text-books dealing with Roman-Dutch law were non-existent so that, to determine any legal question, a laborious reference to the old authorities was necessary. Added to this he was all alone, at any rate for several years, with nobody to consult and with only the nucleus of a Bar to give him assistance. Under those circumstances the easiest course would have been to seek guidance from the much more conveniently available text-books and reports of the English law. But that was not the way of Mr. Justice Kotzé. Not only did he hold the torch of Roman-Dutch law on high in his judgments, but he found time to give the legal world the benefit of his study and research in his excellent annotated edition of Van Leeuwen's *Commentaries on the Roman-Dutch law*. A career so auspiciously begun was continued with the same success till his retirement from the Bench, just fifty years after he had first taken a seat on it."

54 The translation was published in London in two volumes in 1882 and 1886. See Roberts 1942: 184.

55 The Grotius Society was a London-based organisation, established in 1915 during the First World War. Its purpose was to "afford facilities for discussion of the Laws of War and Peace, and for interchange of opinions regarding their operation, and to make suggestions for their reform, and generally to advance the study of international law". Although its membership was restricted to British citizens, the Society catered not only for views from a British perspective or for those that favoured British interests. See Ilner 1916: 381. The Society was dissolved in 1958, when it merged with the Society of Comparative Legislation to form the British Institute of International and Comparative Law.

legislation⁵⁶ and was involved in the compilation and review of several volumes of Transvaal case law,⁵⁷ among others.⁵⁸ In 1896 he was awarded the Knight Grand Cross of the Portuguese Order of the Conception by the King of Portugal. In addition, two honorary doctorate degrees were conferred on him, namely by the University of the Cape of Good Hope in 1912 and by the University of Cape Town in 1927. He has been praised by members of the legal fraternity for being an “honest and fearless Judge”,⁵⁹ for “his genuine interest in and his sympathy for his fellow human beings”, for being “a man who was an example to all of us in his industry, sincerity and cheerfulness”,⁶⁰ and for “his unfailing courtesy to members of the Bar, and especially his kindness and courtesy to juniors”.⁶¹ He has been described as “an outstanding jurist with a thorough knowledge of Roman-Dutch law”.⁶²

Kotzé was married twice. His first marriage was to Mary Aurelia Bell, and seven children born of this marriage survived to adulthood. His second marriage was to Margaretha Jeldina Doornbos. He died in Cape Town on 1 April 1940.

3 1 2 Jacobus Petrus de Wet

As already mentioned, the only other member of the Transvaal bench during the period under consideration was Justice JP de Wet. A discussion of his law career recently featured in an excellent article by Heinrich Schulze.⁶³ Accordingly, only a few facts need be mentioned here. De Wet was born in Cape Town on 25 August 1838.⁶⁴ After first enrolling at the University of Leiden, he soon left for England and obtained his BA degree at the University of London. He was called to the Inner Temple as a barrister-at-law in June 1863; in December of the same year he was admitted to

⁵⁶ The first, entitled *De Locale Wetten der Zuid-Afrikaansche Republiek, 1849–1885*, was published in 1887 with Fred Jeppe as co-editor. The second, entitled *De Locale Wetten en Volksraads-besluiten der Zuid-Afrikaansche Republiek, 1886–1887*, was published in 1888.

⁵⁷ Apart from *Kotzé's Reports* mentioned above (see n 10 *supra*), Kotzé was also involved in all four volumes of the *Reports of Cases Decided in the Supreme Court of the South African Republic*, published between 1881 and 1892. He was namely the reporter of the first and second volumes (with SH Barber for the latter volume) and, due to an increased work load by that time, for the review only of the third and fourth volumes (reported by SH Barber and WAMacfadyen). Kotzé also revised the first three volumes (published between 1894 and 1896) and translated the fourth volume (published in 1897), of the *Official Reports of the High Court of the South African Republic*. See Van Niekerk 2013: 134–138.

⁵⁸ For a full list of his law publications, see Roberts 1942: 184. In addition, he published his memoirs in two volumes (Kotzé 1934: *passim* and Kotzé 1949: *passim*, the latter appearing post-humously), which provides fascinating insight into the events, personalities and politics of his time. See, also, n 18 *supra*.

⁵⁹ Anonymous 1940: 159.

⁶⁰ The latter two quotes both as per Van Zyl JP, cited in Anonymous 1940: 159.

⁶¹ As per De Wet JP, cited in Anonymous 1940: 160.

⁶² Scott 1982: 100.

⁶³ Schulze 2010: *passim*.

⁶⁴ *Idem* at 101.

the Cape Bar.⁶⁵ In 1864 he joined the Eastern Cape Bar at Grahamstown.⁶⁶ In 1873 he was appointed Solicitor General of the Cape, and in 1878 Recorder of Griqualand West.⁶⁷ In May 1878, he was offered the position of Chief Justice of Transvaal, which he accepted.⁶⁸ Despite protestations to his appointment, his term was uneventful, probably due at least in part to Kotzé's admonishment to the members of the local Bar that "the public interest dictated that nothing but the most amicable relations should exist between Mr. De Wet and [himself], and that such would likewise be the proper course for the bar to pursue".⁶⁹

After independence was restored to the Transvaal, De Wet was not offered a seat on the new three-judge bench. Fortunately for him, though, the British government then offered him the position of acting Chief Justice of Ceylon, a British colony that also applied Roman-Dutch law.⁷⁰ He accepted the offer and left for Ceylon, where he served from 1882 to 1883. Afterwards, he moved to England, where he was knighted at Windsor Castle on 19 July 1883.⁷¹ He died in Eastbourne, England on 19 April 1900.⁷²

3 2 The Attorneys General⁷³

3 2 1 Lewis Peter Ford⁷⁴

Ford was born in London, England on 26 January 1846, and moved with his parents to Cape Town five years later. He received his legal training at the South African College and was admitted to practice at the Cape Bar on 4 December 1866.⁷⁵ After

⁶⁵ *Idem* at 102–103.

⁶⁶ *Idem* at 103–104.

⁶⁷ *Idem* at 104–105.

⁶⁸ *Idem* at 108 n 51. He delivered the judgement in thirteen of the cases reported in *Kotzé's Reports* (I have added the dates and certain information to each citation for ease of reference): *Mchattie v Twycross* 1880 Kotzé 190 (Jun 1880); *Welsh v Bernhard, Cohen & Co* 1880 Kotzé 192 (Jun 1880); *Van Breda v Johnston*; *Colquhoun v Brits*; *Green v Gibaud* 1880 Kotzé 193 (Jul 1880); *Twycross v HcHattie* 1880 Kotzé 198 (Jul 1880); *Coventry Brothers v Kingsmill* 1880 Kotzé 203 (Jul, Aug 1880); *Ex parte Bok* 1880 Kotzé 223 (Aug 1880); *Conradie v Dunell, Ebdén & Co* 1880 Kotzé 227 (Oct 1880); *Page v Hudson* 1880 Kotzé 229 (Oct 1880); *D'Arcy v Skinner & Green* 1880 Kotzé 231 (Nov 1880); *Haesant v Becker & De Vries* 1880 Kotzé 236 (Dec 1880); *Celliers v Queen* 1881 Kotzé 237 (Apr 1881; in this case, De Wet and Kotzé gave separate judgements; the case concerned the jurisdiction of the *landdrost* courts); *Don v Erasmus* 1881 Kotzé 254 (Apr 1881); and *Zeiler v Hollins & Holder* 1881 Kotzé 255 (Apr? 1881).

⁶⁹ Kotzé 1934: 716.

⁷⁰ Schulze 2010: 111 n 65 and the sources cited there.

⁷¹ *Idem* at 115.

⁷² *Idem* at 117.

⁷³ On the duties of the Attorney General at the time, see Kruger 1975: 22–24.

⁷⁴ For more on Ford in general, see Smith & Cunningham 1987.

⁷⁵ Roberts 1955: 177 n 15; Kew 1979: 76.

the discovery of diamonds at Kimberly, he moved there during the early 1870s and is credited with being only the second person to use steam power for washing diamonds, and for building the largest diamond-washing machine at the time.

By coincidence, he met John Kotzé in April 1877 when they shared the same mail coach to Pretoria.⁷⁶ They instantly became friends. This friendship would soon also benefit Ford's career. Kotzé recounted that Shepstone had to urgently appoint an acting Attorney General in Jorissen's absence. Due to the position only being temporary, "no suitable member of the bar from outside the Transvaal was available for a mere acting appointment" and "Shepstone's choice was limited to the selection of one of the local practitioners".⁷⁷ When asked by Shepstone for suggestions for suitable candidates, Kotzé – having been in Pretoria only three weeks and not yet having had the "opportunity of judging the individual capacity of these local men" – proposed Ford, and explained that "since he was an Attorney of the Cape Colony ... he would probably have a working knowledge of the practice and routine connected with public prosecutions".⁷⁸ This suggestion was favourably received and Ford was appointed as acting Attorney General in May 1877.⁷⁹ This appointment drew some criticism from Cape Town and Kimberley. However, Shepstone seems to have been satisfied with the quality of Ford's work,⁸⁰ and Kotzé remembered that Ford "did his duty satisfactorily".⁸¹ As part of his duties, Ford participated at the opening of the High Court described above, and would also later act as judge on two occasions.⁸²

⁷⁶ Kotzé 1934: 424 n 1.

⁷⁷ *Idem* at 424.

⁷⁸ *Ibid.*

⁷⁹ He accepted his appointment on 18 May 1877: see TAB SS 237 R1936/77. He had applied for admission as attorney, notary and conveyancer a few days earlier, on 14 May: see TAB SS236 R1843/88. For the Board of Examination's confirmation that he met the requirements for admission, see TAB SS 236 R1880/77 (dated 18 May 1877).

⁸⁰ Kew 1979: 76–77.

⁸¹ Kotzé 1934: 424.

⁸² The first occasion was on 5 Jul 1877, when Kotzé was delayed on his way back to Pretoria with his family: see n 37 *supra*. It was decided that Ford, in his capacity as acting Attorney General, would hear only the urgent cases, and that all others would be postponed until the next sitting of the court on 12 Jul. Even before the sitting on 5 Jul 1877, one "important criminal case had been finally withdrawn and another [had] been transferred to the Circuit Court of Middelburg": see 27 Jun 1877 *De Volksstem*. Nevertheless, during the sitting on 5 Jul 1877, the court heard a number of cases: it fined four jury members for not responding to their call for jury duty; it postponed a motion for confirming a *rule nisi* in *Durham v Fleischmann* (see n 31 *supra*), because the respondent's representative, advocate De Vries, objected that his client had not received sufficient notice; and it declined to confirm a motion for a *rule nisi* in *Van der Berg v Rathbone* for technical reasons. In the latter case, Adv De Vries, representing the respondent, objected that the notice of motion had been signed by Hollard and Keet, "who are no Attorneys of this Court, while it was served by the deputy Sheriff, appointed by a gentleman who is no Sheriff". He also objected to the notice not having been served in time. Advocate Preller, on behalf of the applicant, argued that, in accordance with the relevant *Volksraad* resolution, Hollard and Keet could appear, but not

He also proposed the formal toast at the dinner held for Kotzé by the members of the Bar and Side Bar on 26 July 1877, and proposed “the toast of the evening” to Kotzé in his official capacity, expressing the wish that there would soon be a three-judge court, with Kotzé as Chief Justice.⁸³

However, his friendship with Kotzé suffered when the latter found out about Ford’s “misplaced ambition of being raised to the Bench later on”.⁸⁴ Ford became increasingly reluctant to step down as acting Attorney General, and tried to convince Shepstone that he should instead be appointed on a permanent basis in the place of Jorissen, alternatively that he (Ford) be appointed as a puisne judge.⁸⁵ Kotzé indicated his disillusionment with Ford on a personal level. While they had been good friends after their arrival first in Pretoria, and had even shared an apartment in Pretoria before their families arrived, the friendship soured, and the Kotzé family decided to ignore the Fords, not even greeting them in public.⁸⁶ On a collegial level too, Kotzé expressed his unhappiness during the first half of 1878 by pointing out from the bench the grave breaches of professional etiquette by Ford’s office, and eventually granting a *rule nisi*, ordering Ford to “show cause why he should not be suspended or struck off” the roll.⁸⁷ Nevertheless, Ford remained in his position as acting Attorney General until 3 January 1878, when Jorissen returned and resumed his position.⁸⁸

charge any fees, and that the applicant was not answerable for the fact that the government had not yet officially appointed a deputy Sheriff. After some discussion, the court refused the motion with costs, because although the notice had been served in time, it had not been duly certified. The court also admitted three practitioners, namely TM Siddal as attorney (later sworn in in chambers), as well as DB Naudé and C Ueckermann as advocates and attorneys (later to be sworn in at Zeerust and Heidelberg respectively). Further, a criminal case against one Conradie was postponed, and he was advised to select counsel to represent him – he selected Adv De Vries, and Francois Zeiler as his attorney. See, generally, 11 Jul 1877 *De Volksstem*. The newspaper lamented the “confusion of languages”, as both Advs De Vries and Preller argued their cases in Dutch, while the presiding judge (Ford) ruled in English. The journalist opined that this was “calculated to enhance the dignity of the judicial procedure”, but suggested that, in future, the parties should agree on the language in which a case should be heard beforehand. I could not find details of the second occasion on which Ford acted as judge; if he did do so, Kotzé did not consider the judgement worth reporting.

⁸³ 1 Aug 1877 *De Volksstem*.

⁸⁴ Kotzé 1934: 424–425 relates that he had heard this from none other than the Colonial Secretary at the time, Melmoth Osborn, who told him that Ford was of the opinion that when his term as acting Attorney General came to an end upon Jorissen’s return, he “had a claim on the Government in the above direction”. Kotzé was not impressed and pointed out to Osborn that Ford “had no claim whatever to a seat on the Bench”. See, also, Kew 1979: 78.

⁸⁵ Kew 1979: 78 esp n 8.

⁸⁶ *Idem* at 77–79.

⁸⁷ *Idem* at 79 esp nn 15 and 16.

⁸⁸ *Idem* at 78 esp n 10.

After the First Anglo-Boer War, Ford continued his legal practice at Pretoria.⁸⁹ Of the cases reported for the period from 1877 to 1881, Ford appeared in twenty-two, of which only four was in his capacity as acting Attorney General.⁹⁰

After gold was discovered on the Witwatersrand in 1886, he became one of the founders of Johannesburg and helped to peg out the city. He was one of the partners of the Randjeslaagte Syndicate, and later went into partnership with the Jeppe family. The suburb Fordsburg is named after him. He was also involved in the establishment of the Pretoria Electric Lighting Company. For health reasons, he gave up his practice in 1888, and eventually moved back to England the following year. He resumed business in London in 1896 and was involved in mining enterprises in East Africa.

Ford was married four times and had children from each marriage. He befriended the writer Rider Haggard – probably during their time together as judicial officers in Pretoria (more on him below) – who was the godfather to one of his sons. Ford died in London on 12 December 1925.

3 2 2 Eduard Johan Pieter Jorissen⁹¹

Jorissen was born in Zwolle, in the Netherlands, on 10 June 1829. He never received any formal legal training, except for his three months' study before sitting for the

⁸⁹ Smith & Cunningham 1987: 272. Nathan 1932b: 40 mentions that he had a “large civil practice”.

⁹⁰ As acting Attorney General, he appeared in *Attorney-General v Skinner* 1877 Kotzé 4 (Oct 1877); *In re Phelan* 1877 Kotzé 5 (Nov–Dec 1877); *In re Roselt & Inglis* 1877 Kotzé 13 (Dec 1877; representing the minor); and *Muller v Coppen* 1878 Kotzé 16 (Feb 1878; although the report does not explicitly mention that Ford acted as Attorney General in this case, it concerned the setting aside of an arrest warrant). He also appeared as legal representative in the following cases: *Cape Commercial Bank v Fleischman & Van Rensburg* 1877 Kotzé 1 (Jul 1877); *Zeiler v Weeber* 1878 Kotzé 17 (Mar 1878; with De Vries, for the judgement creditor); *Leathern v Henderson* 1878 Kotzé 46 (Jun 1878; for the attorney of the executors); *Weatherley v Weatherley* 1878 Kotzé 66 (Nov 1878–Jan 1879; with De Vries, for the defendant); *Van Rensburg v Swart* 1879 Kotzé 99 (Jan 1879; with Jorissen, for the defendant); *Barrett v Executors of O'Neil* 1879 Kotzé 104 (Feb, May 1879; with Preller, for the defendants); *Brodrick v Leathern* 1879 Kotzé 139 (Jul 1879; for the applicant); *Leathern v Brodrick* 1879 Kotzé 143 (Jul 1879; for the defendant); *Cape Commercial Bank v Schröder & Co* 1879 Kotzé 161 (Nov 1879, Jan 1880; for the defendants; Attorney General Maasdorp represented the plaintiff); *Baker v Saunders* 1880 Kotzé 176 (Mar, Jul 1880; for the respondent); *McHattie v Twycross* 1880 Kotzé 190 (Jun 1880; with Innes, for the respondent); *Welsh v Bernhard, Cohen & Co* 1880 Kotzé 192 (Jun 1880; for the plaintiff); *Twycross v McHattie* 1880 Kotzé 198 (Jul 1880; assisting Cooper, for the applicant; it appears that Ford felt it necessary to call in assistance in this case as Cooper offered the main arguments on behalf of the client; in this matter, the respondent had three representatives); *Cooper v Jocks* 1880 Kotzé 201 (Jul, Aug 1880; with Cloete, for the plaintiff); *Coventry Brothers v Kingsmill* 1880 Kotzé 203 (Jul, Aug 1880; assisting Cooper, for the plaintiffs); *Municipality of Potchefstroom v Cameron* 1880 Kotzé 206 (May, Jun, Sep 1880; assisting Preller, for the defendants); *Du Toit v Hudson* 1880 Kotzé 220 (Aug 1880; with Preller, for the plaintiff); and *Page v Hudson* 1880 Kotzé 229 (Oct 1880; assisting the Attorney General, Morcom, for the defendant).

⁹¹ See, in general, Ploeger 1972: 344–374; Roberts 1942: 366; Kruger 1975: *passim*.

Transvaal Bar examination in 1876.⁹² He had originally trained as a theologian at the Rijksuniversiteit in Utrecht and received his doctorate in theology from the University of Groningen in 1876.⁹³ He had been a minister of various congregations and authored several theological works, before accepting President Burgers' offer to become a lecturer in classical languages at the still-to-be-built gymnasium (high school) in the Transvaal at an annual salary of £400.⁹⁴ Upon his arrival in South Africa, however, and after consultation with the Transvaal consul in Cape Town, JR Marquard,⁹⁵ Jorissen realised that his philosophical and theological views, as well as the limited opportunities in education in the then Transvaal, necessitated his changing careers as soon as possible.⁹⁶ It was at this point that he commenced with his legal studies,⁹⁷ and after passing the examination,⁹⁸ he was appointed as

⁹² Wildenboer 2011: 350 esp n 86.

⁹³ Kruger 1975: 6.

⁹⁴ See *British Parliamentary Papers* 1971: 486, C 2891 Despatch Lanyon to Earl of Kimberley, dated 1 Feb 1881 at 486. Kotzé 1934: 355 n 1 points out that the popular misconception, namely that Jorissen came to the Transvaal after being offered the post of Superintendent General of Education, was due to Theal's incorrect reporting: see Theal 1919 vol 1: 254–255. Kotzé correctly states that it was actually Van Gorkom who was appointed to this position: see, also, Jorissen 1897: 4; Jorissen was offered and had accepted the position as lecturer in classical languages, although he changed careers when he finally arrived in the Transvaal: see Jorissen 1897: 4; Roberts 1942: 366. Wilhelm Johan van Gorkom (1827–1888) was born in the Netherlands and had several years of experience in education before accepting President Burgers' offer of becoming the first Superintendent of Education of the Transvaal. He arrived in Pretoria on 6 Feb 1876 and took up office a few days later on the 15th. Apart from his efforts to develop the educational system, he was also instrumental in establishing a museum, a library and a botanical garden. He resigned from his position in Mar 1878 due to his refusal to apply new governmental regulations. He then returned to the Netherlands, where he continued his career in education. He had not been popular among the Boers in the Transvaal due to his liberal views, nor did he fully fit in with the British governmental officials. For more on Van Gorkom, see Ploeger 1977b: 825–826.

⁹⁵ Marquard accepted his appointment as Transvaal consul in a letter dated 31 Jan 1874: see TAB SS 168 R239/74. Jorissen 1897: 6 and 7 describes him as “een statige figuur” (a dignified figure) and as “een type van het oude ras der werkelijk aristocratische Kapenaars, eenvoudig van manieren, met iets afgemetens, maar gastvrij, beleefd en hulpvaardig” (one of the old race of truly aristocratic Capetonians, simple in manner, with some dignity, but hospitable, polite and helpful).

⁹⁶ Jorissen 1897: 6–7. It was Marquard who gave him the idea to apply for the position of Attorney General, since Buchanan had shortly before visited Cape Town on his way to Bloemfontein after resigning from that post: see n 99 *infra*.

⁹⁷ On his way to Pretoria from Cape Town, he studied the works of the old Roman-Dutch law authors, which were authoritative sources of law in the Transvaal. (For more on the authoritative sources of law of the ZAR, see Wildenboer 2015: 465–468.) In particular, he studied Van Leeuwen's *Rooms-Hollandsche Recht*, Van der Linden's *Koopmanshandboek* and Grotius' *Inleidinge*: see Roberts 1955: 177. He also consulted Buchanan, Roth (the then public prosecutor in Pretoria) and Swart (the then acting Attorney General). He further attended court sessions to listen to the legal arguments of Stephanus Meintjes, Maurits de Vries and Jan Preller: see Jorissen 1897: 8–9. Jorissen arrived in Pretoria on 6 Feb 1876. For his application to sit for the examination, see TAB SS 208 R1031/76 (dated 30 Apr 1876). He sat for his law examination before a panel consisting of Meintjes, De Vries, Preller, I Munnich and Nicolaas Jacob Reinier Swart (for more on him, see n 98 *infra*), the latter at the time being acting State Attorney before the annexation. See Jorissen 1897: 10; Nathan 1932a: 13.

⁹⁸ For the panel's confirmation that Jorissen had been examined, see TAB SS 209 R1347/76 (dated 6 Jun 1876).

State Attorney (the post was renamed as Attorney General after annexation) on 9 June 1876.⁹⁹ He condemned the 1877 annexation and was one of the two-member delegation (the other being Paul Kruger) who traveled to London in May of that year.¹⁰⁰ It was during this absence that Ford was appointed as acting Attorney General. On his return from England, Jorissen resumed his position as Attorney General on 3 January 1878. Of the cases reported between 1877 and 1881, he appeared in nine, of which only three were in his capacity as Attorney General.¹⁰¹

However, his lack of formal legal training and insufficient legal experience was not consistent with Kotzé's vision of a fully qualified Bar and bench,¹⁰² and ten months after he had resumed this position, Jorissen was replaced with Christian Maasdorp, due, at least partially, to Kotzé's involvement.¹⁰³ The latter had on three

99 And not on 9 Jul 1876 as per Ploeger 1972: 345; see Jorissen 1897: 10. He took the oath as Attorney General on 10 Jun 1876: see TAB SS 209 R1416/76 (dated 10 Jun 1876). See, also, TAB SP 5 SPR1841/76 (dated 10 Jun 1876) for Swart's letter confirming Jorissen's appointment. Jorissen succeeded James Buchanan, who had resigned in Nov 1875; in the intervening months, Swart had acted as State Attorney: see n 97 *supra*. For more on Buchanan, see Moll 1972: 95–96; Roberts 1942: 351. Buchanan (1841–1893) commenced legal practice in 1865. He took office as State Attorney of the Transvaal on 9 Dec 1872, but he found the Transvaal mindset and way of life oppressive, and resigned three years later to become a puisne judge of the Supreme Court in the Orange Free State. For more on Swart, see Spoelstra 1968: 817–818. Swart (1831–1892) was born in the Netherlands, and arrived at the Cape in 1849. He had no legal training. He had tried his hand at farming and teaching before he commenced theological studies. In 1866 he became the first minister of the Reformed Church in Pretoria. However, on his return to Pretoria after a visit to the Netherlands, he announced, to public outcry, that he no longer wanted to serve in the ministry and instead accepted the post as governmental secretary. He left Pretoria and moved to the Cape, eventually settling in Mossel Bay.

100 Leyds 1906: 271–272. See, also, n 28 *supra*. For Jorissen's memories of this journey, see Jorissen 1897: 36–37.

101 As Attorney General he appeared in the following reported cases (I have added the dates and additional information to each citation): *Queen v Saul, Rooikraal and Saul* 1878 Kotzé 32 (Mar 1878); *Ex parte Lithauer* 1878 Kotzé 38 (Apr 1878); and *Breytenbach v Queen* 1878 Kotzé 55 (Aug 1878). He also appeared as legal representative in the following cases: *Van Rensburg v Swart* 1879 Kotzé 99 (Jan 1879, assisting Ford, for the defendant); *Queen v Potts* 1879 Kotzé 115 (Mar 1879; for the accused; Attorney General Maasdorp prosecuting); *Ferguson v Pretorius* 1879 Kotzé 157 (Nov 1879; with Cloete, for the defendants); *Ex parte Bok* 1880 Kotzé 167 (Jan 1880; for the applicant); *Jacobs v Queen* 1880 Kotzé 178 (Mar 1880; for the accused; Attorney General Morcom prosecuting); and *Ex parte Bok* 1880 Kotzé 223 (Aug 1880; with Cooper, for the applicant).

102 See Kotzé 1934: 529–540; at 540 he emphasised that Shepstone at no point discussed the matter with him directly. On this latter aspect, see also Kruger 1975: 106–107. Kew 1979: 80 speculates that Kotzé was worried that the government's blind eye to Jorissen's lack of training in retaining him as Attorney General might later lead to his being raised to the bench (which indeed happened when Jorissen was appointed judge in 1890: see the text to n 112 *infra*). Also, Kotzé did not want the standard of the Transvaal judiciary to be lowered by an unqualified Attorney General.

103 See Kruger 1975: 97–105 regarding the reasons for and the events leading up to Jorissen's dismissal. See, also, Kew 1979: 81–83, who considers the evidence and then concludes that Jorissen's dismissal was due not only to Kotzé's strong views on his lack of training, but also to Shepstone's preference for an Attorney General with confirmed British loyalties.

occasions commented in public on Jorissen's competence, twice in open court.¹⁰⁴ Shepstone had offered Jorissen the position of *landdrost* of Pretoria, with the same salary as that of the Attorney General, but Jorissen declined.¹⁰⁵ After his dismissal, Jorissen remained at the Bar and practised as a dual-capacity lawyer.¹⁰⁶

Jorissen became increasingly involved in politics, and traveled to Cape Town with Kruger and Piet Joubert in early 1880 to contest the proposed plans for the federation of the southern African territories under British rule. In December 1880, Jorissen became a member of the Boers' Executive Council and later played a crucial role in the peace negotiations and the signing of the subsequent Pretoria Convention on 3 August 1881. On 8 August he was re-appointed as Attorney General of the restored Republic.¹⁰⁷ However, in July 1883 he was again dismissed from this post on the grounds of incompetence, and once again Kotzé, this time with the support of SJ du Toit, the then Superintendent of Education,¹⁰⁸ had a hand in

104 Kew 1979: 80–81. The first case was that of *Barrett v The Registrar of Deeds and Holtzhausen* (unreported, cited in Kew 1979: 80 n 18), in which Kotzé criticised Jorissen for a conflict of interests when he appeared for the opposing side after he had already given Barrett a legal opinion for which he had received payment. The second case concerned an arrest warrant issued by Jorissen without his taking cognisance of the relevant procedures stipulated in Ord 5 of 1871; Kotzé couldn't help commenting from the bench that Jorissen's professional oversight and his role in the unlawful arrest would impact on the reputation of the legal profession of the Transvaal. The third occasion was during a public address to the inhabitants of Potchefstroom in May 1878, when Kotzé remarked that the Attorney General, as head of the Transvaal Bar, should have the same qualifications as a judge.

105 Kotzé 1934: 533.

106 Wildenboer 2011: 351 n 89.

107 See n 88 *supra*.

108 For Du Toit's part in Jorissen's dismissal, see Kruger 1975: 250–255. For more on Du Toit in general, see Anonymous 1968: 279–283. Stephanus Jacobus du Toit (9 Oct 1847–28 May 1911) was born and died at Dal Josafat in the Paarl. His father, a wine farmer, was a direct descendent of the French Huguenot, Francois du Toit. SJ received his basic education at the Paarl Gymnasium, where after he studied theology at the Stellenbosch seminary. He became a proponent of the Dutch Reformed Church in 1872, and a minister of the same church in 1875. He served in the ministry until 1881, when he accepted the offer as the Transvaal Superintendent of Education. He had strong political views and was not afraid to voice them. During his time in Pretoria, he became an advisor to Paul Kruger, and was a member of the delegation that signed the London Convention on behalf of the Transvaal government in 1884. However, he became increasingly opposed to the Dutch influence in South Africa; his increasing criticism of Kruger's government made him unpopular, and in 1888 he resigned as Superintendent of Education. He returned to the Paarl in 1890, where he continued his theological work and his writing. He is best known as a campaigner for Afrikaans as an independent language and was involved in the establishment of the Genootskap van Regte Afrikaners in 1875, and for the establishment of the first Afrikaans newspaper, *Die Afrikaanse Patriot*, the next year. He published widely on theology, and on political and linguistic matters. In 1896 he established the first Afrikaans literary magazine, *Ons Klyntji*. He was married twice: first to Elizabeth Jacoba Joubert, and after her death to Anna Francina Malan. Four children were born of each marriage. In 1910, while en route to Calvinia, his horse cart overturned and he sustained serious and ultimately fatal injuries.

this.¹⁰⁹ Jorissen then resumed practice at the Pretoria Bar as an advocate,¹¹⁰ until he was appointed as special judicial commissioner with the powers of a magistrate in 1888 to assist with the backlog of civil cases at the time.¹¹¹ In 1890 he was appointed a criminal judge of the High Court, this time with Kotzé's approval. Nathan¹¹² mentions the time when Jorissen, on Circuit Court in Johannesburg, presumably for reasons of saving public money, started court proceedings at seven in the morning to the disgruntlement not only of prosecuting and defending counsel, but also of members of the jury. However, to appease all present, Jorissen then adjourned the proceedings four hours later "so that those who wished might enjoy a 'schnapps' of 'jenever'".¹¹³

In 1893, Jorissen was chairman of the commission tasked with revising the ZAR Constitution. He also published a codified version of the laws of the Transvaal, known as the *Codex van de Locale Wetten der Zuid-Afrikaansche Republiek: Eene Proeve*,¹¹⁴ and in 1895 he received an honorary doctorate of laws from the University of Groningen. During the constitutional crisis,¹¹⁵ he opposed Paul Kruger's views on the testing abilities of the Transvaal courts. During the final years of his legal career, he attracted criticism for lack of self-control in the performance of his judicial duties,¹¹⁶ culminating in the press calling for his dismissal due to incompetence.¹¹⁷

Jorissen was also involved in political affairs, and endeavoured to bring about Transvaal-Dutch co-operation. This, together with his liberal theological views, his outspokenness,¹¹⁸ his temperamental personality and his apparent lack

109 See Hiemstra 1968: 459, who points out that Kotzé and Du Toit had different motives for wanting to oust Jorissen: Kotzé, because he wanted a better qualified candidate in the post, and Du Toit, because he did not agree with Jorissen's liberal theological views and because Jorissen was Dutch. However, Roberts 1955: 183 argues that the reason for the dismissal was really for financial considerations: the new requirement that the Attorney General should in future be appropriately qualified, meant that the annual salary for the position was raised from £600 to £1 000. For Jorissen's resentment of Kotzé and Du Toit for their part in his dismissal, see Jorissen 1897: 127–130.

110 For more on Jorissen's work as advocate during this time, see Kruger 1975: 345–347.

111 See Kruger 1975: 347–353. Between 1 Oct 1888 and 19 Feb 1890 Jorissen finalised around 700 cases. See Kruger 1975: 348 and 350.

112 Nathan 1932b: 40.

113 For more accounts of Jorissen's eccentric behaviour in court, see Roberts 1955: 185–186.

114 It was published in 1894 in Groningen by Van der Kamp. For more on Jorissen's *Codex*, see Kruger 1975: 364–369.

115 See n 51 *supra*.

116 Nathan 1932b: 40 mentioned the "exceedingly bitter passages of arms" exchanged in court between Jorissen J and Andries Maasdorp in the unreported case of *Van der Hoven v Robinson*, in which Maasdorp represented the plaintiff. Nathan speculated that this enmity might not entirely have been directed at Maasdorp personally, but rather at his client, Van der Hoven, since "the Judge seemed to be animated by an equally strong feeling against the plaintiff".

117 See Kruger 1975: 422.

118 An example of his outspokenness from the Bench is his remark to the accused in a trial held during the Barberton Circuit. The accused, an official, had been charged with peculation, but had been acquitted by the jury despite strong evidence against him. Before discharging the official, Jorissen expressed his views on this matter by addressing him as follows: "When you say your prayers to-night – if you *do* say them – go down on your knees and thank God that you have been tried by a Barberton jury." See Nathan 1932b: 40.

of tact, brought him in conflict with some of his peers and contributed to his unpopularity.¹¹⁹

In 1907 he returned to the Netherlands and died at Scheveningen on 20 March 1912. During his last years he was plagued by mental instability. He was married to Anna Catherina Elisabeth van Eyk, and two daughters and three sons¹²⁰ were born of the marriage.

3 2 3 Christian George Maasdorp¹²¹

Maasdorp was born in Malmesbury in the Cape on 11 June 1848. He was the younger brother of, and should not be confused with, Andries Maasdorp.¹²² He received his

119 In 1896, Jorissen was sued for libel by a member of the Executive Council, PJ Joubert, after Jorissen had, in public, addressed Joubert with the following: “General Joubert, are you aware that your son-in-law, Malan, is in collusion with the rebels of Johannesburg? If so, you are guilty of treason, and you ought immediately to resign your position.” In the magistrate’s court of Pretoria, Jorissen then raised the exception that his words were not libellous, but the exception was overturned by the magistrate. On appeal, the court (presided over by Kotzé) found the words not libellous and without innuendo against Joubert: see *EJP Jorissen v The State* (1896) 3 Off Rep 153. Despite the court’s finding, this incident certainly could not have made Jorissen popular, at least not in governmental circles.

120 Most relevant for purposes of this article is Samuel Gerhard Jorissen (10 Mar 1857–3 Sep 1889), who had also been a judge of the Transvaal Supreme Court until his untimely death at the relatively young age of thirty-two. Samuel was the eldest son of EJP, and was born on Kampereiland, the Netherlands. He received his basic education in Groningen, and obtained his doctorate in public international law in 1880 at the University of Groningen. In 1881 he arrived in the Transvaal, where he was admitted as an attorney and advocate. He practiced law with Dr FB Tobias in Pretoria from 1882. In 1886, he was appointed as commissioner for the Western Districts Court for Potchefstroom and Christiana. In the same year he was appointed as second criminal judge of the Transvaal. He received acclaim for his minority judgement in favour of the testing abilities of the courts in the matter of *Trustees in the Insolvent Estate of Theodore Doms v Bok No* (1887) 2 SAR 189, while Kotzé CJ and Esselen J confirmed the validity of the *Volksraad* decision in question. To the question whether a *Volksraad* resolution has the force of law, Jorissen *filis* argued that “[s]uch Resolution alone is as yet no law; publication and proclamation are still required” (at 200) and that “a resolution that has not been passed in the prescribed manner cannot bind the judge, who is only bound to act in accordance with the laws” (at 201). He then applied the requirements for the promulgation of a law to the *Volksraad* resolution in question (R 2697 of 3 May 1887) and found that “[a]s a law, taking away the rights of plaintiffs, the resolution ... has, in my opinion, no force, as it is informal” (at 203). See, also, Van der Merwe 2018a: 107–112; Hiemstra 1968: 459–460. As a result, Jorissen *filis* was tasked with the review of the 1858 Constitution. His suggestions were accepted in 1889. Samuel married Mary Adelene Burgers, the third daughter of former President Burgers, but no children were born of this marriage. He died of malaria. See, in general, Ploeger 1977a: 467–468.

121 See, in general, Van Warmelo 1987: 479–480; Roberts 1942: 370.

122 Andries Ferdinand(us) Stockenström Maasdorp (1847–1931) was the second of the five Maasdorp brothers, and older than Christian by seventeen months. He was a brilliant student and received an award while still at school in Graaff-Reinet for being the top student in the Cape for both mathematics and classical languages. He continued his studies at the Graaff-Reinet College and in 1869 obtained a BA degree from the University College in London. He was admitted as an advocate at the Inner Temple on 17 Nov 1871. The following year he started practicing at the Cape Bar; he also represented his home town, Graaff-Reinet, in the legislative assembly. From 1878 to

basic education at Graaff-Reinet and obtained both the Second-Class (1867) and First-Class (1868) Certificates in Literature and Science from what would later be known as the University of the Cape of Good Hope.¹²³ He then continued his studies in London, where he obtained the BA degree in 1869. Thereafter he became a member of the Inner Temple, where he was a fellow student of Kotzé.¹²⁴ The latter fondly remembered meeting the two Maasdorp brothers at a dinner hosted by the Reverend Hoets,¹²⁵ and described that as the start of a “life-long friendship” with Christian Maasdorp.

Maasdorp was admitted as a barrister on 6 June 1871. He then returned to South Africa and was admitted to the Cape Bar on 3 August 1871. He practised at the Supreme Court of Griqualand West at Barkly West and thereafter at the Supreme Court of the Eastern Districts in Grahamstown, before being appointed as Attorney General of the Transvaal on 1 October 1877.¹²⁶ He resigned¹²⁷ from this position in February 1880 and returned to Cape Town to resume practice there. During his term as Attorney General, he appeared in twelve of the reported cases.¹²⁸

1896 he served as Attorney General of the Eastern Districts. In 1890, he became Queen’s Counsel. In 1897 he moved to Pretoria, where he joined the Pretoria Bar. In the later constitutional debate between Kotzé en President Kruger, Maasdorp sided with Kotzé. Just before the outbreak of the Second Anglo-Boer War, he returned to Grahamstown, where he resumed legal practice. During the War, he served as member of the special court hearing treason trials. In 1902, he was appointed Chief Justice of the Orange Free State and later Judge President of that province. He was knighted in 1904. He published an English translation of De Groot’s *Inleidinge* (*The Introduction to Dutch Jurisprudence* (1878), of which the second and third editions also included Schorer’s notes). Although he wrote a few other legal works, he is best known for his *Institutes of South Africa* (first published in 1903 with multiple later editions). He was married to Agnes Hayton, with whom he had three sons. He has been praised for his legal skills, especially that of cross examining, and has been described as gifted, with a strong personality and as easy going. For more on Andries Maasdorp, see Van Tonder 1968: 504–505; Roberts 1942: 370.

123 See, also, Kew 1979: 83 esp n 33.

124 Kotzé 1934: 199.

125 *Idem* at 106. Hoets was South-African born, but had studied at Cambridge and had retired as a minister of the church. At the time of this particular dinner, he was living in St John’s Wood, London.

126 *Idem* at 540 mentioned that Maasdorp settled in quickly due to his being bilingual, and because he grew up in Graaff-Reinet. He described Maasdorp as “[c]alm, solid and unassuming”.

127 In his official capacity, Maasdorp had to prosecute MW Pretorius (a former president of the ZAR) and Bok for treason. According to Kotzé 1934: 672, Maasdorp chose instead to resign from his position as this obligation did not sit well with him, and because he was not willing to “help Wolseley [the British administrator at the time] make slaves of [his] countrymen”.

128 *Dore v Meintjes* 1879 Kotzé 101 (Feb 1879; with Meintjes, for the respondent; the case concerned an interdict for diverting water); *White & Tucker v Rudolph* 1879 Kotzé 115 (May 1879; this case concerned an interdict served upon the *landdrost* of Utrecht in his official capacity; Cooper and Cloete appeared for the applicants); *White & Tucker v The Administrator* 1879 Kotzé 127 (May 1879; for the Crown; Cooper and Cloete again for the applicants); *Van Blerk v Hollins & Holder* 1879 Kotzé 128 (Jun 1879; this case concerned an application that the plaintiff provide security for costs); *De Hart v Steyn* 1879 Kotzé 132 (Jul 1879; with Hollard, for the appellant; this case was an appeal from a decision by the *landdrost* of Pretoria and concerned the admissibility of evidence given at Bloemfontein); *Rudolph v White & Tucker* 1879 Kotzé 135 (Jul 1879; for the

In later years, Maasdorp would be Judge of the Supreme Court of the Eastern Districts (from 1885); Judge of the Cape Supreme Court (from 1896); and Judge President of the Cape Division of the Supreme Court, as well as Judge of Appeal (from 1910). He has been commended for “the clarity of his thinking and his logical argumentation”.¹²⁹

He retired in 1922 and died in Grahamstown on 21 May 1926. He was married to Ella Elizabeth Hutton and had six children, two of whom were killed during the First World War.

3 2 4 William Boase Morcom¹³⁰

Morcom was born in Cornwall, England, on 9 October 1846. He received his basic education in England before accompanying his father to South Africa in 1861. In Pietermaritzburg, he worked for the press from 1866 while studying law in his spare time under MH Gallwey¹³¹ and H Bale.¹³² He then took up various governmental

Crown; this was an application for leave to appeal to the Privy Council); *Gouws v Queen* 1879 Kotzé 141 (Jul 1879; for the Crown); *Stamp v Rex* 1879 Kotzé 147 (Oct 1879; with Preller, for the state; the case concerned a claim for damages in terms of a cancelled lease contract of three mills, a wool washery and a dwelling house); *Curator of Van der Merwe's Estate v Van der Merwe* 1879 Kotzé 148 (Jul, Nov 1879; with Meintjes for the plaintiff; this concerned a dispute regarding certain marital assets in an insolvent estate); *Van der Merwe v Turton & Juta* 1879 Kotzé 155 (Jul, Nov 1879; with Meintjes, for the defendants; this involved a claim for damages based on the wrongful seizure and sale in execution of certain property); *Compton v Williams* 1879 Kotzé 160 (Nov 1879; for the plaintiff; this was an exception that the summons was based on an illegal account charging compound interest); and *Cape Commercial Bank v Schröder & Co* 1879 Kotzé 161 (Nov 1879, Jan 1880; for the plaintiff; this concerned the *locus standi* of the plaintiff).

¹²⁹ Van Warmelo 1987: 480.

¹³⁰ See, in general, Leverton 1972c: 494.

¹³¹ See, in general, Leverton 1977: 323–324; Roberts 1942: 361. Michael Henry Gallwey (1826–1912) was born in Greenfield, Clonakilty, Cork, Ireland. He received his education at Trinity College in Dublin and obtained a BA degree in 1851. In 1853 he was admitted to the Irish Bar through King's Inn. Later that same year he emigrated to Natal, where he commenced his legal practice. In 1857 he became the youngest-ever colonial Attorney General of Natal to date. In this capacity, he was also a member of both the Executive and the Legislative Councils. He was opposed to the idea of responsible government. While he was Attorney General, he also maintained his own legal practice and took many up-and-coming young attorneys under his wing. In 1890, he was appointed as Chief Justice of Natal, which he retained until his retirement in 1901. During his career he also served in various other capacities, namely as member of the Natal Education Council, as advocate for the Admiralty and as chairman of the border commission tasked with the setting of the Transvaal/Zululand border. He was knighted twice, in 1883 and in 1888. Gallwey was a gifted speaker and he had the ability to remain patient, even when provoked. These abilities served him well throughout his career. In 1862 he married Fanny Cadwallader Erskine and five children were born of the marriage.

¹³² See, in general, Leverton 1972a: 23–24; Roberts 1942: 347. Henry Bale (1854–1910), a native of Natal, was born and died in Pietermaritzburg. He received his basic education at the Pietermaritzburg High School and thereafter at the Exeter Grammar School in England. Health reasons prevented him from attending university. He completed his articles with a Pietermaritzburg law firm, and was admitted as attorney in 1875, and as advocate of the Natal Bar in 1878. He

positions, namely that of assistant clerk and shorthand writer (1872) and later clerk (1873) to the Natal Legislative Council; as general factotum to Sir Garnet Wolseley (1875); as clerk to the Natal Governor (1875); as clerk to the Natal Executive Council (1875); and as clerk to the Natal Attorney General (1876). He accompanied Shepstone to the Transvaal in 1877 as his private secretary, legal adviser and financial confidant. He was appointed as the Transvaal Attorney General on 12 February 1880.¹³³ The members of the Bar resented his appointment and “considered themselves slighted by the placing over their heads of a new importation”.¹³⁴ Kotzé was not impressed with the appointment of “a person without proper qualification” either.¹³⁵

During his time as Attorney General, Morcom appeared in nine reported cases.¹³⁶

practiced in Pietermaritzburg and took silk in 1897. In 1890 he became a member of the Natal Legislative Council. He opposed responsible government. He was twice offered the premiership of Natal (in 1897 and in 1899), but declined on both occasions. Instead, he accepted the position of Attorney General in 1897. He succeeded Gallwey as Chief Justice of Natal in 1901 and remained in that position until his death. He was also interested and involved in educational affairs. Bale was known for his good judging of character, for his patience and for his ability to concisely and logically summarise a position. These abilities served him well as Chief Justice. Although he was sympathetic, he has also been described as knowing “how to dispense real and effective justice in dealing with undoubted offenders”. Bale was knighted in 1901. He was married twice, first to Eliza Wood (1880) and later to Margaret Berning. No children were born of either marriage.

133 On Morcom, Jorissen 1897: 38 sarcastically remarked the following: “Hij heft groote diensten aan de Republiek bewezen. Ik durf zeggen onbedoeld. Een jong mensch, zonder eenige de minste politieke ervaring, uiterst geschikt om acte’s van Beschuldiging op te trekken, heft hij met voorbeeldigen ijver den Administrateur der Transvaal advise gegeven, welke de verbittering tusschen de Britsche Regeering en de Boeren voortdurend aanwakkerden” (He served the Republic. I must add by accident. A young person, without the least political experience, very suitable to draft indictments, he advised the Administrator of Transvaal with exemplary diligence, which continuously encouraged resentment between the British government and the Boers). However, it should be borne in mind that apart from the fact that Morcom served the British government during the First Anglo-Boer War, Jorissen resented Morcom for a more personal reason as well. Jorissen 1897: 38 mentioned Morcom’s letters being intercepted by the Boers during the war, which alerted the Boers to the fact that Morcom intended to prosecute the Boer leaders (Kruger, Joubert, Bok and Jorissen himself) before a special military court after the war.

134 Kotzé 1934: 672–673.

135 *Idem* at 696–697. Kotzé took offence at the fact that a person who had attended a mere twelve court sessions in three years, and who had been but a clerk in the office of the Natal Attorney General, was appointed as Attorney General of the Transvaal. Once again he feared that this would set a precedent and might induce Morcom to hope for a later promotion to the bench itself. Kotzé complained in writing to the Secretary of State, but the letter was returned to him by the new Administrator, Lanyon, on the basis that Kotzé had signed the letter as “Chief Justice”; Lanyon coolly pointed out that he could not forward the letter since Kotzé was merely a puisne judge. Kotzé was not to be deterred. He responded to Lanyon, and also sent a separate letter containing the correspondence in this regard between himself and Lanyon directly to the Secretary of State. See Kotzé 1934: 698–701. However, his complaint was ignored and Morcom remained in his position until the signing of the Convention of Pretoria.

136 *Jacobs v Queen* 1880 Kotzé 178 (Mar 1880); *Cloete v The Government* 1880 Kotzé 175 (Mar 1880; for the Crown); *Potchefstroom Municipality v Cameron & Shepstone* 1880 Kotzé 185 (Mar 1880; this case concerned an exception based on a notice published by the Colonial Secretary); *Du Toit v Hudson* 1880 Kotzé 220 (Aug 1880; with Meintjes, for the defendant in his capacity as Colonial Secretary); *Ex parte Hudson* 1880 Kotzé 224 (Aug 1880; a case of the arrest of the

After the Transvaal regained its independence in 1881, Morcom returned to Pietermaritzburg where he became a solicitor, having a special interest in commercial law. He acted as Natal Attorney General in 1885 and was appointed to this position four years later, succeeding his old mentor, M Gallwey. He was made Queen's Counsel in 1888. In the years after his resignation as Attorney General, he again became involved in governmental affairs and was appointed Minister of Justice in 1903. He also served as Member of Parliament for Pietermaritzburg from 1897 until his death, and drafted the federal constitution for South Africa.

Morcom never married and died in Pietermaritzburg on 23 April 1910. He was not popular and has been described as "a poor speaker and a poor statesman" and as "a pedant who regarded the law more important than justice", despite being "the Natal authority on Roman-Dutch law and on international and constitutional matters".¹³⁷ In his private life, he was conservative and critical of drinking and gambling.

3 3 Registrars and Masters

3 3 1 Hendrik Willem van Breda

Not much is known about HW van Breda. He is not mentioned in any of the usual sources, nor by Kotzé in his memoirs. I found only a handful of references relating to one Van Breda. According to them, he died after a long illness early in 1878.¹³⁸ Since this corresponds with Rider Haggard's recount of the previous Master and Registrar dying shortly after the 1877 annexation,¹³⁹ I assume this is the same person.

In 1874, the State Secretary requested information on HW van Breda from the Transvaal consul, JR Marquard,¹⁴⁰ in Cape Town.¹⁴¹ This response seems to have been reassuring, because on 3 February 1875, Van Breda accepted in writing his appointment as Treasurer General of the Transvaal.¹⁴² On the day after the annexation, Van Breda wrote to the new government, requesting to remain in his position.¹⁴³ His request was clearly not taken seriously, because instead he was then appointed as Registrar and Master of the High Court. As mentioned earlier, he was sworn in in

Orphan Master, HC Bergsma, to prevent him from leaving the Transvaal); *Page v Hudson* 1880 Kotzé 229 (Oct 1880; with Ford, for the defendant in his capacity as Colonial Secretary); *Haesant v Becker & De Vries* 1880 Kotzé 236 (Dec 1880; this case involved a promissory note signed by an agent); *Celliers v Queen* 1881 Kotzé 237 (Apr 1881; with Cloete); and *Meintjes v Meintjes* 1881 Kotzé 252 (Apr 1881; a provisional sentence regarding martial law).

¹³⁷ Leverton 1972c: 494.

¹³⁸ See TAB SS 273 R1006/78 (dated 5 Apr 1878) for the request of the acting executors of his estate (M van Breda and G Weavind) regarding Van Breda's arrears salary.

¹³⁹ Rider Haggard 1926: 110.

¹⁴⁰ See, also, n 95 *supra*.

¹⁴¹ See TAB SS 181 Supl 7/74 (dated 13 Mar 1874).

¹⁴² See TAB SS 183 R284/75.

¹⁴³ See TAB SS 235 R1566/77 (dated 13 Apr 1877).

this capacity at the official opening of the High Court.¹⁴⁴ Soon after he seemingly fell ill and by the end of May had not yet officially handed over his previous office to his replacement.¹⁴⁵ He remained indisposed and could not resume his duties.¹⁴⁶ The prognosis must not have been good, for in August his successor was appointed (see part 3 3 2 below). I found one letter from him, dated 25 February 1878, requesting an opportunity to consult his books, presumably those of his office.¹⁴⁷ After his death, the Treasurer General requested instructions on how to direct claims against his office to Van Breda's estate.¹⁴⁸

Van Breda left a widow, Sara Susanna, née Ziervogel.¹⁴⁹ The estate took more than a year to finalise, and the widow must have suffered financially, because in February 1879 the executors requested that a gratuity be paid to her.¹⁵⁰ The last correspondence regarding the estate dates from June 1879.¹⁵¹

3 3 2 Henry Rider Haggard¹⁵²

Henry Rider Haggard, the well-known author of, among other works, *King Solomon's Mines*, was born in Bradenham, Norfolk, England on 22 June 1856. He was one of ten children; his father was an attorney and land reformer. Rider Haggard received his formal education at Ipswich Grammar School. Shortly after, in 1875, he arrived in Pietermaritzburg as a member of staff of Sir Henry Bulwer,¹⁵³ the newly appointed

144 See n 22 *supra*. I could find only one document sent by Van Breda in his capacity as Registrar and Master, namely that of a request for supplies for the High Court: see TAB SS 237 R1932/77.

145 See TAB SS 237 R2037/77 (dated 30 May 1877).

146 See TAB SS 268 R634/78.

147 See TAB SS 267 R585/78.

148 See TAB SS 274 R1054/78 (dated 9 Apr 1878).

149 See TAB MHG 0/933. This explains Van Breda's request that CF Ziervogel, probably one of his in-laws, be considered as magistrate of Middelburg: see TAB SS 192 R1700/75 (dated 12 Aug 1875).

150 See TAB SS 328 R471/79 (dated 8 Feb 1879).

151 See TAB SS 348 R2126/79 (dated 11 Jun 1879) and TAB SS 348 R2131/79 (dated 23 Jun 1879).

152 See, in general, Goedhals 1968: 355–356.

153 Henry Ernest Gascoyne Bulwer (1836–1914) was born and died in Heydon Hall, Norfolk, England. He received his basic education at Charterhouse School and obtained a BA degree at Cambridge University in 1859. He was appointed to various governmental positions on Prince Edward Island, the Ionian Islands, Trinidad, Dominica, the Leeward Islands, Labuan and Borneo, before being sent to Natal as Lieutenant General in 1875. He was known as a “level-headed ruler who preserved a calm outlook on political affairs”. It was his task to establish peace in the troubled colony. He tried to prevent war, and during the eventual Anglo-Zulu War of 1879 he often disagreed with Lord Chelmsford (Lieutenant General Frederic Thesiger), the British military commander. Chelmsford's army would later suffer defeat by Cetshwayo's Zulu army at the famous Battle of iSandlwana on 22 Jan 1879. This battle served as inspiration for the well-known song “Impi”, penned by song-writer activist, Johnny Clegg. Much has been written about the Anglo-Zulu War; for a recent account of the battles of iSandlwana and Rorke's Drift, see Knight 2010: *passim*. Bulwer was involved in the education system in Natal, and personally drafted Act 15 of 1877, which concerned an improved primary education and established a board

Lieutenant General of Natal. In 1877, he accompanied Shepstone to the Transvaal as a member of his staff. It was Rider Haggard who, for the first time, hoisted the Union Jack on Church Square on 24 May 1877.¹⁵⁴

Despite his lack of legal training, he succeeded Hendrik van Breda as Registrar and Master of the High Court on 3 August 1877. In a letter to his father, dated 7 April 1878 and written eight months after assuming this position, Rider Haggard wrote that—

I had not the slightest knowledge of my work, a good deal of which is of course technical, and what is more there were no records, no books, indeed nothing from which I could form an idea of it, nor had I anyone to teach me.¹⁵⁵

Rider Haggard commented on the litigiousness of the Boers. He considered it outrageous to “spend hundreds or even thousands of pounds over the question of the ownership of a piece of land that was worth little”. Moreover, he was not impressed that some lawyers overcharged their clients. He recalled one bill of costs in the amount of £600 that came before him for taxation. He taxed it down by half, but the unnamed lawyer didn’t want to accept this and appealed to the High Court, where, after an entire day’s worth of arguments, the court finally ordered Rider Haggard to “restore an amount of, I think, six and eightpence”.¹⁵⁶ Despite his lack of experience, Rider Haggard implemented at least one innovation during his term: he introduced a stamp system that involved stamps to be affixed to the bill of costs to ensure that the required percentage of the bill would be handed over to the Treasury.¹⁵⁷

of education. Act 16 of 1877 provided for the establishment of high schools at Pietermaritzburg and Durban, and aimed for an improved public schooling for girls. However, he has been criticised for his top-down approach, and for failing to address other important education matters. He was also involved in the administration of justice, and played a particular role in the administration of “Bantu law” and in the establishment of a High Court for “Bantu matters”. He left Natal in Apr 1880, but was recalled two years later, this time as Governor of Natal. His aim in that capacity was to enable self-government for the territory, but this was frustrated when responsible government was rejected at the polls in 1882. Despite this setback, he continued to work towards conferring self-government. He eventually left Natal in 1885, after which he was appointed as High Commissioner of Cyprus. He retired in 1892 and was knighted in 1864, 1874 and again in 1883. See, in general, Leverton 1972b: 101–103.

154 And not on 12 April 1877 as incorrectly reported in some sources. Kotzé 1934: 355 n 1 pointed out the error in Theal 1919 vol 1: 274. However, see Jorissen 1897:33, who remembered the Union Jack being hoisted on Church Square on 12 Apr 1877. Shepstone purposefully delayed the hoisting of the Union Jack upon annexation to prevent Boer hostilities; instead, the flag was only unfurled on Queen Victoria’s 58th birthday more than a month later.

155 Rider Haggard 1926: 114.

156 *Idem* at 109. However, bearing in mind that £600 was the annual salary of the Attorney General at the time, this amount is probably exaggerated: see n 109 *supra*. For more on the overcharging of the Transvaal lawyers, see Wildenboer 2011: 354–356.

157 Rider Haggard 1926: 109–110.

As part of his duties, he also accompanied Kotzé on circuit during August 1877¹⁵⁸ and August 1878.¹⁵⁹ Kotzé fondly remembered the first circuit, which had hearings at Middelburg, Lydenburg, Wakkerstroom, Heidelberg, Potchefstroom and Rustenburg. Ford, the acting Attorney General at the time, and Juta, the High Sheriff, also accompanied Kotzé and Rider Haggard on this journey: Ford to conduct prosecutions, and Juta to select a deputy sheriff in each district. The members of the court traveled in two light wagons, each drawn by eight oxen because of a lack of horses or mules at the time. Juta had to see to the provisions and “proved himself to be an excellent commissariat”. En route the wagons also served as sleeping quarters, while Kotzé and Rider Haggard ensured that the party was “well supplied with fresh meat” for the entire journey. Rider Haggard had come well prepared and brought with him for this purpose “a fowling piece and his horse, as well as his famous pointer Ben”. However, it seems that Rider Haggard was not yet fully skilled at hunting as he “was a better marksman with his shot-gun than his rifle”, a Martini Henry.¹⁶⁰ It was on the occasion of Rider Haggard’s shooting (and wounding) his first antelope, a blesbok, that he had an adventure of his own that surely was worth his recounting at future social evenings.¹⁶¹ After firing the shot, he became lost and had to sleep in the veld with his horse tied to his left arm and using his saddle as a pillow. His active imagination kept him from sleeping for most of the night and “he imagined that he heard all kinds of weird noises and cries”, probably made by jackal, as drily pointed out by the Judge. Fortunately for Rider Haggard, it was a “calm and bright starlight night” and his servant eventually found him and lead him back to the wagons.¹⁶² Rider Haggard further made himself useful to his traveling

158 For a description of this circuit, see Kotzé 1934: 458–486. During this journey, Kotzé and Rider Haggard met an Australian, one Palmer, who had come to South Africa for some hunting. Kotzé invited him to travel with them from Middelburg to Wakkerstroom. The Judge was impressed with Palmer’s wagon, an “American ox-wagon or ‘prairie schooner’” and described the comfort and conveniences of the wagon in some detail (at 521–522). The Judge was therefore pleased when the government bought the wagon from Palmer a few weeks later when he arrived in Pretoria to dispose of his belongings. The wagon was henceforth used for circuit court journeys.

159 See *idem* at 517–523. This second circuit court went to Middelburg, Lydenburg, Wakkerstroom and Heidelberg. In May 1879, the third circuit court went to Potchefstroom, Zeerust and Rustenburg. See *idem* at 626–635. By this time, Rider Haggard had resigned as Registrar and only traveled with the party as far as Six Mile Spruit, where he said his farewells on his journey to Natal. Accompanying Kotzé on this circuit was Henry Cloete (who would act as Crown Prosecutor), one Dawson (the Judge’s secretary, who would also act as Registrar), Bishop Bousfield and the latter’s fifteen-year old son, Hugh.

160 *Idem* at 458–459. Rider Haggard’s skill with the rifle increased to such an extent that a year later, while on circuit, he was able to shoot two blesbok with one bullet: see *idem* at 519.

161 See n 168 *infra*.

162 Kotzé 1934: 459–461.

companions when he proved to be “an excellent cook” and “a first-class chef”.¹⁶³ It was during this circuit court that the members of the court also visited one of the Wonderfontein caves,¹⁶⁴ which so impressed him that he later used it as inspiration in *King Solomon’s Mines*.¹⁶⁵

During the First Anglo-Boer War, Rider Haggard joined the volunteers’ corps to defend Pretoria. In May 1879 he resigned¹⁶⁶ as Registrar and Master and returned to England, where he met and married Mariana Louisa Margitson. Four children were born of this marriage. They returned to Natal in December 1880 to take up ostrich farming, but when this venture failed, the couple returned to England after the First Anglo-Boer War.

There, and due to Kotzé’s influence,¹⁶⁷ Rider Haggard joined Lincoln’s Inn and commenced his legal training. During this time, he also wrote for newspapers and published his first books.¹⁶⁸ He wrote *King Solomon’s Mines*¹⁶⁹ in a mere six weeks, and as part of a bet with his brother to compete with Robert Louis Stevenson’s

- 163 See *idem* at 465. Rider Haggard cooked whatever meat was available on the day (such as venison, korhaan or red-wing partridge) in a baking pot, “steamed the potatoes to perfection” and sometimes “prepare[d] more dainty dishes, such as roast snipe on toast”. Dawson, who acted as Registrar during a third circuit court in May 1879, was also expected to prepare the food. Kotzé recounted the incident where Dawson burnt the one side of his moustache. Fortunately nothing but Dawson’s pride was hurt, as he “was very proud of his moustache”. The rest of the group was not very sympathetic and instead took the opportunity to make fun of Dawson, telling him that he could not attend church the next morning with half a moustache. In the end, they persuaded him that there was nothing left but to shave off the other half of the moustache as well, and this was done by Bishop Bousfield himself, who happened to have a pair of scissors at hand: see *idem* at 634–635.
- 164 The Wonderfontein caves (or Wonder Cave) is situated at Kromdraai, Gauteng, and is the third-largest cave chamber in South Africa. It is still an attraction for spelunkers, and is listed by Triposo (an online, social travel site) as one of the seven amazing caves in the country: see Chloé *sd.* For an account of the Wonderfontein caves by a recent spelunker, see Van der Schyff 2014: *passim*.
- 165 Kotzé 1934: 481–482. The group explored the caves by candle light and was amazed by the stalactites, and also by a structure resembling a pulpit, which, of course, would have been a stalagmite.
- 166 Rider Haggard sent two letters of resignation, namely on 4 and 29 May 1879: see TAB SS 341 R1547/79 and TAB SS 344 R1777/79 respectively. It is not clear why he felt the need to confirm his original intention, as word must have spread quickly after his first letter: three days after, nine candidates had already applied for his soon-to-be vacant post: see TAB SS 341 R1536/79 (dated 7 May 1879). See, also, n 173 *infra*.
- 167 Elsewhere, Kotzé 1934: 388–389 n 2 described Rider Haggard as “my old friend” and as “genial, high-spirited and romantic” (at 465). However, he bemoans the fact that Rider Haggard was prejudiced against the Boers and that he “could not be persuaded into visiting [their] homes” (at 523). He blamed his mindset on the general anti-Boer sentiment in Natal, where Rider Haggard had resided before coming to the Transvaal (at 524).
- 168 Kotzé 1934: 451 remembered that Rider Haggard had written his first short stories – published in English publications, such as the *Gentleman’s Magazine* (a monthly magazine published between 1731 and 1922) or the *Cornhill* (a monthly magazine published between 1860 and 1975) – based on anecdotes of frontier life in the Cape, told by none other than Shepstone himself during social evenings at Government House.
- 169 For two recent reviews of *King Solomon’s Mines*, see Foden 2007 and Rundell 2014: 33–34.

popular *Treasure Island*. Various other novels followed, all written as adventure stories and many of them set in Africa.¹⁷⁰ His passion for farming and social reform would later also feature in works, such as *The Farmer's Year Book*, *Rural England* and *The Poor and the Land*.

Rider Haggard also traveled extensively. He was knighted in 1912, and he became a Knight Commander of the British Empire in 1919. He died in London on 14 May 1924.

3 3 3 Richard Kelsey Loveday¹⁷¹

Loveday was born in Pietermaritzburg on 4 August 1854. He received his basic education in Natal, but started working at the tender age of fourteen. A few years later, he moved to the ZAR for health reasons, where he joined the civil service.¹⁷² He was one of at least nine candidates who applied for Rider Haggard's vacant post.¹⁷³ Successful, he succeeded Rider Haggard as the Registrar and Master in an acting capacity.¹⁷⁴ In October 1880 he was again appointed in this position in an acting capacity.¹⁷⁵

After the First Anglo-Boer War, Loveday was not re-appointed, probably due to his participation in defending Pretoria against the Boers during the war.¹⁷⁶ Nevertheless, he remained in Pretoria for the rest of his life and accepted the ZAR as his homeland. He then busied himself with various other duties, including land surveying, although he was not professionally trained as such. In 1885 he was appointed a Fellow of the Royal Geographical Society after compiling and publishing a map of the Lydenburg gold fields.¹⁷⁷ Between 1891 and 1900 he was the

170 For an overview of his work, see Etherington 1984: *passim*.

171 See, in general, Cloete 1968: 500–501.

172 He already showed an interest in surveying at this early stage, as he applied to the Surveyor General's office for the position of draughtsman on 11 Dec 1878: see TAB SS 317 R4351/78. It is not clear whether his application was successful.

173 See TAB SS 341 R1536/79 (dated 7 May 1879). The other eight candidates were AS Dauson, F Jeppe, CHR Norman, J Vogel, W Atlely, F Coppen, FC Faure and H Browne. See, also n 166 *supra*.

174 The date of his appointment is not certain; I could not find any official documentation in this regard. Cloete 1968: 501 gives the date of his appointment as 1 Jun 1879, which is probably correct as Rider Haggard had already left Pretoria by the middle of May: see n 159 *supra*. By the end of that year, Loveday's provisional appointment had not yet been confirmed: see the letter by Loveday dated 29 Dec 1879 at TAB SS 378 R4501/79. I could not find any correspondence in response to this letter.

175 He was also instructed by the Administrator to take over the official records of the Attorney General on 4 Feb 1880, a week before Morcom took office as Maasdorp's successor in that role: see TAB SS 392 R509/80. This was probably only an interim measure until Morcom could commence his duties.

176 According to Kotzé 1934: 748, Loveday had the rank of captain and commanded the fourth company. See, also, Loveday's suggestions for a volunteer artillery corps: TAB SS 404 R1123/80 (dated 12 Mar 1880).

177 For more on the Lydenburg gold fields in general, see Glynn *sd*: 28–42.

Volksraad representative for Barberton, and became known for his progressive and liberal views.¹⁷⁸ He was especially concerned with matters regarding administration and education. From 1897 to 1900 he was twice appointed by Kruger himself as member of the first and second interim Pretoria municipality.¹⁷⁹ During the Second Anglo-Boer War, the British appointed him acting mayor of Pretoria,¹⁸⁰ and after that war he was elected as a member of the city council, which he served until his death.¹⁸¹ In addition, during this time, he served in various other capacities, such as member of the legislative council of the Transvaal, the central judicial commission and the railway commission.

Loveday was furthermore interested in nature conservation and was one of those who, in 1898, proposed the motion in the *Volksraad* for proclaiming the Kruger National Park.¹⁸² He was an avid rugby player and cricketer,¹⁸³ and displayed some skill as a hunter.¹⁸⁴

He was married to Augusta Magdalena Wilhelmina Juta, the daughter of JC Juta,¹⁸⁵ and of the marriage was born four daughters and two sons. He died in Pretoria on 10 July 1910.

4 Conclusion

The establishment of the High Court of Transvaal was long overdue. By 1877, the Transvaal was the only territory in what would later become South Africa that did not have a high court. What's more, at the time, the Transvaal did not have the necessary resources at its disposal for the establishment of such a court. Not only was the country on the verge of bankruptcy, but it had very few qualified lawyers to serve as judicial officers. President Burgers had to appoint an outsider, and a young lawyer at that, to the bench of the envisioned new court. The Attorney General at the time was not a qualified lawyer either, and his predecessor, who had the necessary

¹⁷⁸ Fitzpatrick 1899: 64 describes him as being the only progressive element in the *Volksraad* in 1888, although his views influenced others.

¹⁷⁹ See, also, Gey van Pittius 1955: 50. The first interim municipality consisted of fifteen members, which included a district surgeon (Dr G Messum), a city engineer (E Lutz) and the magistrate (CE Schutte).

¹⁸⁰ See, also, *idem* at 58.

¹⁸¹ See, however, the cartoon reprinted at Pelzer 1955: 326, where Loveday is depicted as one of the fence sitters regarding the issue of responsible or representative government.

¹⁸² See Joubert 2007: 1–22 for a general overview of the history of the Park; Loveday and JL van Wyk are specifically mentioned for their efforts in persuading the ZAR government to eventually proclaim the *Gouvernement Wildtuin* on 26 Mar 1898 (*idem* at 1–2).

¹⁸³ Vlok 1955: 235.

¹⁸⁴ He often accompanied none other than Kotzé on hunting trips to the Pretoria surroundings, where they hunted mostly fowl and antelope. Kotzé 1934: 452 described Loveday as a “first-rate shot”.

¹⁸⁵ See n 23 *supra*.

training and legal skills, had left the Transvaal in search of greener pastures. The capital, Pretoria, did not even have a dedicated court building.

Nevertheless, during the first four years of its existence, slow but steady changes were implemented. In order to encourage a fully qualified bench and Bar, several interventions were made: formal requirements were set for the admission of advocates and attorneys; a new examining body was established; and a divided legal profession was implemented. In addition, the judicial officers were required to have the necessary qualifications. However, sometimes appointments still had to be made as a matter of urgency when the administrative needs of the court became more pressing than having to wait for a suitable candidate to be found abroad.

During these four years, the Transvaal found itself in political turmoil, eventually culminating in the First Anglo-Boer War. One is therefore perhaps a bit surprised that the day-to-day activities of the court continued as usual; that apart from political differences and views, personal prejudices also still played a role, not only in the appointment of law officers, but also within the court itself. Yet, despite the threat of war in the Transvaal, and the reality of war in Natal, in court it was mostly business as usual. The court had to decide on various civil matters, such as divorces, deceased estates and boundary disputes, and had to hear the usual criminal cases. Individuals still had to earn a living. Life, therefore, continued steadily as always, at least within the court room. It is tempting to think that the rules and formalities of the court served as a reprieve from the political tension for those who earned their living there. But perhaps that is the entire point of the legal system: to provide order for societies in strife.

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