

BEE-ING CHINESE IN SOUTH AFRICA: A LEGAL HISTORIC PERSPECTIVE

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ABSTRACT

This article traces the history and dilemma of the South African born Chinese (SABCs, also known as the indigenous Chinese) in terms of their legal dispensation. Within months of the implementation of the Broad-Based Black Economic Empowerment Act 35 of 2003, it became apparent that the Chinese communities were excluded as beneficiaries of the legislation as well as from the Employment Equity Act 55 of 1998. This situation was in line with the treatment that the Chinese had received since they first arrived in the Cape Colony towards the end of the seventeenth century, and was perpetuated throughout the subsequent centuries to beyond the 1994 new political dispensation. The exclusion of the Chinese from Broad-Based Black Economic Empowerment and Employment Equity and their legal action challenging the Acts, took place against the backdrop of stereotypical representation in popular consciousness and ignorance of a people who have been part of the South African past for three centuries. This article places the South African Chinese legal battle of the twenty-first century within the context of their perpetual invidious position in South Africa's past. It traces the neglected and checkered legal history of a marginalised minority.

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1 Introduction

In the year 2008 the South African High Court in Pretoria ruled that the South African Chinese community were “black” in terms of Employment Equity and Broad-Based Black Economic Empowerment. This was the result of an eight-year battle launched by the Chinese Association of South Africa to clarify their status in terms of affirmative action and empowerment legislation. In this instance they took recourse to their history and place in the South African past. The case was eventually unopposed by the Respondents, yet while the court decision heralded an important milestone victory, the subsequent media, public and ministerial reaction cast a shadow over their successful plea. This article will trace the position of the Chinese in terms of the court case, as well as their history, indicating how they had been legally discriminated against since their arrival in southern Africa some three centuries ago. It will consider the situation that preempted the case, the plan of action, the court case and the invidious situation that ensued.

2 *Status quo*

Since 1994, in an attempt to create a more equitable South African society within the newly-found democracy, various pieces of legislation were drafted to redress the inequalities of the past. Two key pieces of legislation that were promulgated were Act 55 of 1998, the Employment Equity Act,¹ followed five years later by Act 53 of 2003, the Broad-Based Black Economic Empowerment Act.² In short, the combined effect was “to promote equity and fairness in the labour market and in trade and

- 1 Employment Equity Act no 55 of 1998. The point of this legislation is to strive to attain equity in the workplace by promoting fair treatment and equal opportunity through the elimination of unfair discrimination and by the implementation of affirmative action measures so as to redress the disadvantages in employment experienced by designated groups. See <https://www.saica.co.za/Technical/LegalandGovernance/Legislation/EmploymentEquityAct/tabid/3041/language/en-ZA/Default.aspx>.
- 2 Broad-Based Black Economic Empowerment Act no 53 of 2003. This subsequent legislation aims to “ensure that the economy is structured and transformed to enable the meaningful participation of the majority of its citizens and to further create capacity within the broader economic landscape at all levels through skills development, employment equity, socio economic development, preferential procurement, enterprise development, especially small and medium enterprises, promoting the entry of black entrepreneurs into the mainstream of economic activity, and the advancement of co-operatives. B-BBEE needs to be implemented in an effective and sustainable manner in order to unleash and harness the full potential of black people and to foster the objectives of a pro-employment developmental growth path”. See <http://www.edd.gov.za/about-us/programmes/economic-policy-development/b-bbee>.

industry”.³ Also, “against a background of apartheid and discriminatory laws” to give those members of society that had been discriminated against access to employment opportunities and employment equity, to ensure workforce diversity, promotion of economic development and access to financial deals and other forms of assistance in the corporate and business environment, while establishing a legislative framework for the management and monitoring of black economic empowerment.⁴

According to the definitions of the Employment Equity legislation, the Act applied to “black people” which was defined as “a generic term which means Africans, Coloureds and Indians”.⁵ Thus having been excluded from the benefits referred to in the Employment Equity legislation under apartheid and having been classified as “coloured” by the Population Registration Act in 1950,⁶ it was believed by the Chinese community that they should be included in the application of the legislation. However, by the end of the 1990s, it became increasingly apparent to members of the South African Chinese community that they were being discriminated against in terms of employment equity, as well as matters relating to preferential shares and other economic empowerment deals in both the public and private sectors.⁷

In the Eastern Cape Province, for example, a Chinese businesswoman submitted an application to open a business in a casino complex. She was informed that according to the Employment Equity Act, “30 per cent of the businesses in the complex had to be black owned” and as the “newly implemented Employment Equity Act [did] not regard Chinese people as previously disadvantaged” she would probably not qualify.⁸ A member of the corporate world added that in terms of the Act “black” meant “African, Coloured and Indian and that Chinese people did not count”.⁹ Another example involved a Chinese employee who had worked in the IT division of a bank for some twenty-five years. When the bank launched the first

3 Chong 2007: 4.

4 *Annual Survey of South African Law* 1998, Employment Equity Act no 55 of 1998, School of Law, University of the Witwatersrand 2004 567; *Annual Survey of South African Law* 2003, Broad-Based Black Economic Empowerment Act no 53 of 2003, University of the Witwatersrand 2004 494.

5 Employment Equity Act ch 1 6 Act 55 of 1998.

6 Population Registration Act no 30 of 1950. Initially the Act identified three groups: “white”, “black” and “coloured”. While the latter group was intended to be more inclusive to accommodate people who were not members of the other two groups there was widespread reaction. This led to Proclamation no 73 of March 1951 whereby three “new” groups – Indian, Chinese and Malay – were identified as sub-divisions of the “coloured group”. See Harris 1999: 187-188.

7 The Chinese Association – Gauteng: Newsletters, Aug 2000, Jun, Jul, Aug 2002. Discussions and meetings were held within the Chinese communities across the country regarding the apparent discrimination. Already in 2000 it was claimed that the “Chinese were being marginalized” and it was decided that CASA should “approach the problem at national level”. See Anon 2004: 10; Sakato 2005: 6; Ford 2006: 24; and Terblanche 2006: 10.

8 Adkins 2000: 7; Anon 2000: 4. Ah Hing was an owner of a sweetshop in Port Elizabeth and had put in a tender to open a fudge shop in the new Summerstrand casino complex.

9 Sundstrom & Van der Merwe 2000: 10.

phase of its empowerment share offer his application was refused on the grounds that the finance sector of the Charter Council had advised that the definition “excludes people of Chinese origin”.¹⁰ The same response was made when the second phase of the scheme was launched.¹¹ To further confuse matters, two other banking institutions subsequently announced that South African Chinese would be included in their empowerment share schemes.¹² A third example related to a municipal affirmative action land sales policy which attempted to give those from “former disadvantaged communities an opportunity to own land by giving them favourable concessions to acquire the land”.¹³ According to this, only South African citizens from “designated groups” – as defined in the Employment Equity Act – could buy sites identified for sales in terms of the policy. Here again the Chinese were excluded.¹⁴ Lastly, in the recruitment for affirmative action positions, Chinese applicants were turned down as “according to South African AA standards ... only black, coloured and Indian need apply”.¹⁵

On challenging the situation, the government reaction at local, provincial and national level remained vague and inconsistent. A spokesperson of the Department of Labour commented that the African National Congress did not view the Chinese “among previously disadvantaged groups” because they were “a small group with no voice”.¹⁶ In another instance, an African National Congress councillor stated that the party was aware that the Chinese had suffered, but what was to be considered most was “the degree of suffering”.¹⁷ Nerine Kahn, Chief Director of Labour Relations in the Department of Labour, claimed that “the Chinese had been very irritating because they believe it would be that simple to make an amendment” to the Employment Equity Act and Broad-Based Black Economic Empowerment legislation.¹⁸ Government officials also claimed that “the history of Chinese South Africans [was] far too complex to allow them to make a decision about where they stand now”.¹⁹

10 Anon 2006: 10. The bank claimed that the Charter Council had advised that this definition (in the Employment Equity Act and the Broad Based BEE Act) excludes people of Chinese origin.

11 Anon 2006: 10; Whyte 2005a: 11.

12 Rossouw 2005: 20; Jacks 2005: 69; Cameron 2005: 35. Standard Bank introduced two empowerment share schemes: the Tutuwa Scheme and the Share Scheme, but excluded the Chinese as beneficiaries. Other banks, such as Old Mutual, Nedbank and ABSA, did not exclude Chinese from such schemes.

13 Mativire 2000: 6.

14 *Idem* 4. Again it was the Port Elizabeth City Council that refused the application which was made to its town planning and land use committee.

15 Holmes 2000: 4. This was a Nedcor IT training program for affirmative action candidates.

16 Anon 2000: 4; Adkins 2000: 7.

17 Matavire 2000: 4. This would be an ongoing debate and point of contention and was to resurface after the court case was won by CASA in Jun 2008, particularly among politicians and the media which again reflected on the uninformed nature of the broader populace regarding the history of the Chinese in South Africa.

18 Sakato 2005: 6.

19 *Ibid.*

Lionel October, Deputy Director General of the Department of Trade and Industry, which drives the policy,²⁰ insisted that “the thrust of Broad-Based Black Economic Empowerment was to correct the inequities of people commonly understood as African, Indian and coloured”. Both his Department and that of Labour argued that

the Chinese were never discriminated against consistently. The departments would have to assess how they were discriminated against, if the discrimination was sustained, and if it equaled the discrimination faced by other “blacks”.²¹

October stated that the Chinese concerns had to be “put on hold indefinitely while legal opinions [were] formed and other political and economic stakeholders [were] consulted”.²² In 2007, the matter was still being debated and various government divisions and private sectors persisted in pronouncing that the Chinese should not be considered as part of Employment Equity or Broad-Based Black Economic Empowerment benefits.²³

While this uncertainty continued, Cliffe Dekker Attorneys, who had published a widely acknowledged guidebook to black economic empowerment in South Africa, had in fact already prepared a report on the matter for EmpowerDEX and the Department of Trade and Industry in 2004. The nine-page report concluded that it was Cliffe Dekker Attorneys’ considered view that

the breadth of discriminatory legislation applicable to Chinese people in South Africa between 1984 and 1993 is such that any suggestion that they should not qualify as being “Black people”, “historically disadvantaged South Africans” or “historically disadvantaged individuals” would patently [be] unfair and, quite possibly, unfairly discriminatory as contemplated in section 9 of the Constitution of the Republic of South Africa Act.²⁴

20 *Annual Survey of South African Law* 2003, Broad-Based Black Economic Empowerment, School of Law, University of the Witwatersrand 2004 494.

21 Sakato 2005: 6.

22 *Ibid.* CASA argued that this so-called confusion arose as a result of people not understanding the community’s history which was “causing an inconsistent interpretation of current affirmative action laws”. CASA maintained that the Chinese were “historically disadvantaged in terms of the Race Classifications Act of 1956”.

23 Anon 2007.

24 Cliffe Dekker Incorporated “The status of South Africans of Chinese descent”, Prepared for Empowerdex and the Department of Trade and Industry 2004 9. According to sec 9 of the Constitution: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Yet, despite this report, the Chinese continued to remain outside of the ambit of the two Acts, while uncertainty among the Chinese community, as well as business and government sectors, persisted.

The Chinese community argued that the application of the Acts left them “vulnerable to the same discrimination they suffered under apartheid” and failed to “recognize Chinese South Africans’ status as people who were disadvantaged by previous governments”.²⁵ It was felt that under the apartheid government they were “not white enough” and now under the new government they were “not black enough”.²⁶ They regarded this as a “double jeopardy” and questioned whether it was “not unfair to punish a minority twice for a crime they did not commit”.²⁷ The change from white minority rule to black majority rule had left them in the “same no-man’s land they had always occupied in this country”,²⁸ making them the “classic victims of reversed racism”.²⁹

3 *Modus operandi*

These Employment Equity and Broad-Based Black Economic Empowerment concerns of the Chinese community that were sporadically voiced in the media were eventually channeled to their local associations and ultimately their national organisation, the Chinese Association of South Africa. It is important to point out that the South African Chinese, not unlike their overseas Chinese (*haiwa huaren*) counterparts the world over, had generally opted to maintain a low political profile.³⁰ The Chinese Association of South Africa was actually only founded in March 1981 in reaction to a political dilemma that was foisted upon them by the apartheid government. In an attempt to appear more “politically inclusive”, the National Party government had introduced a sixty-member President’s Council appointed from the “white, coloured, Indian and Chinese population groups” to act as a consultative body to advise the government. The Chinese refused to accept participation on the grounds that “their numbers did not warrant participation” nor did they believe

25 Accone 1998: 12; Sundstrom & Van der Merwe 2000: 10.

26 Nwajah 2000: 16.

27 Whyte 2005b: 14. While the Chinese had been discriminated against under the apartheid government they were also discriminated against under the new democratic government. However, this discrimination against them as an identifiable cultural group reaches as far back as the early twentieth century with the introduction of the Chinese Exclusion Act in 1904 and, one could argue, to the seventeenth century under the Dutch East India Company rule when they were disallowed certain economic rights.

28 Robins 1997: 8.

29 Nwajah 2000: 16. According to MYap (co-author of *Colour Confusion and Concession*) “[i]n the past they were not regarded light enough to be white, now they are not dark enough to be black”.

30 Anon 1981: 6; Wilkins 1981: 31. The overseas Chinese in countries such as the United States of America, Australia and New Zealand generally opted to maintain a low profile in terms of politics within their host countries.

they had the “right to make decisions affecting much larger population groups” and that they “preferred no role until full rights [were] given”.³¹ Instead they decided to unite the existing six disparate Chinese regional organisations into one umbrella organisation as this would then enable them to articulate their position and demands with one voice.³² One of the main mission statements of the Chinese Association of South Africa’s reads as follows:

We are dedicated to promoting and preserving the Chinese cultural identity and heritage, and safeguarding the interests of Chinese in South Africa.³³

In May 2000 the Chinese Association of South Africa chairperson wrote to the Minister of Home Affairs to attain clarity as to the classification of Chinese people. This was followed over the next five years by the Chinese Association of South Africa making submissions to the Director of Equal Opportunities, the Labour Portfolio Committee and the Departments of Labour, Trade and Industry, but all in vain.³⁴ At the end of 2004 in a response to a question in the National Council of Provinces whether Chinese employees must be classified as “coloureds” for the purposes of submissions in terms of the Employment Equity Act, the Minister of Labour stated as follows:

[O]n whether the Chinese are included or excluded from the definition of designated groups or are being unfairly discriminated against in terms of The Employment Equity Act, individuals or groups have the right to seek clarity or legal recourse via the Courts.³⁵

And again the Department of Trade and Industry and the Financial Sector Charter Council reiterated this view that

[t]he department is absolutely clear that the definition of “black people” as contained in the latest draft of the codes will stand. This excludes the classification of Chinese people as “black” for purposes of broad-based black economic empowerment.³⁶

This stance, and the fact that the Chinese Association of South Africa had as yet not received any formal responses to its various submissions to government since 2000, left the Chinese community with no other option than to take legal action and recourse

31 Anon 1980: 8.

32 Anon 1981: 6.

33 CASA Mission Statement: 2004. CASA was established as a “voluntary and non-profit national community organisation which promotes the interests of the Chinese community in South Africa”. According to clause 2.2 of the Constitution the Association is a “corporate body under common law, with perpetual succession and shall sue and be sued in its own name”.

34 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) “Chinese Association of South Africa: chronological timeline” 2008 1-2.

35 *Idem* 2.

36 Whyte 2005b: 14.

to the courts.³⁷ The Cape Town-based attorneys Edward Nathan and Sonnenbergs were assigned the case and, should it go to court, human rights advocate George Bizos and constitutional law advocate Alfred Cockrell were appointed to appear.³⁸ In June 2006 Edward Nathan and Sonnenbergs addressed letters to the Ministers in the Departments of Labour, Trade and Industry and Justice and Constitutional Development regarding the matter. These formal letters of demand state as follows:

We invite you and the two other concerned Ministers to indicate whether or not you agree with our clients' view that Chinese people should be regarded as "Coloured" and, accordingly, fall within the ambit of the phrase "black people" as used in The Employment Equity Act and The Broad-Based Black Economic Empowerment Act.³⁹

At the end of June 2006 the Department of Labour responded to a query by Accenture SA (Pty) Ltd regarding the status of the Chinese in terms of Employment Equity. They stated that "individuals of Chinese descent are not designated and should not be included in the Employment Equity Report as a sub-group of Coloureds". They continue "to confirm that Chinese individuals should be reflected as 'white' in terms of employment equity, especially if they are citizens of this country".⁴⁰ As a result, in December 2007 the Chinese Association of South Africa launched an application in the Pretoria High Court against three ministerial departments: the Minister of Labour, the Minister of Trade and Industry and the Minister of Justice and Constitutional Development. A month later all three Respondents filed a notice to oppose, but Justice and Constitutional Development as the third Respondent ultimately indicated that they "would not oppose the Notice of Motion but would abide by the court's decision".⁴¹

4 *Locus standi in iudicio*

The attorneys Edward Nathan and Sonnenbergs compiled a Notice of Motion whereby the three Applicants, namely the Chinese Association of South Africa, Victor Chong and Albert Peter Fung, applied for an order in which Prayer 1 read as follows:

37 Sakato 2005: 6.

38 Terblanche 2006: 10. ENSAfrica is Africa's largest law firm boasting one hundred years of experience. George Bizos is a Human Rights lawyer of note who had campaigned against apartheid and also represented Nelson Mandela in the Rivonia Trial. Alfred Cockrell SC is a former professor of law at the University of the Witwatersrand. George van Niekerk of Edward Nathan and Sonnenbergs in Cape Town was appointed to act for CASA.

39 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) "Chinese Association of South Africa: chronological timeline" 2008: 2-3.

40 *Idem* 3. Accenture SA (Pty) Ltd which is a global management consulting, technology services and outsourcing company.

41 "Chinese Association of South Africa: chronological timeline" 2008: 3.

that the South African Chinese people:

- (a) fall within the ambit of the definition of “black people” in section 1 of the Employment Equity Act 55 of 1998;
- (b) fall within the ambit of the definition of “black people” in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003.⁴²

Failing the above, the alternative Prayer requested that the definition of “black people” in both Acts be declared “inconsistent with the Constitution and invalid by virtue of its failure to include Chinese people within its ambit”. This then would require the addition of the phrase “and Chinese people” at the end of the current definition of “black people” in both Acts. In addition, Prayers 3 and 4 referred to the payment of the costs of the application “on a joint and several basis”.⁴³

In the overview of the application it was pointed out that “during the apartheid era South African Chinese people were regarded as ‘coloureds’ under numerous apartheid laws which divided the population into various groups”. As a result, the South African Chinese were “treated as second-class citizens and derived no better treatment from the law than other racial or ethnic groups regarded as ‘coloured’ or non-white”. Besides the explanations dealing with the Applicants and the “declaratory order” they sought, the application also set out a well-researched summary of the “manner in which Chinese people were treated before 1994”.⁴⁴

The discriminatory regulations that South African Chinese were subjected to were outlined in the “legislative framework” of the Application. All relevant pieces of apartheid legislation which impacted on the Chinese were briefly discussed. Starting with the Population Registration Act of 1950,⁴⁵ the “negative criteria” that were used to define the classification of the South African Chinese as “coloured” were pointed to. The Chinese fell within this group only because they were not “whites” or “natives”. In point of fact, within a year of its promulgation the legislation was amended to sub-divide the “coloured group” into three additional groups: Indian, Chinese and Malay.⁴⁶ By Proclamation no 46 of 1959 the “coloured” category was again subdivided into seven different “coloured” groups, which again designated a “Chinese group”.⁴⁷ The imprecision and unwieldiness of the Act is evident in the fact

42 *Idem* at 2.

43 *Idem* at 2-3.

44 *Idem* at 3. This first applicant’s founding affidavit comprised 351 pages and included an 84-page account of the legislative structure that discriminated against the Chinese. It also included 164 pages regarding discrimination against the Chinese from the book by Melanie Yap and Diane Man, *Colour, Confusion and Concessions*.

45 *Statutes of the Union*, Population Registration Act 30 of 1950. This Act was only repealed in Jun 1991. It is, however, maintained that the racial categories devised in the 1950 Act persist in South African society such as the census as well as the legislation introduced to remedy the inequalities of the past.

46 Proclamation no 73 Mar 1951.

47 Proclamation no 46 Mar 1959.

that it was amended eight times before it was eventually repealed four decades later. The application emphasised that as such, discrimination against the South African Chinese was “widespread and systematic” throughout the apartheid years. The eight areas used to substantiate this claim were education; employment; ownership of property; trading/business rights; voting rights; separate amenities; freedom of movement; and marriage.⁴⁸ A detailed eighty-four page memorandum analysing this discriminatory legislation was also submitted, along with numerous extracts from the book *Colour, Confusion and Concessions: The History of the Chinese in South Africa* authored by Melanie Yap and Dianne Leong Man.⁴⁹

The court application also included affidavits from six other individuals that included members from both within and outside of the Chinese community. In the second applicant’s affidavit, Victor Chong recounts his career as a “non-white” social worker, trader and later teacher at a “coloured” school. The discrimination he endured included – amongst others – permits to study, to trade and to reside as well as the fact that he earned a salary a third less than his white counterparts with the same qualifications. He was also denied shares in the Johannesburg Stock Exchange Black Shareholder retention Scheme.⁵⁰ The third applicant, Albert Peter Fung, mainly focused his affidavit on his exclusion from his company’s Black Ownership initiative even though he was treated as a “non-white” and had worked for them for over twenty years.⁵¹ The evidence of Leslie Hum Hoy, who qualified as an architect, stated that he had to leave the country as although he was offered a partnership in a firm, his “non-white” status resulted in him being refused this on legal grounds. He furthermore recounted how he was also asked to leave hotels and other public amenities where he met clients because of his Chinese “non-white” status.⁵² The next two affidavits were primarily concerned with the history of the Chinese in this country. Authors Melanie Yap and Dianne Leong Man verified the methodology and research of their abovementioned book.⁵³ Lastly, there was an affidavit that focused

48 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Notice of Motion: case no 59251/07 High Court of South Africa (TPD) Legislative Structure: Discrimination, Pretoria 18 Jun 2008: 1-84.

49 Yap & Man 1996. See the review articles on this book by Harris 2009: 116-128 and Harris 1997: 316-325.

50 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Second Applicant’s founding affidavit: V Chong pp 1-17 case no 59251/07 High Court of South Africa (TPD) Pretoria 18 Jun 2008.

51 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Second Applicant’s founding affidavit: AP Fung, pp 1-12 case no 59251/07 High Court of South Africa (TPD) Pretoria 18 Jun 2008.

52 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Second Applicant’s founding affidavit: LH Hoy, pp 1-9 case no 59251/07 High Court of South Africa (TPD) Pretoria 18 Jun 2008.

53 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Second Applicant’s founding affidavit: Yap 1-12 and DL Man 1-5 case no 59251/07 High Court of South Africa (TPD) Pretoria 18 Jun 2008.

on an assessment of *Colour, Confusion and Concessions* as a reliable text,⁵⁴ as well as a select historical overview of discrimination against the Chinese from the very first stages of colonialism, and the position of the Chinese community under apartheid and the post-apartheid period.⁵⁵

That discrimination against the Chinese was rife is indeed evident in the historical record and dates back to the first arrivals at the Cape. To begin with, in the early eighteenth century the Dutch East India Company (DEIC) introduced *plakkaten* (ordinances) in, for example, 1727 and 1740 that forbade the miniscule Chinese community certain trading rights in the Cape region.⁵⁶ Many of these legal regulations were introduced to address the protests by certain Dutch *burgers* that could apparently not compete against the “industrious” Chinese and appeared to have a kind of disdain for them.⁵⁷ They were, for example, not to sell baked goods or fresh fruit and vegetables in the streets with a transgression leading to confiscation of the produce and fines. They were also relegated to living areas on the outskirts of Cape Town and had a separate burial ground. Moreover it was declared they were not to wear Western clothes so that they could be easily identified.⁵⁸

In the nineteenth century independent *Boer* Republics⁵⁹ introduced legislation that restricted the presence and movement of Asians. Although the number of Chinese remained very small and the legislation was more often than not directed at Indians,⁶⁰ the Chinese fell within the ambit of this legislation and were also subjected

54 Harris 1997: 316-325.

55 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) Second Applicant’s founding affidavit: Harris 1-12 case no 59251/07 High Court of South Africa (TPD) Pretoria 18 Jun 2008.

56 Armstrong 1997: 36-37; Jeffries & Naude: 121. There were no more than about 150 Chinese at the Cape during the Dutch East India Company period (1652-1799). However, regardless of the miniscule numbers they were identified and discriminated against in terms of their economic and social activities.

57 Harris 2010: 223-224. Almost a century and a half later a similar situation arose when Europeans on the Witwatersrand objected to the apparent competition the Chinese traders posed. They declared that these Chinese merchants were causing them “a great injury and were a serious menace”. The *Indian Opinion*, most probably Mahatma Gandhi, wryly commented that “if the Chinese shopkeepers [were] allowed to supply the necessities to their countrymen, it would be the height of injustice and deprivation of the rights of the European shopkeepers”, adding that they confessed their “utter inability to compete with the Chinese”. See Harris 1995: 162-163 for a detailed discussion of this perpetuated idea of a perceived economic threat.

58 Jeffries & Naude 1948: 121.

59 Two independent *Boer* Republics were established in the interior of southern Africa in 1852 and 1854 as a result of two conventions signed between the British colonial government and the *Boer* leaders: *Zuid-Afrikaansche Republiek* and the *Oranje Vrystaat*. There were two other states under the British colonial government, namely the Cape and Natal colonies.

60 While Indians had been present at the Cape as part of the enslaved community since the latter quarter of the seventeenth century, the introduction of 152 184 indentured Indians into the Natal Colony to work on the sugar plantations in the mid-nineteenth century had heightened an awareness and resistance against them. See Harris 2010c: 147.

to the restrictions. In the *Zuid Afrikaanse Republiek*, Law 3 of 1885 required that all “persons belonging to the native races of Asia” register and carry annually renewable passes.⁶¹ In 1893 this regulation was extended by a resolution whereby every Chinese had to obtain an annual special pass with a stamp to the value of twenty five pounds.⁶² It also denied them the right to ownership of property except in government designated “streets, wards and locations”.⁶³ In the other *Boer* Republic, the Orange Free State, legislation was introduced in 1891 which forbade “Chinese coolies or other Asiatic coloureds” from settling or remaining in the territory.⁶⁴ This particular piece of legislation remained on the statute books for close on a century, only being repealed in 1986.⁶⁵

In the early twentieth century, under British colonial rule, the Chinese were subjected to one of the first overtly racist pieces of legislation introduced during the genesis of white hegemony in southern Africa, namely the Chinese Exclusion Act of 1904.⁶⁶ This legislation required that all Chinese residents in the Cape Colony had to apply for a permit (a Certificate of Exemption). In addition they had to register with the district magistrate, notify and re-register with the authorities if they moved, and apply to renew the permit annually.⁶⁷ This discriminatory Act of 1904 remained on the statute books until 1933 and had the “restrictive efficiency” of halving the number of Chinese in South Africa and essentially ending the immigration of Chinese for the remainder of the century.⁶⁸ In the Transvaal Colony the Chinese fared little better. Here legislation that also applied to the Indians required them to register,

61 *Codex van Den Locale Wetten* ZAR Wet no 3 1885.

62 *De Locale Wetten en Volksraad Besluiten der ZAR* Art 1353 1893.

63 *Statute Laws of the Transvaal* Law no 3 Jun 1885: 135.

64 *Wetboek van die Oranjevrijstaat* 1891 Hoofdstuk xxxiii.

65 *Statutes of the Republic of South Africa*, Matters Concerning Admission to and Residence in the Republic Amendment Act 53 of 1986.

66 *Statutes of the Cape of Good Hope* 1902-1906, The Chinese Exclusion Act 37 of 1904. It is important to note that Exclusion Acts had been implemented against the Chinese in other colonial destinations prior to the implementation in the Cape Colony: Australia in 1851, New Zealand in 1881, the United States of America in 1882 and Canada in 1885. The 1904 Act has been relatively ignored in South African history mainly because it does not accord with the black-white dichotomy of traditional historical analysis.

67 *Statutes of the Cape of Good Hope* 1902-1906, The Chinese Exclusion Act 37 of 1904. Following in the wake of the “Immigration Act of 1902”, the restrictive nature of the Exclusion Act revealed the not-so-liberal and racist underside of Cape colonial politics. At the time of the promulgation of the Act, the proposers declared that they had drafted the legislation in “as radical a manner as possible, but welcomed any amendments or provisions that would make it more so”. They had apparently followed the example of Australia and the United States of America by dealing separately with Chinese immigration, rather than combining it with the Alien Immigration Law. The rationale was that these other countries had found that “the Chinese as a race could be more easily dealt with than any other race that came under the Alien Immigration Laws”. For further discussion of this see Harris 1998a: ch 5.

68 *Statutes of the Union of South Africa*, The Immigration Amendment Act no 19 1933.

obtain passes and be fingerprinted. The “Black Act” of 1907 against which Mahatma Gandhi protested was thus equally applicable to the small Chinese community, and was likewise objected to by them.⁶⁹

Moving into the twentieth century, under the apartheid regime, from the outset the Chinese were classified as “non-white”. As indicated above, in 1951 they formed a sub-group of the “coloured group” and remained as such without the vote until 1994.⁷⁰ They were therefore subjected to all the disadvantages of people who were not white. Their small size and low political profile often propelled them into extremely tenuous situations. For example, for two decades the apartheid architects tried to allocate Chinese group areas, but except for Kabega Park in Port Elizabeth, their numbers did not warrant an area. Instead, they were subjected to a permit system whereby they had to apply for permission from the Department of Community Development and obtain a “no objection” from immediate neighbours before moving into an area. They were also affected by the resultant Group Area forced removals and clearing of “mixed” areas which often left them displaced and destitute.⁷¹ Permit and permission permeated all dimensions of their lives⁷² until 1994 when they supposedly became part of the new non-racial democratic South Africa.

It thus becomes clear that the exclusion of the Chinese from the benefits of the two Acts (Employment Equity and Broad-Based Black Economic Empowerment) was not something new to them – before and during the apartheid period they had endured similar discriminatory treatment. They were yet again in the extraordinary predicament of being in an “interstitial position”.⁷³ The merits of the case were, however, of such a nature that although all three Respondents had initially filed a notice to oppose, by April 2008 “they eventually conceded”⁷⁴ and the State Attorney indicated that “the Respondents consent to prayer 1 of the Notice of Motion and that

69 *Statutes of the Transvaal* 1907, Asiatic Law Amendment Act 2 of 1907. This legislation was introduced by the Transvaal legislature to specifically curb the influx of Indians into the colony, but applied to all “Asiatics”, including the Chinese. Not unlike the Cape Colony legislation that preceded it, it required the compulsory registration of all Asians with a Registrar and a certificate of registration with information such as name, residence, age, caste, marks of identification as well as finger and thumb impressions. The penalty for failing to comply ranged from a fine to imprisonment and deportation. Although there had been legislation in both the *Zuid-Afrikaanse Republic* and the Transvaal Colony restraining and regulating the Asian communities prior to this, the implications of this legislation were far more restrictive than any previous legislation and thus resulted in the protest reaction that ensued. See Harris 1998a: ch 6.

70 Proclamation 46 of 1959.

71 Harris 1999.

72 Besides the Population Registration and Group Areas Acts, the Chinese were to find themselves in an invidious position in terms of public amenities such as access to hospitals, public transport, cinemas, beaches, fishing areas as well as education. For the most part they were relegated to the non-European facilities, while at times they were treated as coloured or could be designated facilities specifically allocated for Chinese. See Yap & Man 1996: ch 11.

73 Harris 1998b.

74 SAPA 2008: 5.

the matter may be set-down on an unopposed basis”.⁷⁵ The Respondents, however, indicated that they would not accept liability for the costs, but after the attorney’s intervention, this too was conceded. On 18 June 2008 in the High Court in Pretoria at 10:00, Judge Cynthia Pretorius ruled that in case number 59251/07 the South African Chinese “fall within the definition of black people in the Constitution”, allowing them to “now enjoy the full benefits of black economic empowerment”.⁷⁶

For the Chinese it was more than being acknowledged for Broad-Based Black Economic Empowerment. According to Patrick Chong, chairman of the Chinese Association of South Africa, the Chinese community’s struggle had “not been about economic opportunism, but about lack of recognition and clearing up of the misconceptions of the historical injustices the South African Chinese faced”. He said that the court decision “recognized the need for human dignity for the Chinese people, who didn’t fit in under apartheid ... or after 1994”.⁷⁷ The Chinese community celebrated the court ruling by hosting an event they called “Dignity Day”, underlining that this was indeed a case of rectifying their place in South Africa’s past.⁷⁸

5 *Post hoc ergo propter hoc*

While members of the Chinese community were visibly overjoyed, some even overwhelmed, by the decision after their eight-year legal battle with government,⁷⁹ the euphoria was short-lived. The local and international media had a field day with headlines such as “Chinese locals are Black”,⁸⁰ “Chinese not black”,⁸¹ “Race makes nations act funny”; and “In South Africa, Chinese is the New Black”,⁸² while cartoons caricatured the stereotypical Chinese with captions like “Chinese nou ere-swartes” (“Chinese now honorary blacks”).⁸³ More disturbing were the reactions and responses from certain sectors of the public and government,⁸⁴ but in particular, comments by the First Respondent in the case Minister of Labour, Membathisi Mdladlana.⁸⁵ It

75 *Chinese Association of South Africa v Minister of Labour* (59251/2007) [2008] ZAGPHC 174 (18 Jun 2008) “Chinese Association of South Africa: chronological timeline” 2008: 3.

76 SAPA 2008: 4; Fourie 2008: 6; Masombuka 2008: 4.

77 Ho 2008: 1; Gerardy 2008: 8.

78 See Harris 2010: 147-162. Dignity Day was celebrated by the community for the following five years. Celebrations were held by the various regional associations with speakers reminiscing on past experiences.

79 Fourie 2008: 6.

80 Ho 2008: 1.

81 Ndlovu 2008: 4.

82 Accone & Mthethwa 2008:13.

83 Cartoon 2008a: 18; Cartoon 2008b: 12. This was the type of media attention that the Chinese had traditionally tried to avoid. It also reflected on the embedded stereotyping of the Chinese in popular consciousness – a phenomenon that resonated with depictions of the Chinese in other overseas destinations.

84 Ndlovu 2008: 4; MacKenzie 2008: 20; Rossouw 2008: 6.

85 SAPA 2008a: 2; Ngqiyaza 2008a: 3. Mdladlana was appointed Minister of Labour in 1998 and held the position until 2010.

turned out, as journalist Mohau Pheko aptly summed up: “Black judgment subjects Chinese to animosity, not equality”⁸⁶ as once again the small South African born Chinese community were thrust into the unwanted spotlight with much conjecture about their status being bandied around.⁸⁷

The Labour Minister’s controversial comments were made at a media briefing where he reportedly stated the following:

Now that they had been classified coloured, Chinese employers had no excuse to mistreat workers or pretend to labour inspectors that they could not speak a South African language ... What I know is that coloureds don’t speak Chinese.

He also said that

the Chinese might yet rue having gone to court [as] sometimes it’s better that it’s not clarified than it is clarified ... I hope that they would ... make sure that they would implement and comply with the Labour Relations Act, and the Basic Conditions of Employment Act, much, much better now that they have decided to classify themselves as coloureds as in the past.⁸⁸

In Parliament he also stated that there had been “distortion of facts and legal issues surrounding the applications made by the Chinese Association of South Africa against his ministry”.⁸⁹

The Chinese Association of South Africa’s legal representative in the case, George van Niekerk of Edward Nathan and Sonnenbergs, responded to the Minister’s statements by pointing out that the Minister had chosen not to oppose the granting of the order and that his “comments were in conflict with the constitution and the country’s statutes”. Van Niekerk also said that his statements about the South African Chinese community were “factually inaccurate”, while the Chinese Association of South Africa “stopped just short of saying the Minister was in contempt of court”.⁹⁰ Following on from this, the Chinese Association of South Africa and their legal representative referred the Minister’s comments to the Human Rights Commission, saying that they amounted to “crude racial stereotypes” and complained that they were “unfair” and promoted “harmful assumptions”.⁹¹

In the midst of this furor, in a letter to the editor of the *Saturday Star*, one reader touched on an aspect that goes to the heart of the matter: “Ignorance of history is no excuse for xenophobia.”⁹² Teboho Katze wrote that he failed to “understand why

86 Pheko 2008: 23.

87 Accone & Mthethwa 2008: 13; Donaldson 2008: 2; Baleta 2008: 12.

88 SAPA 2008b: 2; Ngqiyaza 2008: 6.

89 Donnelly 2008: 16.

90 Ngqiyaza 2008a: 3; Ngqiyaza June 2008b: 6.

91 Donnelly 2008: 16. The case was never resolved as in 2010 Minister Mdladlana ended his term as Minister of Labour and took on an ambassadorial position.

92 Katze 2008: 14. Xenophobic violence had erupted in townships in Gauteng against individuals from neighboring African countries such as Mozambique, Malawi and Zimbabwe. Sixty-four people died.

this week's verdict by the Pretoria High Court classifying South Africans of Chinese descent as black and thus previously disadvantaged caused such a stir". He stated that

[i]f anything, the condemnation highlight[s] our people's extraordinary ignorance in so far as the history is ... concerned. And if it is a question of extreme ignorance, then the government is to blame. A country that fails to support the teaching and learning of its national history ... should brace itself for such things.⁹³

Focusing on a different issue, but coming to the same conclusion, was the rather coincidental article published during the same week by academic and educationist Rob Siebörger entitled "Don't rob our pupils of crucial lessons in history" wherein he argued that

[w]ithout a sense of history being ingrained in school, it's likely that the young adults caught up in xenophobic violence were unaware of how South Africans were received by countries around us in the past ...⁹⁴

He continued by stating that

[i]n order to understand history in such a way that they can use it to inform their thinking, youths need to go into more depth, debate, weigh up and consider the impact of events and the actions of people. Future leaders in their professions and communities need these insights, and it's high school pupils who are being denied the insights by short-sighted policies of schools that elect to drop history, consign it to less able pupils, or fail to employ teachers.⁹⁵

The point to be made in relation to the Chinese Broad-Based Black Economic Empowerment and Economic Equity case is that the extreme public and private "ignorance" about the South African born Chinese may be sought in the very position that history has been relegated to in the broader educational system, both at secondary and tertiary level. Moreover, the persistent binary perception of the South African past in terms of "black" and "white" has meant that "other" histories of minorities are often marginalised.⁹⁶ This has indeed been the case with the Chinese who have been part of the South African past since the seventeenth century. The South African born Chinese involved in the recent High Court decision are third, fourth and fifth generation Chinese whose ancestors arrived from the end of the nineteenth century. They had nothing to do with the 63 695 Chinese indentured labourers who worked on the Witwatersrand gold mines between 1904 and 1910; they were not part of the National Party scheme to attract wealthy Taiwanese entrepreneurs to rescue the

93 *Ibid.*

94 Siebörger 2008: 15. The teaching of history at South African schools had undergone a dramatic decline. History was taught together with geography as a social science and there was a distinct decline in the number of learners taking the subject to matric.

95 *Ibid.*

96 See, eg, Harris 2004.

apartheid state's lagging economy; and they are not related to the new, or third wave, of Chinese who have converged on South Africa (both legally and illegally) from mainland China and other Pacific regions. Moreover, the South African born Chinese were never granted "honorary white status" by the apartheid architects – in fact neither were the Japanese.⁹⁷

The invidious position the Chinese found themselves in is integral to the historical record: The South African born Chinese minority were indeed discriminated against. This is a view that the first president of the new democratic government, Nelson Mandela, neatly encapsulated in an address delivered in 1998 when he said they were

a community which has shared the indignities heaped on all those in South Africa who were not categorized as "white", a community which, because of its small size and its own insistence on human dignity, helped expose the twisted logic of apartheid.⁹⁸

In South Africa the legal history of the Chinese more than corroborates this view, a position that has continued to be perpetuated in the recent past with the surfacing of xenophobia and hate speech crimes.⁹⁹ According to the dictum by overseas Chinese scholar Professor Wang Gung-Wu "[b]eing Chinese in China is in itself a complex problem, but being Chinese outside China has several complicating features" – and in the South African context this is indeed the case.

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THE HISTORICAL PROSECUTION OF HATE CRIMES IN THE UNITED STATES OF AMERICA¹

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ABSTRACT

Hate crimes refer to criminal conduct that is motivated by the personal prejudice or bias of the perpetrator. This article examines the laws that were historically used by the American federal government to prosecute hate crimes prior to the passing of a federal hate-crime law. Within the American federal system, the prosecution of crimes is largely left to states that comprise the federation. In the nineteenth century, however, the recalcitrance of states to prosecute racially-motivated hate crimes led to the passing of numerous federal-criminal civil-rights laws which permitted greater federal intervention in the investigation and prosecution of such crimes. Despite the laudable intentions underpinning the enactment of federal-criminal civil-rights laws, these laws were costly to implement and poorly interpreted by the courts. The Civil Rights Act of 1968 which was passed after the Civil-Rights Movement allowed for greater federal intervention in the investigation and prosecution of hate crimes at state and local level. However, the Civil Rights Act of 1968 contained burdensome evidentiary requirements which placed the onus on the prosecution to prove that

- 1 Since there is no globally-accepted definition of a hate crime, a hate crime can be described as a crime against the person or property that is motivated by the perpetrator's bias or prejudice towards the victim. In crimes against the person, the bias or prejudice could have been directed against a personal characteristic of the victim, such as, *inter alia*, the victim's race, ethnicity or sexual orientation. In property crimes, the perpetrator's bias or prejudice could have been directed against a personal characteristic of the owner, the possessor or the occupier of the property.

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the victim had been engaged in a federally-protected activity and that the victim's federal rights had been interfered with. It was only in the twenty first century, after the perpetration of two brutal hate crimes that a federal hate-crime law was passed by the American Congress. The Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 has facilitated the federal prosecution of hate crimes by removing the evidentiary burdens of the earlier laws and by allowing for increased federal funding and assistance in the investigation and prosecution of hate crimes.

Keywords: Hate crimes; historical prosecution; hate-crime laws; United States of America

1 Introduction

Prior to the enactment of a federal hate-crime law in the late twentieth century, the federal government of the United States of America made use of several different laws to prosecute hate crimes.² This article examines the historical background to these laws and their judicial interpretation. The article concludes with a brief examination of the first federal hate-crime law that was enacted by the American federal government in the twenty-first century.

2 The nineteenth century to the mid-twentieth century: The use of federal-criminal civil-rights laws

From the nineteenth century to the mid-twentieth century, the American federal government often resorted to the use of federal-criminal civil-rights laws to prosecute racially-motivated crimes when states defaulted by failing to prosecute the perpetrators. Before commencing a discussion of federal-criminal civil-rights laws, however, it is necessary to briefly explain the concept of federalism which is central to the American system of governance.

As opposed to a unitary form of government where a central government authority wields supreme power over all territorial divisions within a state, in a federal system, all exercisable governmental powers are divided between a central, federal government and several state governments.³ Within the American federal system, some powers are concentrated in the federal government complemented by other powers vesting in the states which comprise the federation.⁴ The powers

2 There is some consensus that hate-crime laws or laws that specifically criminalise conduct motivated by bias or prejudice were first enacted in the USA in the late twentieth century. See, further, Hall 2013: 20 and Levin 2002: 227.

3 See Zimmerman 1992: 3-4.

4 In reality the position in the USA is more complicated since political authority is divided between the central, national government and more than fifty state governments, and thousands of local governments, counties, municipalities and school districts. See, further, Zimmerman 1992:1.

that vest in the federal government are limited, enumerated powers since the Tenth Amendment of the American Constitution (1791) reserves powers to the states.⁵ The federal government can consequently enact federal laws only in terms of these limited, enumerated powers.⁶ The powers that are reserved to the states, which are also referred to as “residual powers”, include the policing power, and powers that relate to health, safety, morals and the welfare of state citizens.⁷ According to Meese,⁸ the intention of the drafters of the American Constitution was for crime and law enforcement to fall largely within the jurisdiction of states.⁹ The federal government therefore has jurisdiction only over a limited number of crimes which include treason,¹⁰ counterfeiting,¹¹ piracy on the high seas and crimes against the law of nations.¹²

In the nineteenth century, however, state and local authorities were reluctant to prosecute crimes that had been perpetrated by Whites against African Americans.¹³ The American Congress therefore passed several federal-criminal civil-rights laws which allowed the federal government greater powers to intervene in racially-motivated crimes that had been committed at state level.¹⁴ The origins of modern American hate-crime laws have been traced to these laws which were enacted during the Reconstruction period.¹⁵ The Reconstruction period refers to the period after the American Civil War when several constitutional amendments were ratified and a number of legal reforms were affected.¹⁶ The constitutional amendments included provisions for Congress to pass laws which would enforce the amendments at state level and remove the autonomy of states to deprive minorities of their rights.¹⁷

5 Bradley 1998: 392.

6 *Ibid.*

7 Sheldon 2002: 81. According to Sheldon, at present, the federal government has slowly usurped what were previously state responsibilities.

8 Meese 1997: 6.

9 A similar view has been expressed by Bradley 1998: 404.

10 United States Constitution, Art III, §3, Cl 2.

11 *Idem* Art 1 §8 Cl 6.

12 *Idem* Art 1 §8 Cl 10 and Riker 1955: 453.

13 The term “African American” is the politically-correct appellation to refer to Americans of African origin. This is the preferred term in this submission. Reference to the older terms, “Negro” and “Black” is, however, unavoidable in a few direct quotations.

14 Jacobs & Potter 1998: 36. According to Hall 2013: 47, at this point in time, a debate raged between states and the federal government over the control of criminal-law enforcement.

15 This is a view that has been expressed by several American writers including Levin 2002: 227; Hall 1998: 20 and Levin 2009: 7. See, further, Petrosino 1999: 15.

16 The constitutional amendments include the Thirteenth Amendment (1865), which abolished slavery; the Fourteenth Amendment (1868), which granted citizenship to all persons born or nationalised in the USA; and the Fifteenth Amendment (1870), which extended voting rights to citizens who were previously denied the right to vote because of their race, colour or prior status as slaves. See Hall 2013: 21.

17 Hall 2013: 21. Section 5 of the Fourteenth Amendment gave Congress the power to pass any laws necessary to enforce the amendment.

A number of federal statutes were subsequently passed which supplemented and enforced the constitutional amendments in order to protect newly-freed slaves, particularly in the Southern states, where they were subjected to physical abuse and murder.¹⁸ Congress passed the Enforcement Act of 1870¹⁹ which aimed to enforce the rights of due process of law and equal protection of the law guaranteed by the Fourteenth Amendment (1868) and the right to vote established by the Fifteenth Amendment (1870).²⁰ The Civil Rights Act of 1871²¹ permitted the federal government to prosecute persons who conspired to deprive others of their civil rights or to prosecute government agents who deprived persons of their rights. Congress also passed the Ku Klux Klan Act of 1871²² which expanded the federal government's power to intervene in cases where states failed to protect the constitutional rights of its citizens.²³ The Ku Klux Klan Act allowed federal authorities to intervene in an enumerated list of activities where there was a conspiracy to violate a civil right, for example, threatening government officers, intimidating witnesses and jurors at a federal trial, interfering with a citizen's right to equal protection under the law and interfering with a citizen's voting rights. These were the most common conspiracies perpetrated by the Ku Klux Klan²⁴ against African Americans.²⁵ Jacobs and Potter²⁶ opine that federal-criminal civil-rights laws were the only option available to the federal government to ensure the investigation and prosecution of crimes perpetrated against former slaves at local and state level. If crimes against former slaves had been investigated and prosecuted by state and local authorities, the enactment of such laws would have been unnecessary.

Despite the laudable federal laws which were passed to protect minority groups, Lawrence²⁷ regards these laws as ineffective tools which remained largely unenforced since the Enforcement Act and the Ku Klux Klan Act placed an onerous financial

18 Lawrence 1999: 122. The first civil-rights statute to be passed by Congress was the Civil Rights Act of 1866 (codified as 14 Stat 27-30) which established citizenship for all persons born in the USA.

19 The Enforcement Act of 1870 is codified as 16 Stat 140.

20 Lawrence 1999: 122.

21 The Civil Rights Act of 1871 is codified as 17 Stat 31.

22 The Ku Klux Klan Act of 1871 is codified as 17 Stat 31.

23 Shimamoto 2003-2004: 831.

24 The Ku Klux Klan or "Klan", which is regarded as an organised "hate" group, was formed in 1867 shortly after the American Civil War in the war-ravaged southern states. The "Klan" initially terrorised African Americans by means of cross-burnings and acts of intimidation. See Kelly 1998: 51.

25 According to Lawrence 1999: 122-123, during the congressional debates on the Ku Klux Klan Act, the intention was to have provided federal authorities with the right to intervene in a number of common-law crimes such as murder, arson and robbery which had been committed in states. However the bill was amended and federal prosecution was limited to the specified activities. Thus, rather than a broad, federal hate-crime law, the Ku Klux Klan Act confined federal-criminal jurisdiction only to cases of "rights-interference crimes".

26 Jacobs & Potter 1998: 36.

27 1999: 123.

burden on states to protect witnesses. At the time, Congress was unwilling to release additional funds to protect witnesses.²⁸ Congress also passed the Civil Rights Act of 1875²⁹ which may be considered as one of the earliest federal anti-discrimination laws. The Civil Rights Act of 1875 provided for the equal treatment of all races in public-accommodation facilities, transport and places of entertainment.

However, in several cases which mirrored the conservative, prejudicial racial attitudes that were prevalent at the time in the United States of America, the United States Supreme Court invalidated several criminal civil-rights statutes or interpreted the laws in a manner that provided no protection to victims from minority groups.³⁰ These decisions have been described as the “evisceration”³¹ of the Reconstruction-era statutory protections and as “the Supreme Court’s assault on status-based protections”.³²

In the case of *Blyew v United States*,³³ after the murder of an African-American family by two White defendants in the state of Kentucky, the African-American child witnesses were precluded from testifying in state courts. According to the Revised Statute of Kentucky of 1860 which was in force at the time, African-American witnesses were prohibited from testifying against Whites. A federal prosecution was subsequently brought under the Civil Rights Act of 1866.³⁴ The United States Supreme Court, however, rejected the basis of the indictment since the child witnesses had no standing in federal courts. The court held that the Civil Rights Act of 1866 was intended to protect the rights of the accused and not the rights of victims and witnesses. Levin³⁵ refers to the Supreme Court’s reasoning in the case of *Blyew* as “contorted”.

In *United States v Cruikshank*,³⁶ during a local election in the village of Colfax, Louisiana, a group of armed, White militia attacked and murdered over one-hundred freed African Americans. Only nine of the ninety-seven White defendants who were charged were eventually brought to trial and a mere three defendants were convicted of murder under the Enforcement Act.³⁷ The United States Supreme Court, however,

28 *Ibid.*

29 The Civil Rights Act of 1875 is codified as 18 Stat 335-337.

30 Levin 2002: 232.

31 Lawrence 1999: 130.

32 Levin 2002: 232.

33 80 US 581 (1872).

34 It should be noted that apart from being an early anti-discrimination law, the Civil Rights Act of 1866 (which has been referred to *supra* in n 18) also provided circuit courts with criminal and civil jurisdiction where persons were unable to enforce their constitutional rights in local and state courts. The right to testify in criminal proceedings was one of the constitutional rights envisaged by the act.

35 2002: 232.

36 92 US 542 (1876).

37 The Enforcement Act made conspiracy to deprive an individual of his constitutional rights (which included the right to peacefully assemble, the right to bear arms, the right to vote and the right to life) a felony.

overturned all three convictions on the basis that the indictments were vague and general and had not specified that the victims were deprived of their constitutional rights on the basis of their race or colour.³⁸

In *United States v Reese*³⁹ an election official in Kentucky was indicted under the Enforcement Act for refusing to register the vote of an African American in a municipal election.⁴⁰ The Supreme Court held that the Fifteenth Amendment did not create a positive right to vote but the right to be free from discrimination on the basis of race, colour or servitude in the election process. Since section 3 of the Enforcement Act did not specify race, colour and servitude, the court held that Congress had exceeded the scope of the Fifteenth Amendment and that the section was therefore invalid.⁴¹

In *United States v Harris*⁴² it was held that the general prohibitions in the Ku Klux Klan Act against interfering with an individual's equal protection rights were too broad. No constitutional basis for federal-criminal jurisdiction existed in order to protect an individual from private conspiracies. This was a matter which fell within the jurisdiction of states.⁴³

In the *Civil Rights Cases*⁴⁴ the United States Supreme Court invalidated the Civil Rights Act of 1875. The case consolidated five separate cases that had been brought under the Civil Rights Act of 1875 by African Americans who had sued theatres, hotels and transit companies that had refused them admission.⁴⁵ The court held that the Civil Rights Act of 1875 was unconstitutional since Congress had exceeded its powers under the Thirteenth and Fourteenth Amendments. The court ruled that the Thirteenth Amendment which prohibited slavery was not intended to eliminate the "badges of slavery"⁴⁶ such as discrimination in public accommodation. It was also held that the Fourteenth Amendment which dealt with the denial of equal protection by states was not applicable to private discriminatory acts by individuals, but only to discriminatory acts by the states and their officials.

The "contorted" reasoning present in the United States Supreme Court decisions persisted until the mid-twentieth century. In the case of *Screws v United States*,⁴⁷ Robert Hall, an African-American man, was brutally assaulted and murdered by, *inter alia*, the Sheriff, Deputy Sheriff and a police official in the town of Newton,

38 *United States v Cruikshank* 549-551.

39 92 US 214 (1876).

40 Section 3 of the Enforcement Act prohibited the wrongful refusal to register a vote.

41 *United States v Reese* 215-218.

42 106 US 629 (1882).

43 *United States v Harris* 643-644. In *hoc casu* the court struck down the criminal provisions in sec 2 of the Ku Klux Klan Act.

44 109 US 3 (1883).

45 The Civil Rights Act of 1875 has been described *supra* as one of the earliest federal anti-discrimination laws.

46 The expression "badges of slavery" historically referred to any markers or signifiers of slavery. See Mason-McAward 2012: 575-577.

47 325 US 91 (1945).

Georgia. Since local authorities had failed to prosecute the perpetrators four months after the incident, the Federal Department of Justice instituted proceedings against the perpetrators under the Civil Rights Act of 1871.⁴⁸ After all three defendants were convicted of murder in a federal court the United States Supreme Court ordered a retrial on the basis that the trial judge had not explained the meaning of “wilfully” to the defendants. The defendants had therefore not had a fair trial. The United States Supreme Court found that the defendants had misused their powers since they were acting in their official capacity or “under colour of law” when they arrested the victim. The prosecution under federal criminal civil-rights law was thus permissible. However, since the case concerned a “non-enumerated” right, all three defendants were acquitted.⁴⁹

In his commentary on the *Screws* case, Cohen⁵⁰ writes: “The arm of the Federal government, which was intended to protect Negro civil rights, was unduly weakened by its long struggle with the judiciary.” According to Lawrence,⁵¹ the federal government gradually abandoned the prosecution of federal civil-rights crimes and entrusted states with the protection of minorities. Consequently the protections offered by the federal-criminal civil-rights statutes almost disappeared.

3 The nineteen sixties to the nineteen nineties: The occasional use of federal-criminal civil-rights laws and the Civil Rights Act of 1968

Pursuant to the United States Supreme Court’s decision in *Brown v Board of Education*⁵² which held that segregated schools were unconstitutional, African Americans began to assert their constitutional rights in what is commonly referred to as the Civil-Rights Movement. Despite the ruling in *Brown v Board of Education*, racist practices were commonplace in the United States of America. Such practices included segregated public facilities, discrimination in the provision of housing, discrimination in the armed forces and segregated public transportation.⁵³ By the

48 The Civil Rights Act of 1871 (which has been referred to *supra* in n 21) permitted the federal government to prosecute persons who conspired to deprive others of their civil rights or to prosecute any person acting “under colour of law” who willfully deprived persons of their rights” (in other words by any person who is a government agent).

49 According to Lawrence 1999: 39, there is no specific provision in the US Constitution of a right to be free from police brutality. It is thus an unspecified, non-enumerated right.

50 1946: 94.

51 1999: 126.

52 347 US 483 (1954). In *hoc casu*, the segregation of White and African-American children in public schools was found to have a detrimental effect on African-American children, especially when sanctioned by the law. The case thus settled the issue that the “separate but equal” policy under segregationist laws affected African Americans unequally and unfairly. This case is regarded as having “set the stage” for the Civil-Rights Movement of the 1960s. See Dahlin 2012: 85.

53 Rhodes (accessed 23 Jan 2017).

early nineteen sixties the Civil-Rights Movement was at its peak with race riots and mass social upheaval occurring across the United States of America.⁵⁴

According to Rhodes,⁵⁵ “[t]he 1960s would be marked by sit-ins (protests aimed at public places that refused to serve blacks), freedom rides (a form of protest aimed at desegregating interstate transportation), protest marches and ... voter registration projects”. Lawrence⁵⁶ writes that the assertion of civil rights by African Americans was met with racial violence that included murders, assaults, church arsons and bombings. Gerstenfeld⁵⁷ similarly writes: “Once again, Black Americans striving for civil rights inspired thousands of White Americans to lash back”. According to Perry,⁵⁸ “[i]mages of police dispersing crowds with fire hoses or tear gas, missing and murdered civil-rights workers, Black, White, Jewish, Native American and Latino” were all part of the legacy of the Civil Rights Movement. The extensive media coverage of police brutality against anti-segregation demonstrators in Birmingham, Alabama and civil-rights workers in the South in 1963 influenced former President John F Kennedy’s call for new civil-rights legislation.⁵⁹

During the nineteen-sixties the federal government began to intervene in crimes that had been committed by state agents and private persons by resorting to the use of federal-criminal civil-rights statutes.⁶⁰ This occurred in the case of *United States v Price*⁶¹ which arose out of the murders of three civil-rights workers by local law-enforcement officers and members of the Ku Klux Klan in the state of Mississippi. Since state law-enforcement officers had conspired with members of the Ku Klux Klan, the federal government intervened and charged the eighteen defendants with conspiracy to commit murder and of depriving the victims of numerous rights under the Enforcement Act and the Civil Rights Act of 1871. The court held that acting “under colour of law” does not necessarily involve only government agents. Since the other defendants had wilfully participated in joint activity with agents of the state they also had acted “under colour of law” in terms of the Civil Rights Act of 1871.⁶² Seven of the defendants were consequently convicted of conspiracy to commit murder and to deprive the victims of their Fourteenth Amendment rights to due process of law.

54 Shimamoto 2003-2004: 831.

55 Accessed 23 Jan 2017.

56 1999: 143.

57 2013: 142.

58 2001: 218.

59 Rhodes (accessed 23 Jan 2017).

60 Belknap 1982: 474. According to Belknap, a serious deficiency in the justice systems in the Southern states was its persistent refusal to punish Whites for acts of violence against African Americans. The Police and Sheriff’s Departments were often complicit in the violence. If the perpetrators were charged and tried, all-White juries acquitted them or found them guilty of less serious offences.

61 383 US 787 (1966).

62 *US v Price* 794-795.

One of the significant American laws that was passed at the end of the Civil-Rights Movement and which is regarded as a precursor of modern hate-crime laws is the Civil Rights Act of 1968.⁶³ Although the act was not aimed directly at hate crimes, it is considered as a “catalyst for modern-hate crime legislation”.⁶⁴ The Civil Rights Act of 1968 prohibits interference with a person’s federally-protected rights in cases of violence or threats of violence because of a person’s race, colour, religion or national origin.⁶⁵

The federally-protected rights include, *inter alia*, the rights to vote, to public education, to participation in jury service, to interstate travel and access to public places and services. Jacobs and Potter⁶⁶ write that the act was intended to provide a remedy for the violence that resulted from opposition to civil-rights marches, to voter registration and voting issues, to the admission of African-American students to formerly all-White schools and universities and to efforts to abolish segregationist laws.

According to Wang,⁶⁷ the Civil Rights Act of 1968 requires the defendant to have acted with a bias motive since it uses the words “because of” the victim’s protected status and that prior to the creation of a purely federal hate-crime law, the federal government resorted to the use of this statute to prosecute hate crimes. The Civil Rights Act of 1968 also prohibits wilful interference or intimidation

63 Jacobs & Potter 1998: 38.

64 Hall 2013: 24.

65 The Civil Rights Act of 1968 which is codified as 18 US §245 (b)(2) provides: (b) “Whoever, whether or not acting under colour of law, by force or threat of force wilfully injures, intimidates, or interferes with, or attempts to injure, intimidate or interfere with- (2) any person because of his race, colour, national origin and because he is or has been- (a) enrolling in or attending any public school or public college; (b) participating in or enjoying any benefit, service, privilege, programme, facility, or activity provided or administered by any State or subdivision thereof; (c) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labour organisation, hiring hall or employment agency; (d) serving, or attending upon any court of any State in connection with possible service as a grand or petit juror; of any common carrier by motor, rail, water, or air; (e) travelling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility (f) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theatre, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public ... (s)hall be fined not more than \$1000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than \$10000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.” According to Woods 2008: 395, the Civil Rights Act of 1968 was enacted since local and state law-enforcement authorities were unable or unwilling to address racially motivated violence aimed at preventing minorities from exercising their constitutional and statutory rights.

66 1998: 38.

67 2000: 1401-1402.

with a number of federally-protected activities including voting, serving as a juror, enjoying employment, attending school, using the facilities of interstate commerce or public facilities.⁶⁸ The groups protected by the Civil Rights Act of 1968 include groups based on race, colour, religion and national origin since these were the victim groups most frequently targeted by White-supremacist organisations such as the Ku Klux Klan.⁶⁹

The Civil Rights Act of 1968 places the onus on the prosecution to prove that the defendant was motivated by bias or prejudice and attacked the victim who was engaged in a federally-protected activity. However, the complicated nature of the act⁷⁰ and the high burden of proof required to secure convictions led to the emergence of state hate-crime laws in the United States of America with less onerous evidentiary requirements.⁷¹

Several high-profile hate crimes were prosecuted under the Civil Rights Act of 1968.⁷² In the case of *United States v Lane*,⁷³ Alan Berg, a prominent Jewish radio talk-show host in Denver, Colorado, was murdered by members of a local hate group. The defendants were charged with violating the Civil Rights Act of 1968 in that they had wilfully injured and interfered with the victim because of his race and religion and because he was enjoying employment.⁷⁴ The victim was well known for expressing his provocative views on radio about White right-wing groups. The defendants were all member of a right-wing group called “The Order”. Using witness statements to prove the defendant’s anti-Jewish sentiments, their desire to target prominent and powerful Jews in the media and their anger at the victim’s anti-right wing views which had been publicly declared on radio, the court found that the defendants disliked the manner in which the victim used his position on the radio to deride their beliefs. The defendants wanted to prevent the victim from continuing to perform his employment in a way that they considered offensive. On appeal, the defendants were found guilty of contravening the Civil Rights Act of 1968 and were sentenced to life imprisonment.

In *United States v Ebens*⁷⁵ the defendant, Ron Ebens had killed Vincent Chin, an American of Chinese origin after an altercation which had commenced in a Detroit bar. Ebens pleaded guilty to manslaughter and was fined 3700 dollars and placed on probation. Following the huge public outcry and negative media coverage over the

68 *Idem* 1401.

69 Woods 2008: 394.

70 Which Jacobs & Potter 1998: 38, describe as “abstruse”.

71 Hall 2013: 114.

72 The Civil Rights Act of 1968 is regarded by some academics as the equivalent of the first federal hate-crime law, albeit one that was limited in scope. See, further, Woods 2008: 394 and Simmons 2012: 1878.

73 883 F2d 1484 (1989).

74 The provisions of the Civil Rights Act 1968 have been provided *supra* in n 65. Refer, in particular, to the provisions of 18 USC §245 (b)(2)(c) in n 65.

75 800 F2d 1422 (1986).

leniency of the sentence, the Federal Department of Justice intervened and instituted proceedings against Ebens in a District Court under the Civil Rights Act of 1968⁷⁶ since Chin had been enjoying the privileges and accommodation of a public bar which was a place of entertainment that was open to the public. Ebens was convicted of violating Chin's civil rights under the Civil Rights Act of 1968 since he had singled out Chin on account of his race and all the state witnesses testified about the racist statements made by the defendant during the altercation.⁷⁷ On appeal, however, the judgement was overturned since Ebens had not been given a fair trial.

Wang⁷⁸ contends that the Civil Rights Act of 1968 is a difficult statute to invoke in hate crimes since it requires that bias motivation has to be proved in order to fulfil the culpability requirements and that a victim's "enumerated right" had been interfered with or that the victim was engaged in a "federally-protected activity". This may often require the court to have to consider "trivial facts".⁷⁹ In *United States v Baird*,⁸⁰ for example, the court had to decide whether a "7-11" convenience store was a "place of public accommodation" under the Civil Rights Act of 1968.⁸¹ Since electronic video games were installed in the store, it was held that the store could be considered as a "place of entertainment" which the public could access and frequent.⁸² The assaults which occurred on the premises were thus prosecutable under federal civil-rights laws.

Despite the difficulties associated with the Civil Rights Act of 1968, Levin⁸³ writes that it was the most frequently-used federal-criminal civil-rights law.

In 1992 a federal-criminal civil-rights statute was used to prosecute the perpetrators who had assaulted Rodney King. Rodney King was an African American who had been brutally assaulted by four police officers from the Los Angeles Police Department.⁸⁴ After all four police officers were acquitted of assault in the lower court widespread riots ensued in the city of Los Angeles.⁸⁵ The assault of King is regarded as a racially-motivated hate crime.⁸⁶ Federal prosecutors subsequently invoked the

76 The defendant was charged under 18 USC §245 (b)(2)(f) which has been referred to *supra* in n 65.

77 Ebens had made racist comments about both the Chinese and Japanese which suggested that he thought that Chin was Japanese. He also referred to foreign vehicle imports and blamed the Japanese for unemployment.

78 2000: 1402-1403.

79 *Ibid.*

80 85 F 3d 450 (9th Cir 1996).

81 Refer to the provisions of the Civil Rights Act of 1968 in n 65 *supra*, and in particular to the provisions of 18 USC (b)(2)(f).

82 *US v Baird* 453.

83 2009: 7.

84 *Koon v US* 518 US (1996) at 81.

85 *Koon v US* 518 US (1996) at 83. The link between the Los Angeles riots and the acquittal of the four police officers has been made by Torres 2004: 231, Shenk 2004: 304 & McDevitt *et al* 2004: 46.

86 Craig 2004: 64. Perry refers to widespread White supremacist activity being exposed in the Los Angeles Police Department during the investigations. See, further, Perry 2001: 221.

provisions of one of the old federal-criminal civil-rights laws to prosecute the four police officers.⁸⁷ In the subsequent trial, two of the four police officers were convicted of violating King's rights and received lengthy prison sentences.⁸⁸

Despite the existence of numerous federal-criminal civil-rights statutes and the Civil Rights Act of 1968, such laws did not facilitate federal interventions in cases of hate crimes at state and local level. Moreover these laws were often difficult to prove since they required proof of bias motivation and that the victim's rights to use public accommodation or public facilities were interfered with or that the victim was engaged in a federally-protected activity such as voting, attending school or performing jury service. In this regard the former Attorney General of the United States, Janet Reno, stated as follows: "Federal civil rights laws make it more difficult to successfully prosecute the case than state law."⁸⁹ Lawrence⁹⁰ cites the example of the two African-American perpetrators who murdered a Jewish scholar during the Crown Heights Riots in New York. Federal prosecutors took two years to lay charges against the perpetrators due to the evidentiary burden of having to prove that they chose the victim because of his use of public facilities, which in this case consisted of a public street.⁹¹

Moreover, federal-criminal civil-rights laws and the Civil Rights Act of 1968 afforded protection to only a limited number of victim groups based on race, colour, national origin and religion. Since the second half of the twentieth century, other minority and victim groups, particularly women, gay men, lesbian women, and the disabled had begun asserting their rights and had come to the fore. Such groups were neither specifically mentioned in nor afforded protection by any of the statutes that were used to prosecute hate crimes.

4 The twenty-first century: The enactment of a federal hate-crime law⁹²

The enactment of an American federal hate-crime law in 2009 can be attributed to the perpetration of two high-profile hate crimes eleven years earlier. In 1998, James Byrd Junior, an African-American man, was brutally assaulted and murdered by

87 Gerstenfeld 2013: 2-13. The Civil Rights Act of 1871 (which has been referred to *supra* in n 21) was invoked in this case. The Civil Rights Act of 1871 prohibits depriving a citizen of his rights or privileges "under colour of law". Since the four police officers were acting in their official capacity, they were acting "under colour of law".

88 *Koon v US* 518 US (1996) at 82-83.

89 Janet Reno quoted in Lawrence 2008: 275.

90 2008: 276.

91 *Ibid.*

92 Since this submission focuses on the historical prosecution of hate crimes, the federal hate-crime law that was passed in 2009 will only be discussed briefly.

White supremacists.⁹³ In the same year, Matthew Shepard, a gay university student, was lured from a bar by two men who pretended to be gay, assaulted, tied to a fence and left to die in sub-zero temperatures.⁹⁴ Both murders increased public pressure for stricter federal hate-crime legislation.⁹⁵ Despite several efforts to introduce a new federal hate-crime law, the proposed law was met with fierce opposition in the Conservative-led House of Representatives.⁹⁶ After ten years of Congressional debates, a new federal hate-crime law, the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act⁹⁷ was eventually signed into law by President Barack Obama in late 2009.⁹⁸

The Matthew Shepard Act provides that the Attorney General of the United States of America may, at the request of state, local or tribal law-enforcement authorities, provide financial, technical, prosecutorial or any other form of assistance in the criminal investigation or prosecution of any crime of violence that constitutes a felony under state, local or tribal law and that is motivated by prejudice based on the actual or perceived race, colour, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim.⁹⁹ The Attorney General of the United States of America is empowered to award financial grants to state, local or tribal authorities upon application by the latter, in order to assist in the investigation and prosecution of hate crimes in their respective jurisdictions.¹⁰⁰

The Matthew Shepard Act is regarded as an improvement on the Civil Rights Act of 1968 which had hitherto been the most important federal statute to prosecute hate crimes, since it removed the requirement that the victim had to have been engaged in a federally-protected activity or that a victim's federally-protected rights had been interfered with.¹⁰¹ The positive effects of the Matthew Shepard Act's funding and resource provisions are summed up by Woods who writes that the act

93 Husselbee & Elliott 2002: 834.

94 *Idem* 835. See, further, The Matthew Shepard Act (accessed 6 Feb 2017).

95 Jackson (accessed 6 Feb 2017) and Chorba 2001: 322.

96 Coker 2011: 282. Opposition to the proposed hate-crime law in the House of Representatives stemmed from the fact that the law would have extended protection to gay men and lesbian women.

97 Hereafter referred to by its short title, the Matthew Shepard Act.

98 Weiner (accessed 5 Feb 2017). The Matthew Shepard Act is codified in various sections of the United States Code as 18 USC §249.

99 According to sec 4 (a)(1) of the Matthew Shepard Act. According to Eric Holder (2010), former Attorney General of the USA, some states and local authorities do not possess the funds, resources and technology to investigate hate crimes. The act consequently allows the federal government which has greater capacity and a larger network to assist in the investigations and prosecutions. See, further, testimony by Eric Holder 2010: 18.

100 Section 4(b) 1-3 of the Matthew Shepard Act.

101 Henderson 2010: 67-168. As was discussed earlier in this article, these requirements placed an onerous evidentiary burden on the prosecution in hate-crime cases and led to delays in prosecutions.

has the potential to substantially eliminate the failures of state and local authorities to classify and investigate hate crimes because of a lack of resources.¹⁰²

However, the need for a federal hate-crime law has been questioned by Chorba who found no evidence of state default in the prosecution of hate crimes.¹⁰³ As has already been discussed in this article, the most important reason for the enactment of federal-criminal civil-rights statutes in the nineteenth century was the default of states in the investigation and prosecution of racially-motivated crimes. While Lawrence¹⁰⁴ concedes that the overt forms of state default that existed in the past may no longer exist today, there are still “systemic factors” at state level that call for a federal hate-crime law. According to Lawrence,¹⁰⁵ racially-motivated hate-crime cases are often politicised and if prosecuted at state level they would have to be prosecuted by elected District Attorneys and a local jury. In the case of a federal prosecution, however, the case would be brought by an appointed United States Attorney and heard by a federal jury appointed from a broad cross-section of federal judicial districts.¹⁰⁶ The role players in a federal prosecution are thus largely immune from local politics.¹⁰⁷

5 Conclusion

While the necessity of an American federal hate-crime law has been questioned, it is submitted that a law which includes a criminal sanction may be considered as the ultimate “symbolic message” that a government has at its disposal to try and change prejudiced attitudes and behaviour.¹⁰⁸ Hate-crime laws are therefore regarded as highly symbolic laws¹⁰⁹ which are intended to convey a government’s denunciation

102 Woods 2008: 423. Refer, eg, to the case of *United States v Beebe*, Case No 1:10-cr-03104 BB (US District Court for the District of New Mexico) which was one of the earliest prosecutions to be brought under the Matthew Shepard Act. The case involved the racially-motivated assault of a Native-American man. The case illustrates how federal, state and local authorities co-operated in the investigation and successful prosecution of the crime.

103 See Chorba 2001: 345-346. He refers to the inability of former Attorney General Eric Holder to cite actual examples of state default in the prosecution of hate crimes in congressional hearings on the Matthew Shepard Act. He also cites the example of the Matthew Shepard murder where local and state prosecutors sought the strongest penalties available under the existing criminal law since the state of Wyoming did not have a hate-crime law that covered sexual orientation. See, further, Chorba 2001: 349-351. He also refers to the murder of James Byrd. In the investigation of this murder, prosecutors in Texas had obtained death sentences for both White-supremacist murderers in the absence of a Texas hate-crime law. See, also, Chorba 2001: 351.

104 Lawrence 1998-2000: 163.

105 *Idem* 164.

106 *Ibid.*

107 *Ibid.*

108 Hall 2013: 124.

109 *Ibid.*

of criminal conduct that is motivated by certain prejudices.¹¹⁰ Lawrence¹¹¹ advocates for federal hate-crime laws since hate crimes, and particularly those hate crimes that are racially-motivated, impinge on the commitment to equality which is one of the most sacrosanct American values. According to Lawrence,¹¹² racial inequality was the reason for the American Civil War and the subsequent constitutional amendments. Racial inequality was also the catalyst for the Civil-Rights Movement later in the twentieth century. According to Lawrence,¹¹³ hate crimes are therefore a violation of the national social contract of equality and this is the main prudential reason for the enactment of federal hate-crime laws in the United States of America.

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110 Walters 2013: 1.

111 1998-2000: 164.

112 *Ibid.*

113 *Ibid.*

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RAPE AND INFIDELITY: THREATS TO THE ATHENIAN *Πόλις* AND *Οἶκος*

Jamie Pretorius*

ABSTRACT

In terms of sexually motivated transgressions, adultery is viewed by many modern Western legal systems as a matter dealt with only in the intimate realm of those entangled and subsequently attaches little legal consequence to its occurrence. Rape, on the other hand, is regarded as a heinous crime (and rightly so) for which severe punishment for transgressors awaits. Conversely, ancient Athenian law demonstrated a notable distaste for adultery, so much so that affairs involving a male citizen's wife, or any other woman under his *οἶκος*, constituted a crime and, by law, transgressors could be killed immediately by an affected male party if caught *in flagrante*. Committing rape, however, was not as severely punished as a rapist could only receive the death penalty in the event that he was so prosecuted by the Athenian judiciary consisting solely of male citizens. Under this ancient Athenian precedent, a victim of rape – a woman who was forced to have sexual intercourse – was, legally speaking, thought to suffer less than a woman who was seduced reflecting Athens' prejudicial social-legal view of women. Moreover, this view must be seen against the background of the threat of insecurity to the patriarch's *οἶκος* (that is, his household including his estate and, by extension, the members of his household that formed part of that estate) that the adulterous woman posed as well as the all-male Athenian judiciary whose members themselves were members of an *οἶκος* and, in most cases, were no doubt at its head.

Keywords: Rape; adultery; Athenian law; *οἶκος*; *πόλις*; *μοιχεία*; Demosthenes; Lysias; Euphiletus; Draco; inferior position of women in Athenian law

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1 Introduction

Ancient literary discourse demonstrates that, in Athenian law and oratory, the seduction of a citizen wife, widowed mother, unmarried daughter or sister was considered a far more serious transgression than rape. This notion implies, therefore, that the offender would be liable to receive a far more severe punishment (possibly even the death penalty) for seducing a citizen woman than if he would be for having forced her into having sexual intercourse. This contrasts markedly with modern Western society, in which rape is considered by law to be a serious criminal offence while adultery is not generally regarded as a criminal offence at all. As such, in modern Western society adulterers are generally not exposed to the risk of criminal prosecution. This contrast has sparked scholarly discussion over this ancient Athenian convention, namely, concerning the extent to which – and the social reasons why – adultery was in fact more harshly punished than rape and on the scope and interpretation of the word *μοιχεία*, commonly recognised as the most suitable Greek term for “adultery”.

Fuelling this debate is the fact that, with regards to the Athenian judicial system as a whole, evidence for many issues of legal ordinance and procedure is lacking, and the evidence that we do have is fragmentary, making it difficult to present firm statements on such a matter. Accordingly, the consensus that rape was not as culpable a crime as that of seduction has been challenged as not being a reflection of commonly held social attitudes in Athens at the time as many of the laws on adultery have not, for the most part, been preserved. However, one of the statutes cited by Demosthenes on justifiable homicide in his speech *Against Aristocrates* (which has been regarded as providing the definitional foundation of the law of adultery), makes it clear that it was *μοιχεία* to seduce the wife, or any other woman related to the offended head of the household, and that the adulterer could be killed by him if caught in the act.¹

The most pertinent piece of evidence available to us that substantiates the view that seduction was seen as a worse crime than rape and in which this statute was referred to, is the speech written by Lysias for his client Euphiletus in his defence for the murder of a man who had been caught *in flagrante* with his wife.² On the one hand, such a case has been argued to present merely a small window, or a “snapshot” on the Athenian legal system at a particular stage in its development,³ making it difficult to provide conclusive assertions about popular morality in Athens or ancient legal attitudes as a whole. On the other hand, this challenge does not eliminate the possibility of Euphiletus’ argument being valid in the eyes of his male contemporaries who would preside over his case and to whom legal procedure was exclusively designated.

1 Demosthenes *Against Aristocrates*: 23 53; see Dover 1974: 209, hereafter referred to as D 23 53.

2 Lysias’ speech *On the Murder of Eratosthenes* 1 32 (tr Lamb 1930), hereafter referred to as Lys.

3 Carey 1995: 407.

Under this ancient Athenian precedent, a victim of rape – a woman who was forced to have sexual intercourse – was, legally speaking, theoretically thought to suffer less than a woman who was seduced. However, on account of the fact that women in classical antiquity were for the most part excluded from legal activity, Athenian law must be viewed strictly through the lens of a male standpoint. Moreover, the notion that the seduction of a citizen woman was seen as a more severe crime than rape, must be regarded as an assertion of male responsibility over the οἶκος (household) and not as a legal measure of the suffering experienced by the victim. The role of women with regards to the legal and social attitudes towards rape and adultery was certainly discounted and has yet to be discussed in a scholarly light.

This article will demonstrate that the reason why adultery was seen in Athens as a more severe crime than rape was, for the most part, due to the subordinate nature of the female role in the legal and social spheres. The matter would have been considered purely from the perspective of the deceived husband, whose dignity and social status was perceived to be impaired more by the fact that he was cuckolded – in that his wife (who was regarded as part of his patrimony rather than an independent human being) – was seduced by another man (ie, she voluntarily succumbed to the sexual advances of another man and thus, by implication, preferred him to her own husband) than by the fact that she was raped (in which case she notionally remained faithful to her husband).

In order to do so, this article will consider the Greek institutions of the πόλις and the οἶκος and some of the moral significances attached to them so as to provide a societal background against which rape and adultery in Athens must be seen. Then, this essay will discuss the ancient Athenian legal-social interpretation of μοιχεία to the extent that available legislative evidence allows using the statute brought forward by Demosthenes regarding justifiable homicide as a starting point. Thereafter, in order to represent the justification of this decree outside of the theoretical realm, this essay will refer to an actual case of adultery as demonstrated in Lysias' speech for Euphiletus in his *apologia* for the murder of Eratosthenes. Moreover, due to the fact that this legal practice acknowledges the deceived male as the victim of the crime, the issue of gender will need to be examined to determine the extent to which male-dominated ideas and laws and the neglect of female views affected notions surrounding rape and adultery.

2 The Οἶκος and Πόλις

When speaking of the typical Athenian household and its characteristics, scholars routinely refer to Aristotle's interpretation of the οἶκος as being the basic social unit of the πόλις and the individual a unit of the οἶκος.⁴ MacDowell, in his examination of the οἶκος in Athenian law, identifies three main aspects of the οἶκος: first, the

4 Roy 1999: 1.

building that is the house; second, the household possessions in the form of property or the estate; and third the family.⁵ These last two aspects of the *οἶκος* have been used interchangeably so that the individuals of the *οἶκος* are sometimes seen to be an extension of the household belonging to the male head of the house. The composition of those that constitute the household is the nuclear family as well as the slaves belonging to the household, identified by Aristotle⁶ through their fundamental relationships as: (1) master and slave, (2) husband and wife, and (3) father and children. As is made evident by the presence of the male head in each relationship described by Aristotle, the nature of the household was such that it was wholly dominated by the patriarch, or *κύριος*, who was responsible for the *οἶκος*.

Like the modern term “family”, this third aspect of the *οἶκος* can indicate a range of parents and children over several generations, which serves as a reminder that the household existed in a network of kin.⁷ It is when these networks unite and their association aims at something more than the supply of daily needs that a community is established, first in the form of a village and, on a higher level, a city-state or *πόλις*, which was seen by Aristotle to be the obvious, natural form of society.⁸ Pomeroy posits that “family and kin groupings were fundamental to [Athenian] political structure ... citizens became members of a classical *πόλις* not as individuals ... they first had to be accepted as members of a family”.⁹ It is for this reason that the *οἶκος* must be seen as the basic unit of the greater *πόλις* and, in the same way that the *κύριος* is responsible for the well-being of the individuals in his household, the *πόλις* looks to protect the *οἶκος* as the pivotal building-block of society. Therefore, in the same way that the *κύριος* would impose certain principles on his household that would, in his view, be for the sake of its own welfare, the *πόλις* would pass legislation that it thought necessary for its own well-being, namely for that of the community. It has been suggested that an *οἶκος* belonged not to one individual but rather to the whole family. In relation to classical Athens, at the very least, this proposition is incorrect as, while *οἶκος* may itself have meant “family”, it also meant “property”, in which instance it referred to the entire household and its estate belonging to one individual.¹⁰ In such a way, however, the rights and needs of the family were regarded to be more important than those of one particular individual – a notion that the greater state would uphold in its own administration – and, in the same way that a small unit of male aristocrats dominated political power over the entirety of the *πόλις*, a central male authority would govern the *οἶκος*. Such a notion would then ensure that this central authority’s dominion permeated through both the *οἶκος* and *πόλις* and that this dominion lay in the hands of the patriarchs of Athens.

5 MacDowell 1989: 10.

6 In Aristotle’s *Politics* 1 3 (tr Jowett 1999), hereafter referred to as *Arist Pol*.

7 Roy 1999: 2.

8 *Arist Pol* 1 2.

9 Pomeroy 1996: 74.

10 MacDowell 1989: 11.

On account of the fact that the *πόλις*' main concern was the preservation of the *οἶκος*, legislation inevitably looked to uphold this preservation and would often result in the *πόλις* interfering with the *οἶκος*. Such legislation is most clearly seen in laws concerned with citizenship due to the fact that the state "relied on the nuclear citizen family to produce the new citizens of the *πόλις*".¹¹ Before Pericles changed the citizenship law, citizenship was acquired through descent from a citizen father. However, by 451 BC the *πόλις* came to interfere with the affairs of the *οἶκος* to a significant extent as Athenian citizenship was limited to those of Athenian parentage on both sides.¹² Such a legal stance then suggested that Athenian marriage be recognised as a union driven to or having as its goal the establishment of a new *οἶκος*.¹³ Therefore, it would be the will of the state, not only to perpetuate purely Athenian citizenship, but to safeguard and maintain the union of husband and wife as the source of Athens' new citizens.

It is clear that the Athenians held the *οἶκος* in very high regard as, unlike today, when the individual is acknowledged as an independent being, the Athenian individual was considered a unit of the larger *οἶκος*. Beringer holds that "a man who was a citizen belonged to a group (the *οἶκος* or family) and was as much protected by it as he himself was bound to maintain, support and defend it".¹⁴ Therefore, the individual's behaviour was thought to be a reflection on the family to whom the individual was connected and, therefore, the reputation of the *οἶκος* was held in higher regard than that of one particular member of the family. The importance of the *οἶκος* over the individual was reinforced by socially-accepted Athenian conventions exercised by the *κύριος*, who acted on behalf of the household. For example, Aristotle himself advises that the *κύριος* could dispose of an unhealthy or deformed infant if he deemed it to be a burden on the family:¹⁵ for example, if he felt it was simply too expensive to rear and educate or, otherwise, if he had reason to believe that the child was illegitimate in a patrilineal society where paternity was important for inheritance purposes.¹⁶ The killing of a child was undoubtedly believed to have religious ramifications and the ordinary Athenian citizen held that to murder was to bring a pollution (*μίασμα*) upon himself and his family, and so, by leaving the infant to die by exposure the *κύριος* would rid himself of guilt.¹⁷ Although infanticide was probably a very rare practice, the motif of the "exposed" infant is a recurring one in Greek mythology as well as in Greek theatre. What is, however, striking, is the lack of legislation prohibiting the exposure of an infant.¹⁸

11 Roy 1999: 4.

12 *Ibid.*

13 Patterson 1991: 60.

14 Beringer 1985: 41.

15 Arist *Pol* 8 16.

16 Carey 1995: 416.

17 Kapparis 2003: 12.

18 Roy 1999: 8.

What needs to be understood from the dynamics of the *οἶκος* is that, in the same way that a *κύριος* represented his household, the household was most fully manifested in the *κύριος* himself as the family was seen as an extension of the male head's *οἶκος*. This is confirmed by the fact that, when a woman married, she was transferred from the *οἶκος* of her father to that of her husband and it is further demonstrated through Athenian inheritance law.¹⁹ Pomeroy defines *οἶκος* as the familial estate which implies that the household could only exist with its financial estate and assets and would therefore, as Athenian law maintained, need to remain within the control of relatives of that household's male head so as to preserve the estate under his *οἶκος*.²⁰ In the case where a *κύριος* died without a male heir, but had a daughter, she would become an *ἐπίκληρος* and, by law, would have to marry the closest male relative on the paternal side of the family to ensure that the estate was inherited patrilineally.²¹ Thus, the *ἐπίκληρος* essentially became part of the estate that would come under the jurisdiction of the closest male heir. Moreover, another way to ensure the maintenance of the man's *οἶκος* if there was no male heir, was to adopt a son either during the man's lifetime or posthumously in his will.

It is apparent here that the preservation of the patriline took priority over the will of a household's individual simply due to the fact that its possibly-enduring nature prevailed over the inevitable mortality of the individual; or, as Pomeroy encapsulates it, the life expectancy of the *ἀγχιστεία* (relatives entitled to inheritance) was essentially unlimited, while the life expectancy of the individual was short.²² An *οἶκος* was the primary form of a citizen's identity and people's names, as in many families today, were constructed from the same stems as their ancestors, repeated over a number of generations.²³ A family clearly placed great emphasis on the continuation of the household legacy for as many future generations as possible and a son was therefore obliged to marry and produce an heir to keep the *οἶκος* alive, as eloquently expressed by Lacey in her illustration of the *οἶκος* as a "living organism ... required to be renewed every generation to remain alive".²⁴

At the crux of social and legal notions (made clear by the accepted practice of exposure of unwanted infants and the laws on citizenship and inheritance respectively) is the undeniable truth that individuals belonging to the *οἶκος* were subject to the will of the *κύριος* in his responsibility for the household's best interests as upheld by the *πόλις*. Legislation over such matters had to be considered by the Athenian assembly which, during the classical period, became the deciding body of state policy,²⁵ with

19 MacDowell 1989: 18.

20 Pomeroy 1996: 20.

21 Roy 1999: 10.

22 Pomeroy 1996: 19.

23 *Idem* 73.

24 Lacey 1968: 16.

25 Pomeroy 1999: 476.

hardly any limits on the extent of its power.²⁶ It is widely known in the study of classical Athens that the assembly consisted solely of male citizens who themselves were members of an *οἶκος* and, in most cases, were no doubt at its head.²⁷

Accordingly, unlike in typical modern Western families, women had very little say within the realm of the *οἶκος* and lacked altogether any social or political status in the greater *πόλις*. Apart from her primary role of marrying and bearing children,²⁸ a woman's function in the *οἶκος* then was to ensure that her husband would not have to concern himself with family affairs so that he could see to affairs outside the home. Therefore, her duties were to rear her children after their birth, look after the family, delegate domestic chores to slaves and make sure the household ran smoothly.²⁹ She could not represent herself in court and most probably did not have the education or skills required to earn an adequate living independently. Legislation, demonstrated in institutions such as that of the *ἐπίκληρος*, therefore, made certain that the citizen woman would always be under the protection of a male relative. A respectable woman was ideally expected to spend her time indoors at home as Greek standards of modesty required that women be sheltered from any sort of physical or visual contact with any man but her husband.³⁰ Moreover, a woman's fragile reputation was dictated by a wide range of socially demanded behaviour which, if disobeyed, would reflect adversely on the *οἶκος* to which she belonged. However, it must be noted that, in a society that segregated sexes, it is more than likely that boys and girls would have devoted great effort in defeating such social restrictions.³¹

One of the legal rights available to married citizen women was the right to divorce her husband, after which she would return to her former *οἶκος* to which the husband was also required to return the dowry. If children had been born before the divorce, they would however remain under the custody of the father,³² reiterating further the priority of Athenian inheritance law for patrilineage and the preservation of the *οἶκος* under the male head's dominion. As will be discussed in more detail below, social standards regarding adultery were firmly asserted by Athenian legislation, as a husband whose wife was found to be guilty of adultery was legally obliged to divorce her. More telling is the fact that, if proven that a husband was aware of his wife's infidelity and had not divorced her, a severe penalty would be imposed on him.³³ The adulterous woman would be barred from religious activity, the only area of Greek public life in which a woman could approach anything like the influence of a man, and if she ignored the bar could be beaten by anyone with

26 Thorley 2005: 57.

27 Roy 1999: 12.

28 Pomeroy 1994: 62.

29 Kapparis 2003: 11.

30 Cole 1984: 97.

31 Dover 1973: 62.

32 Pomeroy 1994: 65.

33 Roy 1999: 11.

impunity,³⁴ while the cuckold who had failed to divorce his adulterous wife was subject to disenfranchisement from his civilian rights.

3 *Μοιχεία*

Before discussing competing interpretations of *μοιχεία*, it must be noted that the starting point of debate surrounding the relative gravity of rape and adultery in Athenian society is the statute attributed to Draco, cited by Demosthenes, which is referred to in the speech written by Lysias, *On the Murder of Eratosthenes*. This statute will be dealt with in greater detail below.

It is a matter of controversy among scholars of Athenian antiquity whether adultery was, in fact, regarded as a more serious offence than rape. Although some scholars believe that this was indeed the case, it is not universally accepted that adultery was, in fact, viewed in a more serious light than rape. Much of the debate surrounding the rejection of the argument that, in Athens, adultery was seen as a worse transgression than rape stems from the scope and interpretation of the term *μοιχεία*.³⁵ Many scholars have understood *μοιχεία* as being the most suitable Greek term for “adultery”. While they would not be wrong in doing so, such a translation is inexact as the term referred to more than simply sexual intercourse with a person who is married to someone else (as the word “adultery” would imply in modern parlance). There is good reason to believe that the word was further-reaching in its implications: “not in terms of actions committed but in terms of circumstances under which a sexual act constituted *μοιχεία*”.³⁶ In another translation of the term formulated by Dover³⁷ in which he refers to Draco’s provision for justifiable homicide, *μοιχεία* was defined as “to seduce the wife, widowed mother, unmarried daughter, sister, or niece of a citizen; that much is made clear from the law by Demosthenes 23 53 5”. On this interpretation, *μοιχεία* is understood in more expansive terms than the modern conception of adultery, and includes the seduction not only of a husband’s wife, but the seduction of his other close female relatives as well.

The interpretation of *μοιχεία* that encompasses female relatives of a male citizen other than his wife stems originally, as Dover points out, from the statute in which the abovementioned individuals are included within the ambit of those women in respect of whose seduction an action for *μοιχεία* can be brought by the aggrieved male citizen. The use of this statute in an actual case of adultery is demonstrated by the assertion in Lysias’ well-known *On the Murder of Eratosthenes* (which will be discussed fully below) in which the speaker has the statute recited to the jury as part of his defence that he killed a man found *in flagrante delicto* with his wife. Despite the fact that

34 Carey 1995: 414.

35 *Idem*: 407-412.

36 *Idem* 407.

37 Dover 1974: 209.

the actual statute is not revealed, the speaker uses the Greek words for spouse, sister and daughter (including concubines as well) in his reference to it, substantiating that the cited statute is, in fact, that provided by Demosthenes.³⁸ As will be seen below, Aristotle in his own summary of the law of justifiable homicide provides additional supporting evidence of the more inclusive scope of the interpretation of *μοιχεία*.³⁹

Another speech that advocates Lysias' expanded scope of *μοιχεία*, namely *Against Neaera*, refers to a case in which Epainetos is held to ransom by Stephanos for having had sexual intercourse with a woman, Phano, alleged to be Stephanos' daughter. Stephanos' action is based on the claim that Phano is his daughter (as opposed to his wife), while Epainetos' defence refutes this claim, thus seeking to discharge himself of liability in an action under the law dealing with *μοιχεία*. Since Stephanos charges him on the basis that Phano is his daughter and not his spouse, in response to which Epainetos does not deny Stephanos' right to sue him on account of seduction of his daughter, but instead denies that Phano is actually his daughter, *Against Neaera* confirms that Athenian law recognised the right to bring a case of unsanctioned non-violent sex with persons other than a man's wife.⁴⁰

These four excerpts together form the basis upon which some scholars argue that *μοιχεία* extends beyond the bounds of the marital relationship. However, there is further debate over the scope of actions in respect of which a charge can be brought against an individual for *μοιχεία*. Despite the fact that some scholars have recognised the statute attributed to Draco as the actual law on adultery, most scholars rightly observe the statute as a law regarding justifiable homicide from which the basis of the law of adultery is inferred. Cohen's article entitled "The Athenian law of adultery" criticises the traditional view posited by Dover that *μοιχεία*, for legal purposes, indeed encompassed seduction of a citizen's wife or close female relative, and suggests that there are inaccuracies with extant conclusions drawn from the statute and examines it more closely.⁴¹ Here, I provide the translation of the relevant statement by Demosthenes:

If a man kills another unintentionally in an athletic contest, or overcoming him in a fight on the highway, or unwittingly in battle, or in intercourse with his wife, or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer on that account.⁴²

As is plainly evident from its very formulation, this statute is part of the law on justifiable homicide and does not make a distinction between offences, but rather establishes conditions under which homicide can be condoned in a court of law. Accordingly, as Cohen argues, "the statute ... no more proves that adultery was

38 Cohen 1984: 149.

39 In Aristotle's *Constitution of Athens* 57 3 (tr Dymes 1891), hereafter referred to as *Arist Ath.*

40 Carey 1995: 408.

41 Cohen 1984: 151.

42 D 23 53.

an offense punishable by death than it proves that participating in athletic contests, assault, or fighting in a war were crimes punishable by death”.⁴³ Therefore, it is argued that the statute cannot constitute the actual adultery law, unless one were to assume that *μοιχεία* was, in fact, not a transgression at all, but was only concerned with extra-judicial self-help. Furthermore, when looking at the diction used by Demosthenes, neither in the statute itself nor in the extended analysis of it is the word *μοιχεία* used. He only discusses sexual intercourse without offering a distinction between rape or adultery which, from a legal perspective on homicide, is compatible as it is of no import whether or not the perpetrator in question raped or committed adultery – under the bounds of law he can be killed with impunity if found *in flagrante delicto* by a male family member of the raped / seduced woman.⁴⁴ Cohen proposes, therefore, that adultery was regarded as equally reprehensible as rape, which is why the abovementioned individuals (wife, mother, daughter, etc) are included in the statute.⁴⁵

Cole, in his *Sanctions Against Sexual Assault* (written in the same year as Cohen’s *The Athenian Law of Adultery*), is, however, confident that Athenian legislation, as well as its society at large, deemed *μοιχεία* as a more punishable offence than sexual assault.⁴⁶ Unlike Cohen, Cole posits that a distinction is, in fact, made between *μοιχεία* and rape by referring to legislation against rape mentioned in two sources:⁴⁷ one in a speech of Lysias, and the other in Plutarch’s writings about Solon.⁴⁸ Where Demosthenes fails to prescribe a penalty for *μοιχεία* (which, it will be argued below, is, in fact, what Demosthenes is referring to, contrary to what Cohen argues), both Lysias and Plutarch point out that the penalty for rape is a monetary fine.⁴⁹ Cole goes on to refer to three Athenian laws with which *μοιχεία* is correlated:⁵⁰ The first requires a husband to divorce his adulterous wife or face the risk of *ἀτιμία* (disenfranchisement); the second law is that of Demosthenes, already discussed, in which a man who kills an adulterer caught in the act is exempt from prosecution; and the third law protects an accused adulterer, allowing him to bring against the accuser a suit that, if unsuccessful, allowed the accuser any punishment (without the use of a knife) he chose to be performed on the accused in court.

Although Cohen claims that the statute quoted by Demosthenes is merely the law on justifiable homicide and does not actually focus on *μοιχεία*,⁵¹ Aristotle refers to the same law and includes the word *μοιχεία* which indicates that later Athenians

43 Cohen 1984: 151.

44 Carey 1995: 410.

45 Cohen 1984: 152.

46 Cole 1984: 100-103.

47 *Idem* 99.

48 Lys 3 6; and see, too, Plutarch’s *Solon* 23 (tr by Dryden 1683), hereafter referred to as *Plu Sol*.

49 D 23 53.

50 Cole 1984: 100.

51 Cohen 1984: 147.

themselves acknowledged this statute as the one dealing with *μοιχεία*.⁵² Plutarch also cites the same law but calls it the law of Solon, stating that it allowed a male relative who caught a *μοιχός* (ie the alleged seducer) to kill him with impunity.⁵³ As has been noted, Demosthenes makes no distinction between adultery or rape; likewise, the myth on which Draco bases this statute is that of Ares' acquittal from criminal liability for killing a man caught raping his daughter. Rape is not distinguished from adultery in the statute attributed to Draco, but it cannot go unheeded that Lysias, Plutarch and Aristotle took it to encompass both rape and *μοιχεία* and state clearly that *μοιχεία* was believed to be the far more serious crime.⁵⁴

Further speculation over the law referred to by Lysias has been offered by Todd,⁵⁵ to the effect that the law cited is not in fact the statute on homicide but is rather the law dealing with *κακοῦργοι* (malefactors) who were subject to *ἀπαγωγή* to the Council of Eleven and poses the possibility that *μοιχοί* were classed under this law. The only excerpt that can conceivably be referred to in aid of this perspective is from Aeschinus, which reads:

A clear way has been revealed whereby those guilty of the greatest wrongs will escape punishment. For what mugger or thief or adulterer or killer or any other of those who commit the most serious wrongs but do so in secret will be punished? For any of these who are caught in the act are punished by death at once if they confess, while those who go undetected and deny their guilt are judged in court and the truth is discovered on the basis of probability.⁵⁶

The only useful conclusion that can be drawn from this is the affirmation that adultery (and presumably cases of rape as well) is punished by death. However, Harris and Carey conclusively rebut this citation as misleading,⁵⁷ on the basis that Aristotle⁵⁸ informs us that *κακοῦργοι* were accountable only to summary arrest and referral to the Eleven and could not be killed on the spot, as Aeschinus would have us believe. Only if they confessed or were found guilty were they liable to execution. In addition to this, it is exceedingly unlikely for this to be the law cited by Lysias as Euphiletus' defence was based on the fact that, in killing his wife's seducer, he was acting as necessitated by law. Since he refers to the statute that allows him to do so, it is unlikely that the law referred to is that on *κακοῦργοι* which does not require nor permit the immediate killing of an adulterer.⁵⁹

Since the law cited by Lysias is not the law that deals with *κακοῦργοι*, the only alternative is the reference to that which stipulates actions in cases of *μοιχεία*,⁶⁰ as

52 Arist *Ath* 57 3.

53 Cole 1984: 100.

54 *Idem* 101.

55 Todd 1993: 276.

56 Aesch *Ep* 1 90; see, further, Carey 1995: 411.

57 Harris 1990: 376; Carey 1995: 411.

58 Arist *Ath* 52 1.

59 Carey 1995: 412.

60 *Ibid.*

will be demonstrated below. Moreover, if it is indeed the law on adultery, confirmed by Aristotle and Plutarch, then one can be certain that it did designate killing as a right accessible to the aggrieved party. Although the law on *μοιχεία* may have offered alternative punishments for the culprit, Lysias opted not to include them for obvious reasons as his aim was to defend a man charged with killing his wife's seducer. What is apparent from the statute, is that it was not merely used as a defence under the homicide law, as Cole assumes, but explicitly permitted killing as a legitimate measure in the case of *μοιχεία*.⁶¹

Therefore, according to post-Draconian law, there was a significant difference between *μοιχεία* and rape as *μοιχεία* not only gave an aggrieved *κύριος* or other male relative the right to a defence allowed under homicide law, supported by contemporary legislation, but also specified homicide as a legitimate option open to a male in the case where a person was caught in the act with a woman under his authority as *κύριος*. In contrast, Solonian legislation dealing with rape assigns "the penalty of one hundred drachmas"⁶² to be paid to the victim or the *κύριος*.⁶³

This seemingly contradictory notion will be demonstrated in the following section where the actual case of Euphiletus's defence under the homicide law – the speech *On the Murder of Eratosthenes* written by Lysias for him – after he killed a man caught in the act of having sexual intercourse with his wife, is discussed.

4 Euphiletus' *Apologia*

Most of the controversy around the subject of the Athenian notion that adultery was regarded as a far worse transgression than rape, for which the offender could ostensibly receive the death penalty (as has been made evident by the generally accepted interpretation of the term *μοιχεία* held by Lysias, Aristotle and Plutarch), revolves around the actual case in which Euphiletus was prosecuted for the murder of Eratosthenes after allegedly catching him *in flagrante* with his wife. Although we have no evidence that Euphiletus' argument was accepted by his jurors, a number of modern scholars such as Pomeroy, MacDowell and Cole have judged it valid and supported the verdict that Athenian legislation deemed *μοιχεία* a crime more reprehensible than rape.⁶⁴

Euphiletus' defence was written by Lysias in a speech, *On the Murder of Eratosthenes*, which is divided into four sections:⁶⁵ the preface (1 1-5), the narrative (1 6-26), the argument (1 27-46) and the conclusion (1 47-50). In the preface, the *prooimion*, Euphiletus introduces the case and appeals to his jurors on the basis of

61 Cole 1984: 97.

62 *Idem* 101.

63 *Idem* 412.

64 Pomeroy 1994: 86-87; MacDowell 1978: 124; Cole 1984: 103.

65 See Lamb 1930: 2.

the universal detestation of the transgression of adultery. He seems confident in his position, stating that

I should be only too pleased, sirs, to have you so disposed towards me in judging this case as you would be to yourselves, if you found yourselves in my plight. For I am sure that, if you had the same feelings about others as about yourselves, not one of you but would be indignant at what has been done.⁶⁶

His confidence presumably stems from his assumption (probably not unfounded) that his male jurors, who themselves were members of an *οἶκος* and in many cases, like Euphiletus, were *κύριοι*,⁶⁷ would share his distaste of those who threaten the marital union and the stability of the household as the basic unit of the *πόλις*. He then makes the point that, in seducing his wife, Eratosthenes corrupted her and inflicted disgrace upon his children as well as himself by entering his home. This, he says, is the only enmity between him and Eratosthenes and he had no motive or premeditated intentions of murdering him.⁶⁸

He then goes on to recount the *diegesis* or narrative of the events that led up to the murder for which he is being prosecuted. After his wife bore him a child, Euphiletus says, he trusted her wholeheartedly and placed all his affairs in her hands. He states further that she was an excellent wife; a clever and prudent housewife – but after the death of his mother his trouble began.⁶⁹ It was at his mother's funeral that Eratosthenes first became interested in his wife and, aided by his own unsuspecting nature and his wife's servant-girl, seduces her. After some time, Euphiletus is made aware of the seduction by an old woman sent by one of Eratosthenes' neglected mistresses who was angry that he was not visiting her as regularly as he used to. The old woman advises that he should find his wife's servant-girl (through whom Eratosthenes paid addresses to her mistress) at the market and torture her into confessing the whole story.⁷⁰ After Euphiletus has adopted this advice, the servant-girl agrees to betray Eratosthenes and informs Euphiletus one evening that he is in the house. At hearing this, he rounds up several friends and returns to the house where he breaks open the door of his wife's bedroom. There the scene of Eratosthenes lying naked with his wife presented itself to him.⁷¹ Thereafter, Euphiletus knocked his wife's seducer down, tied his hands behind his back and began interrogating him, in response to which Eratosthenes admits guilt and begs that his life be spared in return for compensation in the form of money.⁷² Before carrying out the seducer's fate, Euphiletus replies:

66 Lys 1 1.

67 Roy 1999: 12.

68 See Lamb 1930: 2.

69 Lys 1 6-7.

70 *Idem* 1 16.

71 *Idem* 1 24.

72 See Lamb 1930: 2-3.

It is not I who am going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person.⁷³

Hereafter, Euphiletus commences the *pisteis*, his defence against the prosecution for murder made by the dead man's relatives against him. He begins by having the law attributed to Draco on *μοιχεία* recited to the court which (as discussed *supra*) stipulates that if a man kills another found *in flagrante* he will not be indicted as a manslayer.⁷⁴ He then goes on to note that Eratosthenes, after being struck down and restrained in his wife's bedroom, acknowledged his guilt as an adulterer and implored, as law authorises, that he was ready to provide compensation in money so that he not be killed. As pointed out earlier, Euphiletus declared that the legislation should have higher authority than the pleadings of Eratosthenes and that he would be satisfied in acting the way he did.⁷⁵ He then brings forward witnesses to the alleged crime. Their names are not disclosed but they are assumed to be the friends Euphiletus brought with him to his wife's bedroom. He also then has the "the law from the pillar in the Areopagus",⁷⁶ on which Draco based his own law, read out to the court. This law is not preserved but it has been established that it declared that, like the previous law cited, "whoever kills an adulterer caught *in flagrante* with his wife cannot be convicted of murder".⁷⁷

This law, as Euphiletus maintains, also applied the same penalty to the adulterous woman and is the law on which he concludes that Athenian legislation deemed seduction of a citizen woman as a worse offence than that where force is used. He posits in his speech that:

[the law] directs that, if anyone forcibly debauches a free adult or child, he shall be liable to double damages; while if he so debauches a woman, in one of the cases where it is permitted to kill him, he is subject to the same rule. Thus the lawgiver [presumably referring to Draco], sirs, considered that those who use force deserve a less penalty than those who use persuasion; for the latter he condemned to death, whereas for the former he doubled the damages.⁷⁸

He adds that those who used persuasion corrupted their victims' souls, therefore making the wives of others more intimately associated with the seducers than with their husbands, while also placing the husband's household under their own influence, thus causing doubt as to whose the children belonged to.⁷⁹ He eventually says in the *epilogos*, his conclusion of his defence, that he acted not upon private

73 Lys 1 26.

74 D 23 53.

75 Lys 1 29.

76 *Idem* 1 30.

77 Harris 1990: 370.

78 Lys 1 32.

79 *Idem* 1 33.

interests of spite, but rather in the interest of the city as indicated by Athenian law.⁸⁰ Euphiletus ends his defence declaring that, if he is found guilty of murder, he will have been enticed by the law, which he trusted and obeyed.⁸¹

It must be noted that Lysias' speech was not an impartial study of a legal scholar but rather an attempt to persuade Euphiletus' jurors of his innocence. The sources he used in order to do so may therefore have been distorted to create specific effects favouring Euphiletus. Harris rightfully brings into question a number of assumptions about this area of Athenian law and ethics.⁸² However, Carey, after a thorough examination of the sources brought forward in Euphiletus' defence, demonstrates that adultery was, in fact, deemed a more heinous crime than rape.⁸³ The summary of the law cited by Lysias above, has been accepted by a number of scholars already mentioned.⁸⁴ However, Lysias cleverly oversimplifies the formulation. The action open to those in cases of rape specifies damages for the victim whom Lysias explicitly mentions; his distortion lies in his suppression of other penalties which a rapist might receive.⁸⁵

As has been mentioned above, Harris points out that the passage referred to by Euphiletus is not concerned with definitions of *μοιχεία*, but rather deals with justifiable homicide.⁸⁶ This is because it would surely be problematic for someone who, for example, finds his wife with another man, to prove whether rape or *μοιχεία* took place. Only if physical violence was evident, and not simply threats of physical violence, would it be clear for the aggrieved party to tell the difference between the rapist and the adulterer. Moreover, the citation does not distinguish between rape and adultery which, as shown, was of little import as a defence could be offered under this provision of Draco's law, whether or not the man killed by the defendant was a rapist or adulterer.⁸⁷

Lysias chooses to omit alternative punishments available to the aggrieved party so as not to erode the precise contrast he postulates between rape and adultery as he intends to demonstrate that Euphiletus was correct in acting the way he did. Euphiletus was, of course, not obliged to kill, as Lysias tries to convey, and could have subjected Eratosthenes to physical abuse; other means of abuse that intended to gravely humiliate him; hold him to ransom; demand pecuniary compensation; or have him prosecuted in a court of law.⁸⁸ For this reason, Lysias chooses to refer to the law on justifiable homicide and not the extant laws on *μοιχεία* as the latter would

80 *Idem* 1 47.

81 *Idem* 1 50.

82 Harris 1990: 370-377.

83 Carey 1995: 407-417.

84 Lys 1 32.

85 Carey 1995: 409.

86 Harris 1990: 370.

87 Carey 1995: 410.

88 Forsdyke 2008: 8.

have brought to light his distortion. Carey claims that “to argue that a distinction is exaggerated is not to invalidate the distinction altogether”, and that it can be demonstrated that the acute case of Euphiletus “rests on a real distinction drawn by the Athenians”.⁸⁹

Carey goes on to provide his argument to substantiate this statement, firstly, by disputing Harris’ claim⁹⁰ that Euphiletus makes an effort to deceive the court by claiming that “the law from the pillar in the Areopagus”⁹¹ designates the penalty for adultery to be death. Carey does not deny this particular statement, but points out that this law is not, in fact, the only testimony for Euphiletus’ defence, as after the *diegesis* recounting the events of Eratosthenes’ death, he says: “[F]irst of all, read out the law.”⁹² The prospect that this law (unavailable to us) is that which substantiates Euphiletus’ actions appears inescapable: the words “the law” conveys that its authority in this context is axiomatic due to its reference directly after the *diegesis*, as well as the fact that Euphiletus asserts, forthwith, the legal penalty for adultery. This law is highly unlikely to be the same law cited in Lysias (1 30), firstly because the Greek word “καί” in Lysias (1 30) suggests that the citation quoted is in addition to that quoted in Lysias (1 28) and is not a repetition.⁹³ Therefore, if the law cited in Lysias (1 28) is not the homicide law, as maintained by Harris,⁹⁴ and is not the law on *κακοῦργοι* as asserted by Todd,⁹⁵ the only clear alternative would be a reference to the statute stipulating actions in cases of *μοιχεία*.

As has been mentioned above, if the statement by Lysias is in fact a reference to procedures revolving around *μοιχεία*,⁹⁶ we can be certain that it did give the aggrieved male the right, in cases of adultery, to kill those implicated, as acknowledged by Plutarch, Aristotle and Demosthenes.⁹⁷ We can be sure that punishments other than death were mentioned, but Euphiletus opted to withhold them so as not to detract from the effectiveness of his argument. What is essential is that the right to homicide in cases of *μοιχεία* was expressly given to an aggrieved male, not simply giving a person a defence under the homicide law. Moreover, there was a significant difference between *μοιχεία* and rape in Draconian law, which remained in effect throughout the classical period,⁹⁸ and due to the fact that Solonian legislation prescribes only pecuniary compensation in cases of rape, it can be confidently contended that *μοιχεία* was in fact treated more severely by Athenians than rape. Carey also raises the point

89 Carey 1995: 410.

90 Harris 1990: 374.

91 Lys 1 30.

92 *Idem* 1 28.

93 Carey 1995: 410-11.

94 Harris 1990: 374.

95 Todd 1993: 276.

96 Lys 1 28.

97 Plu *Sol* 23; Arist *Ath* 57 3; D 23 53.

98 Carey 1995: 410.

that, in this context, it is important to distinguish between the possibility of a rapist being executed – “conditional upon the jury accepting the extreme sanction proposed by the prosecutor,” as Aeschinus informs us – and the legally given right to homicide *without trial* “and without reference to any state official or body” regarding cases of *μοιχεία*.⁹⁹

5 The inferior role of women in Athenian law

As has been made clear by the aforementioned legal decrees, accounts by ancient contemporary notables and actual legal cases of *μοιχεία*, in Athens adultery was regarded as a crime and was treated as a far more grievous transgression than was the act of rape. If one considers the approximate life-spans of the notables from which these decrees, accounts and cases emanate (eg Draco, c 650-600; Solon, c 638-558; Lysias c 445-380; and Demosthenes and Aristotle c 384-322) and how long their points of view may have remained popular, it can confidently be posited that this convention, namely that adultery was a more serious crime than rape, both in legal terms and in terms of social perception, was prevalent for a considerable period of time in Athenian antiquity.

Modern Western opinion differs considerably from this ancient convention in that legislation (as well as social opinion) holds that the victim of rape suffers markedly more than one who is seduced outside of marriage (and significantly more than does the spouse of someone who is so seduced). The question that begs being raised by this decided contradiction is why ancient Athenian legislation deemed the suffering of a sexually assaulted person to be less than that of a woman who was adulterous (or that of her cuckolded husband) to the extent that the adulterous woman and her partner could be killed if caught *in flagrante* while the former victim’s offender was simply liable to a pecuniary penalty. The answer lies in the gender dynamics prevalent in Athens at the time of such laws and attitudes. These dynamics ensured that women were, without any doubt, seen as inferior to men in all spheres of life (social, legal, and economic) except religion, in which women’s status was ostensibly equal to that of men. To fully comprehend this detail in ancient Athenian gender dynamics, one must look at the role of women in its society, as will be discussed in detail below.

Very early in the academic attempt by Edwin Ardener to understand traditional societies as they are (or were) seen from the point of view of women, it was observed that the representations of a society made by most ethnographers tend to be models derived from the male sector of that society.¹⁰⁰ He pointed out that, as a consequence of the articulation of history in terms of a male world-position, women in history comprise a “muted group” and that “the study of women is on a level little higher than the study of the ducks and fowl they commonly own”. Since this study, there

⁹⁹ *Idem* 412.

¹⁰⁰ Ardener 1975: 1.

have been many like it that have made an effort to understand societies from the perspective of women so as to provide a more comprehensive representation of those societies instead of accepting male-shaped perceptions of societies in history.

With regards to classical Athens in the fifth and fourth centuries BC, one might think that modern scholars are better off than their ancient counterparts in terms of presenting a more conclusive or realistic model of Athenian society. This may be due to the fact that the ancient literature available to modern scholars seems to provide an accurate and holistic presentation of Athenian women and their role in society. However, this is a delusion: modern scholars have no direct access to the model of Athenian society to which women subscribed, even as it might have been expressed in the dominant language of men “for the evidence available to us is almost without exception the product of men and addressed to men in a male-dominated world”.¹⁰¹ One should make a constant effort to remember that the words of a Lysistrata or a Medea are, in fact, the product of a man’s perception speaking to other men.¹⁰²

While this statement might be more than three decades old, one must understand that very little, if any, new ancient material or evidence has been uncovered that would allow direct access to the model of Athenian society to which women subscribed. However, we are able to piece together components of that society that help illuminate women’s subjugated role in Athens and thus how they were perceived within specific spheres of that society. Before looking at legal attitudes towards women implicated in cases of *μοιχεία*, one must understand (as has been briefly noted above) that Greek girls were segregated, not only from the world outside the home, but from boys in particular. In court, a speaker may have attempted to proclaim his family’s respectability by stating that his sister and nieces are “so well brought up that they are embarrassed in the presence even of a man who is a member of the family”.¹⁰³

Since this article looks at the ancient Athenian phenomenon whereby women implicated in extra-marital sexual liaisons (or unmarried women who were found to be in a sexual relationship with a man without the consent of her *κύριος*) were, under legal precedent, punished far more severely than offenders in cases of sexual violence, one must look at Athenian legal attitudes towards women in that society. It has been suggested by some scholars¹⁰⁴ that, due to the fact that laws in antiquity were written only by men, legal status and social status in reality had very little or no correlation. However, it must be acknowledged, at least, that status before the law played, and continues to play, a large role in defining the position of women within the structure of a given society, even though from a male point of view. It is indisputable that the law is one of those sets of social institutions by which society

101 Gould 1980: 38.

102 Dover 1972: 158.

103 Lys 3 6.

104 For example, Gomme & Sandbach 1973: 28.

seeks to define its inner structure.¹⁰⁵ In other words, legal norms and principles reflect prevailing social norms and values. On the other hand, legal norms and principles also shape and influence social norms and perceptions, such that a dynamic and symbiotic relationship exists between law and society: they both reflect and influence each other. As such, by studying the laws of a particular society, one can learn a great deal about the social *mores* of that society.

In a society where segregation of the sexes was imposed, boys and girls (of any age) were likely to devote a great deal of time to defeating this restriction. However, Greek laws were not at all lenient towards adultery and *μοιχεία* (which entailed not only the seduction of a man's wife, but also the seduction of a widowed mother, unmarried daughter, sister, niece or any other woman whose legal guardian he was) because an offender (ie the male seducer) could be killed, physically abused or forcefully imprisoned until he purchased his freedom.¹⁰⁶ This article has already discussed this specific aspect of Athenian law in depth, but has yet to analyse, more broadly, how exactly women were regarded by the law. Examining Athenian law and its processes, when handling cases in which women were present, might shed some light on why it is that adultery was seen as a more heinous transgression than the act of rape.

According to Athenian law, as well as in the rest of classical Greece, this question is immediately answered by the juridical position of women, namely, the commonly known fact that, in court, a woman, regardless of her age or social class, or of her role as daughter, sister, wife or mother, was in essence a minor since throughout her life she was under the legal control of a male *κύριος* who represented her.¹⁰⁷ If she was married, either her husband or father would represent her in court, while if she was unmarried, her father, brother or paternal grandfather could take up that role.¹⁰⁸ In no circumstance could a woman have any semblance of legal personhood, as she was legally regarded to have been an extension of her *κύριος*' property. The status of an *ἐπίκληρος* demonstrates that, even in extreme cases, a woman had no control over any issue regarding her marriage as she was "assigned" a representative in the form of the nearest male kinsman in a fixed order of precedence. It thus becomes apparent that Athenian law connected women with property and this connection can be illustrated in laws regarding dowries, concisely summed up by Gould:

[A]ny dowry that went with the woman in marriage is controlled by her husband qua *κύριος* but cannot be disposed of by him; on the husband's prior death or on dissolution of the marriage the dowry passes with her to her new *κύριος*; on the death of the wife without children born to her, the dowry reverts to the original *κύριος*.¹⁰⁹

105 Gould 1980: 43.

106 Dover 1973: 62.

107 Gould 1980: 44.

108 Kapparis 2003: 9.

109 Gould 1980: 44.

What is most striking here is the fact that, legally speaking, women were not seen as citizens, as a male would have been, but as potential transmitters of property. This parallel drawn by Athenian law between women and property is articulated by the twofold use of the Greek word *ἐγγύη*, which could be used to denote “marriage” or “surety”, and the origin of which implied “transference with a reserved right to the transferor”.¹¹⁰ Her role in the transference of property was further encapsulated by the fact that she might have been required to produce a son in order to facilitate the progression of the *οἶκος* under her husband or father. In their role as transmitters of property as well as in their very necessary roles in the survival of a given *οἶκος*, Athenian society displayed interest in and extended protection to its women by articulating such interest within a framework of legal rules and institutions. This articulation, however, placed women in a position that lacked all agency and characterised them as incapable of independent thought. As such, Athenian women became “sub-citizens” excluded from the bounds of those who formed the community’s representative members while also defining them as precious and indispensable to the maintenance of social order and in particular, to the continuity of property.¹¹¹

The essence of women’s position in society, as seen by Athenian legal attitudes, thus equated her with property belonging to a man; and so, to seduce a man’s wife, thereby stealing away her affection and loyalty from him, was to threaten the stability of his estate. A woman who was seduced by someone other than her husband would have been regarded as being more deserving of blame as the Greeks “tended to believe that women enjoyed sexual intercourse more than men and had a lower resistance to sexual temptation”,¹¹² which the law quite explicitly recognised. As has been shown above, Athenian law stipulated clearly that if a woman committed adultery, she could be killed by her husband (or next male kinsman) if caught in the act; and the same steps could be taken if a man’s widowed mother, unmarried daughter, sister, or niece was caught committing the same offence. There was no such law that we know of that suggested any inclination towards the punishment of the husband of the same woman if he were to have engaged in sexual activity with someone other than his wife. Moreover, if such law existed, a woman was not legally permitted to take action against her adulterous husband anyway – the law was very harsh on adulterers, remarkably more so on women. A man could not receive any penalty if he were to engage in extramarital sex, as long as it was not with another man’s wife, or another citizen woman under the oversight of a *κύριος*. A further testament to Athenian men’s immunity from legal action, were they to have engaged in extramarital sex, is the lack of evidence of any law against brothels. In fact, after Solon’s reforms many Athenian brothels were believed to have been state-funded,¹¹³

110 Harrison 1968: 32.

111 Gould 1980: 46.

112 Dover 1972: 159.

113 Pomeroy 1994: 57.

showing just how socially-permitted it was for Athenian men to engage in sexual activity with someone other than their wives.

Ultimately, what all this demonstrates is the vastly different legal attitudes towards men, on the one hand, as Athenian citizens with full legal personhood, and, on the other hand, women, as legal “sub-citizens” unable to represent themselves in the court of law. Legal positioning of Athenian women must be seen in light of the fact that, in court, a case in which a woman was implicated was fought between a man and the *κύριος* of the woman over whom he looked. A woman’s personal sentiment was of no importance. Cases would be fought between men and thus held, in essence, only their intentions. By examining Athenian legal attitudes towards women, we are made aware of their undoubtedly inferior position in comparison to men. The ancient Athenian phenomenon, whereby adultery was considered as a crime worthy of significantly harsher punishment than rape, must be seen against the background of the inferior position of women before the law, due to the fact men comprised the sole agents in courts of law in which the jury would also be exclusively male, thus taking out of the equation any sentiments of women even if they were greatly implicated in the case at hand. With regards to this article’s aim of bringing to light the reason why adultery was seen as a worse crime than rape in classical Athens, one must understand that legal disputes were fought entirely by men, and so, the victimisation of women in cases of rape would not be recognised. Moreover, when focussing on cases of *μοιχεία*, Athenian action under the law must be seen as a reflection of the threat placed on a man’s estate, with significant blame placed on the culpable woman.

6 Conclusion

In recent years, there has been considerable scholarly debate around the topic of the ancient Athenian phenomenon in terms of which offenders, in cases of adultery, or *μοιχεία*, were punished more severely than rapists – a phenomenon that stands in stark contrast to modern Western attitudes to rape and adultery. Some commentators have argued that this anomaly was more apparent than real, contending that the circumstances under which a sexual act, in fact, constituted *μοιχεία*. These commentators have also highlighted the actions that were legally permitted to be taken by cuckolded husbands or male kinsmen of the woman implicated. This article, however, has maintained the conventional view that those guilty of *μοιχεία* could, in fact, be punished more severely than those who had raped, as was confirmed by Athenian law.

This article has endeavoured to substantiate this orthodox view by referring to essential excerpts from notable sources which form the basis upon which ancient Athenian attitudes around *μοιχεία* are established. These sources include the statute attributed to Draco, cited by Demosthenes, which stipulated that seducing a man’s wife

or female relative constituted *μοιχεία* and that legal action could not be taken against a man who killed those involved in such seduction. This statute did not attempt to define what constituted *μοιχεία* and dealt rather with justifiable homicide. However, Aristotle in his summary of the law on justifiable homicide referred to the same law and included the word *μοιχεία*, which indicates that later Athenians themselves acknowledged this statute as being the one dealing with *μοιχεία*. Lysias is thought to have used this same law in his speech in defence of his client Euphiletus, who was accused of having murdered a man found having sexual intercourse with his wife. Scholars have no evidence that the argument advanced by Lysias in Euphiletus's case was accepted by the jurors in that case, but modern scholars have judged that argument valid and support the verdict that Athenian legislation deemed *μοιχεία* a crime more reprehensible than rape. Lysias pointed out that the penalty for rape was simply a monetary fine, which Plutarch confirmed. Therefore, although rape is not distinguished from adultery in the statute attributed to Draco, it cannot go unheeded that Lysias, Plutarch and Aristotle understood it to encompass both rape and *μοιχεία* and stated clearly that *μοιχεία* was believed to be the far more serious crime.

After demonstrating that adultery was regarded as the more heinous and more punishable offence in Athens, this article has looked at the reasons why this was so, and posits that this was, for the most part, due to the subordinate nature of the female role in the Athenian legal sphere. Due to the fact that women were excluded from the legal realm and that men were the sole agents in courts of law, in which the jury was also exclusively male, cases were fought only between a man and another man, even in cases where women were significantly implicated or affected. Accordingly, the sentiments and opinions of the implicated or affected women would not have been acknowledged, thus positioning males as the only potential victims in legal courts. Therefore, to be in an adulterous relationship with a man's wife was thought to have posed many threats to the man's estate and his *οἶκος* whose institution, as this article has demonstrated, held great significance in the eyes of the greater *πόλις* as the building block of society. As such, the state made great efforts in the protection of the *οἶκος*, which would explain the harsh nature of punishments imposed in cases of *μοιχεία*. Thus, this article brings to light the remarkable relationship between the legal attitude towards women and why it is that Athenian law stipulated a harsher punishment for offenders in cases of adultery – which, in modern Western terms, is not seen as a crime at all – than for rapists, who are seen as some of the most despicable individuals in modern society.

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PRIMITIVE PROHIBITION OF DIRECT REPRESENTATION IN ROMAN LAW SCHOLARSHIP: ORIGINS, SOURCES AND FLAWS

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ABSTRACT

Roman law scholars since the nineteenth century have claimed that Roman law originally banned any form of direct representation, and that only through juristic innovations was this general prohibition of the *ius civile* partially overcome. Such theory was built on the assumption that some texts found in classical jurisprudence were manifestations of a general principle that inspired early Roman law. However, modern scholars have discarded many of the assumptions on which this theory was built, granting a much more limited scope to the texts which restrict the possibility to act on behalf of someone else. Moreover, the sources show that early legal institutions did not exclude agency-like figures, and that Roman jurists resorted to different criteria to determine whether the principal was affected by his agent depending on the particular legal act that was performed, for example the conclusion of a contract, the transfer of ownership, payment, acquisition of possession, etcetera. Accordingly, legal historians should avoid approaching the Roman sources through the notion of “direct representation”. A piece-meal approach serves to understand when and under which conditions Roman jurists enabled an agent to affect the legal position of the *dominus negotii*.

Keywords: Direct representation; agency; *voluntas domini*; *nuntius*

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1 Introduction

It is a commonplace among scholars since the nineteenth century to claim that Roman law forbade direct representation.¹ While there are different ways in which this idea has been presented, the common thread behind it is that early Roman law knew a negative principle which forbade anything what one would nowadays label as “direct representation”. It is argued that the *ius civile* was initially too unsophisticated to allow that the legal position of an individual could be affected by the acts of another one acting on his behalf. However, at some point the needs of commerce would have urged jurists to develop exceptions to this primitive set of rules, particularly through the activity of the praetor. This would have been the case regarding, for instance, the *actiones adiecticiae qualitatis*.

Despite being broadly accepted, this general reconstruction has some troubling issues. Most of them are related to its inherently anachronistic phrasing. It is in fact odd to claim that Roman law prohibited a legal doctrine that would come into existence some two thousand years later.² It is, moreover, rather obvious that Roman jurists ignored the main features of such doctrine. Despite these self-evident remarks, scholars have made curious claims regarding what the alleged prohibition of direct representation meant for Roman law, which are directly related to the scope they grant to the doctrine of direct representation. Particularly relevant is the key role often granted to the *contemplatio domini* of the agent, that would determine whether – and why – a specific case fell under the prohibition on direct representation or not.³ Such idea pictures Roman jurists distinguishing between direct and indirect representation, or between *Stellvertreter* and *Bote*, distinctions that are troublesome considering the absence of analogous clear-cut dogmatic notions in the sources.

Another issue which rises when approaching the Roman sources through the notion of direct representation is the exact field of application of this theory – and its related prohibition – within Roman law. As it will be shown below, the doctrine of direct representation found its origin in the *ius commune* in the context of the law of obligations, and it was not until the nineteenth century that scholars applied it to other fields of patrimonial law, such as the acquisition or transfer of ownership. Following this trend, Roman law scholars approach different situations where a legal act is concluded by an intermediary as part of a common phenomenon of “direct representation”, covering both the law of obligations and the law of property. This leads once again to the rather puzzling conclusion that somehow Roman jurists approached different situations – namely a pledge, sale, delivery, payment or any other act concluded through an intermediary – as part of a common phenomenon of “direct representation”. Such idea is of course even more awkward considering that

1 For an outlook of the scholarship behind this claim, see Cappellini 1987: 440-441; Coppola Bisazza 2008: 3-10.

2 Coppola Bisazza 2008: 10; Hamza 2010: 2-4.

3 See, eg, Jörs, Kunkel & Wenger 1987: 113; Zimmermann 1996: 50-51; D’Ors 2004: 561-562.

Roman law never developed a comprehensive doctrine which would simultaneously deal with every form of legal intermediation.

Leaving aside these remarks, perhaps the most problematic aspect of the theories dealing with “direct representation” in Roman law is the underlying thought that early Roman jurisprudence completely banned such notion, and that accordingly the *ius civile* did not allow any form of legal intermediation on behalf of the *dominus negotii*. Such idea was built on the interpretation of a handful of texts which to a large extent has become obsolete through the studies of later scholars. However, the general theory built around such texts has remained alive and well, influencing in turn the way in which scholars approach the evolution of numerous legal institutions.

In a recently published dissertation I have attempted to revise the idea that Roman jurisprudence had to overcome a primitive ban on direct representation regarding the transfer of ownership.⁴ The aim of this contribution is to show the wider picture of the problem of direct representation in Roman law, presenting the origins and flaws of this theory when approaching the sources. As a result, a more source-oriented analysis of the sources is proposed in order to present the piece-meal approach of Roman jurisprudence to the problem of agency.

2 Origins of the theory in German scholarship

Christian Friedrich Mühlenbruch was the first jurist to develop a general theory regarding the prohibition of direct representation in early Roman law. His ideas on the subject were presented in three successive editions of his work *Die Lehre von der Cession der Forderungsrechte*, between 1817 and 1836.⁵ However, the theory was to some extent already in the air. In fact, some of Mühlenbruch’s starting points can be found in an earlier discussion regarding the possibility to perform *actus legitimi* – namely acts belonging to the ancient *ius civile* – through another person.⁶ This discussion can be traced back to the sixteenth century, when Jacobus Raevardus (1535-1568) claimed that the rule “*nemo alieno nomine lege agere potest*” of D 50 17 123pr⁷ necessarily implied that no *actus legitimus* could be carried out through another person.⁸ Raevardus attempted to demonstrate this regarding the *cretio*, refuting the ideas of Duarenus concerning the possibility of a *procurator* to acquire the *hereditas*. However, most of Raevardus’ energy is devoted to proving that the *mancipatio* could only be performed by the owner. According to him, this circumstance would explain the role of the ancient *fiducia* (*cum creditore* or *cum amico*) since the only way in which the *mancipatio* could be performed by someone

4 Rodríguez Diez 2016.

5 Mühlenbruch 1836: 41-47.

6 Rodríguez Diez 2016: 223-225.

7 D 50 17 123pr (Ulpian 14 *ad edictum*), translation by Watson & Crawford: “[n]o one can legally act on behalf of another.”

8 Raevardus *De auctoritate prudentum liber singularis* (1566): 39-51.

else was by transferring him ownership in the first place. These views were subject to discussion in the following centuries. For example, Conradi (1701-1748) denied Raevardus' textual support and conclusions regarding the *cretio* and the *mancipatio*,⁹ while Averanius (1662-1738) upheld the idea that Roman law excluded that an *actus legitimus* – particularly the *cretio*, *acceptilatio* and *mancipatio* – could be concluded through an agent.¹⁰

This brief overview shows that by the nineteenth century it was not an original idea that the *ius civile* was reluctant to various forms of agency. However, Mühlenbruch gave a much broader scope to this claim.¹¹ He approached through the notion of *Stellvertretung* various institutions in which someone carried out a legal act on behalf of someone else, such as the *actiones adiecticiae qualitatis* or the acquisition of ownership through a non-owner. He then proposed a general historical reconstruction for the evolution of *Stellvertretung* in Roman law, claiming that it was a general principle in early Roman law that no one could act on behalf of another as D 50 17 123*pr* would show. In support of his theory he brought the ideas of Averanius.¹² But he went even further, quoting other general statements¹³ such as “*alteri stipulari nemo potest*”¹⁴ and “*per extraneam personam nobis adquiri non posse*”.¹⁵ Moreover, he also argued that originally ownership could only be transferred by the owner, which would explain the importance and role of the *fiducia*. Accordingly, Mühlenbruch saw a common thread running through early Roman private law, namely that everybody should perform legal acts personally.¹⁶ Such general principle would have proven problematic for trade, which is why Mühlenbruch proposed that all the cases where someone legally acts on behalf of another would have been exceptions to the original

9 Conradi *De pacto fiduciae exercitatio* (1732): 12-14; 23-25.

10 Averanius *Interpretationum juris libri quinque* (1753) 1 12 54 at vol 1: 166.

11 For an overview of nineteenth-century scholarship on this point see Rodríguez Diez 2016: 24-27.

12 Mühlenbruch 1836: 45 n 75.

13 *Idem* 41-42.

14 D 50 17 73 4 (Scaevola *libro singulari* ὁρῶν): “*Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cavere potest*” (“Nor can anyone stand surety for another by making a pact or laying a condition or stipulating” [translation by Watson & Crawford]). Other references to this rule can be found in Just *Inst* 3 19 4 and 3 19 19, as well as D 45 1 38 17.

15 Gai *Inst* 2 95: “*Ex his apparet per liberos homines, quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos servos, in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse. Et hoc est, quod vulgo dicitur per extraneam personam nobis adquiri non posse ...*” (“It is apparent from this that we never acquire through a free person except where we have power over him or possess him in good faith, nor through a third party’s slave unless we have a usufruct in him or possess him in good faith. That justifies the common maxim ‘no acquisition to us through an outsider’...” [translation by Gordon & Robinson]). Other references to this rule can be found in Just *Inst* 2 9 5; D 45 1 126 2; Codex Iustinianus 4 27 1*pr*.

16 Mühlenbruch 1836: 43-44: “Den in diesen und andern Stellen enthaltenen Bestimmungen lag ursprünglich ein Hauptgedanke zum Grunde, der nämlich: dass Jeder für sich in Person handeln müsse”.

prohibition on direct representation. Such exceptions, however, would never have affected institutions belonging to the *ius civile* where the original ban on direct representation would have retained its validity.¹⁷

Mühlenbruch's historical reconstruction on the evolution of *Stellvertretung* in Roman law would be adopted and developed by Savigny. Already in his famous *Vom Beruf unserer Zeit* (1814) Savigny presented the idea of an early prohibition of direct representation,¹⁸ a theory which, as pointed out before, was not completely original to Mühlenbruch. However, Mühlenbruch does seem to be his main source of inspiration when Savigny further developed his theories in his *System* (1840) and later in his *Obligationenrecht* (1853),¹⁹ where he reproduced largely the ideas of Mühlenbruch, adding additional references from the sources and offering a more elaborate historical outlook. Perhaps Savigny's greatest innovation was to add a practical twist to the theory by claiming that it showed that there should be no obstacle for the acceptance of direct representation in legal practice in Germany. This had been an ongoing debate during the nineteenth century, which concerned specially the *alteri stipulari*-rule. Savigny would limit the scope of the texts which seemed to exclude direct representation by arguing that they belonged to the old *ius civile*, which excluded direct representation due to its formal and primitive character. However, he argued that Roman jurisprudence would have developed a series of exceptions to the general prohibition of direct representation, thus reducing its practical impact on trade. Such exceptions, in any case, would have only taken place regarding informal legal acts, since the formal legal acts of the *ius civile* – such as the *stipulatio* – remained under the old principle that excluded direct representation. Savigny's conclusion came thus as self-evident: yes, Roman law seems to exclude direct representation in a series of texts, but these refer only to an early prohibition which was overcome by Roman jurists themselves. Therefore, if already Roman law overcame this prohibition to a large extent, why should German legal practice have remained stuck with it? In fact, such ban on direct representation would be even more difficult to endure in the nineteenth century, since some Roman legal institutions that relieved this limitation had disappeared by that time, such as the possibility of the *paterfamilias* to act through his sons-in-power or slaves.²⁰

Savigny is, moreover, more explicit than Mühlenbruch concerning the scope of his conclusions since he claims that the doctrine of direct representation applies generally to patrimonial acts *inter vivos*.²¹ It is precisely this systematic approach which leads him to deal with different situations where an agent performs an act on behalf of the principal – the acquisition of possession, the conclusion of contracts,

17 Mühlenbruch 1836: 44-47.

18 Savigny 1814: 102-103.

19 Savigny 1840: vol 3 90-98; Savigny 1853: vol 2 21-88.

20 Savigny 1840: vol 3 98; Savigny 1853: vol 2 68-73.

21 Savigny 1840: vol 3 91-92; Savigny 1853: vol 2 41.

the transfer of ownership, etcetera – as part of a general problem of *Stellvertretung* which would develop a common evolution regarding all of them. This comfortably anachronistic approach served well the practical objective of his theory, advocating in favour of granting an unlimited application to direct representation in the German legal system.

Savigny's theories on direct representation had a dissimilar impact on later scholarship. On the one hand, many of his views concerning the dogmatic framework of direct representation for his own time were soon overshadowed by the contributions of authors such as Ihering and Laband. On the other hand, his historical reconstruction was enormously influential among Roman law scholars. This is all the more surprising considering not only that many of the starting points of his theory were abandoned by later scholarship – as it will be shown in the following section – but also because his theory had a rather evident practical aim. Nonetheless, even after legislation had served that practical aim, scholars upheld the theory that Roman law originally knew a prohibition on direct representation (*Verbot unmittelbarer Stellvertretung*), which was gradually overcome through juristic innovation regarding informal acts, while the formal acts of the *ius civile* remained bound to it. This idea is to be found among several nineteenth-century Roman law scholars, including Exner, Pernice and Sohm,²² but it found its most influential formulation in Mitteis' *Römisches Privatrecht bis auf die Zeit Diokletians*.²³ Many Roman law handbooks retained a special title regarding “direct representation” which largely reproduced the views of Mitteis, even if it seemed old-fashioned to make use of this pandectistic category when dealing with classical Roman law. Accordingly, many Roman law scholars continue to adhere up to this day to the main aspects of the theory concerning an early prohibition on direct representation in Roman law.²⁴

3 The theory's starting points fall, but the theory stands

As it was mentioned before, a curious fact behind the ongoing success of the traditional theory regarding direct representation in Roman law is that several of its original starting points have long been discarded. Many scholars may agree up to these days with the main conclusions on the subject offered by Mühlenbruch, Savigny and Mitteis, but few could share their approach to specific problems or texts. This is the case regarding, for instance, the possibility to carry out an *actus legitimus* through an agent. Mühlenbruch built his theory on earlier discussions concerning this point, claiming that no *actus legitimus* whatsoever could be carried out through

22 Exner 1867: 125-127; Pernice 1873: vol A 488; Sohm 1908: 256-262.

23 Mitteis 1908: 203-213. For his earlier views on the subject, see Mitteis 1885: 9-77.

24 See, eg, Siber 1928: vol 2 411-416; Riccobono 1930: 389-337; Betti 1935: 400-405; Voci 1952: 81-91; Rabel 1955: 182-192; Bonfante 1968: vol II/2 210-214; Kaser 1971: 260-267; Claus 1973: 9-13; Hamza 1980: 193; Jörs, Kunkel & Wenger 1987: 111-114; Zimmermann 1996: 34-35; 47-54; D'Ors 2004: 561-571; Finkenauer 2008: 442-448.

another person. Savigny and Mitteis would also rely on this idea. However, Roman law scholars have long ago identified cases of *actus legitimi* carried out through an agent,²⁵ which immediately jeopardises the very foundations of a primitive ban on direct representation. We are aware, for instance, that a slave could acquire ownership for his master through *mancipatio*.²⁶ Accordingly, not every *actus legitimus* falls under the rule “*nemo alieno nomine lege agere potest*”. In fact, its paligenetic analysis shows that it was originally related to the centumviral courts,²⁷ where the *legis actiones* were still in use.²⁸ This shows that this rule was referred in particular to procedural representation under the *legis actiones*, and not even in this context did it have an over-arching validity.²⁹

The objections are even more serious regarding other foundations of the theory. For instance, Savigny sought confirmation for his theories in the analysis of D 41 1 53, which according to him would prove the fundamentally different approach to direct representation between formal acts of the *ius civile* and informal legal acts. Later scholars dealing with the acquisition of ownership and possession have long discarded the scope given to this text, which occupies a central position within Savigny’s theory.³⁰ Moreover, the study of the acquisition of property and possession through an agent in general has undergone significant changes in the last century, with countless articles and monographic works dedicated to this topic. Several authors discard in fact that the *per extraneam personam*-rule had an overarching validity concerning the acquisition of ownership and possession through an agent.³¹ On the contrary, such maxim would simply convey the idea that slaves and sons-in-power would automatically acquire for the *paterfamilias*, since they had no goods of their own, while the acquisition through a *sui iuris* would only take place if specific requirements were met. The *per extraneam personam*-rule would therefore have a limited scope within Roman law concerning the acquisition of property, and would not imply a general or ancient prohibition.

Concerning the law of obligations, the scope of the *alteri stipulari*-rule seems to have been restricted as well. Hans Ankum, who argued that the rule only concerned stipulations involving a *dare oportere*, showed this some decades ago in an influential contribution.³² The original limitation would stem from the features of the formulary procedure, where the stipulator would be unable to claim an obligation of *dare* that

25 See, eg, Ankum 1978: 13.

26 Gai *Inst* 3 167.

27 Lenel 1889: vol 2 col 494.

28 Gai *Inst* 4 31.

29 Kaser & Hackl 1996: 62-63; Finkenauer 2010: 221; Erxleben 2017: 3 n 12.

30 Hölzl 2002: 229-278.

31 See, eg, Corbino 1982: 278 283; Corbino 1984: 2267-2271; Klinck 2004: 356-358; Briguglio 2007: 538-551; Coppola Bisazza 2008: 209-222; and Miceli 2008: 265-277.

32 Ankum 1970: 21-29. Among the supporters of this view, see Kaser 1975: vol 2 339 n 30; Zimmermann 1996: 35-40; Hallebeek & Dondorp 2008: 8-14.

favoured a third party, since he would have no actionable interest himself. This is why most of the exceptions to this rule had to do with cases where the stipulator did have a pecuniary interest, thus rendering the stipulation valid. Further exceptions could only be introduced under compelling reasons, as it was the *favor dotis*.³³

The specific scope of the *alteri stipulari*-rule does not imply that the Roman law of obligations accepted agency in general and only had to face this particular limitation. One may indeed agree to some extent with the basic claim that the Roman law of obligations knew no such thing as direct representation, since it was never possible for an agent to bind the principal to a contract by acting on his behalf.³⁴ This was not even the case regarding the *actiones adiecticiae qualitatis*, where the agent would still be personally bound to the contract. However, it is essential to bear in mind that this is a particular feature of the law of obligations, where it is in principle rather awkward that someone who does not personally conclude a contract is bound to its terms. In other words, one can understand the limitations of Roman law on agency in the context of the peculiar features of the law of obligations, and not because of an underlying principle that would span through the whole of Roman patrimonial law. This is why the *alteri stipulari*-rule should be approached on its own scope, and not as a manifestation of a wider prohibition of direct representation in early Roman law. The same can be said concerning the applications of the *per extraneam personam*-rule in the law of obligations. Moreover, regarding this latter principle, the sole fact that it is alternatively used within the law of property and the law of obligations,³⁵ in occasions coupled with the expression “*vulgo dicitur*”,³⁶ suggests a loose rule of thumb rather than an iron rule stemming from the *ius civile*.

Another maxim which is usually brought up as proof for the original prohibition of direct representation is Ulpian’s *nemo plus iuris*-rule,³⁷ which allegedly would have excluded the transfer of ownership by a non-owner according to the *ius civile* for the case of the *mancipatio* and the *in iure cessio*.³⁸ Leaving aside the inaccuracies this implies for the evolution of the transfer of ownership by a non-owner – which will be reviewed in the following section – it is worth noting that the origin of this rule is by no means as ancient as it is usually assumed. In fact, the rule first appears in different philosophical and rhetorical writings,³⁹ from where it was adopted by jurists in order to enhance legal arguments in the most various contexts, including the law of possession, pledge, succession and of course the transfer of ownership.⁴⁰

33 See on this case Stagl 2009: 140-157.

34 See, eg, D 45 1 83pr; D 44 7 11; Just Inst 3 19 3 and 3 19 21.

35 Codex Iustinianus 4 27 1pr-1; D 45 1 126 2.

36 Gai Inst 2 95: “Et hoc est, quod vulgo dicitur per extraneam personam nobis adquiri non posse ...”

37 D 50 17 54 (Ulpian 46 *ad edictum*): “Nemo plus iuris ad alium transferre potest, quam ipse haberet” (No one can transfer to another a better right than he has himself). Similarly D 41 1 20pr.

38 Jörs, Kunkel & Wenger 1949: 125 n 4; Schulz 1951: 351-352; Voci 1952: 4-5.

39 Eg, Plato *Symposium* 196d-e; Aristotle *De Sophisticis Elenchis* 23 179^a 22-24; Cicero *Pro Flacco* 56 4; Seneca *De beneficiis* 5 12 7; Quintilian *Institutio Oratoria* 5 10 74.

40 D 41 2 21pr; D 9 4 27 1; D 20 1 3 1; D 50 17 120; D 7 1 63; D 41 1 46. On this development, see Rodríguez Díez 2016: 265-316.

Accordingly, both the origin and the scope of this rule discard that it had anything to do with an early prohibition on direct representation.

This brief overview shows that nowadays one cannot grant the same scope originally given to the various texts which once were seen as concluding evidence for an early prohibition on direct representation. On the contrary, these texts have a particular origin and scope of application that must be understood individually, and not as part of a common notion of “direct representation”. It is even more far-reaching to claim that this handful of texts would describe a general principle which underlies all *inter vivos* acts in early Roman law. The objections on this point are not only theoretical, but lead to serious distortions when approaching the sources, as it will be shown in the following sections.

4 A flawed approach to the sources

The traditional theory regarding the evolution of direct representation in Roman law has had a direct impact in the way scholars have approached the early stages of development of different legal institutions. Since there is not much information available concerning early Roman law, scholars have filled in the gaps through this general theory, often neglecting what little evidence is available in the sources. It is particularly the case regarding the transfer of ownership by a non-owner.⁴¹ As noted above, several scholars since the sixteenth century have claimed that a non-owner could not perform the *mancipatio*. Mitteis developed this idea in detail in the context of the *mancipatio* by slaves,⁴² which in turn gave place to wide controversy in the twentieth century.⁴³ However, most of the texts involved in the discussion are rather inconclusive, since it is almost impossible to determine whether the alienation takes place *fiduciae causa* or not.⁴⁴ Due to this innate ambiguity, personal preconceptions ultimately stir the discussion. Moreover, some scholars have dismissed on various assumptions what is perhaps the only truly conclusive text dealing with *mancipatio* by a slave.⁴⁵

41 Mitteis 1908: 207-213; Siber 1928: vol 2 412-413; Riccobono 1930: 437-443; Rabel 1955: 186; Claus 1973: 307; Zimmermann 1996: 51; Guzmán Brito 2013: vol 1 504.

42 Mitteis 1908: 208-211. Among the supporters of a general inability of a non-owner to perform a *mancipatio* or *in iure cessio*, see, eg, Siber 1928: vol 2 412-413; Kaser 1950: 66; Kaser 1971: vol 1 267; Claus 1973: 307; Talamanca 1990: 271; Weimar 1993: 552; D’Ors 2004: 231.

43 In favour of the views of Mitteis is Ankum 1978: 1-18; Ankum 1984: 5-17. Contrary to Mitteis are Buckland 1918: 372-379; Corbino 1976: 50-71; Corbino 1984: 2257-2272; Coppola Bisazza 2008: 287-289. The controversy is analysed in Rodríguez Díez 2016: 239-252.

44 Mitteis 1908: 208 n 16 in fact acknowledges the lack of evidence on the subject: “Der Quellenbeweis für die Unmöglichkeit stellvertretender Manzipationsveräußerung ist freilich nicht ganz leicht zu führen, weil die klassischen Erörterungen über diese Frage von den Kompilatoren gestrichen sind.”

45 D 21 2 39 1, analysed in Rodríguez Díez 2016: 243-252. Mitteis 1908: 209, in particular, claims that the text is highly corrupted.

The debate on *mancipatio* has also determined the approach to other related legal institutions. Particularly noteworthy is the analysis of the *satisfactio* or *repromissio secundum Mancipium*, a mysterious archaic surety given in the context of the *mancipatio*. Ankum has conducted extensive research of these institutions, but his results rely heavily on his ideas concerning the impossibility of a non-owner to perform the *mancipatio*,⁴⁶ thus leaving the door open for a further revision of the subject.

The impact has been much more widespread regarding the transfer of ownership by *traditio*. The traditional theory on direct representation considers that this was one of the cases in which direct representation was only developed at a later stage, on the grounds of being an informal act that would fall outside the prohibition of the *ius civile*. This, in turn, has affected the way scholars understand the development of various legal institutions. For instance, regarding those cases where the faculty to dispose is granted by a statutory provision, such as the *curator furiosi* or the *tutor*, it has been traditionally assumed that the legal guardian originally should acquire ownership over the administered goods in order to alienate them. Otherwise – it is argued – he would not be able to transfer ownership, due to the old prohibition of direct representation of the *ius civile*.⁴⁷ Other authors have toned down this idea by claiming that legal guardians could indeed transfer ownership over someone else's property, but could only transfer praetorian ownership, since Quiritary ownership could not be transferred through an agent.⁴⁸ There is, however, hardly any evidence in the sources to support such ideas, which is why scholars seem to rely almost exclusively on the theory of a primitive prohibition when making these claims.⁴⁹

The interpretations stemming from the traditional theory have been even more distorting concerning the cases where the *traditio* is authorised by the owner. Again, scholars have traditionally claimed that this could only take place through praetorian innovations, being impossible for a non-owner to transfer Quiritary ownership.⁵⁰ This discussion has shaped the way modern scholars approach several institutions, such as the pledge, regarding which some claim that the pledge creditor could only transfer praetorian ownership.⁵¹ However, there are countless texts where ownership is transferred by a non-owner who acts under the authorisation of the owner (*voluntate*

46 Ankum 1981: 790: “Secondo l’opinione dominante, che io considero esatta, un procurator non aveva la capacità di mancipare la *res Mancipi*, che vende per il suo *principale*. Non può dunque far nascere il dovere di auctoritas per mezzo di una *mancipatio* della cosa venduta ad un prezzo reale.” See, moreover, Ankum 2013: 14-28, where the author revises some ideas on the subject, which do not include the possibility of a *mancipatio* by a non-owner.

47 Mitteis 1908: 210; Siber 1928: vol 2 413; Rabel 1955: 184-185; Weimar 1993: 551; D’Ors 2004: 379 n 2.

48 Guzmán 2013: vol 1 455.

49 For a revision of these views, see Rodríguez Díez 2016: 177-186.

50 For example, Kaser 1971: vol 1 267 n 59: “Die Zustimmung wirkt offenbar nur honorarrechtlich.”

51 Weimar 1993: 551-569.

domini).⁵² Some of these texts clearly show that the authorised non-owner may transfer Quiritary ownership. An opinion of Javolenus even presents the owner's consent for the delivery as the criterion that stems from the strict interpretation of the *ius civile*, which can be corrected through the intervention of the praetor.⁵³ However, scholars have traditionally neglected these references to the owner's consent at the *traditio*, claiming that such texts reflect post-classical doctrines.⁵⁴ Such criticism is coupled with the idea that the Roman *traditio* was strictly causal in nature, which is why every reference to a particular intent at the delivery should be regarded as post-classical.⁵⁵ This line of reasoning – which again makes use of strict modern legal notions to approach the sources – has refrained scholars from attempting to understand the way Roman jurists approached the *voluntas domini* in the transfer of ownership by a non-owner, as well as its evolution within classical Roman law.⁵⁶

The traditional theory also faces serious problems when faced with the evidence concerning other legal institutions. There are, in fact, various archaic legal institutions where the legal position of an individual is affected by the acts of someone else. Whether one wants to label them as forms of “direct representation” is as arbitrary as it has always been to approach the sources through this notion, but the point remains that some agency-like figures can be found in early legal institutions. For example, we have noticed that a sacred and ancient ritual such as the *consecratio* of holy objects could be carried out by someone other than the owner of the consecrated object, as long as the latter authorised it.⁵⁷ There are also numerous texts where a non-owner – particularly a son-in-power – performs a *manumissio vindicta*,⁵⁸ a form of manumission which was modelled after the *in iure cessio*. Scholars advocating for an ancient prohibition on direct representation – and specially Mitteis – have resorted to the unappealing argument of post-classical corruption in all of these texts,⁵⁹ which Buckland rebuffed.⁶⁰ There is even evidence of cases where a *sponsio* or *stipulatio* is concluded by a slave.⁶¹ One can also identify in Plautus a case where someone

52 For example, D 41 1 9 4; D 6 1 41 1; D 50 17 165; D 24 1 38 1; D 12 4 3 8; D 17 1 5 3; D 24 1 5 *pr*; Gai 2 64. Concerning the *voluntas domini* at the *traditio*, see Rodríguez Díez 2016: 63-164.

53 D 39 5 25. See, moreover, D 6 2 14; D 41 4 7 6; Codex Iustinianus 7 26 4. For an analysis of these texts, see Rodríguez Díez 2016: 66-69.

54 Pringsheim 1933 & 43-60 379-412.

55 Riccobono 1930: 437-443; Pringsheim 1933: 55-60; and Jörs, Kunkel & Wenger 1949: 129.

56 Among the few scholars that have proposed to study the *voluntas* or *consensus* at the delivery as a classical phenomenon, see Schulz 1917: 141-145 and Lovato 2001: 133.

57 Gai *Inst* 2 7; D 1 8 6 4.

58 For example, D 37 14 13; D 38 2 22; D 40 1 7; D 40 1 16; D 40 1 22; D 40 2 4 *pr*; D 40 2 10; D 40 2 18 2; D 40 2 22; D 40 9 15 1; D 49 17 6; Pauli Sententiae 1 13a; Codex Iustinianus 7 15 1 3.

59 Mitteis 1900: 199-211; Mitteis 1904: 379-381; Mitteis 1908: 211 n 23.

60 Buckland 1903: 737-744; Buckland 1908: 718-723. On this controversy, see Rodríguez Díez 2016: 257-259.

61 Urbanik 1998: 185-201.

attempts to persuade his friend to marry off his sister through a *sponsio*.⁶² To return to the transfer of ownership: in the context of the ancient *consortium ercto non cito* one of the co-owners could transfer ownership over the object as a whole, thus affecting his co-owners even without their authorisation.⁶³ Leaving aside the peculiar features of these institutions, it seems at any rate clear that early Roman jurisprudence was not abiding to a prohibition on direct representation.

The above analysis of the sources shows that Roman law acknowledged different forms of agency. It is worth bearing in mind that the doctrine of direct representation originally developed in modern law specifically within the law of obligations, particularly regarding the conclusion of contracts through an agent. This tells us in itself a lot about the sources. Until the nineteenth century, jurists had no problem to explain how an agent could carry out countless legal acts on behalf of the principal, such as the transfer of ownership, pledge, payment, etcetera. The sources provided abundant criteria to determine the outcome of the agent's acts in all of these cases. This is why, for instance, a jurist like Pothier bestowed considerable attention to overcome the *alteri stipulari* rule within his *Traité des Obligations*,⁶⁴ but did not feel the need to apply such notions to explain, for example, how ownership was transferred through an agent.⁶⁵ Only in the course of the nineteenth century did German jurists feel the need to approach every form of legal intermediation under a common doctrine of *Stellvertretung*, even if the sources did not present any obstacles for an agent to act on behalf of the principal in countless situations.⁶⁶

At this point it becomes clear that Roman law knew no such thing as a general prohibition on direct representation. One may, moreover, add that Roman jurists developed general distinctions of their own to determine under what conditions an individual could affect the legal position of someone else, considering whether an act is beneficial or detrimental to the *dominus negotii*.⁶⁷ Particularly interesting in this regard is an opinion of Gaius in D 3 5 38(39),⁶⁸ which generally distinguishes

62 Plautus *Trinnumus* act 2 scene 4 v 502. Karakasis 2003: 205 considers, however, that this had purely comical implications. I thank Professor Carlos Amunátegui for this reference.

63 Gai *Inst* 3 154b.

64 Pothier *Traité des obligations* (1861): 42-45.

65 Pothier *Traité du droit du domaine* (1772): 212-219 resorts to an independent set of rules to approach this problem.

66 Cappellini 1987: 456; Gai *Inst* 3 154b.

67 Kreller 1948: 222; Rodríguez Díez 2016: 37-43.

68 D 3 5 38(39) (Gaius 3 *de verborum obligationibus*): “Solvendo quisque pro alio licet invito et ignorante liberat eum: quod autem alicui debetur, alius sine voluntate eius non potest iure exigere. Naturalis enim simul et civilis ratio suasit alienam condicionem meliorem quidem etiam ignorantis et inviti nos facere posse, deterioorem non posse” (“Anyone paying on behalf of someone else, even without his knowledge and agreement, frees him from liability, but another person cannot lawfully demand payment of what is owing to anyone without his consent. For the principles of both natural justice and the civil law are in favour of our being able to improve another's position, even without his knowledge and agreement, but not of our being able to make it worse” [translation by Watson & Kinsey]).

between acts which imply a patrimonial loss for the principal and those which imply a patrimonial gain. In the first case, the principal will be bound as long as he authorises the agent to perform such acts, while in the second case it is only necessary that the agent acts on his behalf.

The general formula offered by Gaius agrees with the legal reasoning behind numerous texts,⁶⁹ since the sources show that an agent could in fact carry out *voluntate domini* several acts that involved a patrimonial loss. This is, for instance, the case regarding the transfer of ownership, the constitution of various *iura in re aliena*,⁷⁰ pledge,⁷¹ consecration of holy objects, manumission,⁷² etcetera. On the other hand, several acts involving a patrimonial gain to the *dominus negotii* required that the agent acted *nomine domini*, such as the acquisition of ownership – although the sources do not offer a uniform view on this regard – or payment.⁷³ Moreover, Ulpian's explanation to the *alteri stipulari*-rule abides by the general distinction between acts that imply a patrimonial gain and those that cause a patrimonial loss,⁷⁴ as does Gaius when claiming elsewhere that “*melior condicio nostra per servos fieri potest, deterior fieri non potest*”.⁷⁵

Gaius' formula in D 3 5 38(39) and the texts related to it also show that Roman jurists were mainly concerned with the problem of whether the position of an individual was affected by the acts of someone else, and not whether an agent was validly fulfilling the requirements to bind the principal. For example, Roman jurists did not ask themselves whether an individual who buried a dead man in someone else's property was acting as his agent, but whether the owner was affected by granting his consent. Modern scholars would rather approach these problems through different dogmatic categories, distinguishing for instance between direct representation and the abdicative acts of the owner. Such distinctions are however completely absent from the Roman sources.

Despite these interesting constructions offered by Roman sources, one should avoid relying on them too much. Texts such as D 3 5 38(39) are little more than a

69 For example, D 39 3 8.

70 Regarding the right to carry water across land see, for example, D 39 3 8; D 39 3 10; Codex Iustinianus 3 34 4.

71 For example, D 13 7 20; D 20 1 21*pr*; Codex Theodosianus 2 30 2.

72 D 23 2 51 1.

73 D 46 3 53; Just *Inst* 3 29*pr*; D 46 3 17. On the latter text see Rodríguez Díez 2016: 133-134.

74 D 45 1 38 17 (Ulpian 49 *ad Sabinum*): “*Alteri stipulari nemo potest, praeterquam si servus domino, filius patri stipuletur: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur, nihil interest mea ...*” (“No one can stipulate on behalf of another, except where a slave stipulates for his master, a son for his father; for obligations of this kind were devised in order that each man should acquire for himself what is of benefit to him; but it is of no benefit to me that something should be given to another ...” [translation by Watson, Hart, Lewis & Beinart]). Similarly D 45 1 126 2 (Paul 3 *quaestio*).

75 D 50 17 133 (Gaius 8 *ad edictum provinciale*) (translation by Watson & Crawford: “Our condition can be improved but not worsened by our slaves”).

guideline or rule of thumb which were obtained through the observation of specific solutions, and they should not be adopted as over-arching principles which can explain every form of legal intermediation in Roman law.⁷⁶ Accordingly, scholars should refrain from replacing the general theory of “direct representation” in Roman law by a new theory of “patrimonial gain or loss” in order to approach the sources. Instead, the particular set of texts and solutions governing specific legal institutions – the conclusion of contracts, transfer of ownership, payment, etcetera – should be approached individually, as it will be shown in the following section.

5 A piece-meal approach, anachronistic preconceptions and the *nuntius*

These different features of the various agency-like situations in Roman jurisprudence show that one cannot take as a starting point that every form of agency in early Roman law evolved from a uniform prohibition on direct representation. The common thread that scholars identified since the nineteenth century concerning direct representation in early Roman law is nothing but an illusion. This is why one should favour a piece-meal approach of each of the different cases where an individual carries out a legal act through someone else. This approach is already to be seen to a large extent in different contributions by Buckland, where he pointed out the often careless constructions made around the notion of direct representation in general, as well as the evidence in the sources regarding specific cases.⁷⁷ Such a piece-meal approach when approaching the problem of agency in the sources was moreover explicitly described as an agenda for the study of agency in Roman law by Kreller, Cappellini and – more recently – Coppola Bisazza and Miceli, who have urged to discard a joint analysis when dealing with institutions that were governed by various sets of rules.⁷⁸

This piece-meal approach to agency in Roman law must also be complemented by an effort to uproot some seriously anachronistic conceptions which the traditional theory has brought into the analysis of Roman law. It could be argued that Roman law scholarship tolerates to a considerable degree the use of modern legal terminology to describe the sources, particularly when it provides the legal historian with a mere working hypothesis.⁷⁹ However, such use should be restrained when it brings along relevant distortions, explaining legal outcomes through dogmatic distinctions that are alien to the sources.⁸⁰ This is precisely what happens regarding the significance of the *contemplatio domini* in the Roman law of agency. Since scholars have traditionally

76 I thank Prof Mr Egbert Koops for his useful input in this point.

77 Buckland 1918: 372-373; Buckland 1931: 161.

78 See Kreller 1948: 221; Cappellini 1987: 440-442; Coppola Bisazza 2008: 3-14; Miceli 2008: 12-18.

79 Hoetink 1955: 6-7 & 16; Rodríguez Díez 2016: 21-22.

80 Hoetink 1955: 15-16.

claimed that Roman law forbade “direct representation” – which implies acting *nomine alieno* – many have assumed in turn that what was acceptable to Roman law was “indirect representation”, namely to carry out a legal act for someone else while acting on behalf of oneself (*nomine proprio*). This, in turn, has led countless scholars to claim that any agent who acts on behalf of the *dominus negotii* should be labelled as a *nuntius*.⁸¹

The significance granted to the *contemplatio domini* in Roman law on account of the traditional theories on direct representation is utterly alien to the sources. The scope given to the *nuntius* in particular is part of a typically pandectistic construction,⁸² and in fact the legal significance of the *nuntius* in Roman law is a problem which remains largely unaddressed by modern Roman law scholarship.⁸³ Accordingly, whether an agent acts on behalf of his principal or not may of course be relevant in some situations, but the sources do not offer a general distinction in this regard, and certainly do not set the *nuntius* as a uniform figure for all the cases where the agent acts *nomine alieno*. For instance, it could be relevant for the acquisition of ownership through an agent whether the latter acts on behalf of the owner or not.⁸⁴ Similarly, as mentioned above, the payment of someone else’s debt needs to be done on behalf of the debtor, or otherwise the debtor will remain bound. This outcome is not only related to the fact that the debtor is favoured by such act – as pointed out in D 3 5 38(39) – but also to the practical fact that the creditor cannot know which debt is extinguished unless pointed out by the person who pays. Such considerations are not relevant for the transfer of ownership by a non-owner, where the *contemplatio domini* is by no means decisive to determine whether ownership is transferred or not. In fact, some of the sources dealing with the delivery *voluntate domini* reveal in passing that the *traditio* was carried out on behalf of the owner, but that this circumstance is only relevant to determine the good faith of the acquirer for the *usucapio*.⁸⁵ The decisive element for the transfer of ownership remains thus the *voluntas domini*. Burdese was critical of the attempts to analyse the transfer of ownership through the notion of direct representation, particularly regarding the significance of the *contemplatio domini*.⁸⁶ Accordingly, the evidence shows that one cannot claim that the *contemplatio domini* is equally relevant in all of these cases, or that every legal act performed *nomine alieno* should be approached under the common idea of a *nuntius*. Neither should one attempt, for instance, to determine by way of analogy the significance of the *contemplatio domini* in the transfer of

81 See, eg, Zimmermann 1996: 50-51.

82 Concerning Savigny’s ideas regarding the *nuntius* see Hölzl 2002: 205-216; 279-280; 288-289.

83 Among the few contributions on this subject see Düll 1950: 162-170; Longo 1982: 514-515.

84 Consider, for instance, the relevance of the *nominatio* when a slave has more than one master, as described in Gai *Inst* 3 167-167a.

85 See D 41 4 14, analysed in Rodríguez Díez 2016: 131-132.

86 Burdese 2009: 15-29. See, moreover, Rodríguez Díez 2016: 103-111 128-136.

87 Rodríguez Díez 2016: 43-47.

ownership by resorting to the rules for the acquisition of ownership.⁸⁷ These are all problems that have a logic of their own in Roman law, where over-arching dogmatic constructions on direct representation are completely absent.

Similar considerations can be made concerning contracts concluded by commercial agents. The sources often refer explicitly to contracts concluded on behalf of the *dominus negotii*,⁸⁸ something that must have been as common in the ancient world as it is today. Just as in the case of the transfer of ownership, whether the agent acts on behalf of the principal or not is largely irrelevant for the ensuing legal consequences.⁸⁹ The agent will bind himself to the other contracting party, whether he acts on behalf of the principal or not.⁹⁰ However, the sources often show that the third party is fully aware of contracting with an *alieni iuris*, particularly if he is dealing with an *institor* or an *exercitor*. In fact, it is precisely this knowledge that would normally enable the third party to resort to an *actio adiecticiae qualitatis*. This knowledge is, moreover, important in order to know the scope of the appointment of the agent (*praepositio*) and the limitations he faced (*proscriptio*), information which sometimes was even displayed through a *lex praepositionis*.⁹¹ Scholars should therefore avoid picturing Roman tradesmen as artfully hiding who their principal was in order to avoid violating a prohibition of direct representation. Accordingly, the intermediary who acts on behalf of the principal cannot be labelled as a *nuntius* only on account of acting *nomine alieno*.

6 Concluding remarks

Two main conclusions can be obtained from the above analysis. Firstly, the notion of “direct representation” should be left aside when approaching the Roman sources. The doctrine of direct representation is a relatively modern construction, the features of which are alien to Roman law. For example, while a modern jurist may approach different situations – such as contracts concluded by an agent, delivery by an agent, payment by an agent – as part of a common phenomenon of direct representation which has a general set of rules, such uniform approach was completely unknown to Roman jurists. Moreover, the *contemplatio domini* has a decisive role in the modern doctrine of direct representation, while it was only occasionally meaningful to determine whether the acts of an agent could affect the *dominus negotii*. Accordingly,

88 For example, D 45 1 126 2 (Paul 3 *quaestionum*): “Plane si liber homo nostro nomine pecuniam daret vel suam vel nostram, ut nobis solveretur, obligatio nobis pecuniae creditae acquireretur ...”; D 3 3 67 (Papinian 2 *responsorum*): “nam procurator, qui pro domino vinculum obligationis suscepit, onus eius frustra recusat”; D 12 1 9 8 (Ulpian 26 ad edictum): “Si nummos meos tuo nomine dederō ...”

89 Talamanca 1990: 266 268.

90 D 3 3 67.

91 D 14 3 5 11-16; D 14 3 16; D 14 1 1 12; D 14 3 11 2-6. Concerning these institutions, see Ligios 2013: 23-78.

“direct representation” is an anachronistic notion that is inadequate for the legal historian approaching Roman sources. Instead, a more source-oriented understanding of agency in Roman law favours a piece-meal approach, which identifies the peculiar reasoning behind the different situations where the *dominus negotii* is directly affected through the acts of his agent.

A second conclusion is that there is no evidence to claim the existence of a primitive ban on direct representation in Roman law. Since there was no common legal doctrine to approach the different forms of agency in Roman law, one cannot claim that all of these cases were equally subject to a general prohibition. Nor is there evidence that early Roman law consistently prevented an agent from validly affecting the legal position of the principal. Moreover, in those cases where agency faced some sort of limitation, there is no evidence that such limitations sprung from a primitive general principle. Accordingly, legal historians should refrain from referring to a primitive prohibition on direct representation when describing the evolution of different forms of agency and intermediation in Roman law.

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THE DOCTRINE OF OCCUPATION AND THE FOUNDING OF AUSTRALIA

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ABSTRACT

There is certainly nothing surprising in the thesis that many legal doctrines, however complex or sophisticated they could be, are quite often difficult to apply directly. This problem occurs both in domestic and in international law. Traditionally considered modes of acquiring the territory of a state, mostly derived by modern scholars from Roman private law, make for a good example of this problem. It rarely happens that any of them provides a complete answer to the question of how a state acquired its legal title to a certain portion of land, especially when the title is contested. Scholars tend to emphasise that the modes of acquisition typified in textbooks of international law do not exactly reflect the complex process that occurs when a tribunal or an arbitrator has to adjudicate between competing claims. Yet, particularly where no dispute occurs, there are certain situations when some of the modes of acquiring state territory appear in pure form. Such is the case of Australia and the creation of a legal title to the vast territory of this continent by Great Britain. The goal of this paper is therefore to look at the beginnings of Australia through the prism of the doctrine of occupation, which has found direct application in this case.

Keywords: Occupation; international law; Roman law; Australia; Vattel; territory

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1 The beginnings of the doctrine of occupation

The birth and early development of modern international law was catalysed by a series of events we know today as the age of discovery. As a Spanish author highlights, describing the problems that his ancestors were faced with,

Europeans saw themselves confronted with the problem of the law of colonization, and from this point of view it finally became necessary to pose the problem of the law of nations in global perspective. The impact of the discovery of America on the law of nations thus appears as a particular effect of the impact which the Discovery had in the more general domain of human culture and knowledge.¹

The legal theory of feudal Europe, based on the pillars of Roman and canon law, failed to manage these new problems. Lesaffer found “the feudal and local customary laws that formed the basis of territorial divisions within the Latin West inappropriate. There were no feudal or customary titles for the new territories which could substantiate the claim of one prince *vis-à-vis* his European counterparts, while the feudal and local law systems were completely irrelevant to native peoples. The authority of the Pope to dispose of the non-Christian lands, which had its foundations in some precepts taken from medieval canon law, was equally unsatisfactory”.² Setting aside the interesting, but having no direct reference to the topic of this paper, problem of papal donations and bulls, we shall move to answers that were given to the above described problems by scholars known today as the “fathers of international law”. The renowned Spaniard Francisco de Vitoria, in his work *De Indis*, was probably the first to propose that “regions which are deserted become, by the law of nations and the natural law, the property of the first occupant”.³ This idea obviously did not appear out of nowhere. Vitoria, as a true scholastic should do, points the source by direct reference to Justinian’s *Institutiones*.⁴ The ancient Roman rule that “what does not belong to anyone by natural law becomes the property of the person who first acquires it,”⁵ remains largely unchanged in civilian private law jurisdictions until today,⁶ and it was perfectly known to Vitoria, a theological and legal scholar of the University of Salamanca. He emphasises that the rule can be derived from both the

1 Truyol y Sera 1971: 309.

2 Lesaffer 2005: 41.

3 See Francisco de Vitoria *De Indis* 2 7: *Et videtur quod hic titulus sit idoneus, quia illa, quae sunt deserta, fiunt iure gentium et naturali occupantis [...] Ius autem gentium est, ut quod in nullius bonis est, occupant conceditur* (English translation in the main text by JB Scott (New York London (1964))).

4 Vitoria twice refers directly to *Inst de rerum divisione*, § *ferae bestiae* (see I 2 1 12).

5 See Digest 41 1 3pr: *Gaius libro secundo rerum cottidianarum sive aureorum: Quod enim nullius est, id ratione naturali occupanti conceditur*. In almost the same words in I 2 1 12 (English translation in the main text by Scott *The Civil Law* (1932)).

6 In modern civil codes occupation as a mode of acquiring ownership is applicable to movable objects only. See, eg, sec 958(1) of the German Civil Code or art 181 of the Polish Civil Code.

ius naturale and the *ius gentium* and is therefore universally applicable. Other famous authors of the formative period of international law, including Grotius, followed Vitoria's path. They – as Lesaffer aptly summarises – took the Roman concept of occupation and stripped it of its particulars and technicalities of private law, creating a pure legal concept applicable in international relations.⁷ Moving away from the main topic we can observe that such a manner of creation of rules, doctrines and principles of international law was quite common. From the perspective of three centuries it allowed TE Holland to state, perhaps with slight exaggeration, that “the Law of Nations is but private law writ large”.⁸

Thus, the main idea of occupation was simple but, as usual, the devil is in the detail. At least two crucial questions arise: First, what does it exactly mean to occupy land? Second, what qualities must a territory display to be considered *terra nullius*? In civil law both answers are rather intuitive. Occupation, since Roman times, materialises simply by taking into possession a thing that has never had any owner or had been abandoned by the previous owner (*res nullius*). However, when it comes to territorial acquisitions by monarchs, states or nations, it is not so obvious what shall be regarded as “taking into possession” and – what is probably a more complex issue – it is easy to observe that hardly any newly discovered lands were completely uninhabited. Nowadays, basic answers to these questions may be found in every textbook of international law, and it is worth knowing that the process of their formation by the practice of states and theories of legal scholars took several hundred years. Both issues will be discussed hereafter with direct references to the case of colonisation of Australia.

2 Symbolic or effective occupation?

It must be stated at the outset of this section that contrary to the common opinion the mere fact of discovery was at no time regarded as capable of granting a fully developed title to territory.⁹ Appropriation by some means has always been regarded as inevitable and so the important question is whether the taking of land into possession should be performed merely by symbolic acts or whether it should immediately be followed by effective occupation. Therefore, mere discovery only creates an inchoate title.¹⁰ However, a distinction between discovery and taking a newly discovered land into possession by symbolic acts may be regarded as a purely academic one, as the practice of performing many sorts of legal acts on distant, newly discovered shores, used to be very common. It is as old as the great European discoveries themselves, since the Portuguese placed *padrões*¹¹ on the

7 Lesaffer 2005: 45.

8 Holland 1898: 152.

9 Heydte 1935: 451.

10 Oppenheim and Lauterpacht 1958: 558.

11 Wooden or stone crosses, bearing the royal coat of arms of the Kingdom of Portugal and the Algarves.

Atlantic islands and all along the coasts of Africa and Brazil. Subsequently, Spanish, English and French explorers, equipped with royal privileges and charters entitling them to take every new land into their king's possession, raised their sails. In most cases hoisting a flag, issuing a proclamation or giving a gun salute were the only means available, since the establishment of a colony or another form of effective governance was a complex and expensive operation. Still, it is doubtful if a symbolic act of appropriation sufficed in any case to establish a valid and long-lasting title. Von der Heydte highlights that royal charters usually mentioned both symbolic occupation and effective conquest or establishment of forts, towns or trading posts.¹² The doctrine of that time was not clear concerning this matter either. A passage from the *Tractatus de insulis* by the German scholar Johann Gryphiander from 1623 provides a good example, as the author describes a means of acquiring sovereignty rights over no-man's land as *inventio*, but states that factual possession is the main premise thereof.¹³

The case of Australia turns out to be a gauge of the changing doctrine and practice of international law regarding the issue. The question who the first European was to reach the coasts of this smallest of continents is beyond the scope of this paper. What is, however, of great importance concerning the problem of occupation are the Dutch discoveries. When Abel Tasman set off on his great voyage in 1642, he was empowered by the Dutch East India Company to take possession of new lands. He actually performed many acts of symbolic appropriation on the coasts he explored and during his life such practice was sufficient – at least – to create general recognition for the usage of “New Holland” as the first official name of Australia and “Van Diemen's Land” for the island now known as Tasmania. But the voyage of Tasman or any of his compatriots was not followed by any more definite action by the Republic of the Seven United Provinces, or by the Company. The Dutch were not interested in establishing any settlement or trading post on those lands simply because they did not offer any promising perspectives for trade. So decades passed, and Tasman's symbolic actions remained unsupported by any other measures and the practice of European colonial powers tended to turn towards the principle of effectiveness. Therefore, even if symbolic occupation could be regarded as sufficient to create a title when Tasman was mapping the coast of New Holland, the continuous evolution of both practice and theory changed the situation completely.

This evolution was clearly visible in the jurisprudence in the second half of the eighteenth century. Emerich de Vattel, a Swiss scholar and diplomat in the service of Augustus, King of Poland and Elector of Saxony, was the first to firmly state a principle nowadays considered as obvious.¹⁴ In his canonic work dating from 1758 he states that

12 Heydte 1935: 454-455.

13 Grewe 2000: 252.

14 Ruddy 1968: 282.

[a]ll mankind have equal rights to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it: and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands and other lands in a desert state, have taken possession of them in the name of their nation: and this title has been usually respected, provided it was soon after followed by a real possession ... The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. In effect, when navigators have met with desert countries in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony, as to the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal.¹⁵

Vattel begins with the general statement on occupation as a rule of natural law, but what makes his text particularly important is the conclusion he derives from the observation of the practice of states. He concludes by stating that title is created only by “a real possession” that is an effective establishment of rule over a territory.

3 Facts regarding the colonisation of Australia

Lieutenant James Cook reached Botany Bay twelve years after Vattel had published his *Law of Nations*, so the doctrine formulated in this work was very timely. On 21 August 1770, Cook hoisted a Union Jack on a small plot of land known now as Possession Island in Queensland and read a proclamation stating that a large portion of New Holland’s shore had been taken into possession of King George III. The ceremony was rather modest since all *Endeavour*’s cannons had been thrown overboard to lighten the ship and enable her to sail over barrier reefs. Therefore, only muskets’ salvos were fired.¹⁶ According to the aforementioned theory, this act could be considered only as a symbolic act of appropriation, but Cook’s actions had to be followed by actual occupation. After a relatively short period of eighteen years (especially compared to the period of more than 150 years during which no such action had been performed by the Dutch) the First Fleet arrived on 26 January, carrying inmate settlers, soldiers and supplies. Its commander, captain Arthur Phillip, founded the first settlement. The colony was formally established a few days later, yet “accounts differ as to details of the small ceremony that occurred on the 26 January 1788 near the head of Sydney Cove. But in essentials they agree. A flag staff had been erected. From it the Union Jack was displayed. Standing under the flag the Governor and a group of officers drank toasts to the health of the King and the

15 Vattel 2008: §§ 207-208.

16 Hughes 1987: 55.

Royal Family and the success of the new Colony. A party of Marines fired a *feude joie*. All gave three cheers, and the cheering was echoed by the ship's company of the 'Supply' lying at anchor in the Cove. Governor Phillip had entered upon his government".¹⁷ It is, however, not very likely that Phillip, being an experienced officer of the Royal Navy, had at this very moment any particular legal doctrine in mind. Nor is it likely to prove whether the British government at the time considered the legal issue either, since there is no sign of any legal reasoning in the most important act of law concerning the establishment of New South Wales: Governor Phillip's Instructions of 25 April 1787, already "constituting and appointing [Phillip] to be Our [King's] Captain General and Governor in Chief of Our Territory called New South Wales".¹⁸ It is therefore rather clear that the doctrine was – as usual – at best in the far background of those events. The practical circumstances were clearly decisive, since the British were well aware of the fact that the French explorer La Perouse has just appeared in Botany Bay. Phillip "knew well enough that the title of the Crown to the new land would depend not so much on doctrines of international law as on effective possession; not only on the raising of the British flag, but also on the existence of the British fleet".¹⁹

However, the following events enable us to adjust a doctrine to the facts *a posteriori*. First, the administration of the newly occupied lands was formally established as soon as possible – on 7 February. The process of colonisation of the whole vast land was obviously extended in time, but by the middle of the nineteenth century Great Britain had unquestionably taken effective possession of the whole continent – or at least all hospitable parts of its shores. On no occasion was that met with any reaction from the Dutch who lost interest in Australia almost as soon as Tasman claimed it for their Republic. Therefore, this process carries some importance for the development of international law since it provides a practical example that symbolic annexation was definitely considered not to grant full sovereignty rights over newly found regions, but to create "only an inchoate title which finally perished unless followed and perfected by actual occupancy within a reasonable time".²⁰ It follows that, according to the classical view on occupation that was eventually reached by the end of the nineteenth century, a title is constituted by two essential facts, namely taking territory into possession by an occupying state and establishing some kind of administration thereon.²¹ From a historical perspective there can be

17 Windeyer 1962: 637.

18 "Instructions for Our Trusty George R and well beloved Arthur Phillip Esq. Our Captain General and Governor in Chief, in and over (LS.) Our Territory of New South Wales and its Dependencies, or to the Lieutenant Governor or Commander in Chief of the said Territory for the time being, Given at Our Court at St. James the 25th day of April 1787, in The Twenty Seventh year of Our Reign" (see <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/1787/> (accessed 10 Jun 2017)).

19 Windeyer 1962: 637.

20 Heydte 1935: 460.

21 Oppenheim & Lauterpacht 1958: 557-558.

no doubt that British actions initiated in 1788 finally turned out to be a textbook example of creating a title in this particular way.²²

4 *Terra nullius* and the question of indigenous inhabitants

Consideration of the second of the questions raised above requires us to go back to the beginnings of the occupation doctrine. Francisco de Vitoria tells us that occupation as a mode of acquisition known to the law of nature and the law of nations applies only to “deserted land”. He does not state expressly that the presence of any indigenous population excludes occupation by European power, yet such a conclusion can be easily derived from the entirety of his work. One of his main theses is that Indians possessed the right to *dominium*, both in the fields of private and public interests.²³ Thus, it is clear that at the time of its birth the doctrine of occupation was meant to be applied only to truly no-man’s lands, that is territories which were not only under no jurisdiction of a contemporary political entity, but literally uninhabited. Yet, for the centuries to follow that issue remained rather unclear. Vitoria’s and many of his successors’ position regarding the rights of Indians was determined by their theological and moral background. The Enlightenment changed the intellectual climate in the way that, at least at the first glance, made it even harder to deny the rights of indigenous peoples. In particular, the popular theories of JJ Rousseau boosted the creation of the archetype of a “noble savage”, unspoilt by civilisation and thus much closer to the ideas of nature and its law. At this point we move back to Vattel, who managed to deal with this theoretical obstacle in the way that is a sheer mastery of legal gymnastics. Therefore, his reasoning is worth being quoted:

There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed (§81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled

22 A question could arise whether the evident loss of interest in Ausatralia by the Dutch could be considered as abandonment of a land earlier occupied. If the answer was positive, Australia prior to 1788 could rather be defined as *terra derelicta*. However, as was discussed above, according to the doctrine widely accepted in the times of British colonisation, the Dutch title was only an inchoate one that perished and New Holland definitely remained no-man’s land until the establishment of the colony of New South Wales.

23 Salas 2012: 338.

to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not therefore deviate from the views of nature in confining the Indians within narrower limits.²⁴

And so Vattel did much to convince the European public – and probably himself too – that depriving the beloved “savages” of their territories not only does not violate the law of nature, but is in complete accordance therewith. Obviously, the intricacies and dilemmas of the doctrine of “new worlds” lose all their importance when confronted with the practice of European colonisation. However, it is crucial to realise that this practice did not have much to do with the concept of occupation. As Ruddy aptly summarises, “the history of state practice in this matter indicates that in occupying territory, states did not begin with the classical idea of *occupation*, but developed into it. European states in establishing dominion over countries inhabited by backward peoples adopted as the method of extension, cession, or conquest, and did not base their rights, in the main, on the occupation of *territoria nullius*”.²⁵ Such an observation could be made not only from a historical perspective, since it was rather common when the era of colonisation was at its height. For instance, in 1899 the British author J Macdonell stated that “treaties are concluded with aboriginal races. No nation deems its annexations legitimate without the colour derived from compacts with native chiefs”.²⁶ However, pre-colonial Australia is underlined by this author as the best example of a “territory sparsely occupied by nomadic tribes possessed of no form of government”,²⁷ and so as an example of *res nullius*. It can therefore be regarded as a paradox that a doctrine developed on a Roman basis for the purpose of justifying the claims of European powers to newly discovered territories was rather seldom used in this context. Ruddy’s remarks cited above are particularly convincing when we recall the history of the colonial Americas. England, for example, based its claims to the northern continent on discoveries and acts of appropriation taking place since the times of Giovanni Caboto, but the colonisation process performed by both Crown and colonial companies is filled with treaties with native tribes and wars against them. The doctrine of occupation did, of course, find some use in America, especially in the border disputes between colonial powers as an argument in the processes of negotiating the treaties.²⁸ Against the background of

24 Vattel 2008: § 209.

25 Ruddy 1968: 278.

26 Macdonell 1899: 285.

27 *Idem* 284.

28 The Oregon Treaty of 1846 is particularly interesting, because both parties – the UK and the USA – agreed that they had jointly occupied the disputed territory and finally decided to establish a border along the forty ninth parallel. It can therefore be stated that the doctrine of occupation constituted the basis of claims for both powers, but that the eventual titles were also based on the treaty. For further details see Sage 1946.

the colonisation of Australia – a vast continent acquired by a sovereign power solely on a basis of effective occupation – it seems rather unique, especially in the times when the doctrine of occupation finally took the form we know from the classical law of nations.

Nowadays, the fact that not a single treaty has ever been signed between the European settlers or the Crown and the indigenous peoples of Australia is probably not something to be proud of,²⁹ yet it is not the point of this paper to ponder on the mistreatment of indigenous Australians. What should be underlined is the fact that the British colonial authorities never found it useful or advisable to conclude any formal agreement with any of the numerous tribes of Native Australians. This fact makes Australia unique, especially among former British colonies, in not recognising the sovereign ownership of the country by its indigenous population prior to British arrival.³⁰ In this connection Australia contrasts most strongly with its close neighbour. The Maori culture, organisation and martial virtues and skills were at such a level that British settlers and the colonial government either had to negotiate with the Maori tribes or declare war against them. New Zealand was consequently founded by the Treaty of Waitangi,³¹ signed by the representatives of the Crown and Maori chiefs, while Australia's beginning shows the factual (even if not exactly conscious) application of the doctrine of occupation combined with a recognition of a whole continent as no-man's land.

It should therefore be emphasised – from the perspective of the creation of sovereignty rights – that the colonisation of Australia provides a rare and probably the only geographically significant example of treating an inhabited land as *terra nullius*. However, although this matter seems to remain completely clear from the point of view of the general theory of international law, it is being undermined on the ground of Australian common law. Nowadays, some Australian scholars³² do so to create a theoretical background for a very late general treaty with the Aborigines and to support their land claims. The courts too, in resolving the issues of such property disputes, tend to deny the “no man's land” internal law doctrine of the past³³ which was predominant in Australian jurisprudence prior to 1992.³⁴ The arguments applied in these discussions relate mainly to common law issues and are therefore of limited importance for problems regarding the law of nations. For instance, the

29 Williams 2013.

30 Baker *et al* 1988.

31 See Palmer 2008.

32 Havemann 2005; Williams 2008: 37-48. Some scholars even claim that the doctrine of *terra nullius* did not exist at the time of arrival of the First Fleet (Connor 2005). Such a thesis may be true in relation to common law, but it cannot withstand a simple confrontation with the main sources of the *ius gentium* of the seventeenth and eighteenth centuries. Therefore, it is of no importance for the matters discussed in this paper.

33 See *Mabo v State of Queensland* (No 2) (1992) 107 ALR 1 (*Mabo*).

34 See *supra* n 27 & n 28.

arguments given in the decision of the High Court of Australia in the *Mabo* case do not contradict the validity of the occupation doctrine in the law of nations. They focus on “the enlarging of the concept of terra nullius by international law to justify the acquisition of inhabited territory by occupation on behalf of the acquiring sovereign raised some difficulties in the expounding of the common law doctrines as to the law to be applied when inhabited territories were acquired by occupation”³⁵ and therefore the formerly recognised absolute ownership title of the Crown is undermined. Moreover, even if we recognise these new arguments and legal facts as convincing even in the field of international law, our present point of view, evidently, cannot change the actual practice of the time of colonisation. This practice was rather clear and indicated a total non-recognition of any sovereignty titles of Aboriginal tribes. It therefore constitutes good factual proof that the thesis of Vattel’s somewhat twisted arguments became a part of international law. It can be read in the classic treatises on this discipline that a territory inhabited by natives “under a tribal organization which need not be regarded as a State” can be occupied,³⁶ but it is rather clear that such cases were (at least theoretically) rare.

5 Further applications of the doctrine and its current status

The uniqueness of the Australian case is clearly visible not only against the background of the history of European colonisation and conquests on other continents, but also in comparison to other examples of usage of the occupation doctrine. As emphasised at the outset of this paper, cases where occupation serves as the sole basis for creation of a title to a territory are generally rare. The list of cases exemplifying the application of the occupation doctrine in the practice of states is very short. Taking all these examples into consideration, the first thing that strikes us is simply the size of Australia in comparison to the surface of such lands as Jan Mayen, Pacific atolls, Bouvet Island or even Svalbard and the eastern coast of Greenland. The last case is particularly interesting as probably the second largest territory ever acquired by means of occupation only. The well-known judgment of the Permanent Court of International Justice, issued in 1933, has had its strong and lasting impact on both international law and geopolitics of the Arctic, but what is most important for the issues contemplated herein is the complete barrenness of the territory considered. Prior to the first attempts of colonisation made by the Danes in the 1920s, the eastern shores of Greenland had been only rarely visited by both Inuit and Europeans, and no permanent settlements had ever existed.³⁷ Two main examples of territories appropriated solely by occupation are, therefore, the world’s smallest continent and

35 See *Mabo* sec 34.

36 Oppenheim & Lauterpacht 1958: 555.

37 For further information on that issue, see Smedal 1931: 77.

a big portion of the world's largest island, but the crucial difference is that only the former has been inhabited beforehand and was nevertheless considered to be practically *terra nullius*.

The second half of the nineteenth century brought – as mentioned above – a confirmation of occupation as an institution of customary international law. It even gained some sort of acknowledgement in a treaty, which is in that case the General Act of the Berlin Congo Conference of 1885.³⁸ The treaty explicitly provided a possibility of occupation of all portions of Africa's coasts that had not yet been annexed by any of the colonial powers, although it was rather evident that no such lands existed anymore.³⁹ The aforementioned atolls on the Pacific Ocean were at that time objects of occupation by both the United Kingdom and the United States and the annexation of the island Jan Mayen – owned by the Dutch in the seventeenth century and abandoned by Norway in 1930 – is usually considered as the last major example of occupation of no-man's (in this particular case – derelict) land. By the 1930s all hospitable or relatively hospitable lands on earth had been acquired by one way or another by sovereign states. If we omit tiny scraps of no-man's land somewhere between usually long-established state borders, only the Antarctic has remained *terra nullius* until today, and all the declared territorial claims remain “frozen” since the establishment of the Antarctic Treaty System. The last significant territory still unclaimed – Marie Byrd Land – is also subject to Treaty regulations and as such cannot be occupied or claimed. Since the international community has chosen a treaty as a proper way of dealing with the southern circumpolar territories, it is rather unlikely that occupation will ever be considered as a righteous way of gaining sovereignty over any portion of the White Continent. Space law handles the problem of potential territorial acquisitions of celestial bodies even more radically, expressly excluding the possibility of occupation by any state. The prohibition has led scholars to describe the status of sky bodies not with the term of *res* or *terrae nullius*, but with other ancient concepts of Roman law: *res communis* or *res extra commercium*.⁴⁰ Therefore, the present legal status of the last territories under no sovereignty on earth and all the territories in outer space implies that occupation as a concept is not very likely to be used in any important future case. That certainly gives Australia a substantial chance to remain the most significant case of its application in history.

6 Conclusion

The doctrine of occupation, derived from a timeless principle of the Roman law of property, emerged at the dawn of the age of discovery. The sudden appearance of the “new worlds” on the horizon shattered the mentality and consequently many

38 Oppenheim & Lauterpacht 1958: 559.

39 Koskenniemi 2001: 124.

40 Hara & Stańczyk 1985: 22.

legal concepts of the “Old World”, and the new idea was meant to respond to these problems. Paradoxically, in most cases it was not sufficient to fit its purpose and was very often supported or replaced by other means of creating sovereignty titles.

Colonisation of Australia coincided with the finalisation of the formation of the classical doctrine of effective occupation. A legal title to the whole continent was created by the British only by taking it into possession as a no-man’s land. No treaties were signed with the indigenous peoples of Australia, nor were any regular military operations against them undertaken. The British title has never been contested and no other power has ever tried to establish colonies in Australia. All these facts set aside problems of cession, prescription or conquest as modes of acquiring sovereignty over the Continent. The practice clearly shows that the whole title is based solely on occupation and remains perfectly valid according to classical theories of international law. As was highlighted above, there have not been many cases of acquiring a legal title to territory merely by occupation and almost all of them concern lands that are either small or completely uninhabited. Undoubtedly, Australia stands out among all those examples.

With reference to the beginnings of Australia, it is often highlighted that the idea of such a large penal colony was unique. It is even more worth emphasising that this colonisation was equally uncommon from the perspective of international law. Furthermore, the history of the doctrine of occupation in and of itself provides a strong example of how Roman law was used to form modern legal concepts not only in the field of private law, but international law as well.

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EXECUTION AGAINST A DEBTOR'S HOME IN TERMS OF ROMAN-DUTCH LAW AND THE CONTEMPORARY SOUTH AFRICAN LAW: COMPARATIVE OBSERVATIONS

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ABSTRACT

Relatively recently, fundamental changes, not only in the law, but also in policy and judicial approach, have occurred in the context of debt enforcement by execution against a debtor's home. These have been the product of the recognition of the right to have access to adequate housing, provided by section 26 of the Constitution of the Republic of South Africa, 1996, and the regulation by the National Credit Act 34 of 2005 of debt enforcement procedures against consumers in credit transactions, including mortgage bond agreements.

South African common law principles applicable to mortgage bonds and applicable in the context of execution against a mortgagor's immovable property that constitutes his or her home, are rooted in Roman-Dutch law. Certain Roman-Dutch procedural rules and practices may be identified as having generally tended towards affording a measure of protection for the home of a debtor against execution by a creditor. These were rules which, for example, encouraged extra-judicial

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settlement negotiations and required personal service of summonses, four defaults before default judgment could be obtained in respect of a claim involving immovable property, and a more protracted procedure for execution against immovable, as opposed to movable, property. Exacting requirements were also imposed in order to maximise the price obtained at a judicial sale of immovable property. The same procedural rules and practices were not evident in the pre-Bill of Rights South African law. However, they may be viewed as being more in line with contemporary, constitutional imperatives, as well as law reform initiatives, to balance the various rights applicable in the context of execution against a debtor's home and to ensure that execution against a debtor's home may occur only as a last resort, where there are no alternative means by which the debt may be satisfied.

Keywords: Roman-Dutch; debt enforcement; mortgage bond; execution; home mortgage foreclosure; right to have access to adequate housing; section 26 of the Constitution; the National Credit Act

1 Introduction

Recently reported judgments, in matters concerning execution against a debtor's home, reflect the fundamental changes that have occurred in South Africa, not only in the law applicable in this context, but also in policy and judicial approach. These developments have been the product of the recognition of socio-economic rights and, most significantly, the right to have access to adequate housing, provided by section 26 of the Constitution of the Republic of South Africa, 1996.¹ The Constitutional Court's judgments in *Jaftha v Schoeman*; *Van Rooyen v Stoltz*,² *Gundwana v Steko Development CC*,³ and *Nkata v FirstRand Bank Limited*,⁴ each of which gives effect essentially to section 26 rights, reflect ground-breaking changes in the treatment of a creditor's, including a mortgagee's, entitlement to enforce its claim by executing against immovable property that constitutes the debtor's home. The regulation by the National Credit Act 34 of 2005⁵ of debt enforcement procedures against consumers in credit transactions, including mortgage bond agreements, has also had a significant impact on home mortgagors' and mortgagees' rights. This is borne out by the case of *Nkata v FirstRand Bank Limited*,⁶ which illustrates the marked difference between

1 Hereafter referred to as the Constitution.

2 *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), hereafter referred to as *Jaftha v Schoeman*.

3 *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC), hereafter referred to as *Gundwana v Steko*.

4 *Nkata v FirstRand Bank Limited* 2016 (4) SA 257 (CC), hereafter referred to as *Nkata v FirstRand Bank* (CC).

5 Hereafter referred to as the NCA.

6 See *Nkata v FirstRand Bank* (CC) at par 100 and the judgment of Rogers J, in the court *a quo*, reported as *Nkata v FirstRand Bank Limited* 2014 (2) SA 412 (WCC), hereafter referred to as *Nkata v FirstRand Bank* (WCC) at par 53.

a defaulting mortgagor's right to "reinstatement" of the agreement, in terms of the NCA, and his or her right to "redemption" of the mortgaged property, according to the South African common law, with Roman-Dutch legal principles as its source.⁷

The position regarding execution against a debtor's home, in Roman times, was considered in an earlier issue of this journal.⁸ This article will consider the relevant Roman-Dutch law, as it applied in Holland⁹ and as later received into the Cape Colony in the seventeenth century.¹⁰ Taking into account recent developments, some comparisons will be drawn between the position in Roman-Dutch law and in contemporary South African law.

2 Roman-Dutch law

2.1 General background

Roman-Dutch law may be regarded as having existed as soon as Germanic custom incorporated elements derived from Roman law. This may be traced back to the time when the Codex Theodosianus of 438 AD influenced tribal customs in the regions now known as Holland and Belgium.¹¹ After the Frankish Empire dissolved in 900 AD, no general legislation was passed for a number of centuries. The Counts of Holland issued local *handvesten* (privileges) in their towns which were, in many respects, at variance with one another. As a result, Roman law, regarded as "a system logical, coherent and complete",¹² was received in some of the provinces of the Dutch Netherlands. Ordinances passed by municipalities also formed part of the law. Charles V promulgated what have been referred to as "useful measures",¹³ such as the *Placaat* of 10 May 1529, relating to the transfer and hypothecation of immovable property, and the Perpetual Edict of 4 October 1540. Another significant ordinance was the Ordinance on Civil Procedure of 1580.¹⁴ By the end of the sixteenth century, the applicable law consisted of ordinances; *handvesten*; Roman-Dutch law, that is, "the ancient customs engrafted on the Roman law"; and Roman law as reflected in the Corpus Iuris Civilis as well as, in some cases, Canon law.¹⁵ This law was introduced to the colonies, including the Cape of Good Hope.¹⁶

7 See *Nkata v FirstRand Bank* (WCC) at par 53, with reference to *Nedbank Ltd v Fraser and Four Similar Cases* 2011 (4) SA 363 (GSJ), hereafter referred to as *Nedbank v Fraser*; at pars 40-41 and Brits 2013a: 167-168.

8 Steyn 2015: 119-141.

9 "Holland", in this context, is intended to bear the same meaning as that attributed to the term by Lee 1953: 2.

10 See par 3 *infra*.

11 Lee 1953: 3.

12 *Ibid*.

13 Lee 1953: 6.

14 See Erasmus 1996: 143. See, also, par 3 *infra*.

15 Wessels 1908: 206-207.

16 Lee 1953: 7. See, further, par 3 *infra*.

2 2 Debt enforcement

According to Germanic custom, a debtor could be sold into slavery and, during the feudal regime, a debtor could be compelled to work for his creditor.¹⁷ Old Dutch *handvesten* permitted a debtor, who was unable to pay his creditor, to be handed over to him until the debt was paid.¹⁸ Apparently, before the introduction of *cessio bonorum*,¹⁹ the law of Holland provided only for execution against the person. Later developments allowed execution against the debtor's property. Because litigation was complex, necessitating representation by attorneys and advocates,²⁰ and because it was expensive, a plaintiff had first to claim satisfaction from the defendant in a friendly manner²¹ before he could institute action by serving summons.²² In the high court, the parties were required first to appear before a commissioner in an attempt to reach a compromise before a summons could be issued. The process server, when serving the summons, had also to explain to him the "exigency" of it. If the defendant wished to defend the matter, the process server would appoint a convenient day, between fourteen days and one month later, for him to appear.²³

If the defendant did not appear on the return day, the plaintiff would "pray default". In an ordinary action, four defaults were required. After each default, the defendant was afforded the benefit of a subsequent writ or summons until, after the fourth default, the court would grant judgment against him.²⁴ In a defended matter,

17 Wessels 1908: 664 observes that later legal provisions for civil imprisonment were vestiges of this practice.

18 *Idem* 663 where the author refers to the *Handvest* of Alkmaar of 1254. See, also, Calitz 2010: 9.

19 Exactly when *cessio bonorum* was introduced is unclear. See Bertelsmann *et al* 2008: 8, where the authors refer to authoritative views that it was not in use before 1288; *cf* Van der Keessel 1884: 883, who indicates that it was in use towards the end of the fifteenth century. See, also, Wessels 1908: 218 & 663-664. *Cessio bonorum*, which may be regarded as the predecessor to the voluntary surrender process in South African insolvency law, entailed full disclosure of the position of the debtor's estate in a petition to court, with notice to creditors. Briefly, it prevented the arrest of the debtor and effected a stay of execution against his assets. The debtor was entitled to rely on the *beneficium competentiae* to retain certain assets including his clothes, bedding, tools and other necessities of life such as items which might enable him to earn a living. The estate was initially administered by commissioners under the supervision of local magistrates (*scout* and *schepenen*). *Cessio bonorum* will not be discussed further as this article is concerned with the individual debt enforcement procedures. For more detail, see Voet 1957: 42 3 7; Wessels 1908: 663-666; Bertelsmann *et al* 2008: 8; Grotius 1903: 3 51 2; Van der Linden 1891: 3 7 2; van der Keessel 1884: 884 & 889. See, also, Roestoff 2002: 51-52; Roestoff 2005: 78 & 81; Evans 2008: 42-43; and Calitz 2009: 24-25.

20 Van der Linden 1891: 3 2 4.

21 Either orally or in writing, or by notarial demand.

22 Van der Linden 1891: 3 2 1. On service of summons, see Van der Linden 1891: 3 2 6.

23 *Idem* 3 2 9. On the return day, the plaintiff's attorney had to file a declaration setting out the claim: see Van der Linden 1891: 3 2 12.

24 *Idem* 3 2 13. If the defendant appeared on the second or third summons, he could apply to purge the defaults, but if he appeared only on the fourth summons, he was required to obtain a writ of relief.

once the substantive and procedural requirements²⁵ had been complied with and a valid judgment had been granted,²⁶ it had to be declared executable. In the lower courts, the judgment had to be placed in the hands of the messenger. In the high court, a writ of execution of the judgment had to be taken out at the registrar's office giving authority to the process server to execute it.²⁷

The process server or messenger had to deliver to the execution debtor a document, known as the *sommatie*, calling upon him to satisfy the judgment debt, together with costs, within twenty-four hours²⁸ failing which a *renovatie*,²⁹ or *alias* writ, was issued.³⁰ The process server or messenger, on serving the *renovatie*, would demand that property should be pointed out to him by the judgment debtor. It was the duty of the former to take movable property sufficient to satisfy the judgment debt.³¹ On the other hand, if despite diligent enquiry the process server or messenger did not find sufficient movable property to satisfy the judgment debt, he had to levy execution upon the immovable property. However, he was not entitled to levy execution upon immovable property of great value for small debts unless it could not be divided.³²

In the lower courts, after the immovable property was attached, its sale had to be publicly announced on four Sundays and market days, in the towns, and on four Sundays and court days, in the country, with placards having to be posted in the nearest town. Once the sale had been held and the purchase price had been paid, a deed of transfer was granted to the purchaser by the lower court.³³

In the high court, execution against immovable property entailed a more complex process.³⁴ Once the immovable property was attached in the presence of the *schepenen*,³⁵ notice was given both to the execution debtor and to the lower court. The process server publicised the sale by issuing proclamations on four Sundays and market days and, on the appointed day, he provisionally sold the property to the highest bidder. Thereafter, he had to summons all interested persons to the high court and to annex returns of service to the judgment and the writ of execution. On the appointed day, the execution creditor had to file his claim at the Rolls of the High Court for it to issue a decree of transfer which would confirm the sale after which

25 For a matter to be rendered "ripe for judgment", see Van der Linden 1891: 3 2 10, 3 3 & 3 8.

26 It had to have been pronounced or delivered publicly; see Van der Linden 1891: 3 9 4.

27 Van der Linden 1891: 3 9 5.

28 *Idem* at 3 9 6. In the high court, the *sommatie* set out what was required of the judgment debtor and a copy of the judgment and the writ of execution were also delivered to him.

29 This was a repetition of the *sommatie*.

30 Van der Linden 1891: 3 9 7.

31 *Idem* at 3 9 9 & 3 9 10.

32 *Idem* at 3 9 11.

33 *Ibid.*

34 *Idem* at 3 9 12.

35 The *schepenen* were administrative and judicial officials; see Bertelsmann *et al* 2008: 8.

nobody could oppose it.³⁶ A certificate, or deed of proclamation, was drawn up in the registrar's office calling on all persons to appear at the high court on a certain day if they wished to make a higher bid for the immovable property than that already received. The process server published the deed of proclamation by posting placards announcing the final sale.

On the advertised day, the property was *de novo* publicly put up for sale at the Rolls of the High Court by the assistant registrar, or secretary in charge of the Rolls, and knocked down to the highest bidder. Thereafter, a ceremony took place in which the oldest commissioner of the Rolls held in his hand the deed of transfer with the court's seal attached to it and he removed the court's seal, thus signifying that the property had been adjudicated to the highest bidder or, when there were no further bids for the property, to the purchaser.³⁷ The proceeds of the sale of the immovable property had to be paid to the secretary of the lower court or to the registrar of the high court, as the case might be, and payment to the creditor was regulated from there.³⁸

If the judgment debtor did not have property or had property insufficient to satisfy the judgment debt, the judgment creditor was permitted to proceed against his person.³⁹ A debtor could evade imprisonment by relying on the *beneficium competentiae* which entitled him to retain an amount adequate for his maintenance according to his craft and standing.⁴⁰

2.3 Real security

Mortgage,⁴¹ as defined by Grotius, is a "right over another's property which serves to secure an obligation".⁴² The ancient form of German pledge was not an accessory agreement but more a kind of "alternative payment" whereby the debtor delivered to the creditor, as provisional payment, something different from the object promised and which he could "redeem" once he performed his obligation. The debtor could choose not to perform what he had promised but to allow the object to remain with

36 There was a set procedure to be followed if anyone wished to oppose it, although it appears that this rarely occurred; see Van der Linden 1891: 3 9 7.

37 *Ibid.*

38 Van der Linden 1891: 3 9 8.

39 *Idem* at 3 9 14.

40 Discussed at n 19 *supra*. See Voet 1957: 42 1 46, with reference to D 42 1 19 1; 50 17 173 & 25 3 5 7. It was interesting that a nobleman was entitled to more than a common person and an old man was entitled to more than a youth because it was easier for the latter to obtain a livelihood; see D 42 2 63 6 & D 24 3 15.

41 Note that Gane explains, in Voet 1957: vol 3 at 470, with reference to Voet 20 1, that, although, strictly speaking, the term "mortgage" was not used in the Dutch law, the proper term to be used being "hypotheec", for the sake of convenience, he makes reference to "mortgage" of immovable property in this context.

42 Lee 1953: 183, with reference to Grotius 2 48 1.

the creditor as fulfilment of their agreement. Further, if the creditor sold the object to a third party the debtor could not reclaim it. These aspects indicate that the creditor was regarded as the owner of the thing “pledged” and that, in a sense, credit was in fact not granted.⁴³

In time, the Roman law principles relating to *pignus* and *hypotheca* were adopted so that by the time of Grotius the law of Holland, in relation to pledge, was similar to the Roman law of Justinian’s time.⁴⁴ Initially, when immovable property was pledged, the creditor became *dominus* with full usufruct of the land on the basis that he had promised to transfer the land back to the debtor once the debt was paid. If the debt was not paid within the stipulated time, the mortgagee remained the owner. However, in the thirteenth century the law was modified so that, if the mortgagor did not fulfil his obligation, the mortgagee could no longer treat the property as his own but he had to sell it by judicial sale. Wessels explains the position as follows:⁴⁵

The Hollanders followed the Frisians, who adhered more strictly to the Roman law in not divesting the owner of his *dominium* in the thing mortgaged. The consequence of this was that the law of Holland was always favourable to the mortgagor, and its policy was to allow the debtor to recover the property pledged up to the time that it was actually sold in execution by judicial decree.

Wessels states that the extent to which the law of Holland protected the debtor is also evident from the fact that it did not recognise *parate executie*, which was a stipulation by which the debtor agreed to allow the creditor to sell the property pledged if the debt were not paid.⁴⁶ Another prohibited agreement was a *pactum commissorium*, or agreement for forfeiture of the mortgaged property in the event of non-payment.⁴⁷ However, where payment of the debt had to be made in a number of instalments or in a series of payments, it was permissible to agree that the pledged property could be sold in the event of default in respect of a single payment.⁴⁸

43 This was based on the *vadium* contract; see Wessels 1908: 569-571 & 592-593 who describes it as a type of contract of exchange.

44 Specific aspects, based on German custom, remained; see Wessels 1908: 593.

45 *Idem* 595-596.

46 *Idem* at 596. There is controversy as to whether the later law of Holland permitted *parate executie*. Lee 1953: 200-201, with reference to Voet 20 5 6, states that a *parate executie* agreement would not be enforced if the debtor afterwards objected, or if the private sale would be prejudicial to the other hypothecary creditors. Van der Keessel 1884: 439 states that a pledgee could sell the thing delivered to him if that was originally agreed upon. It may be noted that the translator, Lorenz, has qualified this statement by pointing out, with reference to D 8 7 4, that it would be more accurate to translate the text as “where there has been no stipulation to the contrary”.

47 Lee 1953: 200 with reference to Voet 20 1 25.

48 Voet 20 5 1, with reference to Inst 3 15 3 & D 33 1 3. This is known as an acceleration clause, which is commonly employed in a modern day mortgage bond and which is discussed at par 4 3 *infra*.

By the fourteenth century, the general practice was for the mortgagor to retain possession of his property.⁴⁹ Thus, a deed of hypothecation became necessary as well as sufficient publicity for a mortgagee to be able to ascertain if property had already been mortgaged. To this end various *placaaten* were issued which effectively provided that a special mortgage of immovable property, including a *kustingbrief*,⁵⁰ was valid only if it was executed before the court and the required duty was paid.⁵¹ The holder of a validly executed special mortgage had a preferent claim on the proceeds arising from the sale of the mortgaged property. Where more than one special mortgage had been executed upon the same property, they would rank according to the order in which each was executed.⁵²

To obtain the court judgment, which was required before a creditor could sell the mortgaged property, he had to have drawn up a confession of judgment by the debtor,⁵³ or he had to issue a summons against the debtor requiring him to pay the debt or to appear to hear the mortgaged property being declared bound and executable. Once the judgment was obtained, the special mortgage was executed in compliance with certain requirements.⁵⁴ Where mortgaged property was sold without the consent of the true owner, the latter could legally claim it from any person who was in possession of it without making restitution for the price paid by the latter. An exception to this rule was where goods were sold *bona fide* in the public market. In such a case, the price had to be restored.⁵⁵

Mortgage was extinguished by decree of court or by judicial sale or sale in insolvency of the mortgaged property.⁵⁶ It could also be extinguished by prescription.⁵⁷

49 Wessels 1908: 594.

50 A *kustingbrief* was a special mortgage of immovable property for the balance of its purchase price, the bond being passed at the time of transfer of the property; see Van der Linden 1891: 1 12 3.

51 These included a Placaat of Charles V of 10 May 1529 and the *Politique Ordonantie* of 1580; see Wessels 1908: 217-218 & 595. The *Placaat der 40ste Penning* of 22 Dec 1598 made duty of 2.5 per cent payable; see Lee 1953: 185; Van der Keessel 1884: 433.

52 A special mortgage enjoyed a claim preferent to that in respect of a prior general mortgage: see Van der Keessel 1884: 436; Lee 1953: 198; Van der Linden 1891: 1 12 4.

53 Known as *willige condemnatie*. This was required in a case where the bond had been made subject to confession being signed.

54 Lee 1953: 200. Van der Linden 1891: 1 12 5 states that the formalities were those required in the case of an *onwillig Decreet* which was "a sale of immovable property that took place by way of execution upon the order of the court; or, in a more general sense, a sale of the debtor's property, commenced by the *Deurwaarder* upon a judgment, and afterwards consummated at the High Court".

55 See Van der Keessel 1884: 183 n 3, with reference to S van Leeuwen *Censura Forensis* part I book iv ch 7 § 17, 184. This rule applied in Holland, but not in Zeeland.

56 Voet 20 § 10, with reference to Mattheus II *De Auctionibus Libri Duo, quorum prior Venditiones, posterior Locationes, quae sub hasta fiunt, exequatur: adjecto passim voluntarium auctionum jure* 1 14 11.

57 Van der Keessel 1884: 208.

3 Reception of Roman-Dutch law into the South African legal system

In 1652, the Dutch East India Company established a refreshment station in the Cape of Good Hope for ships travelling between the Netherlands and the East Indies. The commander of the settlement, Jan van Riebeeck, established a rudimentary judicial system, at first administered by himself and his staff, applying the laws of the Province of Holland. These events led to the Cape Colony being established and the introduction of Roman-Dutch law into South Africa.⁵⁸ In 1656, a *Justitie ende Chrijghsraet* was created to deal with legal matters. Except for the introduction of civil courts, called the courts of *landdrosten* and *heemraden*, for more remote areas outside Cape Town and the substitution of the *Justitie ende Chrijghsraet* with the *Raad van Justitie*, this basic structure of the administration of justice remained until the end of the first period of Dutch occupation of the Cape in 1795.⁵⁹ Although the local government at the Cape issued *placaaten*, these were all repealed and Roman-Dutch law is generally regarded as the common law of South Africa.⁶⁰ No rules of procedure were promulgated specifically for the Cape and it appears that the *Raad van Justitie* applied the Ordinance on Civil Procedure of 1580.⁶¹

As from 1795, the Cape was controlled by Britain. From 1803 to 1806, it was controlled again by Holland, or the Batavian Republic, as the Netherlands was then called.⁶² In 1803, the Batavian Republic appointed Jacobus Abraham de Mist as Commissioner-General of the Cape, who brought about significant changes, including the creation of a *Desolate Boedelkamer* for the administration of insolvent estates. It may be noted that, around 1805, in civil matters *landdrosten* “were required to use every endeavour to bring parties to amicable terms before proceeding to give judgment”.⁶³ Also, three defaults by a defendant were required before default judgment could be granted. This rule did not exist in later South African law.⁶⁴

In 1806, Britain re-occupied the Cape, which became a British colony from 1815 until 1910 when the Union of South Africa was formed.⁶⁵ In 1818, the *Desolate*

58 See Fagan 1996: 35; Calitz 2009: 37; Du Bois 2007: 64; De Vos 1992: 3, 18 & 226.

59 See Fagan 1996: 38; Erasmus 1996: 144-145 suggests that “the general organization of the administration of justice remained remarkably consistent” until 1827.

60 See Fagan 1996: 39 & 41, with reference, *inter alia*, to Hahlo & Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 578. For a useful, succinct explanation of the reception of Roman-Dutch law in South Africa, see Glover 2003: 38 n 3. See, also, generally, De Vos 1992.

61 See Erasmus 1996: 143 n 15 & 145. See par 2 1 *supra*.

62 From 1795 to 1806, following its conquest by the French, the Netherlands was known as the Batavian Republic.

63 See Wessels 1908: 360.

64 *Idem* at 361.

65 See Fagan 1996: 46; De Vos 1992: 242ff.

Boedelkamer was abolished and replaced by a *Sequestrator*. In 1819, an Ordinance⁶⁶ was promulgated in terms of which the office of the *Sequestrator* would be responsible, *inter alia*, for the execution of all civil sentences except those specially entrusted to the boards of *landdrost* and *heemraden*.⁶⁷

The British were dissatisfied with the administration of justice at the Cape and, after a commission enquired into the matter, in 1827, a Charter of Justice was issued which reshaped the judicial system along English lines.⁶⁸ It provided, *inter alia*, for the replacement of the *Raad van Justitie* with an independent Supreme Court consisting of a Chief Justice and two puisne judges. This occurred in 1828. Full-time judges were imported from Britain. There was no Court of Chancery or Chancery jurisdiction and thus no separate courts of law and equity as there were in England.⁶⁹ The courts of *landdrost* and *heemraden* were replaced by resident magistrates as in the English system.⁷⁰ The Charter of Justice also established the post of Master of the Supreme Court. The office of the *Sequestrator* was abolished.

A second Charter of Justice, issued in 1832, came into effect in 1834. It provided for the retention of Roman-Dutch law as the law of the Cape Colony.⁷¹ The Supreme Court was given extensive powers to make rules for the practice and pleading in civil matters which “had to be framed ‘so far as the circumstances of the ... Colony may permit, ... with reference to the corresponding rules and forms in use in ... [the] Courts of record at Westminster’.”⁷² This was significant for the development of South African civil procedure as a unique process in a mixed legal system.⁷³ Further, Ordinance 72 of 1830 stipulated that the English rules of civil procedure were to apply in the courts.⁷⁴ However, a number of Roman-Dutch remedies and concepts were retained.⁷⁵ This is clearly evident in the South African law applicable in the context of execution against a debtor's home.

4 South Africa

4 1 The position, pre-Constitution

Traditionally, a debtor's home has not enjoyed specific protection against forced sale in the debt enforcement process. Statutory exemptions of specific classes of property

66 See Proclamation 2 of Sep 1819, referred to by Calitz 2009: 39.

67 See Calitz 2009: 39-40.

68 See Erasmus 1996: 146; Calitz 2009: 40; De Vos 1992: 244ff.

69 See Erasmus 1996: 146; Zimmerman 1996: 218-219.

70 Fagan 1996: 51.

71 See Erasmus 1996: 146; Girvin 1996: 96; Fagan 1996: 51.

72 See s 46 of the Charter of Justice, referred to by Erasmus 1996: 146-147; Fagan 1996: 51; De Vos 1992: 247-248.

73 See Zimmermann 1996: 217; De Vos 1992: 248-249; Erasmus 1991: 265-276.

74 Eckard 1990: 1.

75 See Erasmus 1996: 148-149; Wessels 1908: 386.

from sale in execution have never included the debtor's home. In the individual debt enforcement process, the common law position has always been that a judgment creditor is obliged first to attach and execute against a debtor's movables before executing against his immovable property, for which a court order is required.⁷⁶ However, a mortgagee may execute against hypothecated immovable property without first having to excuss the debtor's movables as long as he obtains a court order declaring the immovable property specially executable.⁷⁷ *Parate executie* is not permissible as regards immovable property.⁷⁸

Important procedural changes were brought about in order to alleviate the burden on courts. Legislative amendments were made and rules of court became applicable, which empowered a registrar of a high court and a clerk of the magistrate's court to grant default judgment against a debtor who did not respond to a summons or who did not enter an appearance to defend the matter.⁷⁹ Legislation and rules of court also empowered a registrar of the high court to issue a writ of execution and a clerk of the magistrate's court to issue a warrant of execution, without an order of court, in respect of the immovable property of a judgment debtor against whom default judgment had been granted.⁸⁰

4 2 Developments based on recognition of the right to have access to adequate housing

The introduction of a new constitution, including a bill of rights, brought about fundamental reform to South African jurisprudence and its legal system. This led to changes, in the individual debt enforcement process, in relation to execution against a debtor's home, through the recognition of the impact of everyone's right to have access to adequate housing, provided for in section 26(1) of the Constitution, which forms part of the Bill of Rights. Section 26(3) provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. Section 26(2) obliges the state to take reasonable legislative and

76 In relation to the position according to Roman law, see Steyn 2015: 126 and references cited there. As regards South African law, see Rule 43 of the Magistrates' Courts Rules, as well as Van Loggerenberg 2011: commentary to Rule 43; and Rule 46(1) of the High Court Rules as amended by the Rules Board for Courts of Law in terms of sec 6 of the Rules Board for Courts of Law Act 107 of 1985 and approved by the Minister of Justice and Constitutional Development. In particular, see Amendment: Rules regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa: Rules regulating the Conduct of the Proceedings of the High Courts of South Africa; Government Notice R981 of 2010; GG 33689, 19 Nov 2010, discussed further at par 4 2 *infra*.

77 *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) 135. See, also, par 4 3 *infra*.

78 See, further, par 4 3 *infra*.

79 See Steyn 2012: pars 4 4 3 2 & 4 4 4 2 and references cited there.

80 *Idem* at pars 4 4 3 3 & 4 4 4 3 and references cited there.

other measures within its available resources to achieve the progressive realisation of everyone's right to have access to adequate housing.⁸¹ The Constitutional Court interpreted and applied section 26 for the first time in *Government of the Republic of South Africa v Grootboom*,⁸² a case that concerned the eviction of a community from private land. The court held, *inter alia*, that, at the very least, section 26(1) places a negative obligation on the state and all other persons to desist from preventing or impairing the right of access to adequate housing.⁸³

In 2004, the Constitutional Court's judgment in *Jaftha v Schoeman* heralded the implications of section 26 for execution against a debtor's home. This case concerned execution through the magistrate's court process against the state-subsidised homes of two indigent debtors in actions to obtain satisfaction of trifling, extraneous⁸⁴ debts. The Constitutional Court held that execution against a debtor's home may constitute an unjustifiable infringement of section 26 of the Constitution. It concluded that section 66(1)(a) of the Magistrates' Courts Act was unconstitutional in that it was sufficiently broad to allow sales in execution to proceed in circumstances where they would not be justifiable in terms of section 36 of the Constitution. It directed certain words to be read into section 66(1)(a) with the effect that, where insufficient movables were found to satisfy a judgment debt, the creditor would need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. A court was required to consider all the relevant circumstances to evaluate whether, in the circumstances, execution would be justifiable in terms of section 36.⁸⁵ The Constitutional Court stated that, in the absence of any abuse of court procedure, execution should ordinarily be permitted where a debtor had mortgaged his home to secure a debt.⁸⁶ It also stated that balancing the parties' interests in accordance with section 36 should not be "an all or nothing process" but that there was a need to find "creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort".⁸⁷

In late 2010, rules 45 and 46 of the High Court Rules were amended to bring the high court process into line with that applicable in the magistrates' courts after *Jaftha v Schoeman*. A proviso, apparently only applicable to sub rule 46(1)(a)(ii), required a *court*, not a registrar, to issue a writ of execution against the primary residence of a judgment debtor and only after it has considered all the relevant circumstances. Close on the heels of this rule change, followed the delivery of the

81 The Housing Act 107 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, as well as other statutes, were enacted in furtherance of this obligation and the National Housing Code was issued in terms of the Housing Act.

82 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), hereafter referred to as *Grootboom*.

83 *Grootboom* at par 34.

84 In other words, the homes had *not* been mortgaged in favour of the judgment creditors.

85 *Jaftha v Schoeman* at paras 44 & 55.

86 *Idem* at par 58.

87 *Idem* at par 59.

Constitutional Court's judgment in *Gundwana v Steko*, which concerned the validity of default judgment and a declaration of executability of mortgaged property by the registrar of the high court, issued post-Constitution but before the change in the High Court Rule 46(1). The effect of the judgment is that now, in every case in which execution is sought against a person's home, including where it has been mortgaged, a court, not a registrar, is required to undertake an evaluation, considering "all the relevant circumstances", to determine whether execution should be permitted.⁸⁸ The Constitutional Court stated that due consideration should be given to the impact that execution might have on judgment debtors who are poor and at risk of losing their homes. It also stated that, before granting execution orders, courts should consider whether the judgment debt may be satisfied by reasonable alternative means.⁸⁹ During the period of the developments outlined above, various practice directives were issued in some divisions of the high court in order to guide courts and practitioners on how to conform to constitutional imperatives as interpreted and applied in the precedent-setting judgments.⁹⁰

The NCA, which came into full effect on 1 June 2007, with consumer protection and, notably, "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers" included in its main objectives,⁹¹ impacts significantly on the enforcement of credit agreements, including "mortgage agreements".⁹² The most recent Constitutional Court decision that has impacted fundamentally on home mortgagors' and mortgagees' rights is *Nkata v FirstRand Bank*, which concerned the provisions contained in section 129(3) and (4) of the NCA. This case will be discussed below, after the main principles pertaining to mortgage and the NCA's regulation of mortgage debt enforcement have been set out.

4 3 Mortgage

South African law in relation to mortgage is founded upon the principles of Roman and Roman-Dutch law.⁹³ A "mortgage bond" is a document which, when registered

88 *Gundwana v Steko* at par 50.

89 *Idem* at par 53. Courts subsequently interpreted and applied the precedent established in *Gundwana v Steko* in, eg, *Nedbank v Fraser*, *FirstRand Bank Ltd v Folscher and Similar Matters* 2011 (4) SA 314 (GNP); *Standard Bank of South Africa Ltd v Bekker and Four Similar Cases* 2011 (6) SA 111 (WCC); and *Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA).

90 See Steyn 2012: 192, 285, 287 & 301. See also, eg, ch 10 17 of the Practice Manual of the South Gauteng Court, referred to by Van der Linde J in *FirstRand Bank t/a First National Bank v Zwane* 2016 (6) SA 400 (GJ), discussed at par 4 3 *infra*.

91 See s 3 of the NCA.

92 A "mortgage agreement or a secured loan" constitutes a "credit transaction", which is a "credit agreement" regulated by the NCA; see s 8(4)(d). In s 1, a "mortgage agreement" is defined as "a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property" and a "mortgage" is defined as "a mortgage bond registered by the registrar of deeds over immovable property that serves as continuing covering security for a mortgage agreement".

93 As set out in 2 3 *supra*.

in the Deeds Registry in accordance with the provisions of the Deeds Registries Act 47 of 1937, creates a right of security over immovable property,⁹⁴ which is accessory to the principal obligation that it secures.⁹⁵

Common types of mortgage bond are a *kustingbrief*; a covering bond; a collateral bond; a surety bond; an indemnity bond; and a participation bond. A *kustingbrief* is a bond passed by the purchaser of immovable property simultaneously with the transfer of the property into his name.⁹⁶ The bond may be in favour of the seller, to secure payment of the purchase price, or a third party, such as a bank, to secure the repayment of a loan provided to the mortgagor to enable him to pay the purchase price.⁹⁷ A covering bond is one which secures a debt, or debts, which will, or may, be incurred in the future. A collateral bond is one which is passed by the mortgagor to secure an obligation for which he has already provided security. A surety bond is one in which a surety secures his obligation to the creditor. The most likely forms of mortgage bond to feature in the context of forced sale of a debtor's home would be a *kustingbrief* or, possibly, a covering, collateral, or surety bond, in the case of a homeowner or a businessperson who has passed a mortgage bond over his home in order to secure personal or business debts.

A mortgage bond invariably contains, *inter alia*, the following particulars and terms:⁹⁸ an acknowledgment of indebtedness by the mortgagor in favour of the mortgagee; a description of the cause of indebtedness and the amount owed; a statement of the interest rate applicable; the terms of repayment; and a "foreclosure clause" in terms of which it is agreed that, should the mortgagor breach the principal obligation or any other term contained in the mortgage bond, the principal debt together with interest will become payable immediately and the mortgagee will be entitled to institute action for payment and for an order declaring the mortgaged property specially executable.

Ordinarily, the parties agree that, if the debtor fails to pay any *one* instalment, the creditor will be entitled to demand the entire balance of the debt. This is termed an "acceleration clause".⁹⁹ Thus, upon failing to pay a single instalment, the entire balance of the debt will become due for payment by the debtor, failing which the creditor will be entitled to enforce all the other terms of their contract.¹⁰⁰ However, constitutional implications must also be borne in mind. In the case of a mortgagor missing a single instalment due in terms of a home mortgage, any limitation of his housing and other rights and, for that matter, any limitation of the creditor's

94 Lubbe & Scott 2008: pars 324-398.

95 See *Kilburn v Estate Kilburn* 1931 AD 501.

96 Also mentioned in par 2 3 *supra*.

97 Lubbe & Scott 2008: par 397.

98 *Idem* at pars 353 & 360-366.

99 Bradfield 2011: 436-437.

100 As was the position in *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T), hereafter referred to as *Absa v Ntsane*. See *Absa v Ntsane* pars 67-68, 81-82, 85, 91 & 93-94.

rights must accord with proportionality assessments required by section 36 of the Constitution.¹⁰¹ In *ABSA v Ntsane*, Bertelsmann J refused to grant judgment in the amount of the accelerated debt or an order of special executability in respect of the mortgaged home of the judgment debtors on the basis that it was regarded as an abuse of the court process to seek execution against a person's home in respect of a trifling arrear amount of R18,46.¹⁰² Since its coming into operation, the NCA regulates the enforcement of mortgage obligations, the consequences of which will be discussed below.¹⁰³

The effect of the registration of a mortgage bond is that the mortgagor, who remains the owner, may use and enjoy the property.¹⁰⁴ Where the mortgagor breaches any term of the mortgage bond, the mortgagee is not required first to execute against the movable property of the judgment debtor, as a judgment creditor is ordinarily required to do, but he is entitled to immediate execution against the mortgaged immovable property.¹⁰⁵ This is the case even where there is no clause in the bond to this effect. However, he cannot execute against the mortgaged property without reference to the mortgagor or the court: he must first sue and obtain judgment on the mortgage bond and obtain a court order declaring the mortgaged immovable property specially executable.¹⁰⁶ A *parate executie* clause, permitting the mortgagee to take possession of the mortgaged immovable property and to sell it without reference to the mortgagor or the court, is invalid and therefore void.¹⁰⁷ Likewise, a forfeiture clause providing that, upon the mortgagor's default, the mortgagee will become the owner of the mortgaged property, is void.¹⁰⁸ However, the mortgagee may purchase or, as it is termed, "buy in" the mortgaged property at the sale in execution and may set off the amount due under the bond against the purchase price.¹⁰⁹ If the purchase price is less than the amount due under the bond, the mortgagee still has a claim against the mortgagor for the balance. In other words, the mortgagor will nevertheless

101 See Steyn 2012: par 3 2 3; Brits 2013a: 183-184; Brits 2016: 89-91; and the reasoning expounded by Gorven J in *Firststrand Bank Ltd v Mdletye* 2016 (5) SA 550 (KZD) at paras 14-17.

102 *ABSA v Ntsane* at par 97.

103 See par 4 4 *infra*.

104 Lubbe & Scott 2008: par 360.

105 *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) 135.

106 Lubbe & Scott 2008: par 368.

107 *Idem* at par 368; *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T), approved in *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at par 7, *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at par 13, and *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA). This was also the position at the time of Grotius; see 2 3 *supra*.

108 As was the position in Roman law, after the passing of the *lex commissoria* in AD 320.

109 Lubbe & Scott 2008: par 368; *Smiles' Trustee v Smiles* 1913 CPD 739; *ABSA Bank Ltd v Bisnath NO* 2007 (2) SA 583 (D), hereafter referred to as *ABSA v Bisnath*. See, also, *Cronje v Hillcrest Village (Pty) Ltd* 2009 (6) SA 12 (SCA).

be liable for the shortfall.¹¹⁰ Worthy of mention, in this context, is a proposal for the amendment of the Uniform Rules of Court and the Magistrates' Courts Rules, respectively, to provide for personal service upon a debtor of a notice of attachment of immovable property that is his or her primary residence and for a court to have the power to set a reserve price for the sale in execution of the debtor's residence.¹¹¹ This would be to avoid debtors' homes being sold for exceedingly low prices.¹¹²

A common law principle applicable is that a mortgagor may redeem the mortgaged property by paying the total amount outstanding and costs, even after a sale in execution has taken place. It has been held that this applies right up until the registration of the property in the name of the purchaser in execution.¹¹³ This aspect of the common law has been referred to in various reported cases and different contexts, and, recently, in the interpretation and application of provisions of the NCA in matters concerning execution against a mortgagor's home.¹¹⁴

4 4 The NCA's regulation of enforcement of a mortgage bond

As stated above, the provisions of the NCA apply to a mortgage bond.¹¹⁵ The NCA limits the powers of a "credit provider" to enforce a credit agreement by, *inter alia*, requiring notices to be issued to the debtor, termed the "consumer", advising him of his rights and options available under the NCA and prescribing the lapse of minimum periods between the various stages of the debt enforcement process.¹¹⁶ The NCA forbids the granting of "reckless credit" by credit providers.¹¹⁷ It also provides an alternative debt relief measure for an over-indebted consumer by providing for debt counselling, debt review, and, where appropriate, debt restructuring in terms of which it is envisaged that a consumer will be required eventually to fulfil all of his or her financial obligations.¹¹⁸

110 In *Rossouw v FirstRand Bank*, it was held that s 130(2) of the NCA does not apply to mortgage bonds. *ABSA v Bisnath* at 589-590 is authority for the proposition that, if the mortgagee thereafter sells the property to a third party for a price higher than the total cost that he has been occasioned, the mortgagee must account to the mortgagor for any ultimate profit arising from his subsequent transactions.

111 See the invitation by the Rules Board for Courts of Law, Republic of South Africa, for public comment on the proposed Rule 46A of the High Court Rules and Rule 43B of the Magistrates' Courts Rules; http://www.justice.gov.za/rules_board/invite/2016-SalesExecution-HCR46-MCR43.pdf (accessed 12 Aug 2017).

112 See *Brits 2013b* with reference to *Nxazonke v Absa Bank* (18100/2012) [2012] ZAWCHC 184 (4 Oct 2012).

113 See *Nkata v FirstRand Bank* (CC) at par 131 and *Nkata v FirstRand Bank* (WCC) at par 53.

114 See, eg, authorities cited and discussed in *Nedbank v Fraser* at par 40. See, also, *Brits 2012*: 48; *Brits 2013a*: 167.

115 See par 4 2 at n 92 *supra*.

116 See ss 129 & 130 of the NCA.

117 See ss 80-84 of the NCA.

118 See s 3 of the NCA.

In terms of section 130 of the NCA, a credit provider cannot enforce a credit agreement unless the consumer has been in default under that credit agreement for at least twenty business days.¹¹⁹ The credit provider must then deliver to the consumer a notice as contemplated in section 129(1)(a).¹²⁰ Such notice must draw the consumer's attention to the default and propose that he consults a debt counsellor,¹²¹ alternative dispute resolution agent,¹²² consumer court,¹²³ or ombud with jurisdiction¹²⁴ so that they may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.¹²⁵

Section 129(3) permits a consumer who has fallen into default, at any time before the credit provider has cancelled the agreement, to "reinstate" or "remedy a default in" such agreement by paying all arrears and prescribed charges and costs.¹²⁶

Where at least ten business days have elapsed after delivery of the section 129(1)(a) notice, the court may hear the matter.¹²⁷ This is as long as there is no issue regarding the credit agreement pending before the National Consumer Tribunal¹²⁸ or the matter is not already serving before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction.¹²⁹ The failure to issue a section 129 notice in compliance with the NCA will prevent a mortgagee from obtaining judgment against a debtor upon the latter's default and, consequently, an order of executability in respect of the mortgaged property.¹³⁰

The first reported judgment concerning enforcement of acceleration clauses in home mortgage bonds, after the coming into operation of the NCA in 2007, was *FirstRand Bank Limited v Maleke*; *FirstRand Bank Limited v Motingoe*; *Peoples*

119 Section 130(1).

120 See, also, s 129(1)(b).

121 "Debt counsellors" must be registered in terms of s 44 of the NCA.

122 An "alternative dispute resolution agent", according to s 1, is "a person who provides services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".

123 In terms of s 1 of the NCA, a "consumer court" is defined as "a body of that name, or a consumer tribunal established by provincial legislation".

124 In terms of s 1 of the NCA, an "ombud with jurisdiction" in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a "financial institution" as defined in the Financial Services Ombud Schemes Act 37 of 2004 means an "ombud" or the "statutory ombud", as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against the financial institution.

125 Section 129(1)(a).

126 The wording of s 129(3) was amended by s 32(a) of the National Credit Amendment Act 19 of 2014, which came into effect on 13 March 2015. This will be discussed further, *infra*.

127 Section 130(1)(a). The consumer must also not have responded or rejected the credit provider's proposals; see s 130(1)(b).

128 Section 130(3)(b).

129 Section 130(3)(c)(i).

130 See *Dwenga v First Rand Bank Ltd* (EL 298/11, ECD 298/11) [2011] ZACECLLC 13 (29 Nov 2011), hereafter referred to as *Dwenga v FirstRand Bank*. See, also, the minority judgment of Jafta J in *Nkata v Firstrand Bank* (CC) at pars 163 & 166-175.

Mortgage Ltd v Mofokeng; *FirstRand Bank Limited v Mudlaudzi*.¹³¹ The court refused to grant default judgment and orders of special executability against four mortgaged homes, regarding it as being more appropriate for the recently introduced debt review process to be explored as an alternative before judgment was granted and execution was permitted against the defendants' homes.¹³²

Recently, in *Nkata v FirstRand Bank (CC)*,¹³³ the majority of the Constitutional Court delivered a judgment in which it interpreted and applied section 129(3) and (4) of the NCA in a way that has significant implications for parties to mortgage agreements. As mentioned above, section 129(3) allows a debtor to "reinstate" or to "remedy a default in" a credit agreement by paying the arrears and certain prescribed charges and costs.¹³⁴ Section 129(4) limits the circumstances in which reinstatement may occur. Section 129(4)(b) provided that "[a] credit provider may not re-instate a credit agreement after ... (b) the execution of any other court order enforcing that agreement".¹³⁵ The majority, per Moseneke DCJ, interpreted this to mean that reinstatement of the credit agreement is prevented only once "the proceeds from a sale in execution have been realised".¹³⁶ The effect is that a mortgagor may remedy his or her default and reinstate the mortgage bond by paying the arrears and prescribed charges and costs at any point until the registration of title in the name of the purchaser at the sale in execution.¹³⁷ The Constitutional Court confirmed that reinstatement in terms of section 129(3) occurs by operation of law as soon as the arrears and prescribed charges and costs have been paid.¹³⁸ Another significant aspect of the decision is the declaration that reinstatement renders invalid a default judgment previously obtained.¹³⁹

The precedent established in *Nkata v FirstRand Bank (CC)* has been applied in two reported cases. In *FirstRand Bank Ltd v Mdletye*,¹⁴⁰ the court granted judgment against the mortgagors in the amount of the accelerated outstanding debt of R275 315,04,

131 *FirstRand Bank Limited v Maleke*; *FirstRand Bank Limited v Motingoe*; *Peoples Mortgage Ltd v Mofokeng*; *FirstRand Bank Limited v Mudlaudzi* 2010 (1) SA 143 (GSJ), hereafter referred to as *FirstRand Bank v Maleke*.

132 *Idem* at pars 6, 16 & 17-24.

133 *Nkata v FirstRand Bank (CC)*.

134 *Nkata v FirstRand Bank* concerned the provisions as they were worded before their amendment. The amended s 129(3) no longer uses the term "reinstate", which was used in the original version of the provision, but it provides for a consumer to "remedy a default" in a credit agreement, which, it is submitted, essentially amounts to the same thing. See Steyn & Sharrock 2017: 500; cf Brits, Coetzee & Van Heerden 2017.

135 The amended s 129(4) now states that "[a] credit provider may not re-instate or revive a credit agreement after ... (b) the execution of any other court order enforcing that agreement". There is no change to the meaning of the provision; see Steyn & Sharrock 2017: 500 & 512.

136 *Nkata v FirstRand Bank (CC)* at par 131.

137 Cf the common law right of redemption and authorities cited and referred to at par 4 3 *supra*.

138 *Nkata v FirstRand Bank (CC)* at par 105.

139 *Idem* at pars 76 & 137.

140 *FirstRand Bank Ltd v Mdletye* 2016 (5) SA 550 (KZD), hereafter referred to as *FirstRand Bank v Mdletye*.

plus interest. However, it refused to grant the application to declare the immovable property executable and adjourned it *sine die*, directing that the application could not be set down sooner than six months from the date of judgment.¹⁴¹ The purpose of this was to provide the mortgagors with the opportunity to remedy their default in terms of section 129(3) of the NCA in order to avoid execution against their home.¹⁴² In *Firststrand Bank t/a First National Bank v Zwane*,¹⁴³ the court extended protection even further to the mortgagors by adjourning *sine die* the applications both for the granting of default judgment in the accelerated amount of the debt and for declarations of special executability of the mortgaged properties in question. The court also directed that the applications could not be set down earlier than four months from then.¹⁴⁴ Bearing in mind the Practice Manual applicable in its area of jurisdiction, the court applied the rationale that, if, in each case, it granted default judgment in the amount of the accelerated debt and postponed only the application for the declaration of executability of the mortgaged property, this would leave the mortgagor exposed to the possibility of the mortgagee executing against the former's movable property and other assets. This, the court observed, might defeat the purpose of the postponement by jeopardising the capacity of the mortgagor to reinstate the mortgage bond by paying the arrears and prescribed charges and costs in terms of section 129(3) of the NCA.¹⁴⁵

5 Conclusion

Clearly, the South African common law principles relating to mortgage and those applicable in the context of execution against a mortgagor's immovable property that constitutes his or home, are rooted in Roman Dutch law. A number of fundamental Roman-Dutch principles feature prominently in contemporary South African common law. For example, as was the case in the developed Roman-Dutch law, a mortgagor remains owner of the mortgaged property; acceleration clauses are permissible and are frequently relied upon by mortgagees after a mortgagor's default; *parate executie* clauses are invalid in mortgage agreements in respect of immovable property and a judicial sale in execution is required. *A pactum commissorium* is invalid and therefore a mortgagee may not become owner upon a mortgagor's default, but may "buy in" at a sale in execution.¹⁴⁶ A mortgagor may "redeem" the mortgaged property by paying

141 *Idem* at par 18.

142 *Idem* at pars 13-17.

143 *Firststrand Bank t/a First National Bank v Zwane* 2016 (6) SA 400 (GJ), hereafter referred to as *Firststrand Bank v Zwane*.

144 *Idem* at pars 28 & 31.

145 *Idem* at pars 5-7 & 23-24.

146 See par 23 *supra*.

the total outstanding debt and costs at any time until registration of transfer of title, that is, even after a sale in execution has been held.¹⁴⁷

Certain Roman-Dutch procedural rules and practices may be identified as generally tending towards affording a measure of protection for the home of a debtor against execution by a creditor. These were rules which encouraged extra-judicial settlement negotiations and required personal service of summonses, four defaults before default judgment could be obtained in respect of a claim involving immovable property, and a more protracted procedure for execution against immovable, as opposed to movable, property. Exacting requirements were imposed in order to maximise the price obtained at a judicial sale of immovable property. There was also the rule that a creditor could not levy execution upon immovable property of great value for small debts unless the property was indivisible.¹⁴⁸

The same procedural rules and practices were not evident in the pre-Bill of Rights South African law but may be viewed as being more in line with the contemporary approach. For example, the requirements and procedure for a creditor to obtain default judgment were made more debtor-oriented by the decision in *Jaftha v Schoeman* and by an amendment to rule 46(1) of the High Court Rules as well as by the decision in *Gundwana v Steko*.¹⁴⁹ *Jaftha v Schoeman* also established precedent to the effect that execution may not be levied against a person's home in respect of a trifling debt.¹⁵⁰ Recently, proposals have also been made for the following: personal service of a notice of attachment of immovable property that constitutes a debtor's primary residence; and for the court, in appropriate circumstances, to set a reserve price for a sale in execution of a debtor's primary residence.¹⁵¹

Since the enactment of the NCA, the position is significantly different from that which applied at the time of the decision in *Absa v Ntsane*, in 2006. Then, Bertelsmann J found that it was an abuse of process for the mortgagee to seek to enforce an acceleration clause in the mortgage bond when the arrear amount was trifling. In the circumstances, the court granted judgment in an amount calculated with reference to the arrears only, and not the capital amount of the loan, and it refused to declare the mortgaged property specially executable. Now, section 129(3) and (4) of the NCA applies to counter the harsh consequences of enforcement of an acceleration clause. Most significantly, in *Nkata v Firstrand Bank (CC)*, the Constitutional Court confirmed that a mortgagor may remedy his or default by paying the arrears and prescribed costs at any time before the registration of title in the name of the purchaser in execution. This may occur even after a sale in execution has been held. The important difference between reinstatement, in terms of the NCA,

147 See par 4 3 *supra*.

148 See par 2 2 *supra*.

149 See par 4 2 *supra*.

150 *Ibid*.

151 See par 4 3 *supra*.

and redemption, in terms of the common law, based on Roman-Dutch principles, is that, for a mortgagor to redeem the mortgaged property, he or she had to pay the total outstanding amount of the debt, together with costs, at any time before registration of transfer of title to the purchaser in execution. Now, having considered “all of the relevant circumstances”, as a court is required to do, where appropriate, it may afford the mortgagor an opportunity to reinstate, or remedy his or her default, in terms of section 129(3) of the NCA, by simply postponing, even *sine die*, an application by the mortgagee for judgment in the accelerated debt amount and/or an application for a declaration of special executability of the mortgaged home.

Wessels observed that “tenderness towards the defendant always formed a marked feature in the procedure of the Dutch courts ... ”.¹⁵² He also commented that certain Roman-Dutch principles were “favourable” to a mortgagor.¹⁵³ Various aspects of the Roman-Dutch principles and procedural rules may be regarded as reflecting an approach that execution against immovable property should occur only as a last resort. These may be viewed as being more in line with contemporary, constitutional imperatives to balance the various rights applicable in the context of execution against a debtor’s home.

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*BROWN V LEYDS NO (1897) 4 OR 17: A CONSTITUTIONAL DRAMA IN FOUR ACTS. ACT TWO: THE 1858 ZAR CONSTITUTION, MALLEABLE INSTRUMENT OF TRANSVAAL REALPOLITIK (1859-1881)**

Derek van der Merwe**

ABSTRACT

This is the second in a series of articles on the historical and jurisprudential background to the well-known case of *Brown v Leyds NO (1897) 4 OR 17*, central to Chief Justice Kotzé's interpretation of the provisions for law-making in the 1858 *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek*. This article traces the subsequent history of the *Grondwet* against the background of the socio-political turmoil in which the Republic was engulfed, the annexation of the Transvaal in 1877 and the restoration of the Republic in 1881. It describes the *Volksraad's* readiness to amend the *Grondwet* from time to time, on matters big and small, and to adopt a somewhat *laizzes faire* attitude to the manner in which the *Grondwet* was amended. The manner in which the *Volksraad* made laws, either by means of the constitutionally-prescribed legislative process or by means of resolutions – an

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

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issue that became severely contentious in later years – is discussed and analysed. Also discussed is the uneasy relationship between the sovereign authority of the *volk*, the supreme authority of the *Volksraad* and the executive authority of the state president. It was the inability of both President Pretorius and President Burgers to fully appreciate the centrality of the *Volksraad*'s supreme authority in the Republican constitutional dispensation that led to their political demise. A final section examines the rise to political prominence of Paul Kruger (emphasising his obedience to the sovereign voice of the people as the voice of God) and of John Kotzé (emphasising judicial independence and integrity), against the backdrop of the annexation of the Transvaal by Great Britain and the successful war for independence fought by the *Boers*. This background is important for an understanding of the approaches adopted by Kruger and Kotzé in the later constitutional crisis they became embroiled in.

Keywords: 1858 *Grondwet*; constitution; constitutional amendments; unification; civil strife; *volk's party*; state party; *Volksraad*; supreme authority; sovereign authority; *volk*; *volkstem*; *Boer/Boers*; Paul Kruger; John Kotzé; MW Pretorius; TF Burgers; Keate Award; Alexander McCorkindale; annexation; War of Independence 1880-1881; supreme court; chief justice.

1 Introduction

The *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek*, approved by the people at Rustenburg on 18 February 1858,¹ was a significant landmark in the history of white settlement in the Transvaal, the more so because it had been achieved against heavy odds. It provided the final confirmation that in the republican democracy which the people presumed to embrace, the King's voice (the *koningstem*) belonged to the people (the *volk*). In the exercise of that sovereign authority the people had assigned to the *Volksraad* not only legislative authority but supreme authority (the *hoogste gezag*).² All (the president, the commandant-general, the Executive Council, the *landdrosts*) exercised their authority subject to the supreme authority of the *Volksraad*, an arrangement made possible through the people's exercise of their sovereign authority as captured in the *Grondwet*.³

The *Grondwet* was about much more than the codification of fundamental principles of government. It was also an important codification of much of the Republic's public law; in doing so it provided for settled and structured government. In the manner in which it steered a workmanlike course between competing claims to ultimate authority, it was and remained a symbol of hard-won unity, a triumph of dogged perseverance rather than jurisprudential acuity.

The *Grondwet* settled the form and nature of statehood in the society, but it did not transform that society. It did not bring prosperity, peace or harmony. The

1 The original 1858 *Grondwet* is published in Jeppe & Kotzé 1887: 35-69.

2 See arts 12 and 29 of the *Grondwet*. Unless otherwise indicated, all references to the *Grondwet* are to the 1858 *Grondwet*.

3 The manner in which the *volk's* sovereignty is captured in the *Grondwet* is discussed in the first of this series of articles: see *Fundamina* 2017 24(1) at 149-150 & 162-163

African co-inhabitants of the territory were still a real and present danger to the *Boers*, whether openly hostile to them or temporarily peaceable.⁴ They remained locked into an agrarian economy that developed only intermittently and in patches beyond subsistence levels. They were united, but that did not mean that they liked each other. Nor did it mean that they would forego their essentially individualist and contrary mind-set.⁵ To cap it all, MW Pretorius and Stephanus Schoeman both still harboured delusions of grandeur.

Soon after the formal approval of the *Grondwet*, the business of the inclusion of the self-proclaimed independent Republic of Lydenburg into the *Zuid-Afrikaansche Republiek (ZAR)* commenced. The formal unification of the Republic of Lydenburg and the ZAR was completed in April 1860, not without some acrimony.⁶

The years following the approval and implementation of the *Grondwet* were a time of turmoil and strife for the Republic. First, civil war disrupted the region; then the discoveries of large diamond and gold deposits in the southern African interior impacted severely on the brittle state administration of the ZAR; thereafter, Theophilus Shepstone annexed the ZAR to Great Britain in 1877, an event that re-ignited the dormant sense of national pride among the Transvaal *Boers* and gave Paul Kruger the opportunity to become the natural-born leader of the *volk*. The First Anglo-Boer War (*Eerste Vryheidsoorlog*) of 1880-1881 brought about the independence of the ZAR as a suzerain of Great Britain and a political stability that the ZAR had rarely enjoyed in the preceding years. The early 1880s also saw the parallel launch of the careers of State President Paul Kruger and Chief Justice John Kotzé, both aspiring, through different means, to leave their permanent imprint on the state. They regarded the *Grondwet* as their source of strength and inspiration.

2 MW Pretorius's designs to unite the ZAR and the Free State

As early as May 1858 the affairs of the Free State again loomed large in the government chambers of the ZAR.⁷ Moshoeshoe had seized the advantage offered to him by the

4 The regular discussions in the *Volksraad* in the late 1850s and 1860s on the ever-present threat posed by African tribes and how to deal with them (as recorded in the minutes of the *Volksraad* meetings (and reflected in *Volksraadsnotule II* and *Volksraadsnotule III*) is testimony to this constant morale-sapping and resource-sapping struggle.

5 In fact, in September 1859 the *Volksraad* found it necessary to make a law criminalising language uttered in private or in public that caused dissent, contempt or denigration of the state and made the offender liable to a wide range of punishments that included death and banishment: see art 26b in the minutes published in *Volksraadsnotule III* at 198 and see, too, the law published in *Volksraadsnotule III*: 602.

6 See the discussion by Wichmann 1941: 223-234; see, too, arts 1-18 of the minutes of the *Volksraad* meeting held in April 1860 in *Volksraadsnotule IV*: 37-51 esp 38-42.

7 On what follows, see, in particular, Van Jaarsveld 1951: 211-274 as well as Wichmann 1941: 199-211 and 235-245.

internecine conflict that raged between the *Boers* on either side of the Vaal River to attack the Free State *Boers* mercilessly. The Free State President, Boshoff, having been refused Cape colonial assistance by Governor George Grey, felt compelled (he was no friend of Pretorius) to seek the assistance of the *ZAR* or suffer being overrun by the Basotho armies. Pretorius, who hardly needed a second invitation, sought and gained permission during a special session of the *Volksraad* for him to lead a commando to assist the Free State.⁸ Yet again, as he had done the previous year,⁹ he chose to focus on so-called international affairs rather than on the pressing issues of internal unification and national conciliation in his own troubled country. Of course he used the opportunity to vigorously promote unification between the two Republics, the more so after a *ZAR* delegation led by Paul Kruger had helped secure a ceasefire with Moshoeshe.¹⁰ Circumstances were propitious for unification and some 1 500 Free State citizens demanded unification from their *Volksraad*.¹¹

Governor Grey, though, with more than enough strife to contend with both within the Colony and on its northern borders, had no intention of allowing Pretorius's grand unification designs to flourish. His own grand design was to establish a federation of southern African nations, black and white, under the benign protection of Her Majesty's British Empire (a project which enjoyed the support of President Boshoff and an influential portion of the Free State citizenry).

He wrote to President Boshoff to inform him, with no small manipulation of the truth, that if unification were to take place, it would invalidate both the Sand River and the Bloemfontein Conventions (signed respectively in January 1852 and February 1854).¹² That would mean that Great Britain would no longer consider itself bound to recognise the Conventions, placing a huge question mark over the independence of the two states. Not so, of course. The Conventions gave Britain no right to interfere *ex post facto* in the affairs of independent states. But the *Boers'* fear of Great Britain was only surpassed by their fear of God. They judged, correctly, that Britain was powerful enough to make and break the rules and have its way in southern Africa. The unification drive fuelled by Pretorius was therefore halted until *Boer* deputations could meet with Grey to discuss the future.

Nothing came of Grey's federation plans, though. He had acted independently of his London superiors, whose avowed stance was not to expend further resources on the expansion of British influence in southern Africa. Boshoff became a casualty of Grey's failed federation scheme. Never very popular with the electorate, he resigned in early 1859, estranged from the unificationists as well as from the federationists..

8 Arts 16-17 of the minutes of the meeting published in *Volksraadsnotule III*: 169-178 esp 176.

9 See the discussion in the first of this series of articles in *Fundamina* 2017 24(2) at 157-158.

10 See Van Jaarsveld 1951: 222-223.

11 *Idem* at 281. See, too, Wichmann 1941: 206 and Van Jaarsveld 1951: 230.

12 See Wichmann 1941: 206-208 and Van Jaarsveld 1951: 229-230.

Unification was now back on Pretorius's (and his supporters') agenda. Not on that of the *ZAR Volksraad*, though. The *Volksraad* feared the retraction of the Sand River Convention and the impact this might have on their independence. The *de facto* hands-off relationship they enjoyed with Britain outweighed even the most impassioned arguments of unification supporters. But Pretorius, buoyed by continued pressure in the Free State for unification, persisted in the pursuit of his father's dream of a united and independent *Boer maatschappij*. He made himself available for the vacant presidency of the Free State in the hope that being president of both Republics would somehow strengthen and hasten the unification process. It did neither. He was elected as President of the Free State in December 1859. He was sworn in in February 1860 for a limited term of office, having secured from the *ZAR Volksraad* – surprisingly – a six-month leave of absence. A key component of his unification design was to convince the Free Staters that their Constitution was flawed. The clear divide that existed, in his view, between the Free State *volk* and their *Volksraad* was because their Constitution, unlike the *ZAR Grondwet*, did not clearly enough articulate the *volkstem* of which the *Volksraad* was meant to be the representatives and interlocutors.¹³

Pretorius's plans were half-baked and, without the active support of the *ZAR Volksraad*, doomed to fail. In April 1860 the *ZAR Volksraad* (now including representatives of Lydenburg, none of whom were impressed by Pretorius and his schemes) temporarily suspended him as president, fearful that his activities in the Free State as a sitting president of the *ZAR* would threaten their treasured independence. Pretorius reacted to his suspension first with bluster (threatening them that they had to support him since the *volk* supported him) and then with demands that the legality of their conduct be demonstrated. The *Volksraad* responded in vintage *Grondwet* fashion, straight out of the constitutional rule-book Pretorius had himself helped to draft.

Its authority to take action against him, they informed him, is derived from a disapproving *volk*. Potchefstroom and Pretoria might support him, and these towns may be more influential in affairs of state than the others (the former was, after all, the capital, and the latter the seat of government). Demonstrably, though, they told him that he did not have support in the rest of the country where the *volk* constitutes the majority, if not in influence, then certainly in numbers. Its right to act against him derives from the highest authority it enjoys in the state, given to it by the *volk* and enshrined in the *Grondwet*. The nature of the action taken against him is prescribed by the *Grondwet* to which all owe obedience.

On 10 September 1860 Pretorius, with not much good grace, sought and was grudgingly granted an honourable discharge by the *Volksraad*. He remained president of the Free State until he resigned in June 1863.

13 See Wichmann 1941: 240; Van Jaarsveld 1951: 264.

3 Civil strife in the ZAR (1860-1864): Paul Kruger's successful promotion of a constitutional *Rechtstaat*¹⁴

As a condition of Pretorius's discharge as president, he and Commandant-General Stephanus Schoeman, in order to promote peace and unity in the Republic, had to engage with the *volk* in public meetings to inform them why Pretorius had sought and was granted his discharge. They did nothing of the sort. Sworn enemies not two years before, comrades-in-arms now, they sought in October to drum up support for Pretorius and his unification ideal against the *Volksraad* primarily in the Potchefstroom region and the Marico district in the far west. Their line was that the *volkstem* must be heard and that the *Volksraad*, no longer representatives or mandatories of the *volk*, must be overthrown.¹⁵ The good folk of Potchefstroom and those from the western parts of the country had kept the machinery of state going in the dark years of the previous decade and had been the driving force behind the *Grondwet*, while the people from Lydenburg and Soutpansberg had done little more than consistently derail well-intentioned efforts. And now these same nay-sayers were calling the shots. Hardly fair. Not two years earlier, Pretorius had campaigned tirelessly for unity and conciliation and the return of Lydenburg to the fold.

The *Volksraad* had appointed as acting president JN Grobler – one of the burgher members of the Executive Council – and not Schoeman, who, as the senior member of the executive, should have been appointed. Schoeman, though, would then have been obliged to give up the office of commandant-general, which the *Volksraad* did not want to happen. A Pretorius/Schoeman support group (calling themselves *Sprekers van die volk* – interlocutors of the people) then declared the decisions of the *Volksraad* invalid as they were contrary to the wishes of the people (and the *Grondwet*). They also gave President Pretorius leave of absence to pursue unification with the Free State, appointed Schoeman as acting president and replaced other members of the Executive Council. The revolution was underway.

When this revolutionary *volk's* party sought to drum up support in Rustenburg, they were met by a determined Paul Kruger. Kruger's stance was commendable: the integrity of the state and its institutions is guaranteed by the *Grondwet* and is sacrosanct. If there is indeed serious division in the country and if indeed the *Volksraad* is out of touch with the *volkstem*, this should be discussed at a general assembly of the *volk* and, if needs be, by referring the matter to a special court (as had happened with the 1857/1858 Pretorius/Schoeman fracas).¹⁶ Soon large parts of

14 The main sources of reference for the following section are Van Jaarsveld 1951: 253-320; Ferreira 1978: 174-184, 192-206, 240-246 and 256-314; and the minutes (or, in some cases, unofficial reports) of the *Volksraad* meetings sporadically held during this period available in *Volksraadsnotule IV*: 37-223 and *Volksraadsnotule V*: 3-27.

15 See Van Jaarsveld 1951: 272-276; Ferreira 1978: 178-181.

16 See, further, Van Jaarsveld 1951: 279-281.

the country had chosen sides: either for the *volk's* party of Schoeman and Pretorius or for, what came to be called, the state party of Paul Kruger. The latter stood for the constitutional integrity of the state and rejected revolutionary activity.

The division also manifested itself along church-based lines. When, in 1859, Dirk Postma arrived from Holland as a minister of religion for the Transvaal *Boers*, he organised a church around the ultra-orthodox *Dopper* sect of the Calvinist-inspired Reformed Church. They called themselves the *Gereformeerde Kerk*, to distinguish themselves from the other Reformed churches, the *Hervormde Kerk* (the state church of the ZAR under the control of Potchefstroom-based Dirk van der Hoff) and the *Nederduits Gereformeerde Kerk* under the control of the Cape Synod (to which the majority of Lydenburgers owed allegiance). Paul Kruger was the best-known and most influential member of the *Dopper* church. To the consternation of the members of the *Hervormde* church, the formation of the *Dopper* church meant a disassociation from the state church. Members of the *Dopper* church and of the *Nederduits Gereformeerde* church, in turn, resented the anti-state agitation indulged in by the *volk's* party members, most of whom were members of the *Hervormde* church. They were adamant that all owed obedience to the Biblical injunction (also entrenched in Calvinist doctrine) to defend the integrity of the state. For these men, faith and politics were but two sides of the same coin.

Pretorius, true to form when decisive leadership was required, chose at this time to absent himself from the ZAR and returned to the Free State. Schoeman was now in his element. In early December 1860 he travelled to Pretoria, where Acting President Grobler had in the meantime resigned. Schoeman proclaimed himself acting president and appointed his own Executive Council. He also, with no little cheek, called for a meeting of the *Volksraad* in January 1861. The *Volksraad* would not kowtow to Schoeman. Defiantly, they arranged a special court sitting, in which five members of the *volk's* party were found guilty of various misdeeds and issued with hefty fines.¹⁷

Schoeman called a general meeting of the people in April 1861. Only his supporters arrived and obligingly denounced the *Volksraad* and confirmed his status as acting president. Pretorius, in the meantime, had been convinced by a joint commission that it was impractical to expect immediate unity of the two Republics and that fraternal co-operation between them was the best that could then be achieved. He informed Schoeman that he no longer saw his way clear to returning to the ZAR as president. A mere three years after the approval of the *Grondwet*, the ZAR once again found itself in a political crisis.

In September 1861 another people's assembly was organised by Schoeman in Pretoria. It merely entrenched divisions. Kruger now decisively entered the fray. He fulminated from public platforms that the only conceivable way forward was to

17 *Idem* at 282; Ferreira 1978: 194-1954.

remain true to the *Grondwet*. It was the source of legality and of the integrity of the state. This meant a return to the state of affairs that had prevailed before Pretorius and Schoeman began their agitation against the *Volksraad*. Schoeman would not be intimidated by Paul Kruger, whom he derided as the king of the Doppers, the Transvaal Garibaldi and nothing more than an insolent potbelly. Armed conflict between supporters of Schoeman's *volk's* party and Kruger's so-called state party on the western outskirts of Pretoria was avoided when Pretorius facilitated a truce. Part of the brokered deal was to constitute a new *Volksraad* – a moral victory for Schoeman.

A newly-constituted *Volksraad* met in Pretoria in April 1862. Commendably, they exhibited backbone during their extended session and meticulously worked through the available evidence, identifying numerous instances of unconstitutional conduct on the strength of which charges could be brought before a special court.¹⁸ Schoeman, they decided, occupied his position unlawfully and should be suspended. Pretorius was not the president and could not claim to be so. WCJ van Rensburg (1818-1865), *voortrekker*, erstwhile *Volksraad* member and a former ally of Schoeman, was appointed acting president along with an acting Executive Council, until the special court had decided on all of the matters referred to it. Schoeman, Pretorius and their supporters, unsurprisingly, rejected the decisions taken.

The special court convened in Pretoria in August 1862. Hundreds of rowdy and boisterous supporters of both parties gathered and security measures were put in place. It never got underway: Schoeman and his supporters disrupted the proceedings and barricaded government offices, demanding Pretorius's re-instatement as president. Forces loyal to Acting President Van Rensburg surrounded the town and re-opened the government offices. Van Rensburg established his headquarters in Rustenburg and Schoeman entrenched himself in Potchefstroom. The revolution had begun and military confrontation was inevitable.

In September 1862 Schoeman's so-called *volk's* army and Paul Kruger's state army were ready for conflict, both sides spoiling for action. On 9 October the first shots of the so-called civil war were fired. Schoeman went to the Free State, spouting venom against Kruger and his army and accusing them of trying to impose a *Dopper* ascendancy on the country and of behaving not unlike Cromwell and his Puritans.¹⁹ Upon his return, the two armies (neither boasting more than 1 000 men at full strength) squared off against each other near Potchefstroom, but bloodshed was averted when Pretorius mediated peace. Each party would submit their grievances to a special court constituted by non-ZAR burghers (Chief Justice Harding of Natal was mooted as chairman) and functioning in accordance with the provisions of the *Grondwet*.

18 The minutes of the session, held from 2 to 26 Apr 1862 in Pretoria, are published in *Volksraadsnotule IV*: 93-153.

19 Van Jaarsveld 1951: 300-301.

The date scheduled for the court hearing was 12 January 1863. None of those nominated to serve as judges was available, so Van Rensburg's government appointed a court comprised of locals to convene in January 1863. Schoeman would have none of it, though. In true revolutionary style, he entered Pretoria with an armed escort, took possession of the government offices, appointed his own officials and proclaimed himself acting president – and commandant-general for good measure. Kruger retaliated by assembling, with hostile intent, his men outside Pretoria. Again Schoeman fled the scene and retreated to the Free State.

The special court, in the meantime, found Schoeman and a number of his co-revolutionaries guilty of seditious behaviour. He and four others (including his son) were banished from the Republic, outlawed and their property confiscated.²⁰ A measure of peace had been restored and ordinary government business proceeded. Elections for the positions of president and commandant-general were held in April 1863. Pretorius had resigned as president of the Free State in the same month and made himself available for election. Chicanery at the ballot box was suspected and the elections were re-run in October.

At the October elections Van Rensburg was elected as president when he beat Pretorius by the narrowest of margins. Paul Kruger was elected as commandant-general by a huge majority. Suspicion, intrigue and plotting were the order of the day. Van Rensburg was deemed to be a mere puppet in the hands of the real power, Kruger, the so-called King of the *Doppers*. Pretorius began to gather significant support around his person country-wide. There was very little statesmanship on display; factional interest dominated.

The state was in turmoil. During this period the Lydenburgers had to expend all of their energy on yet another war with African tribesmen in the east, and withdrew from the seemingly endless bickering in the west. In fact, a number of petitions were received from Lydenburg stating that there should rather be no government, as the current government was patently inept.²¹ The Lydenburg withdrawal left Kruger with much reduced support. President van Rensburg declared martial law on 5 December 1863. Kruger arrived in Potchefstroom in December with less than one hundred troops, to find that an army in excess of five hundred had gathered there under the leadership not of Schoeman (banned to the Free State), but of another leading member of the *volk's* party, the redoubtable Jan Viljoen of Marico, famed hunter and veteran of Boomplaats. The odds were stacked against Kruger. Most of his men were captured and this time it was he who had to beat an ignominious retreat over the Vaal River to the Free State.

Viljoen was now declared commandant-general and Pretorius was invited to take up his rightful position as president (a position, so it was argued, he had never foregone). With Schoeman in train, Viljoen marched to Pretoria. When told that

20 *Idem* 303-304; Ferreira 1978: 287-290.

21 See Swart 1963: 72-79.

Van Rensburg and his government had ensconced themselves in Rustenburg they continued their march to the west. Kruger, meanwhile, had re-grouped and the two armies met in the vicinity of the Crocodile River, west of Pretoria (near where the Hartbeespoort Dam is today). Kruger outmanoeuvred Viljoen, both sides suffered casualties and Viljoen was forced to retreat. As with all of the skirmishes in this civil strife, there was no decisive victory or defeat. Pretorius again mediated between the two parties. A peace treaty was signed in which (again) a special court was mooted and a form of co-government was agreed to that would precede yet another presidential election. The court never sat. No external parties were available for such a sitting. Both parties had hoped that the influential JH Brand, who had been elected as state president of the Free State in 1863, would be one of the judges. He (wisely) declined.

The presidential elections took place in May 1864 and this time forty four-year old Pretorius beat Van Rensburg by a comfortable majority to become president of the ZAR for the second time.

Peace at last. The Executive Council granted amnesty to all, including Schoeman, and everyone could return home. Peace, though, was not much better than war. Farms and families had been neglected, hostile African tribes were everywhere, the little trade there was had suffered and the struggle to subsist and survive became yet again the dominant force in the lives of the burghers. Peace, though, did have one inestimable benefit: it allowed for the sort of political stability on which sound government administration could be founded. Settled conditions allowed an industrious *Volksraad* and a hard-working government administration (staffed in large part by competent young Hollander immigrants) to achieve a great deal and to put the Republic's affairs of state on as sound a footing as the social and economic conditions of the country allowed.

The civil strife that plagued the benighted Republic in these years brought about no major constitutional revisions. It did, though, have an important constitutional impact and therein lies its interest for later constitutional discourse. In the run-up to the 1858 *Grondwet* it was easy to badmouth the latest constitutional effort and to dismiss it as partisan chicanery. Now the *Grondwet* stood firm. Both sides appealed to the *Grondwet* to bolster their claims that the other party was in the wrong. Much credit for this must go to that "*parmantige dikpens*"²² (insolent potbelly), the *Dopper* Paul Kruger. He insisted throughout that the *Grondwet* was the benchmark against which to judge the merits of the statements made and actions engaged in by the combatants. His military skills apart, Kruger's firm stance in upholding the *Grondwet* much enhanced his reputation and provided the springboard for his later political dominance of Republican politics.

22 See Van Jaarsveld 1951: 288.

The civil strife also highlighted the lack of maturity of a political system that proclaimed the *volkstem* as the foundation of the Republican constitutional democracy. Both sides appealed to the *volkstem* as the arbiter of the justness of their actions. The *volk's* party appealed to the majority support they had in the Republican capital (Potchefstroom) and at the seat of government (Pretoria). To be sure, these areas – and Rustenburg – had been at the centre of the attempts in the 1850s to transform the Republic into a constitutional democracy and they certainly had been the torch-bearers of the constitutional cause. Their views mattered and they could not be faulted for their cynicism towards the actions of the eternally-oppositional Lydenburg and the uncouth hunting and fighting Soutpansberg good-lifers. The reality, though, as pointed out time and again by Paul Kruger and his state party, was that since 1858 the *volk*, for better or for worse, comprised *all* of the regions; the system adopted for the unified Republic was that of one-man (white, Dutch Reformed), one-vote. The best means to test the *volkstem* was to arrange for a people's assembly to have their voices heard and their votes recorded. But this was very difficult in the prevailing socio-economic conditions. In any event it would not have addressed the problem of the tyranny of the majority that the Lydenburg field-cornets had so fussed about in 1854. An appeal to the *volkstem* could readily be a fairly transparent political ruse and would remain so in later years when Paul Kruger exercised *de facto* autocratic powers.

4 The influence of *Boer Realpolitik* on the *Grondwet* in the 1860s

4 1 Introduction

In the mid-1860s the government presided over by President MW Pretorius and the state – of which the *Volksraad* was the *hoogste gezag* (highest authority) – remained isolated and poor. State revenue was insufficient even to consistently pay the salaries of all its officials. Some tin and lead mining took place and copper mining was lucrative for enterprising individuals, but in general mining was of no substantial benefit to the *ZAR* economy.²³ In the place of hard cash, and in the absence of a bank, the government had, since 1859, relied increasingly on government promissory notes – secured with government land – to meet its financial obligations, but the scheme lacked credibility and was a source of constant mockery. Despite the presence in the Republic of many foreign hunters, explorers, adventurers, traders and craftsmen, foreign interest in the *ZAR* was negligible and investment non-existent. African tribes within and outside of the Republican borders (borders imprecisely defined and determined by claim rather than agreement) remained aggressively hostile towards the *Boers*.

23 See Jeppe & Kotzé 1887: 125 & 295-296; and Bulpin 1953: 109.

Despite these depressing socio-economic conditions prevalent in the 1860s, once peace reigned, sincere efforts were made by a new generation of committed *Volksraad* members to run the country properly and in close conformity to the dictates of the *Grondwet*. They were assisted by a fair number of young Hollanders and some Germans who had trickled into the country in these years and whose capabilities considerably enhanced the administrative efficiencies of the Republic.

4 2 The malleability of the *Grondwet* demonstrated

The *Grondwet* had stood firm amidst the political turmoil. Afterwards *Volksraad* members and officials were scrupulous in their desire to adhere to the letter of the *Grondwet* in their official activities. This did not mean, though, that it remained unchanged. Sporadically, the *Volksraad* saw fit to make revisions to it, as circumstances demanded. As early as September 1858, a mere seven months after the *Grondwet* had been approved, the *Volksraad* passed a number of amendments to the *Grondwet*. One, in fact, had important political consequences, in that it allowed for the removal of one of the qualifications for enfranchisement, namely membership of the Transvaal Dutch Reformed Church. In the coming years the *Volksraad* would further approve a number of amendments to the *Volksraad*: on matters of important constitutional consequence (in 1860, an increase in the membership of ordinary burghers of the Executive Council from two to not more than four,²⁴ and, in 1862, to provide for a high court with the capacity to hear charges of misconduct against not only the president and his executive, but also against *Volksraad* members²⁵); and on lesser matters (such as the regularity with which the president was obliged to visit the different regions²⁶). In 1864 consideration was even given to a substantive revision of the *Grondwet*, although nothing came of this.²⁷

The *Grondwet* was not only subject to regular amendment, it was also deemed necessary in 1859 for it to be supplemented. Four supplements were approved by the *Volksraad* in September of that year.²⁸ The first supplement clarified what was meant by the term *Hollandsche wetten* referenced in the Thirty-Three Articles and other legislation. In so doing it provided the well-known law of citations for the Roman-Dutch common law of the Transvaal.²⁹ The second provided clarification on the law

24 Art 42 of the minutes published in *Volksraadsnotule IV*: 48. This amendment was a consequence of Lydenburg's re-incorporation into the ZAR.

25 Art 62 of the minutes published in *Volksraadsnotule IV*: 111-112. The amendment was passed during the civil strife to make it possible for the special court of Apr 1862 to hear charges preferred against members of the recalcitrant 1860 *Volksraad*.

26 Art 26 of the minutes published in *Volksraadsnotule V*: 3-18 at 16.

27 Art 225 of the minutes published in *Volksraadsnotule V*: 27-68 esp 67.

28 Arts 52, 53, 55-58 and 61-62 of the minutes published in *Volksraadsnotule IV*: 9-33 esp 24-25 and see, also, 315-322 for the supplements.

29 On which see Wildenboer 2015: 465-468 and sources cited.

to be applied by the courts when adjudicating on matters involving land rights that had been left pending prior to the approval of the *Grondwet*.³⁰ The third supplement provided for rules of civil and criminal procedure and the fourth for a rudimentary tariff of legal costs.

Interestingly, the first set of amendments were done not by the passage of legislation in the format prescribed by article 12 of the *Grondwet*, but by means of a *besluit* (resolution). The enfranchisement amendment was passed subject to a three-month opportunity for public comment, but the other amendments had no such conditionality attached.³¹ This flexible approach to the manner in which these amendments (and the 1859 supplements) were passed, set the tone for future *Grondwet* amendments: Sometimes the amendments were passed by means of laws, sometimes by means of resolutions; sometimes the proposed amendment was published for public comment three months prior to its discussion in the *Volksraad*, at other times the amendment was passed with a three-month period granted for public comment afterwards; again, at times amendments/supplements were approved with immediate effect because they “brooked no delay” (as provided for in art 12) while at other times this condition was not referenced. There was no discernible rationale for the different approaches adopted each time the *Grondwet* was amended by the *Volksraad*. Certainly, it did not reside in any distinction that could be drawn between mere administrative or regulatory amendments and amendments of a more substantive nature.

It is apparent from the minutes of the *Volksraad* meetings held during these years that the *Volksraad* was intent upon exercising the constitutional status they enjoyed as not only the legislative authority in the state, but indeed as the highest authority in the state, subservient to none in the manner in which it exercised that authority. Clearly, they did not allow themselves to be encumbered by rigid adherence to provisions in the *Grondwet* on how laws were to be made or how they were to be amended. Nor did they treat the *Grondwet* as sacrosanct or its provisions as immutable and fundamental.

4 3 Law-making by means of legislation and by means of resolution

As indicated above, the *Volksraad* in these years legislated either by passing laws as prescribed in article 12 of the *Grondwet*, or by means of the passing of resolutions

30 In 1867 State Attorney Kleyn, in a matter concerning State President Pretorius’s alleged unlawful conduct, extended the application of the second supplement to extend beyond only pending matters at the time the *Grondwet* was approved in 1858. His interpretation carried the approval of the *Volksraad*. See arts 212, 223 and 233 of the minutes of the Sep-Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 66, 69-70 & 74.

31 Arts 22-23 of the minutes in *Volksraadsnotule III*: 188-199 esp 195-198.

(*besluiten*) that had its origin in the exercise of its supreme authority. The passing of resolutions had in fact been the dominant form of decision-making by the *Volksraad* in the 1850s. Both means had the same outcome: they produced formal pronouncements of the *Volksraad* enforceable against all. Did the *Volksraad* itself recognise any distinction between law-making and resolutions? After all, the distinction between law-making by means of legislation (constitutionally-prescribed) and by means of resolution (nowhere prescribed but inherent in the nature of *Volksraad* authority) was the source of much contestation in later years.

When in September-October 1864 the *Volksraad* was called upon to approve rules of procedure for the *Volksraad*,³² an opportunity presented itself to clarify this distinction. It did not happen, though. Perhaps the members thought the distinction was axiomatic enough for them not to bother. A draft law, according to the rules, was considered only after it had been published in the *Government Gazette* for three months unless the *Volksraad* itself decided (ie resolved) to dispense with the public notice. Draft laws, stated the rules, did not include *gewone raadsbesluiten* (ordinary council resolutions). So they did acknowledge a distinction between the two types of legislative activity.

If a *gewone raadsbesluit*, then, was not a “law”, what was it? Both had force of law, in the sense that both types of rule-making created rights and obligations, private and public, enforceable against all. Conjecturally, the distinction lay, firstly, in the *source of authority* of the *Volksraad*: the *Volksraad*’s competence to make laws resided in its *legislative authority*; its competence to make resolutions resided in its status as the *highest authority* in the state. Secondly, it lay in the *actual source*: the source of (draft) laws was the president and his Executive Council; the source of resolutions was the *Volksraad* itself, either reacting to the *volkstem* expressed through petitions or its own considered judgment on the need for a ruling on a particular matter. These distinctions, if indeed valid, were distinctions of form and not of substance. One suspects that any self-respecting *Volksraad* member in these years would have been perplexed had he been told, as Chief Justice Kotzé would write in *Brown v Leyds* in 1897, that a *besluit* had not the quality of binding law unless it complied with the public notice provisions of article 12 of the *Grondwet*.

4 4 The evolving relationship between the sovereign authority of the *volkstem* and the supreme authority of the *Volksraad*

Having definitively spoken through the *Grondwet* of 1858, the *volk* had found no occasion to raise its collective voice in the ensuing years. To be sure, people’s

32 The Rules of Procedure approved in 1864 are published in *Volksraadsnotule V*: 192-198. See, too, arts 10-21 of the minutes published in *Volksraadsnotule V*: 27-68 esp 32-36.

assemblies had been called on more than one occasion during the civil strife, but these gatherings had been partisan, rabble-rousing affairs and provided no platform for the king's voice of the entire *volk* to be heard.

The sovereign voice was raised, though, in 1865. Fourteen regulations and ordinances, drafted by the state attorney in 1864 and dealing with important matters of state and judicial administration, were proposed to the *Volksraad* by the president in September. This was the first *Volksraad* sitting after the civil strife had ended. The *Volksraad* had discussed each in turn and approved each draft with or without amendments – a thorough and a necessary exercise. However, at least 1 000 burghers had petitioned the president, voicing their opposition to all (or many) of the ordinances and laws passed and published in the *Government Gazette* in March 1865. For good measure, they also expressed opposition to State Attorney SJ Meintjes, who was responsible for their implementation.³³ Emotions still raw from the civil strife, there were disturbances among the burghers at the high-handedness of the *Volksraad* and its poor communication of the fruits of its legislative activity.³⁴ This prompted the *Volksraad* to acknowledge that these laws had not been published for public comment prior to their approval and that a three-month period should therefore be allowed for public comment, whereafter they would again be considered by the *Volksraad*.³⁵ Having learnt its lesson, the *Volksraad* decided in March 1866 to consider only the five most urgent sets of regulations and ordinances and to give yet more opportunity for public comment in respect of the others.³⁶

The king might slumber but, when stirred, his – the *volk's* – voice would rise in protest. Its representatives in the *Volksraad* could amend the *Grondwet* as and when they deemed fit and they could do so by whatever legislative means they considered appropriate for the circumstances – they were, after all, the *hoogste gezag*. What they could not do, though, and against which the *volk* would rise in protest, was to adopt heavy-handed tactics such as to approve and implement a range of legislation that impacted directly on the *volk's* interests without proper consultation and communication.

Apart from this occasion, the people were seemingly happy to acquiesce in the manner in which the *Volksraad* conducted its business and the manner in which its interests were served through not only its representatives, but also the regular audience that was granted to the people's voice (*volkstem*) by means of the endless petitions the *Volksraad* were confronted with. No contemporary reflections exist on the nature of the relationship that existed between the *volk* and the *Volksraad*,

33 A summary of the petitions, prepared by a *Volksraad* committee commissioned for that purpose, is published in *Volksraadsnotule V*: 332-333.

34 Article 32 of the Jun minutes published in *Volksraadsnotule V*: 68-83 at 78.

35 Article 36 of the minutes published in *Volksraadsnotule V*: 68-83 at 80.

36 Article 480 of the minutes of the Feb to Apr 1866 meeting published in *Volksraadsnotule V*: 86-150 at 122.

between the sovereign and the supreme authority. An analysis of the minutes of the *Volksraad* meetings in these years and of the sundry documents that were presented to the *Volksraad* suggests that – subconsciously – the burghers of the ZAR employed two related fictions in the manner in which they conceived of democratic governance in their state.

The first fiction they embraced was that no distinction existed or could exist in their *Realpolitik* between *volk* and *Volksraad*.³⁷ They supported this fiction (because fiction it was, or at most a stylised representation of reality) as long as the *Volksraad* and the government exercised the authority described in the *Grondwet* in a way that was least intrusive on and most supportive of their chosen way of life. When, however, the government needed *them*, to pay taxes and licence fees, to enlist in commandos, to fairly treat their so-called apprentices, to submit to laws that placed limitations on the use of their property and on their personal rights and freedoms, to abide by the decisions of the law courts and to respect authority; then they were prepared to tolerate only so much intrusion and no more. Government weakness and limited resources meant that too severe intrusions happened but rarely. When it did, when the *Volksraad* did not *represent* them but *prescribed* to them, when it exercised its highest authority in a way that did not clearly or appropriately or even approximately articulate their *volkstem*, and did so in respect of matters that threatened their freedom, then they were ready to exercise their *koningstem*. In the *volkswil* resided the ultimate legitimacy of the state and its apparatus. This they understood. This was the political instrument to trump an overreaching government.

They adopted yet another fiction. This was the fiction that the *volk* was homogenous. This was so even though it was spread over vast distances in regional enclaves, embodying clear differences between town and country, between non-*Boer* and *Boer* burghers, between the manner in which they exercised their religious faith, between those who enjoyed some prosperity and those who were poor. According to the fiction the *volk* was like-minded enough, small enough in numbers and separated from the state apparatus by a recognisable enough mental layer, to have a definable concurrence of interests and to be stirred to like-minded passion by a heedless government. The fiction allowed burghers from a single district, when promoting merely regional interests in petitions, to glibly assert, in 1868, and as they had often done in the past, that their interests coincided with that of *het Volk, de koningstem des lands*.³⁸ It further allowed them, in 1871, to demand from their mandatories in the *Volksraad* an amendment to the *Grondwet*, despite opposition from the mandatories themselves.³⁹

37 See, eg, arts 354-355 of the minutes of the Sep-Nov 1866 *Volksraad* meeting published in *Volksraadsnotule VI*: 3-79 esp 36-37.

38 See Kleynhans 1966: 23 with reference to a petition from the troublesome Wakkerstroom district, unhappy with the officials elected by the President.

39 Wypkema 1949: 379 n 3.

This fiction also informed the *Volksraad*'s refusal to swear in SJ Meintjes, sometime State Attorney and State Secretary, when legitimately elected as *Volksraad* member for Pretoria in September 1867. The *Volksraad* refused to do so because State President Pretorius (he was styled "state president" since 1864) had informed them that he had received yet another petition, similar to many in the past, protesting vehemently against Meintjes as a member of the state apparatus. The petition (signed by eleven burghers only) warned that they would not recognise any *Volksraad* decision as lawful if Meintjes was a party to it. The state president then insisted that the *Volksraad* remove Meintjes as a member. Incredibly, the *Volksraad* acquiesced and Meintjes was not sworn in. They did so because the state president's insistence was in compliance with the *wensch des volks* (the wish of the people). Whatever Meintjes's demerits as an official and representative of the people⁴⁰ – they must have been many to excite so much opprobrium – he had been duly, that is, constitutionally elected as *Volksraad* member. No matter, decided the *Volksraad*: the people had badgered the state president for long enough and their will be done. The *Volksraad* was the highest authority and their (and their state president's) judgment on the matter held sway, whatever the provisions of the *Grondwet*.⁴¹

At the same *Volksraad* meeting two elected members (backed by their constituents) refused to be sworn in according to the oath prescribed by the rules of procedure approved in 1864. They insisted on being sworn in according to the oath prescribed in the *Grondwet*. The *Volksraad*, anxious for it to be quorate and effective, approved a return to the oath prescribed by the *Grondwet*, because "*aan de bekende begeerte van het volk gehoor moet worden gegeven*" (the acknowledged wishes of the people must be complied with).⁴² Here, then, a section of the *volk* exercised their voice on a matter deemed contentious and divisive. In compliance with the fiction that there was a concurrence of opinion among the entire *volk* on contentious issues, it was deemed to reflect the voice of all. There was much merit in a call to revert to the more appropriate *Grondwet* oath. However, the *Volksraad* did not base their decision on merit. They based it rather on the desire to be obedient to the *volkstem*, the voice of the people. The *volkstem* was apparent from a petition signed by twenty-six burghers from Pretoria on behalf of the two members; from the statements of four other members saying they were pretty sure their constituents felt the same; and from the opinion of Commandant-General Paul Kruger that he was sure the majority of the people wished the *Grondwet* oath to be administered.

4 5 Reflection

By the mid-1860s, then, the *Grondwet* stood firm, its democratic credentials and its legitimacy intact. The *Volksraad* and the president and his executive had provided

40 See Wildenboer 2013: 449 n 41.

41 See arts 2-3 of the minutes of the Sep-Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 4 (and see, too, at 3).

42 Arts 25 and 28 of the minutes published in *Volksraadsnotule VII*: 3-80 at 8-9.

ample evidence of their subservience to the *Grondwet*. It was an important instrument of sound administration and good governance as well as a source of rules and principles that guided the government and the legislator and to which considerable weight was attached. It was, though, a law like any other and, like any other law, was amended, revised or amplified from time to time to adapt to changing circumstances.

The changes were effected by law and by resolution. The *Volksraad* bowed to no one in its (re-)assertion of its highest authority, except to the *volk*, who retained its right to hold the *Volksraad* accountable for compliance with the provisions of the *Grondwet*. The approach adopted by the *Volksraad* towards the *Grondwet* – deference to its *volk*-based authority, but not blind deference to a flawed instrument, nor unquestioning obedience to a mythical supra-norm – set the tone for the role the *Grondwet* was to play in later years. This was also the case from the late 1880s onwards, when the social and economic circumstances of the country changed so radically that the 1858 *Grondwet* really by then reached its natural sell-by date and could no longer serve the country's governance needs through regular maintenance alone.

The people lived solitary and self-sustaining lives for the most part and did not, in fact, *need* much government. Their voice was the king's voice, to be sure, but they were satisfied that that voice found expression in the *Volksraad* and in the apparatus of government that supported *volk* and *Volksraad*. Their interests were served by the *Volksraad* members elected biennially and by the *memories* (petitions) that formed the staple of *Volksraad* discussions.

5 The late 1860s: The brittleness of the ZAR's constitutional fabric exposed

5.1 Introduction

Pretorius's Republic of the late 1860s and early 1870s would have struck the casual foreign observer as a very strange place indeed.

In Pretoria he would have met, first, a well-intentioned, but ineffectual president; secondly, the popular commandant-general, Paul Kruger – a natural leader, deeply religious, immersed in *Boer* politics; thirdly, stolid, bearded, black-frocked *Volksraad* members, meeting in months' long annual *Volksraad* sessions, radiating dignity and serious-mindedness (if not always elevation of thought), conscious of their God-given duty to represent the *volk* and to create the conditions for good governance; and, fourthly, government officials, young *Hollanders* mostly, some *Boers*, some Germans and some Englishmen, eager to make their mark in a country very much in need of non-agrarian skills. In Pretoria, Potchefstroom and the larger towns he would have been surprised to find many foreigners among the citizenry, mostly but by no means only English, mostly traders and craftsmen, but also hunters, adventurers,

prospectors, teachers and journalists (the first newspaper in the ZAR, the bilingual *Transvaal Argus*, was first published in Potchefstroom in May 1866).⁴³ English, in fact, was an acknowledged *lingua franca* in the towns.

Those who lived beyond the urban areas on farms, big and small, were mostly the *Boers*, some 25 000-odd by now, spread thinly over the vast plains of the Transvaal. He would have found them unlike any Europeans he had met before. Fully attuned to their natural surroundings, they were deeply pious, conservative and inflexible, spiritual relics of the eighteenth century. The *Boers* were also hospitable and generous to co-burgher and foreigner alike, but ungenerous towards Africans (reduced through Biblical interpretation to inferior beings); solitary and taciturn by nature, but loquacious, disputatious and thin-skinned when stirred in religious and political debate; being no strangers to hardship, resilient and possessed of natural strength and fortitude; strong-willed, but lacking in more than rudimentary learning and not as a rule naturally enterprising. In fact, a race apart, neither Dutch nor even Cape Dutch, not still European nor yet African. They had, in a remarkably short period, developed a definable identity, one that espoused a set of values and a lifestyle closer to the eighteenth than the nineteenth century.⁴⁴

It was a country that suffered severe socio-economic privations. Hostilities between Africans and *Boers* continued unabated. Thirty years after first trekking into the southern African interior, the policy of the *Boers* towards the Africans – vastly superior in numbers and increasingly able to match *Boer* firepower – had changed little. They were deemed an inferior people and not, as the British missionaries would have it, their equals in the eyes of God. African and *Boer* inhabited the same geographic space and there was mutual benefit (labour, trade – including trade in women and children – and security) to this close proximity. But neither *Boer* nor African was willing to treat the other as neighbours living in a cordial relationship of give-and-take. The *Boers* would subjugate the Africans to their will, if not through persuasion, then through force. One important consequence of this attitude was that living-space boundaries remained ill-defined, because they did not result from agreements negotiated between equals and so lacked the legitimacy that otherwise bind contracting parties that negotiate freely and willingly.⁴⁵

43 Bulpin 1953: 109.

44 Many character sketches of the Transvaal *Boers* by contemporaries visiting the Transvaal in the nineteenth century (some written with more prejudice than others) exist. Giliomee 2003: 189-191 quotes extracts from some of these observers. See, too, Bulpin 102-106 and Giliomee 2003: 168, 176-177, 180-181 & 189-192.

45 Art 9 of the 1858 *Grondwet* decreed that there would be no equivalence in either Church or State between Whites and Blacks: see Jeppe & Kotzé 1887: 36. In June 1852 the *Volksraad* directed two commandos deployed against African tribes to dispossess the Africans of their arms, recover stolen cattle and to “force them into service”: see art 87 of the *Volksraad* minutes published in *Volksraadsnotule II* 70-84 at 83. See, generally, also Giliomee 2003: 176-177 & 180-181.

So, in the mid to late 1860s the ZAR was (still) at war with African tribes to the south-east, the west, the north and the east of the Republic, often at one and the same time. Indeed, Schoemansdal, the capital of the Soutpansberg region in the north, had to be evacuated by the *Boers* in 1867 when they lost their authority there in the aftermath of a Venda onslaught and humiliating *Boer* military inefficiency. The more sober-minded burghers were probably grateful, given the anarchic and wanton conditions under which most of the white settlers had lived there, dependent on the trade in ivory.⁴⁶ The ZAR could not afford even one of these wars: they were debilitating, demoralising and costly with little gain.

It also didn't help that some individuals in the far northern and north-western parts of the country still openly trafficked in African children. As late as 1866 individuals from the Soutpansberg were still being arrested and charged with child trafficking.⁴⁷ The *Volksraad*, at Pretorius's urging, yet again had to strengthen the law to proscribe and heavily punish activities that went beyond the euphemistically called "apprenticeships" of orphans and that resembled trafficking in child slaves.⁴⁸ With such activities still present in the Republic, constant warfare with African tribes and the well-documented wantonness of many of the whites (*Boers* and non-*Boers* alike) in the godless far north, Pretorius had no chance of securing an attentive, empathetic investor audience from Britain or Europe.

The state of education in the ZAR by 1867 was dismal. Only the government school in Pretoria was doing well with three teachers teaching fifty-odd Dutch speakers and forty-odd English speakers. However, there was only one state-funded teacher in Potchefstroom and one in Lydenburg, with one promised for Rustenburg. In March 1868 the *Volksraad* placed control of education in the hands of the Executive Council.⁴⁹

Pretorius's biggest problem was the severe shortage of state revenue. This was due to various reasons: the *Boers* were notoriously difficult to extract tax from; there were no large industries in the Republic; income from licence fees was small and hardly recurrent; and such trade as did take place in *Boer* products (animals and animal products, wheat, grain, tobacco and fruit) was either conducted on a barter basis or else generated too small a cash flow to keep the state solvent. Metals and minerals (lead, copper, iron, tin and such-like) were being mined in the Republic, but the scale was small and the yield too insubstantial to generate recurrent state revenue. Gold and diamonds were rumoured to exist, but had yet to be found.

46 On the state of law and justice in and around Schoemansdal, see, most recently, Wildenboer 2013: 441-462.

47 See communication to the *Volksraad* of an Executive Council decision of 22 Oct 1866 published in *Volksraadsnotule VI*: 155-156.

48 Articles 423-431 of the minutes of the Feb to Apr 1866 *Volksraad* meeting published in *Volksraadsnotule V*: 86-150 esp 117-118. See, too, *idem* art 268 at 104.

49 Articles 380-381 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 116; see, too, reports published at 257-258 and 258-260.

In the late 1850s the *Volksraad* had introduced into the cash-strapped economy *goedvoren* (“good-fors”) and *mandaten* (mandates). The former were really “IOUs” in lieu of petty cash, the latter government promissory notes to be redeemed for cash at a later stage. In the absence of ready cash or a steady state revenue stream, neither system was economically viable and merely plunged the ZAR ever deeper in debt.⁵⁰

Following the example of the Free State government, Pretorius spearheaded the introduction of a new payment system in June 1865. The *Volksraad* approved that government notes be printed; these would be secured by government land. Yet more notes were printed in 1867 and 1868. These notes, which were to be regarded as legal tender for public and private purposes, were disparagingly called “blue-backs” in both Republics, because of the bluish tint of the badly printed notes.⁵¹ Unlike in the Free State, though, where the commercial benefits of the diamond fields allowed its government to redeem all of its blue-backs within a decade, this system, essentially a deferred cash-settlement system, did not and could not work in the ZAR, because there was little prospect of future prosperity. The blue-backs soon lost fifty per cent and more of their face value.⁵² In September 1866 traders were even instructed to accept the government notes at their face value or face loss of their licences.⁵³

All to no avail. In 1868 a *Volksraad* commission found that the state was hopelessly insolvent.⁵⁴ The *Volksraad* blamed the state president for the mismanagement of the state finances, but did not accept his offer to resign.⁵⁵ Presumably no one else wanted the thankless job. The Treasurer-General, Van der Linden, was dismissed and charged with embezzlement and fraud, found guilty and imprisoned.⁵⁶

50 On the system of “good-fors” in southern Africa generally and in the ZAR in particular, see Engelbrecht 1987: 22, 30, 58-59 & 64. Engelbrecht provides a useful overview of the monetary system in the ZAR and elsewhere in southern Africa, but is not a specialist work on the topic. On the financial difficulties produced by the *mandaten* system, see art 99 of the minutes of the Sep to Oct 1864 *Volksraad* meeting published in *Volksraadsnotule V*: 27-68 esp 49; see, too, art 144 at *idem* 54-55 and art 171 at *idem* 60.

51 This new system elicited lengthy discussions in the *Volksraad*. See arts 31-32, 34, 41, 44-46, 54, 318, 652-672, 714 and 719-720 of the minutes of the Feb to Apr 1866 *Volksraad* meeting published in *Volksraadsnotule V*: at 68-150 esp 78, 79, 80, 81, 82, 109-110, 141-144, 147 and 148. On the “blue-backs” in general, see Bulpin 1953: 107 and 118 as well as Engelbrecht 1987: 57-60 and 64-66.

52 See Wildenboer and Dietrich 215: 295-301 for an interesting discussion of a legal dispute in 1872 in which a creditor demanded (in vain) that his debtor pay him in hard cash rather than in government notes, because of the loss of value of the notes.

53 Articles 257-258 of the minutes of the Sep to Nov 1867 *Volksraad* meeting published in *Volksraadsnotule VI*: 3-79 esp 26.

54 Article 383 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 116.

55 Articles 193, 212-224 and 230-237 of the minutes of the Sep to Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 66-75.

56 Article 556 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 150; see, too, *idem* 157-158.

By the end of the 1860s the *ZAR* was on a road – paved though it was with good intentions – to slow but steady rock-bottom decline. The best efforts of the Republican government and the *Volksraad* to achieve settled statehood and a measure of prosperity bore little fruit.

5 2 Alexander McCorkindale promises much, delivers little and further enfeebles State President Pretorius's standing

Alexander McCorkindale,⁵⁷ born in Glasgow in 1816, immigrated to Natal with his wife and about seventy co-immigrants in 1856. For eight years he tried his hand at all manner of schemes and industries, without significant success. In 1864 a young relative, David Forbes, who hunted and traded in the Transvaal, showed him a stretch of land in the eastern Transvaal (immediately south-west of present-day Swaziland) that bore a close resemblance to the hills, dales and lochs of the Scottish highlands. McCorkindale was immediately enamoured of the place and soon after met with President Pretorius at Pretoria in September 1864. A bond of friendship quickly developed between them. McCorkindale's plan to buy the land on which to settle industrious and skilled Reformed Scots appealed greatly to the embattled president; even more so did his plan to establish a bank for the impecunious Republic. The *Volksraad* received the news of the Scotsman's entrepreneurship with equal enthusiasm and by October 1864 agreement was reached⁵⁸ between McCorkindale and the *Volksraad*. It provided that a company, to be established by the Scot, would purchase two hundred farms over a four-year period and, further, that these farms would be settled within five years by "respectable immigrants from Europe and the Colonies" in order to cultivate the land and establish factories and industries. A grateful *Volksraad* provided McCorkindale with very generous terms.

McCorkindale had promised heaven and earth and, given the state of the country, Pretorius (and his executive and the *Volksraad*) can be forgiven for indulging McCorkindale in his fancy. After all, they had nothing to lose and much to gain.

He left for Britain almost a year later, in September 1865, and returned in the autumn of 1866. He had promised much, but he delivered little. He managed to induce some of his Scottish relatives and acquaintances to try their luck in the *ZAR*. However, they were not the major English investors he had hoped for. They had no stomach for his scheme in the back of beyond. Nevertheless, McCorkindale did manage to secure a supply of gunpowder for the *ZAR*, a rare and vital commodity in the strife-torn Republic.⁵⁹ He was a genuine propagandist and enthusiast for the

57 For biographical details on McCorkindale, see, in particular, Forbes 1938: 157-161; *DSAB* vol 1: 507-509 *sv* "McCorkindale, Alexander"; Pelzer 1970(a): 6-23; and Mackenzie 2007: 147, 148 and 157-161.

58 The agreement is published (in Dutch and in English) in *Volksraadsnotule VI*: 253-258.

59 See art 29 of the State President's report to the *Volksraad* dated 19 Feb 1866 published in *Volkraadsnotule V*: 452-454 esp 454.

Republican cause (he became a citizen of the Republic at the end of 1864), but, like his good friend, MW Pretorius, he simply aimed too high and blurred truth with invention.

After McCorkindale returned from Europe, he continued to propagate any number of schemes that would benefit the Republic – and himself, of course. The schemes were big (land settlement, a bank, a harbour complete with customs house, a steady supply of ammunition and gunpowder, sourcing of cannons, rifles, even bombs, consular representation in England and the colonies of Natal and the Cape) and small (the mining of salt pans, printing of seals of office and of stamps, a postal system, supplying stationery). In his presidential address to the *Volksraad* in September 1866, Pretorius sang McCorkindale's praises, listing one project after the other that would bring prosperity to the country.⁶⁰ The *Volksraad*, with McCorkindale (and the public) present, shared in the president's enthusiasm.⁶¹ The bank scheme in particular interested them greatly and a bank charter was hastily approved. It was the surest way to save them from the continued embarrassment of the government blue-backs.

McCorkindale's land-settlement scheme remained the focal point of interest. In the winter of 1866, McCorkindale and some prospective settlers were ready to settle on the land.⁶² However, things had begun to unravel: first, the exact area on which the farms were established remained contested; secondly, McCorkindale had not established the company he had promised to do, but instead a different company with different articles of incorporation; thirdly, the registration of individual title deeds did not follow due process and the allocation and purchase of the farms were contrary to the terms of the 1864 agreement;⁶³ and, fourthly, mineral rights to the farms had since been added to the rights of the settlers, contrary to existing legislation that vested these rights in the state. McCorkindale and Pretorius were seemingly making up the rules as they went along. In an attempt to bring order to a situation that threatened to get out of hand, a tripartite agreement to provide clarity was concluded in October 1866 between the *ZAR* government, McCorkindale and the alternative company McCorkindale had registered in Glasgow.⁶⁴ It only served to further muddy the waters, though, and alienated the local inhabitants of the Lydenburg region in which the area lay.

The first fifty immigrants arrived from Natal in January 1867 and were met by Pretorius himself. They called the area identified by Pretorius *New Scotland*

60 The address is published in *Volksraadsnotule VI*: 233-237 esp 234-235.

61 Articles 291-305 and 332-336 of the minutes published in *Volksraadsnotule VI*: 3-79 esp 29-31 and 33-34. A *Volksraad* committee's report to the *Volksraad* is published in *Volksraadsnotule VI*: 144-155 esp 148-150.

62 The agreement is published in *Volksraadsnotule VI*: 258-259.

63 The new arrangement was captured in an agreement published in *Volksraadsnotule VI*: 260.

64 The tripartite agreement is published in *Volksraadsnotule VI*: 266-269.

(today broadly encompassing the Gert Sibanda Municipality – Ermelo is its main town – of the Mpumalanga Province). The district in which the eighty farms of the Glasgow-registered company were situated, was named Industria and this is where the earliest immigrants settled. The lake at the centre of this district was re-named “Chrissiesmeer” (Lake Chrissie), after Pretorius’s daughter, Chrissie. The title deed for the entire district (rather than for each individual farm) was finally conveyed in July 1867. Later, the remaining one hundred and twenty farms out of the originally-agreed two hundred (eighty for the district of “Londina” and forty for the district of “Roburnia”) for New Scotland) were duly inspected, surveyed and transferred to McCorkindale’s Glasgow company.

Now firmly ensconced on his farm(s) at New Scotland, McCorkindale next presented to the *Volksraad* via Pretorius a scheme for a harbour and customs house on the eastern seaboard, at the mouth of the Umzuti River (now the Maputo River) south of Delagoa Bay.⁶⁵ The *Volksraad*, increasingly uncomfortable with all of McCorkindale’s schemes and with his close relationship with the state president, had a close look at the proposals.⁶⁶ The *Volksraad*, after much debate, approved the harbour scheme, but only on the condition that a proper contract be drawn up. Typical of McCorkindale, the terms of the contract promised a great deal, among others, a £250 000 loan to the ZAR, the use of Scottish built, steam-driven traction engines to transport goods on a newly-built toll road to Potchefstroom as well as a large number of professional people to assist in the overnight commercialisation of the Republic. McCorkindale, of course, would benefit much from the entire project.⁶⁷

If it sounds too good to be true, it is too good to be true. When Pretorius presented the draft agreement to the *Volksraad* some three weeks later, in October 1867, it took the casting vote of the chairman for it to be approved. McCorkindale, feeling insulted by the narrowness of the vote, wrote to the *Volksraad* that this amounted to a vote of no confidence in him and he refused to engage further in any public transactions with the ZAR.⁶⁸

This put paid to the harbour scheme. In any event, it was clearly pie-in-the-sky: the rivers that were to have been used were not navigable and there was no chance that anyone would loan £250 000 to the ZAR. It also resulted in a deterioration in relations between McCorkindale and the *Volksraad* and between the *Volksraad* and the state president.⁶⁹ By November 1867 the *Volksraad* had had enough of McCorkindale’s glib assumption of privilege and his offhanded approach to the

65 Article 553 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 149; see, also, Pelzer 1970c: 151.

66 Articles 46-53 of the minutes published in *Volksraadsnotule VII*: 13-14.

67 Articles 73-79 of the minutes published in *Volksraadsnotule VII*: 19-21. The minutes of a specially-appointed *Volksraad* committee is published at 177-182 and the draft contract and accompanying memorandum of explanation from Pretorius at 187-193. See, too, Pelzer 1970c: 150-153.

68 Articles 100-101 of the minutes published in *Volksraadsnotule VII*: 25-26.

69 Article 113 of the minutes published in *Volksraadsnotule VII*: 29.

settlement of his debts. They found it necessary to assert their status as the highest authority in the land and to disabuse him of the assumption that his arrangements with the state president overrode their authority. A *Volksraad* committee was appointed to investigate all of the transactions between McCorkindale and Pretorius on behalf of the government. It was chaired by Hendrik Bührmann, the irascible, no-nonsense member for Lydenburg.⁷⁰ The committee was diligent and presented a comprehensive report to the *Volksraad* in early December.⁷¹

The *Volksraad* considered the report over a two-week period in early 1867.⁷² It was inclined to judge the poor financial management, land management and record-keeping in respect of the settlement scheme exhibited by Pretorius and his government less harshly than the committee. The *Volksraad* was also less harsh than the committee in its evaluation of the evidence that McCorkindale, if not actually fraudulent, was stringing along the gullible Pretorius and the ill-informed *Volksraad*. It did, though, take exception to the transfer, approved by Pretorius, in November 1867, of the eighty Londina farms by Pretorius to the yet-to-be-established company that McCorkindale had promised to establish in terms of the 1864 agreement. The *Volksraad* decided to cancel the transfer of the Londina farms.

Member Lys voted against this decision on the grounds that only a court of law could cancel a transfer of property conducted in accordance with statutory requirements. Once the *Volksraad* assumed the authority, without proper investigation, to cancel a duly registered deed of title, he warned, the property rights of the citizenry would no longer be guaranteed.⁷³ This powerful argument fell on deaf ears. The *Volksraad* was, after all, the *hoogste gezag* and, so one imagines the line of thought, it was entitled, in fact duty-bound, to take steps to disentangle an affair that had become an embarrassment for the state president, the *Volksraad* and the people, even if it meant nullifying a lawfully conducted property transfer.

It was these Londina farms, or at least forty-five of them, that would form the subject-matter of a court action fifteen years later and would provide the first opportunity for Chief Justice John Kotzé to express an opinion on the validity of *Volksraad* resolutions passed in apparent contravention of existing law.

The *Volksraad* instructed the government to take immediate steps to disentangle the complexities that had enveloped the land-settlement scheme since its inception. This was easier said than done. By the time of McCorkindale's premature death in

70 On Bührmann and the leading, often controversial, role he played in *Boer* politics since the late 1840s see Swart 1963: *passim*. His descendants continue to play an influential role in the Ermelo district that incorporates the erstwhile New Scotland region. His role in the constitutional politics leading up to the final approval of the 1858 *Grondwet* is discussed in the first of this series of articles: see *Fundamina* 2017 24(1) at 152-161.

71 See the minutes of the committee meeting published in *Volksraadsnotule VII*: 229-240.

72 See, generally, arts 291-362 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 91-111.

73 Articles 316-320 of the minutes published in *Volksraadsnotule VII*: 98-100.

1871, his affairs were as hopelessly entangled as ever, his estate was insolvent and it would take until the early 1880s for his estate to be finally wound up.

After wading through the committee's report on the land-settlement scheme, the *Volksraad* had little sympathy left for McCorkindale's other schemes. It cancelled the deed of agreement in respect of the bank he would have been instrumental in setting up and continued to cut any further ties McCorkindale had with the state.

True to form, McCorkindale continued to promote commercial enterprises, but without success. He died of malaria on Inhaca Island (off the coast of modern Mozambique) in May 1871, by which time he was hopelessly insolvent.⁷⁴ When McCorkindale died, his dream of an influential, populous and prosperous Scottish settlement in the south-eastern Transvaal remained unfulfilled. Beyond the modern town of Chrissiesmeer and the immediately surrounding area with its Scottish farm names and some Scottish surnames, Alexander McCorkindale is remembered primarily in connection with the 1884 Supreme Court judgment of Kotzé CJ in *Executors of McCorkindale v Bok NO*.⁷⁵ It was the first of a number of Supreme Court judgments that dealt with the constitutionality of *Volksraad* resolutions that purported to amend or revoke existing law and legal process.

5 3 The diamond-fields Keate Award and the political demise of State President Pretorius

MW Pretorius had always had about him the faint whiff of failure. The whiff became a smell in the early 1870s. He had sought to take decisive, pro-active steps in the early months of the diamond rush on the Republic's western border to secure financial benefit for the Republic. In their follow-through the steps became mere clumsy assertions of dubious authority. It led to humiliation for him, another missed opportunity for the Republic and his resignation as state president in November 1871.⁷⁶ As much as he had relied on Alexander McCorkindale five years earlier to bring prosperity to the eastern borderlands of the *ZAR*, so he found, at least initially, another willing ally in a German, Theodore Doms, on whom to rely to bring prosperity to the western borderlands of the *ZAR* – with equally unfortunate consequences.

During the second half of 1869 a search for alluvial diamonds on the banks of the Vaal River commenced in earnest. Of particular importance to the *ZAR* was the area between the Vaal and the Harts Rivers, on the northern banks of the Vaal River (north of present-day Kimberley in the Northern Cape Province), where much of the initial alluvial diggings took place. This territory had, until then, been

74 On his later schemes and his death, see Pelzer 1970b: 156-162.

75 (1884) 1 SAR 202-219. This judgment will be discussed in detail in the third of this series of articles.

76 The following sources were primarily consulted in writing this section: Agar-Hamilton 1937: 37-131; Oberholster 1945: *passim*; and Meredith 2007: 13-26.

occupied by *Boer* farmers, and by sundry tribes. Already in April 1868 Pretorius had gained *Volksraad* approval for a proclamation that purported to provide a definitive description of the eastern, northern and western boundaries of the Republic.⁷⁷ Gold had been discovered in 1867 by the German explorer Karl Mauch in the Tati district in the north-eastern corner of present-day Botswana in an area mined by the Tswanas centuries before. There was also the real prospect of significant diamond discoveries being made along the banks of the Vaal River (north and south). Pretorius therefore saw fit, in April 1868, to stake an early claim to lands as far to the west as possible. The western boundary was drawn in such a way that it included the Tati district and the area enclosed by the Vaal and Harts Rivers. In fact, the boundary line enclosed large swathes of the north and east of present-day Botswana.⁷⁸

In 1869 the presence of diamonds in large quantities along both banks of a 150 kilometres stretch of the Vaal River had, unlike Mauch's gold, become a reality. Large parts of land on both sides of the Vaal River became inundated with diamond diggers from near and far. The Cape Colony, the Free State, the *ZAR* and the local African tribes all became extremely interested in what, until then, had been a dry, forlorn and sparsely populated stretch of land.

Some, though, engaged not in alluvial diggings on the river banks, but in so-called dry diggings thirty to forty kilometres south of the Vaal River. On the farms Du Toit's Pan, Bultfontein and the De Beers's farm – an area of some 150km² – lay a series of diamond "pipes" in which were to be found hitherto unimaginable diamond riches. The rush to the diamond fields started in earnest towards the end of 1870. The early promise was confirmed in July 1871 when a diamond pipe was found on a *koppie* that was soon worked to such an extent that it became the famous Big Hole in what would later become the town of Kimberley.

The vitally important question was to whom this territory belonged, not only in respect of the fabulously rich dry diggings, but also the lucrative alluvial diggings along the banks of the Vaal River? Claims to parts or to the whole of the territory were staked by the Griquas, a number of Tswana tribes, the *ZAR*, the Free State and, of course, by Great Britain. The *ZAR* claimed for itself all lands beyond or north of the Vaal River, encompassing land claimed by the Ba'Thlaping and Barolong tribes and the Griquas. As far back as the 1850s, the *ZAR* had claimed the territory by way of conquest, occupation and a dubious treaty signed with a tribal chief in 1858. In pursuance of the 1868 proclamation, Pretorius, in November 1869, provisionally proclaimed the disputed area (between the Vaal and the Harts Rivers) to be *ZAR* property.

77 See art 552 of the minutes published in *Volksraadsnotule VII*: 148. The proclamation is published at *idem* 274-275.

78 See Agar-Hamilton 1937: 45; see, too, Oberholster 8-9.

Of course, this proclamation did nothing to assuage feelings running high among diggers, tribespeople and burghers. Agents of the different Tswana and Griqua tribes also involved themselves in the land disputes. One such was the German, Theodore Doms. No paragon of honesty, he was not averse to playing sides off against one another, and sided both with and against a gullible MW Pretorius.⁷⁹

Into this cauldron of political and administrative conflict, suspicion and double-dealing, rode the Governor of the Cape Colony, Sir Henry Barkly, in February 1871, little more than a month after having taken up office. British interests were obviously focussed on the potential wealth of the diamond fields. The Cape Colony, like all of southern Africa, was in an economic slump and desperately needed the financial boost that the diamond diggings were sure to provide. In addition, Britain was anxious to secure for itself unfettered access to the north. The trade route to and from the north passed through the lands of the Griquas and if the ZAR and the Free State succeeded in laying claim to the land, or at least to parts thereof, it would inhibit the free access so essential to British commercial interests in the north.

It was important, therefore, for Barkly to co-operate closely with Nicolaas Waterboer, the Grique leader (*kaptijn*), and to secure him as a political ally. Annexation of the territory by Britain (or at the very least, self-government for the Griquas under British protection) was, politically and economically, the only viable solution for the promotion of British interests as the paramount power in South Africa. The two Boer Republics dared not gain a foothold in the territory. The Griquas were amenable to such protection against the Boers. To this end the Cape Colonial Secretary, David Southey, had developed a close working relationship with the Griquas and Waterboer's agent, smart but unscrupulous David Arnot, to achieve control over the diamond fields without resort to arms.

Arbitration was mooted as the best means to resolve the land disputes and the rival claims. Pretorius, though naturally suspicious of the British, grudgingly agreed to submit to arbitration the question of who exercised authority over the lands between the Vaal and the Harts Rivers (in other words, the lands to the north of the Vaal River). The arbiters were to be AA O'Reilly – the Irish-descended *landdrost* of Wakkerstroom – on behalf of the ZAR, and John Campbell – Special Magistrate for Griqualand West – on behalf of the Griquas. The umpire would be Robert Keate, the lieutenant-governor of Natal. President Brand of the Free State, far more politically astute than Pretorius, refused the offer of arbitration regarding ownership of the lands to the south of the Vaal River (the so-called Campbell Lands), unless such arbitration

79 Little biographical detail on Doms is available. Agar-Hamilton 1937: 46 describes him as “an accomplished adventurer who continued to change sides during the next few years with an engaging candour which seems to have daunted public comment”; and at 104 he calls him “the egregious Theodore Doms”. On Doms and his exploits in the region until his death in 1886, see, generally, Agar-Hamilton 1937: 46-48, 52-53, 65, 83-85, 189 and 198ff; see, too, Oberholster 1945: 117, 143-144 and 264-269.

was undertaken by an unbiased international tribunal. Barkly, of course, refused to consider international arbitration and threatened military intervention.

The arbitration commenced in April 1871 at Bloemhof and continued for three months.⁸⁰ Pretorius himself and State Attorney Kleyn appeared on behalf of the *ZAR*. They did not distinguish themselves in the way they presented the *ZAR*'s case. Keate was called upon to make the final arbitration, which he did in October 1871. The evidence left him with little choice but to find for one of the Tswana tribes. Since their chief was a vassal of the Griquas, he effectively found for the Griquas. In no time at all, the Griquas requested Britain to take control of the territory on their behalf (as Waterboer had been primed to do). In October 1871 Barkly annexed the whole of the territory specified in terms of the Keate Award (including the area between the Vaal and the Harts Rivers) in the name of the Queen and named it Griqualand West.

Pretorius came out of the affair poorly. The long-suffering *volk* had had enough of Pretorius's well-intentioned, but naïve, impetuosity and his embarrassing lack of political insight. He had betrayed what they regarded as the first principle of statehood: never trust the English (at least McCorkindale was Scottish) – and for this he could not be forgiven. In November 1871 the *volk* gathered at Potchefstroom (the region that bore the brunt of the land losses) and demanded from the *Volksraad* that Pretorius and his complicit officials be forced to resign and placed in a state of impeachment. The *Volksraad* heeded the clamorous voice of the people (of Potchefstroom). As the highest authority in the state, they should have been kept abreast of the details of the case presented at the arbitration and this Pretorius and Kleyn had not done – not that it would have helped, but still. They quibbled among themselves whether or not to grant him an honourable discharge (some wanted him tried for treason). He solved their problem by resigning on 20 November 1871. The *Volksraad* repudiated the Keate Award.⁸¹

The *ZAR* continued to lay claim to the land between the Vaal and the Harts Rivers.⁸² The new state president, Burgers, enlisted the help of Doms to negotiate with the tribes in occupation of the territory. With Doms's assistance, Burgers managed to convince the tribes to align themselves with the *ZAR* and to accept its protection. Effectively, then, by mid-1873, the territory was once again under the control of the *ZAR*. Not that it had much economic benefit: the alluvial diamonds found in the territory was not commercially viable. Doms undoubtedly later served the Republican cause well as negotiator and facilitator. President Burgers was not ungrateful. He promised him farms in the Bloemhof-Christiana area.

80 On the arbitration and its consequences, see, in particular, Agar-Hamilton 1937: 60-88; and Oberholster 1945: 138-157.

81 See Appelgryn 1979: 2-3; and Agar-Hamilton 1937: 95-9729.

82 For what follows, see, in particular, Agar-Hamilton 1937: 89-131; Oberholster 1945: 263-275; and Appelgryn 1979: 32-38.

The colonial authorities (Lieutenant-Governor Southey of Griqualand West and Governor Barkly) continued to employ their best efforts to undo the machinations of the ZAR in securing possession of the Vaal/Harts Rivers territory. It was territory strategically important to British imperial interests and to the assertion of British paramountcy in southern Africa. Their overlords in London, however, had no appetite for the costly and disruptive annexation of yet more territory that was at best but sparsely inhabited by British citizens. Imperial policy then was more inclined to federation rather than annexation of southern African states.

Theodore Doms's political career was not yet over. He continued to play an active part in public affairs in the region throughout the 1870s and the early 1880s,⁸³ though his activities tended to excite condemnation rather than approbation. He was a prime mover in the brief, bloody and wholly unedifying rise and fall of the so-called independent statelets of Goshen and Stellaland.

He retired to Bloemhof and claimed from the ZAR twenty-one farms on the Harts River he said had been promised to him by President Burgers in 1874 when the latter appointed him diplomatic agent for the ZAR. Doms died in December 1886. His estate was insolvent. He had wheeled and dealt in land for close on two decades, distributing large tracts of land to others, claiming much of it for himself, but died unable to claim full and fair title to any of it. When the *Volksraad* refused to acknowledge the legitimacy of his arrangement with President Burgers, the trustees of his insolvent estate referred the matter to the Supreme Court. The judgments handed down in this matter in 1887⁸⁴ contributed significantly to the later debates about the constitutional validity of *Volksraad* legislative activities and were important precursors to the *Brown v Leyds* judgment in 1897.

6 The rise and fall of President TF Burgers, the *volkstem* silenced and the annexation of the Transvaal in 1877

6 1 The rise of President TF Burgers⁸⁵

When MW Pretorius resigned in November 1871, the *volk* – at least the relatively small percentage among them who cared about the Republic, who concerned themselves with its government and who understood its precarious geopolitical situation – demanded fresh blood to lead them. The political system enshrined in the *Grondwet* was not working in practice. In this system the people awarded to the

83 See Agar-Hamilton 198ff.

84 See *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189-204. The case will be discussed in some detail in the third of this series of articles.

85 The most comprehensive biography on Burgers is by Appelgryn 1979: *passim*.

Volksraad the highest authority in the land and elected a state president every five years, whose executive powers were subservient, both in theory and in practice, to that highest authority. The requirements for the office ensured that he was one of them and therefore not likely to get too far ahead of himself. The trouble with Pretorius was that he was no leader, no visionary, no astute political tactician. He was, like the others, only a farmer who wished well for the Republic. Like them, he was, in affairs of state, naïve and gullible and no match for politicians across the country's borders or for the likes of McCorkindale and Doms.

The country, it was now recognised, needed a proper leader, someone who could take them beyond the limited horizons of their abilities, their education and their experiences. Within the country itself there really was no-one willing and able to meet this demand. Commandant-General Paul Kruger was, to be sure, a man of courage and conviction and an active participant in constitutional engagements since the 1850s. He listened well enough to the *volkstem* and understood that the *hoogste gezag* resided with the *Volksraad*; yet he also had enough inherent authority to provide true leadership. He was, though, cut too much from the same cloth. A proud and true son of the soil, undoubtedly. He lacked, however, education and refinement, he was too immersed in the strictures of the *Dopper* creed to engage on an equal footing in a battle of wits and words with the likes of empire-backed colonial administrators.

Change was in the air. The discovery of diamonds on the western border of the ZAR and the intense international scrutiny of the Republic as a result of the less than salubrious interaction by its coarse-grained north-western burghers with the African tribes in that region had certainly re-awakened British interest in the ZAR. There were clear signs that London once again had imperialist, expansionist designs and the ZAR's inherent weakness certainly made it a strong candidate.

Then, too, the constant discoveries of gold deposits and a variety of other metals and minerals within the Republic and beyond its northern and western borders meant that commercially-viable mining of those minerals was a real likelihood. Indeed, during the winter of 1871 a substantial discovery of gold had been made at Marabastad (midway between the present-day Polokwane and Mokopane in the Limpopo Province), the site appropriately named *Eersteling* (Firstling). Broad-ranging expertise was required and a sophisticated economic and social infrastructure, administered by knowledgeable administrators. It also meant a substantial growth in the number of foreigners settling in or active within the country.

The person most assiduously wooed by the people of the ZAR was Jan Brand, president of the Free State. Son of the formidable Sir Christoffel Brand, journalist, lawyer and first Speaker of the Cape Colony Legislative Assembly, he had breeding, he was educated (in law, at the University of Leyden and the Inner Temple) and intelligent – a man of principle and popular with the Free Staters.⁸⁶ If he could be

86 On Jan Brand (affectionately known as “Onze Jan” by the Free Staters) see, among many biographies on him, *DSAB* vol 1: 110-116 *sv* “Brand, Johannes Henricus”.

convinced to make himself available, there was the real possibility that the yearned-for union of the two *Boer* Republics could become a reality. Brand, though, withstood the intense pressure and declined the request.

The second-most popular candidate was Thomas Francois Burgers. Born in Graaff-Reinet in 1834, he had studied theology in Utrecht. There he had been ordained in the ministry and had also married his Scottish wife. During his five years in the Netherlands he became a close friend of Jacobus Kotzé, elder brother by seventeen years of John Kotzé, the later Chief Justice of the *ZAR*. After the friends' return to South Africa, both became *predikante* (ministers) in the Dutch Reformed Church. They became involved in a bitter controversy over Dutch Reformed Church doctrine. Both were suspended by the Synod for articulating liberal views at variance with established church dogma. Burgers's heresy was his statement that he doubted the separate existence or personality of the devil. He challenged his suspension in the Cape Supreme Court in 1864, which gave judgment in his favour. The Synod challenged the judgment in the Privy Council, but lost their appeal.⁸⁷ This liberal/orthodox struggle in the Dutch Reformed Church simmered for many years and in the case of Burgers became a political albatross around his neck.

When Brand finally made it clear that he was not available for the presidency, Burgers became the strongest candidate (Brand, in fact, urged his candidacy), because he would hold his own against the English. However, he did not enjoy universal support. The likes of Paul Kruger strongly resisted his candidature. Kruger, representing the ultra-orthodox *Dopper* view, would have none of his liberal theological views.

Burgers won the election by a landslide, accumulating almost 3 000 votes, substantially more than the combined votes of the handful of other candidates.⁸⁸ He was inaugurated in July 1872. Kruger, in his welcoming address as commandant-general, said that he had opposed Burgers because of his wrong religious views. As a staunch Republican, he would, however, submit to the voice of the majority of the people and support him in the hope that he would find Burgers more of a believer than he had thought.⁸⁹

Burgers set about his duties with energy and enthusiasm. By July 1873 he had secured control over land between the Vaal and the Harts Rivers; he had secured approval from the Executive Council to build a railway line between Delagoa Bay and Pretoria; and, most importantly, he had, in December 1872, secured a loan of £60 000 from the Cape Commercial Bank, which allowed the *ZAR* government to rid itself of the worthless *mandaten* and blue-backs.

His presidential address to the *Volksraad* in February 1873 was in the nature of a reform manifesto. It was broad-ranging, comprehensive and met with general

87 See Kotzé 1934: 31 and 38-42.

88 On Burgers's candidature for the presidency and the election, see, in particular, Appelgryn 1979: 3-7.

89 *Idem* 8-11.

approval. He meant business. Politically he had to steer a course between two extremes: on the one hand, the conservative die-hards, among whom Paul Kruger featured prominently, who experienced Burgers's energetic reform-mindedness as an attack on *Boer* values, customs and way of life (he was, after all, Cape Dutch, not a *Boer*, and theologically liberal to boot); and, on the other hand, the growing population of progressive-minded *Boers* and, to a greater extent, British foreigners (or *uitlanders*, as they came to be called). The majority of the *uitlanders* wanted to live and work under British, not *Boer*, protection.

Burgers introduced many reforms in the Republic. These pertained to administrative, judicial and infrastructural changes, as well as those in respect of financial management and of the free movement of Africans in the Republic. He also worked hard at education reform and single-handedly wrote a comprehensive draft education law, which he presented to the *Volksraad* in February 1874. Large quantities of payable gold had been discovered in February 1873 in the Blyde River valley in the Drakensberg Mountains near Lydenburg, far more than at *Eersteling*. He visited the diggings in August 1873,⁹⁰ where a large community of prospectors, for the most part foreign and British, had congregated. Intent on making a favourable impression, he promised them local government and roads between the goldfields and Lydenburg and between the goldfields and Delagoa Bay.

Most of his plans and reform initiatives were enthusiastically received by a supportive *Volksraad* and by the people. However, not all the measures enjoyed support. He had early on proposed to reform the judiciary by amending the *Grondwet* to allow the Executive Council to appoint *landdrosts*. The prescribed system was for the Executive Council to present a list of candidates to the public, from which list a *landdrost* was elected by the people.⁹¹ The danger that a popular rather than a competent person would be elected was obvious. This, though, was a ticklish matter: it went to the heart of the system of people's government given the important and wide-ranging, extra-judicial role of the *landdrost* in each region. The *Volksraad*, as it had often done before, deferred to public comment on the matter. Eighteen months later, in October 1874, the voice of the people was heard: change the electoral system for *landdrosts* at your peril.

Another jarring note was struck when, in June 1873, Paul Kruger had asked for his discharge as commandant-general.⁹² This occasioned discussion on the hoary chestnut, namely whether or not the position should be occupied in peace-time. Burgers used the opportunity to push for abolition of the position in peace-time. The *Volksraad* agreed. It might be that Kruger's resignation was triggered by the fact that Kruger was no longer prepared to sit cheek-by-jowl in meeting upon meeting of the

90 *Idem* 18-19.

91 *Idem* 22-23.

92 *Idem* 24-25.

Executive Council with one whom he could barely be cordial with. Certain, though, is that the decision had consequences. With no commandant-general, the vacancy on the Executive Council was filled, not by an elected office-bearer such as the commandant-general was, but by the state attorney, a salaried official appointed by the state president. In an Executive Council comprising the state president, the state secretary and the state attorney – both of the latter working in close collaboration with the state president – and only two additional *Volksraad*-elected members, the state president's views were much more likely to hold sway. The *volk* was not happy (incited, it was said, by Paul Kruger, covertly accusing Burgers of dictatorial tendencies)⁹³ and heavily petitioned the *Volksraad*. As a result, in October 1874, the *Volksraad* changed its mind and again amended the *Grondwet* so that the Executive Council comprised the state president, the state secretary and three members elected by the *Volksraad*. *Volksraad*-elected members once again held the majority and one of these was Paul Kruger. State Attorney James Buchanan, having lost his place on the Executive Council, resigned and became a judge in the Free State, thereafter judge-president of the Griqualand West High Court and one of the leading jurists of the time.⁹⁴ In Buchanan the *ZAR* had lost a competent and industrious individual of the type they badly needed.

Burgers was a champion of education and personally drafted an Education Law.⁹⁵ It ran into difficulties in the *Volksraad*.⁹⁶ He proposed that no religious instruction should take place during school hours. Aware of his liberal theology, the *Volksraad* was unhappy with this provision. A *Volksraad* committee had recommended an intelligent compromise amendment, but Burgers's opponents had found a peg on which to hang their disaffection with the pushy president. When he then also appointed two theologically free-thinking Hollanders (one of whom was the later influential Dr EJP Jorissen)⁹⁷ to supervise education and to teach at the new high school (*gymnasium*) in Pretoria, his noble scheme was doomed to failure. Only four pupils attended the *gymnasium* and only four hundred-odd pupils attended the fifteen state schools. Petitions again flooded the *Volksraad* in May 1876, pleading for religious instruction in the schools and for the dismissal of the Dutch superintendent of schools. The *Volksraad*, to their credit, stood firm, but people-power (misguided,

93 See Kotzé 1934: 274.

94 *Idem* 274-276.

95 The Education Law 4 of 1874 is published in Jeppe & Kotzé 1887: 566-582; see, too, at 640 for its date of implementation in 1876.

96 See Appelgryn 1979: 57-62 for an analysis of the *Volksraad* discussions.

97 1829-1912. The abrasive Jorissen's supporting role, as Supreme Court judge since 1890 – as well as that of his son – in the unfolding drama that was *Brown v Leyds* is discussed in the third and fourth of this article series. For biographical details on Jorissen see, especially, his reminiscences on the period 1876-1896: Jorissen 1897: *passim*.

chauvinistic, but powerful nevertheless) – the *volkstem* – ensured that Burgers's school reforms were a failure.

Furthermore, in October 1874 Burgers presented to the *Volksraad* the designs for a new flag and a new coat of arms for the Republic.⁹⁸ These symbols of nationhood had a powerful appeal to the burghers and excited much discussion in the *Volksraad*. The *Volksraad* approved the new coat of arms and the new flag. Again, though, dissent was fomented among the public by the die-hards. For reasons that had more to do with Burgers's unpopularity among an influential minority of the burghers, resistance among the *volk* grew. It thus happened that in May 1875, during Burgers's prolonged absence in Europe pleading the Republican cause, the *Volksraad* repealed their approval of the new flag and coat of arms. The tendency of the *Volksraad* to repeal decisions already taken when pressurised by the *volk* to do so and thereby to create an impression of vacillation, caused Burgers acute embarrassment at a time when he was desperately seeking funding and goodwill from European states. In a letter to the Executive Council he vented his frustration.⁹⁹ Its response is unknown. Conceivably, it could well have been as follows: "The *Volksraad* derives its highest decision-making authority from the *volk*. We must heed the *volkstem*, the voice of the people. To be sure, we should take it more upon ourselves to *represent* them by explaining to them why decisions are taken and what the meaning is of decisions that have been taken, thus disabusing them of their ignorance and their prejudices. But it is the *volk* that determines the legitimacy of our activities and that ultimately decides what is best for it. The *volk* has the *koningstem*, not us and not you."

The September to November 1874 *Volksraad* session also held another surprise for the state president. The gold £1 coins he had had minted from the Pilgrim's Rest gold diggings were displayed to the members. They viewed the coins with displeasure. It was the *Volksraad*'s prerogative to approve the coins, not his. In any event, Burgers's image on the back of the coins suggested to the *volk* that he arrogated to himself that *hoogste gezag* that was the *Volksraad*'s exclusive prerogative – and it flouted the principle of egalitarianism.

The message after the 1874 *Volksraad* session from *volk* and *Volksraad* would have been clear: You are here to lead us, not to change us.

Burgers's grandest and most ambitious scheme, though, was the railway line to Delagoa Bay.¹⁰⁰ On it hinged the future of the ZAR and his own success. When the original concessionaire appointed by the *Volksraad* was unable to meet the conditions set by the *Volksraad*, Burgers convinced them to make it a state project. Despite debilitating ill-health (he had been bed-ridden for three months in 1874) he went to Europe in February 1875, determined to secure a £300 000 loan from European investors, to negotiate with the Portuguese and to plead the Republican

98 *Idem* 48-52.

99 *Idem* 51.

100 *Idem* 77-94.

cause in Britain and in continental Europe. He was away for eighteen months and worked tirelessly for the Republic. He achieved many diplomatic successes, despite regular reports from the *ZAR* about mounting criticism against him and a not unreservedly loyal *Volksraad*. Importantly, he was able to interest an Amsterdam investment company to invest money in the scheme, which launched subscriptions on the Amsterdam stock exchange. Confident that the loan was secured, Burgers placed an order for £63 000 worth of railway stock and returned home to a hero's welcome in April 1876.

The scheme collapsed, for two reasons. First, it had not been in the bag and only about £100 000 had been subscribed to by September 1876. Second, war had broken out between the *ZAR* and the Pedi paramount chief, Sekhukhune, in the north-eastern regions near Lydenburg. News of the war put paid to any hope there might have been that the remaining amount would be fully subscribed. In any event it soon became clear that the railway would cost significantly more than estimated and that it faced severe infrastructural obstacles unforeseen at the time of planning. The *ZAR* was certainly in no financial position to fund any loan. Burgers was accused of being less than transparent in the matter of the loan and he suffered severe censure from friend and foe alike. The railway stock ordered was left to rust in the sun.

The war with Sekhukhune, which started little more than a month after his return from Europe, was another humiliation.¹⁰¹ Ostensibly the war was meant to counter Pedi aggression against *Boer* inhabitants of and *uitlander* prospectors of the Lydenburg region. Sekhukhune's defeat would have the added advantage of securing more land for the Republic. Faced with a recalcitrant citizenry unwilling to go on commando to fight Sekhukhune, Burgers, with more courage than common sense, decided that he, with MW Pretorius as commandant-general, would lead the commando as commander-in-chief. It was a sorry, drawn-out affair, with many of the *Boers* and foreign volunteers (officers and men) distinguishing themselves only through their cowardice, their lack of discipline and their willingness to desert. A drawn-out siege of Sekhukhune's stronghold ensued and eventually, to everyone's relief, Sekhukhune sued for peace in December 1876, which Burgers was only too happy to accept.

6 2 The fall of President Burgers and the annexation of the Transvaal in April 1877

Burgers had won the battle but lost the war. The war with Sekhukhune had strained the already parlous Republican finances beyond breaking point. The manner of its conduct had left the outside world, and a censorious Great Britain in particular, with a distinctly poor impression of the Republic's ability, first, to look after itself, let alone

101 *Idem* 110-134.

protect the large numbers of prospectors on the goldfields (close to Sekhukhune's land); and second, to secure peaceful co-existence with Africans through means other than hostile action. War in the Transvaal on all fronts between white and black and between black and black was a distinct possibility and British interests were under threat. Thus argued the colonial office. The railway fiasco and the debilitating war had led to Burgers becoming deeply unpopular, even among his supporters. Ill and disillusioned, Burgers tried hard to make the best of a bad situation and to turn things around for himself and the country.

The *ZAR*, though, was ripe for imperial plucking. Benjamin Disraeli's Conservative government, in power since 1874, was pursuing an expansionist imperial programme, meant to further increase the prosperity and prestige of an already immensely powerful and wealthy empire.

A ready case was made in London for annexation: The rights of British citizens on the diggings and elsewhere could not be guaranteed by an enfeebled Republic; a militarily weak Republic threatened British interests in Natal, where the Zulus were threatening British hegemony in the region; the strategic value of Delagoa Bay to Britain was under threat from the *ZAR*'s railway scheme; and the conduct of the burghers towards the Africans in the north-west continued to excite vituperative comments from British administrators and missionaries. Of course, most importantly – but discreetly underplayed – the country was rich in gold and other minerals already and still waiting to be discovered. These (potential and actual) riches could be utilised far better to the greater glory of the British Empire in the whole of southern Africa rather than to shore up an inept, insolvent and altogether inferior *Boer* Republic, so the argument would have run.

Sir Theophilus Shepstone – erstwhile native commissioner in Natal, son of an 1820 Settler, speaker of many African languages as well as of the Afrikaans-Dutch language of the *Boers* and well-versed in South African affairs and conditions – was sent to the *ZAR* in October 1876. As special commissioner his brief was to investigate the extent and nature of African (the Zulus, the Pedis and the Swazis) unrest in and on the borders of the *ZAR* and to take the steps he deemed necessary to protect British citizens and their possessions. If a sufficient number of inhabitants so required and supported it, he was to proclaim the *ZAR* a British possession, and to serve as its administrator; he could even annex it outright if deemed necessary. Shepstone, then sixty years old, arrived in Pretoria on 22 January 1877 with an armed escort of twenty men and a number of administrative assistants, among whom counted twenty-one year-old Henry Rider Haggard, later famed Victorian adventure novelist, author of such novels as *King Solomon's Mines* and *She*.

As a result of his arrival and the general stir it caused in the country, the presidential election scheduled for 15 February was postponed. Burgers, despite misgivings, had decided to make himself available for re-election. Paul Kruger, initially reluctant, was also persuaded to make himself available as a candidate.

Both sides, the progressives/free thinkers and the conservatives/dogmatists were vociferous in their support for and denunciation of the respective candidates. In his election manifesto, made public on 22 December 1876, Kruger had stated that two of the pillars on which his presidency would be based were obedience to the law and obedience to the *volkstem*, which was, after all, the *koningstem*.¹⁰² During his tenure Burgers had too readily sought to change fundamental principles in the *Grondwet* (such as the election procedure for *landdrosts* and the composition of the Executive Council) as a means to increase executive power at the expense of the sovereignty of the *volk*. In the process he had failed to listen to the *koningstem* and arrogated too much sovereign power to himself.

The elections never took place. When Burgers fully grasped the real underlying intent of Shepstone's arrival in Pretoria, he called for a special session of the *Volksraad* in February/March 1877 and delayed the elections. It was high noon for the Republic. A significant number of inhabitants were all for annexation. There were also those who opposed it vehemently. Then there was the silent majority, apathetic to the political undercurrents and who simply longed for an improvement in the way the country was governed – be it by the British, the *Boers* or within a federal scheme. Anything was better than the present state of affairs.

Burgers was eager to convince Shepstone that the Republic was intent on reform of such a nature as to make British interference unnecessary. He presented to him a new constitution,¹⁰³ modelled after the Constitution of the United States of America.¹⁰⁴ Among many innovations to the system of government, and to the administration and national defence, he also proposed a Supreme Court of three judges, separate from and superior to the *landdrost* courts, to ensure judicial independence and a professional judiciary.¹⁰⁵

The *Volksraad* refused to consider these amendments, accusing Burgers of autocratic tendencies. The *volkstem* would be silenced. The president would devolve state power away from the *Volksraad* and from the *volk*. The *Volksraad* would also not be swayed to accept a supreme court of final appeal, in the composition of which the *volk* had no say. Burgers responded that he demanded no more power than was accorded the presidents of the Free State and the United States of America.¹⁰⁶

The *Volksraad* prevaricated, refusing to acknowledge that the country was in a crisis and steadfastly refusing to be swayed by Burgers's pleas to take decisive reform action. Shepstone bided his time. It became increasingly clear that Shepstone,

102 The manifesto was published in the *Government Gazette* of 3 Jan 1877. See Wypkema 1939: 255; Smit 1951: 19; Gey van Pittius 1941: 15; and Appelgryn 1979: 187.

103 Assisted in the drafting by EJP Jorissen – see Jorissen 1897: 14 & 29.

104 See Burgers's posthumously-published "Defence" in Appelgryn 1979: 261-269 esp at 265.

105 Already in the mid-1860s there had been agitation among the *landdrosts* for the establishment of a professional judiciary: see art 495 of the *Volksraad* minutes of 10 Feb to 9 Apr 1868 published in *Volksraadsnotule VII*: 136.

106 See Appelgryn 1979: 207-208.

contrary to his initial protestations of friendship and assistance, had one object in mind only, namely annexation as a precursor to a broad-ranging confederation of southern African states under British hegemony. It was plain for all to see that the Republic was in desperate straits, that it suffered from crippling debt and had a pitifully weak government.

Burgers continued to urge the *Volksraad* through impassioned cajolery to do something to save republican independence; as a result, he was already at the time accused of playing a double game and of being a traitor to the cause of the *volk*. The weight of current opinion suggests that Burgers played both sides but in the final analysis genuinely sought to preserve the Republic's independence against overwhelming odds. He did this despite the Kruger-fomented suspicion and impassivity of many of the *Volksraad* members.

Burgers's addresses to the *Volksraad* took on increasingly harsh overtones. A *volk* who professed their independence to be sacred, but was unwilling to earn it, did not deserve to be independent. The *volk* and its representatives needed to assume the responsibilities that necessarily attach to the independent participative democracy they professed to espouse. Translated into a language Kruger would appreciate, this meant that if you arrogate the *koningsstem* to yourself, then you must behave like a king and accept massive responsibilities along with the privileges he enjoys. Otherwise the king's voice will be silenced.

Burgers's pleas eventually got through to the *Volksraad*. On 7 March, weeks after Burgers had convened the session to urgently address the crisis, the *Volksraad* approved the new constitutional dispensation.¹⁰⁷ Paul Kruger was elected as vice-president. Feeling that what they had done was sufficient, they dispersed.

Burgers feverishly sought to give effect to the new dispensation. In between his many activities he wrote to John Kotzé, younger brother of his friend, Jacobus Kotzé, and offered him the position of chief justice. John had recently returned from London where he had studied law for five years. He also offered the two junior judgeships to Jan Preller and Abraham Munnich, law agents practising in Pretoria and Potchefstroom respectively.¹⁰⁸ By offering the junior judgeships to local practitioners

107 See Appelgryn 1979: 214-219.

108 JC Preller was a leading inhabitant of Pretoria, who served for a brief period as State Attorney in 1868 and would, in December 1880, be elected Pretoria's first mayor (although he did not take up the position, because of the outbreak of the war of 1880-1881: see *Pretoria 1855-1955* 1955: 47 and 370. AI Munnich was a colourful (not to say slightly off-colour) character. He served as State Attorney in 1866, but was dismissed from office in the same year by the Executive Council for dereliction of duty, negligence and accepting a bribe (accusations he vehemently denied): see Executive Council decision at 155-156 in *Volksraadsnotule VI* at 155-156 and see, too, arts 452 and 553 of the minutes of the Sept-Nov 1866 *Volksraad* meeting published in *Volksraadsnotule VI* 3-79 at 52 and 63 (and see, too, arts 646-649 at 76-77). In 1869 he was also a member of a consortium of speculators to whom President Pretorius awarded a dubious concession to dig for diamonds on the northern banks of the Vaal River: see Agar-Hamilton 46-47 and 83-84. See, at 73 *infra* a discussion of his dialectical machinations in court in the matter of *Baumann Bros and Co v Munnich*.

he clearly sought to assuage the *Volksraad*'s protests that the *volk* would have no voice in the administration of justice.

However, it was too little, too late. Shepstone made it clear that the annexation would proceed, whatever reform measures were implemented. After some delays the annexation proclamation was read out in Pretoria on 12 April 1877. The *Zuid-Afrikaansche Republiek* had become the Transvaal Territory under British rule.¹⁰⁹

The proclamation listed a number of reasons for the annexation (and justification for the obvious deviation from the terms of the Sand River Convention): the threat posed by the Africans to white supremacy in the region; the inherent weakness of the ZAR government; the country's insolvency; and the fact that the majority of the population favoured annexation.¹¹⁰ It mattered not that Burgers's new government that had met on 9 April 1877 had published a strongly-worded protest on 11 April against the annexation and that Burgers had done likewise in his capacity as state president. It also mattered not that the government gave notice to Shepstone of an intention to send a delegation to London (comprising the Hollander EJP Jorissen, appointed as state attorney by Burgers in June 1876, Vice-President Paul Kruger, with WE Bok as secretary) to petition the Queen. Nor that the excitable burghers were enjoined to remain calm pending the outcome of the petition.¹¹¹ Nor that a pro-annexation majority proved to be a fiction: although many non-*Boers* who farmed and traded in the Republic, a number of whom were well-off and well educated, indeed favoured annexation, as did some of the more affluent and therefore influential *Boers*, they were not a majority. Nor that the death of the Republic had been greatly exaggerated by Shepstone and his willing allies in his despatches to Cape Town and to London. The deed had been done.

The *Zuid-Afrikaansche Republiek* was no more. The *Boers* had lost what they prized (or used to prize) above all else: their independence as a nation. The voice of the people, the *volkstem*, a mere whisper in the months preceding the annexation, had grown silent. The *volk* had been replaced by a collective of individuals pursuing, not national interests, but self, sectional and regional interests. The government had made little tangible difference to the lives they led, whether for good or ill. To the poor and the destitute, of which there were large numbers, a change of government might actually improve their lives. For most, "independence" had come to mean

109 The annexation proclamation is published in Jeppe & Kotzé 1887: 691-696.

110 Kotzé 1934: 336-383 analyses at length the reasons advanced for the annexation (both in the proclamation itself and in the run-up to it) and concludes that the annexation was "a fatal step and a blunder" (at 382). At the same time he viewed it as a blessing for the *Boers*, as it taught them the value of settled government, law and order, of promoting trade and commerce and providing them with a market for their produce as well as enhancing the creditworthiness of their country and the value of their land. When the Republic regained its independence in 1881, the British recognised the righteousness of the *Boer* cause, which recognition, wrote Kotzé, was striking proof of "the greatness of the British nation" (*ibid*).

111 See Appelgryn 1979: 239.

merely non-interference. As Shepstone had promised a soft-touch approach, they did not care enough to influence events.

Burgers retired to the Cape Colony, ill, broken in spirit and impecunious, unable to look after his wife and ten children. They survived on the generosity of friends and a small pension awarded him by the British government and paid out of the Transvaal treasury. He died in 1881. Illness and disillusion had made him a mere shadow of the energetic, genial, but fatally impatient, even obstinate, young state president ready for any challenge.¹¹² He had been maligned as a traitor to his people, by the very same people whom he accused of having betrayed him.¹¹³

7 The annexation years: The rise of Paul Kruger and John Kotzé and the raising of the *volkstem*

7.1 The rise to national political prominence of Paul Kruger

In early May 1877 Kruger, Jorissen and Bok left for London to protest the annexation. They met with Lord Carnarvon, the secretary of state for the colonies, and described by less-than-neutral Jorissen¹¹⁴ as an unimpressive and vain aristocrat who received the delegation with opprobrious condescension. He would not yield on the annexation question, despite the delegation's pleas and protests. The majority of the population wanted British control in the Transvaal, said Carnarvon, and this was the best course to preserve European (read: British imperial) interests in southern Africa. When asked if he would allow a plebiscite to determine the true feelings of the population, he demurred. Plebiscites belonged to Napoleon's rabble-rousing style of government and he would certainly not allow the pure constitutional principles by which Britain was governed to be thus adulterated. The *Boers* were like children who did not know what was in their best interests. Britain had assumed a burden of responsibility towards the Transvaal and it would do its duty towards them.¹¹⁵ The delegation returned in December 1877, not quite empty-handed: a loan of £100 000 was made available to the Transvaal, the recognition of Dutch as one of the official languages was guaranteed and telegraph communication as well as the building of a railway in due course was promised.

In early 1878 a series of report-back meetings began. It was upon the delegation's return that Paul Kruger now came into his own. No longer burdened with the presence

112 Jorissen (1897: 18-19), who worked closely with Burgers and with whom he developed a close friendship, describes his personality well.

113 Kotzé 1934: 260-330 and 384-399 is fulsome in his praise of Burgers's qualities and severely critical of those who denigrated him and accused him of being a willing accomplice of the British.

114 1897: 36.

115 *Ibid.*

of Burgers, he shed his image of the dour, taciturn, narrow-minded religious fanatic¹¹⁶ and assumed the mantle of leadership for the *Boer* fight to reclaim its independence. In the eyes of the British observers of the time, he was physically ugly, with coarse features, coarse manners, coarse speech and lacking in any of the accepted social refinements. There was, though, more to him than met the eye. He was quick-witted, possessed of a native shrewdness, persuasive and eloquent when called for, and not easily swayed.¹¹⁷

He proved to be a leader of men. Under his influence the *Boers* set aside their debilitating factionalism and their apathy, and began to actively organise their resistance to the annexation. It was, in the hyperbolic language of Jorissen's fervent patriotism,¹¹⁸ an awakening of the slumbering *volksgeest* (spirit of the people), which complemented and fed off (and into) the nationalist Afrikaner movement that had been burgeoning in the Cape Colony since the mid-1870s.¹¹⁹

Kruger's leadership was inspired by the zeal of one who believed, and allowed others to believe, that he was divinely chosen to lead his people, as Moses had done with the Israelites, to a land where they could live freely and independently, submitting only to the will and the word of God.¹²⁰ His leadership was guided by a fierce, almost fanatical, desire for independence. It included both *freedom from* non-interference and *freedom to* make one's own friends and enemies – political and commercial – that had animated the *Voortrekkers* and continued to animate their immediate descendants. He was supported across political and religious divides and particularly by the women who, in the opinion of Olive Schreiner,¹²¹ were the driving force behind the agitation to resist rather than surrender.

Initially he was, to be sure, ethically ambivalent towards the British authorities and intimated more than once that he would accept the inevitable were Carnarvon to refuse to retract the annexation. He justified his early lukewarm attitude by stating that it was only upon his return that he became aware how strident the *volkstem* was in its opposition to the annexation. Only then did he begin to act accordingly, since he was always implacably led by (his interpretation of) the *volkstem*.¹²²

A *Boer* committee of some sixty members¹²³ was set up, with MW Pretorius as chairperson to guide and organise the resistance movement. A petition against the annexation was circulated to demonstrate that the majority of the *Boers* were, in fact, dead against the annexation. Some 6 500-odd signatories expressed their opposition to and some 500-600 in favour of annexation (the enfranchised, that is white and

116 This is how Jorissen saw him when he first met him in 1876: see *idem* 15-18.

117 See Meredith 2007: 77-79.

118 See Jorissen 1897: 39.

119 See Meredith 2007: 81-83.

120 See Giliomee 2003: 229.

121 *Idem* 231.

122 On Kruger's apparent double-dealing with Shepstone, see the discussion and exculpation of Kruger by Kotzé 1934: 501-511.

123 Jorissen 1897: 61.

male, population at the time was roughly 8 000). Armed with this evidence, a second deputation, comprising Kruger and Piet Joubert (Kruger's later political opponent), with Bok again as secretary, went to London to plead the Republican cause once more.

The deputation reached London in July 1878. They presented their case to the then secretary of state for the colonies, Sir Michael Hicks Beach. Hicks Beach rejected the petition on the grounds that the signatures were clearly obtained through intimidation and, in any event, represented the views of people who, for the most part, were incapable of forming a true and deliberate judgment on the matter.¹²⁴ Insult added to injury. Poorly educated and ignorant though many of the *Boers* undoubtedly were, the petition did reflect the *volkstem*. To Kruger, Joubert and others in whom the *Boer* political psyche was deeply ingrained, the importance of the *volkstem* was both axiomatic and foundational. It did not matter that there existed little clarity on the means to determine how the voice of the people on a particular matter was gauged and on how the representatives of the people were meant to react upon hearing that voice. Nor that the average member of that *volk* lacked the qualities commonly associated with sophisticated political discernment.

As with Lord Carnarvon, for Hicks Beach the *volkstem* was neither axiomatic nor foundational. Britain, as the paramount power in the region, was responsible first and last for the peace and safety of the country and in that matter it alone was entitled to decide. Power makes the rules and might rules. Surely the delegation did not seriously suggest that the *Boers* would resist by force the duly established government established in the Transvaal?¹²⁵ Kruger and Joubert reported back to the *volk* in early 1879 and thus the fires of resistance remained stoked.

1879 was an eventful political year for Great Britain in southern Africa. Cetshwayo, paramount chief of the Zulus, was frustrating the efforts of the British High Commissioner, Sir Bartle Frere, to implement his grand imperial federation scheme for southern Africa. Frere then brazenly provoked a dispute with Cetshwayo by making unreasonable demands on him. When Cetshwayo, to no-one's surprise, ignored the demands, Frere, in early January 1879 and without obtaining explicit approval from London to do so, sent a large British force to invade Zululand. Thus commenced the Anglo-Zulu War of 1879. At the Battle of Isandlwana on 22 January 1879 the British forces were decisively beaten by a Zulu army with vastly inferior weaponry but vastly superior numbers. It was a humiliating defeat for the British and severely damaged their reputation for invincibility and paramountcy. In a series of subsequent bloody battles, Britain succeeded in subjugating the Zulus in August of that year at the Battle of Ulundi.¹²⁶

124 See Kotzé 1934: 565-566.

125 *Idem* 568-573.

126 See, among many descriptions of the Anglo-Zulu War of 1879 in general histories, especially Cameron & Spies 1986: 176-179; Saunders 1988: 182-188; and Giliomee & Mbenga 2007: 165.

While dealing with the Zulus in 1879, Frere also sought to deal with the Transvaal *Boers*. Unimpressed by Shepstone's administration of the Transvaal (official reports described him as "an execrably bad manager"),¹²⁷ he recalled Shepstone and replaced him with Sir Owen Lanyon in March 1879. Lanyon was deeply unpopular in the Transvaal. In contrast to Shepstone's conciliatory approach, Lanyon's high-handed and condescending attitude towards the *Boers* (he called them "inflated toads" and "mortal cowards"),¹²⁸ aggravated tensions between *Boer* and Briton.¹²⁹ Frere visited the Transvaal in April. He did not impress the *Boers* favourably, nor did they impress him: like Lanyon, he regarded them as simple-minded, inferior people who had to be dealt with firmly. They in turn experienced him as duplicitous and untrustworthy.¹³⁰

Frere and Lanyon met with delegates of the *Boer* committee on 12 April 1879, in the presence of a large gathering of some 4 000 excitable *Boers* who had waited for weeks on end for him to arrive. To the patriotic Jorissen the gathering represented the best evidence of a vibrant national spirit and a clear expression of the *volkstem*.¹³¹ Kruger, Joubert and William Robinson (the latter no doubt for his proficiency in English) were deputed to engage with them on behalf of the *volk*, who demanded full and unconditional independence. Frere was prepared to offer them no more than the self-government enjoyed by other colonies.

The *Boer* committee prepared a memorandum of their demands for presentation to the colonial secretary, and Frere duly sent the memorandum to Hicks Beach. It was futile. They never even received a response. Frere had some days earlier written to Hicks Beach to inform him that, in his view, the agitation was driven by a disaffected minority who posed no real threat and who should be effectively and forcefully dealt with.¹³² His use of quotation marks in his despatches when referencing "the people" made it clear that he shared Hicks Beach's lack of comprehension for this amorphous, ill-defined concept of the *volk* and the importance the *Boer* committee attached to it.¹³³

In July Sir Garnet Wolseley was appointed as governor of Natal and Transvaal and commander-in-chief of the imperial forces in southern Africa. He then went to the Transvaal to bring to heel the *Boers* and Sekhukhune's Bapedi in the eastern Transvaal. In a major offensive that included some 6 000 Swazi troops, he defeated

127 See Meredith 2007: 83; Kotzé 1934: 544-551. Kotzé's account contains an extract of an exculpation by Shepstone (at 549-551). His sympathies lay with Shepstone, and definitely not with Frere.

128 See Meredith 2007: 99.

129 Kotzé 1934: 580-581 provides a character portrait of Frere.

130 See Jorissen 1897: 41-42. Kotzé 1934: 596-608 is surprisingly scathing in his assessment of Frere's character, temperament and his lack of discrimination, notwithstanding his undoubted ability, breeding and dedication to duty.

131 See Jorissen 1934: 42-45.

132 See Kotzé 1897: 601-602.

133 See extracts from Frere's despatch to Hicks Beach on 14 Apr as quoted by Kotzé 1934: 596-597 n 1.

the Bapedi after facing stern resistance, had Sekhukhune imprisoned in Pretoria and secured the safety of the British dominated inhabitants of the Lydenburg goldfields.

The diplomatic offensive he conducted against the *Boers* was less successful. He was no less prejudiced against the *Boers* than Lanyon and lacked the required tact and good judgment. In his diary he records his first impressions of the *Boers*: “These Transvaal *Boers* are the only white race I know that has been going steadily backwards towards barbarism ... Altogether I regard them as the lowest in the scale of white men & to be the very most [*sic*] interesting people I have ever known or studied.”¹³⁴ In a proclamation he issued immediately after being sworn in as governor of the Transvaal colony he made it abundantly clear that the Transvaal would be “for ever” an integral part of the British empire.

The *Boer* committee arranged for a mass meeting just north-west of Krugersdorp in December 1879 (on the farm Luipaardsvlei, where sixteen years later Robert E Brown’s pegging off of gold claims would trigger a constitutional crisis and an acrimonious stand-off between Kruger and Kotzé). The defiant *Boers* reiterated their desire not to be treated as British subjects and demanded the restoration of the government and *Volksraad* of the ZAR. They expected from a re-constituted *Volksraad* that it would participate with all southern African states in the formulation of a single so-called native policy and in the establishment of a confederation of southern African states and colonies. They set early April 1880 as a return date for a progress report from the committee.

Wolseley had MW Pretorius, chairman of the *Boer* committee, and WE Bok, the secretary, arrested in early 1880 on charges of treason. Also in early January he gazetted a constitution for the Transvaal. This provided for an executive council and a legislative assembly, the members of both bodies being nominated by the government rather than elected by the people. This was contrary to the terms of the annexation proclamation, which provided for an *elected* legislative assembly. Quirkily, he then had Pretorius released and offered him a position on the executive council. Pretorius declined.

The king’s voice of the people rose ever more stridently in the wake of Wolseley’s autocratic actions. His (and Lanyon’s) attitude would have been a harsh reminder to those who remembered why, forty years earlier, their *Voortrekker* forebears had left first the Cape Colony and then Natal to escape precisely the sort of dictatorial rule and imperial arrogance Wolseley and the colonial office sought to impose on them. Agitation also spread to the Free State and the Cape Colony. Petitions were addressed to William Gladstone – whose defeat of Disraeli saw the Liberal Party returned to power in April 1880 – by Kruger and Joubert on behalf of the *Boer* committee and by an increasingly large and influential number of *Boer* sympathisers in the Cape. Given his liberal credentials and his stance against the annexation in his pre-election

134 Meredith 2007: 95-96.

campaigning, it was thought that Gladstone would be more sympathetic to the *Boer* cause. However, he was not.¹³⁵

7 2 Paul Kruger leads his *volk* in the War of Independence of 1880-1881

Wolseley left South Africa as early as April 1880, after only seven months in office, for yet more imperial duties and honours. He left behind a Transvaal *Boer* population indignant and resentful. Many had little stomach for a war with Great Britain and strongly advocated a diplomatic solution. The *Boer* committee had postponed the planned gathering of the *volk* scheduled for April 1880 to January 1881. They hoped that Prime Minister Gladstone would be moved by their own petition and the one emanating from the Cape Colony to revise imperial policy in respect of the Transvaal. When Gladstone remained unmoved, the warmongers began to gain the ascendancy. The hotheads sought and found a *casus belli* when Lanyon had the wagon and oxen of a local farmer in the Potchefstroom district attached for his failure to pay taxes. When sympathetic *Boers* prevented the sheriff from attaching the property, Lanyon was forced to send troops to Potchefstroom. Hostilities were now inevitable.

The *Boer* committee called a mass meeting of the *volk* in early December 1880 at the farm Paardekraal, where Krugersdorp was later established. Between 12 000 to 15 000 came, among whom were some 8 000 armed and belligerent potential conscripts. The committee was disbanded by the Executive Council and the *Volksraad* of the Republic was restored. The *Volksraad* appointed, instead of a state president, a triumvirate comprising Paul Kruger (who was also designated vice-president, the position he occupied immediately prior to the annexation), MW Pretorius and Piet Joubert (the latter was appointed commandant-general). On 16 December Heidelberg became the provisional seat of government. On the same day Lanyon responded by publishing a proclamation declaring the Transvaal to be in a state of rebellion.

In his acceptance speech on 14 December 1880, Kruger said: "I stand before you, called by the People. In the Voice of the People I have heard the Voice of God, the King of all nations, and I obey."¹³⁶ In doing so he echoed the language used by Piet Retief when appointed governor of the *Voortrekkers* in 1837. It was also the language employed in 1859 by a *Volksraad* member in describing the influence of the will of the people on those elected to draft the 1858 *Grondwet*. It was, the member then said, a manifestation of the notion of *vox populi vox Dei*.¹³⁷ This re-affirmation of a long-held Calvinist precept in his acceptance speech represented a

135 On the presumed reasons for his non-interference, see Jorissen 1897: 58-59; see, too, Kotzé 1934: 694-695 & 722-724.

136 See Smit 1951: 14; Kleynhans 1966: 23.

137 Wypkema 1939: 381-382.

subtle but important shift in perspective on the primacy of the *koningstem* concept, a shift that became crucial in later years. The *volk* has the *koningstem* and not the British sovereign, Queen Victoria. This is so not only because in a Republic the people, and not the king, have ultimate authority; but also because God, the King of all Nations, speaks through them. The *volk* therefore not only has sovereign authority, but also divine authority. And he, Paul Kruger, by the grace of God, was the bodily representation of that divine authority.

The gathering of the *volk* at Paardekraal and Kruger's rousing commitment to lead them to victory, was the culmination of the awakening of a national identity. It was cultivated by speaker after speaker, promoting a patriotism that fed off anti-British sentiment and was infused with religious fervour.¹³⁸

The first shots in the war were fired in Potchefstroom on 16 December 1880. The *Boers* laid siege to the larger towns where pro-British sentiment (including many loyalist *Boers*) dominated. On 20 December 1880 British forces suffered heavy casualties near Bronkhorstspuit, east of Pretoria. They also suffered a succession of defeats under General Sir George Colley (he had succeeded Wolseley as high commissioner for south-east Africa and governor of Natal) on the Transvaal/Natal border in January/February 1881, culminating in the Battle of Amajuba, where Colley himself was killed. The British and *Boer* forces agreed to a ceasefire on 6 March to discuss the terms of peace. Negotiations were conducted between Kruger and his advisers and Colley's successor, Sir Evelyn Wood and his advisers on 14 March. Kruger led the peace talks on behalf of the *Boers*. President Brand of the Free State mediated the talks. Initial peace terms were agreed to soon thereafter in March.

The terms of the peace were fleshed out by a royal commission comprising Sir Hercules Robinson, high commissioner for Southern Africa, as chairperson; Sir Evelyn Wood and Sir Henry de Villiers, chief justice of the Cape Colony. They met with the *Boer* leaders in June and July, with Brand serving as mediator. The final terms were captured in a convention between the ZAR and Britain (De Villiers was the primary draftsman) and signed by both parties on 3 August 1881 in Pretoria.¹³⁹

The convention provided for "retrocession": complete self-government for the inhabitants of the Transvaal Territory. Nevertheless, self-government was subject to British suzerainty.¹⁴⁰ Self-government was granted subject to a range of other terms, conditions and limitations.

The newly established *Volksraad*, which commenced its first sitting on 15 August, was given three months within which to approve the terms of the convention. They balked at many of its provisions. It was a severe curtailment of the full independence

138 Giliomee 2003: 234.

139 The convention is published in Jeppe & Kotzé 1887: 996-1009.

140 "Suzerainty", a term pregnant with political meaning, meant that the suzerain (Great Britain), though granting to the inhabitants self-government of and control over the internal affairs of their country, retained control over and in fact conducted its foreign affairs.

they had enjoyed since 1852, particularly with regard to the conduct of and control over their foreign affairs and their relationships with Africans, inside and outside Transvaal borders. To insert provisions related to slavery, religion and the freedom of citizens was deemed an insult to national honour. The borders, in particular those to the east and the south-west, were unsatisfactorily drawn. They fulminated against English interference in their affairs. All in vain. Refusal to approve the convention would have unleashed the full might of Britain upon the Republic, as Britain had done with the Zulu kingdom after Isandlwana. The convention was finally, grudgingly, approved by the *Volksraad* on 25 October 1881.

7 3 The rise to judicial prominence of John Kotzé¹⁴¹

Johannes Gysbertus Blanckenberg Kotzé, anglicised to John Gilbert Kotze, was born on the Leeuwenhof Estate in Cape Town (currently the residence of the Premier of the Western Cape) in 1849, the fourth of six children, the eldest of whom, his brother Jacobus, was seventeen years his senior. His father was a member of Parliament in the Cape legislative assembly and was twice mayor of Cape Town.

John studied at the South African College from 1864 to 1868. He went to London in 1869 to continue his studies. He sat for his matriculation examination at the University of London in December. In January 1870 he entered the Inner Temple as a student and read for the LLB degree of the University of London. In his first year he studied jurisprudence alongside Roman law and constitutional law. Kotzé was much impressed by the writings of the legal theorist, John Austin (1790-1859), whose virtues he extolled in his *Memoirs*:¹⁴² “His clearness of expression, original and logical mind and contempt of sophistry appealed to me, and I probably owe more to him than to any other jurist with whom my early course of reading made me familiar He has indeed performed abiding work, and rendered great and lasting service to the scientific study of law in England.” Austin’s so-called scientific command theory of law was the peg on which Kotzé would hang his arguments in his early constitutional judgments in the 1880s. In his later judgments he jettisoned Austin in favour of more liberal American constitutional jurisprudence. He always retained a fondness, though, for the so-called scientific jurisprudence he had been introduced to as a young student.

He passed his first examination for the LLB degree in December 1870 and his second examination in December 1872, graduating with a LLB from the University of London. In that same year he married Mary Bell, described twice in the *Memoirs* as being eighteenth in descent from King Edward I. Kotzé, having kept his terms, was admitted to the Inner Temple. He remained in London for another two years,

141 Kotzé’s *Memoirs* served as the primary source for biographical details on Kotzé’s early career: see Kotzé 1934: *passim* and 1941: *passim*.

142 See Kotzé 1934: 117.

studying and also translating and commenting on Roman and Roman-Dutch law texts and, in 1874, serving a period of pupillage. He was called to the Bar on 30 April 1874. In this same year he was contracted to engage on his well-known English translation of Simon van Leeuwen's *Het Rooms-Hollands Regt – the Commentary on Roman-Dutch Law*, which he finished in two volumes, one in 1881 and the other in 1886.

The five years he spent in London as a student made a deep impression on the young Kotzé. He became a confirmed Anglophile. His *Memoirs*, written sixty years later, breathe the awe and admiration he felt as he first sampled and then fully absorbed the sights, sounds and sophistication (intellectual, industrial and technological) of the largest and richest city in the world.¹⁴³

Twenty-four year old John Kotzé, his wife and first child arrived in Cape Town in August 1874. He was admitted as an advocate of the Cape Supreme Court before Chief Justice Sir Henry de Villiers in the same month. Hoping to earn more money than in Cape Town, he began to practise law at the Bar of the Eastern Districts Court in Grahamstown in July 1876.

On 4 April 1877, while on circuit in Queenstown, he received a telegram informing him that President Burgers had offered him the chief justiceship of the ZAR. He accepted the offer and soon afterwards left by stagecoach for Kimberley. While there, the news reached him that the ZAR had been annexed by Shepstone. He decided to go to Pretoria anyway. He reached the town on the weekly mail coach on 28 April.

Shepstone met with Kotzé in early May. Preller had declined Burgers's offer of a judgeship. Munnich, however, had accepted. Shepstone's administration had insufficient funds to appoint a second judge; in any event, Munnich was unqualified and lacked the judicial temperament.¹⁴⁴ Shepstone, despite Kotzé's urging, would not implement the erstwhile *Volksraad's* constitutional reform of the judiciary. In a proclamation of 18 May 1877 Shepstone established a single-judge high court for the Transvaal. Kotzé was appointed to this position. He wanted to be a chief justice (the Free State had established a supreme court in 1874 with initially a single judge only as chief justice). Kotzé accepted the appointment subject to the consideration of his claim by the colonial office to be appointed as chief justice. This did not happen, much to Kotzé's indignation. When the British administration did appoint a Chief Justice, in April 1880, it was JP de Wet, then a judge in the Griqualand West District court, who was given the position, with Kotzé the junior judge. Kotzé had questioned some of the appointments made by the administration and this seemed to suggest to them that he had not the true imperial spirit.¹⁴⁵ Only when the ZAR was restored in

143 See chaps IV-VI of his *Memoirs*: Kotzé 1934: 103-165.

144 On Munnich's unsuitability for high office, see, also, Wildenboer 2011: 357-358.

145 For Kotzé's views on his claims to the Chief Justiceship and on the reasons for his failure to secure the position in 1880, see Kotzé 1934: 695-711. On JP de Wet and his post-ZAR career, see Schulze 2010: 98-120.

1881 did he become chief justice. His insistence on being made chief justice and his indignation when he was refused this title exhibited in him, already as a young man, a headstrong streak and a self-confidence that shaded into vanity. It would later characterise his dealings with another headstrong and vain man, Paul Kruger.

When he was sworn in, wigged and robed, as judge of the High Court on 19 May 1877, he was, at twenty seven years of age, the youngest judge in the British empire, a matter he records with much pride. The High Court was established three days later. Rider Haggard was appointed the first registrar of the High Court.¹⁴⁶

Kotzé and his family settled into what he described as the “simple and natural” life in Pretoria, so vastly different from life in London and in Cape Town. Soon after, in early August 1877, he went on a three-month circuit to six of the major towns in the country, accompanied by Rider Haggard. This journey into the African hinterland and the characters they met on circuit certainly stimulated Haggard’s imagination and laid the foundation for his stories of African adventure. At Potchefstroom in October the Victorian novelist Anthony Trollope, then touring the southern African interior, saw the youthful Kotzé in action on circuit and made his famous comment that “[o]ne expects a judge to be reverend with years, but this was hardly more than a boy judge”.¹⁴⁷ Trollope had earlier, when in Pretoria, visited Kotzé at his home in Pretoria, “the first distinguished stranger who visited us in our new home”, as Kotzé proudly records in his *Memoirs*.¹⁴⁸

While in session in Potchefstroom, Kotzé J granted an order for the re-transfer of a property in Potchefstroom from AJ Munnich to Baumann Bothers and Co of Bloemfontein.¹⁴⁹ In February 1875 the local *landdrost* court had found that an agreement of sale had been entered into between Munnich and Baumann Brothers and Co and that the latter was therefore bound to transfer the property to Munnich. Baumann Bros appealed this decision to an appeal court in Potchefstroom in April. The appellants asked for leave to amend their summons so that they were correctly identified as “Baumann Bros and Co” rather than merely as “Baumann Bros”. Munnich objected to the appeal being heard, as the appellants had been described in the summons as “Baumann Bros” and not “Baumann Bros and Co” (undoubtedly a mere clerical error on the part of the scribe). There had been no judgment in a matter between Munnich and “Baumann Bros” (only one between Munnich and “Baumann Bros and Co”). Therefore, so ran the argument, there could be no appeal against a fictitious judgment and Munnich could not be called upon to defend himself

146 See Jeppe & Kotzé 1887: 703-707 for the Dutch version of the proclamation; see, too, Kotzé 1934: 417-435. Kotzé and Haggard developed a strong friendship, even though the latter had strong anti-*Boer* sentiments: see Kotzé 1934: 523-524.

147 Trollope 1878: 121-122. Kotzé describes this circuit in some detail in his *Memoirs*: see Kotzé 1934: 458-488. See, too, Kahn 1959: 399.

148 See Kotzé 1934: 516.

149 Kotzé describes the background to the case and the case itself in some detail in his *Memoirs*: see Kotzé 1934: 480 at n 1 and 805-807.

against a non-existent judgment. Surprisingly, the appeal court accepted Munnich's argument and dismissed the appeal with costs. For good measure, some three days later the court provided a memorandum to the court registrar informing him that what the court had meant to convey was that Baumann Bros and Co were barred from pursuing the matter any further.

The Baumanns were nothing if not persistent in their fight against such people's justice. They lodged a new appeal against the original judgment in January 1876 when the appeal court sat at Zeerust. This court considered the merits of the case afresh and decided that there had not in fact been a contract of sale. They set aside the original judgment, found that the property still belonged to Baumann Bros and Co and that Munnich had to bear the costs both in the *landdrost* court and the appeal court. Faced with two contrasting appeal court judgments, the registrar of deeds sought advice from the state attorney on which judgment to give effect to. Acting State Attorney Swart advised that the first appeal court judgment should be followed, as the court had held that Baumann Bros and Co could not further pursue their appeal. When, a week later, EJP Jorissen was appointed as state attorney, he confirmed the opinion of his predecessor. On the strength of this advice the Executive Council resolved to set aside the judgment of the Zeerust appeal court and to order the transfer of the property to Munnich.

The Baumann brothers, fighting for justice to the very last, petitioned the *Volksraad* soon after the Executive Council resolution had been passed. The *Volksraad*, to their credit, refused to approve the resolution. They did this on the grounds that the Executive Council had acted unconstitutionally by arrogating to itself a judicial authority not provided for in the *Grondwet*.¹⁵⁰ When the matter came before Kotzé's circuit court in November 1877 (almost eighteen months later) he was petitioned to order the re-transfer of the property from Munnich (the registrar of deeds having meanwhile acted on the Executive Council's resolution) to Baumann Bros and Co. Kotzé J found little difficulty in granting the order: the application to amend the summons in the first appeal court should have been granted, since the summons plainly contained a mere formal error which could not possibly have prejudiced Munnich. In any event, the appeal court had no authority to rule, in its explanatory memorandum and after the fact, that Baumann Bros and Co was barred from instituting a fresh appeal. Kotzé in his *Memoirs* recounts the Baumann Bros and Co matter in some detail as an example of the propensity of the executive to interfere unconstitutionally in the administration of justice. It was this propensity for interference that would surface from time to time during his tenure as chief justice, with increasingly far-reaching consequences.

150 For the *Volksraad* resolution see Jeppe & Kotzé 1887: 669. This was not the first time the Executive Council had unconstitutionally arrogated to itself the authority to encroach on the independence of the judiciary. It happened in 1872 as well: see Wildenboer and Dietrich 2015: 297-298.

True to his character Judge Kotzé soon found an opportunity to stamp his authority on the administration of justice. EJP Jorissen had been recruited by Burgers in Holland in 1875. He had a doctorate in divinity and had been a minister of the Dutch Reformed Church until his professed liberal views led to him resigning from the Church. He was asked by Burgers to head up the new *gymnasium* in Pretoria. This high school was not a success and Jorissen soon sought other employment. Burgers offered him the position of state attorney vacated by James Buchanan. He accepted, after immersing himself in the *Hollandsche wetten* and the *locale wetten* and passing an examination for admission as an attorney.¹⁵¹ This was conducted by a Board of Examiners of four practitioners (one of whom was the ever-present AJ Munnich). Only one of them was trained in law. Kotzé referred to this examination disparagingly as being “of no intrinsic value, judged by the usual and accepted standard”. Jorissen continued to serve as state attorney after the annexation and was admitted as an advocate and attorney of the High Court.

Kotzé had high expectations for the judiciary of the Transvaal. Those who practised law and who held high office in the judicial administration needed to be trained lawyers, like him and a handful of others. Jorissen was not a professionally trained lawyer. In April 1878 Kotzé J ordered the release of a man who had been arrested in Pretoria on the strength of a warrant signed by the magistrate in Kimberley and counter-signed by State Attorney Jorissen. Kotzé J found that the statutorily prescribed procedure for the arrest of an individual as a result of a foreign warrant had not been followed. Kotzé publicly commented on the irregularity perpetrated by Jorissen as state attorney. No doubt Jorissen, cantankerous and quick-tempered, took umbrage at the judicial dressing-down he received from the twenty-eight year-old, twenty-one years his junior.

A week later the high court was in session in Potchefstroom. There had been agitation for more judges to be appointed to alleviate the heavy judicial workload. Kotzé saw fit, in an address to the public from the bench, to support the call for more judges. He went further, though. He also said that such additional judges, and indeed the state attorney as the head of the legal profession, should be fully trained and qualified lawyers. Jorissen again took umbrage. The matter was taken up with Shepstone, who sided with Kotzé. Shepstone told Jorissen that his lack of legal training and his public reprimand by the judge made him unfit to hold the office of state attorney. Jorissen was dismissed from office and replaced on 1 October 1878 by Christian Maasdorp of the Cape Bar (he would later become a judge of the appellate division of the Union of South Africa).¹⁵² Jorissen felt hard done by and it does seem as if one relatively unimportant mistake was insufficient justification for his dismissal – “with shame”, in Jorissen’s view – from office at the instigation of Judge

151 See Jorissen 1897: 7-11.

152 On CG Maasdorp see Roberts 1942: 370. He was the younger brother of Sir Andries Maasdorp, who also became a judge and was an accomplished legal scholar: see Roberts 1942: 370.

Kotzé.¹⁵³ Observers at the time had no doubt that there was little love lost between John Kotzé and Eduard Jorissen.¹⁵⁴ Interestingly, in Jorissen's own memoirs, he makes no mention of the role played by Kotzé in his dismissal and attributes the dismissal to the need for a more compliant, less oppositional state attorney.¹⁵⁵

State Attorney Maasdorp, who had had to oversee the preliminary investigations against Pretorius and Bok after their arrest on charges of treason, resigned in protest at what he perceived to be a politically-inspired witch-hunt against Pretorius and returned to the Cape Colony. He was replaced, much to Kotzé's chagrin, by WB Morcom who was an admitted attorney in Natal. Morcom had no legal qualifications and would not have been admitted to legal practice elsewhere. Kotzé protested against this appointment which offended his sense of the dignity, traditions and standing of the Bench and Bar – to no avail. In fact, worse was to come for Judge Kotzé. Finally responding to repeated requests for an increase in the number of judges of the high court, in April 1880 Governor Wolseley announced in the *Government Gazette* that JP de Wet, a former colleague of Kotzé's at the Eastern Districts Bar in Grahamstown, from 1873 solicitor-general of the Cape Colony and from 1878 to 1880 recorder¹⁵⁶ of Griqualand West, had been appointed chief justice and that Kotzé had been appointed as puisne judge.¹⁵⁷ Kotzé protested vigorously at this perceived slight. Not only had he expected to become chief justice of the enlarged court, he had argued consistently since 1877 that he was, in fact, entitled to the position, having been appointed into that position by Burgers just prior to the annexation. Kotzé had incurred the wrath of Wolseley by earlier questioning Lanyon's suitability for the office of administrator and more recently questioning the appointment of Morcom. His protests fell upon deaf ears. He resolved to petition the Privy Council to claim his right to the position of chief justice. His first petition was rejected and, not satisfied with the reasons provided, he drafted a further petition to the Privy Council in December 1880.

To his credit, while pursuing legal avenues to address his grievance, he continued to serve in the high court alongside De Wet CJ, and the two judges retained cordial and professional relations. In his *Memoirs* Kotzé devotes considerable space to his thwarted claims to the chief-justice position.¹⁵⁸ It is clear that he had been deliberately overlooked for the position. His prolix argument to justify his entitlement to the position is not persuasive. In reading Kotzé's *Memoirs* one is struck by his enthusiasm for politics and his readiness to express himself on political

153 Kotzé devotes a number of pages to Jorissen's dismissal from office in his *Memoirs*: see Kotzé 1934: 526-540. He surely protests too much at the suggestion that he was animated by ill-feeling towards Jorissen.

154 Kahn 1959: 399.

155 See Jorissen 1897: 37-38.

156 Judges in the Cape Colony controlled districts of Natal and Griqualand West and were called "recorders".

157 On JP de Wet, see *idem passim*.

158 See Kotzé 1934: 695-711.

affairs. Both a confirmed Anglophile and a *Boer* sympathiser, he promoted a politics of compromise: He foresaw a self-governing republic under British protection, its external relations and its relations with the African inhabitants subject to British federation policies.¹⁵⁹ In the increasingly febrile atmosphere of 1878 to 1880 such compromise proposals made little impression on either *Boer* or Briton. Kotzé would retain his predilection for politics in later years; it would contribute in no small measure to the later antagonism between him and Kruger.

When the government of the country was restored to the *Boers* on 8 August 1881, one of its first actions was to establish the Supreme Court of the South African Republic, which had been approved by the *Volksraad* immediately prior to the annexation. JP de Wet was not offered the position of chief justice by the government. He had served on a commission – with Kotzé and the newly-appointed British resident, Hudson – appointed in terms of the Convention to assess individual claims for war damages. Upon completion of his committee duties in March 1882, De Wet left for Ceylon (Sri Lanka) where he became the acting chief justice for a brief period before his health-induced retirement.¹⁶⁰ John Kotzé, who had wisely withdrawn his petition to the Privy Council, was offered and accepted the position of chief justice. On 8 August 1881 he was sworn in as chief justice of a three-judge supreme court of the *ZAR*. EJP Jorissen, who had rendered sterling service to the *Boer* committee and the government-in-exile and had been responsible for much of the written communications, was re-appointed as state attorney of the *ZAR*.

As mindful of the dignity of the judicial office (and of his own) as ever he had been when first appointed as a judge, Kotzé had asked for, and received, an undertaking that he would be consulted before any additional judges of the supreme court were appointed. In March 1882 the Executive Council sought his advice on the appointment of a particular individual as an additional judge (he mentions no name in his *Memoirs*). Kotzé was adamant that, though duly qualified, the individual was not fit for office and intimated that if Kruger were to persist with the appointment, he would rather resign his own position. Though Kruger took none too kindly to this show of resistance from the young judge, the Executive Council did not make the appointment. Soon thereafter Kotzé was informed that the executive had decided to fill both judicial vacancies and to offer the positions to Maasdorp (former state attorney) and a practitioner from the Free State. Though both declined the offers, Kotzé felt scorned that he had not been consulted on the appointments and feared that the course of action, with the accompanying spectre of political interference in judicial affairs, would be repeated. When, therefore, while on holiday in Cape Town in July 1882, he was offered the position of judge of the newly constituted district court of Griqualand West in Kimberley (Griqualand West had recently been

159 His political views are best captured in a memorandum he wrote to Administrator Lanyon in Dec 1880 on the eve of the outbreak of war and published in the *Memoirs*: see Kotzé 1934: 731-735.

160 See Schulze 2010: 111.

incorporated into the Cape Colony) he accepted and resigned his position in the ZAR. Whether motivated by his sense that Kruger was an unpalatable dictator in the making, to the clear detriment of judicial integrity; or by a desire to be in a society where British *mores* dominated and where his wife and daughters were able to live stable, refined lives; or by a desire to test Kruger and try to strengthen his own position in the ZAR, his resignation caused anxiety for him and for the country.¹⁶¹

The government had in the *interim* appointed EJP Jorissen as acting chief justice¹⁶² and approached Melius de Villiers, brother of Sir Henry and a judge in the Free State, to become the chief justice. De Villiers declined and many prevailed upon Kotzé to reconsider his position. Kotzé was no doubt gratified at being fêted by so many influential burghers. In fact, in their desire to curry favour with him, some even went so far as to ask him to stand as a candidate in the presidential elections to be held in early 1883. Recognising the inappropriateness of the request, some then withdrew the request. Kotzé nevertheless decided to “think the matter over” before declining.¹⁶³ A seed had been planted.

Kotzé once again interviewed the triumvirate. He withdrew his resignation and again took up his position as chief justice. Kotzé also suggested, and the government approved, the appointment of Piet Burgers, nephew of President Burgers and then law student at the University of Leyden, and of Christoffel Brand, son of President Jan Brand and then advocate at the Cape Bar, as additional judges of the Supreme Court.

8 Concluding remarks

A tumultuous decade was closed out by a war that never should have happened. It was the condescending attitude adopted by imperial Britain towards the *Boers* and an ill-conceived desire among its administrators not to lose face, that led to hostilities. It was the spiritual torpor of the *Boers* at the beginning of 1877, their apathy and self-pity that provided additional justification for the annexation and generated the need to undo militarily what had been done without force of arms. The war brought peace and resuscitated dormant *Boer* nationalism. It left both sides with a sense that there were still scores to be settled, and that little that was decisive and lasting had been achieved. Sides had irreversibly been chosen and the choices made would influence political decision-making for the next two decades. Everything – the treatment of the African indigenous inhabitants of the region, the mineral wealth of the country, its

161 He insisted that his reason was “solely the vacillating and unsatisfactory policy of the Government, in regard to the Transvaal” and that “my heart, I confess, was with the Transvaal”: see Kotzé 1941: 21.

162 See Jorissen 1897: 124.

163 See Kotzé 1941: 24.

strategic position in southern Africa – became subordinated to a battle for ultimate control of the ZAR.

The *Boers* interpreted the peace terms and the convention as a victory over Britain and a resumption of the independence from Britain they had enjoyed since the 1852 Sand River Convention. Victory in the battle of Amajuba was an act of God, a sign of divine intervention meant to restore to the *Boers* what was rightfully theirs.¹⁶⁴ From their side, the British interpreted the peace terms and the convention as a magnanimous gift of self-government by Queen Victoria to the inhabitants of the erstwhile Transvaal territory, as a token of her might and generosity.

Whether as a result of divine intervention or sovereign magnanimity, a careful reading of the convention certainly suggests that the *Boers* got what they wanted, namely the right to govern themselves. Their independence, though, was substantially circumscribed to the extent that Britain retained significant influence over the affairs of the ZAR. Britain had lost prestige, the *Boers* had gained prestige. But Britain's power in the region had not diminished and the *Boers'* power had not been enhanced.

Paul Kruger, then fifty-five years old, emerged triumphant as the undisputed *Boer* leader. His policies for the next two decades would remain shaped first, by what he had achieved and by how he had achieved his successes, and second, by his desire, which had by then mutated into a holy calling, to defend his *volk's* independence by keeping them sanitised against *uitlander* (ie, British) influence and overrun. John Kotzé, then thirty-one years old, had decided to adopt the country as his own and to fully identify with the country and its inhabitants (both *Boer* and *uitlander*). As chief justice he enjoyed a seat at the high table of the state and rendered excellent judicial and legal service to it. He retained the compromise politics he had adopted in the 1870s and sought to encourage, rather than discourage, British influence in the ZAR. As Kruger became ever more of a nationalist demagogue, so Kotzé became ever more committed to and embedded in extra-judicial politics. Full-blown conflict between the president and the judge was inevitable. It bubbled under the surface during the 1880s, but erupted into a constitutional crisis in the 1890s with consequences more far-reaching than either had imagined. Robert Brown happened to be in the right place at the wrong time and became the victim of an ideological battle he had no part in.

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164 *Idem* at 8-11.

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JUDGE JOHN HOLLAND AND THE VICE-ADMIRALTY COURT OF THE CAPE OF GOOD HOPE, 1797-1803: SOME INTRODUCTORY AND BIOGRAPHICAL NOTES (PART 1)

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ABSTRACT

A British Vice-Admiralty Court operated at the Cape of Good Hope from 1797 until 1803. It determined both Prize causes and (a few) Instance causes. This Court, headed by a single judge, should be distinguished from the *ad hoc* Piracy Court, comprised of seven members of which the Admiralty judge was one, which sat twice during this period, and also from the occasional naval courts martial which were called at the Cape. The Vice-Admiralty Court's judge, John Holland, and its main officials and practitioners were sent out from Britain.

Keywords: Vice-Admiralty Court; Cape of Good Hope; First British Occupation of the Cape; jurisdiction; Piracy Court; naval courts martial; Judge John Holland; other officials, practitioners and support staff of the Vice-Admiralty Court

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1 Introduction

When the 988 ton, triple-decker HCS *Belvedere*, under the command of Captain Charles Christie,¹ arrived at the Cape on Saturday 3 February 1798 on her fifth voyage to the East, she had on board a man whose arrival was eagerly anticipated locally in both naval and legal circles. He was the first British judicial appointment to the recently acquired settlement and was to serve as judge of the newly created Vice-Admiralty Court of the Cape of Good Hope.

Britain had occupied the Dutch settlement at the Cape in September 1795, and at the time had no designs on permanent colonisation. Engaged in a war with the French, her main aim was to prevent the strategically crucial port from falling into enemy hands and so to secure her trade with the East Indies.²

As a result, the occupiers left the local administration of justice largely unchanged.³ The Council of Justice was simply re-instituted in 1795 as the Court of Justice⁴ and was only in minor – and mainly compositional – respects altered in 1797.⁵ The applicable Roman-Dutch law and legal procedures, too, remained in place and the Court's jurisdictional powers continued as before.

The Council of Justice had exercised an extensive original and appellate jurisdiction in civil and criminal matters. It also had a broad maritime jurisdiction. This included all causes concerning booty or prize (“alle questien raakende Buiten of Pryzen”) captured during war by Dutch naval vessels or those Dutch vessels sailing under commissions or letters of marque. It further included actions between inhabitants of the settlement and the masters, seamen and passengers belonging to

1 For details of this Honourable (East India) Company Ship, see “Ships of the East India Company” at <http://eicships.threedecks.org> (accessed 16 Mar 2017); Gerber 1998: 393; British Library, IOR/L/MAR/B/332E (journal of the *Belvedere*, 8 May 1797-3 Feb 1800, including passenger lists). There is a painting of her in 1800 by the prolific marine artist Thomas Luny (1759-1837) – as to whom see P van der Merwe “Luny, Thomas” in *Oxford Dictionary of National Biography* (online ed Jan 2012, accessed 27 Jan 2015) – which may be viewed at (and a print of which may be bought from) <http://www.art.com> (accessed 11 Apr 2017).

2 See, generally, Freund 1989: 324-357.

3 On the administration of justice during what is known as the First British Occupation, see, eg, Visagie 1969: 91-94; Giliomee 1975: 95-98; Van Zyl 1983: 444-446; and Boucher & Penn 1992: 150-157.

4 The Proclamation on the Re-establishment of the Court of Justice of 11 Oct 1795 (see Eybers 1918: 97; *Kaapse Plakkaatboek* vol 5: 7-8) re-established the Court of Justice in the same manner as that body had existed at the time of the surrender of the settlement to Britain, and permitted it to operate according to the laws, statutes and ordinances in force in the colony.

5 In terms of the Proclamation on the Administration of Justice of 24 Jul 1797 (see Eybers 1918: 99-101; *Kaapse Plakkaatboek* vol 5: 94-96; Theal 1897-1905 vol 2: 126-128), the administration of civil and criminal law was to continue according to “subsisting laws and jurisprudence”. It made provision for a reduction in the number of members of the court, for the establishment of a Court of Appeals in Civil Matters (consisting of the governor and lieutenant governor) “for the hearing and determining of appeals from the courts of law within the settlement”, and for a possible further appeal to the King-in-Council.

any ships anchored in Cape roadsteads or bays.⁶ Crimes on board East India Company or other Dutch ships, if not dealt with by way of a court martial (*scheepsraad*) on board, were often adjudicated at the Cape by members of the Council of Justice with the aid of the ship's master and high-ranking officers.⁷

One of the first matters the re-established Court of Justice was required to deal with urgently, involved the arrest of the American vessel *Nancy*.⁸

The British initially had no choice but to make use of the local court in maritime matters,⁹ the only alternative being to send the matter to England for trial to the great inconvenience of all concerned.¹⁰ That was clearly not satisfactory. The problem the British naval and maritime community at the Cape had with the Court of Justice was that it was staffed by untrained – even if now full-time and salaried – lawyers (only the secretary and the fiscal had legal qualifications), conducting proceedings in Dutch. Moreover, they applied not the legal system usually applicable in Britain to Admiralty and maritime claims, but Roman-Dutch law, including, where relevant, Roman-Dutch maritime law and procedures.¹¹

- 6 See art 60 of the *Provisioneele Instructie voor den Raad van Justisie*, as paraphrased by Botha 1962e: 126. The Cape Archives (CA) in the Council of Justice (CJ) series contains multiple relevant holdings: see, eg, CJ 3184 (reports of ships' enquiries, 1731-1768) and CJ 3158 (various documents concerning proceedings before the Council relating to ships, 1674-1800). See, also, n 41 *infra* for such proceedings during the First British Occupation.
- 7 Capital offences (murder, manslaughter, mutiny and sodomy) had to be punished in the Netherlands or Batavia, unless there was an imminent danger in postponing proceedings: see Böeseken 1986: vii-viii; Heese 1994: 56-71 (crimes and punishment of soldiers and seamen in the eighteenth century).
- 8 See Theal 1897-1905 vol 1: 203-206 (letter by members of the Court to Gen Craig, 16 Oct 1795, indicating that they were required to be "assembled extraordinarily" – they ordinarily sat only once a fortnight – for this purpose; their assembly gave them an opportunity to raise several issues with Craig concerning the administration of justice, including their salaries and what was to happen to appeals to the Court of Justice in Batavia that were pending at the time of the British occupation).
- 9 Thus, Adm Elphinstone delivered up the American ship *Argonaut*, which he had detained and which later stranded in False Bay, to the Court of Justice to take the necessary legal steps "tot conservatie van den Eijgendom van hetselve Schip en dies lading". The Court obtained permission from Gen Craig to sell her perishable cargo at a local public auction: see De Villiers 1967: 174; CA, BO 30: 107-114, 118 (letter by the Court of Justice to Gen Craig, 27 Oct 1796).
- 10 See CA, NCD 1/45/124 and 125 (1796 notarial protocol containing a protest by the master of the Danish ship *Amalienburgh* to Adm Elphinstone for sending his ship as a prize to Europe on his account).
- 11 To which must be added a rather extensive body of local enactments (*placcaeten*) dealing with matters such as shipwreck, their salvage and preservation, and the prevention and punishment, by death, of the looting of shipwrecked goods (*strandrooverijen*), as well as with life salvage. The *Kaapse Plakkaatboek* contains numerous examples; see, also, Roos 1897: 13-14. Interestingly, a *placaet* of 21 Nov 1792 (see *Kaapse Plakkaatboek* vol 4: 141-155), dealing with "die partikuliere vaart", contained detailed measures on the permission granted by the Dutch East India Co to local inhabitants to engage freely in trade to and from the Cape with surrounding territories as well as with India, and the conditions (eg, no trade in monopoly goods, and only on Dutch ships)

The Royal Navy, in particular, found this state of affairs detrimental. Prevailing conditions of war and the not infrequent capture of enemy men-of-war at or near the Cape, or of neutral ships (or ships disguised as such by flying false flags) carrying (smuggling) contraband, necessitated such ships, captured by British naval or commissioned vessels, being sent to London for adjudication, condemnation and sale as prizes of war. This unnecessarily delayed the eventual division and payment of prize proceeds to the naval officers and seamen attached to the Cape squadron who had effected the captures and whom it was sought to encourage in their endeavours by awarding such proceeds speedily. This in turn had a detrimental effect on safeguarding British merchantmen on the sea route to India against enemy attack and capture. In addition, there was still the unsettled disagreement between the Navy and the Army as to which of them was entitled as captors to the benefit of the prizes captured on the occupation of the Cape.¹²

However, local shipping interests, too, were irked by the situation. A plaintiff who had a maritime claim he wished to be adjudicated in a British court applying English law, had no option but to go to the High Court of Admiralty in London. This was not only most inconvenient but costly as well.¹³

subject to which such trade was permitted (“te vergunnen eenen particulieren vaart en handel op de hieromstreeks geleegene baayen en eilanden, mitsgaders op Indien”); s 39 provided for the subsidiary law to govern any disputes arising from this concession, namely the maritime laws and customs of Amsterdam (“In alle voorvallen en quaestien, welke ter zaake van deeze particuliere vaart en handel zoude mogen ontstaan, en waarin niet specialyk zal zijn of by vervolg worden voorzien, zullen worden gevolgd *de rechten en costume der zee in de stad Amsterdam in gebruik* voor zooverre de locale gesteldheid van dit land derzelve applicatie zal toelaten” (my italicisation)).

- 12 See, eg, Theal 1897-1905 vol 1: 224-22 (letter by Gen Clark to Secretary of State Henry Dundas, Nov 1795, on this contentious issue). It was a matter about which the Army felt so strongly that Gen Craig directed a memorial to the King, dated 27 Dec 1795, to stake the Army’s claim to a share of the prize proceeds: see Theal 1897-1905 vol 1: 293-295. A proclamation providing for the distribution as booty of war of the prizes taken from Dutch subjects at the Cape after 15 Sep 1795 was subsequently issued. It allowed those considering themselves entitled to share in it as captors, “to take such measures and to institute such proceedings in the competent Courts as may be requisite for obtaining condemnation thereof for their benefit”: see Theal 1897-1905 vol 1: 311-313 (letter from the War Office to Gen Clarke of the invading army, 16 Jan 1796), Theal 1897-1905 vol 1: 313-315 (letter from the War Office to Adm Elphinstone, 16 Jan 1796) and Theal 1897-1905 vol 1: 315-318 (letter from the War Office to Gen Craig of the remaining army, 16 Jan 1796). The problem, of course, was that the local Court may indeed not have been “competent” in all senses of the word and, not surprisingly, the matter was ultimately resolved in England: see, further, Van Niekerk 2005.
- 13 In *Boehm v Bell* (1799) 8 TR 154, 101 ER 1318, in Jan 1797, the captured American ship – the George – had to be sent to London for adjudication as prize “as there was no Court of Admiralty there [ie, at the Cape] they [the captors] were under necessity of sending her to England for trial” (at 155, 1319). The British captors – including HMS *L’Oiseau* (Capt Brisbane) – had, through their broker in London, insured the ship for her unavoidable voyage from the Cape to England.

Further, there was a need for a suitable court – which, as will be explained shortly, was not the same as the Vice-Admiralty Court – to be established locally to try crimes committed on board British ships on the high seas. Such crimes included the smuggling of contraband goods in neutral or purportedly neutral ships.

Shortly after the occupation of the Cape, in October 1795, Admiral Sir George Keith Elphinstone complained to the Secretary of War, Henry Dundas, about the activities of neutral ships around the Cape.¹⁴ A while later, in June 1796, Elphinstone¹⁵ wrote to Dundas that “[w]e are greatly at a loss for a Court of Admiralty” necessary to determine the entitlement to prizes speedily and inexpensively and so to encourage the Navy in seizing enemy vessels.¹⁶ “[H]ad there been a Court of Admiralty here, prepared to proceed on causes appropriate to its Jurisdiction”, Elphinstone continued, a great deal of the Indian trade currently being carried on illegally in contraband of war “in ships under false Foreign Colours, often commanded by Britons”, would have been eliminated.

A little more than two months later, Elphinstone “really lamented exceedingly that no steps have been adopted for so material a circumstance” as the establishment

When the prize vessel arrived safely, and was subsequently restored to her American owners as not being a lawful prize, the broker claimed a return of the premium from the underwriters, unsuccessfully so, as the underwriters had been on risk given that, as possessors, the captors did in fact have an interest, albeit a (partially) defeasible one, in the captured ship and her cargo.

- 14 See Theal vol 1: 185 (letter of 10 Oct 1795, stating that he had been compelled to prohibit neutral ships trading at the Cape except for goods in short supply there, because they would ship grain and wine and would then “uniformly pretend to be forced into the French Islands by bad weather or cruizers, and there load English Prize Goods, or take Commissions to capture British Vessels”).
- 15 Who, it is said, had already on 9 Oct 1795 recommended to Dundas that “Mr Pieter Johan de Wit should be appointed registrar of the proposed new Court of Admiralty” as he spoke English perfectly and had suffered much from his attachment to the British: see Spilhaus 1966: 194, who does not refer to any authority for this statement. De Wit was probably Petrus Johannes de Wit (1760-1798), son of his namesake father (1716-1778, who was a prominent farmer and Company official: see JH Mienie “De Wit, Petrus Johannes” in *Dictionary of South African Biography* vol 3: 231-232), by the latter’s second marriage in 1756 to Aletta Jacoba Blankenberg (1738-1805): see <https://www.geni.com/people/> (accessed 28 Mar 2017). De Wit junior may have been vendumaster just before his death: see CA, NCD 1/24/247 (1797 notarial protocol recording an obligation between (his brother?) Willem Adriaan de Wit and vendumaster Petrus Johannes de Wit). Barnard 1999a: 344 n 10 has it that Aletta Jacoba de Wit was the widow of a prominent Cape merchant and member of the burgher council, and that she ran a boarding house in Strand St which was popular with British visitors.
- 16 Theal 1897-1905 vol 1: 393-396 at 395 (letter 25 Jun 1797); see, also, Theal 1897-1905 vol 2: 112 at 118 (letter Gov Macartney to Henry Dundas, 10 Jul 1797, concerning frequent visits by foreign neutral vessels from Batavia, mainly Danish, although many of them were Dutch (or possibly English) “at bottom ... though so artfully covered that the fraud is not to be detected”; some of these attempted to carry on a contraband trade to the Cape and have paid penalties with so little complaint that forfeitures were probably inconsiderable compared to goods that escaped seizure). As to early requests for the establishment of a local Admiralty Court, see generally, De Villiers 1969: 70-71, 167.

of a local Vice-Admiralty Court. He repeated his request to Dundas, perceiving “such serious inconvenience from the want of a competent Court being established here for the necessary proceedings in cases of property being captured or detained, that I must again request permission to address you on that subject”.¹⁷

After the occupying force under Admiral Elphinstone handed over command of the British naval ships at the Cape to Admiral Thomas Pringle, one of the latter’s first actions was to advise the Admiralty in London of the capture of an American merchantman, the *George*.¹⁸ Pringle further warned that other captures that had already taken place or was anticipated soon, together with the illegal trade in contraband both at Mauritius and Batavia, “evidence the very great necessity of a Court of Admiralty being immediately appointed here”.¹⁹

Even after the establishment of a Vice-Admiralty Court had been approved, Governor Macartney reflected on the urgent need for it to commence its activities in a private letter to Henry Dundas, dated 24 July 1797.²⁰ He stated that “[w]e wait with some impatience for the outward-bound fleet, which we flatter ourselves will bring reinforcement to the garrison, the judge of the Vice-Admiralty and the different articles of supply wanted at this place”.

At this stage it may be necessary to clear up a persistent and general misconception. What the local British administrators were requesting and referring to, albeit not always clearly so, and what were subsequently established at the Cape, were in fact two separate and distinguishable institutions.

On the one hand, there was a permanent Vice-Admiralty Court, manned by a single judge, with jurisdiction to determine both instance (maritime) and prize causes. This court was also called a Prize Court – incorrectly so, for that was not its only business.

17 Theal 1897-1905 vol 1: 458-459 (letter from Adm Elphinstone to Henry Dundas, 8 Sep 1796, pointing out that property of “considerable value” had already been taken, but that “for want of a Court”, no further steps could be taken in respect of it locally and that “extreme delay” would be the result. Additionally, “[m]urmurs and discontent” were certain to arise in this regard in naval circles;) Theal 1897-1905 vol 2: 148-151 (letter Gov Macartney to Henry Dundas, 14 Aug 1797, reporting the arrival at the Cape of a Dutch prize, the *Haasje*, which had been flying the American flag and was loaded with arms and goods from Batavia intended for the rebellious population in Graaff Reinet; he informed Dundas that all the relevant information (including a declaration by the captor, a privateering English whaler, the *Hope*: see *idem* at 149-151) relating to the *Haasje* that had been received from the prize master, had been transmitted to London).

18 See, again, n 13 *supra*.

19 Theal 1897-1905 vol 2: 46-47 (letter from Adm Pringle to Evan Nepean, 18 Jan 1797). This letter followed on an earlier one on the same topic (Theal 1897-1905 vol 1: 471-472, letter of 21 Oct 1796, Pringle reporting that in consequence of instructions from Elphinstone, he was sending the Danish prize *Amalienburgh* (see n 10 *supra*) to England under a naval escort for “further Proceedings”). It was in turn followed by others (eg, Theal 1897-1905 vol 2: 47-48, letter of 24 Jan 1797) giving an account of more prizes.

20 It is reproduced in Boucher & Penn 1992: 183-185.

On the other hand, there was a so-called Piracy Court – incorrectly, for not only piracy, but also other serious crimes at sea came within purview of its jurisdiction – also known as a Commission Court or Admiralty Sessions or, confusingly, as an Admiralty Court. This was an *ad hoc* body, constituted as and when necessary, consisting of seven judges, members or commissioners, of which the Vice-Admiralty judge was but one, with criminal jurisdiction to adjudicate crimes committed on board British ships or by British subjects on the high seas.²¹

Most legal and other historians confuse and conflate these two institutions and their respective jurisdictions²² and only a few pertinently and correctly draw the distinction.²³

Then there is another common misconception, namely that the Vice-Admiralty Court was a naval court. That it definitely was not, even if naval men, as the captors of enemy prizes, were some of the most frequent claimants appearing before it. It had nothing to do with naval discipline, which was maintained by courts martial.²⁴

2 The establishment and operation of the Cape Vice-Admiralty Court

2.1 General

Before the end of 1796 matters got moving. In December, George Earl Macartney was appointed governor of the settlement at the Cape.²⁵

His instructions, dated 30 December 1796,²⁶ included the administration of justice generally (instruction no 4); acting as Vice-Admiral²⁷ of the settlement in accordance with the relevant commission he would receive from the Lords Commissioners of the Admiralty (instruction no 30); issuing commissions of marque or reprisal to private ships of war, against enemy states only (instruction no 31); and proceeding according to the applicable Acts of Parliament in trying persons for piracy, a commission for

21 For the Cape Piracy Court, see, further, par 3.1 *infra*.

22 See, eg, Van Zyl 1983: 444-446; De Vos 1992: 238; and Visagie 1969: 94. Van der Merwe 1984: 44-46, 48 initially correctly distinguishes between the Vice-Admiralty Court and the court for the trial of pirates, but then promptly confuses them by incorrectly stating that the Vice-Admiralty Court consisted of seven members, and that it dealt with piracy. There are multiple further instances of such confusion.

23 See, eg, Giliomee 1975: 96-97 referring to two “Admiraliteitshowe” at the Cape; De Villiers 1967: 169 correctly explaining that “hier [is] eintlik van twee heeltemal afsonderlike liggamme sprake”.

24 For naval courts martial at the Cape during the First British Occupation, see, further, par 3.2 *infra*.

25 For the Royal Commission of 5 Jan 1797 appointing him as “Governor and Commander in Chief in and over the Settlement of the Cape of Good Hope in South Africa, now in Our Possession”, see Theal 1897-1905 vol 2: 22-26.

26 See Eybers 1918: 5-11; Theal 1897-1905 vol 2: 3-19.

27 For his commission as Vice-Admiral – and not, it should be stressed, as judge of the Vice-Admiralty (Court), as some would have it – dated 6 Jan 1797, see Theal 1897-1905 vol 2: 27-28.

this to be prepared empowering the governor and others mentioned in it to proceed in the settlement in all matters relating to pirates (instruction no 32).²⁸

In authorising the appointment of Macartney as Vice-Admiral, the Lords Commissioners of the Admiralty further observed that as it had been pointed out that it would be to the advantage of the settlement, its inhabitants and trade “to have a Court of Vice Admiralty settled there”, they also authorised and empowered the appointment of “a Vice Admiralty Judge and other proper Officers for a Court of Vice Admiralty” at the Cape in the same way as had been done elsewhere.

On 6 January 1797,²⁹ the Vice-Admiralty Court of the Cape of Good Hope was established “to hear and determine ... all manner of Causes as to Ships and Goods seized and taken as Prize”.³⁰ To head the Court, a judge would be sent out from England.

The Court would, like Vice-Admiralty courts elsewhere, exercise a dual jurisdiction. On the one hand, there was its ordinary maritime or instance³¹ jurisdiction, to hear cases involving maritime law. This inherent jurisdiction was in England initially often contested by the common-law courts, but was also later, in the nineteenth century, expanded by statutory enactment. On the other hand, there was its extra-ordinary³² prize jurisdiction over disputes involving prize vessels – enemy vessels or neutral vessel carrying (smuggling) contraband – and goods captured *iure belli* by the Royal Navy or by privateers.³³

Vice-Admiralty courts, like the one established at the Cape, displayed several features and for the sake of clarity these may be mentioned briefly.³⁴

First, the Cape Vice-Admiralty Court was a British court, resorting under, and constituted and supervised by, the High Court of Admiralty in London;³⁵ it was not a

28 This last instruction is a reference to the Piracy Court, of which the governor was the president: see, further, par 3 1 *infra*.

29 The very day on which the Court for the Suppression of Piracy was established (see Theal 1897-1905 vol 2: 28-34 and further at n 98 *infra*), which no doubt contributed to the confusion between the two bodies.

30 See CA, BO 35: 167. See, further, eg, De Villiers 1969: 73-77; Van der Merwe 1984: 44-46.

31 And not a “first instance” jurisdiction, as Du Plessis & Olivier 2014: 12 state it; they further incorrectly explain that the instance and prize jurisdictions signified that the court had two separate “afdelings” (departments).

32 In the sense that it was only authorised and exercised in time of war, which was the case during the whole of the First British Occupation of the Cape.

33 Privateers were private merchant vessels authorised by or on behalf of the Crown by means of letters of marque to arm themselves and to capture enemy ships and goods as prizes.

34 On Vice-Admiralty courts generally, see Stokes 1783: ch XIII (Of the Court of Vice-Admiralty); Hall 1809; Dunlap 1836.

35 Smith 1927: 549: “The Vice-Admiralty Courts scattered throughout the world were regarded as mere local agencies of the High Court of Admiralty in England”; furthermore, they were obviously not local, colonial branches of the royal common-law courts in England.

local court and therefore quite independent of the colonial government.³⁶ Secondly, as a British court, the Vice-Admiralty Court was manned, at least initially, by British lawyers qualified or experienced in Admiralty and maritime law,³⁷ who were appointed, salaried by and sent out to the Cape from Britain. Thirdly, it administered and applied not the local law, Roman-Dutch law, but English law. However, the part of the latter system it was mainly concerned with was not English common law, but English maritime or Admiralty law, which displayed pertinent elements of continental civil law. Likewise, the Admiralty procedures it followed were based on civilian rules and forms relevant to maritime matters, including, for instance, the right to bring actions not only *in personam* against a defendant, but also *in rem* against maritime objects such as ships.³⁸ Moreover, it made its own additional rules when they were required.³⁹ And, as a British court, it was constituted, empowered and regulated not by local regulations, but by imperial legislation.⁴⁰ Fourthly, appeals from its decisions were, in cases of civil and maritime causes, to the High Court of Admiralty in London, and in prize causes, to the Lords Commissioners of Appeal in Prize Cases.

Given their – if not identical then certainly overlapping – jurisdictions in maritime matters, it is not surprising that the British Vice-Admiralty Court at the Cape came into conflict with the local Court of Justice. Even after the establishment of the Vice-Admiralty Court, the Court of Justice dealt incidentally – or maybe not so incidentally – with several vessels, including some prize vessels which were

36 Walker 1957: 132, 147, referring to the establishment of a Vice-Admiralty Court that was “independent of the Colonial Government” as also of the local administration of justice and court structures.

37 Later (after 1828) it was staffed by local lawyers, but remained a (British) court quite apart from the local court structure.

38 See, eg *MT “Argun” v Master and Crew of the MT “Argun”* 2004 (1) SA 1 (SCA) at 11 where, having referred to the fact that the civilian practitioners of Doctors’ Commons had the monopoly of Admiralty practice in the High Court of Admiralty in London (until 1859), the Court concluded that a procedural rule of civil law would (before that date) have applied in Admiralty courts (including in Vice-Admiralty courts) in the absence of any legislative provision indicating the contrary.

39 See, eg, the “Orders” issued by the Cape Vice-Admiralty Court on 26 Mar 1800 (see National Archives, Kew (NA), HCA 49/33/11e) concerning the appraisal and sale of goods by order or decree of the Court. Thus, the marshal was instructed in the execution of the Court’s orders and decrees “to expose to public view the usual Ensign of his Office” to avoid his authority being questioned in the discharge of that duty. The marshal and commissioners appointed to appraise prize goods were further prohibited from buying, alone or in partnership with others, any of the goods sold on the court’s orders at public auctions.

40 As a British court, the Cape Vice-Admiralty Court was regulated and the scope of its jurisdiction determined by English law, both the common law and statutory law (of which none was passed in the period under consideration). As to the empire-wide application of British laws dealing with Admiralty courts and jurisdiction, see Smith 1927, pointing out that questions of maritime law and jurisdiction were exclusively matters of imperial concern and accordingly beyond the competency of local, colonial legislatures.

either also, or which more properly belonged, before the Vice-Admiralty Court.⁴¹ This conflict was exacerbated by the fact that the two institutions applied different laws and followed different procedures. However, it came to a head only after the Second British Occupation⁴² and was never considered a problem serious enough to require specific attention during the period under consideration.

The Cape Vice-Admiralty Court was manned by a single judge, seated in Cape Town; there were not, as in some other jurisdictions, more judges sitting elsewhere in the colony. Designated the “Judge and Commissary” of the Court, and sitting without the intervention of a jury in both instance and prize cases, John Holland was the first appointee. The other two main officials appointed to the Court from England were John Harrison as its registrar and George Rex as the marshal.

The Court sat in the Castle.⁴³ By the end of 1800, the office space allocated to the Court and, more particularly, to its registry had become insufficient⁴⁴ and the Governor was approached for accommodation “suitable to the real requirements of the VA Department”.⁴⁵ However, nothing came of these requests and the Court remained where it was.⁴⁶

What, then, of the Vice-Admiralty Court’s activities during the First British Occupation?

41 See, eg, CA, CJ 3185: no 8, 222-236 (inventory of goods in the *Drie Gebroeders* and to be sold by public auction); no 10, 281-295 (report to Gov Dundas of the inspection of the ship *Eleonora Ann*(?) and her cargo, 19 Apr 1799); no 11, 296-580 (papers concerning the privateer, the *Collector*, 1800).

42 For a well-known instance of such jurisdictional head butting, in May 1808, see Edwards 1972.

43 A few days after Holland’s arrival, Gov Macartney instructed that “the place called the Chamber of Commerce”, in the Castle, be readied as a courtroom: see CA, BO 151: 24, and BO 160: 221 (letter, 7 Feb 1798); De Villiers 1967: 175. A contemporary visitor, Percival 1804: 108, wrote that “[a]ll the public offices of government are [there]; all the papers of consequence are lodged, and all important business transacted in the castle”.

44 See CA, BO 35: 249-251 (letter Wittenoom to Holland, 27 Sept 1800, listing the increase in the Court’s business, the crowded offices, and the continual interruptions and lack of secrecy resulting from the inspection of the Court papers as daily inconveniences; eg, there was one small room for the whole of the Court’s registry in which four writing clerks had to be accommodated, and another claustrophobic room for the sessions of the Court itself, into which the registry was spilling over; there was no room for either the Court’s examiner or its translator, both of which worked from home at the time, requiring the relevant papers to be taken out of the registry which was obviously not ideal).

45 CA, BO 35: 247-248 (letter Holland to Macartney, 1 Oct 1800, pointing out the need for “a convenient & secure apartment, for the Holding of courts” and the preservation of important documents, and complaining that the present cramped conditions were irksome and injurious to health).

46 Andrew Barnard, the Colonial Secretary, wrote to Gov Macartney on 11 Jan 1800 (see Fairbridge 1924: 154) of a plan to move all public offices out of the Castle and to give it over to the military. However, it was uncertain where they could be moved and in Barnard’s view these offices, more particularly those of the Receiver General, the Lombard Bank, the Orphan Chamber and the Vice-Admiralty Court, ought not to be relocated as they often had large sums of money in them.

2.2 Prize causes

As far as the exercise of its prize jurisdiction was concerned, British captors, whether naval (mainly part of the Cape Squadron) or commissioned privateers (private ships of war commissioned and authorised in London or locally),⁴⁷ had to hand over captured and arrested enemy ships and their cargoes to the nearest Vice-Admiralty court. Such a court then had to adjudicate whether or not the ships and cargoes were lawful prizes and subject to condemnation, forfeiture to the Crown, and sale. If so, a part of the proceeds of such sales went to the captors as encouragement for similar actions against the enemy in the future. Because of the success of the local naval squadron, the Cape Vice-Admiralty Court was soon rather busy.

From the extensive records of the registry of the Cape Vice-Admiralty Court kept in the National Archives in London, and covering the period from 1795 to 1805,⁴⁸ it appears that the Court heard in excess of 110 prize causes.⁴⁹ The enemy ships and cargoes captured were mainly French (almost fifty) and Spanish (around thirty). In addition to enemy ships and cargoes, neutral ships smuggling contraband, or – enemy or even British – ships merely disguised as neutral ships for such purposes, frequently came before the Vice-Admiralty Court. Neutral ships were mainly Danish (some ten of them) and American (five) and they traded clandestinely not only in contraband of war (mainly to the French Indian Ocean islands), but also in Indian goods coming within the scope of the East India Company's monopoly.⁵⁰

47 In addition to being admiralty judge, Holland also had to issue, on the instruction of the governor (whose instructions authorised him to do so: see at n 26 *supra*) so-called Letters of Marque and Reprisals, authorisations for the capture of enemy ships. See CA, BO 160-161, 369, 475 for several examples. According to CA, BO 92: 355-404, miscellaneous documents (2), the government received twelve applications for such letters from Cape ship owners alone during the period 30 Jan 1799 to 11 Nov 1801. Controversial merchant Michael Hogan was a frequent applicant: see, further, n 55 *infra*. In his petition for an authorisation for his vessel, the *Collector*, he applied for "Letters of Marque and Reprisal for the said Brig to seize and take Ships and Goods belonging to France, Spain, and the United Provinces, or their Subjects, or others inhabiting within their Countries, Territories, or Dominions". CA, BO 230, miscellaneous documents (5), contains instructions given to governors concerning ships having letters of marque for the period from Jan 1797 to Apr 1799.

48 NA, HCA 49/1-49/40.

49 No less than ten prizes were captured by the Cape Squadron from Apr to Sep 1800: see Theal 1897-1905 vol 3: 317; the 1802 *African Court Calendar* lists sixteen prizes sent into Cape ports by naval vessels and seven by privateering vessels between 1 Jan and 31 Dec 1801. By contrast, De Villiers 1967: 291 (and see, too, Arkin 1960: 201) has it that only fifty-six captured ships arrived in Cape ports during the First British Occupation while an unknown number were destroyed; this number appears far too low.

50 See further, eg, Arkin 1960: 193, 199-200, pointing out that it was a notorious fact that most neutral vessels and cargoes arriving at the Cape were actually owned by British subjects living at home or in India and that as a consequence the trade revenue of the Company was greatly reduced; Giliomee 1975: 154-157. See, also, Theal 1897-1905 vol 2: 347-348 and Boucher & Penn 1992: 226-229 (letter by Holland to Henry Dundas, 29 Jan 1799, containing observations concerning

Then there was also the occasional Dutch, Portuguese, Prussian (from Hamburg or Stettin), Tuscan or Swedish vessel, as well as a few captured ships that were either not identifiable or whose nationality was in doubt as they were flying false colours.⁵¹ There was even, on one occasion, a British ship before the Court.⁵²

By far the majority of prize ships, with or without prize goods,⁵³ were captured by naval vessels belonging to the Cape Squadron,⁵⁴ but in excess of fifteen cases involved captures by privateers, including some local or locally operating vessels to whom letters of marque had been granted by the governor.⁵⁵

Those ships and cargoes that were condemned as lawful prizes by the Cape Vice-Admiralty Court were, under its decrees, sold at public auctions held in Cape Town. Advertisements – sometimes several advertisements for the sale(s) of the ship and of various portions of her cargo – were placed in the local press by the court's marshal George Rex; they indicated the time and place of the auction and a description of the

the "Injury the Trade of the Hon'ble East India Company appears to me to be suffering at the present period". Holland noted that "[a]s the law stands at present (unless any act or regulation has taken place since I left England)", if a ship, coloured as neutral is captured and brought into the settlement on suspicion of carrying enemy property, but appearing upon investigation to be the property of persons residing in England or India, and although perhaps commanded by an English subject and actually proved to be trading to or from India in direct and open violation of the applicable legislation (from which he then quotes), "yet the Vice-Admiralty Court here would be bound to release such ship and cargo, having no power under the above act to confiscate any property or to take any cognizance whatever of offences committed against it". He continued: "[I]t appears to me that it would be of important benefit to the East India Company either that the Vice-Admiralty Court here should be invested by the legislature with a power of taking cognizance and punishing offences against the said act and of confiscating ships trading contrary thereto, or that some other court should be erected at this settlement with a similar power."

51 See, eg, NA, HCA 49/11/8 (name of the captured ship not known, but she was condemned as French property, 1798); NA, HCA 49/14/2 (cause of the Dutch ship, the *Haasje*, flying Moorish colours, 1797); NA, HCA 49/21/2 (papers of the Prussian ship, the *Ladoiska*, which was condemned as French property, 1800); and NA, HCA 49/31/4 (papers of an unknown French vessel, 1800).

52 See NA, HCA 49/15/5 (prize papers of the British ship, the *Union*, Thomas Bowker master, captured by a Spanish privateer, but then recaptured by HMS *Diomedé*, 1800).

53 There appears to have been only one instance of goods alone being seized: see NA, HCA 49/11/7, concerning goods captured off Madagascar by HMS *Braave*.

54 For a list of the fourteen naval vessels in the Cape Squadron, with the names of their commanders, to which Dutch ships surrendered in Saldanha Bay in Aug 1796, see Theal 1897-1905 vol 1: 439; for a list of the seventeen naval vessels (including some Dutch prizes) and the names of their commanders remaining at the Cape under Adm Pringle when Adm Elphinstone left in Jul 1797, see Theal 1897-1905 vol 1: 470-471 and vol 2: 131-132.

55 For details of these local letters of marque, see NA, HCA 49/23, listing the authorised vessels with their commanders. Included were two (the *Chesterfield*, as to which see, further, at n 113 *infra*, and the *Lady Yonge*, as to which see, further, n 112 *infra*) belonging to the local firm of Walker & Robertson, and several vessels (eg, the *Harbinger*, *Regulus*, *Chance*, *Harriett* and *Collector*) owned or co-owned by the controversial local merchant Michael Hogan (as to whom see n 77 *infra*).

specific vessel or goods – often the goods first, as they were still on board, and then the ship herself – involved.⁵⁶

On the completion of such sales, the relevant accounts could be inspected at the court's registry in accordance with applicable legislation.⁵⁷ Sometimes advertisements placed by their agents concerned the distribution of the prize proceeds amongst the officers and crews of the capturing vessels.⁵⁸ Only occasionally did prize proceedings in the Vice-Admiralty Court attract enough attention to merit a report in the local press.⁵⁹ However, two notorious prize matters involving the Cape Vice-Admiralty Court warrant a brief discussion.

- 56 See, eg, 4, 11 and 18 Oct 1800 *Cape Town Gazette* (sales of cargo from the British ship, the *Union*; the Spanish brig, the *Numero Sete*; slaves from the French ship, the *La Glaneur*; cargo from the Spanish ship, the *Numero Sete*; cargo from the Prussian ship, the *Ladoiska*; and cargo from the *Santissima Trinidad*); 1, 8, 15, 22 and 29 Nov 1800 *Cape Town Gazette* (sales of goods from an unknown ship captured by HMS *Euphrosyne*; the ship, the *Frederick*; the remainder of the cargo from the Stettin (Prussian) ship, the *Drie Bruder*; the remainder of the cargo from the *Union* recaptured from the Spaniards; the French ship, the *L'Esperance*; the cargo from the French *La Paquebot*; the hulls and materials of *Le Glaneur* and the *Numero Sete*; and the French ship, the *L'Edouard*); 6, 13, 20 and 27 Dec 1800 *Cape Town Gazette* (sales of cargo from the Prussian ship, the *Frederick*; cargo from the ship, the *Drie Bruder*; cargo, including slaves, from the Hamburg ship, the *Sea Nymph*; and the remainder of the cargo from *L'Edouard*). The advertised cargo from the *Sea Nymph* included, tantalizingly, "a chest of French books, containing upward of Sixteen hundred volumes"!; see 7 Feb 1801 *Cape Town Gazette*.
- 57 See, eg, 6 Dec 1800 *Cape Town Gazette* (account of sales of the hull and materials of the prize, the *La Bonne Intention*, to be exhibited in accordance with statute); 1 Mar 1801 *Cape Town Gazette* (account of sales of the *L'Eleonore* and of the cargo of the *Ladoiska*); 30 Jan 1802 *Cape Town Gazette* (account of sales of several prizes, including the *L'Anna*, *La Diane*, *La Charlotte*, the *Courier de Seychelles*, and *Les Deux Cousines*).
- 58 See, eg, 14 and 21 Feb 1801 *Cape Town Gazette*; and 30 Jan 1802 *Cape Town Gazette*. Among the local prize agents who placed such advertisements were William Proctor Smith, the naval storekeeper (see Philip 1981: 392), and William Parry Wallis, secretary to Adm Curtis (Philip 1981: 444). Hercules Ross, secretary to Gen Craig, was the prize agent on behalf of the Army concerning the Dutch ships captured as prizes at Saldanha Bay in Aug 1796 (see Philip 1981: 359-360; CA, NCD 1/45/107 (1796 notarial insinuation of Ross as prize agent). Prize agents also often sought permission on behalf of the captors to sell certain prohibited goods locally by way of exception to the East India Co monopoly: see, eg, CA, BO 116/10 and CA, BO 118/56 (Smith as agent of the captors of the Spanish ship, the *Nostra Senhora de Carmen*, requesting permission to sell pepper and cinnamon locally, 1800); CA, BO 116/19 (Smith and Isaac Strombom, agents of the captors of the Danish vessel, the *Forsøget*, requesting permission to sell her cargo locally, 1800); CA, BO 119/78 (Smith and Wallis requesting permission to sell thirty-four male slaves and cargo locally, 1800).
- 59 See, eg, 16 Aug 1800 *Cape Town Gazette* (announcement of the condemnation of the *Nostra Senhora del Rosario* and of the *Nostra Senhora del Carmen*); 11 Oct 1800 *Cape Town Gazette* (proceedings briefly reported concerning the *Drie Bruder*, the *Union of Whitby*, and the *La Paquebot*); 8 Nov 1800 *Cape Town Gazette* (fuller report of the proceedings in connection with the Spanish prize, the *Santissima Trinidad*); 26 Sep 1801 *Cape Town Gazette* (condemnation of the *Chesterfield* and restoration of part of her cargo to the owners Walker, Robertson & Pringle).

2.3 The *Angelique* and *Collector* affairs

The first involved a neutral vessel, captured for carrying contraband or monopoly goods. It became the subject of disputes between the local colonial government and the Vice-Admiralty Court, giving rise to prolonged litigation.

The Danish vessel, the *Angelique*, was captured in 1798 on a voyage from Madras to (Spanish) Manilla by HMS *L'Oiseau*, of the Cape Squadron, and brought to the Cape to be condemned as a prize.⁶⁰

The Cape Vice-Admiralty Court anticipated protracted litigation preceding any judgment condemning her a lawful prize or not. In February 1799 it accordingly granted an application by the captors to have her goods, the property of Armenian merchants who had chartered the vessel, in the meantime landed, kept in a private warehouse and – to a maximum of £500 worth of cargo, to cover the cost of discharge – sold locally as she was leaking and in danger of sinking in Table Bay. However, the goods in question were so-called India goods – goods produced or manufactured eastward of the Cape and falling within the scope of the East India Company monopoly – and on hearing of the Court's decree of “unlivery” (discharge) without any further permission, the Company's local agent, John Pringle, rushed to complain to the authorities. Acting Governor Francis Dundas ordered the immediate reshipment of the goods.

The naval captor, Captain Losack of the *L'Oiseau*, in turn pointed out that there would be unnecessary expense, detrimental to whoever would eventually be adjudged by the Court to be entitled to the proceeds of the sale of the ship and her cargo, but Dundas threatened to confiscate the whole cargo if it were not immediately re-shipped. The contested issue was whether the sale (as opposed to the mere landing) at the Cape of prize India goods was at all permissible if that would contravene the

60 For an account of the *Angelique* affair, see De Villiers 1967: 176-180; De Villiers 1969: 74-76; Arkin 1960: 200, 202; and Giliomee 1975: 155-156. The prize papers are to be found in NA, HCA 49/27. The matter also generated a considerable number of notarial documents, mainly in the form of protests or authorisations by the captors, the owner of the *Angelique*, or the owners of the cargo on board: see, eg, CA, NCD 1/47/343 (notarial protest, 23 Oct 1798, by Capt Linzee of the *L'Oiseau*, regarding Registrar Wittenoom of the Vice-Admiralty Court); CA, NCD 1/12/804 (1798 notarial protocol, power of attorney by owners of the *Angelique* to Alexander Tennant concerning representation required in the Vice-Admiralty Court); CA, NCD 1/14/1239 (1800 notarial protocol, deed of assumption: Alexander Tennant as empowered by the owners of the *Angelique* concerning the case to be heard in London); CA, NCD 1/50/642 (notarial protest, 25 Jan 1802, by the agent for the captors of the *Angelique*, against the decision of the Court refusing to release the cargo); CA, NCD 1/50/649 (notarial protest, 19 Mar 1802, by the agent of the captors of the *Angelique*, protesting the Court's decision not directing the ship and her cargo to be delivered over as prayed, contending rejection of the prayer as illegal and detrimental to the captors, and also protesting against the marshal of the court for declining to hand over the goods as decreed); CA, NCD 1/50/642/1 and CA, NCD 1/50/649/1 (notarial protest by the agent of the captors of the *Angelique*, against the decision of John Holland and George Rex of the Vice-Admiralty Court, refusing to deliver the vessel's cargo).

East India Company monopoly,⁶¹ by which it was prohibited to import such goods into the Cape without permission.

Underlying the matter was a difference of opinion and interpretation between the colonial government and the Vice-Admiralty Court. Dundas had no doubt that Holland's order of landing and sale was unlawful and in contravention of the relevant measure; Holland, again, was of the view that the prohibition in question – on India goods – was not applicable to prize goods, nor to goods landed for their preservation, but only to such goods imported commercially. A heated exchange of letters followed between the protagonists – Holland and Collector of Customs John Hooke Green on the one side, and Governor Dundas, supported by the Company's agent, Pringle, on other side⁶² – and between the Cape and London. Ultimately the matter was referred to England.⁶³

In August 1799, the Crown law officers delivered their opinion, against the Navy and in favour of the East India Company: the India prize goods from the *Angelique* could not be sold at the Cape for local consumption.⁶⁴

Not surprisingly, the Navy complained bitterly. Here, and in similar cases, the prize goods would have to be sent elsewhere for sale, where there might not be a market for them, at an additional cost that would reduce the size of the prize and with a delay that would be to the detriment of the captors. A more liberal interpretation of the relevant monopoly, it was argued, could hardly damage the mighty East India Company, in whose interest it was in any event to encourage naval captures and the prevention of smuggling by such an interpretation.⁶⁵

61 For the relevant governing order-in-council of 28 Dec 1796, see Theal 1897-1905 vol 2: 1-3; *Kaapse Plakkaatboek* vol 5: 78-80, 117-118, 132-135. On restrictions on trade during the First British Occupation, see, eg, De Kock 1924: 85-86.

62 Giliomee 1975: 106 n 11 observes that Dundas's tactlessness lead to many clashes with different officials in cases where there was uncertainty and a difference of opinion about their respective jurisdictions. The best-known example was his conflict with John Holland, during which Dundas apparently challenged him to a duel!

63 See, eg, Theal 1897-1905 vol 2: 408-409 (letter Holland to Gov Dundas, 5 Apr 1799); Theal 1897-1905 vol 2: 414-419 (letter Gov Francis Dundas to Secretary of State Henry Dundas, 6 Apr 1799, requesting further instructions "in order to ascertain how far the Powers and Privileges of the Court of Vice-Admiralty supersede the Order in Council with respect to the importation of India Goods which the Court conceive themselves to be entitled to order the landing and disposal of at pleasure").

64 See Theal 1897-1905 vol 2: 477 (letter War Office to Gov Dundas, 27 Aug 1799, containing the opinion that "no Prize Goods the produce of any Country Eastward of the Cape of Good Hope should be sold at that Settlement for the consumption thereof, except such as are strictly of a perishable nature", and if they were landed at all, they had to be kept in the custody of revenue officers until re-exported or sold for consumption in the colony (if so perishable of nature as not to admit of re-exportation)).

65 See Theal 1897-1905 vol 3: 9-12 (letter Adm Roger Curtis to Gov Yonge, 1 Jan 1800, expressing "sorrow and dismay" at the legal opinion, the more so as in the West Indies, apparently, prize goods did not attract the protection of any Company monopoly and were imported solely for the benefit of the captors. The Navy's position, he continued, was "truly discouraging and deplorable"); Theal 1897-1905 vol 3: 17 (letter Adm Curtis to Evan Nepean at the Admiralty, 6 Jan 1800, asking, as far as prize goods are concerned, to be put on the same footing of advantage as that enjoyed by naval brethren elsewhere).

In the absence of instructions from London, the new governor, George Yonge, seemingly swayed by naval concerns and the legal opinion from London, devised a compromise. He determined by way of a proclamation issued on 3 February 1800⁶⁶ that, for the time being,⁶⁷ India goods, such as those from the *Angelique*, could be sold locally by way of public auction, but merely for exportation elsewhere and not for local consumption. Only if they were found, and certified, to be already deteriorating, or susceptible to serious damage by such further shipment, would a sale for local consumption be permissible. As to the other minor issue in the dispute, the governor conceded his opposition to the Vice-Admiralty Court by providing in his proclamation that captured prize goods, even if they were India goods, could be landed for safe keeping in anticipation of a decision by the court.⁶⁸

Although the Navy was still unhappy – many articles were not suitable for exportation and would therefore obtain a lower price than they would if sold at the Cape for local consumption⁶⁹ – Yonge's proclamation brought an end to the dispute

66 For the Proclamation on the Disposal of Cargoes of Ships Detained as Prize, see Theal 1897-1905 vol 3: 34-37; *Kaapse Plakkaatboek* vol 5: 195-198. The proclamation dealt with the issue in some detail. It concerned all captured or detained ships and goods brought into the Cape as prizes for adjudication by the local Vice-Admiralty Court. Such goods could be freely landed and deposited in customs warehouses “pending the proceedings to be held thereon by the Court of Vice Admiralty”. If not India goods, they could on condemnation as lawful prize be sold and disposed of in the same manner as if the goods had been imported into the settlement by a friendly ship, subject to the colonial duty of 5 per cent on the selling price. If such goods were sold for re-export or direct sending to Britain, no duties were levied. However, if India goods were condemned or adjudged to be sold by the Court, they could be sold and disposed of free of all import duties whatsoever. Nevertheless, the goods had to be sold by public auction on the express condition (buyers had to provide security bonds to customs to the effect) that they would be exported to Britain within a certain time, and on payment of an export duty of 5 per cent on the selling price. If India goods so condemned and sold should be in a “perishing state”, or liable to be destroyed or to suffer damage by being further exported (this had to be certified by customs officials), then it would be lawful to sell them by public auction for home consumption. Such goods would then be subject to an import duty of 10 per cent. If the captured India goods were not condemned, but released by the Court's judgment to the claimants, then it would be lawful for the goods to be exported to their original destination, free of all duties. However, if the claimants should wish to sell them locally because of the particular nature or necessity of the case, they could be sold subject to all duties as if they had been condemned and sold as lawful prizes.

67 See Theal 1897-1905 vol 3: 421-422 for the order-in-council of 11 Feb 1801, by which that of 28 Dec 1797 was revoked.

68 See Theal 1897-1905 vol 3: 24-27 (letter Gov Yonge to Henry Dundas, 12 Jan 1800, explaining that after a perusal of the relevant measures, “I intend to order the whole to be sold for exportation, to remain for the Judgment of the Courts, and for the Benefit of the Captors or the Claimants as the case may be, so far as relates to India goods, – the remainder there can be no difficulty in selling for consumption here or elsewhere”).

69 See Theal 1897-1905 vol 3: 316-317 (letter Adm Curtis to Evan Nepean at the Admiralty, 20 Oct 1800, pointing to “the peculiar hardships the Officers and Ships Companies of the Squadron on this Station labour under from their being prohibited to sell here except for Exportation any Prize Goods the Produce of the Countries Eastward of the Cape of Good Hope”. The hardship was exacerbated by the fact that the goods they captured were in the main India Goods “so that the captors would receive no great benefit from their exertions to distress enemy commerce”).

and was accepted not only locally, but more generally⁷⁰ and even by the local agent of the East India Company.⁷¹

As the *Angelique* and her cargo were declared lawful prizes by the Cape Vice-Admiralty Court, the Armenian owners of the cargo on board her were naturally less than impressed by what had transpired. Not only had their goods been detained for a really long time, but, so they contended, the goods in question had in fact been traded with the permission of the East India Company.⁷² That was also the basis of their appeal against the decision to the Lords Commissioners of Appeal in Prize Cases, in one of few prize causes going on appeal from the Cape Vice-Admiralty Court to London. However, in the case of *The "Angelique"*⁷³ their Lordships affirmed the decision below.⁷⁴

70 See Theal 1897-1905 vol 3: 199-206 (letter War Office to Gov Yonge, 28 Jul 1800, stating that his proclamation concerning the disposal of prize goods from the *Angelique* brought into the Cape met entirely with royal approval).

71 See Theal 1897-1905 vol 3: 83-86 (letter John Pringle to William Ramsay, East India House in London, 27 Mar 1800, considering the proclamation as "fair enough", except for the fact that the Company's agent had no part in surveying and determining whether landed goods qualified to be sold for home consumption, and except for the possibility of endless disputes arising from applications for exceptions to be granted to enable local sales for local consumption); see, also, Arkin 1960: 202.

72 See Theal 1897-1905 vol 3: 124-125 (letter Gen Francis Dundas to Henry Dundas, 6 May 1800, including a letter from the Armenians as well as the permission given them by the governor of Madras).

73 (1801) 3 C Rob (App) 7, 165 ER 497. The owners claimed that the trade engaged in by them as Armenian merchants resident in Madras, had occurred with the knowledge and prior permission of the East Indian government and the governor, Lord Clive, in Madras and that the trade was therefore legal. On appeal, the Lords Commissioners held that only the Crown could grant such permission and license individuals to trade with a public enemy, not the East India Company (that was not a power within its charter), nor the governor-in-council in India by tacit or acknowledged permission. It was within the power of the Crown alone to declare war and it alone could dispense with its operation. Further, and importantly for present purposes, the claimants also represented "the extreme hardship of the case to the Vice-Admiralty Court of the Cape of Good Hope", but their Lordships did not address this point. Thus, they affirmed sentence of the Cape Vice-Admiralty Court and condemned the ship and her cargo as the property of foreign subjects taken in trade with the enemy. Given the good faith of the claimants, and the general misapprehension apparently prevailing in India, even on the part of the government there, the costs of the suit were directed to be paid out of the proceeds.

74 Another appeal from the Cape Vice-Admiralty Court, *The "Hope"* (Lords, 23 April 1803), referred to in *The "Atalanta"* (1808) 6 C Rob 440, 165 ER 991 at 456-457, 997-998, concerned the conduct of a neutral American ship, the *Hope*, captured by HMS *Trusty* in 1799 and carrying dispatches to and from her mother-country, America, to the Dutch colony of Batavia. The Vice-Admiralty Court had condemned her as a lawful prize. It was argued on appeal that a particular packet might not have been on board (so that there was no ground for her condemnation as a prize) and that it might, notwithstanding the receipt given for it, have been forwarded by some other American ship, of which there were several at Batavia at the time. On appeal, the Lords Commissioners assumed that the Court below had made the necessary enquiries and had been satisfied on that point and that the relevant packet was indeed on board. However, the appeal proceeded on other grounds (the vessel ultimately being restored to the owners) and the argument was not fully considered by their lordships. Ultimately, though, the appeal succeeded and the vessel was restored to her owners. See, further, on the *Hope*, NA, HCA 49/6 for the relevant prize papers.

Even though nominally the victors in the legal dispute, the captors – the officers and crew of the *L'Oiseau* – received their share in the prize only much later. News that the local Court's decision had been confirmed on appeal and that the vessel and her cargo remained condemned as prizes, was received at the Cape only early in 1802.⁷⁵ Only then could the cargo be shipped to England to be sold there for the benefit of the captors.

If the Vice-Admiralty Court escaped relatively unscathed from its confrontation with the colonial government in the *Angelique* matter, its conduct in the second of the notorious prize matters, the *Collector* affair,⁷⁶ did its reputation infinitely more harm and exposed it to severe criticism. It was a matter in which the Court displayed an amazing naivety (if not, worse, a reckless complicity) in failing to recognise an obviously dubious if not illegal scheme for the importation of slaves into the Cape.

At the time, the trade in slaves in British ships was not prohibited (that would only occur in 1807), but the colonial government had decided to control the importation of slaves into the settlement at the Cape. Several schemes were hatched to evade this prohibition. One such scheme involved the importation of slaves under the guise of their having been captured from enemy vessels and, as such, liable to condemnation and sale as prize cargoes at the Cape. Its mastermind was Michael Hogan, a shrewd Scottish merchant – he operated at the Cape from 1798 until 1803 – of doubtful morality, a partner of Alexander Tennant in slave-trading enterprises, and later also implicated with Governor George Yonge in various nefarious activities.⁷⁷

One of Hogan's ships, the *Collector*, for which he had obtained a letter of marque in January 1799, departed in March under the command of David Smart⁷⁸ for the Indian Ocean, ostensibly to cruise as a privateer in the hope of capturing enemy

75 See CA, BO 126, doc 19 of 19 Feb 1802; also 23 Jan 1802 *Cape Town Gazette*.

76 See, generally, De Villiers 1967: 182; De Villiers 1969: 76-77; and Giliomee 1975: 125-126; for a popular account, see Laidler 1939: 181-185.

77 For example, in Mar 1800 the ship *Joachim* arrived in Table Bay with a cargo of slaves from Mozambique, indicating that she was *en route* to Rio de Janeiro. However, the suspicion was that Hogan had chartered her to bring slaves from Mozambique to the Cape despite the fact that all trade with Mozambique, including in slaves, was strictly prohibited. Governor Yonge nevertheless took it upon himself to give Hogan permission to land a few slaves, bypassing the established procedure of obtaining permission via the office of the Colonial Secretary Andrew Barnard. See, further, Giliomee 1975: 125-126; and Fairbridge 1924: 201-202 (letter Barnard to Earl Macartney, 14 May 1800). One of the circumstances leading to Yonge being recalled, in 1801, was his allegedly receiving £5 000 from Hogan for his own use in exchange for permission to import 800 slaves into the Cape: see Theal 1897-1905 vol 3: 484-488 at 487; Theal 1897-1905 vol 4: 221-274 esp 256-273 (report of the commissioners appointed to investigate the charges against Yonge concerning Hogan). Lady Anne Barnard was rather ambivalent about him: see, eg, Barnard 1999b: 60 ("Mr Hogan has always appeared to me a man of mild & benevolent manners, but Mr B[arnard] as well as others tells me that he is of a wonderful sharp invention for making money, letting no occasion slip ..."); *idem*: 125 ("I cant help liking the man tho I am not fond of his 'ways'"). For more on Hogan, see Styles 2003.

78 As to whom, see Philip 1981: 386.

prizes. She apparently had some success, for in November and again in December of that year two vessels, the *La Rose* and the *La Africano*, arrived at the Cape, with respectively fifty-six and twenty-five Mozambican slaves on board. The vessels had, so it was said, been captured by the *Collector* from the French and sent to the Cape for adjudication. The two ships and their cargoes were shortly thereafter condemned as lawful prizes by the Vice-Admiralty Court. Then, in February 1800, the *Collector* herself arrived, with about 160 more slaves on board (all that had survived of the 250 originally taken on board): these had allegedly been taken from an enemy French vessel shortly before the latter was driven onto the Madagascan shore. Again, the Vice-Admiralty Court condemned the cargo as lawful prize – this happened on 15 April – and, as before, decreed the slaves to be landed and sold for the account of the captor.

In the meantime, a Danish vessel, the *Holger Danske*,⁷⁹ had arrived in Table Bay from Mozambique with information that the *Collector* was well known in the slave trade and that the slaves in question had not been captured from the enemy but had been bought by Smart. He had then sent a first consignment home in the two vessels he had bought, and transported a later consignment there in the *Collector*. Given that there was then a shortage of labour at the Cape, the introduction of slaves in this fashion meant that they would obtain keen prices.

A special commission of inquiry by the Court of Justice was reluctantly appointed by Governor Yonge to investigate the matter. After sitting from 16 to 21 April, it found, on evidence presented by Fiscal WS van Ryneveld, that the Vice-Admiralty Court had been deceived by false documentation and untruthful witnesses and that the *Collector's* transactions were unlawful.

Although the last consignment of slaves, from the *Collector*, was confiscated by the Court of Justice and Hogan had to repay the money he had received from the sales of the earlier ones, nothing more happened to him. Even though he had sought to convince the authorities that he was not privy to the dealings of Smart and had genuinely thought that the slaves were lawful prize goods, there was little doubt about his involvement, but still he was not prosecuted. His captain, Smart, fled from the Cape when the inquiry was launched and before he could be prosecuted, and was declared an outlaw and banished from the colony.

However, the credibility and reputation of the Vice-Admiralty Court had already been damaged. There was initial surprise that the Court, and Judge Holland in particular, could have been duped in what was commonly known to be an irregular

79 Herself the subject of Admiralty proceedings after the privateer, the *Henrietta*, captured her later in 1800. For the prize proceedings between 1800 and 1802, see NA, HCA 49/17, 49/22/3-4, 49/24/3, 49/28/2-3, and 49/31/3; see, also, CA, NCD 1/15/1410 (1801 notarial protocol, special power of attorney given by her master Hans Laurens Smit, on behalf of Duntzfeld & Co and De Coning & Co of Copenhagen, to Arnold Jan van der Tuuk, concerning the case to be heard in the Vice-Admiralty Court).

transaction.⁸⁰ In fact, it later transpired that Holland had been more than alerted to the possibility of earlier underhand slave dealings involving Hogan and Yonge.⁸¹ Moreover, a later commission of inquiry into the misconduct of Governor Yonge, considering the *Collector* affair, concluded that it was

a matter of public notoriety that the Court of Vice Admiralty had been grossly imposed upon, and made a cloak to cover a most iniquitous transaction, and the public conversation was not less engaged at that time than a general degree of surprise excited, that no steps appeared to be taken by the Vice-Admiralty Court to bring the delinquents to punishment, who by preconcerted perjury had so completely imposed upon the said Court.⁸²

2.4 Instance causes

As for its instance jurisdiction in ordinary maritime matters, which included claims relating to the ownership and possession of ships, ships' mortgages, carriage claims, claims for seamen's wages, claims resulting from damage caused to and by ships, and bottomry,⁸³ the Cape Vice-Admiralty Court was much less busy. Archival records reveal only five such cases in the period 1797 to 1803:

- *James Thompson* [captain of the ship, the *Mary*] v *Joseph Bray* [Cape merchant], 1798, for freight;⁸⁴

80 See Theal 1897-1905 vol 3: 125-127 (letter Capt Campbell to Henry Dundas, 8 May 1800, explaining the affair. Port Captain Donald Campbell stated that “[h]ow the Court of Admiralty could have been so grossly imposed upon in all this transaction is surprising; [the inquiry] being so public in the Town that I never thought it could possibly [have] escaped the knowledge of the Court until I found the Slaves in the Collector were absolutely condemned as lawful Prize, and landed, when I determined that so glaring and pernicious a Traffic should not pass unnoticed”).

81 See Theal 1897-1905 vol 4: 221-274 (report of the commissioners appointed to investigate charges against Gov Yonge, stating, at 261-262, that Holland had deposed before the commission that having heard from common reports of the scandalous transactions going down at Government House, he had enquired from Col Cockburn, Yonge's aide-de-camp, whether there was any foundation in truth for such reports, and to his surprise Cockburn “openly avowed that he himself was concerned with Hogan in the profits arising from the Sale of prohibited slaves in the Colony”).

82 See Theal 1897-1905 vol 4: 221-274 (report of the commissioners appointed to investigate the charges against Yonge) at 265. However, the commission felt reluctant to put any questions to judge Holland “that could be supposed to convey the most distant appearance of reflecting on the proceedings of that Court” (at 268-269). However, they did ask him if, after it had become apparent that his Court had been deceived, any steps were taken to punish the perjurers. Holland answered in the negative because, first, no one appeared to prosecute for perjury, and second, the jurisdiction of the Vice-Admiralty Court appeared to be questionable, although he did suggest to the fiscal that Smart should be prosecuted.

83 Bottomry loans were occasionally notarially executed at the Cape. There are several archival examples in the CA: see NCD 1/32/215 (1798); NCD 1/32/248 (1798); NCD 1/32/334 (1798); NCD 1/32/352 (1798); NCD 1/32/354 (1798); NCD 1/32/355 (1798); NCD 1/32/356 (1798); NCD 1/32/357 (1798); and NCD 1/32/358 (1798).

84 NA, HCA 49/14/12. As to Bray, see Philip 1981: 37.

- *John Pringle* [East India Co agent at the Cape] v *Nettleman* [captain of the ship, the *Christiana*], 1799, concerning smuggling;⁸⁵
- *Johan Gotlieb Modjer v The Ship “Christianus Septimus”*, 1799;⁸⁶
- *John Peterson & Co v The Ship “Holger Danske”*, 1800, for a seaman’s wages;⁸⁷ and
- *Robert Ross* [Cape merchant] v *John Elmslie* [American consul in Cape Town and owner of the ship, the *Eliza*] 1801, for breach of contract.⁸⁸

Interestingly, and relating to an issue of some contention in modern South African law, namely whether there was Admiralty jurisdiction over marine insurance claims,⁸⁹ Judge Holland wrote in November 1799, when the recaptured property of the American ship, the *Pacific*, was claimed not by her owners but by the underwriters, that it was “not consistent with the practice of Admiralty Courts to receive claims on behalf of underwriters” who could only after the occurrence of a loss “have such an interest in the Property, as to entitle them to represent the Original Owners”.⁹⁰

Despite the establishment of a Vice-Admiralty Court at the Cape, though, the local Court of Justice retained, and on occasion did not relinquish but continued to exercise, its broad maritime jurisdiction that, in many respects, overlapped with that of the British Court. There are several examples of the Court of Justice hearing or being involved in (what appears to be) maritime claims after the establishment of the Vice-Admiralty Court in 1797.⁹¹

A conflict of jurisdiction was no mere theoretical possibility but a reality, and one exacerbated by the fact that in respect of the same subject matter the two courts

85 NA, HCA 49/7/1. As to Pringle, see Philip 1981: 332-333.

86 NA, HCA 49/13/7.

87 NA, HCA 49/18.

88 NA, HCA 39/31/10. As to Ross and Elmslie, see Philip 1981: 361 and 116-117 respectively.

89 See, in general, Van Niekerk 1994.

90 See CA, BO 35, 120-127 (letter Holland to Gen John Henry Fraser). As to Fraser, see Philip 1981: 133).

91 See, eg, CA, NCD 1/46/179 (1797, notarial protest by the captains of the naval ships, the *L’Oiseau*, the *Saldanha* and the *Vindictive*, concerning proceedings in the Court of Justice against the captain of the Dutch ship, the *West Capelle*); CA, NCD 1/21/617 (1800, notarial protocol in which a Danish shipmaster appointed locals Jacobus van den Bergh and Evert Hogh to represent him in a case brought by the merchant JJ Vos before the Court of Justice for breach of contract); CA, NCD 1/21/627 (1800, notarial declaration by the captain of the Danish ship, the *Admiral Chapman* confirming that attorney Buissine had power of attorney to deal with a charge of smuggling laid before the Court of Justice); CA, NCD 1/49/501 (1800, notarial protest by a Danish shipmaster concerning his dispute with the Court of Justice over the poor state of his ship’s anchors and chains); CA, NCD 1/49/506 (1800, notarial protest by a Danish shipmaster against the decision of the Court of Justice for the removal of Danish goods bound for Bengal from his ship’s hold and their subsequent plundering); CA, NCD 1/21/644 (1801, notarial protocol in which a Danish shipmaster appointed locals Van den Bergh and Hogh to act and appear for him before a local court; and CA, NCD 1/50/527 (1801, notarial protest by a Danish shipmaster concerning the delay in loading his ship because of a charge of smuggling that had been laid before the Court of Justice).

applied different and potentially conflicting legal systems.⁹² The potential for conflict was further heightened by competition between the marshal of the Vice-Admiralty Court and the fiscal of the Court of Justice as to who was entitled to bring a matter before his own court. Both were keen to do so as for both courts and officials there was financial advantage involved in hearing such cases.⁹³

Apart from the problems arising from an overlapping jurisdiction – a matter that only came to a head at the end of the second decade of the nineteenth century and was then one of the subjects of investigation by the Colebrooke and Bigge Commission of Eastern Inquiry in 1823 – there were several other grounds for complaint against the operation of the Vice-Admiralty Court at the Cape. Its fees, although prescribed by an order-in-council originating from London, were initially so high that in prize causes the eventual profit of captors was much eroded. Regulations followed “whereby the property of these daring asserters of Britain’s glory is in some measure protected”.⁹⁴ In another instance the Court’s marshal sent in his bill for goods – biscuits and flour delivered to the Spanish prize brig, the *La Balena* – but his charges were later found to be “very exorbitant” and reduced accordingly.⁹⁵

3 The Piracy Court and courts martial

3.1 The Piracy Court

As explained, the Vice-Admiralty Court should be distinguished from another body that operated at the Cape and exercised a criminal jurisdiction over piracy⁹⁶ and other serious crimes (felonies) committed on the high seas. This body has been referred to under several appellations, including, confusingly, the Admiralty Court. Formally, it was known as the Commission or Court for the Suppression of Piracy, hence it was called the Piracy Court – incorrectly, for it dealt with more than only piracy – or the Commission Court. Elsewhere it was known as the Court of Admiralty Sessions, a reference to the fact that it was not a permanent body but one only constituted and sitting for the trial of offences as and when necessary. Merely in order to avoid any

92 As to the conflict between the Vice-Admiralty Court and the Court of Justice during the First British Occupation, see De Villiers 1967: 175.

93 For example, the Admiralty judge received as part of his salary a share of the fines levied and fees collected in cases coming before him: see, further, at n 145 *infra*.

94 See De Villiers 1967: 76 n 167; De Villiers 1969: 181, quoting a statement by Samuel Eusebius Hudson, chief clerk of customs, Cape Town, 1798 to 1800 (see Philip 1981: 195-196), in his *Diary* at 62 (the entry for 14 Feb 1800).

95 From Theal 1897-1905 vol 4: 149 at 189 it appears (from the proceedings of a special governmental commission appointed to regulate the consumption of grain in the colony) that the marshal charged Rds16 per 100 lbs of biscuit and Rds12 for the flour, but the commissioners offered him Rds10 for the biscuit and Rds8 for the flour, these prices “according with the highest at present given in the Market for such articles of the very best quality”.

96 The Cape, of course, had a long acquaintance with (passing) pirates: see Botha 1962a: 42-52.

further confusion with the Vice-Admiralty Court, I will refer to this body as the Piracy Court.⁹⁷

A Commission under the Great Seal of the High Court of Admiralty of England, signed by its registrar Arden, establishing a Court of Admiralty for the Cape Colony, its territories and dependencies, for the prevention of piracy, and for the trial of pirates, was issued on 6 January 1797.⁹⁸

The commission is detailed and only some salient points may be mentioned very briefly. It is addressed to Governor Macartney, Lieutenant Governor General Francis Dundas, the judge of the Vice-Admiralty Court (who had, at the time, not yet been appointed), the colonial secretary, Andrew Barnard, Admiral Elphinstone (who had already left the Cape) or whoever was the commander of the naval forces at the Cape station, and all admirals, captains and commanders of naval ships actually within the Admiralty jurisdiction of the settlement at the Cape of Good Hope. After referring to the applicable legislation dealing with the suppression of piracies, felonies and robberies at sea, it appointed the addressees to be the local “Commissioners” at the Cape to try such offences, and for that purpose to “call and assemble a Court of Admiralty on Ship board or upon the Land for the hearing and final determination of any case of piracy Robbery or Felony and all accessories thereto ... and to give Sentence and Judgment of Death and to award Execution of the Offenders convicted” as and when necessary. The Piracy Court would consist of at least seven of those addressed⁹⁹ and had to proceed publicly in open court “according to the civil Law and the methods and rules of the Admiralty”.

The Cape Piracy Court’s criminal jurisdiction over the crimes at sea mentioned, was further described as “extending from the southern extremity of the continent of Africa along the western coast thereof as far as Cape Negro in the Atlantic ocean and along the eastern coast of the said continent as far as Cape Corrientes in the Indian sea, and comprising all the territory situated within those limits”.

In addition to the judge of the Vice-Admiralty Court being one of the members or commissioners sitting on the Piracy Court, that court, when assembled, was staffed by personnel from the Vice-Admiralty Court.

The Cape Piracy Court sat only twice during the First British Occupation.

97 On the Piracy Court, see, eg, Visagie 1969: 94; De Villiers 1967: 169-172; De Villiers 1969: 71-73; and Giliomee 1975: 97.

98 It is reproduced in Theal 1897-1905 vol 2: 28-34. See, also, CA, H1, and VC [Verbatim Copy] 58 (“Commission appointing a Court of Admiralty at the Cape of Good Hope) in Theal 1895: no 50.

99 If less than seven of them were available, others could be appointed to the court “[p]rovided that no persons but such as are known as Merchants, Factors or Planters or such as are Captains, Lieutenants or Warrant Officers in any of our Ships of War or Captains, Masters or Mates of some English ships shall be capable of being so called and sitting and voting in the said Court”. This power of appointment was made use of in the *Princess Charlotte* matter: see n 104 *infra*.

3 1 1 The *Princess Charlotte*

After an earlier attempt at court martialling them had failed,¹⁰⁰ the Piracy Court convened in the Castle in June and July 1798 to try four mutineers of the HCS *Princess Charlotte*. They were John Mills, Will Gutheridge, John Newberry and William Laws, and they were accused of having committed various acts of mutiny and piracy on board the ship.¹⁰¹

The commissioners present were the governor, Lord Macartney, who was also the Court's president; the Lieutenant-Governor General Francis Dundas; John Holland as judge of the Vice-Admiralty Court; Andrew Barnard, the colonial secretary; Admiral Hugh Cloberry Christian, the commander of the naval forces at the Cape;¹⁰² and four captains of naval ships then at the Cape, George Losack of the *Jupiter*, Lord Augustus Fitzroy of the *Imperieuse*, Andrew Trodd of the *Trusty*, and Thomas Alexander of the *Sphinx*. George Rex, the marshal of the Vice-Admiralty Court, was appointed as the Piracy Court's registrar.

100 A court martial had been convened on board the HMS *Sceptre* in Table Bay, but was dissolved as the court martial had doubts about its own competency to try the mutineers (the mutiny had not taken place on a naval but on an East India Co vessel and the accused had not been detained as prescribed). See, further, Theal 1897-1905 vol 2: 274-277 (letter Gov Macartney to Henry Dundas, 7 Jul 1798, from which it appears that Macartney had obtained the opinion of Judge Holland of the Vice-Admiralty Court and that of Sir Thomas Strange, Recorder of Madras, who happened to be on board the *Princess Charlotte en route* to the Cape, confirming that a "Court for the trial of Pirates" would be competent to hear the matter). Thomas Andrew Lumisden Strange (1756-1841), former chief justice of Nova Scotia (an appointment he had obtained through his mother's friendship with Lord Mansfield), was first recorder of Fort St George (Madras) in British India from 1798 and, when the Recorder's Court was superseded, chief justice of the Supreme Court there from 1800-1817: see DF Chard "Strange, Sir Thomas Andrew Lumisden" in *Dictionary of Canadian Biography Online* at <http://www.biography.ca> (accessed 17 Apr 2017).

101 The proceedings of Jun-Jul 1798 are to be found in CA, BO 36, 1-96. Further information may be found in the British Library, IOR/G/9/6, 153-161 (letter by Pringle to the Secret Committee of the East India Co on the arrival of *Princess Charlotte*, the mutinous state of her crew, and the proceedings before the Commission of Piracy); Wits Historical Papers A140 (*Great Britain. Court of Admiralty (Cape of Good Hope)*) contains a copy of the complete proceedings. Further information may be found in Wits Historical Papers A88 (Macartney Papers), eg, items 360 (articles of piracy and felony), 363 (minutes of evidence taken at the Court of Piracy), 368 (sentence of the court), 369 (death warrant issued to John Claiden, provost marshal, Castle, Cape Town, instructing him to hang the mutineers between 9 and 12 o' clock on the morning of 23 Jul 1798, according to the Court of Admiralty's sentence), and 370 (order of respite of execution of Mills, Newberry and Laws, issued to John Claiden, provost marshal, by Earl Macartney). See, also, eg, L Albertson "Mutiny on the *Princess Charlotte*, 1798", available at <http://archiver.rootsweb.ancestry.com> (7 May 2002, accessed 4 Aug 2014); L Albertson "Princess Charlotte and confusion at the Cape", available at <http://archiver.rootsweb.ancestry.com> (19 Jul 2002, accessed 4 Aug 2014).

102 On Christian (1747-1798), whose involvement in the proceedings occurred shortly before his death at the Cape, see K Breen "Christian, Sir Hugh Cloberry" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 29 Jul 2014).

Immediately upon commencement, proceedings were delayed by a complaint from Admiral Christian that Judge Holland had been sworn in by the presiding governor, following the order set out in the Piracy Court's deed of establishment, before himself. Shortly after, the other naval officers complained that Barnard had been sworn in before any of them. The naval officers, who relied on "the Points of the Naval precedence Established by the Rules of the Admiralty Board", according to which, for instance, an admiral was entitled to precedence over an Admiralty judge, promptly left the courtroom when their complaints fell on deaf ears.¹⁰³

The remaining commissioners simply made use of their right of appointment to supplement the members of the Court to ensure the prescribed quorum of seven.¹⁰⁴ Kennard Smith, captain of the East India Company ship, the *Minerva*, and two Cape merchants, Michael Hogan and John Robertson¹⁰⁵ were promptly co-opted as replacements.

After several sessions,¹⁰⁶ judgment was delivered on 5 July 1798. Three of the accused (Mills, Newberry, and Laws) were condemned to death while the fourth (Gutheridge) was acquitted.¹⁰⁷ All three condemned men were recommended¹⁰⁸ for a royal pardon which they received in March 1799,¹⁰⁹ no doubt gratefully.¹¹⁰

103 For Macartney's later defence of the procedure and his contention that the swearing in would only be regular if the order was followed in which the members were named and appointed in the establishing commission, see Theal 1897-1905 vol 2: 274-277 (letter Macartney to Henry Dundas, 7 Jul 1798). In his comments on Macartney's report on the *Princess Charlotte* proceedings, Dundas not only supported the governor, but also expressed concern over the Navy's attitude. He nevertheless conceded that it may have been due to a (misguided) sense of duty and was therefore not in need of any censure: see Theal 1897-1905 vol 2: 309-313 (War Office to Macartney, 15 Dec 1798).

104 See n 99 *supra*.

105 Both merchants were implicated in earlier and later underhand dealings at the Cape: see, again, n 77 *supra* as to Hogan; Robertson was a partner in the firm of (Alexander) Walker & Robertson which had supposed and much talked-about commercial dealings with Gov Yonge: see Boucher & Penn 1992: 229, 239.

106 The Court sat on Tue 26, Thurs 28 and Fri 29 June, and Mon 2, Thurs 5 and Fri 6 Jul 1798.

107 In pronouncing the death sentence, Macartney erroneously read Gutheridge's name in the place of that of Newberry, so that the Court had to reconvene the following day for Newberry to be sentenced anew: see CA, BO 36, 187-189.

108 By Gov Macartney, because of the disagreement among members of the court and the fact that the accused had experienced a long period of suffering in prison, uncertain of their fate.

109 For the relevant proclamation announcing the free pardon granted to the three sailors who had been condemned to death (by the Court of Piracy), dated 27 Mar 1799, see *Kaapse Plakkaatboek* vol 5: 182.

110 See Theal 1897-1905 vol 2: 414-419 (letter Gov Francis Dundas to Henry Dundas, reporting that he had assembled the members that had constituted "the Court of Piracy" and before them read to the three men the royal pardon, which was also announced by a proclamation. The convicted persons, he reported, received this pardon "perfectly penitent and with a grateful sense of His Majesty's goodness").

3 1 2 The *Chesterfield*

The Piracy Court was next convened in the Castle almost three years later, on 19 March 1801, in a matter involving the captain Michael Franklin Brooks and the supercargo James Mortlock¹¹¹ of the *Chesterfield*.

In November 1800, the *Chesterfield*, belonging to the local firm of Walker & Robertson,¹¹² and having been commissioned as a privateer against enemy, including Spanish, marine trade,¹¹³ was captured by HMS *Diomedé* near the Rio de la Plata while trading with the enemy “in a treasonable and traitorous manner” and with compromising papers on board. She was brought back to the Cape with her original cargo with a view of sending her under escort on to England for trial, the naval captor, Captain Charles Elphinstone¹¹⁴ of the *Diomedé* “thinking at that Time there was no Tribunal competent to take cognizance of these Offences in this Colony”.¹¹⁵

However, first the Vice-Admiralty Court seized the *Chesterfield* pending its findings as to the lawfulness of her capture as a prize,¹¹⁶ and then governor Yonge informed the captor that he had the power to convene the Piracy Court – over which he would preside – to try Brooks and Mortlock, as the latter had apparently requested.¹¹⁷

111 Mortlock (1760-1806) had a long and fascinating career at sea. After joining the Royal Navy in 1779, he was part of Commodore Johnstone’s mission to the Cape in 1781 (see Van Niekerk 2015b and 2016), but was out of naval service by 1790 and probably transferred to the merchant service. In 1794, as commander on board the HCS *Young William* on her return voyage from the East Indies, he was credited with the so-called discovery of two sets of uncharted islands in the Pacific Ocean, the one now known as the Takuu (formerly the Mortlock) Islands and part of Papua New Guinea, the other further north-west still called the Mortlock (or also the Nomoi) Islands and now part of the Federated States of Micronesia (see “Log Book of the *Young William*”, available at <http://web.singnet.com.sg>, accessed 15 May 2014). He was at the Cape at least from Apr 1798, when he requested permission to remain in the colony. In Oct that year, he left Cape Town on a privateering cruise aboard the *Britannia* and off Rio in Jun the next year he captured the 100-ton Spanish merchantman, the *Nostra Senora de Carmen*, which was brought back and condemned as a prize by the Cape Vice-Admiralty Court (see NA, HCA 49/14 for the prize papers of the *Nostra Senora de Carmen*, 1798-1800). After his return to England subsequent to the *Chesterfield* trial, Mortlock went back to sea. In Jul 1806, when captaining the privateer *Antelope*, it was reported that she had been taken by an armed Spaniard in the Pacific, off the coast of Chile, and that Mortlock had subsequently been murdered in Lima. On Mortlock, see esp Griffiths 2002; also Philip 1981: 290.

112 John Robertson had been a member of the previous Piracy Court: see n 105 *supra*. The firm had earlier been implicated in irregularities involving Gov Yonge concerning the government’s charter from them of (“in the circumstances somewhat suspiciously named”: Laidler 1939: 190-191) the *Lady Yonge*, for what appeared to be the governor’s private (slave) trading ventures: see, further, Giliomee 1975: 124-125.

113 See NA, HCA 49/23/1 for the original papers concerning the granting of a letter of marque to the *Chesterfield*, 20 Jan 1800; see, again, at n 55 *supra*.

114 Charles Elphinstone Fle(e)ming (1774-1840), later a member of Parliament (1802-1812, 1832-1835) and admiral (1821), was the nephew of Adm Sir George Elphinstone: Philip 1981: 117.

115 See CA, BO 37, 198-200; De Villiers 1969: 173.

116 See, further, at n 126 *infra*.

117 Elphinstone accepted this. The accused were initially kept in the Castle as the charges against them, amounting to high treason, were serious. But when they were granted bail – put up by messrs Walker & Robertson – by Gov Yonge on 12 Mar, Elphinstone feared that they would

When the Piracy Court convened on 23 March 1801,¹¹⁸ the following members were sworn in: Governor George Yonge, Lieutenant-Governor General Francis Dundas, Judge Holland of the Vice-Admiralty Court, Colonial Secretary Andrew Barnard, Admiral Roger Curtis, and two naval captains, William Hotham of the *Adamant* and Commodore Roger Curtis¹¹⁹ of the *Rattlesnake*. This time the question of precedence caused no objections to be raised by the naval officers.¹²⁰

Although George Rex was again appointed to act as the Piracy Court's registrar, he informed it a few days later that because of his position as marshal of the Vice-Admiralty Court, "his personal attendance is daily required for the dispatch of the Business of that Court" and accordingly requested the Court to dispense with his further involvement. His request was acceded to and notary Rouviere was appointed as the registrar.¹²¹

The main charge against Brooks and Mortlock was that they had had treasonable and traitorous "correspondence" with the enemy and had carried on an illicit and nefarious trade in that they had supplied an enemy vessel with provisions and other contraband and had warned her of the approach of a British man-of-war. Voluminous and damning evidence were presented during the trial.

After several sessions,¹²² during which the governor's conduct did little to allay the suspicion of his bias in favour of the accused and their employers,¹²³ both accused were on 16 April found guilty and sentenced to death. However, there was a condition. As the Court was unsure of whether their conduct came within the provisions of any applicable statute, it added the proviso that if it did, they were not guilty. This issue was referred for an opinion to the Crown lawyers in London. In any event, the accused were recommended for royal mercy.

escape and accused the governor of conduct "both illegal and unprecedented": see Theal 1897-1905 vol 3: 458-459 (Capt Elphinstone to Henry Dundas, 23 Mar 1801), 459-460 (encl 1: Capt Elphinstone to Yonge, 15 Mar 1801, and the reply by Yonge, 21 Mar, and by Elphinstone, 22 Mar); Boucher & Penn 1992: 236 add that the governor's patent partiality towards the accused was unprecedented and probably illegal and filled everyone with astonishment and disgust.

118 For the proceedings, see CA, BO 37, 1-113; De Villiers 1967: 172-174; Giliomee 1975: 127; Boucher & Penn 1992: 236, 248 n 78. See, also, Theal 1897-1905 vol 3: 455-461 and vol 4: 8-9; for a popular account of the *Chesterfield* affair, see Laidler 1939: 184-191, referring to the proceedings in the "Court of Piracy Commission".

119 He was the son of the admiral: see Boucher & Penn 1992: 239.

120 Lady Anne Barnard wrote to Lord Macartney on 22 Mar 1801 (see Fairbridge 1924: 273-274) that "the Navy have stroak'd down their prow'd stomach, and sit quietly in their places now". However, a difference of opinion did arise between the governor and the Navy when the Court reconvened on 23 Mar. Captain Elphinstone requested that the correspondence between Yonge and himself be read, and complained when it was only read in part, demanding either that everything be read or that his further petition be included in the Court's record; the latter route was followed the next day and proceedings could commence: see CA, BO 37, 197-204.

121 See CA, BO 37, 18; Brooks 1802: 45.

122 On Thurs 19, Fri 20, Mon 23, Sat 28, Mon 30, Tue 31 Mar and Wed 1 to Thurs 16 Apr 1801.

123 See Boucher & Penn 1992: 236.

Still, Yonge's biased conduct continued.¹²⁴ Without informing the naval captors or anyone else, he acceded to Brooks and Mortlock's petition for permission to proceed to England under escort, summarily ordering that the men should be released on bail and be allowed to return to London on the first available ship, there to await the decision of the Crown lawyers and any decision on a pardon.¹²⁵ It seems that, for whatever reason, both accused eventually escaped punishment.

Incidentally, there had also been insurance on the *Chesterfield* and her cargo which became the subject of litigation in England – *Robertson & Thomson v French*¹²⁶ – with the owners claiming, unsuccessfully, from the London underwriters in a matter turning on the interpretation of the marine insurance policy in question.¹²⁷

124 In addition to Yonge's alleged involvement with Hogan and the *Collector* affair (see at n 76 *et seq supra*), he also had dealings with the firm of Walker & Robertson. They had advanced him money and acted as his agent in private speculation in cargoes. The government, eg, in May 1800 chartered their ship, the *Young Nicholas*, for a year at an excessive rate (of £1200 per month, after she had shortly before been hired for a monthly rate of £591) and in what appeared to have been a highly irregular arrangement: see, further, Giliomee 1975: 123-124; CA, BO 37: 205, 304. Shortly after the *Chesterfield* trial, Yonge was summarily dismissed from his office for various misconducts and recalled to England; see as to those of his misconducts that involved Walker & Robertson, eg, Theal 1897-1905 vol 3: 484-488 (letter Lord Hobart to Gen Dundas, 22 May 1801).

125 See Theal 1897-1905 vol 4: 8-9 (letter Andrew Barnard to William Huskisson, 10 Jun 1801, explaining the decision of the court and Yonge's subsequent conduct); see, also, CA, BO 120/16 (1801, memorial received from Brooks and Mortlock regarding their trial for treason by the Court of Piracy, and requesting permission to proceed to England under escort); CA, BO 120/24 (1801, memorial received from Mortlock and Brooks regarding permission to obtain a copy of the proceedings against them in the Piracy Court). Brooks subsequently had the Piracy Court's proceedings and his own version of events published: see Brooks 1802.

126 (1803) 4 East 130, 102 ER 779. It has subsequently been pointed out that the case was "not very clearly reported" (see *Carr & Josling v Montefiore* (1864) 5 B & S 408, 122 ER 883 at 432, 892) and that is so. Many factual statements made in the course of the judgment raise multiple questions about what precisely happened to the ship herself and her cargo. Thus, it is said that on the vessel being delivered by her captors to the Cape Vice-Admiralty Court, her insured owners abandoned her to the underwriters; that the ship was condemned by the sentence of the Vice-Admiralty Court (for her prize papers, see NA, HCA 49/25 (1801)), sold at the Cape under the court's decree, and had since arrived in England; that this sentence went on appeal to the Lords Commissioners of Appeal (see NA, HCA 32/1835 pt 1 (1801) for the Prize appeal) which, in turn, declared the property in the ship to reside in the claimant, to whom she was restored; hence, the claim against the underwriters. Mortlock himself was a witness and his testimony was in preliminary proceedings found to be acceptable because, although as supercargo he had, like Brooks, a share in the ship and in the profits of the adventure, such profits would be realised only after a sale and not from a recovery of an indemnity from the underwriters: see *Robertson v French* (1803) 4 Esp 246, 170 ER 707 (KB).

127 The insurance on the ship, cargo and freight was against the usual perils "at and from all, any or every port ... on the coast of Brazil, and after the 17th day of September [1800] to the Cape of Good Hope, ... beginning the adventure upon the goods and merchandizes ... from the loading thereof aboard the said ship [the *Chesterfield*] at all, any or every port ... on the coast of Brazil, and from the 17th day of September 1800; and upon the ship in the same manner" (my italics). The owners claimed for the loss of the *Chesterfield* by arrest and restraint, as she was condemned by the Vice-Admiralty Court at the Cape. In the insurance case, the court held (at 137-142, 782-784) that the policy only attached to a homeward-bound cargo, laden on board at the coast of Brazil, and did not cover cargo originally taken in at the Cape, which continued on board after 17 Sep while the ship

3 2 Courts martial

Naval courts martial, consisting of a body comprised of naval captains, were on many occasions convened on board naval ships (or, exceptionally, on land) at the Cape.¹²⁸

So, when incidences of mutiny occurred on board naval ships in Simon's Bay in October and November 1797, probably following the earlier naval mutinies in April in England, at Spithead and Nore,¹²⁹ court-martial proceedings followed.

Initial uprisings had quickly been suppressed and a free pardon was granted – unwisely as it turned out – by Admiral Thomas Pringle on 12 October¹³⁰ to the mutineers who were assured that their grievances would be addressed. However, the honourable discharge on 6 November by a court martial of Captain George Hopewell Stephens of HMS *Tremendous*, who had been charged with oppressive conduct that had allegedly given rise to the uprisings in the first place,¹³¹ caused further discontent; open mutiny flared up again. The first incident occurred on 7 November 1797 on board the *Tremendous*, the flagship of Admiral Pringle, commander of naval operations at the Cape, and unrest soon spread to other vessels of the Cape Squadron.

A court martial, held in the Castle on 21 November, condemned to death two of the large number of insurgents charged: Philip James of the *Tremendous* and Daniel Chapman of the *Sceptre*. They were hanged two days later. Two more mutineers were later tried and hanged in December.¹³² The others found guilty, including Francis Peacock from the *Sceptre*, were imprisoned in the Castle, where they were observed by Lady Anne Barnard¹³³ and where they scratched their names into the walls and doors for later study.¹³⁴

was on the coast of Brazil and after she had left it on her return to the Cape. The policy on the ship and her cargo never attached as the adventure in terms of the policy commenced from the loading of goods aboard the ship on the coast of Brazil (and then only after 17 Sep), an event which never happened as the goods were loaded not there, but earlier at the Cape. In short, cargo laden at the Cape before the ship's arrival on the coast of Brazil was not cargo loaded on board on the coast of Brazil; likewise, the policy also did not cover the ship herself, which was insured in the same manner as her cargo. This decision soon became a precedent (see, eg, Marshall 1808 vol 1: 261, 323) and has remained one until today (see, eg, Arnould 2013: *passim*, and especially paras 3-34 where it is described as a "leading case" and considered in some detail).

128 See, further, eg, De Villiers 1969: 129.

129 See, eg, Brenton 1837 vol 1: 361-362; Yonge 1863 vol 1: 518-519; Dugan 1965: 404-407; Wells 1983: 107; Davey 1988; Featherstone 2009: 775. For a popular account, see Rosenthal 1954.

130 See Theal 1897-1905 vol 2: 186 for the proclamation pardoning the seamen and marines who had been involved in acts of mutiny, disobedience of orders, or any breach or neglect of duty, but who, so it was stated, had since returned to good order and the regular discharge of their duties.

131 For the trial of Stephens, 6-14 Nov 1797, see NA, ADM 1/5342.

132 For the trial of Philip James, Daniel Chapman, and Francis Peacock, 17-23 Nov 1797, see NA, ADM 1/5342. See, also, Theal 1897-1905 vol 2: 161-187, 202-211 for a large volume of correspondence and documentation (in the form of enclosures) concerning the 1797 Simon's Bay mutiny and the subsequent courts martial. See, also, Ulrich 2011; Ulrich 2013.

133 She failed to improve their position by having them paroled for outside work for the rest of their term of imprisonment: see Barnard 1994: 270-271.

134 See Horwitz 1997: 57, 59-60, 94 and 98-100 (the names of the persons involved in the 1797 mutiny in Simon's Bay). Peacock was the only naval prisoner in the Castle positively identified by the remaining graffiti.

Another mutiny, on board the naval vessel HMS *Hope* off the coast of Madagascar in May 1799, resulted in the ringleaders being tried and five of them being sentenced to death. Four of them – the execution of one of them, Joseph Peters, was suspended and he was recommended for mercy – were hanged on board the naval vessel HMS *Lancaster* in Table Bay in January 1800.¹³⁵

Military discipline was maintained by (regimental) courts martial.¹³⁶ Captain Robert McNab, who served at the Cape from 1795 to 1803, was in 1797 appointed deputy judge advocate and the next year judge advocate.¹³⁷

(To be continued)

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- 136 See Percival 1804: 313, explaining that after the cessation of martial law following on the British Occupation of the Cape, the provost martial only exercised jurisdiction over military crimes.
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János Jusztinger *A vételár az ókori római adásvételnél –
Price in the Ancient Roman Sale*

(Dialóg Campus, Budapest/Pécs, 2016, pp 240,

ISBN 978-615-5376-03-0)

I This book is the author's "Erstlingswerk" as monograph, and with it the Hungarian Romanist János Jusztinger¹ made a valuable contribution to the complex of problems arising from the *pretium* of ancient Rome's *emptio venditio*.

Emptio venditio has always been – and will undoubtedly remain – a "Lieblingsthema" among Romanists, and complex monographic analyses of the Roman law of sale are a dime a dozen, enough to fill libraries. Although this statement is also true in the case of monographs on specific topics regarding *pretium* – such as "just price", *laesio ultra dimidium* or *enormis*– the author states (p 16) that his work contains a complete and full analysis of the whole institution of ancient Roman *pretium*, and as such it is the first one internationally.

Although such assertions are to be made with caution, the author's statement is correct with regard to the West-European and North-American literature of the past few centuries. The author is, both in Hungary and internationally, the first researcher who dedicated a whole monograph of such extent to a "pure" Roman law analysis of the complex topic of *pretium*. This Hungarian book therefore deserves to be introduced to a wider professional audience.

II The monograph of Jusztinger is not a simple composition of his published preliminary works on the topic,² but an autonomous work providing new results. The

1 Assistant Professor and Head of the Department of Roman Law, University of Pécs.

2 Here I enumerate the author's papers which were published in international journals and/or in a variety of languages (the number of articles published in Hungarian is twenty). See J Jusztinger "Transfer of ownership in Dacian sales documents" in G Szőke (ed) *Essays of the Faculty of Law University of Pécs: Yearbook of 2015* (= *Studia Iuridica Auctoritate Universitatis Pécs Publicata*

book is composed of six chapters: (1) The purchase price as the essential element of the contract of sale (pp 21-44); (2) The purchase price's requirement of being *certum* (pp 45-84); (3) Lump sum price and unit price: Price determination and transfer of risk in the case of *emptio ad mensuram* (pp 85-103); (4) The limits of the price's free definition (pp 105-135); (5) Purchase or rental price? The definition of "price" in hardly definable contracts on the boundaries of *emptio venditio* and on that of similar contracts (pp 137-156); and (6) Payment of the price and the transfer of property (pp 157-192).

The book also contains a *Table of Documents* including papyri (pp 193-197); a bilingual résumé or thesis in Hungarian and English (pp 199-211); a comprehensive bibliography (pp 213-235) composed of some 600 pieces of works published in nine different foreign modern languages; and an impressive *Index Fontium* (pp 237-240) incorporating a dozen of pre-Justinianic primary sources (incl the *Twelve Tables* and many other sources such as *Inst Gai*, *Epit Gai*, *PS*, *IP*, *Ulpiani lib sing reg*, *Cod Theod*, *Nov Val III*, *Nov Anthem*, *Cod Euric*), and an impressive list of sources from the *Corpus Iuris Civilis*, such as twenty texts from the Institutes, 144 *loci* of the Digest, and twenty three sections of imperial laws of the Code.

Among the literary sources we can find Cato's *De Agri Cultura*, Cicero's *De Officiis*, Varro's *De Re Rustica*, the *Iliad* and the *Odyssey*. The enumeration of documents and papyri contains *FIRA III* Nr 87-90; *P Ital 2/P Tjäder* 30, 35-36, 36 7-13, 38-42, 46; and *Tabl Albertini* II 8-11, III 30-34, IV 11-14, VII 16-18, IX 8-12, XVIII 11-14, XXV 3-5. The "Index of Modern Civil Codes" in effect includes several articles and paragraphs of the *BGB*, the *Code civil*, the *Codice civile*, the Swiss *OR*, the *CISG*, and the New Hungarian *Civil Code* as well.

III Jusztinger states that he tries to break with the "textbook-taste" tradition of analysing *pretium* in a *static* manner through its three main requirements, namely *verum*, *certum* and *iustum*. The author emphasises that the role of the *pretium* in Roman law was much more than the plain value or the simple consideration of the

153) (Pécs, 2016) 89-102; J Jusztinger "Acquisition of ownership in the sales contract practice of ancient Rome" in A Földi, I Sándor & I Siklósi (eds) *Ad Geographiam Historico-Iuridicam Ope Iuris Romani Colendam: Studia in Honorem Gábor Hamza* (Budapest, 2015) 221-234; J Jusztinger *Venditio spei*: "Inverse" purchase of a hope in Roman law? in E Štenpien (ed) *Kúpna zmluva – história a súčasnosť II* (Košice, 2014) 112-130; J Jusztinger "Acquisition of property and payment of the purchase price in the contract practice of ancient Rome" in E Štenpien (ed) *Kúpna zmluva – História a súčasnosť* (Košice, 2013) 183-200; M Petrak, N Žiha & J Jusztinger "Universal foundations of local laws – example of a 'just price' (*iustum pretium*)" in T Drinóczi, M Župan & M Vinkovic (eds) *Law – Regions – Development* (Pécs / Osijek, 2013) 307-338; M Petrak, N Žiha & J Jusztinger "Univerzalni temelji lokalnih prava – primjer „pravedne cijene" (*iustum pretium*)" in M Župan & M Vinković (eds) *Pravo – regije – razvoj* (Osijek, 2013) 243-273; J Jusztinger "The principle of *laesio enormis* in purchase and sale contracts in Roman law" in Gy Zs Balogh (ed) *Essays of the Faculty of Law University of Pécs: Yearbook 2011* (= *Studia Iuridica Auctoritate Universitatis Pécs Publicata* 149) 107-123.

thing sold: The institution's dynamic and functionalist examination showed that this method of investigation would be correct.

These efforts of following an entirely novel method of analysis, which rejects the other way of investigation using the trifold frame following the three main characteristics of the *pretium*, are not fruitless. However, this endeavour of the author partially resulted in a mere reorganisation of the parts, and in a visual or, in some cases, only a virtual cutback of the significance of such analysis of the accentuated three characteristics of the price as its requirement of being, for example, *iustum*.

The real value of the *opus* may rather be found in the following: (i) The book is unique in that it widely collects and criticises the difficult and also serious issues of the topic, and it does not hesitate to form an own standpoint regarding even the most debatable problems regarding the matter; (ii) The other virtue of the work is that it not only summarises and epitomises the huge amount of information about the examined topic, but it also investigates them meticulously; (iii) The third salient point of the monograph is that the author uses an excellent method of criticism. This he learnt from his late master, Professor Ferenc Benedek (1926-2007), according to whom primary sources should be compared – if possible – with other primary and literary sources in order to describe the global characteristics of the Roman world with respect to the targeted issues and questions. And, in conclusion he sets out his own standpoint, which should then be compared with other views in Roman legal studies.

IV I shall now briefly review certain sections of the work. The review follows the same scheme as in the monograph's chapters, and this will probably confirm my view of the author's laudable efforts. The purpose of the review is not pointing out typing errors, and I will mention but one word which is misspelled, namely *essentialia* which has three times been spelled as "essentialie" (pp 15, 39, 138).

(1) The historical overview in Chapter 1 emphasises that the feasibility of crediting the *pretium* together with the mutuality of services were the most meaningful factors which made possible the genesis of the consensual *emptio venditio* (pp 21-23).³

The book mentions and analyses a wide range of primary sources from Gaius to Justinian on the issue of the "price" requirement of being pecuniary (pp 24-38).⁴ The author points out that the famous debate between the Sabinians and Proculians in connection with the requirement to pay money clearly proved that the controversy concerning the requirement of *pecunia numerata* – contrary to other views in literature – is not the main distinction between *permutatio* and *emptio venditio*. It was evident to classical jurists that common barter had to precede the contract of sale – including monetary consideration as an essential component – in ancient Rome. Homeric sources also confirm the obvious historical fact that barter appeared prior to

3 Cf Paul D 18 1 1pr.

4 Cf Gai 3 141; Paul D 18 1 1 1; Paul D 19 4 1pr; Gord C 4 64 1; Diocl et Maxim eod 7; 1 3 23 2; Const Omnem 11.

monetary sale.⁵ However, parallel to the development of financial management, the significance of exchanging *only* goods gradually disappeared, and it was the *pretium* which appeared as one of the mutually provided objects of barter. On the one hand, monetary consideration provided by the purchaser separated *bonae fidei* contracts of sale from other legal relationships, such as *permutatio*, and on the other hand, in the case of an agreement on additional services in addition to the price, the availability of *actio empti* depended on a measure of monetary consideration.

The next section examines the significance of the agreement on price, and the determination of the price having an effect on the division of risk between the contracting parties.⁶ A noteworthy statement of Ulpian (that is, *sine pretio nulla venditio est*), which emphasises the importance of consensus on the determination of the price, not only states that this element is indispensable for a valid *emptio venditio*, but also that the transfer of risk (*periculum est emptoris*) presupposes a determined price (pp 38-43).

(2) The second chapter – analysing the requirement of the price being determined – offers a survey of the fragments regarding clear and “borderline cases” of *certum pretium*. On the basis of the analysed *loci* we can conclude that Roman jurists regarded the requirement of *certum pretium* as the purchase price being determined by *objective* factors at the time of the contract’s conclusion, and that *subjective uncertainty* is not a relevant factor (pp 46-48).

For this reason contracts of sale concluded with either of the following clauses, namely *quanti tu eum emisti* or *quantum pretii in arca habeo*, were regarded as valid.⁷ And, consequently, if the parties managed to make a bargain with each other in return for the amount that could be found in the cash-box of the purchaser, the contract was regarded as valid even with this price-clause. Likewise, if the vendor sold his goods in return for a *pretium* that had been bargained during the previously concluded sale – as it were, at procurement price – it was regarded as a determined price even if the purchaser was not aware of the fixed amount. Because of the possible extremely high risk in the *arca*-case the author facetiously calls it a kind of an “inverse purchase of a hope” (*venditio spei*). However, the author states that a comparison between the case of selling with an “*arca*-clause” and the *emptio spei* cannot be based on the special character (*spes*) of either of the mutual services, and not even because of the lack thereof (*scil* analogously: *etiamsi nihil inciderit* or *etiamsi nihil capit*⁸ in the case of *spei emptio*). The only connection between the two transactions is the risk exceeding the average measure (pp 48-53). Although this statement is correct, it should be kept in mind that the risky or almost aleatoric

5 Cf II 6 234-235 & 7 472-475; Od 1 430.

6 Cf Gai 3 139; I 3 23 1; Ulp D 18 12 1; I 3 23 3; Paul D 18 6 8pr.

7 Cf Ulp D 18 1 7 1.

8 See Pomp D 18 1 8 1 and *eod* 19 1 11 18.

character of contracting with an *arca*-clause lies in the obvious uncertainty of the equilibrium, or the great possibility of the lack thereof. Perhaps we can really call one of the mutual services – as Pomponius did in the case of *spei emptio* – *spes* (see my further reviews on this issue below at IV (3), in its last paragraph).⁹

Indirect primary legal sources (*quanti a testatore emptus est*)¹⁰ may be found in order to prove that Roman jurists regarded the purchase price as fixed even in the case of a subjectively uncertain price which was objectively certain for *both* of the contracting parties (pp 54-56).

Thus, continues the author, *pretium* was held *certum* even if the price was a fixed amount of money plus a thing or another service, the value of which was *objectively uncertain* at the time of the conclusion of the contract. Primary sources confirm that a contract of sale concluded with the price clause *quanto pluris eum vendidero* also complied with the requirement of being *certum*. Therefore, a purchase price determined at the time of the conclusion of a contract could be completed – depending on the agreement of parties – with the profit deriving from a re-sale: either with the whole profit¹¹ or with a certain percentage thereof.¹² Thus, such profits from the re-sale of the sold goods had to be paid on the basis of *iusta causa venditionis*, and this amount could also be demanded *ex vendito*. *Certum pretium* included profit arisen from future contracts of sale as well (pp 56-60).

Still, it clear that the purchaser was not allowed to determine the price all by himself, since in this case there would be no consensus between the parties – an essential element of the conclusion of a contract. After examining a wide range of literary views regarding the question of such contracts' validity or conditional effectiveness (Windscheid,¹³ Grosso,¹⁴ Arangio-Ruiz,¹⁵ Seckel and Levy,¹⁶ Albertario,¹⁷ Bechmann,¹⁸ Daube,¹⁹ Nelson and Manthe,²⁰ Zimmer-

9 *Scilicet* Pomp D 18 1 8 1.

10 *Cf* Ulp D 18 1 37.

11 *Cf* Ulp D 18 1 7 2.

12 *Cf* Ulp D 19 1 13 24.

13 See B Windscheid *Lehrbuch des Pandektenrechts* II (Frankfurt am Main) 1891⁷ 407ff.

14 See G Grosso *Obbligazioni. Contenuto e requisiti della prestazione. Obbligazioni alternative e generiche*, (Torino, 1966³), 117ff; *idem* "Le clausole 'si putaveris', 'si aestimaveris', e simili, nei fedecomessi, e la dottrina dell'arbitrium boni viri" in *Studia et documenta historiae et iuris* 1 (1935) 85ff.

15 See V Arangio-Ruiz *La compravendita in diritto romano* I (Naples, 1956²) 111-112² & 141³.

16 See E Seckel / E Levy "Die Gefahrtragung beim Kauf im klassischen römischen Recht" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung* 47 (1927) 152⁶.

17 See E Albertario "L'arbitrium boni viri del debitore nella determinazione della prestazione" in *Studi di diritto Romano* III (Milan, 1936) 309; and *idem* "L'arbitrium boni viri nell'onerato di un fedecomesso" in *Studi di diritto Romano* III (Milan, 1936) 357.

18 See A Bechmann *Der Kauf nach gemeinem Recht* II (Erlangen) 1884 (repr Aalen 1965) 347ff.

19 See D Daube "Certainty of price" in *Studies in the Roman Law of Sale. Dedicated to the Memory of Francis De Zulueta* (ed) (Oxford, 1959) 21-24 & 44.

20 See HLW Nelson & U Manthe: *Gai Institutiones* III 88-101. *Die Kontraktsoobligationen. Text und Kommentar* (Berlin, 1999) 262.

mann,²¹ Pennitz,²² Kooiker²³ and Leessen²⁴), the author ascertains that a contract of sale concluded with the clause *quanti velis, quanti aequum putaveris, quanti aestimaveris*²⁵ must be regarded as void since it is regarded as a sale *sine pretio* (pp 60-66).

The next – fairly large part of the work – deals with a detailed and lucid analysis of the old problem of price-determination by third parties (pp 66-82). On the first pages of this section (pp 66-71), the author examines this question in the pre-classical and classical eras, during which a debate between the Sabinians and Proculians had emerged after Gaius (Gai 3 140). The author follows the standpoint (eg of Kübler,²⁶ Falchi,²⁷ Thomas²⁸ and Torrent²⁹) that this controversy is not a debate in the “classical” sense of the word. Thereafter he discusses the matter as it appears in Justinian’s constitution (I 3, 23, 1 and C 4, 38, 15pr-3). As for *emptio venditio* concluded with a purchase price determined by a third person, it is well-known that Justinian regarded contracts of sale concluded with the price clause of *quanti Titius rem aestimaverit*³⁰ valid, thereby putting an end to the earlier debate between classical jurists.³¹

Now (pp 71-77) the question regarding the effect of the third person’s statement must be answered: Does it have a constitutive or a mere declarative effect? This important question is somewhat anachronistic (Jusztinger himself also mentions the same problem later on p 77), but the author’s aim, and also the way he approaches it, is correct. He declares that Justinian’s constitutions (in I 3 23 1 and C 4 38 15) do not answer this question. Thereafter, he analyses analogous cases emerging in the field of *locatio conductio* (in Cato’s *de agri cultura* 144, 2-3 and 145 3) and *societas* (Procul D 17 2 76 & 78). After an examination of analogous cases, he states that the third party, while determining the price, had to behave as a *vir bonus* because objectiveness had to prevail in such cases too. Thus, if the price was determined by a third person at the request of the parties, it was obligatory only if he had made a

21 R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, 1996³) 254-255; R Feenstra & R Zimmermann (eds) “Römisch-holländisches Recht. Ein Überblick” in *Das römisch-holländische Recht ...* (Berlin, 1992) 151.

22 See M Pennitz *Das periculum rei venditae. Ein Beitrag zum „aktionenrechtlichen Denken“ im römischen Privatrecht* (Wien / Köln / Weimar, 2000) 223.

23 H Kooiker “*Pretium certum esse debet*” in *Groninger Opmerkingen en Mededelingen* 21 (2004) 37-62.

24 T Leessen *Gaius Meets Cicero. Law and Rhetoric in the School Controversies* (Leiden, 2010) 215.

25 Cf Gai D 18 1 35 1.

26 See B Kübler *sv Rechtsschulen* in *Realencyclopädie der Classischen Altertumswissenschaft* 2 1 (1914) col 380-394.

27 See GL Falchi *Le controversie tra Sabiniani e Proculiani* (Milan, 1981) 263-267.

28 JAC Thomas *The Institutes of Justinian. Text, Translation and Commentary* (Oxford, 1975) 231.

29 A Torrent “*“Pretium certum”*”, determinación del precio ‘per relationem’” in *Bullettino dell’Istituto di Diritto Romano «Vittorio Scialoja»* 98-99 (1995-1996) 105.

30 Cf C I 4 38 15 pr-3 and I 3 23 1.

31 Cf Gai 3 140.

correct decision on the basis of objective criteria, in a fair and honourable process, and without arbitrariness (*arbitrium boni viri*).

In the next part (pp 77-82) Jusztinger, also keeping in mind the danger of anachronism, asks: “Is the clause “*quanti Titius rem aestimaverit*” a *condicio suspensiva* or a *pactum adiectum*?” After having discussed Gaius on *locatio conductio* (D 19 2 25pr) and Proculus on *societas* (D 17 2 76), the author concludes that their views – according to which such contracts are regarded as suspensive conditions – are correct. He thereupon discusses the possibility of transferring this standpoint to *emptio venditio*. Then he correctly states that we do not have enough primary sources to support the one or the other view (pp 80-82). The phrase *sub hac condicione*, even in Justinian’s constitution, cannot be interpreted in a technical meaning. The author holds that the controversy of invalidity and ineffectiveness, which also established the incorrect debate of *pactum adiectum* or *condicio suspensiva*, depended on the different standpoints regarding the interpretation of the certainty of price-matter: On the one hand that of *Labeo* and *Cassius* (exact sum already at conclusion of the contract, and without it the contract is void), and on the other hand that of *Ofilius* and *Proculus* (according to whom the price can be defined later on, too, and that a contract with a clause *quanti Titius rem aestimaverit* is valid, albeit ineffective until the determination). He states that this “debate” had originally turned around the *perfection* of the contract of sale.

(3) The third chapter (pp 85-103) attempts to find the answer to the following question: In the case of *emptio ad mensuram*, to what extent did the price-clause chosen by the parties have an influence on the division of risk between vendor and purchaser? The analysis of certain cases of selling at a lump sum (*uno pretio, per aversionem*) and selling at a unit price (*in singulas amphoras, in singulos metretas, in singulos modios*) justified the fact that the method of price determination chosen by the contracting parties had a decisive impact on the date of transfer of risk. In the case of selling at a lump sum, *periculum* transferred to the purchaser immediately, while in the case of selling at a unit price the seller had to bear the risk until the goods had been measured. The literary sources (Cato: *lex vini in doliis*,³² and Varro: *emptio ovium*³³ and *emptio canum*³⁴) make it clear that in normal contract practice either of the “lump sum-unit price”-clause pairs could already have been applied in the Republican age in the case of *emptio ad mensuram*.

The next part deals with the sale of replaceable things for a lump sum (*emptio per aversionem*). Comparing it briefly with the purchase of a hope (*emptio spei*), the author repeatedly³⁵ states that the important difference between these contracts is not the distinction of *rei* and *spei emptio* as held by others in the topic’s wide literature,

32 Cf Cato Agr 148.

33 Cf Var Rust 2 2 5.

34 Cf Var Rust 2 9 7.

35 See the so-called *arca*-case in IV (2).

including the author of this review. The author opines that the relevance of *emptio spei* is not its special object, but the aleatoric character appearing in the obligation of the purchaser to pay the price unconditionally: It means that the contractual risk is much higher than its average extent. Jusztinger states that the difference between these two transactions can be found more likely in their “dogmatic structure” than in the nature of their objects. In other words, in the case of an *emptio spei*, according to the agreement of the parties, the purchaser’s risk has a special measure and nature; that is why he has to pay the price even if the vendor cannot give him the goods, the quantity and quality of which is unknown at the time of the contract’s conclusion. As for *emere per aversionem*, the purchaser is obliged to pay the lump sum stipulated in advance. The author concludes that the regulation of bearing risk, such as the measure of purchase price, was negotiable (pp 94-95).

I agree with the author’s final statement, and also with the outcome of his reasoning on the fairly free allocation of contractual risks by the parties’ consensual agreement. However, he does not seem to understand those views (including mine³⁶) which emphasise the different natures of the objects of these contracts. I can confirm that the latest concepts in legal history, which *literally* interpreted the picturesque and imaginative words most likely of Pomponius appearing in D 18 1 8 1 (in the *sedes materiae* of *spei emptio*), stem from the late medieval Canon law. These misinterpretations (eg of Mantica, Turri and Gonzalez-Tellez) did not belong to the mainstream of Jesuit Canon law. The mainstream³⁷ has always tried – legally or illegally – to contentwise and substantially interpret the (probably) Pomponian metaphor. For example, when the *opinio communis* states that “the object of *emptio spei* is the hope (itself)”, this statement is mainly an abbreviating grammatical structure based on the detailed analysis of the legal character and phrasal nature of *spes* during the age of this important legal phrase’s creation. However, this correction is marginal.

(4) Chapter four (pp 105-135) deals with the evolution of legal regulations which defined the limits of freedom of price determination. In ancient Rome, as a result of a long-term development, they managed to develop a useful system of laws situated somewhere between the limitless freedom of contract on the one hand and detailed regulations restricting the contractual will of the parties on the other hand. The author found it necessary to correctly re-construct the requirement of *verum pretium* defined

36 See, eg, A Földi “József Benke, Reményvétel. Az európai magánjogi gondolkodás a reményvétel mikrokosmoszán keresztül” [Der Hoffnungskauf. Europäisches privatrechtliches Denken im Mikrokosmos des Hoffnungskaufs] HVG-Orac (Budapest, 2011) 448 in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung* 131 (2014) 460-465.

37 See, also, J Benke “Aleatorischer Kauf nach römischem Recht” in *Orbis Iuris Romani* 11 (2006) 7-29. Here, I had so many problems trying to re-interpret all the rules of *emptio venditio rei* according to the special characters of *spes* and *spei emptio* that I decided that it would be better to develop my new standpoint in a monograph (see review *supra*).

as a “real” price that was mentioned in a popular regulation during the nineteenth century, namely *Pandektistik: pretium debet esse verum, certum, iustum*. Jusztinger reasons that the difference between the value of the goods and the sum of the purchase price never resulted in a nullity of sale-contract. However, if the purchase price was so low that the intention of acquisition in return for consideration became unreliable, it excluded the conclusion of a valid contract. The author points out that legal sources³⁸ regarded the parties’ rather extensive freedom to define the sum of the price even by means of speculative manoeuvres (*invicem se circumscribere*) as an inherent element of the contract of sale, the most important limit of which was the *bona fides* in its objective sense (*mutatis mutandis* like “*Treu und Glauben*”). Despite the fact that Roman law did not require *total* equivalence between the purchase price and the objective value of goods, it has already turned its attention to the fairness of the purchase price prior to the introduction of *laesio enormis*. Jusztinger proves that, on the one hand, classical Roman law respected the contractual will of the parties and did not interfere with the process of price determination; on the other hand, however, classical law tried to keep the parties’ bargaining process within bounds in order to prevent it from becoming endless with respect to the principle of *bona fides*. Two imperial rescripts, for example, indicated the first steps in order to find the optimal balance between the freedom of contract and equity.³⁹ The aim was to defend the more unprotected party, and for this the laws used the strict criterion of *dimidia pars*.

(5) The fifth chapter (pp 137-156) analyses the “borderlands” of *emptio venditio* and *locatio conductio*. This section intends to verify that the determination of monetary consideration played a key role in these cases as well. The author correctly states that the common rules of the determination of consideration, such as the requirement of paying money; the permission of circumscription; and the possibility of *pretium* or *merces* being determined by a third party, are the reasons for this problem according to which some cases of sale and rent are difficult to separate.⁴⁰ Therefore it is difficult to decide whether the contracting party pays a purchase price or a rental price.⁴¹ This is important for various aspects: to determine liability; the transfer of risk; and the legal consequences of the determination of monetary consideration.

After analysing the most important common features of *pretium* and *merces*, both pecuniary services (pp 138-142),⁴² the author classifies this chapter according to the nature of the *casus paralleli* of *emptio venditio*: (i) with the *locatio conductio rei*: Ulp D 19 5 20 1; Gai 3 146; (ii) with the *locatio conductio operis*: Gai 3 147;

38 Cf Paul D 19 2 22 3; Ulp D 4 4 16 4.

39 Cf Diocl et Maxim C 4 44 2 and *eod* 8.

40 Cf Gai 3 145.

41 Cf Gai 3 147; Iav D 18 1 65.

42 Jusztinger examines further pros and cons: Afr D 19 2 35 1; Ulp D 10 3 23; Ulp D 16 3 1 9; Ulp D 19 5 17 3; Paul D 19 5 5 2-3; I 3 24 2; Paul D 19 2 22 3; Gai D 19 2 25; Gai D 19 2 2pr.

Iav D 18 1 65; Pomp D 18 1 20; Paul D 19 2 22 1-2; Ulp D 6 1 39; and (iii) with the *locatio conductio operarum*. In this last comparison, the author critically examines the analogues emerging from the object lessons of *spei emptio* (Pomp D 18 1 8 1), such as fishing and hunting for an unconditional payment of the purchase price, and the case of a labour-contract like fishing also for an unconditional payment. In these cases of fishing for an unconditional payment regardless of the outcome (*captus piscium vel avium*), Jusztinger perceives and examines the “hard nut” of the acquisition of property *per occupationem*, namely which party and how he is to enjoy this *modus adquirendi*: either the fisher (as vendor or employee), who catches (occupies) the lordless objects (fish, birds, etc), or the other party (as emptor or employer), to whom or for whom the fisher caught it.

(6) The investigations of chapter 6 (pp 157-192) analyse the connection between the payment of price and the transfer of ownership. Here the author intends to confirm that both the determination and performance of *pretium* (could have) indicated significant turning-points regarding the conclusion of sales contracts. I epitomize the author’s statements as follows: Although with different intensity and originating from different causes, the rule of paying the purchase price appeared from the time of the Twelve Tables⁴³ and continued in various stages of the development of Roman law. It consequently has a place in the codes of the Justinian codification. The early act of real-sale by means of *mancipatio* entailed the requirement of paying the purchase price as an indispensable element of the transaction fulfilled immediately from hand to hand. However, concerning the formation of consensual sale, it does not seem to be unreasonable that despite the handover of goods, the purchaser does not acquire the ownership without the performance of *pretium*. Thus, if the buyer does not perform, the seller can at least reclaim his goods. The most obvious way to ensure the seller’s interest – without a concrete stipulation referring to the maintenance of ownership – is the application of the rule which makes the transfer of ownership dependent on the payment of *pretium*. Of course, all these possibilities are true since the purchaser can postpone the performance or pay by instalments. As soon as the seller’s position becomes equal, the examined prescription ensuring the significance of the balance of performances decreases. Thus, by the classical age, once it had been acknowledged that the parties’ agreement regarding the postponed performances is sufficient to establish the sale, and *emptio venditio* functions merely as the title of acquisition in connection with the transfer, the prescription is no longer as it had been previously. The requirement of paying the purchase price remains in a less strict form; its functional significance was more or less depleted. Even Tribonian’s committee accepted the reduced importance of simultaneity.⁴⁴ Considering the Dacian sales documents⁴⁵ and sales contracts concluded in Ravenna,⁴⁶ everyday contract

43 Cf 7 11.

44 Cf Gai D 18 1 53; Pomp D 18 1 19.

45 Cf FIRA III Nrs 87-90.

46 Cf P Tjäder 36 7-13.

practice provides examples which either diverge from the prevailing (imperial) legal standpoint or follow it. The regulation attaching the transfer of ownership to the payment of the purchase price, in any stages of the development of Roman law, may be regarded rather as a provision depending on the agreement of the parties and their everyday practice than as a general legal rule or principle.

V Finally, the author states that it can clearly be seen that the influence of price determination and the payment of the purchase price exerted on the functional *synallagma* conflicts only at first glance. On the one hand, the transfer of *periculum* is not inconsistent with it, since the buyer bears the risk of accidental destruction of goods (not owned by him yet) only if the handover of goods depends solely on the buyer and the seller is ready for performance. On the other hand, Roman law has already recognised payment of the purchase price as a requirement for the transfer of ownership during the Archaic Age, but this requirement was continuously exceeded by newer legal possibilities of crediting the purchase price, pledge, or bail.

To conclude: I hope that this commendable book of János Jusztinger will receive the deserved support for publishing it in a world language, which would make the book more easily accessible to a wider audience consisting of Romanists and legal historians.

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