

**TOWARDS A LEGAL HISTORY OF WHITE WOMEN IN THE TRANSVAAL,
1877-1899**

by

MARELIZE GROBLER

Submitted as requirement for the degree

MAGISTER HEREDITATIS CULTURAEQUE SCIENTIAE (HISTORY)

in the

**Department of Historical and Heritage Studies
Faculty of Humanities
University of Pretoria
Pretoria
2009**

Supervisor: Prof. L. Kriel
Co-supervisor: Prof. K. Harris

I. PREFACE

If one considers South African history as a whole, white women in the Transvaal as a group have been somewhat neglected by historians.¹ This study is a first step in rectifying this neglect, by using legal sources in a historical context to create a space for the women, one on which future research can build. This space is referred to as a stage, and the theoretical thinking behind the use of the stage analogy is discussed in chapter 2.² What it translates to in practice is that women played out their lives on a historical stage. The stage is constructed by various means: legal sources are used to build it, a study of 'life' in the Transvaal is the backdrop, and court cases are the *mise-en-scène*.

This is a study of white, not black, women, and the determining factor is scope. Black women were not perceived as equal citizens by the Transvaal's leaders or its white inhabitants, but most importantly, they had their own legal system.³ Eventually, one would like to reach a stage where black and white women's rights could be studied simultaneously, but that as yet is not possible. The rights of neither of the two female populations have been sufficiently explored; this study aims to redress the situation as far as the whites were concerned. Therefore, when women are mentioned throughout the study, it refers to white women.

The Transvaal is traditionally perceived of as an Afrikaner (Boer) territory, due probably to the Afrikaner leadership and the wars which forced a division between Englishman and Afrikaner. This oversimplifies the situation: Pretoria was probably more English than Afrikaans, and the inhabitants of the Witwatersrand included people from many different nationalities. All women of European descent, however, no matter what their nationality, were under the jurisdiction of the same courts, and while Afrikaner-women are seemingly predominant, not enough bibliographic information is available on the women in the court

¹ The governments of the Transvaal, especially under President Paul Kruger, preferred their country to be known as the Zuid-Afrikaansche Republiek (South African Republic). However, the term Transvaal is used throughout in this study since it includes the British interregnum, and seems to be a more commonly used, and well known, term today.

² J. Alberti, *Gender and the historian*, p. 69. Alberti mentions a theory which involves first creating the women's historical situation before studying the women. The idea of a construction of a historical 'stage' comes from social-anthropologists.

³ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 45. Of course, black men were not considered equal citizens either.

cases of chapter 6 to exclude anyone.⁴ Since there has been a greater focus on Afrikaners in the Transvaal (due to trends in historiography that will be discussed in chapter 2), English women are more difficult to uncover and identify than Afrikaner women. Therefore, the legal documents' coverage of white women irrespective of their national, linguistic backgrounds helps to address this shortcoming. Furthermore, in studying all the women, the study attempts to break away from the trend of studying white communities in isolation, instead of studying interactions between the different sub-groups in a specified area. It wants to see how the law should have, and in some cases did, work for all white women.

According to R. Hunter, 'legal history' has been approached in two ways: *legal history*, and *legal history*, with the emphasis falling on quite different areas. The first focuses mostly on "legal documents", the second on the "legal dimensions of historical problems."⁵ I. Farlam commented on this issue in South Africa when he said that

legal history written by an historian who knows no law is almost as bad as legal history written by a lawyer who knows no history. And I have a problem here. Though professional South African historians have written works on legal history one does not hear much about them in legal circles. There appears to be little dialogue between professional South African legal historians and historians.⁶

This study might not yet redress this problem, but by taking steps to make legal history more visible, it will hopefully stimulate further research that might eventually lead to more open interdisciplinary dialogue.

The choice of legal history was significantly influenced by an availability of legal sources that refer to women. That these legal sources lacked specific information on the women, which in many cases translated to a surprising absence even of gender awareness, meant that secondary sources were crucial. Some of the difficulties with regard to finding information on women are mentioned in chapter 2. Literary sources, at least those that mention women specifically, do not assist in clarifying the picture; indeed, it just poses more questions than

⁴ The case studies are a selection that reflects more on the rural areas and small towns, which means that the focus in this study leans more towards rural Transvaal than the Witwatersrand.

⁵ R. Hunter, Australian legal histories in context, *Law and History Review* 21(3), Fall 2003. At the time of publication of the article, Hunter was Dean of the Faculty of Law at Griffith University, Queensland, Australia, specializing in feminist legal scholarship.

⁶ I. Farlam, Some reflections on the study of South African legal history, *Fundamina: A Journal of Legal History* 9, 2003, p. 9. Farlam is a judge of the South African Supreme Court of Appeal.

it answers. C. Jeppe, for example, refers to a family on trek, where the man would pack his things for a trek to the bushveld, and loaded everything onto his wagons, which “were crowded with the housewife and her numerous progeny.”⁷ M. Nathan mentions Paul Kruger’s wife “who had all the strong but invisible influence possessed by women of her race,”⁸ but fails to elaborate. Between women being mentioned as if part of the baggage, and referring to them as ‘strong but invisible’, there has to be more that can be said, and that is where the legal sources came in.

The advantages of studying law for a gender historian is pointed out by B. Welke, who argues that one can use any area of law if the right questions are asked, since court cases are about both men and women, and they live gendered lives.⁹ Hunter adds that reading legal documents can help one to see “what they [the legal documents] say about contemporary society and for evidence of how characters performed on the legal stage.”¹⁰ In her study on negligence claims in the United States, Welke also points out the significance of a study of the High Court: “[A]lthough most potential claims never reached a courtroom and even fewer reached American appellate courts, those that did had a significance that far outweighed their numbers: they became the law.”¹¹ Therefore, the law is tangible proof that these are rights that women supposedly had. In the Transvaal, the cases that ‘became the law’ are called reported cases, and it is from those that the cases for this study were selected.

In his 1979 dissertation on Chief Justice John Gilbert Kotzé, J. Kew remarked that

[l]egal history, as a field of interest for trained historians, is arguably perhaps one of the most neglected aspects of traditional South African historiography. The problems are complex and I must admit that while struggling with the legal, constitutional and judicial issues involved in ... [my study] ... I did, at times, come to feel that legal history is perhaps better left to lawyers with an interest in the past than to historians with a legal turn of mind. The subject is, however, of considerable significance in

⁷ C. Jeppe, *The kaleidoscopic Transvaal*, p. 88.

⁸ M. Nathan, *Paul Kruger. His life and times*, p. 302.

⁹ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 126. Welke is Professor of Law and Associate Professor of History at the University of Minnesota.

¹⁰ R. Hunter, Australian legal histories in context, *Law and History Review* 21(3), Fall 2003.

¹¹ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 83.

a wider framework than purely legal and it is hoped that my approach to it will make a positive contribution to a deeper understanding ...¹²

This sentiment has definite resonance. For a historian with limited legal knowledge, there is much to learn without the study becoming a complicated legal analysis. Although a large part of this study is devoted to legal discussions, it remains cultural history, at core an attempt to describe and understand social behaviour, by scrutinizing aspects of legal documents in search of women, and their gendered lives.

Women's lives included participation in social interactions and economic activities in the Transvaal, but women in relation to those are not mentioned by name in the majority of secondary sources. The dependence on secondary sources inevitably necessitates a process of deconstruction of sources, in the process of constructing the backdrop of the stage, one on which the female presence (and female agency) could be more imaginable. One of the complications in creating the socio-political background of the Transvaal is what P. Burke refers to as 'mapping', a term that he uses in *What is cultural history?* 'Mapping' means to lump all the inhabitants of a territory into one socio-economic unit. He states that "the idea of a cultural frontier is an attractive one ... [but] it encourages users to slip without noticing from the literal to the metaphorical uses of the term, failing to distinguish between the geographical frontiers and those between social classes ..."¹³ The dangers inherent in this for a study of the Transvaal are already evident. The inhabitants were not a homogenous community, and by virtue of geography and political boundaries, areas as diverse as the Witwatersrand and the rural areas around the Zoutpansberg are, but maybe should not be, considered in the same ambit.

The boundaries or frontiers in the Transvaal in the late nineteenth century are complex, being both geographical and social. As indicated, Burke regards boundaries as misleading, because they "seem to imply a homogeneity within a given 'cultural area' and a sharp distinction between such areas ... The view from the outside needs to be supplemented by one from the inside, stressing the experience of crossing the boundaries between 'us' and

¹² J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 145. Kew is a South African historian.

¹³ P. Burke, *What is cultural history*, p. 117. Burke is Professor Emeritus of Cultural History at the University of Cambridge.

‘them’, and encountering Otherness with a capital ‘O’’. Finally, Burke warns that historians “are dealing with the symbolic boundaries of imagined communities, boundaries that resist mapping. All the same, [we] cannot afford to forget their existence.”¹⁴

The difficulties faced in this regard are also stipulated by H. Bhabha, when he asks: “How do strategies of representation ... come to be formulated in the competing claims of communities where, despite shared histories and deprivation and discrimination, the exchange of values, meanings and priorities may not always be collaborative and dialogical, but may be profoundly antagonistic, conflictual and even incommensurable?”¹⁵

Bhabha’s comment warrants closer scrutiny, when one attempts to construct the Transvaal in a gender sensitive manner. If one looks at geographical frontiers, the Transvaal was a state containing different worlds: Pretoria and the Witwatersrand, for example, the main urban areas, were, figuratively if not literally, worlds apart. Then there is the rural Transvaal, spatially and spiritually widely removed from life in the urban centres. When one considers social boundaries, there were many in the Transvaal, based on race, culture, language, class and gender. Many inhabitants were not born there.¹⁶ The descendants of the pioneers lived on farms, or in relatively small towns like Rustenburg or Potchefstroom. Very few of the original inhabitants participated in the mining revolution around Johannesburg after 1866. The Transvaal’s inhabitants were clearly not a homogenous community.

For most of its existence the Transvaal was an independent state.¹⁷ Yet, by virtue of its history, location and inhabitants, it was also part of the ‘informal’ British Empire. A. Perry comments that

settlers occupied a strategic, curious and contested place within the conduits of power that constituted the British world. Settlers were undeniably colonizers of African ... space ... At the same time they themselves were colonized. The British world was fragmented by the lived practice of rule by settler self-government, but it remained governed by the metro pole that gave it its name. Settlers thus occupied what we might call a doubled place within the Empire: they experienced

¹⁴ P. Burke, *What is cultural history*, p. 117.

¹⁵ H. Bhabha, *The location of culture*, p. 2. Bhabha is a noted post-colonial theorist.

¹⁶ Most, if one also considers the Witwatersrand.

¹⁷ See chapter 3 for a short political history. The Transvaal was independent from 1852 to 1877, and then again from 1881 to 1899.

being colonized and colonizing in simultaneous and seemingly contradictory ways.¹⁸

Being part of the British world adds yet another dimension to the Transvaal, and another 'boundary'. It puts the Transvaal on a bigger map, and allows for the acknowledgement of British influence. The settler status of the Transvaal influenced the relationship between the settlers and the indigenous populations. As A. Perry rightly states: "Settlers had ... a profoundly ambiguous and deeply unsettling relationship to the societies they inhabit[ed] and claim[ed]."¹⁹ The heterogeneity of the settler population also influenced the jurisprudence, as many of the women in the court cases were not Voortrekker descendants. All that this entailed is discussed later.

From this analysis some pitfalls are already apparent: Firstly to pretend that inhabitants of the Transvaal were homogenous; secondly to forget that boundaries, real or imagined, existed; and thirdly to forget that ultimately, the Transvaal was part of a bigger world, which had an impact on its inhabitants' relationships with different populations, their settlement, their legal system, and the way they perceived themselves.

Their self perception was also influenced by their whiteness. According to M.J. Green, C.C. Sonn and J. Matsebula, whiteness is "... the production and reproduction of dominance rather than subordination, normativity rather than marginality, and privilege rather than disadvantage."²⁰ What is suggested is that white people are put into a dominant position based on their whiteness, while, at the same time, "rendering these positions and privileges invisible to white people."²¹ The reason for its invisibility is that "[w]hiteness is ... constituted by the absence and appropriation of what it is not. In turn, white people do not experience the world through an awareness of racial identity and cultural distinctiveness, but rather experience whiteness and white cultural practices as normative, natural, and

¹⁸ A. Perry, Interlocuting empire: Colonial womanhood, settler identity, and Frances Herring, in P. Buckner & R. Douglas Francis (eds.), *Rediscovering the British world*, p. 159. Perry is an Associate Professor at the University of Manitoba.

¹⁹ A. Perry, Interlocuting empire: Colonial womanhood, settler identity, and Frances Herring, in P. Buckner & R. Douglas Francis (eds.), *Rediscovering the British world*, p. 160.

²⁰ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 390. The writers argue that "whiteness is perhaps the most compelling theoretical concept that has emerged in recent decades to deal with racism." Australian and South African social researchers.

²¹ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 390.

universal, and therefore invisible.”²² Whiteness manifests itself through social identity, but the manifestation is not uniform, and is influenced by specific situations, which means that the meanings of whiteness vary greatly.²³

What did whiteness, and being white, mean in a colonial context like the Transvaal? It represented “orderliness, rationality, and self control ... The connection whiteness has with rationality and civilisation persists, but it is now signified in terms of the economic sphere. Whiteness has become integral to what is meant by truth, knowledge, merit, motivation, achievement, and trustworthiness ... goodness, fairness, intelligence, rationality, sensitivity ... inclusiveness ...”²⁴ Added to this is the idea of defining yourself by what you are not, rather than by what you are. The example Green, Sonn and Matsebula use is Australian, but could just as easily be used in the Transvaal colonial context: “whether Indigenous Australians are constructed as ‘noble’ or ‘ignoble’, ‘heroic’, ‘urban’, ‘degenerative’, ‘drunk’, or ‘wretched’ has depended on what white Australia wanted to say about itself. Whiteness is constructed and validated not so much by what it is but mostly by what it is not.”²⁵

The importance of this for the Transvaal is that “[g]enerations of white people, particularly Afrikaners, were socialised into believing that their rights were naturally superior to those of other population groups.”²⁶ This was, in fact, integral to the first Republican legislation. However, “[w]hiteness is often represented as a homogenous identity of all white people. This tends to obscure ethnic [and gender] differences among white people and to induce a false sense of oneness and sameness. While the white population in South Africa is by no means homogenous, whiteness is an overarching identity.”²⁷

Being ‘white’ is also a racial identity. Race is a social, historical, ideological construct. This leads us to something that is referred to as the ‘wage of whiteness’, which means that you

²² M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 396.

²³ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 393.

²⁴ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 397.

²⁵ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 400.

²⁶ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 403.

²⁷ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 404.

believe no matter what you do that you are inherently better than others (with others, read: blacks).²⁸ Whiteness “reflect[ed] ... deeply embedded, structural, hard, enduring, solid features of race and racism.”²⁹ For those who were part of the dominant racial identity, as were the Transvalers, it impacted on the way they thought about themselves (and, of course, of others, but that is not the issue in this study). The white Transvalers were not part of a culture that was racist – made so by social and political forces, but a racist culture – which means that the racism was ingrained and inherent in their culture.³⁰ F. Morton points out that

[i]n a land where the majority of the population was African and unconquered, Boer farmers needed constant reinforcement of their notions of racial and cultural superiority and it is no surprise that often they regarded their *inboekelinge* and *oorlamse* with affection and retained them into their old age as appendages to Boer families ... they were valued for their imitation of Boer values and given protection as long as they remained distinct from African communities.³¹

This treatment of the indigenous populations, when understood in conjunction with how whiteness influenced the people, was then not so much conscious as automatic.

While understanding whiteness with regards to the Transvalers, there are clear parallels to gender relations. Men were in a dominant position based on their maleness. Whereas whiteness meant ‘orderliness’ and ‘self control’ to white people, being a man meant that some qualities, and social spheres, were reserved for men. While one of these spheres is the commercial sphere, in a legal sense, the law was perceived as a ‘man’s world’, and as such, would subconsciously have catered for men more than women, not by any design, but simply because that is the way that things were. For a woman, especially in the court cases where she chose to use the legal system, the territory was probably unfamiliar, and possibly unwilling, or even hostile.

²⁸ N. Roos, *Ordinary Springboks*, pp. 4-5.

²⁹ M.J. Green et al., Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 395.

³⁰ N. Roos, *Ordinary Springboks*, p. 7.

³¹ F. Morton, Female *inboekelinge* in the South African Republic 1850-1880, *Slavery and Abolition* 26(2), Aug 2005, p. 211. Morton is an American historian who resides in Botswana, and has done much research on specifically the Western Transvaal.

Given the complexity of the topic, and the need for contextualization and explanation, it is only in the final chapter that the women participating in the court cases are dealt with directly. The court cases will be considered in conjunction with laws and newspaper articles. The findings are both investigative and preliminary, and raise many more fascinating issues that warrant future research.

After a long study like this, all one can do is give thanks. The following people deserve more than I am able to give:

- The staff at the University of Pretoria's Academic Information Service, the National Archives in Pretoria and the UNISA Library.
 - The members of the Department of Historical and Heritage Studies of the University of Pretoria, who create opportunities and care about individual students.
 - My colleagues in the Unit for Academic Literacy, for cheering me on.
 - Fred Morton, for proofreading the final copy, and allowing me to stay with him and Sue to write that one chapter. Thank you very much.
 - Ouma Connie, Ellenmarie and Mamma, for proofreading various drafts.
 - For my Ouma, Stefaan, Ellenmarie, Jessica, Fourie, Sulani and the rest of my friends, for all your love, support and good times in between.
 - Prof. Karen Harris, my co-supervisor, for wisdom and encouragement.
 - My supervisor, Prof. Lize Kriel, who with incredible enthusiasm, knowledge and insight made me a better researcher and historian than I ever thought I would be.
- Thank you.

Marelize Grobler

September 2009

I dedicate this dissertation to my parents, Jackie and Elize. Not only did you create an environment for all of us to excel in, but you did it with so much passion. Thank you for support and acceptance, but mostly, for unconditional love.

CONTENTS

	PAGE
I. SOUTH AFRICAN HISTORIOGRAPHY	1
1. Introduction	1
2. Finding white women’s history in the Transvaal	1
3. Sources for contextualising Transvaal history	7
4. Legal sources	12
5. Conclusion	15
II. THEORY AND METHOD: WRITING WOMEN’S HISTORY FROM LEGAL SOURCES	16
1. Introduction	16
2. ‘History as a performance’ and ‘occasionalism’	16
3. Constructing a legal stage	18
4. Women’s history and gender history	22
5. Agency in women’s history	24
6. Post-modernism and deconstruction in women's history	25
7. Women, gender and legal history in nineteenth century Transvaal	29
8. The opposition of ‘public’ and ‘private’ in legal history	34
8. Conclusion	35
III. CONTEXTUALISING TRANSVAAL HISTORY FROM 1877 TO 1899	37
1. Introduction	37
2. The early years of white settlement 1844-1877	37
3. Transvaal under annexation 1877-1881	39
4. Transvaal between the wars 1881-1899	42
5. The inhabitants of the Transvaal	45
6. Conclusion	58
IV. THE DEVELOPMENT OF THE LEGAL SYSTEMS OF THE TRANSVAAL 1844 TO 1899	60
1. Introduction	60
2. The Cape Colony from white settlement to the Great Trek	62
3. 1844-1877: Conception, consolidation and problems	64
4. 1877-1881: The influence of the British annexation	69
5. 1881-1899: The courts back under Volksraad control	72
6. Transvaal jurisprudence: The influence of English common law and the Cape’s legal system	76
7. The members of the High Court	79
8. Executive and the judiciary: Conflict over the testing-right of the High Court	81
9. Conclusion	86



V.	ESTABLISHING WOMEN’S LEGAL POSITION: SOURCES AND THE LAW	88
	1. Introduction	88
	2. Sources used to establish women’s legal position	88
	3. Laws regarding women	90
	a. Marital status and marital power	90
	b. Women’s property rights	93
	c. Antenuptial contracts	94
	d. <i>Echtscheiding, overspel</i> and its influence on guardianship over children	95
	e. Second marriages	97
	f. <i>Erfopvolging</i>	98
	g. <i>Misdaden tegen de eer</i>	99
	h. Infanticide (murder of infants)	99
	i. <i>Minderjarigheid, voogdijschap</i> and <i>vaderlijke</i> or <i>ouderlijke macht</i>	100
	j. Women and criminal cases	102
	k. Education	103
	4. Other sources mentioned in court cases	103
	5. Conclusion	105
VI.	WHITE WOMEN AND COURT CASES IN NINETEENTH CENTURY TRANSVAAL	107
	1. Introduction	107
	2. Women and court cases	107
	a. Marital status and marital power	108
	b. Women’s property rights	111
	c. Antenuptial contracts	113
	d. <i>Echtscheiding, overspel</i> and its influence on guardianship over children	115
	e. Women’s agency and political rights	126
	3. Conclusion	127
VII.	CONCLUSION	129
	SOURCES	131
	ABSTRACT	144

ABBREVIATIONS

DRC	Dutch Reformed Church
WCTU	Women's Christian Temperance Union
ZAR	Zuid-Afrikaansche Republiek

I. SOUTH AFRICAN HISTORIOGRAPHY

1. Introduction

The literature available on the nineteenth century Transvaal has rather large voids in it. A preliminary search for references to white women, in order to create the fully dimensional characters I had envisioned on the stage, yielded less than the desired results. The reasons for these difficulties, together with the peculiarities of South African history, and the impact of events like the Anglo Boer War of 1899-1902 on the existing historiography, will be discussed.

The divergent nature of this study – from socio-economic to legal history – necessitated researching wide-ranging but fascinating sources. To construct an impression of social lives and interactions, a variety of secondary sources were studied. For a historian studying legal history, it is crucial to find sources that are easily accessible to someone unfamiliar with legal discourse. Three types of sources were prevalent and useful: legal documents and publications; studies on legal history from a legal viewpoint; and historical studies on notables in the legal profession.

2. Finding white women's history in the Transvaal

South African historiography has been strongly influenced by two approaches: first, nationalist historiography not necessarily motivated exclusively by nationalism, and second, the 'big event syndrome,' or the disproportionate attention to a single event while the history of the people and the nation fades from view.

In 1997, P. Zeleza wrote that the underdevelopment of African women's history could be ascribed to the recent development of the writing of history in Africa. He went on to explain that after independence, the "fixation with celebrating and laying the empirical framework of African civilizations ... blinded them to gender analysis. These historians sought to reclaim and glorify Africa's great states, cities, and leaders ... nationalist historiography was primarily political and elitist. It had little to say about the 'masses', whether men or women,

or social and economic history.”¹ The relevance of Zeleza’s comments in the Transvaal context is two-fold: parts of the historiography are still young, but also, there were many events – not only independence from colonial domination – that were inspired by, while simultaneously stimulating, nationalist historiography.

Historical writing in the nineteenth century was based on a loyalty to Britain. The Trekkers were rebels, the Cape Colony the ‘real’ South Africa, but only a colony in the bigger British world – the context as was set out in the Preface. Naturally, this meant that British history was central in the historiography. In its turn, Afrikaner nationalism grew in the years after the Great Trek in protest against the school of British historiography, especially from 1877 to 1881. The Anglo-Boer War and the National Party’s victory in the 1948-election added to the predominance of Afrikaner nationalist historiography in the twentieth century. The third wave of nationalist historiography was ushered in after the 1994 election and the ANC’s subsequent take-over of power. A ‘new South African’ nationalism now seems to dominate South African historical writing, particularly in its focus on liberation movements. At the same time, however, an older, traditionally exclusive Afrikaner (white) nationalism still prevails, as does a ‘South Africanism’ historiography, driven by white English South Africans.²

Nationalist historiography’s impact on the histories of women in South Africa is critical, because if nationalism influences the focus of historical research, and what historical images (*geskiedsbeelde*) are created,³ it follows that different nationalisms dictate what should be written and said about women in that nationalist context. The dominance of Afrikaner nationalism throughout most of the twentieth century meant that it prescribed what could be written about women in its nationalist context. E. van Heyningen touches on this when writing about the Anglo-Boer War that the “South African experience of war has been more neglected than most, despite our legacy of conflict and the huge body of military history which has been produced. In the latter half of the twentieth century other agendas have

¹ P.T. Zeleza, *Manufacturing African studies and crises*, p. 179. Malawian historian Paul Zeleza is the president of the African Studies Association, and is a leading authority on African economic history.

² The latter is discussed in Saul Dubow’s *A commonwealth of knowledge*. Saul Dubow is Professor of History at Sussex University.

³ F.A. van Jaarsveld, *Lewende verlede*, p. 65.

prevailed. For Afrikaners the history of Boer women has been deliberately constructed to serve the ends of Afrikaner nationalism.”⁴

On the other side of the nationalist debate, which would have been a counter to Afrikaner nationalism, is “the Left [for whom] other issues, notably resistance to colonialism and apartheid, have been more important.”⁵ This again results in a neglect of certain events. The impact of nationalism dictates to the historiography on one side, but indirectly creates a resistance in those marginalised by it, and so influences the historiography on the opposite side.

S. Trapido mentions that “the emphasis of nationalism in the study of Afrikaner people in South Africa has meant that important, probably crucial, social relations in the South African Republic (between 1850 and 1900) have been largely ignored.”⁶ ‘Social relations’ in this context includes not only relations between men and women, but also between white women and white women and white women and black women. In 1990, C. Walker noted this trend amongst South African historians who “are still a long way from mapping women’s position, both historically and in the present, while much must be done to integrate their findings into our conceptualisation of society.”⁷ Almost two decades later, we are still far from attaining this goal.

Books by white (male) Afrikaner nationalist historians have not heeded Walker’s advice. One example is H. Giliomee’s *The Afrikaners*, which out of all the historical writing about the Afrikaners has to be considered the pivotal secondary source.⁸ However, in his text of slightly more than 650 pages, he mentions women only in regard to seven events.⁹ Ironically, when he mentions women, it is to extol their virtues and to mention how, but for

⁴ E. van Heyningen, Women and gender in the South African War, in N. Gasa (ed.), *Women in South African History*, p. 92. Van Heyningen is a South African historian whose areas of expertise are social history, urban history, and the social history of medicine.

⁵ E. van Heyningen, Women and gender in the South African War, in N. Gasa (ed.), *Women in South African History*, p. 92.

⁶ S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 350. Trapido was a noted Marxist historian and Oxford University lecturer.

⁷ C. Walker (ed.), *Women and gender in South Africa to 1945*, p. 2. Walker is also the author of ‘Women and resistance in South Africa, and specializes in land rights and gender in South Africa.

⁸ H. Giliomee, *The Afrikaners*. Giliomee is an Extra-Ordinary Professor of History at the University of Stellenbosch, and is considered by many to be the leading voice in Afrikaner historical writing.

⁹ H. Giliomee, *The Afrikaners*, p. 696.

their impact, the history could have been different, for example, “Afrikaner women were a driving force behind the [Great] trek,”¹⁰ and the “indomitable resistance of Boer women was the decisive factor in the [Anglo-Boer] war”.¹¹ The trend in J. Grobler’s book *Uitdaging en antwoord* is somewhat similar,¹² although he mentions women slightly more often, but only in some detail when they appeared in noteworthy events, like the Women’s March in 1915,¹³ or when they suffered, as in the Anglo-Boer War concentration camps.¹⁴ Whatever the reasons are for this exclusion of women, if one of them is a lack of a concise Afrikaner women’s history, it is hoped that this study might contribute to make the next general study on white South African history more gender inclusive.

The impact of what I earlier called the ‘big-event syndrome’ on women’s studies in South Africa is evident in a brief overview of studies done on women’s history in South Africa for the period 1870 to 1910. The focus of this research has mainly been on the Anglo-Boer War.¹⁵ Some of these works were relatively useful for accessing the pre-war ‘mindset’, like Van Heyningen’s “Women and gender in the South African War, 1899-1902”,¹⁶ although disappointingly, most were not.

The relative abundance of Anglo-Boer War research is not really surprising. There are few situations where gender-divisions are sharper than in a war: “After biological reproduction, war is perhaps the arena where division of labour along gender lines has been the most obvious, and thus where sexual difference has seemed the most absolute and natural.”¹⁷ When considering conventional views of war, men fight and women stay at home. Fighting and winning or dying are all newsworthy, and is what is written about. The Anglo-Boer War does not go down this same road, since the concentration camps provide subject matter for

¹⁰ H. Giliomee, *The Afrikaners*, p. 169.

¹¹ H. Giliomee, *The Afrikaners*, p. 256.

¹² J.E.H. Grobler, *Uitdaging en antwoord*. Grobler is a senior lecturer at the University of Pretoria, who currently focuses on Afrikaner history.

¹³ J.E.H. Grobler, *Uitdaging en antwoord*, pp. 145-146.

¹⁴ J.E.H. Grobler, *Uitdaging en antwoord*, pp. 123-127. Female (and child) suffering has done steady service in anti-British nationalist historiography, though as Johanna Brandt’s diary reveals, the deprivations of women at the time fuelled intense anti-British sentiment, also among women. J. Grobler (ed.), *The war diary of Johanna Brandt*.

¹⁵ The list of books on the war focusing on women is fairly long. It includes titles like E. Wessels and L. Hanekom, *Meer kosbaar as korale: ‘n Oorsig oor die rol van Afrikaner- en Uitlandervroue en kinders binne en buite Anglo-Boereoorlog konsentrasiekampe 1899-1902*; B. Theron, *A social history of Pretoria during the first phase of the Anglo-Boer War: October 1899-1900*, M.A. dissertation, U.P., 1984; A.W.G. Raath and R.M. Louw, *Vroueleed: Die lotgevalle van die vrou en kinders buite die konsentrasiekampe 1899-1902*; P. Marais, *Die vrou in die Anglo-Boereoorlog, 1899-1902*.

¹⁶ E. van Heyningen, Women and gender in the South African War, in N. Gasa (ed.), *Women in South African History*.

¹⁷ M. Cooke & A. Woollacott, *Gendering war talk*, quoted in E. van Heyningen, Women and gender in the South African War, in N. Gasa (ed.), *Women in South African History*, p. 91.

historians of women's history. There is a fair amount of primary evidence one can consult about the concentration camps, which makes it a relatively easy subject to research. When considering research on the Anglo-Boer War, a case could be made out that if it was not for the concentration camps, the role of the Afrikaner women in the war, as her role in the rest of her history, would have been left somewhere in the background.

When studying the impact of Afrikaner nationalism and the Anglo-Boer War, the marginalisation of English speaking white women (as group, not necessarily individuals) in the Transvaal is evident. Pre-war leaders, as well as the majority of rural inhabitants, were Afrikaners, and the concentration camps are perceived as 'Afrikaner' camps, so this is not too surprising. Although pre-war research on these women is limited, the war did open up new areas of research on English women.¹⁸

In the rest of the country (outside of the Transvaal), the above mentioned influences reveal a different picture, suggesting that the study of white women in South Africa has not only been constricted by nationalism, but also by class, territory, and race, although these are, of course, not rigid categories. P. Hetherington noted in 1993 that the "very limited historiography concerning white women is usually about working class women, prostitutes, garment workers, and white servants ...",¹⁹ the noticeable omission being middle-class white women. More recently, though, studies dealing with white women have appeared, notably from Natasha Erlank and others.²⁰

The studies mentioned above, and, similarly, studies on working class black and white women, have focused almost exclusively on women in the former British colonies (the Cape

¹⁸ Van Heyningen wrote a chapter about this in N. Gasa, *Women in South African history*. An example of this trend with regards to Afrikaner women is M. du Toit's The domesticity of Afrikaner nationalism: Volksmoeders and the ACVV, 1904-1929, *Journal of Southern African Studies* 29(1), March 2003. Studies on post-war suffrage movements will be considered in chapter 6.

¹⁹ P. Hetherington, Women in South Africa: The historiography in English, *The International Journal of African Historical Studies* 26(2), 1993, p. 261. Hetherington is an Australian historian whose research includes women in South Africa.

²⁰ See, for example: N. Erlank, Thinking it wrong to remain unemployed in pressing times: the experiences of two English settler wives, *South African Historical Journal* 36, 1995; K. McKenzie, My own mind dying with me: Eliza Fairbairn and the reinvention of colonial middle class domesticity in Cape Town, *South African Historical Journal* 38(1), 1993; E. van Heyningen, The diary as historical source: a response, *Historia* 38(1), 1993; N. Erlank, *Letters home: the experiences of middle-class British women at the Cape, 1820-1850*, M.A. dissertation, U.C.T., 1995; L. Kruger, *Gender, community and identity: Women and Afrikaner nationalism in the Volksmoeder discourse of Die Boerevrou (1913-1931)*, M.A. dissertation, U.C.T., 1991; E. Brink, Man-made women: Gender, class and the ideology of the Volksmoeder, in C. Walker (ed.), *Women and gender in southern Africa to 1945*.

Colony and Natal),²¹ or the Witwatersrand,²² and much less on the rest of the Transvaal and the Free State. Walker noted this trend as regards the chapters in her book, namely that there is “a noticeable unevenness in the geographical range.” She commented that “[d]evelopments in Natal and Basutoland are covered in detail, while the Western Cape, Orange Free State and even the Transvaal received far less attention.”²³ Women on missions have also received some focus, but missions located in the Transvaal are spatially a different world from that accepted by the rest of the women in the Transvaal. In any case, the women in the court cases were not missionaries or their wives.²⁴

There are several reasons for the absence of detailed studies on these women, and the ‘geographical unevenness’ of such studies. As regards the latter, C. Simkins and Van Heyningen suggest that the Cape Colony had by far the most sophisticated civil service at the end of the nineteenth century, which could “generate demographic statistics consistently and accurately.”²⁵ Another reason is found when adding a racial dimension to the earlier nationalist argument. When Afrikaner nationalist historiography dominated, white women as subjects for historical research were neglected. Today, with the new South

²¹ See, for example, P. Scully, Rape, race and colonial culture: The sexual politics of identity in the nineteenth-century Cape Colony, South Africa, *The American Historical Review* 100(2), Apr 1995; C. Simkins & E. van Heyningen, Fertility, mortality and migration in the Cape Colony, 1891-1904, *The International Journal of African Historical Studies* 22(1), 1989; E.B. van Heyningen, The social evil in the Cape Colony 1868-1902: Prostitution and the Contagious Diseases Acts, *Journal of Southern African Studies* 10(2), Apr 1984; H. Bradford, Women, gender and colonialism: Rethinking the history of the British Cape Colony and its frontier zones, c.1806-1870, *The Journal of African History* 37(2), 1996; S. Burman & M. Naudé, Bearing a bastard: The social consequences of illegitimacy in Cape Town, 1896-1939, *Journal of Southern African Studies* 17(3), Sep 1991; H. Deacon, Midwives and medical men in the Cape Colony before 1860, *The Journal of African History* 39(2), 1998; W. Dooling, The decline of the Cape gentry, 1838-c.1900, *The Journal of African History* 40(2), 1999; A. Appel, Trying to make them visible: Women in PE in the late 19th century - early 20th century, *Historia* 43(1), May 1998; T.V. McClendon, Tradition and domestic struggles in the courtroom: Customary law and the control of women in segregation era Natal, *The International Journal of African Historical Studies* 28(3), 1995.

²² See, for example, D. Gaitskell, Housewives, maids or mothers: some contradictions of domesticity for Christian women in Johannesburg, 1903-1939, *Journal of African History*, 1983; Belinda Bozzoli, *Town and countryside in the Transvaal*.

²³ C. Walker (ed.), *Women and gender in South Africa to 1945*, p. 5.

²⁴ See, for example, L. Kriel & A. Kirkaldy, 'Praying is the work of men, not the work of women': The response of Bahananwa and Vhavenda women to conversion in late nineteenth-century Lutheran missionary territories, *South African Historical Journal* 61(2), 2009; K. Ruther, *The power beyond: Mission strategies, African conversion and the development of a Christian culture in the Transvaal*. Articles on the subject of missions include K. Ruther's, 'Sekukuni, Listen! Banna! And to children of Frederick the Great and our Kaiser Wilhelm': Documents in the social and religious history of the Transvaal, 1860-1890, *Journal of Religion in Africa* 34(3), 2004; and I. Hofmeyr's Jonah and the swallowing monster. Orality and literacy on a Berlin mission station in the Transvaal, *Journal of Southern African Studies* 17(4), 1991. Christina Landman's *Digging up our foremothers* only briefly mentions nineteenth century Christian women, but the primary focus of this work is on the twentieth century.

²⁵ C. Simkins & E. van Heyningen, Fertility, mortality and migration in the Cape Colony, 1891-1904, *The International Journal of African Historical Studies* 22(1), 1989, p. 79. Simkins is an economist.

African historiography, the neglect of white women continues as the focus has shifted to the previously discarded and disadvantaged group of black women in South Africa.

The amount of work that has been done on black women in the late nineteenth century raises some interesting questions about the marginalisation of black women's history versus the domination of white women's history, and the trend is evident in various places. A special issue of the *South African Historical Journal* on 'Gender and History' in 2000 included no contributions on white women.²⁶ Compilations on gender history in South Africa, like the already mentioned Walker's *Women and gender in Southern Africa to 1945*,²⁷ W. Woodward and others' *Deep Histories*,²⁸ and more recently, N. Gasa's *Women in South African History*,²⁹ focus overwhelmingly on black women. This research emphasis is neither surprising nor unjustifiable, since they were oppressed by their colour and their gender. However, viewing white women remains essential, especially as they were dealt with in legal discourse, since there are continuities there that affect all South African women.

The effect of all this on the white women in this study is the following: historical writing started out as British imperial and then Afrikaner nationalist, both of which relegated women's history to the periphery. In the second half of the twentieth century, when gender as historical subject became relevant, African nationalist historiography started growing, and white women, for the most part, were left out of the mainstream again, in favour of black women.³⁰ This neglect hampers an understanding of the Transvaal in a larger sense.

3. Sources for contextualising Transvaal history

There are many gaps in the historiography of the Transvaal. The deficit in women's history has already been discussed, but there is an overall imbalance between political and economic history on the one side, and the history of social interactions on the other. 'Big-event syndrome' again played a decisive role here. The tendency of historians of white South Africans was to research 'important' events like the Great Trek or the Anglo-Boer

²⁶ Special Feature: Women and gender in South Africa, *South African Historical Journal* 43, Nov 2000.

²⁷ C. Walker (ed.), *Women and gender in South Africa to 1945*.

²⁸ W. Woodward, et al (eds.), *Deep Histories: Gender and colonialism in South Africa*. Woodward is a lecturer in the Department of English at the University of the Western Cape.

²⁹ N. Gasa, *Women in South African history*. Gasa is a gender and political analyst.

³⁰ And, of course, white women on the side of the liberation struggle, like Ruth First.

War, and disregard the periods in between,³¹ where history was also being ‘made’. The in-between times may not have been notable, but researching them can help one comprehend that environment better, and understand why people reacted the way they did to the ‘big events’.³²

In this particular case the Anglo-Boer War’s impact on the mindset of the Transvalers cannot be underestimated. In the early years of the twentieth century, it dominated Afrikaners’ perceptions of themselves, whether they were proud or ashamed of their role in it. This obsession with the war in its aftermath gave it a pivotal place in the mindset of those who experienced it, and in this furore people seemed to have forgotten that a time and history before the war existed.³³ This is particularly relevant to women’s history. The war is still a favoured topic today, especially seen in the light of the recent 100-year anniversary of the war. There are numerous examples of social studies being done about the war, ranging in subject from the camp-life to military strategy, and everything in between, and women have a growing prominence in such studies.³⁴ When taking stock of historical research on the period just preceding the war, however, it is clear that a lot more work still needs to be done.

Due to the scarcity of secondary sources on white women before 1899, those that are available need to be scrutinized carefully to create the social environment in which the people lived, that can hopefully give us some insight into the lives of women. The sources used to create this chapter are divided into different groups based on their approach to the period rather than their content.

³¹ The issue is not that these events were not notable. They are, and for controversial reasons, like the conflicts between the settlers and the indigenous populations in the Great Trek and the concentration camps in the Anglo-Boer War. However, by their very nature they make people forget that there were times in between.

³² The Annalists argued for this kind of thinking, saying that the *long duree* is as, if not more, important, than the event. See, for example, P. de Vries, *De zegetocht van de Annales*, in H. Beliën & G.J. van Setten (reds.), *Geschiedschryving in de twintigste eeu. Discussie sonder eind*.

³³ In P. Hutton, *History as an art of memory*, the writer mentions how some events are burned into the memory of a community, while other seem to be collectively forgotten. On the same topic Peter Burke wrote a chapter entitled ‘History as social memory’ in P. Burke, *Varieties of cultural history*.

³⁴ J.D. Kestell, *Met die boerekommando’s*; A. Wessels, *Die militêre rol van swart mense, bruin mense en Indiërs tydens die Anglo-Boereoorlog*; G. Cillié, *Gewyde sang en koorsang gedurende die Anglo-Boereoorlog, 1899-1902*.

The first set of sources comes from a Marxist and/or socio-economic background. C. van Onselen's *New Babylon, New Nineveh. Everyday Life on the Witwatersrand*,³⁵ Trapido's chapter entitled 'Reflections on land, office and wealth in the South African Republic, 1850-1900' in S. Marks and A. Atmore's *Economy and society in pre-Industrial South Africa*,³⁶ P. Delius's chapter 'Abel Erasmus: Power and profit in the Eastern Transvaal' in W. Beinart and others' *Putting a plough to the ground*,³⁷ and B. Bozzoli's *Town and countryside in the Transvaal: Capitalist penetration and popular response*,³⁸ are some examples. The focus of these books is either exclusively on the Witwatersrand, or labour relations and economic struggles, neither of which speaks directly to the core issues of this study.

The second set of sources is literary accounts of people who lived and wrote in the nineteenth century, like accounts from travellers and inhabitants. Traveller's accounts include T. Macdonald's *Transvaal Story*,³⁹ C. Jeppe's *The Kaleidoscopic Transvaal*,⁴⁰ J. Sanderson's *Memoranda of a trading trip in the Orange River (Sovereignty) Free State and the country of the Transvaal Boers*,⁴¹ T. Bulpin's *Lost trails of the Transvaal*,⁴² A. Trollope's *South Africa*,⁴³ and J. Nixon's *The Complete Story of the Transvaal*.⁴⁴ On the side of the inhabitants themselves, A. Kuit wrote accounts like *Transvaalse Verskeidenheid*⁴⁵ and *Transvaalse Gister*.⁴⁶ Some of them are valuable for information on social relations, but unfortunately very few of them mention any women directly, not even female travellers like S. Heckford in *A lady trader in the Transvaal*⁴⁷ or F. Dixie in *In the land of misfortune*.⁴⁸

³⁵ C. van Onselen, *New Babylon, new Nineveh: Everyday life on the Witwatersrand 1886-1914*. Van Onselen is currently Research Professor at the University of Pretoria.

³⁶ S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*.

³⁷ P. Delius, Abel Erasmus: Power and profit in the Eastern Transvaal, in W. Beinart et al (eds.), *Putting a plough to the ground*.

³⁸ B. Bozzoli, *Town and countryside in the Transvaal: Capitalist penetration and popular response*.

³⁹ T. Macdonald, *Transvaal story*.

⁴⁰ C. Jeppe, *The kaleidoscopic Transvaal*.

⁴¹ J. Sanderson, *Memoranda of a trading trip in the Orange River (Sovereignty) Free State and the country of the Transvaal Boers*.

⁴² T.V. Bulpin, *Lost trails of the Transvaal*.

⁴³ A. Trollope, *South Africa II*.

⁴⁴ J. Nixon, *The complete story of the Transvaal*.

⁴⁵ A. Kuit, *Transvaalse verskeidenheid*.

⁴⁶ A. Kuit, *Transvaalse gister*.

⁴⁷ S. Heckford, *A lady trader in the Transvaal*.

⁴⁸ F. Dixie, *In the land of misfortune*. Significantly, although these women travelled independently, their accounts do not focus primarily on being a women, and since they were almost trying to fit into male ideas of what a traveler should be, did not try to understand Transvaal women, and therefore do not offer any insights. For more on Heckford and Dixie refer to M. Adler, "'Skirting the edges of civilization': two Victorian women travellers and 'colonial spaces'

The third set, historical books written about the Transvaal, have tended to focus on certain groups within the colony. Take, for example, J. Ploeger's *Die Nederlanders in Transvaal*,⁴⁹ A. Davey's *The British pro-Boers*,⁵⁰ A.C. van Wyk's *Jode in Transvaal tot 1910. 'n Kultuurhistoriese oorsig*,⁵¹ and H. Turkstra's *Die Gereformeerde Gemeente Pretoria 1859-1930. 'n Kultuurhistoriese studie*.⁵² These sources, together with seemingly promising works on Pretoria like *Die Geskiedenis van Pretoria 1855-1902*⁵³ by R. Peacock and *Kruger's Pretoria. Buildings and personalities of the city in the nineteenth century*,⁵⁴ by V. Allen, are rather limited because of the narrow and more focused approach the authors take. They include statistics, names and events, but tend to ignore social issues.

More useful secondary sources dealing with lifestyles and behaviour, and that specifically comment on the inhabitants' beliefs and intrigues, as well as being valuable sources of empirical facts, are G.D. Scholtz's *Die ontwikkeling van die politieke denke van die Afrikaner*,⁵⁵ C.M. van den Heever and P. de V. Pienaar's *Kultuurgeskiedenis van die Afrikaner*,⁵⁶ F.L. Cachet's *De worstelstrijd der Transvalers*,⁵⁷ H.B. Thom's essay in 'Die waardes van die Afrikaner',⁵⁸ and F.A.F. Wichmann's *De wordingsgeskiedenis van die Zuid-Afrikaansche Republiek*.⁵⁹ Since these studies were all done by male Afrikaner historians in the heyday of white supremacy, one must use them discriminately. They also hardly mention women.

Other works on the Transvaal in the second half of the nineteenth century have a strong focus on the interactions between the whites and blacks, and include J. Bergh & F. Morton's *To make them serve: the 1871 Transvaal Commission on African Labour*,⁶⁰ P. Delius's *The*

in South Africa," in K. Darian-Smith, L. Gunner & S. Nuttal (eds.), *Text, theory, space. Land, literature and history in South Africa and Australia*.

⁴⁹ J. Ploeger, *Die Nederlanders in Transvaal*.

⁵⁰ A. Davey, *The British pro-Boers*.

⁵¹ A.C. van Wyk, *Jode in Transvaal tot 1910. 'n Kultuurhistoriese oorsig*, D.Phil.-proefskrif, U.P., 2003.

⁵² H. Turkstra, *Die Gereformeerde Gemeente Pretoria 1859-1930. 'n Kultuurhistoriese studie*. M.A.-verhandeling, U.P., 1988.

⁵³ R. Peacock, *Die geskiedenis van Pretoria 1855-1902*, M.A.-verhandeling, U.P., 1955.

⁵⁴ V. Allen, *Kruger's Pretoria*.

⁵⁵ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*.

⁵⁶ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*.

⁵⁷ F.L. Cachet, *De worstelstrijd der Transvalers*.

⁵⁸ H.B. Thom, *Ons historiese vorming, in Die Waardes van die Afrikaner*.

⁵⁹ F.A.F. Wichmann, *De wordingsgeskiedenis van die Zuid-Afrikaansche Republiek. 1836-1860, Argiefjaarboek vir Suid-Afrikaanse geskiedenis*, 1941 II.

⁶⁰ J. Bergh & F. Morton (eds.), *To make them serve: the 1871 Transvaal Commission on African Labour*.

land belongs to Us: the Pedi Polity, the Boers and the British in the nineteenth century Transvaal,⁶¹ and I. Hofmeyr's *We spend our years as a tale that is told: Oral historical narrative in a South African Chiefdom*.⁶² Again, references to white women are lacking. These sources, although helpful, are relatively gender insensitive.⁶³ One exception to this is F. Morton's '*Female inboekeling in the South African Republic, 1850-1880*',⁶⁴ whose analysis of the female slaves shows the influence that white women and the 'inboekeling' had on one another.

Two Transvaal newspapers are examined when studying court cases, namely *The Press* and *De Volksstem*.⁶⁵ Giliomee remarks that although "in the ZAR it was subject to intimidation by Kruger and others ... the press ... was remarkably free."⁶⁶ *The Press*, an English newspaper, supported the government while being relatively liberal and progressive, and was "in close touch with governmental policy, and generally – though by no means invariably – supported it loyally ..."⁶⁷ *The Press* reported on High Court cases in almost every issue, but gives only accounts of the proceedings, with little or no commentary. The court cases for this study were selected from reported cases (cases that had legal significance), and would not necessarily have been of public interest. An example of a case with a woman of public interest that *The Press* reported on was a criminal case in April 1897, *The State vs Mrs. H.G MacIntyre*, who shot a man and was found guilty of manslaughter, with a sentence of two years imprisonment with hard labour. The article mentioned that there was "much interest being manifested in it by the public. The Court was packed with people, and a large crowd was congregated outside."⁶⁸ Another example is an article entitled 'Sensational Divorce Case', on a divorce case in Durban, which the editor or reporter must have found

⁶¹ P. Delius, *The land belongs to us: the Pedi polity, the Boers and the British in the nineteenth-century Transvaal*. Another example is C. van Onselen, *The seed is mine: The life of Kas Maine, a South African sharecropper, 1894-1985*, a work where white women barely feature.

⁶² I. Hofmeyr, *We spend our years as a tale that is told: Oral historical narrative in a South African Chiefdom*.

⁶³ This is also true for Bozzoli's *Town and countryside*, and the History Workshop in 1983 that inspired it. In Van Onselen's *New Babylon, New Nineveh* there is chapter entitled *Prostitutes and Proletarians, 1886-1914. Commercialised Sex in the Changing Social Transformations Engendered by Rapid Capitalist Development in the Transvaal during the Era of Capitalism*, but as the title suggests it, the focus is more on social and economic issues than gender.

⁶⁴ F. Morton, *Female inboekeling in the South African Republic 1850-1880, Slavery and Abolition* 26(2), Aug 2005.

⁶⁵ These were not the only newspapers published in the Transvaal. Others included *Land en Volk*, *De Pers*, and many appearing in the Witwatersrand. Due to their easy accessibility in the State Library and UNISA's Library respectively, *De Volksstem* and *The Press* were selected.

⁶⁶ H. Giliomee, *The Afrikaners*, p. 235.

⁶⁷ C.T. Gordon, *The growth of Boer opposition to Kruger, 1890-1895*, p. x.

⁶⁸ *The Press*, 1897-04-21 (High Court of Justice. Criminal sessions), p. 3.

‘sensational’ enough to report on in Pretoria.⁶⁹ This signifies that in principle *The Press* did not mind covering court cases, as long as they were exciting or newsworthy.⁷⁰

The state newspaper, *De Volksstem*, published in Pretoria, appeared for the first time in 1857. *De Volksstem*, at least during Kruger’s presidency, mostly supported the political ideals of the government, and was possibly the most responsible of the newspapers in its reporting.⁷¹ *De Volksstem*, similar to *The Press*, covered most of the court cases factually. The reporting in this newspaper, however, seems more inconsistent than *The Press*. In some months court cases, criminal and civil, were regularly covered, in others no mention is made of any court case. If a case was really sensational, it was covered to an extent that included supplements and extras. However, the trend in *De Volksstem* appears to be that when they decided to cover something in an issue, they spared little space for other events.⁷² When court cases were covered, gender seems to not have been the main issue.

In most of the above mentioned sources, gender is sidelined by political, social and economic issues. These issues, however, are used to construct the stage on which the women, where they are found in court cases, can perform.

4. Legal sources

In 1989, M. Chanock stated that “South African legal history has not yet been extensively explored ...”⁷³ In the same article, he pointed out that the “new South African historical writing, which explores the experience of the oppressed minority, is producing highly illuminating studies of the workings of the legal system.”⁷⁴ He then mentions the areas of legal history that have been addressed in South Africa, namely criminal law, or the history of crime and social control, and labour law.⁷⁵ Undoubtedly, the focus has shifted since 1989,

⁶⁹ *The Press*, 1897-04-28 (Sensational Divorce Case), p. 3.

⁷⁰ With many editions of *The Press* unavailable in the State Library, I am unable to say whether some of the unavailable cases may have also been newsworthy.

⁷¹ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 163; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 99.

⁷² So, for example, in issues covering the British annexation and Anglo-Transvaal War, there is hardly mention of any court cases.

⁷³ M. Chanock, Writing South African legal history: A prospectus, *The Journal of African History* 30(2), 1989, p. 275. Chanock is Professor of Law and Legal Studies at La Trobe University, Melbourne, Australia.

⁷⁴ M. Chanock, Writing South African legal history: A prospectus, *The Journal of African History* 30(2), 1989, p. 275.

⁷⁵ M. Chanock, Writing South African legal history: A prospectus, *The Journal of African History* 30(2), 1989, pp. 275-276.

and F. Batlan points out that gender and law is now one of the more popular fields of legal history.⁷⁶

Legal sources that Chanock points out as being useful when researching the legal system are “the South African law reports; reports of Parliamentary debates; the annual reports of government departments; the reports of numerous commissions of enquiry; law journals and the press. There is no shortage of material, but it is, by and large, material which reflects the white, official world.”⁷⁷ Some of these are used in compiling the final chapter of my study, specifically law reports and the press, but in a more detailed study the rest of Chanock’s list will undoubtedly add to the legal picture.

In the search for sources to write a legal history from a historian’s perspective, the choice of ‘reported cases’ was made, simply, because of its accessibility. Not all cases are reported, but it can be presumed that the important ones are. Reported cases were also those cases that play a role in the development of the law. Reported cases in South Africa, collectively known as ‘Law Reports’, was initiated by J.G. Kotzé in 1877.⁷⁸ Chanock emphasises a study of the official legal world:

[L]egal historians have turned, in South Africa as elsewhere, to studies of High Courts. This is an arcane world, far from the people’s struggle. Not only is it a lawyers’ view: it is a very limited lawyers’ view, that of a handful of judges at the furthest reaches of the legal processes. Yet there are many good reasons for starting at this end. The best is that the materials are accessible, and limited in volume, and for those who have tried to write history this might well be reason enough. And there are other reasons. Many of the cases which reach the appellate level are those of the greatest complexity and are of particular social and political, as well as legal, interest. And while the experience of legality which the mass of people encounter is not that of the passionless decorum of the Appeal Courts, the decisions of those courts reach far down, not to

⁷⁶ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 837. Batlan is Associate Professor of Law at Chicago-Kent College of Law.

⁷⁷ M. Chanock, Writing South African legal history: A prospectus, *The Journal of African History* 30(2), 1989, p. 287.

⁷⁸ There are various series of law reports: Kotzé’s Reports for the period 1877 to 1881, the Reports of the High Court of the South African Republic (1881-1892), Hertzog’s Reports for the year 1893; Duxbury’s Reports for 1895; the so-called Official Reports (OR) for 1894-9, and others. R. Zimmerman & D. Visser, Introduction, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 17.

determine but to structure the encounters between people and state at all levels.⁷⁹

The High Court and judiciary of the Transvaal has its roots in both the system of Roman-Dutch law of the Netherlands, and the Cape legal system, from where it was brought to the Transvaal. To understand these two influences, it was important to find easily accessible and understandable sources, as was mentioned earlier. P. Maisel and L. Greenbaum,⁸⁰ R. Zimmerman and D. Visser,⁸¹ J.W. Wessels⁸² and Chanock's⁸³ works were useful in setting the background of how Roman-Dutch law was established at the Cape Colony, how the Cape system adapted itself around Roman-Dutch law, and eventually moved north and shaped the Transvaal's legal system. They also have useful reference to the use of different law books, especially English legal authorities.

An initial understanding of the Transvaal's legal system was found in E. Kahn's three excellent articles, *The history of the administration of justice in the South African Republic*.⁸⁴ Together they chronicle the development of the judicial system between 1858 and 1899, and provide a solid basis to work from. General works on the history of law in South Africa, such as that of D.P. Visser,⁸⁵ W.J. Hosten,⁸⁶ C.G. van der Merwe and W.E. du Plessis,⁸⁷ and H.R. Hahlo⁸⁸ all have an overarching focus on the twentieth century, but offer valuable information on earlier developments in their respective introductions and conclusions. The main obstacle in the above-mentioned works, with the exception of Kahn, is the tendency to write about law in South Africa as if it were one legal system from beginning to end. In other words, a source that mentions the judiciary in South Africa before 1910 refers only to the Cape Colony. While the influence of the Cape's legal system is not to be underestimated

⁷⁹ M. Chanock, Writing South African legal history: A prospectus, *The Journal of African History* 30(2), 1989, pp. 271-272.

⁸⁰ P. Maisel & L. Greenbaum, *Foundations of South African law*.

⁸¹ R. Zimmerman & D. Visser (eds.), *Southern cross*.

⁸² J.W. Wessels, *History of the Roman-Dutch law*.

⁸³ M. Chanock, *The making of South African legal culture 1902-1936*.

⁸⁴ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959. Kahn is Professor of Law, and a retired editor of the South African Law Journal.

⁸⁵ D.P. Visser (ed.), *Essays on the history of law*.

⁸⁶ W.J. Hosten, *Introduction to South African law and legal theory*.

⁸⁷ C.G. van der Merwe & J.E. du Plessis (eds.), *Introduction to the law of South Africa*.

⁸⁸ H.R. Hahlo, *The South African law of husband and wife*.

(see Chapter 4), to claim that the Cape Colony's and Transvaal's legal systems were identical would be inaccurate.

For a good understanding of Roman-Dutch law, articles published at the start of the twentieth century, mostly written by R.W. Lee,⁸⁹ but also by T. Berwick,⁹⁰ S.B. Kitchin,⁹¹ F. Mackarness,⁹² and W.F. Craies⁹³ have been invaluable. Further primary sources used for compiling chapter 5 are discussed in that chapter.

Secondary research on nineteenth century Transvaal legal history has mostly focused on individual legal role-players. The *Memoirs* of Judge J.G. Kotzé,⁹⁴ the Chief Justice of the Transvaal High Court was found very useful, as was J. Kew's dissertation on Kotzé.⁹⁵ Other titles include L.S. Kruger's *Die rol van Dr. E.P. Jorissen in die geskiedenis van die ZAR*,⁹⁶ and E.A. Walker's *Lord de Villiers and his times*.⁹⁷ These works, however, emphasise both politics and political intrigue, and unfortunately pay little attention to the courts or court cases.

5. Conclusion

The findings of this chapter point to the gaps in the historiography. To counteract this void, a social contextualization of the period, and the construction of legal historical spaces can help position not only women, but also the history of social interactions (men and women, women and women, black women and white women) and familial relations, into a framework that will hopefully lead to the basis of a better understanding of the nineteenth century Transvaal. There are many ways to create such a framework, and possible methods and theories to do so are examined in chapter 2.

⁸⁹ R.W. Lee, What has become of Roman-Dutch law?, *Journal of Comparative Legislation and International Law (3rd series)* 12(1), 1930; R.W. Lee, Roman-Dutch law in the law reports, *Journal of the Society of Comparative Legislation (New Series)* 9(2), 1908; R.W. Lee, The intestate succession of husband and wife in Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 12(2), 1912; R.W. Lee, The history of the Roman-Dutch law, *Journal of the Society of Comparative Legislation* 10(2), 1910. Zimmerman and Visser says about Lee that in him "we have a transitional figure; he was an academic lawyer, though not one teaching in South Africa for he was Dean of the Law Faculty at McGill University in Montreal, and then, from 1921 to 1956, Professor of Roman-Dutch law at the University of Oxford." R. Zimmerman & D. Visser, Introduction, in R. Zimmerman & D. Visser (eds.), *Southern cross*.

⁹⁰ T. Berwick, The vitality of Roman-Dutch law, *Journal of Comparative Legislation (New Series)* 3(1), 1901.

⁹¹ S.B. Kitchin, The judicial system of South Africa, *University of Pennsylvania Law Review and American Register* 62(6), April 1914.

⁹² F. Mackarness, Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906.

⁹³ W.F. Craies, The law of South Africa, *Journal of the Society of Comparative Legislation (New Series)* 2(2), 1900.

⁹⁴ J. Kotzé, *Biographical memoirs and reminiscences*.

⁹⁵ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979.

⁹⁶ L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975.

⁹⁷ E.A. Walker, *Lord de Villiers and his times*.

II. THEORY AND METHOD: WRITING WOMEN'S HISTORY USING LEGAL DOCUMENTS

1. Introduction

When J. Tosh observes that "... there is intense debate among historians about the theoretical approaches which are relevant to the task [of writing history], and here historians find themselves in a challenging and uncertain terrain, in which there are few familiar toe-holds,"¹ he acknowledges the challenge when choosing methods for approaching historical material.

The 'performative turn' in cultural history has been taken as the point of departure for the creation of the framework for this study. What it implies is that people's lives and interactions with one another are seen as portrayed on a historical stage. The stage is constructed by the historian, who then also directs, produces and casts the 'play' or performance. The stage is created with hindsight, and is one which between 1877 and 1899 could not have foreseen its own existence, and definitely not the actors on it: white women.

The ironic implication is that the construction of the composition of the feminist historian's stage entails the deconstruction of already set ideas and preconceptions, in both primary sources and secondary literature. The sometimes problematic use of the terms 'gender' and 'women's history', its relationship with 'legal history', theories surrounding deconstruction, South African legal theory and the dichotomy of 'public' and 'private' in legal history must be examined, and their relevance to writing a gendered history of social relations and interactions amongst whites in the nineteenth century Transvaal, considered.

2. 'History as a performance' and 'occasionalism'

Social anthropologists, led by C. Geertz, introduced the idea of using the 'drama' analogy as inspiration when writing cultural history. This, together with the publication of Hayden White's *Metahistory* and the subsequent emergence in historical theory of the linguistic turn,² became the basis for what P. Burke identifies early in the twenty first century as the

¹ J. Tosh, *The pursuit of history*, p. 272. John Tosh is Professor of History at the Roehampton University.

² F.R. Ankersmit, The linguistic turn, literary theory and historical theory, *Historia* 45(2), 2000, p. 271.

‘performative turn’ in cultural history.³ Geertz looked at history as a “historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes towards life.”⁴ However, these ‘symbolic forms’, and the ‘system of inherited conceptions’, are not fixed. Burke went further, saying that history is not a “social script” but a “social performance.” Therefore, culture is not ‘fixed’ but an improvisation, and constantly changing.⁵ The idea of history as a representation, or “images and texts [that] simply reflect societal reality”, has been substituted by the concept of “the ‘construction’ or ‘production’ of reality (of knowledge, territory, social classes, diseases, time, identity and so on) by means of representations.”⁶ The construction is done by an historian, but, of course, “... different people may view the ‘same’ event or structure from different perspectives.”⁷ Burke’s approach is especially relevant to this study, because in constructing women’s history he argues that

it is necessary to distinguish between male views of femininity (experienced by females as pressures on them to behave in particular ways, ‘modestly’, for example), from female views [also of each other] current at the same time and social level. The latter are enacted all the time in everyday life in the process of ‘doing gender’. In other words ... masculinity and femininity are increasingly studied as social roles, with different scripts in different cultures or sub-cultures.⁸

When B. Welke writes about the same issue, she draws on J. Butler: “The literature of ‘performativity’ from feminist theory is informative here for its recognition of the socially constructed nature of identity categories and the tension between their use as tools of subordination and control and their potential as tools of resistance.”⁹ Seemingly, the argument can be made that the ‘gendered self’ does not exist; all that the self is, is a series of performances.¹⁰

³ P. Burke, *What is cultural history*, pp. 90-91; For an analysis of the linguistic turn, see F.R. Ankersmit, The linguistic turn, literary theory and historical theory, *Historia* 45(2), 2000, pp. 271-279.

⁴ C. Geertz, *The interpretation of cultures: selected essays*, as quoted in P. Burke, *What is cultural history*, p. 36.

⁵ P. Burke, *What is cultural history*, pp. 90, 92

⁶ P. Burke, *What is cultural history*, pp. 74, 97.

⁷ P. Burke, *What is cultural history*, p. 76.

⁸ P. Burke, *What is cultural history*, p. 81.

⁹ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 236. J. Butler, Imitation and gender subordination, in L. Nicholson (ed.), *The second wave: A reader in feminist theory*.

¹⁰ S. Benhabib, Feminism and the question of postmodernism, in *The polity reader in gender studies*, p. 80.

Occasionalism is another important aspect of the ‘drama analogy’, which also helps to make it practical. Burke explains that “on different occasions or in different situations, in the presence of different people, the same person behaves differently.”¹¹ A broad example is that a woman has a different role to play when she appears in court than when she is at home. For women, the home seems to be the obvious and acceptable ‘stage’, whereas placing them on the ‘stage’ of the courts, adds another dimension to their lives, one that needs to be explored.

3. Constructing a legal stage

The legal historical stage is a public sphere that was constructed by men, and women could choose, or were summoned, to perform on it. There are two ways to consider men’s construction of the stage. Firstly, by looking historically at what men did in the past. And secondly, by looking at the work of modern historians to see how (mostly) male historians have constructed history working backwards, thus creating a ‘world’ for women of the past to live in.

With regards to the first issue R. Graycar commented that “if legal rules are disproportionately framed by men, and law reforms respond most effectively to things that happen to men, women’s experiences will either continue to remain outside the scope of the legal system, or, at best, have to be ‘fitted’ to a framework that never contemplated it.”¹² Welke emphasises this point:

When a woman filed a lawsuit, she entered the legal system as an inferior, a supplicant. Law was a man’s world. Men conducted the entire process, in the courtroom and out ... In the courtroom, men described, evaluated, and judged a woman’s actions, appearance and condition. The entire structure of the legal system was premised upon a reasoning world of men separate from the emotional world of women.¹³

Such essentialising of people as either ‘reasoning’ or ‘emotional’ is dangerous. But M. Davies argues that “law itself is an inherently essentialist discourse: for instance, law’s subjects are

¹¹ P. Burke, *What is cultural history*, pp. 95, 97. “Occasionalism” is a term Burke adapted for cultural history from philosophy, where it was first used by Kant.

¹² R. Graycar, Gender issues and the law, *Legaldade* 14(4), Aug 2005, p. 6. Graycar is Professor of Law at the University of Sydney.

¹³ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, pp. 86, 87.

often represented in a rather singular way which reflects norms of white ... masculinity.”¹⁴ One can also consider that if women accepted their role as ‘emotional’, and men theirs as ‘rational’, it must have influenced the experiences of a particular society in a particular time.

F. Batlan’s solution to the second issue is to warn legal historians against the practice of simply writing women into the dominant history of law. Rather, she appeals, if one engenders legal history, one should produce a “new history, creating possibilities of re-narrations and the potential for fresh interpretations.”¹⁵

In the case of the Transvaal, there is not yet a clearly defined and written history – either legal or gendered, and therefore it would almost be easier to produce a whole new history from the start. A new history on women in the Transvaal, naturally, has to be written from a different set of sources than were used to write the traditional patriarchal history. P. Hetherington points out that “[p]erhaps because those interested in ... women’s history tried to establish new fields within academia ... [they] historically sought contact and institutional relationships with people in other disciplines.”¹⁶ Hetherington’s view endorses the premise of this study: when looking for ways and areas in which to find the women of the Transvaal, the legal stage seemed to be one of the best places to start.

The study of court cases is rewarding not only in itself, but also for what they in turn say about society. R. Hunter mentions that several Australian legal historians have commented “that there is a crucial difference between formal law and actual practice and that the gap between the two is mediated by customs, social norms, and popular views.”¹⁷ Legal historians who focus on why that gap exists, and are able to answer such questions as “Does actual practice differ from formal law in order to conform to economic imperatives or to

¹⁴ M. Davies, Unity and diversity in feminist legal theory, *Philosophy Compass* 2(4), 2007, p. 657. Davies is a member of the Department of Law of Flinders University in Adelaide, Australia.

¹⁵ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 823.

¹⁶ P. Hetherington, Women in South Africa: The historiography in English, *The International Journal of African Historical Studies* 26(2), 1993, p. 263.

¹⁷ R. Hunter, Australian legal histories in context, *Law and History Review* 21(3), Fall 2003. This is not her ideas, but is a summary of what Australian legal historians, including Diane Kirkby, Hilary Golder and Bruce Kercher, have written.

dominant social intercourses?” and “Is law fundamentally indeterminate, such that what the law ‘is’ is open to wide-ranging interpretation?”¹⁸, can enhance the value of studying law.

In analysing court cases as sources for writing cultural histories, one trend seems to be to write a micro-history, or to take an event (such as a court case or trial) and add details and evidence to write a total history, which may then reveal connections with other processes and events outside the story itself.¹⁹ This, for instance, is true in the case of E. Le Roy Ladurie where he placed an inquisition at the centre of his “world-famous portrait of life in a medieval village.”²⁰ Social and cultural historian N. Zemon Davis had also done some work where she put the “‘fictional’ aspect of the legal documents at the centre of the analysis.”²¹ L. Hunt mentions J. Scott’s techniques for “linking gender history with the analysis of discourse.”²² In other words, the possibility is there to read legal documents as a narrative or a portrait of how people were making sense of their worlds. The court cases studied in chapter 6 will provide examples.

The approach in the works by S. Burman and M. Naudé in South Africa reinforces this trend. They start by describing the trial, and then include testimony, background information and newspaper coverage to flesh it out. The advantages of this approach in court cases regarding women is the information it could convey: the position of women in society, the effectiveness of the law, the nature of class and race relations, the success of police enforcement and the demography of the country, to mention a few. Furthermore, a case covered in a newspaper might offer the historian contemporary notions of whether the crime was unusual and punishable, and whether the sentence was just.²³ P. Scully uses court cases to uncover perceptions of class and colour, of marriage and women, as well as the judge’s agenda, and the implementation of law.²⁴ This, however, works only with at least a few strong cases, along with the necessary social and economic history, as well as

¹⁸ R. Hunter, Australian legal histories in context, *Law and History Review* 21(3), Fall 2003.

¹⁹ J. Alberti, *Gender and the historian*. London, 2002, p. 69.

²⁰ E. Le Roy Ladurie, *Montaillou*. Le Roy Ladurie is Professor in History at the College de France.

²¹ L. Hunt, *The new cultural history*, p. 19.

²² L. Hunt, *The new cultural history*, p. 19. Hunt is Professor in History at the University of Pennsylvania.

²³ S. Burman & M. Naudé, Bearing a bastard: The social consequences of illegitimacy in Cape Town, 1896-1939, *Journal of Southern African Studies* 17(3), Sep 1991, pp. 373-374. Burman is the Director of the Centre for Socio-Legal Research at the University of Cape Town, and Naudé works in the Socio-Legal Unit at the University of Cape Town.

²⁴ P. Scully, Rape, race and colonial culture: The sexual politics of identity in the nineteenth century Cape Colony, South Africa, *The American Historical Review* 100(2), Apr 1995. Scully is Professor of Women’s Studies and African Studies at Emory University.

biographical information on the participants in the case. Such information is not readily available for the Transvaal. This study, therefore, is obliged to create the context to facilitate such an approach, and makes only brief use of specific court cases.

Transvaal court cases deal mostly with women in family or domestic law, since that is one area where women, regardless of nationality or social position, predominate and are thus easily found. Legal scholars elsewhere have noted this trend: Hunter mentions that one of the most productive strands in developing legal history in Australia is that of women and gender relations in law.²⁵ Batlan echoes her when she comments that “many scholars of gender and legal history have focused on domestic relations and family law. In such areas, issues of women and gender readily appear.”²⁶ A. Dubler goes further, arguing that the law of domestic relations is at the heart of law for women. Whether they were married or not defined a women’s legal status. Married women’s relationship to the state occurred through her husband’s mediation.²⁷ In other words, women, whether married or unmarried, could claim and were denied various rights and entitlements in proximity to marriage.²⁸ In this MA dissertation, it therefore seems wise to study the legal construction of domestic relations as a first step in the direction of a comprehensive history of men and women in the Transvaal.²⁹

Doing so I will bear in mind Graycar, who cautions that, although the traditional areas of law that affect women are areas such as ‘family law’ or ‘law of sexual assault’, gender may also have affected the law in areas where women’s participation might not have been as open.³⁰ Looking at gender and legal history, in other words, ought not to be done in a narrow sense. My survey of Transvaal laws that may have affected the position of white women in the Transvaal, therefore, casts its net as widely as possible.

²⁵ R. Hunter, Australian legal histories in context, *Law and History Review* 21(3), Fall 2003. She was writing about Australia, but it is definitely relevant in South Africa too.

²⁶ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 837.

²⁷ In the Transvaal, married women needed her husband’s consent to go to court. See chapter 5.

²⁸ A. Dubler, In the shadow of marriage: Single women and the legal construction of the family and the state, *Yale Law Journal* 12, 2003, as quoted in F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 833. Dubler is Professor of Law at the Columbia Law School.

²⁹ Granted the limited scope of an MA-study, the focus for now is on white women only.

³⁰ R. Graycar, Gender issues and the law, *Legaldade* 14(4), Aug 2005, p. 5.

4. Women's history and gender history

Until the 1970s, feminist historians tried to write women's history, or to "recover a distinctive women's world – a 'herstory' – in opposition to mainstream history."³¹ This strand of history quickly faded. In 1976, Zemon Davis warned that writing history should be one of both men and women. As Welke stated, men and women live gendered lives, and, to quote Scott, "one [cannot] conceive of women except as they were defined in relation to men, nor of men except as they were differentiated from women."³²

South African historian H. Bradford stressed this move away from thinking of men as gender neutral and women as exclusively gendered beings, playing on the stage of relationships with men and family, where one finds them only in their roles as 'women': wife, widow, sister or daughter.³³ A woman is important here only because she is a woman. S. Dagut emphasises that "women, when they are discussed, ought not to be treated by historians as 'people of gender', concerned exclusively with – and interpreted exclusively in terms of – the 'family unit'. Women were often active in the world outside the home. Equally, men's domestic experiences were central to their lives." The danger for Dagut is "to avoid slipping into the idea that gender is a property pertaining primarily or exclusively to women."³⁴

Dagut opts to reinterpret a set of events with "an eye firmly on gender,"³⁵ which is where the opportunities in this study appear. For the nineteenth century Transvaal, even the histories of great men and their great deeds have not been sufficiently explored, not to mention other strands of history, like social or economic history. The sources to 'reinterpret a set of events' are lacking. Scott mentions the "emergence of women's history as a field [which] involves ... an evolution of feminism to women to gender; that is, from politics to

³¹ J. Tosh, *The pursuit of history*, p. 235.

³² J. Alberti, *Gender and the historian*, p. 123; B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 126; J.W. Scott, Women's history, in P. Burke (ed.), *New perspectives on historical writing*, p. 56. Scott is a pioneer US historian in the field of feminist history and gender theory.

³³ H. Bradford, Women, gender and colonialism: Rethinking the history of the British Cape Colony and its frontier zones, c. 1806-1870, *The Journal of African History* 37(2), 1996, p. 356. Bradford is Associate Professor in the African Gender Institute.

³⁴ S. Dagut, Gender, colonial 'women's history' and the construction of social distance: Middle-class British women in later nineteenth century South Africa, *Journal of Southern African Studies* 26(3), Sep 2000, pp. 556-557. Dagut is a researcher in the Centre for Development and Enterprise in Johannesburg.

³⁵ S. Dagut, Gender, colonial 'women's history' and the construction of social distance: Middle-class British women in later nineteenth century South Africa, *Journal of Southern African Studies* 26(3), Sep 2000, p. 557.

specialized history to analysis.”³⁶ Scott underscores the earlier argument about using women’s legal history as a starting point in writing a larger women’s (and later, gendered) history. In the Transvaal, the specialized history of women has not been written, and therefore that which, according to Scott, ought to evolve into an analysis of gender and gender relations, does not exist.³⁷

P. Zeleza insists that “accounts of women and their agency ought to preoccupy historians of women,” and there should be a “reconstruction, a retrieval, of women’s experiences, expressions, ideals and actions.”³⁸ Taking up this principle makes choosing between gender and women’s history unnecessary: “Gender history cannot go far without the continuous retrieval of women’s history, while women’s history cannot transform the fundamentally flawed paradigmatic bases and biases of ‘mainstream history without gender history.’”³⁹

Zeleza identifies two challenges that face feminist historians. The first is to “recover, empirically, the lives of women and restore their story to history.”⁴⁰ Among the problems encountered in writing early women’s history, has been that “integration proved difficult to achieve ... historians of women themselves found it difficult to write women into history and the task of rewriting history called for reconceptualizations that they were not initially prepared or trained to undertake.”⁴¹ And this, as Scott emphasises, is the “radical threat posed by women’s history ... [as a] challenge to established history: women can’t just be added without a fundamental recasting of terms, standards and assumptions of what has passed for objective, neutral and universal history in the past because that view of history included in its very definition of itself the exclusion of women.”⁴²

Though true for all women, the relevant group in this study is the white inhabitants of the Transvaal.⁴³ On the one hand, the absence of an “established” social history of the Transvaal

³⁶ J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, p. 44.

³⁷ J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, p. 56.

³⁸ P.T. Zeleza, *Manufacturing African studies and crises*, p. 188. Zeleza as source is relevant, because the white inhabitants in the Transvaal, although not indigenous to the region, are, or were in the process of becoming, Africans. This is further discussed in chapter 3.

³⁹ P.T. Zeleza, *Manufacturing African studies and crises*, p. 193.

⁴⁰ The second challenge will be dealt with later in this chapter. P.T. Zeleza, *Manufacturing African studies and crises*, p. 193.

⁴¹ J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, p. 56.

⁴² J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, p. 58.

⁴³ An analysis of the composition of these women will be made in chapter 3.

complicates the intended study in as far as there are no contexts available in secondary literature to readily draw upon. On the other hand, however, there is no ‘mainstream history without gender history’ awaiting feminist deconstruction and recasting. In the intended construction of the legal stage for white Transvalers in the nineteenth century, there is the advantage of hindsight, an opportunity to engage with the primary sources and compose from them something altogether new, and ‘engendered’, from the outset.

5. Agency in women’s history

One of the reasons this study was undertaken was to determine for the Transvaal the plausibility of a statement with reference to women in other parts of southern Africa. Commenting on the chapters in *Women and gender in Southern Africa to 1945*, C. Walker states that they “confirm the increasingly respectable view that women have not been merely passive victims of externally imposed codes of behaviour, swept along by inexorable forces. Women as agents – both in defence and in rebellion against their position – are another major theme to emerge from the[m] ...”⁴⁴

Studying agency is important because, as Dagut notes, “[o]ur vision of the past is gravely distorted when women are absent, or sentimentalised, or when gender relations are poorly handled.”⁴⁵ J. Alberti mentions that since the time of early feminist historical writing, the “glaring absence of women from traditional historical writing” was evident, and the oppression was found, amongst other places, in the concept of patriarchy, a situation where men were responsible for women, and ‘dominated’ their lives. However, patriarchal approaches failed to address the vital question of women’s agency.⁴⁶ S. Benhabib elaborates: “It is futile, let us say, to search for an essence of ‘motherhood’, as a cross-cultural universal; just as it is futile to seek to produce a single grand theory of female

⁴⁴ C. Walker (ed.), *Women and gender in South Africa to 1945*, pp. 29-30.

⁴⁵ S. Dagut, Gender, colonial 'women's history' and the construction of social distance: Middle-class British women in later nineteenth century South Africa, *Journal of Southern African Studies* 26(3), Sep 2000, p. 556.

⁴⁶ J. Alberti, *Gender and the historian*, p. 138. Zeleza also has a problem with this, stating that it “is simplistically assumed, for example, that patriarchy was universal, unambiguous and uncontested,” an assumption he feels features too strongly in studies with regard to African women. P.T. Zeleza, *Manufacturing African studies and crises*, p. 202. Alberti is a feminist historian.

oppression and male dominance across cultures and societies – be such a theory psychoanalytic, anthropological or biological.”⁴⁷

In the Transvaal context, S. Duff warns that when studying the “place of white, middle-class women within nineteenth century colonial societies, the greatest danger for the historian is to over-emphasise their agency or their lack thereof – thus producing a simplistic understanding of women as ‘heroines’, ‘victims’ or ‘villains.’”⁴⁸ Thus, somewhere between oppression on the one side, and an overemphasis of agency on the other, the Transvaal women reside. To summarise what will be explained later, they were simultaneously willing to subscribe to men’s public dominance, while behind the scenes they exercised their rights to be in control of their own lives. Moreover, insofar as legal matters were concerned, the ‘behind the scenes’ became public when they appeared in court.

6. Post-modernism and deconstruction in women’s history

Zeleza is also concerned with the issue of deconstruction. His second challenge is “theoretical, to deconstruct the conventional historical paradigms and devise new ones which will rid history of its inherent androcentrism, in order to redefine and enlarge the scope of the discipline as a whole, to make historical reconstructions more inclusive, more comprehensive, and more complex.”⁴⁹ A further goal of this ‘deconstruction’ is “to understand how social relationships are contextualized and organized.”⁵⁰ To understand the concept ‘women’ or ‘gender’ is to address “the question of [their] identity as a problem of discourse or ideology in historical context.”⁵¹ ‘Ideology’ refers to how social identity is organized, and ‘discourse’ to the processes by which social difference is produced.⁵² One of the reasons why the ‘tools of deconstruction’ and the concepts of ‘discourse’ and ‘gender’ are so attractive to writers of women’s history is that they seemed “well-honed to

⁴⁷ S. Benhabib, Feminism and the question of postmodernism, in *The polity reader in gender studies*, p. 84. Seyla Benhabib is the Eugene Meyer Professor of Political Science and Philosophy at Yale University.

⁴⁸ S.E. Duff, From new women to college girls at the Huguenot Seminary and College, 1895-1910, *Historia* 51(1), May 2006, p. 4-5. Duff is a part-time lecturer in English and History at the University of Stellenbosch.

⁴⁹ P.T. Zeleza, *Manufacturing African studies and crises*, pp. 167-168.

⁵⁰ J. Alberti, *Gender and the historian*, p. 132.

⁵¹ J. Alberti, *Gender and the historian*, p. 132.

⁵² J. Alberti, *Gender and the historian*, p. 132.

transform the enterprise of history in ways which could make a much bigger space available to women in history.”⁵³

The difference between postmodernist and feminist historians is pointed out by Benhabib:

[P]ostmodernists substitute for Man, or the sovereign subject of the theoretical and practical reason of the tradition, the study of contingent, historically changing and culturally viable social, linguistic and discursive practices, feminists claim that ‘gender’ and the various practices contributing to its constitution are one of the most crucial contexts in which to situate the purportedly neutral and universal subject of reason.⁵⁴

Postmodernists “stress the relativity of knowledge, the subjectivity of the author, the literary invention (as opposed to the historical reality) of the historians’ outpourings and the constitutive power of language over some ‘anterior social reality’ in explaining the nature of human society, past or present.”⁵⁵

In postmodernist feminist historiography, as led by Scott, the methodologically central “emphasis is on the ‘construction’ of the agency” of the historical beings, not their actual actions and lives.⁵⁶ Her focus was on “discourses about women, rather than on the lives of women themselves ... [which] led to a concern not with what happened, but with what was represented as happening through a focus on discourses about the subject, and the deconstruction of fixed categories of meaning.”⁵⁷

Davies remarks that the

postmodern view of the subject is of a fragmented, inessential, entity fully situated (and not merely influenced) within discursive structures; identity has no essential core, it is rather produced within complex linguistic, cultural and political environments ... however, postmodernism should not necessarily be understood as a complete rejection of the notion of women’s identity as women ... it is rather a rejection of any *totalistic* view of identity and patriarchy, and an attempt to fracture what might otherwise be seen as intractable obstacles to the generation

⁵³ J. Alberti, *Gender and the historian*, p. 139.

⁵⁴ S. Benhabib, Feminism and the question of postmodernism, in *The polity reader in gender studies*, p. 77.

⁵⁵ D.M. Macrauld & A. Taylor, *Social theory and social history*, p. 142.

⁵⁶ S. Benhabib, Feminism and the question of postmodernism, in *The polity reader in gender studies*, p. 87.

⁵⁷ D.M. Macrauld & A. Taylor, Ideology, mentalité and social ritual: From social history to cultural history, in D.M. Macrauld and A. Taylor (eds.), *Social theory and social history*, pp. 129, 130.

of new meanings for gender and gender relationships.⁵⁸ [emphasis in original]

She continues by describing the dangers: “Postmodernism seems to paralyze the debate in a circular, overly theoretical and minimally transformative, fashion. Postmodernism can appear to generate the expectation that every contribution to scholarship must be critical [and] fully theorized ...”⁵⁹

Although the insights of the post-modernists are informative, the methodology of post-structuralism was found more useful in approaching the legal sources in this study. Following a post-structuralist approach, with its emphasis on the linguistic turn in historical writing, challenges the historian to “develop a new theoretical framework that better explains the real world ... [by] deconstruct[ing] the hierarchical conceptual dualisms that seek to encase women’s lives in the worlds of ‘nature’ and ‘family’, and the ‘private’ and the ‘domestic’ spheres, as distinct from the supposedly male worlds of ‘culture’ and ‘work’, and the ‘public’ and ‘political’ spheres.”⁶⁰ R. Chartier approaches cultural history in a similar way by stressing a “study of the processes by which meaning is constructed.”⁶¹ According to Scott, the necessary question is: “How is knowledge of difference produced, legitimated and disseminated? How are identities constructed and in what terms?”⁶² The place to search is particular, contextual instances, but the answers will not “produce separate stories.” It is merely one part of the “common ground, politically and academically.”⁶³

Benhabib’s interest in ‘linguistic practices’ offers an approach to a text, namely that the researcher “presupposes that there is a thinking author who has produced this text, who has intentions, purposes and goals in communicating with [him/her]; that the task of theoretical reflection begins with the attempt to understand what the author meant.”⁶⁴ But she cautions that “language always says much more than what the author means; there will always be discrepancy between what we mean and what we say; but we engage in

⁵⁸ M. Davies, Unity and diversity in feminist legal theory, *Philosophy Compass* 2(4), 2007, pp. 657-658. Margaret Davies is a member of the Law School at Flinders University, Adelaide.

⁵⁹ M. Davies, Unity and diversity in feminist legal theory, *Philosophy Compass* 2(4), 2007, p. 658.

⁶⁰ P.T. Zeleza, *Manufacturing African studies and crises*, p. 180.

⁶¹ R. Chartier, *Cultural history: Between practices and representations*, as quoted in Kammen, M, Review of I. Irwin-Zarecka's 'Frames of Remembrance', *History and Theory* 34, 1995, p. 253. Chartier is a well-known figure in the field of book history.

⁶² J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, pp. 58-59.

⁶³ J.W. Scott, *Women's history*, in P. Burke (ed.), *New perspectives on historical writing*, pp. 58-59.

⁶⁴ S. Benhabib, *Feminism and the question of postmodernism*, in *The polity reader in gender studies*, p. 81.

communication, theoretical no less than everyday communication, to gain some basis of mutual understanding and reasoning.”⁶⁵

D.M. Macrauld and A. Taylor observe that there has been a shift in cultural history “from a modernist (empirical, materialist, realist, determinist) approach to the past, as typified by classical social history, towards a postmodernist (idealist, relativist, linguistic) approach to the past, which stresses the importance of language as constitutive (rather than the product) of action.”⁶⁶ Walker also notes “the crucial importance of theoretical models for ordering the mass of empirical data that the world throws up in its daily round ... but as feminist researchers have stressed, the construction of an adequate theory of gender requires not simply rigour but critical imagination and a willingness to rethink many of the basic assumptions of social theory as well.”⁶⁷

Post-structuralist theories have its share of critics. J. Hoff warned of the

intellectual dangers ... [namely] the hostility to linear time and ... the operations of cause and effect, and the undermining ideas about reality and truth. The analysis of representation, the ‘linguistic turn’, reduced ‘the experiences of women, struggling to define themselves and better their lives in particular historical contexts, to mere subject stories.’ ‘Flesh and blood women’ became social constructs and ‘material experiences became abstract expressions’.⁶⁸

Welke’s approach to legal history begins to resolve these concerns: “Events are not born as legal stories. Rather, law, legal process, and culture combine to provide a structure, a narrative form into which an event must be translated to state a legal claim. Translating an event into a legal action is a form of storytelling.”⁶⁹ Welke is referring to the ‘legal storytelling movement’ which developed in the United States in the 1980s, and was linked to the previously disadvantaged (in history) ethnic minorities and women: “The stories told by members of these groups challenge a legal system which was created by white male lawyers who did not always have the needs and interests of other groups sufficiently in

⁶⁵ S. Benhabib, Feminism and the question of postmodernism, in *The polity reader in gender studies*, p. 81.

⁶⁶ D.M. Macrauld & A. Taylor, Ideology, mentalité and social ritual: From social history to cultural history, in D.M. Macrauld and A. Taylor (eds.), *Social theory and social history*, p. 119. Macrauld is Professor at the University of Ulster. Taylor is a Senior Lecturer at the Northumbria University.

⁶⁷ C. Walker (ed.), *Women and gender in South Africa to 1945*, p. 3.

⁶⁸ Quoted in J. Alberti, *Gender and the historian*, pp. 126-127. Hoff is a Distinguished Research Professor of History at Montana State University.

⁶⁹ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 235.

mind.”⁷⁰ A. Munslow comments in a similar vein: “The deconstructive emphasis is upon the procedure for creating historical knowledge when we deal with the evidence. We are aware that we take simple verifiable statements, which we compose into a narrative so that they become meaningful.”⁷¹

Burke assumes that “narrative has returned together with an increasing concern with ordinary people and the ways in which they make sense of their experience, their lives, their world ... [rather than the narrative of the] great deeds of men [at] the expense of ordinary men – and women.”⁷² Eventually, Burke’s direction is where one would like South African legal historiography to go – telling the stories not being told before of the making and unmaking of race and class and gender. Nevertheless, the historian first has to construct a theoretical framework: in this case, the stage.

7. Women, gender and legal history in the nineteenth century Transvaal

Batlan notes that most research done in the field of legal history and gender worldwide focuses on the nineteenth century, because that period was the beginning of the campaign for women’s suffrage in large parts of the western world.⁷³ J. Purvis comments that although “[l]iberal histories of the nineteenth century have concentrated predominantly on the activities of ‘great’ individuals in political, economic, intellectual, literary and artistic circles ... when woman are mentioned in general histories of the [nineteenth century], it is mainly in relation to the struggle for suffrage.”⁷⁴ The nineteenth century mattered for other reasons, too. It was the time of early women’s rights, abolition, coverture,⁷⁵ and early married women’s rights, especially in Britain.⁷⁶ L. Kerber notes that the late nineteenth

⁷⁰ P. Burke, *What is cultural history*, p. 122.

⁷¹ A. Munslow, *Deconstructing history*, p. 149. Munslow is Visiting Professor of History and Historical Theory at the University of Chichester.

⁷² P. Burke, *What is cultural history*, pp. 121-122.

⁷³ And much as been written about it, also in Britain and Australia. L.S. Hogan, Wisdom, goodness and power: Elizabeth Cady Stanton and the history of women's suffrage, *Gender issues* 23(2), Spring 2006; J. McCulloch, The struggle for women's suffrage in Queensland, *Hecate* 30(2), 2004; B. Caine, Australian feminism and the British militant suffragettes, *One hundred years of women's suffrage in Australia*, 2004; are some examples, but there are many more.

⁷⁴ J. Purvis, Hidden from history, in *The polity reader in gender studies*, p. 135. Purvis is a British gender historian.

⁷⁵ Legal term signifying that a woman’s legal rights merged with her husband’s.

⁷⁶ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 825.

century was the “high-water mark of women’s public influence: through voluntary organizations, lobbying, trade unions, professional education, and professional activity.”⁷⁷

A comparison of these findings to the Transvaal provides clear contradictions with other British colonies, and even the Cape Colony. The lack of agitation for suffrage is more remarkable when one considers Walker’s comment that “[t]he actual successes of the suffrage movement in this period took place in what were considered by more established societies as the fringes of the western world – young frontier or colonial societies. There, traditional sex-roles were not as rigidly defined, there was a greater opportunity and need for women to participate in the building up of the community and a generally more egalitarian spirit prevailed.”⁷⁸ This was definitely not reflected in the rural nineteenth century Transvaal.

Why do these disparities exist, and why was there seemingly no struggle for women’s suffrage at the end of the nineteenth century in the Transvaal?⁷⁹ Walker argues that the suffrage movement, started by the Women’s Christian Temperance Union (WCTU) in the Cape Colony, was limited in effect because the WCTU was “characterised by its English-speaking, urban-based membership.”⁸⁰ As will be shown in chapter 3, the leaderships and population who considered themselves indigenous were predominantly Afrikaners, and Walker notes that the “reticence of the predominantly rural Afrikaans-speaking women [un]till relatively late was a noteworthy feature and an important retarding factor for the suffrage movement.”⁸¹ It is in Walker’s comparison of the WCTU with an Afrikaner women’s movement, the Vrouesendingbond, that she emphasises the crucial reason:

[W]hile the WCTU was within the next few years to turn its attention to the political rights of women, the ‘Vrouesendingbond’ remained apolitical. Here already the split within the white community between

⁷⁷ L.K. Kerber, Separate spheres, female worlds, women’s place: The women’s history, *The Journal of American History* 75, 1988, as quoted in L.S. Hogan, Wisdom, goodness and power: Elizabeth Cady Stanton and the history of women suffrage, *Gender issues* 23(2), Spring 2006, p. 13. Linda Kerber is a History Professor who specializes in Gender and Legal History.

⁷⁸ C. Walker, *The women’s suffrage movement in South Africa*, p. 11.

⁷⁹ Sources that discuss women’s suffrage in South Africa, like C. Walker (ed.), *Women and gender in South Africa to 1945*; E. Walker, The franchise in Southern Africa, *Cambridge Historical Journal* 11(1), 1953; and D. Gaitskell, The imperial tie: Obstacle or asset for South Africa’s women suffragists before 1930?, *South African Historical Journal* 47, Nov 2002, makes very little mention of the movement in the 19th century, and no mention of any participation from female inhabitants of the Transvaal.

⁸⁰ C. Walker, *The women’s suffrage movement in South Africa*, pp. 6, 18-19.

⁸¹ C. Walker, *The women’s suffrage movement in South Africa*, pp. 18-19.

English and Afrikaans women was in evidence. The reason for the stance of the 'Vrouesendingbond' can be largely attributed to the attitude of the Dutch Reformed Church (DRC), within which framework it operated. As late as the 1920s, this Church issued a report condemning the suffrage movement on biblical grounds, as a violation of a divinely-ordained division of labour between the sexes – 'The exercise of the franchise is an act of the Government and as such belongs to the man as head of the family ... and not the women who, in accordance with the story of creation, was given to the man as a helpmeet' – The stern fundamentalism of the DRC was a major influence on the lack of suffragist enthusiasm among Afrikaans women until into the 1920's.⁸²

On the same issue, Van Heyningen wrote that the

South African War stirred into life women's movements which barely existed before the war. In doing so, the construction of women as purely domestic figures, operating in the private sphere, began slowly to change. British women moved actively into suffrage movements in the post-war era. It could be argued that Boer women, rather than internalising the 'volksmoeder' (mother of the volk) concept as Brink and others have suggested, actively used it to claim their place as part of the political Afrikaner nation.⁸³

Another reason might be that elsewhere in the industrialising world,

far-reaching social and economic developments were taking place ... By undermining the traditional role of women in society, these changes were to provide the foundation for the vigorous advance of their political rights in the 20th century. With industrialisation and the accompanying process of urbanisation, new economic opportunities were opening up for women. Areas of middle-class employment – teaching, nursing, clerical work and, to a limited extent, the professions – were becoming increasingly available and respectable. This was a vitally important development for women's suffrage since middle-class women, with their greater degree of education, economic independence and leisure, were to take the lead in the agitation for votes.⁸⁴

Considering the socio-industrial situation in the Transvaal, and especially in rural areas, it is not surprising that the impact was less evident there.

⁸² C. Walker, *The women's suffrage movement in South Africa*, p. 22.

⁸³ E. van Heyningen, Women and gender in the South African War, in N. Gasa (ed.), *Women in South African History*, p. 115; E. Brink, Man-made women: Gender, class and the ideology of the Volksmoeder' in C. Walker (ed.), *Women and gender in southern Africa to 1945*.

⁸⁴ C. Walker, *The women's suffrage movement in South Africa*, pp. 5, 8-9.

M. du Toit “has shown that, despite the relative paucity of sources on Afrikaner femininity during the period, there is some reason to believe that Dutch-Afrikaans women, especially in rural areas, did lead lives of relative independence and responsibility as they worked alongside their men folk in the management of farms and cared for the smooth running of the homestead.”⁸⁵ Walker then goes on to qualify their ‘relative independence’:

“There were ... clear limits to the degree of individual freedom that women – all women – were allowed in terms of the settler sex-gender system. Both the settler and the indigenous ideologies of gender were in agreement that ultimately men must order the lives of women ... The settler ideology of gender was thus a significant factor in marking the permissible boundaries of the new female world ... In settler society women’s proper place centred at the domestic sphere of children and kitchen, which was set apart from the world of money and power, the domain of men. This does not mean that women were not involved in economic activity beyond the home, but that such work was not recognised as intrinsically ‘female’, certainly not as properly ‘feminine’. Within the household, settler women played an active role in the domestic economy but the dominant ideology stressed their role as reproducers rather than producers.”⁸⁶

The women who feature in the court cases were white settler women, and (for whatever reason) lived in the Transvaal, and were thus part of A. Perry’s ‘settler society’. Perry observes that the “... ambiguities of settler colonialism had special resonance for women. Imperial rhetoric and policy bestowed a literally pregnant mission on settler women, defining them and their reproductive work as essential to – and constituent of – settler regimes. Yet backwoods experience of work, motherhood, and daily patriarchies fragmented and profoundly challenged settler women’s relationships to the Empire they putatively served.”⁸⁷

M.J. Green, C.C. Sonn and J. Matsebula also emphasise the ‘reproducing role’ of settler women, by arguing that one way in which women ‘served’ the Empire was through being white: “[T]he interaction between gender and class, in particular the ‘respectability’ of

⁸⁵ Quoted in S.E. Duff, From new women to college girls at the Huguenot Seminary and College, 1895-1910, *Historia* 51(1), May 2006, p. 6. Du Toit is a member of the History Department at the University of Kwazulu-Natal. Du Toit uses the term ‘Dutch-Afrikaans’ to refer to Afrikaners. Of course, how smoothly the households did in fact run is debatable.

⁸⁶ C. Walker (ed.), *Women and gender in South Africa to 1945*, pp. 11, 120.

⁸⁷ A. Perry, Interlocuting empire: Colonial womanhood, settler identity, and Frances Herring, in P. Buckner & R. Douglas Francis (eds.), *Rediscovering the British world*, p. 159.

women, determines who becomes and remains white. To gain ‘good’ girl status, women must actively engage in the reproduction of white supremacy.”⁸⁸

The role of ‘reproducer’ is a familiar one when discussing white settler (specifically Afrikaner) women. Their role as *volksmoeder* has been written on by, amongst others, Du Toit,⁸⁹ L. van der Watt⁹⁰ and L. Vincent.⁹¹ Walker’s view of this is that the “concept of *volksmoeder* harnessed many of the elements of the nineteenth century ideology of gender – from a strong emphasis on patriotism and loyal conformity by women to the demands of a male-dominated nationalism.”⁹² Welke adds that “[g]ender gave women primary responsibility for the nurture of children; spatially, it also placed women together with their children.”⁹³

Apart from Walker’s work, other sources, though not focusing predominantly on women, can provide inferences that are valuable. Morton’s article on ‘inboekeling’, for instance, makes a telling remark: “The sexual exploitation of female domestic slaves and its attendant profound influence on spousal and familial relationships, which characterized plantation slave societies, appears not to have been significant among the Boer farming community. This suggests that as a rule Boer women exerted controlling influence in their homes and over the domestic servants owned by the patriarch.”⁹⁴

P. van Heerden’s comment helps to sum up the situation for women in the Transvaal in the late nineteenth century: “In my jong dae was die vrou se plek in die huis.”⁹⁵ There is no doubt that the Transvaal women’s role in society was ambiguous, to say the least. Marriage and domestic duties were the most desirable occupation for women. However, domesticity

⁸⁸ M.J. Green *et al.*, Reviewing whiteness: Theory, research, and possibilities, *South African Journal of Psychology* 37(3), 2007, p. 393.

⁸⁹ M. du Toit, The domesticity of Afrikaner nationalism: Volksmoeders and the ACVV, 1904-1929, *Journal of Southern African Studies* 29(1), March 2003.

⁹⁰ L. van der Watt, The comradely ideal and the volksmoeder ideal: Uncovering gender ideology in the Voortrekker tapestry, *South African Historical Journal* 6(39), 1998.

⁹¹ L. Vincent, A cake of soap: The Volksmoeder ideology and Afrikaner women’s campaign for the vote, *The International Journal of African Historical Studies* 32(1), 1999.

⁹² C. Walker (ed.), *Women and gender in South Africa to 1945*, p. 22.

⁹³ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 231.

⁹⁴ F. Morton, Female inboekeling in the South African Republic 1850-1880, *Slavery and Abolition* 26(2), Aug 2005, p. 211.

⁹⁵ P. van Heerden, *Die sestiende koppie*, quoted in C. Walker, *The women’s suffrage movement in South Africa*, p. 61. Translation: ‘In my younger days a woman’s place was in the house.’

must not be equated with a lack of agency.⁹⁶ Constructing a stage and placing some of these women on it might reveal not only the extent of their agency, but also shed some light on the conundrum of white Transvaal women.

8. The opposition of 'public' and 'private' in legal history

While 'public' and 'private' are traditional opposites, a 'public' life versus the 'private' home, when analysing gender and law together, may be seen as influencing each other in various ways. H. Arendt's description of the two realms is that they "are the distinction between things that should be hidden and things that should be shown." She then mentions that by inverting them one "discovers how rich and manifold the hidden can be."⁹⁷

The 'inversion' Arendt mentions, or the deconstruction of 'spheres of social experience', can only be made if, in the case of this study, 'public law' and 'private law' are first constructed, and then deconstructed. Then, as H. Bhabha remarks, the "interstitial intimacy" which is inherent between the two will link, through an "'in-between' temporality, that takes the measure of dwelling at home, while producing an image of the world of history."⁹⁸

Bhabha continues that

by making visible the forgetting of the 'unhomely' moment in civil society, feminism specifies the patriarchal, gendered nature of civil society and disturbs the symmetry of private and public which is now shadowed, or uncannily doubled, by the difference of genders which does not neatly map on the private and the public, but becomes disturbingly supplementary to them. The results in redrawing the domestic space as the space of the normalizing, pastoralizing, and individuating techniques of modern power and police: the personal-is-the-political; the world-in-the-home.⁹⁹

Legal historians, according to Batlan, warn against trying to understand the 'public' law, without also looking at the 'private' domestic, since the question is: if laws are made about marriage (=home) is marriage still private?¹⁰⁰ She then asks: "How does a gendered analysis

⁹⁶ C. Walker, *The women's suffrage movement in South Africa*, p. 61.

⁹⁷ Quoted in H. Bhabha, *The location of culture*, p. 10. Arendt is a German political theorist.

⁹⁸ H. Bhabha, *The location of culture*, p. 13.

⁹⁹ H. Bhabha, *The location of culture*, pp. 10-11.

¹⁰⁰ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 847.

redefine and reposition the dichotomous spheres of public and private, so that their boundaries are blurred, even erased?”¹⁰¹

As will be analysed in chapter 5, while women’s legal rights in the Transvaal pertained mostly to her private life, or to the domestic sphere, as opposed to any public sphere, these rights were never entirely private or domestic. A man worked (farmed, traded) and earned wages, which he used to give his wife financial support. In turn, the wife traded her domestic labour, very much a private thing, for his public work, which, then, became a part of the marriage contract. But if a wife did owe domestic service to her husband as part of the marriage contract, the idea of a woman’s sphere being the public sphere was actually legitimised by the courts.¹⁰² In other words, Batlan explains, the courts created the wife’s dependence on her husband, because if by law her property became her husband’s, to do with as he pleased, and she did not have the same rights to his property, effectively she had no rights.¹⁰³

Public and private collided most tellingly when property became an issue in court cases.¹⁰⁴ Some of the cases in the final chapter revolve around divorce or inheritance, and in many cases the main object in the case was the couple’s property, or their house, an inherently private thing, which, in the court case, became public. In her study of court cases involving liability and injury, Welke points out that “the role of female plaintiffs before them in shaping courts’ understanding of duty and liability for injury was most explicit in the context of the home, where men’s property interests converged with women’s sphere.”¹⁰⁵ As Welke has put it so succinctly, “the courtroom had become a stage on which the private experience ... was re-enacted as public narrative.”¹⁰⁶

9. Conclusion

This chapter points to the need for constructing a stage, positioning women on it, and imagining how they performed. The stage needs to include socially constructed views of the

¹⁰¹ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 824.

¹⁰² F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, pp. 826, 831.

¹⁰³ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 833. This law is discussed in chapter 5.

¹⁰⁴ F. Batlan, Engendering legal history, *Law and social enquiry* 30(4), Fall 2005, p. 833.

¹⁰⁵ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 219.

¹⁰⁶ B.Y. Welke, *Recasting American liberty: Gender, race, law and the Railroad revolution, 1865-1920*, p. 124.

people of the time and how they lived, as well as a historically constructed social, economic and political background of the Transvaal.

In the Transvaal men constructed the stage, or, to say it in another way, the Transvaal was a 'man's world'. Chapter 1 pointed out the peculiarities of the historiography, and, together with the theoretical guidelines in this chapter, stress that the sources and assumptions regarding the period are coloured with a distinctive patriarchal perspective. This will be apparent throughout the study. Whereas in chapter 3, some sources (a few, but at least some) have been written by women, chapters 4 and 5 are dependent on material written almost exclusively by men, contemporary and later.

Admittedly 'gender' is an important current focus in history, but this study argues that women's history must be written before conclusions can be drawn about gender. Women must be specifically located and analysed, which is what chapter 6 endeavours to do, albeit in an introductory sense.

The paucity of secondary sources on women can be counteracted by taking a set of primary sources and deconstructing them, thus carving out a space for women in an environment that did not cater for, and rarely acknowledged, them. This space is carved out on a legal stage in chapters 4 to 6, where legal documents are used to examine the impact of formal law on people's private lives.

The Transvaal was a unique territory in many ways. Studying the area in an attempt to understand the women involves exploring the time and space they lived in. The next chapter will attempt to create and illuminate a socio-economic backdrop for the legal stage of the later chapters.

III. CONTEXTUALISING TRANSVAAL HISTORY FROM 1877 TO 1899

1. Introduction

This chapter aims to construct the so-called reality of the nineteenth century Transvaal, by means of representations.¹ Keeping in mind A. Munslow's statement that "[t]he past is not discovered or found ... [i]t is created and represented by the historian as a text ...",² the attempt is to construct a stage on which societal relations and interactions for white inhabitants in the Transvaal could be played out. The sources used in this chapter are comprised mostly of the secondary sources discussed in chapter 2, and almost all have a predominantly male bias. The building blocks for the stage thus favour a male world, which reinforces the idea that the women are drawn into a picture that did not cater for them. A deconstruction of the sources is necessary in the process of constructing a stage on which women are more imaginable.³

The populations represented in this chapter are the ones under the jurisdiction of the Transvaal legal system. Therefore, the representations are multi-layered and attempt to encompass as much of the society as I felt was allowed by the sources. This chapter includes a short political background, but also a socio-economic and spatial analysis of in and outside influences on the Transvaal, and its different populations.

2. The early years of white settlement 1844-1877

White Trekkers moved into the region north of the Vaal River in the 1840s, and were granted independence by Britain in 1852 with the Sand River Convention. The Volksraad of the new Republic decided on the name the Zuid-Afrikaansche Republiek (ZAR), and accepted its first *Grondwet* (Constitution) in 1858.⁴ This *Grondwet* was a "rambling, unwieldy, untidy document ... containing much that was out of place in a Constitution," but, reflective of inhabitants, was very democratic.⁵

The government had problems from the outset. There was a continuous struggle for land with the various black communities who inhabited the region, and this struggle remained a crucial aspect of the Volksraad's efforts to maintain control over their region until the late 1870s. Lack of money, however, was their chief problem. The Transvaal economy was very weak. W. Beinart and P. Delius

¹ As suggested by Burke in chapter 2.

² A. Munslow, *Deconstructing history*, p. 178.

³ A. Munslow, *The Routledge companion to historical studies*, pp. 1-20.

⁴ In the Preface, the reasoning behind referring to the country throughout as the Transvaal is explained.

⁵ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 302-303.

point out that "... in the earliest decades of white settlement in the Transvaal the state was certainly weak and markets limited ...",⁶ and D. Harrison agrees: "The Boer Republic was in a parlous state. The Transvaal pound was worth one [British] shilling ..."⁷

An important consequence of the lack of money was that civil servants, from teachers to landdrosts, were paid very meagre salaries, and often, not at all,⁸ and this in turn meant that there was a lack of skilled, professional individuals. A.N. Pelzer mentions that when "[v]erantwoordelike leiers, die manne wat koers en rigting moes aandui en 'n definitiewe beleid moes neerlê, aan kennis en insig ontbreek het, kan ons verwag dat dit met die amptenaarspersoneel ... nie beter gestel sou wees nie."⁹ The unqualified officials grappled continuously with the fiercely independent white population, initially the Boers and later also the newcomers and British town-dwellers.¹⁰ Beinart and Delius reiterate: "the politically divided and financially weak Transvaal was characterized by a very considerable devolution of power to officials before 1877. The appointed landdrosts and elected veldcornets found that the nature of their office was determined as much by local possibilities as by central direction or authority."¹¹ Although the situation did improve in the 1870s, with the first discoveries of gold in the Lydenburg district, and a slow gaining of experience in administration, until at least the annexation in 1877, the administrative situation was unsatisfactory.¹²

T.F. Burgers was elected president of the ZAR in 1872. He was apparently brilliant, cultured and educated, with big plans to modernize the Transvaal. However, he is a very controversial figure in the history of the Transvaal. Apart from his lack of practical knowledge in running a country, he completely misunderstood the people of the Transvaal, a feeling which was mutual. He was progressive, they conservative; he wanted to implement changes, they were clinging to the life of their forefathers. He wanted to turn people living the life of pioneers into a modern society, and they were not willing or ready to appreciate him.¹³ The biggest differences between him and the

⁶ W. Beinart & P. Delius, Introduction, in W. Beinart et al (eds.), *Putting a plough to the ground*, pp. 22-23.

⁷ D. Harrison, *The white tribe of Africa*, p. 21.

⁸ J.E.H. Grobler, *Jan Viljoen (1812-1893)*. 'n *Transvaalse wesgrenspionier*, M.A. -verhandeling, U.P., 1976, p. 154.

⁹ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 82. Translation: 'responsible leaders, the men that had to show course and direction and who had to lay down a definitive policy, lacked knowledge and wisdom, one cannot expect that it would go better with the officials.'

¹⁰ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 76; J.E.H. Grobler, *Jan Viljoen (1812-1893)*. 'n *Transvaalse wesgrenspionier*, M.A. -verhandeling, U.P., 1976, p. 154.

¹¹ W. Beinart & P. Delius, Introduction, in W. Beinart et al (eds.), *Putting a plough to the ground*, p. 24.

¹² S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 356.

¹³ W.J. de Kock (red.), *Suid-Afrikaanse biografiese woordeboek I*, pp. 138-142; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 60; J. Kotzé, *Biographical memoirs and reminiscences*, pp. 260-261; J. Nixon, *The complete story of the Transvaal*, p. 31. Although Burgers managed to put the Transvaal under a stronger civil authority, and installed some progressive reforms, he was too liberal in terms of religion specifically, and slowly lost the support of the Volksraad and his people. On the topic of the tension between the civil

white Boer inhabitants, however, was that he was liberal and modern in his religious views, and they were emphatically not, and eventually this alienated him from the people, and, importantly, from the Volksraad. He tried his best to implement changes, but without the necessary finances and the support of the Volksraad, he was fighting a losing battle.¹⁴

When Theophilus Shepstone arrived to annex the Transvaal in 1877, Burgers was one of the few people to grasp what was happening. He attempted several things to try and forestall it; including drafting a new constitution, which he hoped would bring about the stability that the government was lacking. He tried to convince the Volksraad of the danger of annexation, but was unsuccessful. The Volksraad was not on his side, and let his warnings go by.¹⁵ The annexation on 12 April 1877 transpired quickly and efficiently. The annexation stated that the Transvaal government could still govern the state according to their own laws and legislature. Furthermore, Shepstone promised that Dutch would be used as an official language.¹⁶

3. Transvaal under annexation 1877-1881

In the annexation proclamation, Shepstone said that “all confidence in [Transvaal’s] stability ... have been withdrawn ... commerce is well-nigh destroyed ... the country is in a state of bankruptcy ... the Government has fallen into helpless paralysis from causes which it has been and is unable to control or counteract.”¹⁷ These allegations were true, although somewhat exaggerated. What is blatantly untrue, however, is the motivation for annexation, also stated in the proclamation, namely that

a large proportion of the inhabitants of the Transvaal see in a clearer and stronger light than I [Shepstone] am able to describe them, the urgency and imminence of the circumstances by which they are surrounded, the ruined condition of the country, and the absence within it of any element capable of rescuing it from its depressed state, and therefore earnestly desire the establishment within and over it of her Majesty’s authority and rule.¹⁸

A small minority of people living in towns, who, as later will be shown were mostly British, were pro-annexation, but the majority of inhabitants was firmly against it.

and military authorities, see the Introduction in J. Bergh & F. Morton (eds.), *To make them serve: The 1871 Transvaal commission on African labour*, p. 9-14.

¹⁴ J. Kotzé, *Biographical memoirs and reminiscences*, p. 262.

¹⁵ M. Nathan, *Paul Kruger. His life and times*, p. 115; J. Kotzé, *Biographical memoirs and reminiscences*, p. 307.

¹⁶ M. Nathan, *Paul Kruger. His life and times*, p. 119; E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 134; H. Giliomee, *The Afrikaners*, p. 189.

¹⁷ J. Nixon, *The complete story of the Transvaal*, p. 55.

¹⁸ J. Nixon, *The complete story of the Transvaal*, p. 57.

The annexation was a key event, especially for Pretoria, which was now the confirmed capital, but also the seat of the High Court. The influx of British officials meant a social and cultural improvement.¹⁹ J. Nixon remarked that when he arrived in Pretoria during this time: “I was struck with the improvement which had taken place since my previous visit (pre-annexation). Building was going on in every direction, and the town had increased considerably in size and in population. Trade and speculation were brisk, and Pretoria soon promised to be one of the leading towns in South Africa.”²⁰ C. Jeppe’s observation is that “[t]he advent of the British government brought with it an immediate and considerable increase in prosperity to Pretoria.”²¹

The Shepstone-government, with the financial backing of the British Empire, did much to reform the finances and chaotic administration of the Transvaal, and to restore a sense of stability: “The material prosperity of the country was advanced under the new government. The natural treasures of the country began to awaken attention. Public confidence was restored, and money commenced to flow into the country from the [Cape] Colony and Natal.”²² Delius argues: “The state structure which the new Republican rulers inherited in 1881 was much superior to that which the Burgers administration had surrendered to the British in 1877. In 1876 the authority of the SAR had been under serious threat and its finances were in confusion ... [after annexation] ... [t]he Transvaal state’s finances had been put in order and its administrative machinery overhauled.”²³

Another crucial impact the annexation had was that it swung the balance of power decisively to the whites in the state.²⁴ By 1881 the British had defeated the Zulu near the eastern borders, as well as the Pedi under Sekhukhune, whom the Boers had been unable to defeat and who were wreaking havoc in the eastern parts of the Transvaal.²⁵ The Pedi leadership was destroyed, their affairs, internal and external, were put under the control of a magistrate, their weapons were confiscated, and they were forced to pay taxes. The Pretoria Convention of 1881 furthermore fixed the western border of the state, and gave it some stability.²⁶

Chief Justice Kotzé writes that

¹⁹ R. Peacock, *Die geskiedenis van Pretoria 1855-1902*, M.A.-verhandeling, U.P., 1955, p. 108.

²⁰ J. Nixon, *The complete story of the Transvaal*, p. 165.

²¹ J. Nixon, *The complete story of the Transvaal*, pp. 158, 165; C. Jeppe, *The kaleidoscopic Transvaal*, p. 67.

²² J. Nixon, *The complete story of the Transvaal*, p. 152.

²³ P. Delius, Abel Erasmus: Power and profit in the Eastern Transvaal, in W. Beinard et al (eds.), *Putting a plough to the ground*, p. 184.

²⁴ For a full analysis of the conflicts between the different groups in the Transvaal, see Chapter 6: ‘Konflik tussen blank en swart in the 19e eeu’, pp. 153-213, in J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*.

²⁵ P. Delius, Abel Erasmus: Power and profit in the Eastern Transvaal, in W. Beinard et al (eds.), *Putting a plough to the ground*, p. 184.

²⁶ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, pp. 169, 184.

to the burghers of the Transvaal while eating the bread of carefulness, [the annexation] brought a real blessing. It taught them the value and benefit of settled government by restoring law and order, providing effectual and impartial administration of justice, promoting trade and commerce and furnishing a market for the farming industry, thereby also enhancing the value of land, establishing the credit of the country, and making the people realize, as nothing else could, the folly of their previous unhappy divisions and dissensions ... the Boers, as well as Kruger, had experienced the benefit of organized and stable rule under the British flag, which had, moreover, the effect of uniting them into a nation.²⁷

Not everyone agrees with the assessment that the annexation was such a success. L. Thompson observes: "... if the administration had been imaginative and resourceful; but Shepstone initiated no significant reforms, his staff was small and poorly trained ..." ²⁸ M.C. Van Zyl's observation is that there "was grootskaalse ontevredenheid onder die Transvaalse Blankes. Die Engelssprekendes, asook 'n paar koerante, het die ontevredenheid toegeskryf aan Shepstone en sy administrasie en nie so seer aan 'n onwilligheid om onder Britse gesag te wees nie." ²⁹ He adds: "Boonop was daar die diepgewortelde haat vir die Brit en 'n teleurstelling omdat die doel waarna die Afrikaners sedert die Britse verowering van die Kaap gestreef het, nie verwesenlik kon word nie." ³⁰ The British Prime Minister, William Gladstone, himself acknowledged this when he commented that the "insurrection in the Transvaal proved in the most unequivocal manner that the majority of the white settlers were strongly opposed to British rule ..." ³¹ For the British, therefore, the annexation did not have the desired effect. They misread the Transvalers' state of mind, perhaps, because the Transvalers did not know it themselves. It took them a few years, but the threat to their independence eventually unified them with a common goal: to regain their freedom. They held meetings, and delegations went to Europe without success. Finally, at a mass meeting at Paardekraal in December 1880, the Boers decided to start an armed rebellion. This was the beginning of the Anglo-Transvaal War, a war

²⁷ J. Kotzé, *Biographical memoirs and reminiscences*, pp. 382-383.

²⁸ L. Thompson, Great Britain and the Afrikaner Republics, 1870-1899, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 298.

²⁹ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, pp. 68-69. Translation: 'there was widespread dissatisfaction amongst the Transvaal Whites. The English-speaking population, as well as a few newspapers, attributed the dissatisfaction to Shepstone and his administration and not necessarily to an unwillingness to be under British power.'

³⁰ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 73. Translation: 'Furthermore, there was a deep-seated hate for the British and a disappointment that the goal to which the Afrikaners had aspired since the British take-over of the Cape, would not be achieved.'

³¹ L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 50; J. Nixon, *The complete story of the Transvaal*, p. 51.

that only lasted about three months.³² The British suffered early setbacks, which led to their final defeat at the Battle of Majuba Hill on 27 February 1881.

There are two sides to the annexation. Undoubtedly it brought a positive change in terms of social improvement. At the same time, Shepstone's administration had faults, and this was one cause of the Anglo-Transvaal War in 1880. What is of importance is that the annexation stabilized the country economically, and dramatically altered the composition of Pretoria's population.

4. Transvaal between the wars 1881-1899

The peace terms did not favour the Boers, but their leaders realized that they had no choice but to accept them. The Pretoria Convention of 1881 placed the Transvaal under British suzerainty, and gave it self-government in all affairs, excluding foreign and "native" affairs. After the Convention, civil government was handed over to the Triumvirate, consisting of Paul Kruger, M.W. Pretorius and Piet Joubert. They ruled with an elected Volksraad until the presidential election of 1883, which Paul Kruger won against Piet Joubert.³³

The disappearance of British rule meant the disappearance of the economic prosperity that came with it. The problems the government faced after 1881 were much the same as before the annexation. The finances became once again chaotic, and soon the government was on the verge of bankruptcy.³⁴ Furthermore, although annexation and war may have forged the Boers into a somewhat closer knit community, it did not mean that suddenly their leaders were better qualified or more successful at governing the country. The worsening economic situation led to an economic depression in the early years of the 1880s, fuelled on by a costly war against the Ndzundza.³⁵ There was still underlying dissension. The Volksraad, and the same unqualified officials, were inept as a legislative body, and incapable of dealing with the stubborn inhabitants.³⁶ The disastrous attempt to annex Bechuanaland disgraced the country. The outlook was not promising.³⁷

³² C. Jeppe, *The kaleidoscopic Transvaal*, p. 66; E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 134; H. Giliomee, *The Afrikaners*, p. 230.

³³ J.E.H. Grobler, *Uitdaging en antwoord*, pp. 101, 103; E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 162; H. Giliomee, *The Afrikaners*, p. 11; R. Peacock, *Die geskiedenis van Pretoria 1855-1902*, M.A.-verhandeling, U.P., 1955, p. 175.

³⁴ C. Jeppe, *The kaleidoscopic Transvaal*, p. 113; M. Nathan, *Paul Kruger. His life and times*, p. 185.

³⁵ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, p. 195. The war cost the government around £40 000.

³⁶ This will be discussed in detail later.

³⁷ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 331-332, 356-357; H. Giliomee, *The Afrikaners*, p. 236.

As new president, Paul Kruger was a figure “who would influence the ZAR politically and ideologically more than anyone else.”³⁸ Although his education consisted of him being able to read and write, and no more, his personality made him stand out as a leader. He had a natural ability, strong self-confidence, and was a powerful orator. Lord J. Bryce described him as “shrewd, cool, dogged, wary, courageous, typifying the qualities of his people.”³⁹ J.P. Fitzpatrick said that “[b]y the force of his [Kruger’s] own strong convictions and prejudices, and of his indomitable will, he has made the Boers a people whom he regards as the germ of the Afrikaner [sic] nation; a people chastened, selected, welded, and strong enough to attract and assimilate all their kindred in South Africa, and then to realize the dream of a ... [Afrikaner] Republic ...”⁴⁰ Kruger was also regarded as stubborn, difficult, and wary of change. In religious terms, he was the complete opposite of Burgers. He was an orthodox Calvinist, and believed that the Boers were God’s chosen people. In his election-speech he “explicitly stated the principles on which [he] intended to govern, should [he] be elected. God’s Word should be my rule of conduct in politics and the foundation upon which the State must be established.”⁴¹ For Kruger, republicanism and religion went together.⁴²

In 1884 Kruger travelled to England to renegotiate the stipulations of the Transvaal Convention that the Volksraad was not happy with. He succeeded in this with the London Convention of February 1884, which removed British suzerainty, changed the name of the country back to the “Zuid-Afrikaansche Republiek”, and allowed the ZAR to manage its own “native” affairs.⁴³

Many of the problems of the early 1880s were negated by the discovery of gold, arguably the most important event in the history of the Transvaal. H. Giliomee states that “never before in world history had a mineral discovery so suddenly and dramatically, and so utterly, transformed an obscure rural backwater.”⁴⁴ The Transvaal went from being economically bankrupt to one of the richest countries in the world, with the richest gold-fields in the world. Furthermore, the Transvaal now “assumed a hitherto unheard of importance in the political life of South Africa.”⁴⁵ In terms of

³⁸ H. Giliomee, *The Afrikaners*, p. 177.

³⁹ H. Giliomee, *The Afrikaners*, pp. 228-229. James Bryce was a constitutional expert, who later became the British ambassador to the United States of America.

⁴⁰ J.P. Fitzpatrick, *The Transvaal from within*, p. 1.

⁴¹ P. Kruger, *The memoirs of Paul Kruger I*, p. 190; H. Giliomee, *The Afrikaners*, pp. 177-178.

⁴² P. Kruger, *The memoirs of Paul Kruger I*, p. 190; H. Giliomee, *The Afrikaners*, pp. 177-178.

⁴³ P. Lewsen, *John X. Merriman*, p. 109; R. Peacock, *Die geskiedenis van Pretoria 1855-1902*, M.A.-verhandeling, U.P., 1955, p. 180; H. Giliomee, *The Afrikaners*, p. 234. The Boers preferred the country to be named the ‘Zuid-Afrikaansche Republiek’. It was more commonly known amongst British as the Transvaal.

⁴⁴ H. Giliomee, *The Afrikaners*, p. 236.

⁴⁵ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 188.

population, the number of inhabitants in the Transvaal rose from 70 000 in 1881 to 120 000 in 1890 (of which only 57 percent considered themselves Transvaal natives),⁴⁶ and to 250 000 in 1899.⁴⁷

The discovery of gold “ultimately revolutionized the Transvaal economy ... [and the] 1880s and 1890s witnessed the SAR attempting to provide the necessary infrastructure to service the burgeoning mining industry.”⁴⁸ The change from rural to industrial within a matter of months was initially handled fairly well by the government. For the first time in the Republic’s history, the government had enough money to run their country.⁴⁹ The years between 1885 and 1895 saw the interior finally connected to the coast, and the establishment of a road-network that connected little *dorps* (towns) with each other. Apart from the improvement in communication, it was also a huge injection for the economy.⁵⁰

Ultimately, however, the government was unprepared for the impact of gold. Officials were ill equipped to deal with the new administrative demands. John X. Merriman, the Cape Colony’s Prime Minister who visited the Transvaal in 1894, thought the republic was “badly governed and full of grievance and discontent.”⁵¹ According to G.D Scholtz it was one of the tragedies of the Afrikaner that when gold was found, and they had the chance “om ‘n stewige ekonomiese en materiële bodem te verkry vir ‘n bloeiende en veelsydige lewe ... die Afrikaner alles – die kennis, kunde, ervaring en vermoë – ontbreek het om dit behoorlik te benut.”⁵²

The inhabitants were suddenly confronted with both intellectual and industrial lifestyles they had been ignorant of, especially in the areas where gold was discovered.⁵³ Some farmers sold their farms and rode transport to gain a meagre income. For those who had farms suitable for crops, the gold fields created a new market for their products.⁵⁴ Some burghers, especially the poorer ones, moved

⁴⁶ H. Giliomee, *The Afrikaners*, p. 12; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 22, 340; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 23. In July 1896 a census of inhabitants within a three mile radius put the white population at 50,907. 6,205 of these were born in the Transvaal. J.S. Marais, *The fall of Kruger’s republic*, p. 1.

⁴⁷ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 22.

⁴⁸ P. Delius, Abel Erasmus: Power and profit in the Eastern Transvaal, in W. Beinard et al (eds.), *Putting a plough to the ground*, p. 192.

⁴⁹ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 22, 335.

⁵⁰ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 260.

⁵¹ P. Lewsen, *John X. Merriman*, p. 172. E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 219.

⁵² G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 50, 335, 351. Translation: ‘to establish a solid economic and material base for a prosperous and versatile life, the Afrikaner lacked everything – the knowledge, skill, experience and ability – to utilise it properly.’

⁵³ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 335.

⁵⁴ J.E.H. Grobler, *Uitdaging en antwoord*, pp. 76, 87.

to urban areas, but most remained in rural areas. The Afrikaners were never part of large-scale urbanisation in the nineteenth century.⁵⁵

Prior to the discovery of gold, the government and legal system were representative of the white population: predominantly Afrikaner, mostly rural, and relatively ignorant of the rest of the world. This same government and legal system now had to serve not only the older, mostly Afrikaner-Boer population, but also the British newcomers, and the growing Uitlander population. The government and legal system, which had been conceived to serve a relatively homogenous rural population, now had to be used to serve a dynamic, heterogeneous population consisting of people from a broad spectra of society: rural and urban; Boer and Brit; farmer and businessman; Christian and worldly.

The legal system's response to these inherent contradictions forced the judiciary to undergo a metamorphosis, as it addressed the socio-economic changes brought about by the discovery of gold. The effects on the legal system were felt first in Pretoria, before spreading to the rest of the Transvaal.

With a few exceptions, the new immigrants who descended on the gold-fields in their thousands did not intend to make the Transvaal their permanent home. Kruger and the government had no choice initially but to tolerate them, but as the newcomers had no real ties to the Transvaal Afrikaners, Kruger viewed them as a possible threat, and treated them accordingly. He extended the franchise qualification from one to fourteen years, effectively blocking the new immigrants from having any political power.⁵⁶

In the last few years of the nineteenth century, control over the gold fields and Uitlander non-representation in government led to growing tension, culminating in the Jameson-raid in 1895 and the outbreak of the Anglo-Boer War in 1899.

5. The inhabitants of the Transvaal

After the Great Trek of the 1830s, a new, white, predominantly Dutch-speaking community was created. This community lived very isolated lives, for numerous reasons. The Transvaal was spread over a large area, and the white people living in it very few. Sources put the figure at around 15 000 in 1852 and 30 000 in 1872, which is a very low number for the large area occupied by whites. The

⁵⁵ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 94; J.E.H. Grobler, *Uitdaging en antwoord*, p. 87.

⁵⁶ H. Giliomee, *The Afrikaners*, p. 238.

country was geographically diverse, climate differed sharply from region to region, and its many mountain ranges with no easily accessible passes made travelling difficult.⁵⁷

The inhabitants can roughly be divided into two groups: rural and urban. For the most part, Afrikaners lived on farms, with a small minority in small towns, together with some English. Afrikaner groups differed in certain respects, but essentially, at least in the first years after white settlement, and also before the annexation and the discovery of gold, they came from more or less the same background.

In 1860 the Transvaal had nine towns of note - Potchefstroom, Pretoria, Zoutpansberg or Schoemansdal, Andries-Origstad, Lydenburg, Klerksdorp, Krugerspost, Rustenburg and Utrecht. This number multiplied rapidly after the discovery of gold.⁵⁸ Towns were mostly locations for one or other denomination of the DRC, and apart from *Nagmaal* (Holy Communion) the only interactions between towns and farms in the early days occurred when a burgher needed to do business.⁵⁹ As the century progressed, towns also became stops for the circuit court of the High Court.

Even contemporaries commented on the fact that nineteenth century Transvalers lived in extreme isolation. Fitzpatrick mentions that “[w]hen one thinks on the one-century history of the people, much is seen that accounts for their extraordinary love of isolation, and their ingrained and passionate aversion to control ...”⁶⁰ From the beginning of the Great Trek, around 1836,⁶¹ until 1852, when a central government was established, there was no strong or consistent state control over the Trekkers. Furthermore, the white inhabitants were thinly spread.⁶² F. Wilson states that “[t]hree thousand morgen was taken to be the standard size [for a farm] throughout South Africa during the nineteenth century ... The fact that farms were so large meant that people were extremely isolated from community life.”⁶³ The geography not only determined widespread settlement, but also

⁵⁷ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, pp. 137, 141; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 22; H. Giliomee, *The Afrikaners*, p. 187; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, pp. 76, 427; D. Welsh, The growth of towns, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 172.

⁵⁸ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, p. 141.

⁵⁹ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, p. 319; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 68.

⁶⁰ J.P. Fitzpatrick, *The Transvaal from within. A private record of public affairs*, p. 2.

⁶¹ And, for some, much earlier. Many were Trekboers and had moved around the Cape Colony long before the Great Trek.

⁶² Sources put the amount of whites in the area at 15000 in 1852, and 30 000 in 1872, which is a very low number for the area it covered.

⁶³ F. Wilson, *Farming, 1866-1966* in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 106.

hampered basic communication: the first newspaper was only printed in 1857, and a postage system only developed in the 1870s.⁶⁴

Amongst others, the effects of isolation cut them off from events in Europe and the outside world, as well as from the markets in the Cape Colony and Natal. Lack of marketable commodities severely hampered economic growth.⁶⁵ All inhabitants were either farmers, or in some way connected to farming (especially the Afrikaners, hence the name Boers). Because they lived in physical isolation, little trade developed, which forced them to be almost completely self-sufficient.⁶⁶

Farmers were not necessarily poor. Indeed, many of the individual Boers were well-off.⁶⁷ S. Trapido reckons that in “the two decades between 1850 and 1870 the burghers of the Transvaal were relatively prosperous and one should not equate the condition of the state’s finances with those of the citizens ...”⁶⁸ The reason for this is that during “the Great Trek of 1834-8 ... its leaders emerged from the wealthiest of the migrants.”⁶⁹ On the other hand, Trapido mentions that “[a]lthough the subdivision of land and the diminution of game may have left many to eke out a precarious livelihood, it is probable that many burghers never owned land at any time.”⁷⁰

As regards the different socio-economic classes, S. Marks and Trapido write that

[t]he social geography of the north, as others have described, fell into three broad groupings: the landed notables, those with tenuous land

⁶⁴ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, pp. 137, 141; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 22; H. Giliomee, *The Afrikaners*, pp. 179, 187; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, pp. 29, 427; C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 293, 314; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 31, 163; W.J. de Klerk, *Die Afrikaner se erfenis I*, in *Die Waardes van die Afrikaner*, p. 105.

⁶⁵ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, pp. 137, 141; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 22; H. Giliomee, *The Afrikaners*, pp. 179, 187; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, pp. 29, 427; C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 293, 314; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 31, 163; W.J. de Klerk, *Die Afrikaner se erfenis I*, in *Die Waardes van die Afrikaner*, p. 105.

⁶⁶ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 293, 309, 320; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 49; J.E.H. Grobler, *Uitdaging en antwoord*, p. 76; W.J. de Klerk, *Die Afrikaner se erfenis I*, in *Die Waardes van die Afrikaner*, p. 105; J. Kotzé, *Biographical memoirs and reminiscences*, p. 263; H. Giliomee, *The Afrikaners*, p. 189.

⁶⁷ J. Kotzé, *Biographical memoirs and reminiscences*, p. 342.

⁶⁸ S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 356.

⁶⁹ S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 352.

⁷⁰ S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 359.

rights and the entirely landless. The processes underlying this stratification ... involved a combination of rising land prices, inheritance law and natural disaster. Land prices had risen sharply after the intrusion of mines into the Transvaal and the notables made good these speculative opportunities because of their hold on key government posts. Through this concentration of land, wealthy farmers swallowed up numerous 'dwarf-proprietors of oft-divided land', who then became *bywoners*, a term which covered a multitude of social relationships.⁷¹

S. Marais remarks that towards the end of the century "[i]n order to find land for their children many Boers subdivided their farms, often leading to impoverishment. In the nineties landlessness became increasingly manifest. The later nineties were a particularly unhappy period for the farming population. Locusts, drought, and above all rinderpest, visited the land together."⁷² With all these problems, and the influx of immigrants with the discovery of gold and the political and economic changes that occurred with it, the greatest part of the Transvaal still did not evolve past a rural culture before 1899.⁷³

A cornerstone of the Afrikaner society was religion, and almost all the sources agree that it influenced their lives in different ways.⁷⁴ Kotzé remarked in his *Memoirs* that the Boers "remained true to the teaching of their Bible. This, more than anything else, sustained them in their manifold trials, as well as maintained a sound morality amongst them."⁷⁵ F.J.M. Potgieter reiterated this when he said that the "Statebybel is sonder twyfel die kosbaarste erfskat van die Afrikanervolk. Dit was van meet af aan die rigsnoer vir leer en lewe van [hulle] voorgeslagte."⁷⁶

The guiding principle of the DRC was conservatism. F. Morton describes the Afrikaners as a "community led by men who eschewed alcohol, earned their followings within religious sects of the DRC, built personal networks through marriage alliances, and amassed wealth by virtue of holding

⁷¹ I. Hofmeyr, Building a nation from words: Afrikaner language, literature and ethnic identity, 1902-1924, in S. Marks & S. Trapido, *The politics of race, class and nationalism in twentieth-century South Africa*, p. 99.

⁷² S. Marais, *The fall of Kruger's republic*, p. 5. The great majority of the 6205 Transvalers enumerated in Johannesburg in 1897 were landless and impoverished Boers.

⁷³ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 94; J.E.H. Grobler, *Uitdaging en antwoord*, p. 87.

⁷⁴ Much can be said about the religion of the Transvalers, and there are doubts on how pure it really was.

⁷⁵ J. Kotzé, *Biographical memoirs and reminiscences*, p. 263.

⁷⁶ F.J.M. Potgieter, Die Afrikaner se erfenis II, in *Die Waardes van die Afrikaner*, p. 98. Translation: 'The Dutch bible is without doubt the most precious cultural legacy of the Afrikaner. It was from the beginning the directing principle for the learning and life of their forebears.'

office.”⁷⁷ The Bible made the father the patriarch and gave him authority over his wife, children, and workers/slaves.⁷⁸ It did not, however, mean that he dominated them. Life on the farms were difficult and dangerous, and for it to work marriage was almost imperative. This, together with the fact that couples married as young as at fourteen years, meant that marriage had to be a partnership among families as well as couples, not only for survival, but to exist successfully.⁷⁹ This suggests that divorce, although it was possible, would have been a serious decision, with far-reaching ramifications, especially for farmers.

Residents on the farms were usually a large single family and a few *bywoners*. Farms were fairly independent units, catering largely for themselves. The ‘roles’ resulting from this are, almost automatically, gender related. Men did the public, outside work, like handling the livestock, tending the crops, and mending wagons. Women worked in the privacy of the house, mending clothes, raising children and supervising the servants.⁸⁰

In the pioneer society of the Transvaal, education was a luxury. Children were taught basic literacy by their mothers, and her educational tool was the family Bible. The Voortrekkers did not take many books with them on their Trek, and since the adults themselves usually had no more than basic education, they could not supply their children with more.⁸¹ Their lack of education stifled among Boers any wishes to cease their lives of farming. They felt comfortable on the farms, and the practical skills they learnt on the farms, which, apart from the farming skills, also included basic skills like masonry and carpentry, were so specialized that it qualified them for only one thing – farming.⁸² From childhood they were brought up to farm, and without an education, they had no viable options.⁸³ Secondly, lack of education shaped the Boers’ character. Everyone spoke the same language and shared a belief in the same form of Calvinist Protestantism.⁸⁴

⁷⁷ F. Morton, Female inboekeling in the South African Republic 1850-1880, *Slavery and Abolition* 26(2), Aug 2005, p. 212.

⁷⁸ A somewhat more detailed description of the black workers on the farms follows later.

⁷⁹ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 314-316, 320; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 49; H.B Thom, Ons historiese vorming, in *Die Waardes van die Afrikaner*, p. 35.

⁸⁰ C. Jeppe, *The kaleidoscopic Transvaal*, p. 79; J. Kotzé, *Biographical memoirs and reminiscences*, pp. 267-268; H. Giliomee, *The Afrikaners*, p. 190. C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 298, 318-319, 325, 337; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 49.

⁸¹ C. Jeppe, *The kaleidoscopic Transvaal*, p. 77; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 108; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 103.

⁸² A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 49. The gender insensitivity of Pelzer is obvious: he uses masculine skills as the norm.

⁸³ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, pp. 315-316, 325.

⁸⁴ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 50; C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, p. 74.

The end of the nineteenth century was the time of Industrialization, Imperialism and Darwinism, leading to much scientific progress in the rest of the world. Steam engines and electricity became everyday things. C. Jeppe remarks that of these developments, the Boers remained “ignorant, pitifully ignorant.”⁸⁵ [emphasis in original]

When looking at some of the sources on white Transvalers, interesting contradictions arise. Jeppe wrote, somewhat romantically, that “modest and unpretentious was the setting, so were the people that lived in it. There were no ... cliques, no struggle for wealth or social distinction in those halcyon days ... Life was simple and unassuming. No attempt was made to keep up appearances, no endeavour to outshine one’s neighbours.”⁸⁶ Other sources reinforce Jeppe’s view of Boer farm life as simple and frugal. Commentators as diverse as Kotzé and Giliomee have remarked on the generous hospitality of the Afrikaner-Boers.⁸⁷ Writers have stressed their common sense, courage, individualism and independence.⁸⁸ A traveller to the Transvaal in the 1890s, F. Younghusband remarked on their “marvellous powers of endurance”, and the fact that they were self-reliant, peace-loving, large-hearted and genial.⁸⁹

In contrast, S. Marais describes them as “[r]ugged individualists owing to the isolation in which they had grown up, prone to violent political partisanship, unschooled, and suspicious of the innovations deemed necessary by the president, they required skilful handling.”⁹⁰ Younghusband wrote that “shirking the competition of modern life, the frontiersmen had become indolent and devoid of any ambition beyond retaining their independence on their farms. They were deficient in honesty and veracity, ignorant [and] unprogressive ...”⁹¹ In 1885, Leyds said that the “volk is not honest, but I must concede that it is clever ... The national characteristic appears to be cunning dishonesty or dishonest cunning. In my stay here I have been warned, not least by the farmers: ‘trust no one – lies, duplicity and egotism are practised by everyone.’”⁹²

⁸⁵ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 335; C. Jeppe, *The kaleidoscopic Transvaal*, p. 76.

⁸⁶ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 50; C. Jeppe, *The kaleidoscopic Transvaal*, pp. 7, 12.

⁸⁷ J. Kotzé, *Biographical memoirs and reminiscences*, pp. 267-268; C. Jeppe, *The kaleidoscopic Transvaal*, p. 78; C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, p. 316; H. Giliomee, *The Afrikaners*, p. 189.

⁸⁸ C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, p. 293; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 49, 53; J.E.H. Grobler, *Uitdaging en antwoord*, p. 76; W.J. de Klerk, *Die Afrikaner se erfenis I*, in *Die Waardes van die Afrikaner*, p. 105; J. Kotzé, *Biographical memoirs and reminiscences*, p. 263; H. Giliomee, *The Afrikaners*, p. 189.

⁸⁹ H. Giliomee, *The Afrikaners*, p. 189.

⁹⁰ S. Marais, *The fall of Kruger’s republic*, p. 6.

⁹¹ H. Giliomee, *The Afrikaners*, p. 189.

⁹² H. Giliomee, *The Afrikaners*, p. 190. Meaning the Afrikaners, ‘volk’ was also a favoured word of Paul Kruger.

Noticeable is the gender-neutral or male-focused nature of these comments, which illustrate the gender unawareness of these commentators. Pertinent to these comments is not necessarily what the contradictions in them mean, but what the contradiction in itself signifies. Moreover, although a homogenous nation in general, assuming that Transvalers were the same in character and behaviour would be inaccurate and untrue.

One characteristic of the Transvaal Boers that most sources appear to agree on is their unwillingness to cooperate, both with the state and with each other. Van Zyl mentions that “[d]ie grootste faktor wat tot die Transvaalse Afrikaners se passiwiteit bygedra het, was ongetwyfeld gebrek aan samehorigheid en ‘n nasionale besef. Die geskiedenis van die Blankes noord van die Vaalrivier toon van die vroegste tye af tot in 1877 voortdurend tekens van tweespalt en tweedrag.”⁹³ Since the Transvaal was spread over such a large area, and there was an early lack of self-government, it hampered initial unity, and led to group forming.⁹⁴ The groups were divided according to region. Around 1849, one main group was settled around Potchefstroom in the south-west and central areas, another around Andries-Origstad in the north-east, and a third around Zoutpansberg (Schoemansdal) in the north. Pelzer suggests that “die vraag is reeds gestel en op die een of ander manier beantwoord, of die verdeeldheid wat in die ou Transvaal voorgekom het, aan die bestaan van afsonderlike partye moet toegeskryf word. Dat dit wel die geval was ly geen twyfel nie.”⁹⁵ The conflict between the different groups became so intense that it eventually led to a civil war in 1863/64.⁹⁶

It was their individualism that made cooperation so difficult. They believed they could do things better than others, and did not see the need to work together. Moreover, they put their family and farm’s welfare before that of the state: “Family obligations took precedence over other commitments.”⁹⁷ The annexation of 1877 temporarily broke this pattern by providing them with a common goal, thus making unity possible.

⁹³ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 16. Translation: ‘The biggest factor that contributed to the Transvaal Afrikaners’ passivity, was without a doubt a lack of cohesion and national consciousness. The history of the Whites north of the Vaal River shows from the earliest times to 1877 throughout signs of discord and dissension.’

⁹⁴ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 29.

⁹⁵ J.S. Bergh (red.), *Geskiedenisatlas van Suid-Afrika*, p. 133; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 29; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 333; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 66. Translation: ‘The question has been asked and answered in one way or the other, whether the division that existed in the old Transvaal, should be attributed to the existence of different groups. That this was the case, there is no doubt.’

⁹⁶ J.E.H. Grobler, *Uitdaging en antwoord*, pp. 77-78; H. Giliomee, *The Afrikaners*, p. 180.

⁹⁷ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 50-51; C.M. van den Heever & P. de V. Pienaar (reds.), *Kultuurgeskiedenis van die Afrikaner I*, p. 293; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 29; H. Giliomee, *The Afrikaners*, p. 190.

An interesting consequence of the in-fighting for this study is Pelzer's comment that people did not hesitate to take each other to court at the slightest provocation: "Die groot aantal hofsake oor klein en nietige sakies soos aanranding, laster, belediging, bedreiging, wanbetaling van skuld, ens. wat gedurende die vroegste jare voorgekom het, is voldoende bewys hiervoor."⁹⁸

The in-fighting did not cease in the later years of the Republic. In 1889 *De Volksstem* wrote an article on this, saying amongst other things, that "Pretoria is ... een broeinest van intrigues ... [en] ... het volk is ziek."⁹⁹ Members of the government were being attacked, the executive and the legislative were fighting one another, schisms erupted in the DRC, and some of the main families were suspicious of each other. The article concluded by saying: "Zoo groot is de naijver en de vervolgingswoede onder een deel van het publiek geworden dat bij sommigen de stem der vaderlandsliefde wordt overschreeuwd door de uitingen van partijhaat."¹⁰⁰

Their unwillingness to work with the State is commented on by many sources. Pelzer reckons that their stubbornness made it almost impossible for them to accept authority.¹⁰¹ J. Grobler writes that "wanneer dit gekom het by eiebelang ter verbetering van hulle ekonomiese posisie het talle Burgers nie getalm om bevele van die amptenare in hulle wyke, d.w.s die van die veldkornette en kommandante te ignoreer en die landswette te oortree nie."¹⁰² Giliomee reiterates: "There was a distinct unwillingness to cooperate with others in groups or organizations to improve their own economic fortunes and the social conditions of the region," and he adds that their lack of respect for the government meant that they also ignored call-ups for commando in the event of border wars.¹⁰³

A possible reason for their refusal to accept authority is that everyone wanted a share in government. Pelzer argues that the different groups were "niks anders as enersdenkende groepe sonder enige ideologiese verskille maar wat tot met mekaar wedywer en meeding oor die finale

⁹⁸ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 51. Translation: 'The large number of court cases over small and trifling matters like assault, slander, insult, threat, failure to pay debt, etc. that occurred during the earliest years, is sufficient proof of this.'

⁹⁹ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 333. Translation: 'Pretoria is ... a nest of intrigues ... and ... the volk is sick.'

¹⁰⁰ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 333. Translation: 'So great is the jealousy and persecution-anger amongst one part of the public that for some the voice of home-land love is drowned out by expressions of party hate.'

¹⁰¹ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 50.

¹⁰² J.E.H. Grobler, *Jan Viljoen (1812-1893). 'n Transvaalse wesgrenspionier*, M.A.-verhandeling, U.P., 1976, p. 151. Translation: 'when it came to self-interest for improvement of their economic position many Burgers did not hesitate to ignore the orders of the officials in their ward, i.e the veldcornetten and commandants and trespass against the country's laws.'

¹⁰³ H. Giliomee, *The Afrikaners*, pp. 179, 190.

gesag van die staat,” and that the volk, “aangevuur deur ‘n oordrewe demokratiese gevoel, medeverantwoordelikheid vir die landsbestuur wou aanvaar.”¹⁰⁴

Their refusal to pay (very small) taxes received regular comment.¹⁰⁵ The “onverskilligheid wat die landsburger in hierdie verband aan die dag gelê het, was skrikwekkend ...”¹⁰⁶ Their reluctance to pay tax clearly illustrates disdain for the government, and since the government had no other means of income, it weakened their economic position.¹⁰⁷ To illustrate how critical the state’s financial situation was, in 1875-76 the income of the Republic was £64 582 and the expenses £69 394.¹⁰⁸ With the treasury running a deficit, even with small costs, the government alone cannot be blamed for having been inefficient.¹⁰⁹

Holy Communion was the only opportunity for social interaction between different families in the early years. Families travelled for days to attend the three-monthly communion. These gatherings served many purposes. Communion was a chance to get married or to be christened, or, for young people, a chance to meet eligible partners. The men settled “much political and parochial” business, since it was their only real chance to gather news, from near and far, and to coordinate business.¹¹⁰

The people who lived in the Transvaal towns, not only Pretoria, were mostly English, with some Dutch and Germans.¹¹¹ Trapido mentions that “Transvaal dorps had a solid core of English businessmen.”¹¹² Nixon wrote that in the siege of Pretoria during the Anglo-Transvaal War “most of the inhabitants were either home-born [born in England] or English from the [Cape] colony; but there was a small sprinkling of Boers.”¹¹³ These comments show how rural the culture of the Afrikaners remained, and how English Pretoria remained in atmosphere, even until the end of the

¹⁰⁴ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 66, 53. Translation: ‘nothing other than like-minded groups without any ideological differences but who competed with each other on the final authority of the state,’ and “propelled by an exaggerated democratic feeling, wanted to accept co-responsibility for the management of the country.’

¹⁰⁵ J. Kotzé, *Biographical memoirs and reminiscences*, p. 343; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, pp. 54, 72; J.E.H. Grobler, *Jan Viljoen (1812-1893). ‘n Transvaalse wesgrenspionier*, M.A. -verhandeling, U.P., 1976, p. 151; H. Giliomee, *The Afrikaners*, p. 179.

¹⁰⁶ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 72.

¹⁰⁷ J.E.H. Grobler, *Jan Viljoen (1812-1893). ‘n Transvaalse wesgrenspionier*, M.A. -verhandeling, U.P., 1976, p. 151.

¹⁰⁸ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 502.

¹⁰⁹ J. Kotzé, *Biographical memoirs and reminiscences*, p. 342.

¹¹⁰ C. Jeppe, *The kaleidoscopic Transvaal*, p. 9.

¹¹¹ J. Kotzé, *Biographical memoirs and reminiscences*, p. 449.

¹¹² S. Trapido, Reflections on land, office and wealth in the South African Republic, 1850-1900, in S. Marks & A. Atmore (eds.), *Economy and society in pre-industrial South Africa*, p. 356.

¹¹³ J. Nixon, *The Complete Story of the Transvaal*, p. 182.

nineteenth century.¹¹⁴ Of course, the early predominance of non-Afrikaners in towns widened the social gap between the Afrikaner farmers and the town-dwellers.¹¹⁵

The fact that English was generally spoken, especially in the towns, raised some eyebrows. In *De Volksstem* in March 1895 an article asked the question: “Wat is eigenlijk de moedertaal der Transvalers, Hollandsch of Engels? Zoo zal menig vreemdeling die hier in’t land komt, vragen. Dan zal hij voorzeker van menig geboren Transvaler te antwoord krijgen: ‘Ik weet waarlijk niet, of liever: I don’t know.’”¹¹⁶ Mrs. Leyds, wife of the State-Secretary, mentioned this when she said of Pretoria that “hier nog veel Engelsche invloed is. Engelsch is de moedertaal en meer Engelsch-gezinden zijn hier dan wel noodig is ... Gewoonlijk wordt er Engelsch gesproken.”¹¹⁷

From its establishment as the capital in place of Potchefstroom in 1857,¹¹⁸ Pretoria played an important role in the history of the Transvaal. Most of the important political events took place here.¹¹⁹ Its establishment was due to its central geographical position, and it somewhat succeeded in moulding the widely spread, decentralised population into one group.¹²⁰ The development of a postal service helped the government to improve control of the distant wards, and helped to end the worst of the interior isolation.¹²¹

The annexation had a noticeable influence on life in Pretoria. Kotzé, who arrived in Pretoria in 1877, remarked about the town: “Life in Pretoria was simple and natural ... a smiling and happy community ... life in the capital of those days did not entirely consist of trading, speculating, amusement and sport. It also, as became a civilized and Christian community, had its spiritual side.”¹²² He further stated about the Pretorians that they were “well-disposed towards newcomers, and there were indeed several nice families of different nationalities.” After the annexation, “newcomers were constantly arriving to settle in town, both from different parts of the Transvaal and from outside its borders, so that population rapidly increased.”¹²³

¹¹⁴ A.C. van Wyk, *Jode in Transvaal tot 1910. 'n Kultuurhistoriese oorsig*, D.Phil.-proefskrif, U.P., 2003, p. 92.

¹¹⁵ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 68.

¹¹⁶ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 93. Translation: ‘What is actually the mother language of the Transvalers, Dutch or English? This question will be asked by many strangers that arrive here. Then he will definitely get the answer from many Transvalers: ‘I really don’t know (in Dutch), or rather, I don’t know (in English).’

¹¹⁷ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 94. Translation: ‘... here is a strong English influence. English is the mother language and more pro-English are here than is necessary ... Usually English is spoken.’

¹¹⁸ J.E.H. Grobler, *Uitdaging en antwoord*, p. 77.

¹¹⁹ H. Giliomee, *The Afrikaners*, p. 190.

¹²⁰ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 147.

¹²¹ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 166.

¹²² J. Kotzé, *Biographical memoirs and reminiscences*, pp. 446, 452.

¹²³ J. Kotzé, *Biographical memoirs and reminiscences*, pp. 449-450.

An important added advantage of the discovery of gold was that educated young Cape professionals migrated to the Transvaal, where work was easily available. They infused a new cultural and intellectual dimension in Pretoria. Since many were Afrikaners, they were also the first group of professional Afrikaners in the Transvaal.¹²⁴

Though the Witwatersrand is not the focal point of this study, a few comments on that area is in order. L. Thompson makes the point that

notwithstanding the administrative inefficiency and corruption, the concessions, the high living costs, and the other irritants that arose from the fact that the Witwatersrand lay in a previously backward and undeveloped country, the *uitlanders* were not an oppressed community and there was no spontaneous, widespread discontent among them. They had come freely to the Witwatersrand, where most of them made a better living than previously. Except for a normal proportion of malcontents, they would have taken the inconveniences in their stride ... Indeed, few of them cared to identify themselves permanently with the Transvaal by becoming *burgers*, and fewer still were really concerned about the franchise.¹²⁵

Thompson's view needs to be qualified, by D.H. Houghton's point that "[t]he foreign miners, with a variety of international experience behind them, found the Transvaal administration inefficient, obscurantist, and sometimes corrupt, and some resented the franchise laws which precluded the majority of them from participation in the government of the country."¹²⁶

In the context of this study, the position of blacks is mainly important for the roles they played as members of white households, especially on farms.¹²⁷ In Morton's article on the female *inboekeling*, he mentions that "the service of girl slaves was restricted as a rule to the home, where they did the 'female' chores: laundry, housecleaning, cooking, childcare and knitting, among other chores."¹²⁸ They remained in this situation until they were old

¹²⁴ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 341.

¹²⁵ L. Thompson, Great Britain and the Afrikaner Republics, 1870-1899, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 310.

¹²⁶ D.H. Houghton, Economic development, 1865-1965, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 14.

¹²⁷ For a study of African chiefdoms in the Transvaal, see L. Thompson, The subjection of the African chiefdoms, 1870-1898, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, pp. 281-283. As members of chiefdoms threatening white establishments they were also important, but that is not relevant in this study.

¹²⁸ F. Morton, Female *inboekeling* in the South African Republic 1850-1880, *Slavery and Abolition* 26(2), Aug 2005, p. 202. Morton's article deals in a detailed manner with black female slaves.

enough to be married, when they “appear to have been married off to slaves and allowed to live with them ... though the *ex-inboekeling* family, including the children, remained in quasi-service to their masters.”¹²⁹

A final, albeit inadvertent, impact they had is on how the white Transvalers defined themselves in relation to blacks. The Grondwet of 1858 explicitly positioned them as inferior, and the ‘whiteness’ of Transvalers reinforced their feelings of superiority and paternalism.¹³⁰

In the Transvaal with its different socio-ethnic groups, social collisions were unavoidable, and a brief look at the different groups’ perceptions of one another is illuminating. R. First and A. Scott summarize these perceptions of nineteenth century South Africa: “Race and cultural prejudice were all-pervasive: English-speaking South Africans were contemptuous of Afrikaners; all Whites despised all Blacks.”¹³¹ Of course, it was slightly more complex than that. With regards to interactions between blacks and whites, A. Trollope wrote: “These Kafirs [sic] at Pretoria, and through all those parts of the Transvaal which I visited, are an imported population, – the Dutch [meaning Afrikaners] having made the land too hot to hold them as residents. The Dutch hated them, and they certainly have learned to hate the Dutch in return. Now they will come and settle themselves in Pretoria for a short time and be good humoured and occasionally serviceable.”¹³²

The British attitude towards the Afrikaners was clearly condescending. Nixon remarked that in the period leading up to the Anglo-Transvaal War “there was great excitement in Pretoria. The inhabitants of the capital were English in their sympathies, and the new inhabitants who had come into town since the annexation had no fellow-feeling with the Boers.”¹³³ Marais mentions “[a]nother noteworthy characteristic of the British community in the republic was its apparent eagerness to display its political loyalty to Britain.”¹³⁴ Marks and Trapido mention ‘scientific racism’, a term coined in the twentieth century term, which in the nineteenth century

was simply assumed in the everyday discourse of domination. It suffused a developing English-speaking South African identity, which assumed the British ‘racial’ superiority and imperial mission and which produced a certain ambiguity

¹²⁹ F. Morton, Female inboekeling in the South African Republic 1850-1880, *Slavery and Abolition* 26(2), Aug 2005, pp. 200, 211.

¹³⁰ F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*.

¹³¹ R. First & A. Scott, *Olive Schreiner. A biography*, p. 23.

¹³² A. Trollope, *South Africa II*, p. 49.

¹³³ J. Nixon, *The complete story of the Transvaal*, p. 121.

¹³⁴ J.S. Marais, *The fall of Kruger's republic*, pp. 59-60.

in the relationship between the settlers themselves. As the century wore on there was a growing tendency to see the non-English settlers, who were contemptuously referred to as 'Boers', as members of an 'inferior race'.¹³⁵

On the Transvalers' side, Thompson notes that

history had created a cleavage between white South Africans. Having been isolated from Europe for several generations and having adopted a distinctive rural mode of life and developed a new language, Afrikaners were conscious of being a separate people, rooted exclusively in South Africa; while the British community, newer to the country and replenished by fresh recruits from Great Britain, tended to despise Afrikaners and to look to London for protection against them as well as against Africans ... [I]n the republics, the dominant sentiment was uncompromising aversion to British authority. Finally, the republics were themselves too fissiparous, too weak, and economically too backward to command the allegiance of colonial Afrikaners.¹³⁶

In terms of the relations between Afrikaners and 'Uitlanders', Marais observes that the

immigrants brought in by the new industry came to the part of South Africa where they were least assimilable to the existing population: for the South African Republic was the most backward state in the land. Its white inhabitants – the Boers – were mainly cattle graziers owning large ranches, as their ancestors had done before them for generations ... The new immigrants were largely urban in their outlook and habits. In addition they were mainly British: and fighting *rooinekke* was becoming almost as much a part of the Boer tradition up north as fighting 'Kaffirs'.¹³⁷

Thompson adds: "The cultural gulf between the urban, individualistic, and materialistic *uitlander* community and the rural, socially integrated, and Calvinistic *burgher* community was deep and the problem of accommodation extremely difficult."¹³⁸ Noteworthy in these comments is a clear gender insensitivity that shines through.

Another interesting area of interaction was between the Afrikaners and the Hollanders. To make up for the lack of an educated class, both President Burgers and President Kruger brought in people from the Netherlands to fill important positions. They hoped that these men would help them control the Republic, and also help to lift the economy. The Hollanders had an important (and

¹³⁵ S. Marks & S. Trapido, *The politics of race, class and nationalism in twentieth-century South Africa*, p. 7.

¹³⁶ L. Thompson, The subjection of the African chiefdoms, 1870-1898, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 247.

¹³⁷ S. Marais, *The fall of Kruger's republic*, p. 4.

¹³⁸ L. Thompson, Great Britain and the Afrikaner Republics, 1870-1899, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, p. 309.

underestimated) impact on Transvaal political, economic, religious and educational life.¹³⁹ It is reckoned that at the end of the century there was between five and six thousand Hollanders living in the Transvaal.¹⁴⁰ Marais remarks that “[t]he Afrikaner immigrants, as well as a large group among the Boers, resented the appointment of so many Hollanders as public servants and teachers.”¹⁴¹ In some cases this was unavoidable, as in education, where the Transvaal was unable to supply its own teachers, and thus had to bring some in from the Netherlands.¹⁴² Kotzé also picked up on this, and wrote in a letter that he thought one of the causes of the conflict among the Afrikaners were “den invloed van de ‘mijnheertjies’ van het vasteland ... Paul Kruger is voor ons en het land onmisbaar en ik ben bereid voor goed onder en met hem samen te werken, maar hij moet andere raadsmanen hebben dan hij tot nu toe heeft gehad – raadsmanen van Afrikaander hart en bloed die hem getrouw zullen bijstaan.”¹⁴³

The Transvaal as settler community went through many different changes in the period between 1877 and 1899. It was a country where many different cultures were meshed into one. The Transvaal’s kaleidoscopic face was due to the fact that the Transvaal was many different worlds: rural, urban, colonial, imperial, and settler.

6. Conclusion

This chapter creates a socio-political and economic backdrop for the period which allows one to identify areas where women could have performed, or on the contrasting side, areas where they were conspicuously absent. Various deductions can be made when one considers the significance of this for the legal context.

The political role players were all men, and probably did not spend too much time contemplating women’s legal or political position, since they had other important things on their minds: financial crises, external threats, the *uitlanders*, and running a country they were not practically equipped to run. This did not change much in the few years that the British were in charge, since, for example, Shepstone clearly was not a much more able leader than Kruger.

¹³⁹ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 341-342; J. Ploeger, *Die Nederlanders in Transvaal*, p. 18.

¹⁴⁰ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 347.

¹⁴¹ S. Marais, *The fall of Kruger’s republic*, p. 15.

¹⁴² G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, pp. 110, 329; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 37.

¹⁴³ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 345. Translation: ‘the influence of the ‘sirs’ of the mainland ... Paul Kruger is unmissable for us and our country and I am willing to work under and with him for good, but he must have other officials that the ones he’s had until now – officials of Afrikaner heart and blood who will support him faithfully.’

The annexation of 1877 had an overall stabilizing impact on the country, which will become apparent also in terms of the Transvaal's legal system. Prosperity followed with annexation, as it did even more after the discovery of gold in 1886. How universal this prosperity was is not clear. There were different classes in society, and it is probable that the poorer section of society did not benefit. What this translates to in terms of the practicalities and the legal aspect of this study is that financial and economic considerations probably played an important role in any decision to go to court, not to mention being able to go to court, and while more money meant a larger use of the legal system, a lack of money in specific cases meant the opposite.

The lack of large-scale urbanisation together with the discovery of gold is significant, because as with financial issues, accessibility to the courts certainly influenced their utilization. In chapter 4 the existence of a circuit court will be mentioned, and court cases make it clear that residents near to where the court sat (in such urban centres as Pretoria, Rustenburg and Potchefstroom) frequented the courts more often.

The lack of education and general ignorance produced in the character of the white Transvalers, especially the Boers, an isolationist streak, a strong religiosity, and the tendency to become mutually dependent on each other on a micro-scale. In terms of marriage, and by extension divorce cases, the importance of family, especially in rural areas, probably accounts for the very few cases of child custody found. It seems clear that few opportunities to marry were available, as the population was thinly spread over large areas, especially until 1886, and may have also limited rural women's options for divorce, if desired.

Also clear is the difference between urban and rural Transvaal, and what is said above about the rural probably applies less to the urban. Accessibility, especially in Pretoria, made the use of courts easier. Since town populations were denser, greater opportunity for scandal was present. Some evidence shows that the Transvalers were uncooperative when it came to accepting authority, and there was considerable in-fighting, although it probably lessened after the Anglo-Transvaal War. Pelzer's comments on the number of small court cases testify to this, and also show that the inhabitants were not, at least in some cases, afraid to use the legal system.

The conclusions drawn here are tentative ones, and this backdrop must now be positioned on the rest of the legal stage, which will be constructed with legal building blocks in the following chapters.

IV. THE DEVELOPMENT OF THE LEGAL SYSTEMS OF THE TRANSVAAL 1844-1899

1. Introduction

There are two dimensions relevant to my construction of a legal stage for women in Transvaal history. One is an analysis of laws to determine the legal position of women, which will be done in chapter 5. First, however, the focus of this chapter is to provide a context in which to understand the larger, legal history of the Transvaal. Of importance here are the clues as to the accessibility to and effectiveness of the courts, and the courts' attitude to the state, to people overall, and some indication as to their awareness of women.

The history of law in South Africa can be traced back to 4 March 1621, when the *Heeren XVII* stated that the law to be applied within the territories governed by them would be that of the Province of Holland. At that point, it was the most influential province in the Netherlands in terms of its legal system.¹ The law that applied came to be known as Roman-Dutch law. Thirty years later the Cape Colony would be included in these territories, and thus the law would also apply there. Roman-Dutch law has a long and detailed history. It started with the development of the legal system in the Roman Empire, and found its way, mainly through the works of many scholars, into the Netherlands. The term Roman-Dutch law was first used by Dutch jurist Simon van Leeuwen in 1652, and he gave a name to the end result of the 'momentous processes' of the reception of Roman law into the customary law of the Netherlands.²

The history of Roman-Dutch law in South Africa is a mixture of many factors: the law as it was interpreted by scholars of Roman-Dutch law; the law as it was used in the Cape Colony; the influence of that region on the Transvaal; the ways in which it was altered by the

¹ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, pp. 38-39; H.R. Hahlo, *The South African law of husband and wife*, p. 11. The *Heeren XVII* was the Directorate of the VOC.

² P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 47. There are many sources that discuss this in detail, but for a fact-specific source that chronicles the history of the Roman-Dutch law, with specific reference to the South African context, see W.J. Hosten, *Introduction to South African law and legal theory*.

customs of the inhabitants of the Transvaal; and the ways in which it was altered by local legislation; in short, the interaction of the law with the changing conditions in South Africa.³

Law in South Africa has been described as “a Roman-Dutch (i.e. civilian) system, onto which an appreciable amount of English law has been grafted,”⁴ the significance of which warrants further investigation. Firstly, Roman-Dutch law was a civilian system. For most of the nineteenth century, the law was practised by civilians, who had to make sense of it without the benefit of legal experience. The fact that a lot of English law has been ‘grafted’ onto Roman-Dutch law will also be investigated, since the development of South Africa was very much influenced by the British Empire. The impact of English law on the legal systems of the Cape, and later on the Transvaal, then, is of crucial importance.

The distinctive character of law in South Africa “can be ascribed to the colonial transplantation of European law and the interaction of the latter with local conditions and indigenous laws.”⁵ S. Dubow agrees that the evolution of the law in the Cape in the seventeenth and eighteenth centuries “was notably marked by the dual inheritance of Dutch and English influences.”⁶ The intricacies of this ‘dual inheritance’ will be discussed later.

The settlement of law in the Transvaal, from its beginnings as a laymen system to the workings of the High Court at the end of the century will also be examined, with specific reference to the British annexation and its effect on jurisprudence in the Transvaal. The judges of the High Court will be briefly introduced. Also included in this analysis is the crisis over “testing-right” that dominated the legal landscape in the Transvaal in the last few years of the century.

³ C.G. van der Merwe & J.E. du Plessis (eds.), *Introduction to the law of South Africa*, p. 9; F. Mackarness, Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906, p. 39.

⁴ R. Zimmerman & D. Visser, Introduction, in R. Zimmerman & D. Visser (eds.), *Southern cross*, pp. 9-10.

⁵ C.G. van der Merwe & J.E. du Plessis (eds.), *Introduction to the law of South Africa*, p. 9.

⁶ S. Dubow, *A commonwealth of knowledge*, p. 145.

2. The Cape Colony from white settlement to the Great Trek

In the first years the legal system at the Cape was disorganized. Since Cape officials practised Roman-Dutch law as the common law of the Cape,⁷ ordinances from the States of Holland, (not aimed specifically at Holland, being mostly administrative in character) were recognized by the Cape government as law. The issuing of *placaaten* by the first commander Jan van Riebeeck and subsequent governors was the only other legislation in the early years.⁸ Van Riebeeck and his successors were merchants, not legislators, and they “demonstrated a certain lack of interest in societal regulation or improvement.”⁹ The superior court was named the *Raad van Justisie*, with inferior courts consisting of landdrosts (magistrates), and heemraden (persons who as part of tribunals or courts decided on minor cases).¹⁰

Most sources agree that at the time of the first British annexation of the Cape in 1795, the legal system at the Cape was in a bleak state. There was a lack of qualified lawyers; no precedent doctrine, which meant that reasons for decisions were not written down; no statute book; no instructions for landdrosts and heemraden; and in general Roman-Dutch law was not properly applied.¹¹ E. Fagan states that “the Cape of colonial settlement was not an orderly place.”¹² P. Maisel and L. Greenbaum concur: “[T]he situation regarding jurisprudence at the Cape was in a dismal state of confusion.”¹³ J.W. Wessels puts it bluntly: “[B]ehold the sorry state into which justice and its administration had fallen into at the Cape in 1795.”¹⁴ The confusion, the lack of interest in judicial matters, and the lack of legal skills meant that Roman-Dutch law did not change much in the first one hundred and fifty years

⁷ J.W. Wessels, *History of the Roman-Dutch law*, pp. 356-357.

⁸ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 40; H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 573. They also mention that “[i]mportant as they no doubt were in shaping the development of the colony, the Cape *placaaten* did not, it would seem, change the substantive law in any material respect.”

⁹ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 47.

¹⁰ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 57; H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 237. Maisel was Associate Professor at the University of Natal’s Law School, and Greenbaum a member of the University of Natal’s School of Law faculty.

¹¹ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 57; J.W. Wessels, *History of the Roman-Dutch law*, p. 359.

¹² E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 47. Fagan was a lecturer at the University of Cape Town, and a member of the Cape Bar.

¹³ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 57.

¹⁴ J.W. Wessels, *History of the Roman-Dutch law*, p. 359. Wessels was the Judge-President of the Transvaal Provincial Division of the Supreme Court.

that it was used at the Cape, but stayed essentially the same as the original Roman-Dutch law that was brought over from Holland.¹⁵

Since the policy of the British government was not to alter the legal institutions and laws of their conquered territories, Roman-Dutch law continued after the final annexation of the Cape by Britain in 1806.¹⁶ Fagan reckons, however, that although “the system of law in the Cape ... remained officially Roman-Dutch law ... it was always the intention ... [to] ... gradually ... introduce the English law.”¹⁷

At first, the changes to the law were minor. A criminal court of appeal was established in 1808, and a circuit court in 1811.¹⁸ The first Charter of Justice in 1827 clearly stated that Roman-Dutch law was to be applied in courts, and Roman-Dutch law was the official law of the Cape Colony throughout the nineteenth century.¹⁹ Provision was made, however, for legal proceedings in superior and inferior courts to be conducted in English.²⁰ The *Raad van Justisie* was replaced in 1828 by the Cape Supreme Court, consisting of legally qualified, full-time judges from Britain.²¹ In 1830 a magistrate’s court supplanted the old courts of landdrosts and heemraden. In the same year, the law of evidence was altered so that it followed the courts of Westminster and not Holland.²² Legal principles from Roman-Dutch law, therefore, had to be applied in courts that used English legal procedures and law rules.²³

The evolving of the legal system in the nineteenth century was a complex and unavoidable process. M. Chanock’s observation in this regard is illuminating: “The Roman-Dutch law appears in retrospect to have had a solid identity and existence, being a continuation of the

¹⁵ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 40; H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 574.

¹⁶ J.W. Wessels, *History of the Roman-Dutch law*, p. 362.

¹⁷ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 56.

¹⁸ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 58.

¹⁹ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 51.

²⁰ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 59; J.W. Wessels, *History of the Roman-Dutch law*, p. 363.

²¹ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, pp. 50-51; J.W. Wessels, *History of the Roman-Dutch law*, p. 365.

²² H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 237; J.W. Wessels, *History of the Roman-Dutch law*, p. 364.

²³ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 58.

common law in force at the Cape at the time of the second British occupation in 1806. But in reality during the nineteenth century it was but a shadow little known to the few judges whose task it was to enforce it.”²⁴ The use of English in courts, and the importing of English judges and legal practitioners were part of the influence of the English legal system and English common law on the practise of Roman-Dutch law in the Cape, and also in the Transvaal. These are some of the peculiarities of the legal system that were brought into the Transvaal by the first white inhabitants.

3. 1844-1877: Conception, consolidation and problems

When the Burgherraad of the Transvaal declared itself a sovereign Republic in 1844, it adopted 33 articles which set out the constitution of the new state. The articles reflect that no qualified legal practitioners were involved: they were unrefined with little discernible legal basis. Article 31, for example, stated vaguely that the *Hollandsche Wet* (Dutch law, only specified to mean Roman-Dutch law in 1858) was to be the law of the state.²⁵ The existence of a landdrost was implied, but until 1858 no “formal or explicit provision for the creation of courts of justice for dealing with the administration of the law was made.”²⁶ The articles regarding law were mostly occupied with how trials should be conducted and how and for what transgressors could be punished.²⁷ In the early years, pleadings tended to be emotional rather than judicial.²⁸

The Sand River Convention of 1852 made little difference to the legal system. The Volksraad was occupied with matters other than the legal system, which took a back seat. This initial trend of government’s indifference to the judiciary (except when the judiciary acted against them), lasted until late in the century. H. Corder points out: “The various administrations of justice ... suffered from one common disadvantage: a relatively low priority in the minds of

²⁴ M. Chanock, *The making of South African legal culture 1902-1936*, p. 157.

²⁵ J.W. Wessels, *History of the Roman-Dutch law*, p. 367; E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 54-55.

²⁶ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 162.

²⁷ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 295; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 1-6.

²⁸ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 298; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 17.

the political masters of the time. In other words, few resources in terms of staff, finances and buildings were allocated to the judicial branch of government.”²⁹

The lack of legal skills did not go by unnoticed. In 1854, C.J. Brand, future Speaker of the Cape’s House, asked the Chairman of the Volksraad: “Where is a trained lawyer to guard the interests of the new State in international relations and keep a watchful eye over proposed legislation? – There is none. And where is a trained bench, capable of deciding involved legal issues ... Again – none.”³⁰

With the adoption of the 1858 Grondwet, the legal picture improved slightly. Most crucial was the provision for the independence of the three legs of government: legislature, judiciary and executive.³¹ The Volksraad, as legislative body, legislated either by *wet* (law) or *besluit* (resolution).³² The Roman-Dutch law that was to be the basis of the judicial system was specified as based on three Roman-Dutch sources: *The Koopmans Handboek* by Joannes van der Linden as primary source, and secondarily *Introduction to Dutch Jurisprudence* by Hugo Grotius and *Commentaries on the Roman-Dutch law* by Simon van Leeuwen.³³ Somewhat confusingly, especially for the people who had to interpret the law, Roman-Dutch law as contained in Van der Linden was to be the common law, except if modified by the Grondwet or resolutions by the Volksraad, and as long as it did not contradict the 33 articles. To add to the confusion, in 1864 the Volksraad stated that Roman-Dutch law had to be interpreted according to South African usages.³⁴

From the outset there was unhappiness with the use of the Roman-Dutch books. The inhabitants did not want foreign laws, which they neither understood nor were familiar

²⁹ H. Corder, The judicial branch of government, in D.P. Visser (ed.), *Essays on the history of law*, p. 64. Corder is the Dean of the Faculty of Law at the University of Cape Town.

³⁰ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 300, 302. Interestingly, he also made mention of the fact that the Cape did not have enough lawyers to send out to the Transvaal, but that the Volksraad try to attract lawyers from Holland, something which Kruger did later in the century.

³¹ J. de Waal, Constitutional law, in C.G. van der Merwe & J.E. du Plessis (reds.), *Introduction to the law of South Africa*, p. 56.

³² F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 36; E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 302-303. Legislating by *besluit* at the end of the century lead to a crisis between the executive and the judiciary, this will be discussed towards the end of this chapter.

³³ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 307; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 56. In chapter 5 these three sources are discussed in more detail.

³⁴ J.W. Wessels, *History of the Roman-Dutch law*, p. 368.

with, to rule over them. In 1859 a petition to the Volksraad stated that “de Engelsche wetten noch toepasselijker zijn voor ons hier ... stellig in ons republiek [is daar] geen tien personen ... welke de Hollandsche wetten gestudeerd hebben.”³⁵ At a public meeting in Pretoria in 1860 a unanimous decision protested the use of the Dutch laws, and it was suggested that “eene commissie moet worden benoemd om eigen wetten te maken, tot goedkeuring en verbetering door het publiek.”³⁶ In the 1860s more petitions reached the Volksraad protesting the use of Roman-Dutch law, stating that the books were impossible to obtain, were not in character with the country, and that the primary source by Van der Linden was not even used in Holland anymore (which was true). The Volksraad’s response was that they were busy writing new laws, and told the public that, in the meantime, they could protest against individual laws they considered unsatisfactory. The Volksraad also asked that “de burgers meer ondersteuning zullen geven aan het bestuur en de opstellers van de wetten.”³⁷ These efforts of the Volksraad did not stop the complaints. Landdrosten complained in the 1870s that they could not understand the sources and especially the Latin phrases therein. A petition in 1872 begged the Volksraad “om de groote zee van Hollandsche wetten waaronder het geheele land verzopen is, te vernietig.”³⁸

From 1858 judicial power was vested in three different courts. The inferior courts functioned the same way as the Cape’s courts.³⁹ The lowest court was a district court presided over by a landdrost. There was one for each of the districts of the Transvaal. Field-Cornets, who had to maintain daily law and order in their districts, referred cases to the district courts if their mediation failed.⁴⁰ The second inferior court was almost like a district court of appeal. It was presided over by the landdrost and two to six (in 1873 fixed at six) heemraden, who were usually respected burghers from the community. This court had

³⁵ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, pp. 190-192. Translation: ‘the English laws are more relevant for us here...probably in our Republic there is not ten people...who have studied the Dutch laws.’

³⁶ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 222. Translation: ‘one commission should be set up to make its own laws, which had to be approved and amended by the public.’

³⁷ A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 222. Translation: “the burghers give more support to the management and the creators of the laws.’

³⁸ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 192; E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 310. Translation: “to destroy the big sea of Dutch laws in which the whole country was drowning.’

³⁹ J.W. Wessels, *History of the Roman-Dutch law*, p. 368.

⁴⁰ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, pp. 159-160; E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 301, 304, 309, 330; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 162.

jurisdiction in most cases.⁴¹ The *Hooge Gerechtshof* (High Court) consisted of three landdrosts and twelve jury members. This was mainly an appeal court, but in 1867 was given jurisdiction in criminal cases like murder and treason, and could hand out the death penalty, life imprisonment and banishment or transportation. The High Court acted as a circuit court that was required to visit each district twice a year, provided there were enough cases for them to sit on. As the highest court, its decision was final, although the President and his Executive Council could review its sentences.⁴²

In 1867 the duties for public prosecutors were outlined for the first time. The State Attorney was responsible for all prosecutions before the High Court. He also supervised the cases of the other public prosecutors and could refuse to prosecute a case due to insufficient evidence.⁴³ From 1874 lawyers had to be admitted to the Bar if they wished to appear in court, but people could still represent themselves.⁴⁴

Volksraadsresolutions tried to set a standard for legal proceedings. They set out procedures and regulations for the different courts, including the selection of juries, determining the order of events in criminal and civil cases, when appeal was possible, and listing the duties of the *baljuw* (bailiff) of the court. However, without a good understanding of the law, legal proceedings were not very sophisticated.⁴⁵ J.W. Kew remarks on one of the reasons why the legal training was so bad: “[A] Board of Examiners like that which existed during the days of the Republic, and of which three of its four members were locally qualified men while its chairman ... N.J.R. Swart [who] had no legal qualifications, could not be tolerated ...”⁴⁶ Provisions regarding landdrosten stipulated that they had to be over thirty years of age, possess immovable property, have been enfranchised for two years, were members of the DRC, were free from sentence, and, of course, had to be men. Neither lawyers nor

⁴¹ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, pp. 159-160; J.W. Wessels, *History of the Roman-Dutch law*, p. 368; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 162.

⁴² E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 300-309; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 56; M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 160; H. Corder, The judicial branch of government, in D.P. Visser (ed.), *Essays on the history of law*, p. 64; J.W. Wessels, *History of the Roman-Dutch law*, p. 368; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 162.

⁴³ The most notable State Attorney was E.J.P. Jorissen, who held that post before and during the time of annexation.

⁴⁴ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 306, 307; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 275, 541, 669.

⁴⁵ F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 105, 116, 121, 251.

⁴⁶ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 195.

landdrosten had legal training: “If the profession had little legal training, the bench had none. Landdrost[en] ... were laymen.”⁴⁷ The inadequate legal training is commented on, in fairly disparaging fashion, by several sources. Corder states that “the SAR suffered from untrained, often illiterate and apparently incompetent and corrupt legal officials.”⁴⁸ Chanock quotes M. Nathan who told of “Jorissen, the State Attorney and later a judge in the South African Republic, who was a clergyman who ‘bought a couple of Dutch law books which he read in train and coach on his way up North; and by the time he reached Pretoria he was fully qualified to become State Attorney.’”⁴⁹

According to Kew, by the 1870s, it was very evident that the legal system needed a change:

The courts of justice and the procedures for the administration of justice enacted in the Constitution of 1858 proved adequate during the early pioneer years of the South African Republic, although administrative procedures required amendment and expansion in those years. By the 1870s, however, it was becoming increasingly evident that the judiciary was in need of a comprehensive reorganization and overall reform. In 1875 *De Volksstem*, in calling attention to the need for constitutional reform and to grievances regarding the judiciary, referred to the judicial administration as ‘a farce upon justice’. The need for reform arose primarily as a result of the fact that despite the undoubted good character and sound common sense of many of the Landdrosts and Heemraden, they were invariably laymen who had received no legal education to equip them for their duties as judges. The entrusting of the administration of justice to untrained and unskilled hands, particularly in so far as it concerned the courts of appeal, was undoubtedly a weak point in the government of the early South African Republic.⁵⁰

President Burgers proposed a refurbishment of the judiciary, because he thought it would dissuade Shepstone from annexing the country. At a Volksraad meeting on 13 February 1877, he proposed several *bijlagen* (addenda) to the Grondwet. His new legal system would consist of a High Court of three judges, a circuit court of one judge, and landdrost courts for the lower cases in the districts. Since one of the reasons for the needed reforms was that the legal training of jurists was too low, he specified that the Chief Justice had to have a

⁴⁷ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 300, 301, 304, 309; H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 237; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 56.

⁴⁸ H. Corder, The judicial branch of government, in D.P. Visser (ed.), *Essays on the history of law*, p. 64.

⁴⁹ M. Chanock, *The making of South African legal culture 1902-1936*, p. 157.

⁵⁰ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, pp. 162-163.

Diploma of Doctor of Laws. After the Volksraad accepted his reforms, he offered the Chief Justiceship to J.G. Kotzé, a young advocate from the Cape Colony.⁵¹ While Kotzé was on his way to the Transvaal, however, and before any of Burger's reforms could show signs of change, the Transvaal was annexed by Great Britain on 12 April 1877.⁵²

4. 1877-1881: The influence of the British annexation

When he declared the annexation, Theophilus Shepstone stated the following with regard to the legislature:

... I proclaim further that all legal courts of justice now in existence for the trial of criminal or civil cases or questions are hereby continued and kept in full force and effect, and that all decrees, judgements, and sentences, rules and orders, lawfully made or issued, or to be made and issued by such courts shall be as good and valid as if this Proclamation had not been published; all civil obligations, all suits and actions, civil, penal, criminal, or mixed, and all criminal acts here committed which may have been incurred, commenced, done, or committed before the publication of this Proclamation, but which are not fully tried and determined, may be tried and determined by any such lawful courts, or by such others as it may be found hereafter necessary to establish for that purpose. And I further proclaim and make known that the Transvaal will remain a separate government, with its own laws and legislature, and that it is the wish of Her most gracious Majesty, that it shall enjoy the fullest legislative privileges compatible with the circumstances of the country and the intelligence of its people. That arrangements will be made by which the Dutch language will practically be as much the official language as the English; all laws, proclamations, and Government notices will be published in the Dutch language; and in the courts of law the same may be done at the option of the suitors to a cause. The laws now in force in the State will be retained until altered by competent legislative authority.⁵³

Shortly afterwards Shepstone issued a proclamation which officially set up a High Court of Justice. The basis of this court was effectively Burger's suggestion for the High Court. The wording in this proclamation, "het dienstig is onmiddellijke voorziening te maken in de

⁵¹ In chapter 3, the comments Kotzé made in his *Memoirs* helped form an impression of a masculine Transvaal.

⁵² E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 316; R. Peacock, *Die geskiedenis van Pretoria 1855-1902*, M.A.-verhandeling, U.P., 1955, pp. 100-101; M. Nathan, Paul Kruger. *His life and times*, p. 115; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 682; G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner III*, p. 192.

⁵³ Quoted in J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 219.

behoorlijke en krachtdadige administratie de Regts binnen het grondgebied der Transvaal ...”⁵⁴ shows the British administration’s lack of faith in the judiciary. The High Court had its seat in Pretoria, but its judge travelled around the region as a circuit court. It consisted of one judge, Kotzé, and had jurisdiction over all cases.⁵⁵ Criminal cases were presided over by a judge and heard by a jury of nine people, and civil cases were conducted in front of a judge alone.⁵⁶ All hearings were public. The High Court served as a court of appeal. The new High Court officially opened on 22 May 1877 in the Old Volksraad Hall on Church Square.⁵⁷

One of the early shortcomings of the High Court was that beyond it there was no possibility for appeal.⁵⁸ *De Volksstem* reported: “There can be no doubt that the practical suppression of almost all appeal is *the* great defect in the new arrangement. Such a system is repugnant to all judicial procedure and *must* be remedied with the least possible delay.”⁵⁹ [original emphasis]

The lower courts constituted a circuit court of one judge and the courts of landdrosten (known as magistrate courts under the British administration). The lower courts remained largely ineffective.⁶⁰ Corder remarks that “the calibre and jurisprudence of most of the *landdrosten* (who continued to preside over inferior courts), [and] *veldcornetten* (with jurisdiction over blacks) ... left much to be desired.”⁶¹

⁵⁴ F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 703. Translation: ‘it is prudent to immediately make provision for the establishment of a proper and forceful legal administration in the territory of the Transvaal.’

⁵⁵ A more in-depth discussion of the judges is made later in the chapter.

⁵⁶ Since none of the cases discussed in chapter 6 are criminal cases, there is no discussion of the jury system.

⁵⁷ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 397; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 703-706; J. Kotzé, *Biographical memoirs and reminiscences*, p. 430; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 177. Cases concerning the indigenous groups in the Transvaal were not included in the jurisdiction of this court, and provision was made for these cases in their own courts.

⁵⁸ M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 160; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, pp. 182-183.

⁵⁹ Quoted and translated by J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 182.

⁶⁰ J.W. Wessels, *History of the Roman-Dutch law*, p. 368; J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 163.

⁶¹ H. Corder, The judicial branch of government, in D.P. Visser (ed.), *Essays on the history of law*, p. 64.

For almost the entire period of British annexation, Kotzé remained the only judge, since Shepstone did not have enough money to appoint another one,⁶² and since the High Court was also a circuit court, the difficulties are clear:

While the judge was on leave, for instance, an acting appointment had to be made. Furthermore, a single-judge High Court inevitably led, on the one hand, to an over-centralization of judicial business at the capital and, on the other hand to the absence of anyone in Pretoria to attend to urgent matters when the court was on circuit. The deleterious effect of the latter on the smooth running of the judicial affairs of the country can be appreciated if one bears in mind that the High Court went on circuit half-yearly, and that each trip, the judge and his travelling party by bullock wagon, took the best part of two to three months.⁶³

As with the governments before 1877, the legal system received low priority from the British administration. Shepstone was away from Pretoria half of the time, and Colonel W.O. Lanyon, who replaced him in March 1879, had to deal with “growing Boer agitation against the annexation which prevented him, for some time, from giving adequate attention to the Transvaal judiciary.”⁶⁴

In March 1880 the High Court was finally enlarged to consist of three judges, a Chief Justice, and two puisne (ordinary) judges. Kotzé expected to become Chief Justice, but because he was perceived to be young, inexperienced and impulsive, that post went to J.P. de Wet, and Kotzé was made puisne judge. All the judges had the same powers and jurisdiction. If two judges sat on a case and they could not decide on a verdict, the Chief Justice had the deciding vote. Rider Haggard became the Master and Registrar of the Court.⁶⁵ This system stayed in place until the Pretoria Convention of 3 August 1881, which restored the Transvaal’s suzerainty.⁶⁶

⁶² M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 59.

⁶³ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 183; M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 160.

⁶⁴ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 196.

⁶⁵ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 379; M. Nathan, *Paul Kruger. His life and times*, pp. 129, 186; E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 309; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 742-743; M.C. van Zyl, *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*, p. 160. Haggard is more famous for his novels, notably *King Solomon’s Mines*.

⁶⁶ S.D. Girvin, The architects of the mixed legal system’ in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 115.

The annexation brought about important changes. It established a functioning High Court and stabilized the judiciary by “establish[ing] the framework for an effective and increasingly professional administration of justice.”⁶⁷ The British Colonial Secretary Lord Carnarvon authorized funds to supply the Transvaal with much-needed law books, which became the seeds of a law library. Kotzé and some of the other legal practitioners in the Transvaal added their own collections to this, Kotzé drew up regulations to govern the use of the books, and he “insisted that the library should be housed close to the courtroom in order to facilitate easy access and regular use by the legal profession, a practice he strongly encouraged.”⁶⁸ Kotzé was also instrumental in the introduction of pertinent legal reforms.⁶⁹

5. 1881-1899: The courts back under Volksraad control

After the Pretoria Convention the government confirmed the constitution of the High Court, which meant the judiciary remained essentially the same as under British control. Law no 3 of 1881 further confirmed it, and also stated that the circuit court had to be presided over by one judge, who had to sit twice a year, and cases from it could be appealed to the High Court. J.P de Wet retired in 1882, and was succeeded by Kotzé, who held the post of Chief Justice until 1897.⁷⁰

In the first years after 1881, the government made definite efforts to improve the legal system. State Attorney E.J.P Jorissen was ordered to review the rules of Court, and found that the connections between the different courts did not work satisfactorily. He advised the Volksraad that they should have better control over landdrosten and their verdicts.⁷¹ The qualification standards for members of the judiciary were also in the foreground. Kotzé and the Executive were “genuinely desirous of establishing a High Court which should command the respect of the country and of the world at large,”⁷² even if that meant making

⁶⁷ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 215.

⁶⁸ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 194.

⁶⁹ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 194.

⁷⁰ M. Nathan, Paul Kruger. *His life and times*, pp. 184, 186. F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 1028, 1178, 1180; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 400-401.

⁷¹ L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, pp. 188-190.

⁷² E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 181; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 399.

some enemies. Kew remarks that “[Kotzé], young and idealistic, apparently failed to appreciate the fact that standards applicable to the courts at Westminster, or even to those of the Cape Colony, could not as a matter of course be applied in the Transvaal without antagonizing colleagues with inferior qualifications who had a vested interest in judicial posts acquired during the less stringent days of the former Republican administration.”⁷³ However, he was “determined to take all the necessary steps to improve the general standard of the legal profession in the territory.”⁷⁴ To prove this point, Jorissen, who was not a graduate in law, was relieved of his post on the grounds that he was not a “gepromoveerde regsgeleerde”, and that he had “onvoldoende bevoegdhe.”⁷⁵ Although Jorissen was not as incompetent as Kotzé believed, R. Haggard also commented that “Mr Jorissen ... was quite unfit to hold the post of State Attorney in an important colony like the Transvaal, where legal questions were constantly arising requiring all the attention of a trained mind; and ... [Jorissen] had on several occasions been publicly admonished from the bench.”⁷⁶

Admittance to the Bar from 1881 was dependent on passing a supplementary examination on Roman-Dutch law for foreign advocates, which ensured crucial continuity, especially with regard to the use of Roman-Dutch law.⁷⁷ Fagan also argues that the “Cape policy requiring advocates with British training paid handsome dividends also to the Republics, which were able to import their legal expertise and often appointed persons of outstanding legal ability to the Bench.”⁷⁸ They definitely contributed to a gradual upturn in the quality of legal practise in the Transvaal.

Despite these reforms, problems remained. Jorissen’s successor, W.J. Leyds, remarked in October 1884: “De wetten hier! Het is om wanhopig te worden. Overvloed genoeg. Maar er

⁷³ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 189.

⁷⁴ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 189.

⁷⁵ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 181; M. Nathan, *Paul Kruger. His life and times*, p. 186; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, pp. 199-200, 239, 261, 265; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 399. Translation: ‘graduated jurist’; ‘inadequate qualifications.’

⁷⁶ M. Nathan, *Paul Kruger. His life and times*, p. 129.

⁷⁷ E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, pp. 48, 49.

⁷⁸ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 55.

worden steeds nieuwe wetten gemaakt zonder dat men zich recht de oude herinnert. Vandaar verwarring en tegenstrijdigheid zonder eind.”⁷⁹ Kew agrees that “criticism of the government’s handling of the affairs pertaining to the Transvaal judiciary continued unabated ... the government continued to drag its feet on the major causes of discontent with regard to the judiciary – the demands for an increase in the number of judges on the bench of the High Court, for the establishment of a proper circuit court and for an improvement and extension of opportunities for appeal.”⁸⁰ In 1885, the government added two judges to the High Court, and civil cases had to sit before three judges.⁸¹ The duties of the State Prosecutor were again outlined in 1887. Apart from being head of all public prosecutors, he also had to report to the President and provide advice to the Executive Council.⁸²

Law no 1 of 1888 again outlined the seating of the High Court. The president was given the power to appoint more puisne judges if three judges proved insufficient. Again, only two judges had to sit on a case, but if the outcome was tied, a third had to be called in. If there was an appeal against a judge, he could sit in on the appeal, but he did not have a vote in the outcome. Appeals from landdrost courts were now first to a circuit court of one judge, and then to the High Court in Pretoria.⁸³ The Volksraad decided in 1888 that only Dutch could be used as language in the courts. This caused complaints, since often all the parties involved in cases were English. The result was that law reports appeared in Dutch, but were translated into English.⁸⁴

The 1889 Grondwet confirmed the Volksraad as law-making body. The implementation of laws was the duty of the President.⁸⁵ Judiciary power remained in the hands of the three

⁷⁹ G.D. Scholtz, *Die ontwikkeling van die politieke denke van die Afrikaner IV*, p. 331. Translation: ‘The laws here! It is to become despondent about. But still new laws are being passed without men remembering the old ones. From there the confusion and contradictions without end.’

⁸⁰ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 186.

⁸¹ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 401; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 1178.

⁸² J.G. Kotzé (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek, 1886-1887*, pp. 130-131.

⁸³ H.A. Ameshoff (red.), *De locale wetten der Zuid-Afrikaansche Republiek, 1888-1889*, pp. 1-2; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 49.

⁸⁴ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 402-403; C. Jeppe, *The kaleidoscopic Transvaal*, p. 137.

⁸⁵ H.A. Ameshoff (red.), *De locale wetten der Zuid-Afrikaansche Republiek, 1888-1889*, pp. 173-174.

different courts, the High Court, the circuit courts and the courts of landdrosten.⁸⁶ The grounds for appeal were laid out in more detail. Judges for the High and circuit courts were appointed for life. In the first years of the High Court there was no statute that provided for the dismissal of lawyers for misbehaviour. However, a Volksraadsbesluit of 1894 provided grounds for dismissal of members not only of the judiciary, but also the executive.⁸⁷ According to the Grondwet, “[g]ezworen en zoodanige ambtenaren als door de Wet met rechterlijke bevoegdheid zullen worden bekleed, en laat die aan hun oordeel en geweten over, om volgens landswetten te handelen.”⁸⁸

A new Grondwet in 1896 shows the threats to the independence of the judiciary. Although the Grondwet maintained the independence of the Bench, it also provided for the dismissal of judges by the government. An important stipulation for the judiciary was that it made provision for a Second Volksraad, which also had a vote in the making of laws.⁸⁹ Law no 10 of 1896 stated that the President could appoint a fifth puisne judge, with the same rights and jurisdiction as the other judges.⁹⁰

After the retrocession, “with a qualified court and the entry of trained practitioners, the standards of pleading and adjudication rose.”⁹¹ Despite all these improvements, the Transvaal judiciary struggled to gain legitimacy. In an editorial in the *Cape Law Journal* in 1891, for example, it was reported that in terms of legislation and legal development, “there can be but little doubt that much has yet to be done in order to bring the law of the South African Republic (Transvaal) up to the standard required by ... the present state of

⁸⁶ The case load of the courts towards the end of the 1880s was becoming a problem. Pressure was put on the government to appoint more officials. In Johannesburg there was only a landdrost, and it was clear that a judge was needed in Johannesburg, who would have the same rights and jurisdiction than the other judges. Therefore, in July 1888 the Volksraad appointed a special commissioner for Johannesburg, in the person of E.J.P. Jorissen, the same one who earlier that decade was fired from the post of State-Attorney. L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 347.

⁸⁷ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 404; H.J. Coster (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1894*, pp. 307-308.

⁸⁸ H.A. Ameshoff (red.), *De locale wetten der Zuid-Afrikaansche Republiek, 1888-1889*, pp. 175, 189-190, 192, 194. Translation: ‘Sworn in and such officials who by law is given judiciary authority, it is left to their discretion, to handle according to the country’s laws.’

⁸⁹ L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 367; J.A. Schagen van Leeuwen (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1896*, p. 36.

⁹⁰ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 401; J.A. Schagen van Leeuwen (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1896*, p. 84.

⁹¹ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 400.

civilization.”⁹² The Bench continued to face a few problems, noticeably the incompetence of some of its members, and the (sometimes) unwelcome involvement of the Volksraad and the President.

6. Transvaal jurisprudence: The influence of English common law and the Cape’s legal system

At the end of the nineteenth century, the legal landscape of South Africa was influenced directly and indirectly by English common law. When difficulties regarding the use of Roman-Dutch law, especially the law books, became evident, it opened the way for notable English influence through the use of their legal sources (authorities). E. Kahn remarks that the use of the three Roman-Dutch sources “received a generous interpretation over the years. Reports of cases [in the Transvaal] in 1877 show that many authorities, both Dutch and English, were used in the High Court.”⁹³ Fagan also mentions this: “South African courts, despite the isolated structures to the contrary, have by and large adopted a broad approach to the use of authorities ... there are no good reasons, either historical or legal, for seeking the exclusion of principles derived from English law ...”⁹⁴ Wessels reckons that this influence “tended gradually to modify the principles of the Roman-Dutch law, and to bend them so as to assume the form of similar English principles.”⁹⁵ In this same vein, Chanock remarks that the “natural dominating tendency of English law – the decisions of the English courts, English constitutional and procedural frameworks, English statutes, English texts and English-trained lawyers – had, as we shall see, an enormous influence,”⁹⁶ and remarks on the “overwhelming influence of English legal forms, of English as the language of the courts and the profession, of English public law, and of the paucity of Roman-Dutch legal sources available to judges ...”⁹⁷

⁹² Quoted in E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 54.

⁹³ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 305, 307.

⁹⁴ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, pp. 43-44, 76.

⁹⁵ J.W. Wessels, *History of the Roman-Dutch law*, p. 386.

⁹⁶ M. Chanock, *The making of South African legal culture 1902-1936*, p. 158.

⁹⁷ M. Chanock, *The making of South African legal culture 1902-1936*, p. 528.

Furthermore, English authorities mentioned branches of law that Roman-Dutch sources did not. Maisel and Greenbaum reckon that “it was a convenient system of law on which to draw in situations that Roman-Dutch law did not cover.”⁹⁸ Certain issues, like legal and civil procedures, had no Dutch laws governing them. In the law of evidence, for example, “judges as a rule looked to English reports.”⁹⁹ Thus the impact English common law felt by the Cape’s legal system,¹⁰⁰ was in turn experienced in the Transvaal. Because Roman-Dutch law had been abolished in the Netherlands in 1809, no modern cases could be used as precedent in Roman-Dutch law.¹⁰¹ The available cases in a South African context were from the Cape Supreme Court, where many cases were based on English common law.¹⁰²

The influence of the Cape is not surprising. The inhabitants, including the people who drew up the constitutions and laws, had predominant roots in the Cape Colony. Many of them were born there. Their legal background was based on experience in the Cape. Later in the century, many legal practitioners in the Transvaal came from the Cape Colony, most importantly Kotzé. In many cases they received their legal education, and practised some law, in England,¹⁰³ where Roman-Dutch law was not taught, thus English authorities were principally used.¹⁰⁴ Furthermore, a lack of judges and lawyers in the Cape fluent in Dutch necessitated a wide use of English textbooks. Maisel and Greenbaum remark that “referring to English precedents whenever a difficult issue of law arose in the Cape courts ensured that many English principles were indirectly imported.”¹⁰⁵ In the Transvaal, as Wessels explains, the “practice of referring to English decisions was not confined to the English colonies of South Africa. During the period that the Transvaal ... [was a] free Republic, and whilst the official language of [its] superior court was Dutch, English authorities were cited from the Bar and received by the Bench with approval.”¹⁰⁶

⁹⁸ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 56.

⁹⁹ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, pp. 305, 307; A.N. Pelzer, *Geskiedenis van die Suid-Afrikaanse Republiek I*, p. 79; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 57.

¹⁰⁰ The intricacies of which are not discussed here.

¹⁰¹ H.R. Hahlo & E. Kahn, *The South African legal system and its background*, p. 564.

¹⁰² J.W. Wessels, *History of the Roman-Dutch law*, p. 389; E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 57.

¹⁰³ J.W. Wessels, *History of the Roman-Dutch law*, p. 388.

¹⁰⁴ P. Maisel & L. Greenbaum, *Foundations of South African law*, p. 60.

¹⁰⁵ P. Maisel & L. Greenbaum, *Foundations of South African law*, pp. 59-60.

¹⁰⁶ J.W. Wessels, *History of the Roman-Dutch law*, p. 393.

Many sources comment on the considerable influence the Cape Supreme Court had in the Transvaal. As Chief Justice De Villiers of the Cape Bench has stated, “the decisions of the Supreme Court of [the Cape] Colony are received with as much respect in the courts of the Republic ... as the decisions of their own courts.”¹⁰⁷ According to Wessels “[t]he decisions of the Supreme Court of the Cape of Good Hope were almost as authoritative in the Transvaal ... as they were in the Cape Colony; and as these decisions are tinged with English ideas, so naturally the decisions of the Republican court based upon them were also affected by English jurisprudence.”¹⁰⁸ Fagan wrote that “... the courts in the Republics inevitably moved beyond the narrow confines of their constitutions, and were much influenced by the decisions of the Cape Supreme Court.”¹⁰⁹ C.G. van der Merwe and J.E. du Plessis make the point that after the British annexation and the mineral discoveries, improvement in communication meant that the legal systems of the Transvaal and that of the Cape became increasingly aligned. The influx of English citizens into the Transvaal, many of them as legal personnel, resulted in an organic merging of the two systems.¹¹⁰

The importance of Kotzé as Chief Justice should not be underestimated. Although he believed that the British annexation of the Transvaal did not alter Transvaal’s legal system, and stated that “... Roman-Dutch law, as it prevailed in Holland ... is still in force ... the Common Law of South Africa is unquestionably the Roman-Dutch law,”¹¹¹ Kotzé had no hesitation to look to the Cape for help. Kew declares that as “envisaged by the proclamation of 18 May 1877, Kotzé, as sole judge of the High Court, was primarily responsible for the drafting of new rules of court ... The rules of court of the erstwhile Republic were to be retained, but as [Kotzé] believed that they were not entirely suited or adequate for a British court of law, he suggested that the proclamation should permit the use of the rules of court

¹⁰⁷ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 310.

¹⁰⁸ J.W. Wessels, *History of the Roman-Dutch law*, p. 393.

¹⁰⁹ E. Fagan, Roman-Dutch law in its South African historical context, in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 55.

¹¹⁰ C.G. van der Merwe & J.E. du Plessis (eds.), *Introduction to the law of South Africa*, p. 12. At the time of publication, Van der Merwe was Professor of Civil Law at the University of Aberdeenn. Du Plessis was Professor of Law at the University of Stellenbosch.

¹¹¹ W.F. Craies, The law of South Africa, *Journal of the Society of Comparative Legislation (New Series)* 2(2), 1900, pp. 233-235; F. Mackarness, Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906, p. 35.

in force in the Cape Colony in those instances where the former were inappropriate or in the event of them being silent.”¹¹²

The High Court of Justice, consisting of three landdrosten, who went on circuit annually, and the jury system, were both copied from the institutions of the Cape.¹¹³ Kotzé himself remarked that in “certain branches of the law, such as mercantile law, insolvency, and procedure, a great many doctrines have from time to time, by judicial decision and legislative enactment, been engrafted on to our Dutch jurisprudence, assimilating it in some respects to the English system ...”¹¹⁴

7. The members of the High Court

As Chief Justice from (effectively) 1877 to 1897, the majority of judgements in this period, as well as reports of cases, were made by Kotzé. Kahn remarks that

many of the ... judgements of Kotzé remain of great importance, for though a black letter lawyer in the finest tradition, [Kotzé] had his feet firmly on the ground and was always prepared to mould the old law of the Netherlands so as to apply it, in accordance with the Thirty-three articles, in a reasonable way and in accordance with the customs of South Africa. Yet though he found the decisions of other courts in the land to be of strong persuasive authority, he was not afraid to strike out on a different line if satisfied that it was not the correct one.¹¹⁵

Other sources also comment on his competence: “[F]rom the first [Kotzé] gave evidence that he was a jurist of the highest order. He presided over the judiciary with dignity and great efficiency ...”¹¹⁶ Kew remarks that “[h]is skilful translation, in addition to his other contributions to legal literature, and his innumerable judgements throughout his career ... his growing reputation for impartiality, his knowledge of Roman-Dutch law, and his

¹¹² J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, pp. 194, 177.

¹¹³ C.G. van der Merwe & J.E. du Plessis (eds.), *Introduction to the law of South Africa*, p. 432; G.W. Eybers (ed.), *Select constitutional documents illustrating South African history 1795-1910*, p. lxviii.

¹¹⁴ W.F. Craies, The law of South Africa, *Journal of the Society of Comparative Legislation (New Series)* 2(2), 1900, pp. 234-235.

¹¹⁵ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 408.

¹¹⁶ W.M. Nathan, *Paul Kruger. His life and times*, p. 186.

insistence ... on a proper code of conduct for the legal profession contributed in no small measure to the prestige of the Transvaal bench and bar.”¹¹⁷

During his tenure as Chief Justice, he also won the respect of contemporaries. Kew writes that

De Volksstem ... reported that ‘the country may be justly proud of its first Judge,’ and furthermore, added that ‘his affability, his clearness, quick discernment and lucid exposition of the law mark him as admirably fit for the high position which he occupies and which we hope he may continue to fill for a long time yet.’ The esteem in which Kotzé was held was, however, not restricted to the news media at the capital. During his first circuit, for instance, he was presented with numerous addresses of welcome ... they ... reflect the satisfaction of the inhabitants with Kotzé’s appointment to the highest judicial position in the country. Furthermore, wherever he went, the high expectations of the people were confirmed by the dignified and able manner in which he dispensed justice.¹¹⁸

J.S. Marais says of his dismissal as Chief Justice that “there can be no doubt that the Bench, at no time a strong one, was weakened by his dismissal ... he was regarded as an excellent lawyer and an incorruptible judge.”¹¹⁹

The other judges were not as respected as Kotzé. S.D. Girvin states that “[w]ith the exception of the brilliant J.G. Kotzé ... the bench of the Transvaal prior to the Boer War was rather undistinguished.”¹²⁰ P.J. Burgers and C.J. Brand, who became puisne judges in 1883, were both fairly young, without strong convictions, and their judgements did not earn them respect. Brand regained some respect when he made a stand for constitutional rights in 1886 by protesting against the interference of the government. However, “he was not in other respects a man of strong calibre. Like his colleague, Mr. Justice Burgers, who had resigned a few months earlier, he was not a man of temperate habits.”¹²¹

¹¹⁷ S. Dubow, *A commonwealth of knowledge*, pp. 151, 215.

¹¹⁸ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 186.

¹¹⁹ J.S. Marais, *The fall of Kruger's republic*, pp. 203-204.

¹²⁰ S.D. Girvin, 'The architects of the mixed legal system' in R. Zimmerman & D. Visser (eds.), *Southern cross*, p. 115. Girvin was a lecturer in Law at the University of Nottingham.

¹²¹ M. Nathan, *Paul Kruger. His life and times*, p. 239; E. Kahn, 'The history of administration of justice in the South African Republic II', *South African Law Journal* 75(4), 1958, p. 405.

Their successors were S.G. Jorissen and E. Esselen. Esselen resigned in 1890 to go into private practice, while S.G. Jorissen stayed a judge until his death in 1889. B. de Korte was appointed third puisne judge, but he was forced to resign in 1896 under suspicion of “bad behaviour”. H.A. Ameshoff was made puisne judge in 1889, but resigned in 1898 because he was overlooked for the position of Chief Justice as successor to Kotzé. When Esselen resigned, E.J.P. Jorissen applied for the post. Even though he still did not have the right qualifications, he was given the position in 1890. He was not very popular, and some thought “unjudicial in temperament”, but he held the post until the outbreak of the Anglo-Boer War.¹²²

G.T. Morice, of Scottish descent, was appointed puisne judge in 1890. He was a good lawyer, although given in criminal cases to fairly harsh sentences. He also had problems with the Dutch language used in court. R. Gregorowski was appointed to the bench in 1896, and was arguably one of the more successful appointments.¹²³ Girvin says of Gregorowski that his judgement in the Jameson Raid, although “met with sharp and bitter criticism ... displayed his independence and clear insight. One commentator has remarked that he ‘made an important contribution to a South African tradition, the integrity and independence of the bench.’”¹²⁴ He was appointed Chief Justice after Kruger dismissed Kotzé.

8. Executive and judiciary: Conflict over the testing right of the High Court

From the earliest years, the executive and the judiciary operated in conflict with one another, even though the Grondwet of 1885 expressly “affirmed the independence of judicial officers.” The Executive Council stated in a resolution in November 1863 that it had no jurisdiction in judicial matters. In 1872 the Volksraad reaffirmed that they were not a court of review for the High Court. Despite these claims, both the Volksraad and the President interfered with the High Court, and following annexation, their interference

¹²² E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 406-407; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 360.

¹²³ E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 407-408, 414.

¹²⁴ S.D. Girvin, The architects of the mixed legal system' in R. Zimmerman & D. Visser (eds.), *Southern cross*, pp. 115-116.

became a common occurrence. President Kruger was not a believer in constitutional routine and in some cases “his acts appeared to border upon serious disregard of the law.”¹²⁵

One explanation for the executive’s intrusion, seemingly, is that the judiciary allowed it. The lack of strong personalities amongst the judges, apart from Kotzé and to a lesser extent Morice and Gregorowski, meant the Bench could easily be subdued by the executive.¹²⁶ Another reason for the strain between the two was the judges’ very low salaries. Kotzé tried, almost in vain, to secure permanent salaries for judges, but failed due to the parlous state of financial affairs in the Transvaal.¹²⁷ The relationship deteriorated to such an extent in 1883 that Kotzé resigned (although he withdrew his resignation shortly thereafter) over the salaries’ issue for judges, his frustration with some of the Volksraad’s policies, and the fact that he was not consulted when puisne judges were appointed.¹²⁸

The relationship between Kotzé and Kruger was rocky from the start. Kotzé’s belief in the independence of the judiciary added to his “realization of the value of a well trained and competent bar as well as of an impartial and independent bench ... Kotzé believed implicitly in these ideals and his attempts to realize them during his later judicial career led to numerous clashes with colleagues whom he considered inadequately qualified and, during the 1890s, to confrontation between the Supreme Court and the Executive of the South African Republic.”¹²⁹ He was continuously working for the stability of the judicial power, especially in terms of qualifications. He furthermore had problems with the interference of the executive in judicial matters: “Kotzé deduced from the early history of the Republic and from the fact that the Rustenburg Grondwet described people as the source of all authority, that the Volksraad was not a supreme legislature but a legislature subordinate to the

¹²⁵ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 311; M. Nathan, *Paul Kruger. His life and times*, p. 236.

¹²⁶ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 311; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 405.

¹²⁷ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 287; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, p. 410; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 170.

¹²⁸ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 288; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, pp. 170, 195-196; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 405, 410.

¹²⁹ J.W. Kew, *John Gilbert Kotzé and the Chief Justiceship of the Transvaal 1877-1881*, M.A. dissertation, UNISA, 1979, p. 151.

sovereign people, which had endowed it with its powers and which presumably still retained the power of altering the constitution.”¹³⁰

Most importantly the worsening relationship between the executive and the judiciary was caused by the two ways in which the former legislated. The first was by *wet* (law), which required a three month notice-period to the public before a law could be passed. The second was by *besluit* (resolution), where the Volksraad could pass a resolution which had the same power as a law, but which did not need the three months notice-period. Laws could be repealed by a resolution, which required a majority of only one vote in the Volksraad. Addenda to the 1858 Grondwet stated that the courts had to adhere to the Volksraadsresolutions and “shall not be entitled to make any remarks about or pass any judgement on them, and what has been decided or approved by the Volksraad shall not again become subjected to the cognizance of any court of law.”¹³¹

The danger signs were flashing, since the Volksraad could simply go over the heads of the Bench and make resolutions, and the Bench had no legal footing on which to stand against them. It was clear, too, that the members of the Bench had to uphold their independence. Initially this did not happen. In 1884 and again in 1887 Kotzé said that: “the fact had to be faced that a *besluit* had the force of law, that the Grondwet itself was in no stronger position as against the Volksraad than any other law, and that it was not within the power of the Court to set aside a *besluit*.”¹³² Despite these judgements, he was slowly starting to wonder, in letters to Chief Justice de Villiers of the Cape Supreme Court, “whether a judge must not ignore a law which had not been passed in the form prescribed by the Grondwet, and whether a *besluit* was so prescribed.”¹³³

When High Court judge Brand resigned in 1886, he warned the executive that “it was not competent to interfere with the legal procedure of the country.”¹³⁴ In fact, it was becoming

¹³⁰ E.A. Walker, *Lord de Villiers and his times*, p. 293.

¹³¹ E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 306; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 116-117; E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 190.

¹³² E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, pp. 190-191, 288.

¹³³ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 288; L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, pp. 170, 195-196; E. Kahn, The history of administration of justice in the South African Republic II, *South African Law Journal* 75(4), 1958, pp. 405, 410.

¹³⁴ M. Nathan, *Paul Kruger. His life and times*, p. 238.

more and more clear that “the executive had ... stepped over the head of the judiciary, ignoring the distinction, fully recognized by the Republican constitution, between the legislative, the executive and the judiciary. Kruger, though untutored, must have known perfectly well that he was acting unconstitutionally. It seems, indeed, as though he was regarding himself as the sole power of the State.”¹³⁵

Kotzé tried to change the Volksraad’s stand towards resolutions, and he almost pushed his point through. In 1895, Kotzé announced in a judgement that courts could decide whether laws were conforming to the Grondwet. However, the Grondwet of 1896, although it again vindicated the independence of the judiciary, made no mention of changes in the ways in which it was to be legislated.¹³⁶ Therefore, in 1896, he ruled that “the Volksraad was not a sovereign legislature, that existing law could not be altered by [resolution] and that the court might refuse to apply any law in form or substance conflicted with the Grondwet.”¹³⁷ The main issue was that the judges wanted the Grondwet, which affirmed the independence of the High Court, to be placed in such a position that only special legislation could alter it.¹³⁸

Kotzé’s judgement astonished both Kruger and the rest of the judiciary. Essentially, his judgement was “to the effect that laws that had been enacted by the Volksraad as simple resolutions were not valid, because there were clauses in the Constitution requiring specific procedures, including a three-quarters majority and a time delay. Since the majority of the laws of the Republic had been passed as resolutions, Kotzé’s judgement threatened virtually the entire legal system.”¹³⁹ Marais remarks that it “is no exaggeration to say that Kotzé’s judgement was revolutionary in its implications. It rendered a great deal, perhaps most, of the republic’s legislation potentially inoperative and threatened many established rights.”¹⁴⁰

Kruger and the Volksraad could not accept all their resolutions as being invalid. Their response was Law no 1 of 1897, which forced judges to take an oath saying that they had no

¹³⁵ M. Nathan, *Paul Kruger. His life and times*, p. 238.

¹³⁶ L.S. Kruger, *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*, D.Phil.-proefskrif, U.O.V.S., 1975, p. 376; E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, pp. 288-289. The new Grondwet was Law no 2 of 1896.

¹³⁷ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 289.

¹³⁸ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, p. 289.

¹³⁹ L. Thompson, *Great Britain and the Afrikaner Republics, 1870-1899*, in M. Wilson & L. Thompson (eds.), *The Oxford History of South Africa II*, pp. 318-319.

¹⁴⁰ J.S. Marais, *The fall of Kruger's republic*, p. 143.

right to test a law or resolution. The five judges of the High Court, Kotzé, Ameshoff, Jorissen, Morice and Gregorowski, protested this, wrote a letter to the Volksraad, and temporarily suspended the High and Circuit Court.¹⁴¹ Chief Justice de Villiers from the Cape Supreme Court was called in to mediate. He urged the judges to accept Law no 1 of 1897 and although he “admitted that the Grondwet needed amendment and that the powers of hasty legislation wielded by a single chamber Volksraad were highly dangerous ... and, jealous champion of judicious independence though he was, he believed that the court did not possess the testing right.”¹⁴²

De Villiers managed to mediate the best possible solution: If the judges did not enforce their testing right, Kruger would not enforce Law no 1 of 1897. Furthermore, Kruger promised to promulgate a law, as soon as possible, which provided that the Grondwet could only be amended under special circumstances and certain procedures.¹⁴³ However, according to Kotzé, Kruger did not honour his side of the bargain, since nothing came of the last provision. Therefore, Kotzé again used his testing-right. Accordingly, Kruger relieved him of his post in February 1898 under Law no 1 of 1897.¹⁴⁴

A draft Grondwet of 1899 addressed some of these issues. Testing-right was prohibited, but “a proposed amendment to the Grondwet shall not be taken to be carried unless passed by a majority of votes in two successive annual sessions of the First Volksraad.”¹⁴⁵ Essentially this meant that the executive was not willing to give up its right to uncontrolled legislation.¹⁴⁶ Corder rightly states that this incident “cast in a very poor light both the formal independence of the judiciary and the constitutionality of the government of the SAR.”¹⁴⁷ Any further polemics surrounding this, however, were stopped by the outbreak of the Anglo-Boer War in October 1899.

¹⁴¹ E.A. Walker, *Lord de Villiers and his times. South Africa 1843-1914*, pp. 289-291; W.J. de Kock (red.), *Suid-Afrikaanse biografiese woordeboek I*, pp. 458-461.

¹⁴² E.A. Walker, *Lord de Villiers and his times*, p. 296.

¹⁴³ W.J. de Kock (red.), *Suid-Afrikaanse Biografiese Woordeboek I*, p. 460; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, pp. 412-413.

¹⁴⁴ W.J. de Kock (red.), *Suid-Afrikaanse Biografiese Woordeboek I*, p. 461; E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 414.

¹⁴⁵ E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 416.

¹⁴⁶ E. Kahn, The history of administration of justice in the South African Republic III, *South African Law Journal*, 1959, p. 416.

¹⁴⁷ H. Corder, The judicial branch of government, in D.P. Visser (ed.), *Essays on the history of law*, p. 64.

9. Conclusion

Throughout the nineteenth century the Transvaal legal system was unequivocally dominated by men. Women did not feature. The apparent differences between urban and rural Transvaal, were also evident in the legal studies.¹⁴⁸ In rural Transvaal, the legal process started under landdrosten in district courts. This chapter showed that these men were not necessarily able or qualified, and they had to function within a legal system and use legal authorities they probably did not understand. It could follow from this that these men would have judged people (and women) not from a legal position, but a personal (even emotional) one, based on the customs of the community. The patriarchal nature of the society, and that men believed they were ordained by God to be in control over women, compounded the issue. The question arises as to how fairly and equally women would have been treated in these circumstances?

Access for women to the higher courts (the High Court and its circuit court) has already been qualified by a few considerations, such as accessibility and economic possibility. Added to this, even for women in urban areas (except possibly Pretoria), was that the circuit court visited districts irregularly. Therefore, if the timing did not coincide, a case could be postponed for months.

The number of British inhabitants in the Transvaal had a practical outcome with regards to the influence of English common law in the state. The familiarity of the British with their legal system in England may also have played a role.

The influence of the judges was an important factor. Overall, the judges were not remarkable, though Kotzé was an exception. He was an excellent judge, who dominated much of the legal scene for a considerable time.¹⁴⁹ His sense of integrity means that he was probably fair to everyone, men and women. Furthermore, his strong belief in the independence of the judiciary might have meant that he would not allow the law to discriminate against women, as that would not be following the letter of the law. This

¹⁴⁸ As discussed in chapter 3.

¹⁴⁹ Most of the cases discussed in chapter 6 were presided over by Kotzé.

implies a possible subconscious gender-tolerance and sensitivity that would otherwise not have been there.

The improved situation after 1877, including supplementary law-books and better qualified practitioners, resulted in a higher level of jurisprudence, at least in the High Court. Higher levels of education for entry meant judges and lawyers probably interpreted the law, and used law books, more correctly. Since the primary sources for the next chapter are these law books, this means that the theoretical findings of that chapter are more likely to resonate in assessing the practical implementation in the Transvaal's everyday legal system.

V. ESTABLISHING WOMEN'S LEGAL POSITION: SOURCES AND THE LAW

1. Introduction

This Chapter considers the second dimension of the framework necessary for the construction of a legal stage for women in Transvaal history – that is how the law itself treated women. So, together with the findings of Chapter 4, a picture of how women fitted into the entire legal system can be created. These two Chapters therefore provide a composite legal framework as starting point for testing the court cases considered in Chapter 6 which will explore whether this legal position was respected in the reality of every day court cases. This Chapter is compiled using the three Roman-Dutch sources, a compilation of the laws, and laws and resolutions passed by the Volksraad. This chapter will adopt the standard used by Maurits Jossen in 1897 that Van der Linden, Grotius and Van Leeuwen “hebben als grondslag tot deze inleiding tot de Transvaalsche Rechtsgeleerdheid gediend.”¹

2. Sources used to establish women's legal position

The three Roman-Dutch sources, stipulated in the 1858 Grondwet as the law books of the state, were Joannes van der Linden's *Koopman's Handboek* as primary source, and if insufficient *Introduction to Dutch Jurisprudence* by Hugo Grotius and *Commentaries on Roman-Dutch law* by Simon van Leeuwen.² The *Koopman's Handboek* is an elementary review guide of Roman-Dutch law for laymen, not legal scholars. Van der Linden himself said that his object was “to write for persons ... unacquainted with the law and desirous of a general and well-founded idea of law and procedure.”³ The *Introduction* of Hugo Grotius,⁴ published in 1630, was the first concise description of Roman-Dutch law.⁵ Van Leeuwen's

¹ M. Jossen, *Schets van het recht van de ZAR*, p. 5. Translation: ‘serve as a basis for an introduction to Transvaal Jurisprudence.’ Maurits Jossen was an attorney who came to the Transvaal in 1895, and practiced in Pretoria until the outbreak of the Anglo-Boer War.

² G.W. Eybers (ed.), *Select constitutional documents illustrating South African history 1795-1910*, p. 417. Van der Linden's *Koopman's Handboek*, published in 1806, was by more than a century the most modern of the three sources.

³ J. van der Linden, *Insitutes of Holland*, p. xi; W.J. Hosten, *Introduction to South African law and legal theory*, p. 183; F. Mackarness, Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906, p. 38.

⁴ Hugo Grotius is also known as Hugo de Groot, and he is addressed as either of those in all sources concerning him. In this study, he will throughout be referred to as Grotius. He is regarded as a key scholar of Roman-Dutch law because he was one of the first people to see the law of the Netherlands as a system that could stand on its own.

⁵ Grotius wrote the *Introduction* while he was a political prisoner in jail, and thus did not cite authorities in support of his facts. Another Roman-Dutch law scholar, S. van Groenewegen, annotated his work in 1643. In almost all cases, an

Commentaries, published in 1678, is a very complete treatise on Roman-Dutch law, and covers the most important points of Roman-Dutch law, albeit a bit superficially.⁶

For a historian reading legal sources, Grotius and Van Leeuwen are undoubtedly more difficult to make sense of than Van der Linden, and the simplicity of Van der Linden was probably the attraction for the Transvaal law-makers. Van der Linden himself remarked that Grotius was “much too difficult for persons not learned in the law to understand ...”⁷ and Van Leeuwen “is so far removed from the more civilized taste of our time ... although ... still a good book, it no longer fulfils its object.”⁸

Originally written in Dutch, the demand for translations of these three sources increased after 1877, and at various stages all three were translated into English. These translations were done specifically with the British colonies in mind, as the translator of the *Commentaries* stated: “... the Translation is as accurate ... as possible: so that the Work may form a useful Manual to professional Gentlemen in ... the other Dutch colonies now under the English government, where the [Roman-]Dutch laws are still in force.”⁹

Besides these three sources, the *Schets van het recht van de ZAR* by Maurits Josson, written in 1897, is also used.¹⁰ As it is a compilation written during the late nineteenth century, it serves as a useful corroborator for the Roman-Dutch sources, while simultaneously adding relevant information to the analysis. Laws and resolutions are used, but since Josson covers most aspects of the law, they are only added when the *Schets* has no reference to that particular law or resolution. Furthermore, it was noticeable in doing the analysis below that when the Roman-Dutch books were clear on a matter the government found it unnecessary to pass laws related to the issue.

Introduction by Grotius includes notes by Groenewegen. W.J. Hosten, *Introduction to South African law and legal theory*, pp. 176, 178; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. xi.

⁶ W.J. Hosten, *Introduction to South African law and legal theory*, p. 178; J. van der Linden, *Insitutes of Holland*, p. x.

⁷ J. van der Linden, *Insitutes of Holland*, p. x.

⁸ W.J. Hosten, *Introduction to South African law and legal theory*, p. 178; J. van der Linden, *Insitutes of Holland*, p. x; W.F. Craies, *The law of South Africa*, *Journal of the Society of Comparative Legislation (New Series)* 2(2), 1900, p. 235.

⁹ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. v.

¹⁰ M. Josson, *Schets van het recht van de ZAR*.

3. Laws regarding women

To analyse the legal system as it applied to women, I identified eleven categories. In some aspects of the law women are not mentioned, and if this is the case they have been omitted. Only the first four categories contain laws that are referenced in the court cases in the following chapter. However, the other laws are mentioned because altogether they create an illuminating picture of the rights women enjoyed through the protection of laws made by male law-makers.

a. Marital status and marital power

Van der Linden states that “by marriage is understood ‘the union of man and woman contracted for the purpose of procreating and rearing children, and of sharing all good and bad fortune with one another, in an indivisible union and until death.’”¹¹ Josson calls marriage a union of husband and wife with the goal of bringing children into the world, and to share good and bad times with each other until the end of their lives, and adds that “de echtgenooten zijn elkander getrouwheid, hulp en bijstand schuldig; de vrouw moet aan den man gehoorzamen; de man moet zijne vrouw beschermen ...”¹²

Roman-Dutch scholars are not very specific about the legal position of unmarried women. Van der Linden remarks that the legal rights of married and unmarried women differed, and then leaves it at that.¹³ Grotius is a bit clearer, saying that “whatever is done by unmarried women of full age, though without the intervention of their guardians, cannot be otherwise than valid.”¹⁴ Josson, however, states unequivocally that “mannen en ongehuwde vrouwen [is] volkomen gelijk.”¹⁵ The only significant exceptions were that unmarried women could not be witnesses in the signing of wills, were not allowed to occupy posts in government or be chosen to the executive, had no vote, and could not be guardians.¹⁶ In a legal sense, therefore, unmarried women could lead their lives with no interference.

¹¹ J. van der Linden, *Insitutes of Holland*, p. 12.

¹² M. Josson, *Schets van het recht van de ZAR*, pp. 365, 370. Translation: ‘the couple owes each other fidelity, help and assistance; the wife should be obedient to her husband; the husband should protect his wife.’

¹³ J. van der Linden, *Insitutes of Holland*, p. 12.

¹⁴ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 17-18.

¹⁵ Translation: ‘men and unmarried women are completely equal.’

¹⁶ M. Josson, *Schets van het recht van de ZAR*, pp. 171-172.

The sources agree that women could get married after they reached twelve years of age whereas men could marry only after they turned fourteen.¹⁷ The reason for the difference in age, as pointed out by Van Leeuwen, is that “a woman, according to her nature, is sooner fit for procreation than a man although the puberty commences earlier with the one than with the other ...”¹⁸ Marriage was denied to someone suffering from a mental incapacity, and to one unable to procreate. Guardians could not marry their wards, and minors needed consent from parents/guardians to marry.¹⁹

For women, the result of marriage was that she became a minor under her husband’s guardianship: “Elke vereeniging van twee of meer personen moet een hoofd hebben: in de echtvereeniging moet de man, die de sterkste is naar geest en lichaam, noodzakelijk dat hoofd zijn. Daarom wordt de vrouw door het huwelijk onder de voogdij van den man geplaatst.”²⁰ Van der Linden remarks that the “personal consequence of marriage ... consists primarily in the marital power of the husband over the wife.”²¹ According to Van Leeuwen, “... with respect to married woman, it is almost universal usage that they are entirely under the guardianship ... of their husbands.”²²

Male guardianship included control over most of the wife’s ‘public’ life. In the legal sense people were seen either as independent, which meant that they had legal capacity and were seen as capable of exercising their own rights, or as dependent, which meant that they did not have legal capacity. Married women were the latter, and subject to their husband’s marital power. A married woman could not appear in court without her husband’s consent. If a case concerned her, her husband had to be sued in her name, and he appeared in court on her behalf. The only possible exceptions to this occurred when a woman’s husband was

¹⁷ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 19; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 60; M. Josson, *Schets van het recht van de ZAR*, pp. 172, 365.

¹⁸ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 29.

¹⁹ J. van der Linden, *Insitutes of Holland*, pp. 18, 19; M. Josson, *Schets van het recht van de ZAR*, p. 365; Volksraadsresolution 15/6/1852; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 15.

²⁰ M. Josson, *Schets van het recht van de ZAR*, pp. 370-371. Translation: ‘every contract of two or more people should have a head: in the marriage contract the man, being the strongest in spirit and body, is necessarily the head. That is why a women in marriage is placed under the curatorship of the man.’

²¹ J. van der Linden, *Insitutes of Holland*, p. 23.

²² S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 30-31; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 25.

abroad (and then it was only sometimes permitted), or when the husband and wife were suing each other for divorce.²³

A woman who carried on a public trade with the knowledge of her husband was in cases relating to her trade exempted from her husband's guardianship. She could validly transact matters concerning her business, bind herself (and by definition her husband) and others with contracts, and sell and encumber the stock of her business. She could appear in civil cases before a judge in suits relating to her business. However, it had to be clear that she was benefitting from the trade.²⁴

Women had options when their husbands abused their marital powers. According to Van der Linden and Josson, if a woman felt that her husband's actions were reducing her to poverty, she could ask that his person and property be placed under curatorship. A verdict in her favour would result in the end of his marital power. If a husband was affected by an affliction such as lunacy, which rendered him incapable of managing his own affairs, the guardianship of the property did not automatically pass to his wife, although it was possible.²⁵

Persons appointed to execute the wills of others were called executors. Anyone who could legally administer someone else's affairs could be appointed, including women – married or unmarried.²⁶ The duties of an executor included, amongst others, executing a statement and inventory of the property of the deceased, liquidating the estate and calling in the debts, turning the estate into money, paying legacies, and handing over the balance of the estate to the heirs.²⁷ There was no gender distinction as to who inherited: the property of a

²³ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 25-26; J. van der Linden, *Insitutes of Holland*, pp. 23, 260-261; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 31, 523; M. Josson, *Schets van het recht van de ZAR*, pp. 171-172, 371.

²⁴ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 26-27; J. van der Linden, *Insitutes of Holland*, pp. 23, 104; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 31, 125-126, 523-524; M. Josson, *Schets van het recht van de ZAR*, p. 371.

²⁵ J. van der Linden, *Insitutes of Holland*, p. 24; M. Josson, *Schets van het recht van de ZAR*, p. 371; H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 28, 49.

²⁶ Although it is not clear whether this means that every female upon reaching twelve years was classified as a 'woman'. The age of majority is discussed later, and majority was probably a prerequisite to being an executor.

²⁷ J. van der Linden, *Insitutes of Holland*, pp. 72-73; M. Josson, *Schets van het recht van de ZAR*, p. 172.

deceased parent went in equal shares to brothers and sisters. However, women, whether married or unmarried, could not be witnesses to a will.²⁸

b. Women's property rights

According to Grotius, "the guardianship of the husband over his wife's property is very extensive."²⁹ He could alienate and encumber her property without her consent. He could cancel service agreements she had made before the marriage. She was, even against her will, liable for her husband's debts. She was also bound to all contracts entered into by her husband, even if she was ignorant of them. (The exception was if he committed a criminal act when he signed the contract.) Lastly, she could not contract any debts or make any contracts relating to her property without her husband's consent.³⁰ Women could not be sureties, especially not for money lent to their husbands.³¹

Grotius remarks that "property in an estate ... is acquired by ... community of property ... which takes place ... by marriage."³² From the moment a marriage was consecrated, there was complete *gemeenschap van goederen* (community of property), unless the couple signed an antenuptial contract. However, everything not specifically included in the antenuptial contract was included in the community. Since an antenuptial contract could not be signed after the marriage vows, there was no way that the community could be taken away.³³

Everything in community of property was under the control of the husband. Community included the following: all goods and articles of both parties brought into the marriage, which included moveable and immoveable property, current and future; fruits of the property, including profits and losses made during the marriage; debts amassed before the

²⁸ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 134-135; J. van der Linden, *Insitutes of Holland*, pp. 54, 81, 158-159, 172; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 213.

²⁹ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 25.

³⁰ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 25-26; J. van der Linden, *Insitutes of Holland*, pp. 23-24; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 31; M. Jossion, *Schets van het recht van de ZAR*, pp. 215, 371.

³¹ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 315-316; J. van der Linden, *Insitutes of Holland*, p. 119; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 327; M. Jossion, *Schets van het recht van de ZAR*, p. 317.

³² H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 115.

³³ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 116; J. van der Linden, *Insitutes of Holland*, pp. 24-25; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 410; M. Jossion, *Schets van het recht van de ZAR*, p. 371.

marriage, and debts made during the marriage, by both the husband and the wife (although hers, of course, had to be with the permission of her husband), inheritances and legacies.³⁴

Community ended either with the death of one of the spouses, or divorce, which included *de scheiding van tafel en bed* (separation of table and bed). On death, the joint estate was divided equally: half of the estate went to the surviving spouse and the other half to the heirs of the spouse who died first.³⁵ Creditors could sue the husband and his heirs for all debts contracted during the marriage and thus during his guardianship. The wife had the option of renouncing the estate, and therefore freeing herself from liability of the debts acquired during the marriage. On the other hand, a wife could not claim benefit or compensation out of her husband's property until the creditors had been paid.³⁶

In some cases the surviving spouse was safe-guarded from the mistakes of the other. If the husband was found guilty of adultery, and as punishment for this meant that all his property had to be confiscated, it related only to his half, and the wife retained her half of the common goods. Also, one spouse could not be held responsible for debts contracted by the other before the marriage, if it was claimed only after the marriage was dissolved. Lastly, if a husband's property was confiscated because he committed a crime, the wife could not be held responsible.³⁷

c. Antenuptial contracts

An antenuptial contract was a contract between two people who were about to get married, that had to be signed before the marriage, and could not be revoked during marriage, not even by mutual consent. It had to be in writing or notarial deed. The only way an antenuptial contract could end was with the death of one of the spouses. If either party committed adultery, they were not entitled to what would have been theirs by antenuptial

³⁴ M. Josson, *Schets van het recht van de ZAR*, pp. 371-372; J. van der Linden, *Insitutes of Holland*, pp. 25-26; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 410; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 117.

³⁵ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 117; J. van der Linden, *Insitutes of Holland*, p. 26; M. Josson, *Schets van het recht van de ZAR*, p. 372.

³⁶ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 118, 124.

³⁷ S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 412-413, 525; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 26.

contract. Antenuptial contracts were specifically concerned with property, or more accurately, how the husband's guardianship over his wife's property could be restricted.³⁸

Although antenuptial contracts differed from couple to couple, a few conditions seemed common. For example, both parties contributed property but without community of goods. Neither was liable for the other's debts, whether contracted before or during the marriage. The wife retained control of her own property. She could also stipulate that she wanted the administration of her own property, in which case she had legal rights regarding her property. Furthermore, decisions could be made as to what would happen to the goods of the marriage after the death of the first spouse, and the fate of the children. In terms of profit and loss during the marriage, it could either be common, or excluded; or the wife and her heirs could, at the dissolution of the marriage, decide whether they wanted to share or not in profit and loss. Inventories of the property brought in were sometimes inserted. Lastly, the wife could leave the administration of her property in her husband's power, with the stipulation that if she felt that he was impoverishing her, she could interdict him judicially.³⁹

d. *Echtscheiding, overspel*⁴⁰ and its influence on guardianship over children

In the eyes of the law, marriage only ended in death or divorce, and the latter could only be granted by a court of law. Couples could not divorce by mutual consent. Divorce could only be granted on two grounds – *overspel* (adultery) and *malitio desertio* (malicious desertion). These two, however, could be interpreted in several ways, and generally anything that fell under one of these categories could count as a reason. Perpetual imprisonment, for instance, fell under the heading of malicious desertion.⁴¹

Provisional separation, legally known as separation of board, bed, cohabitation and property, but commonly referred to as separation of table and bed, was a possibility in cases where cohabitation seemed dangerous to one of the parties – for example if a husband ill

³⁸ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 27, 120; J. van der Linden, *Insitutes of Holland*, pp. 14, 17; M. Josson, *Schets van het recht van de ZAR*, p. 373; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 424.

³⁹ J. van der Linden, *Insitutes of Holland*, pp. 15, 261; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 417-418; M. Josson, *Schets van het recht van de ZAR*, p. 373; H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 27-28, 121.

⁴⁰ Translation: 'Divorce, adultery,'

⁴¹ M. Josson, *Schets van het recht van de ZAR*, pp. 83, 86, 370, 375; J. van der Linden, *Insitutes of Holland*, pp. 26, 27.

treated his wife, or risked harming her in the case of protracted quarrels.⁴² Separation of table and bed meant that the marriage continued in full force, on the understanding that both spouses were making attempts at reconciliation. It had to be granted by the courts, and it had to be public. Separation could also include separation of property, in which case the community of property, and therefore the husband's marital power, halted for a time. When the couple reconciled, community and marital power were reestablished.⁴³

Hardly any mention is made of what was to happen to the children in the case of divorce and separation. Van Leeuwen states that the children were to pass into the care of the mother, as "the mother ... would be nearest, if she wishes it; and so it is understood, even in other cases, as in the education and maintenance of natural and illegitimate children ..."⁴⁴

The other cause of divorce, adultery, also restricted entitlement of the parties to marry legally again, an influence that changed over time. Grotius mentions that the innocent party could marry again, and thus, because there was then clearly no hope of reconciliation, the guilty party could also marry again. However, according to both Van der Linden and Josson, both parties could remarry, irrespective of who was guilty. They stipulated, however, that the adulterous party could not marry the person with whom adultery had been committed.⁴⁵

The main concern the sources had with adultery was the punishment for it, and, for the purpose of this study, how their notions of punishment differed for men and women. A man who committed adultery with a married woman, with or without her consent, was guilty of inflicting injury and damage on her husband and children, and was liable for that injury.⁴⁶

Both Van Leeuwen and Van der Linden stipulated the punishment for adultery, differing only slightly. According to Van der Linden, if a married man committed adultery with an unmarried woman, her punishment was to be placed on a spare diet (water and bread) for

⁴² H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 112.

⁴³ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 25; J. van der Linden, *Insitutes of Holland*, pp. 27-28; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 85; M. Josson, *Schets van het recht van de ZAR*, p. 374.

⁴⁴ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 87.

⁴⁵ S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 83-84; J. van der Linden, *Insitutes of Holland*, p. 28; M. Josson, *Schets van het recht van de ZAR*, p. 365.

⁴⁶ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 490-491.

fourteen days. If it happened twice, she was banished for fifty years.⁴⁷ His punishment in this case for a first offence was to be declared infamous, deprived of his office, and fined four hundred guilders. For a second offence, he was fined eight hundred guilders and banished for fifty years. In adultery cases between a married woman and a married man, his punishment was to be placed on a spare diet for fourteen days and fined 400 guilders, and for a second offence banished for fifty years. A married woman found guilty of adultery was to be banished forthwith. Van Leeuwen adds that if a married man and a married woman committed adultery, they would both be banished, but independently.⁴⁸ The main difference is that married men were given another chance, whereas married women were banished automatically.

If two unmarried people “by virtue of a mutual agreement entered into, either for life or for a fixed period, live and cohabit together as man and wife,” it was called concubinage, which was against the law, and they were equally fined for it.⁴⁹

e. Second marriages

As in the first marriage, community of property was valid for all subsequent marriages and could not be changed or cancelled. Furthermore, if a woman with children entered a second marriage, she placed herself, her children and her property under the legal power of her second husband. The interests of the second husband and the interests of the children of the first marriage were in conflict with each other. For this reason strict laws regarding second marriages tended to protect the children of the first marriage, as they were often disadvantaged by the second marriage.⁵⁰

The second husband could take from the will of his new spouse, apart from the half which belonged to him by the community in which they married, only a portion of the same size as

⁴⁷ Since the Roman Dutch sources were not aimed specifically at the Transvaal, one has to assume that if this law was indeed implemented in the Transvaal, it must have meant banishment from the Transvaal.

⁴⁸ J. van der Linden, *Insitutes of Holland*, p. 230; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 483-484. This is one of the few areas where big discrepancies are found, and especially when one studies chapter 6. For the sake of continuity, however, what is stated in the sources is used.

⁴⁹ J. van der Linden, *Insitutes of Holland*, p. 233. The argument could be made that even an unmarried women living in concubinage had more rights than a married woman. The use of the term ‘concubinage’ should receive some comment. While traditionally, concubinage referred to an unmarried women living with a married man, Van der Linden used it differently.

⁵⁰ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 24, 116; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 412; M. Jossou, *Schets van het recht van de ZAR*, pp. 374, 388, 523.

that which the children received, and, if the children's portions differed, a portion equal to the smallest portion.⁵¹ Van der Linden says that upon contracting the second marriage, the guardian had to draw up an inventory of the property that came to them out of the estate of their deceased spouse. The value of the property had to be fixed, and was to remain under the control of the guardian until the children came of age. In the meantime, the children could live on the fruits of the property.⁵² In 1871 a law was passed that required individuals wishing to remarry to get a certificate of 'remarriage', signed by the Orphan master, which clearly showed that the children's portion was either paid out or insured.⁵³

The law governing remarriage changed somewhat. An 1870 law permitted widowers to remarry after four months, and widows after nine months. In 1871 this was changed to three months for widowers and three-hundred days for widows. In both cases the woman had to swear to a judge that she was not pregnant.⁵⁴

f. Erfopvolging⁵⁵

Under Roman-Dutch law, anyone who had reached the age of puberty, which was fourteen years for men and twelve years for women, could make a will. Furthermore, these wills could be made without the consent of a guardian, thus married women could make wills without consulting their husbands, and minors without the consent of their guardians.⁵⁶

A husband and a wife could make a will together, called a mutual will. Although one document, legally it was seen as two distinct wills. Each could dispose of his/her estate and revoke the will jointly or separately. They could also be changed without the other's knowledge, and also after the death of the first spouse. However, if the spouse who died first bequeathed the survivor benefit in the will, and had directed how the property of the

⁵¹ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 133, 312; J. van der Linden, *Insitutes of Holland*, pp. 28, 58; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 83, 227, 412.

⁵² J. van der Linden, *Insitutes of Holland*, p. 37.

⁵³ Law no 3 of 1871, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 443-444; M. Josson, *Schets van het recht van de ZAR*, pp. 365, 370.

⁵⁴ Law no 1 of 1870 and Law no 3 of 1871, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 359-361, 443-444; Volksraadsresolution 15/6/52, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 15.

⁵⁵ Translation: 'Wills'

⁵⁶ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 28, 129; J. van der Linden, *Insitutes of Holland*, p. 30, 57; M. Josson, *Schets van het recht van de ZAR*, pp. 522-523.

joint estate was to be distributed after the survivor's death, the survivor could not enjoy this benefit by disposing of his or her share in contradiction with the other spouse's will.⁵⁷

g. *Misdaden tegen de eer*⁵⁸

Rape was defined as the forcible ravishing and, by implication, dishonouring of a woman, sometimes by violence, and against her will, called a crime of repute. The pain and damage it caused determined the punishment, and, as it decreased the ravished women's chances of marriage, the ravisher had to make compensation for his action.⁵⁹ The punishment depended on certain factors – whether or not she was married, and whether the ravisher was her guardian. In worst cases rape was punished with death. Josson writes about the “ontmaagding van eene vrouw, zelfs met haren wil,”⁶⁰ where the ravisher had to pay compensation for damages, or even marry her, although according to Josson and Van der Linden, the man had the choice between the two options.⁶¹

If a man swore under oath that he had no connection with the woman, even though she swore under oath that he did, the man was believed. However, if the man admitted to a connection, he was taken to be the father if a child was forthcoming, even if the woman admitted to connection with others.⁶² The damages depended on whether she became pregnant or not. If she did not, damages were simply a sum of money paid to her. If she was with child, he had to pay labour costs, funeral costs if the child should die, and the child had to be maintained by both the father and the mother.⁶³

h. *Infanticide (murder of infants)*

In this category falls not only infanticide, which could only happen if a child was born alive and not prematurely, but also abortion, and hiding the birth of a baby. Infanticide was a

⁵⁷ H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 137; J. van der Linden, *Insitutes of Holland*, p. 57; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 211.

⁵⁸ Translation: 'Crime of repute.'

⁵⁹ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 482; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 488.

⁶⁰ Translation: 'Deflowering of a women, even with her consent.'

⁶¹ M. Josson, *Schets van het recht van de ZAR*, p. 242; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 480, 482; J. van der Linden, *Insitutes of Holland*, pp. 152-153, 232.

⁶² H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 489-490; J. van der Linden, *Insitutes of Holland*, pp. 152-153; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 482-483; M. Josson, *Schets van het recht van de ZAR*, p. 242.

⁶³ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 489-490; J. van der Linden, *Insitutes of Holland*, pp. 152-153; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 478; M. Josson, *Schets van het recht van de ZAR*, p. 242.

crime committed against new-born babies by mothers, either by negligence or direct action. Negligence included not washing the baby, withholding nourishment, or not tying up the navel string. The punishment for negligence was imprisonment. If it was clear that the child died by the mother's direct action, which included abortion, the punishment depended on the circumstances: whether the mother was induced by others to do it, if the child was alive at birth, and the age of the fetus. If the intention was clearly to kill the child, the punishment was death. If the intention was not clear, punishment could be corporal punishment or imprisonment.⁶⁴

Hiding the birth of a child was usually done by an unmarried woman, who, after bringing a child into the world and finding out the child had died, hid the body. It did not matter whether the child died before, during or after birth, the crime was the same. If she murdered the child, it counted as infanticide, and was a completely different matter. If, however, she was found not guilty of infanticide, she could still be accused of hiding the birth.⁶⁵

i. *Minderjarigheid, voogdijschap and vaderlijke or ouderlijke macht*⁶⁶

The Roman-Dutch scholars put the age of majority at twenty-five for men and twenty for women. However, a resolution passed in 1853 moved that age to twenty-one for both men and women. Until majority, people were still under the power of their parents, or in absence of those, guardians appointed over them. Apart from reaching the desired age, other ways of ending guardianship included receiving special permission from the government, for which men were eligible at twenty and women at eighteen. If children lived alone, and freely managed their own trade, *met de toelating van hunner ouders*,⁶⁷ guardianship also ended. Permission for this had to come from both their parents/guardians, and the state. Marriage ended a woman's minority, to such an extent

⁶⁴ J. van der Linden, *Insitutes of Holland*, pp. 217-219.

⁶⁵ Law no 4 of 1892, H.J. Coster (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende de jaren 1890, 1891, 1892 en 1893*, pp. 415-416.

⁶⁶ Translation: 'Minority, guardianship, and parental or paternal power.'

⁶⁷ Translation: 'with the consent of their parents'.

that once a woman was married, and transferred into marital power, upon her husband's death she did not return to parental power.⁶⁸

If both parents were still alive, guardianship of the children belonged to the father. After the death of the father guardianship transferred to the mother, and she alone was then in control of her children, something all the sources agree on. The phrase *vaderlijke macht* (paternal power), as it was used initially, for this reason changed in the Transvaal to *ouderlijke macht* (parental power).⁶⁹ Guardianship could be borne only by people who were not under guardians themselves. The exception in terms of families was that mothers and grandmothers could be guardians to their own children and grandchildren. In some cases, extra guardians could be added if the courts deemed it necessary. Parents and grandparents were preferred as guardians to their own children, but mothers and grandmothers could stay guardians only until they married again.⁷⁰

The mother and father were appointed the guardians for each other's wills, and each could appoint testamentary guardians independently of the other, for "they both have equal power in this respect."⁷¹ As already indicated, half of everything the estate acquired after the first spouse's death passed to the children. At the death of either of the spouses, the other could appoint a new guardian, who, together with the original guardian, had the same power and authority with regard to the children. If parents failed to appoint a guardian for their children, that task fell to the Master of the Orphan Chambers.⁷²

Duties of the parents included the education of the children, which was borne by both the father and the mother, and was taken over by the guardians after their deaths. Parents and guardians were responsible for all damage done by their minor children. Guardians also conducted legal proceedings for minors, although if they wanted to institute an action on

⁶⁸ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 22, 46; J. van der Linden, *Insitutes of Holland*, pp. 13, 20, 31, 41; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 29, 60-62, 96-97; M. Josson, *Schets van het recht van de ZAR*, p. 171-172, 379, 380. Volksraadsresolution 01/12/1853, E. Kahn, The history of administration of justice in the South African Republic I, *South African Law Journal* 75(3), 1958, p. 301.

⁶⁹ M. Josson, *Schets van het recht van de ZAR*, p. 383; H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 29, 144; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 74; J. van der Linden, *Insitutes of Holland*, p. 29.

⁷⁰ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 31, 34; J. van der Linden, *Insitutes of Holland*, p. 33; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 64, 92; M. Josson, *Schets van het recht van de ZAR*, pp. 172, 388.

⁷¹ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 32-33.

⁷² J. van der Linden, *Insitutes of Holland*, p. 34; S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 89; M. Josson, *Schets van het recht van de ZAR*, p. 389; H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 125-126.

behalf of their wards, they needed the permission of the Orphan Chamber. Furthermore, boys up to eighteen years and girls up to fifteen years, at the youngest, had to be maintained by the surviving parent/guardian out of the fruits of the property.⁷³

Children could be disinherited by their parents, with similar reasons applying to boys and girls. However, if a daughter led an unchaste life, or one of persistent prostitution, and her parents wanted her to get married, she could be disinherited. Parents had to provide a marriage for their daughter before she turned twenty-five, and if they did not, they could not disinherit her on these grounds.⁷⁴

Children were deemed illegitimate when the father was known to be impotent, when a child was born out of wedlock or outside of the accepted pregnancy period (seven to eleven months). Children could be legitimized with the parents' marriage after the birth or by an act of grace from the government. Children born out of wedlock came under the mother's authority. A 'bastard' could not inherit from its father but had to inherit from the mother and her relations.⁷⁵

j. Women and criminal cases

Married women and minors could be called upon to give evidence in criminal cases, provided they had reached the age of twenty. Minors and married women who were taken to court on a criminal charge did not require the assistance of their husbands, fathers or guardians. A married woman could prosecute her husband in her own name. For example, if a husband abused his wife, she could sue him before a court. In case of divorce, the wife could also represent herself. A married couple could not testify against each other, except if the case was between them. However, according to Law no 1 of 1895 they were allowed to give evidence for or against each other, if they wished to do so.⁷⁶

⁷³ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 63; H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 37, 43; M. Josson, *Schets van het recht van de ZAR*, p. 244.

⁷⁴ S. van Leeuwen, *Commentaries on Roman-Dutch law*, p. 234; H. Grotius, *The Introduction to Dutch Jurisprudence*, p. 143.

⁷⁵ H. Grotius, *The Introduction to Dutch Jurisprudence*, pp. 51, 53; J. van der Linden, *Insitutes of Holland*, p. 30; S. van Leeuwen, *Commentaries on Roman-Dutch law*, pp. 33-35; M. Josson, *Schets van het recht van de ZAR*, pp. 376-377.

⁷⁶ J. van der Linden, *Insitutes of Holland*, pp. 238, 349, 377; F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 275, 294; M. Josson, *Schets van het recht van de ZAR*, p. 199; Law no 1 of 1895, H.J. Coster (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1895*, p. 6.

k. Education

In education, the laws did not really discriminate on the grounds of gender. Law no 4 of 1874 stated that “onderwijs word gegeven deur hoofd- en hulponderwijzers en kweekelingen, zoo wel mannelijke als vrouwelijke.”⁷⁷ The goal was to teach boys and girls together, “hoewel afzonderlijke zitplaatsen hebben.”⁷⁸ Subjects were the same for boys and girls, with the exception of a subject like Handwork, which was offered only to girls, and a female teacher could give girls extra lessons, which included drawing and writing. Women were allowed to be principals of schools and to receive the same salary as their male counterparts. Different classes of education were the norm, and only male teachers could teach the highest grade.⁷⁹

In 1892 a law was passed that provided for school boards. Only fathers of families, men who lived close to the school, and men who made donations to the school, could elect the members. In this law, however, the most interesting aspect is that “waar in deze wet van onderwijzer of kweekelingonderwijzer gesproken wordt, geldt dit zoowel vir vrouwelijke als mannelijke personen ...”⁸⁰ The last stipulation in this law regarding women is to provide for a higher girls school, for which the government was willing to provide money, “ter ondersteuning en aanmoediging van het hoger onderwijs voor meisjes.”⁸¹ The principal of this school had to be a woman of adequate education, and the rest of the teachers (seemingly) had to be women as well.⁸²

4. Other sources mentioned in court cases

Although the chief sources used for the court cases were Van der Linden, Grotius and Van Leeuwen, they were supplemented by various Roman-Dutch legal works. Johannes Voet’s famous, and arguably even more respected work on Roman-Dutch law than Grotius’s book,

⁷⁷ Law no 4 of 1874, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 566-580. Translation: ‘education is given by principal assistant teachers and student-teachers, male as well as female’.

⁷⁸ Law no 4 of 1874, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 566-580. Translation: ‘although they had to have separate seats’.

⁷⁹ Law no 4 of 1874, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 566-580.

⁸⁰ Law no 8 of 1892, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 424-435. Translation: ‘when in this law mention is made of teachers or student-teachers, it applies to both female and male persons...’

⁸¹ Law no 8 of 1892, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 424-435. Translation: ‘for support and encouragement of higher education for girls.’

⁸² Law no 8 of 1892, F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, pp. 424-435.

Commentarius ad Pandectas, was seemingly not selected for the practical reason of it being in Latin and thus inaccessible to unlearned legal practitioners. This is also true for other Roman-Dutch sources that were mentioned in the Transvaal court proceedings towards the end of the century, like Benedictus Carpzovius and Johann Bö hmerus's *Quaestionum fere universarum decisiones in materia processus criminalis*, A. Matthaeus's *De criminibus commentarius*, and Cornelis van Bynkershoek's *Quaestionum juris privati libri quatuor*. F. Mackarness mentions that, apart from being in Latin, Voet's *Pandectas*, as it was commonly known, was rather voluminous, and thus, given a choice, the early members of the Transvaal legal profession would have preferred Dutch sources.⁸³

This situation changed dramatically as the century progressed, likely because the standard of jurisprudence rose. In the court cases under discussion, Voet is mentioned on various occasions. In one judgment in 1879, Kotzé remarks that "Van Leeuwen, a very high authority in this Court, has laid it down ... [a]nd Voet, an equally high authority, has in his Commentary on the Pandects, expressed himself to the same effect ...",⁸⁴ proving that for him, at least, the sources could be used interchangeably.

Roman-Dutch sources in Dutch were also in greater use towards the end of the century. *Verhandelinge over de misdaden en der selver straffen* by J. Moorman and J.J. Hassels, P. Merula's *Manier van procederen* and D.G. van der Keessel's *Select theses on the laws of Holland and Zeeland* were quoted regularly if it seemed evident that the primary sources were lacking.⁸⁵

The regular use of English authorities included not only law books, but also court cases in England, Scotland and the Cape Colony. Some of the books used include E.W. Browning's *An exposition of the laws of marriage and divorce*, C.P. Phillip's *The law concerning lunatics, idiots, and persons of unsound mind*, and *Commentaries on the conflict of laws, foreign and domestic in regard to contracts, rights, and remedies, and especially in regard to marriages*,

⁸³ F. Mackarness, Roman-Dutch law, *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906, p. 38; J. Voet, *Commentarius ad Pandectas*; B. Carpzovius & J.S.F. Bö hmerus, *Quaestionum fere universarum decisiones in materia processus criminalis*; A. Matthaeus, *De criminibus commentarius*. C. van Bynkershoek, *Quaestionum juris privati libri quatuor*.

⁸⁴ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 74.

⁸⁵ J. Moorman & J.J. Hasselt, *Verhandelinge over de misdaden en der selver straffen*; P. Merula, *Manier van procederen, in de provintien van Holland, Zeeland ende West-Vriesland*; D.G. van der Keessel, *Select theses on the laws of Holland and Zeeland*.

divorces, wills, successions, and judgments by J. Story and M.M. Bigelow, and others.⁸⁶ Although the nonchalance with which these sources are referred to in the reported cases are telling there is some proof that the three Roman-Dutch sources were used predominantly. In one judgment, Kotzé stated that “[n]o Roman-Dutch writer has been cited. Story [an English author] is of great authority, but he is only a good authority where our own writers are silent.”⁸⁷

5. Conclusion

This composite reference to women’s rights is neither comprehensive, nor universally practically relevant. One reason, as was mentioned, is that other legal sources were also cited in court cases. It sets out ways in which the law saw women, and therefore most laws that mention women are included. Some laws appear not to have been implemented, for example the provisions regarding punishment for adultery. No mention is made of a woman being placed on a spare diet, nor does it appear that banishment was ever offered as punishment.

The laws perceived women and their legal position in contradictory ways. The sources themselves speak about and entrench women as being inferior to men, and marriage reinforces this: Marriage irrevocably changed, and then continued to dominate, every part of a woman’s public and private life. However, as long as a woman remained unmarried she had relatively free reign regarding her own affairs, and was thus not as inferior legally to men as was a married woman. In some cases, as with inheritance and wills, men and women were treated fairly equally. In others, such as rape and adultery (no matter the punishments in the end), different standards were definitely at play.

With regards to some of the legal rights, some inconsistencies and confusion arise. Such discrepancies increased the importance of individual lawyers and judges and their

⁸⁶ E. W. Browning, *An exposition of the laws of marriage and divorce*; C.P. Phillips, *The law concerning lunatics, idiots, and persons of unsound mind*; J. Story & M.M. Bigelow, *Commentaries on the conflicts of laws*. There were numerous others: P.B. Maxwell, *On the interpretation of statutes*; H. Roscoe, *Digest of the law of evidence on the trial of actions at nisi prius*; W.M. Best, *A treatise on the principles of evidence and practice as to proofs of courts of common law*; W. Burge, *Commentaries on colonial and foreign laws generally*; J.P. Bishop, *Commentaries on the law of marriage and divorce, and evidence in matrimonial suits*; J. Story & M.M. Bigelow, *Commentaries on equity jurisprudence in England and America.*, and Scottish works like J. Erskine & J.B. Nicholson, *An institute of the law of Scotland*.

⁸⁷ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 119.

interpretation of the law. It must be reiterated that the reference compiled in this chapter states simply what protection women were entitled to under the law. The question as to whether the laws served to protect them as interpreted in the courts is the subject of chapter 6.

VI. WHITE WOMEN AND COURT CASES IN THE NINETEENTH CENTURY TRANSVAAL

1. Introduction

Having constructed and defined a legal stage and backdrop for Transvaal women, the focus in this chapter is to consider possible ways in which women could have acted on the stage. This chapter considers whether the descriptions of society and women in the late nineteenth century, and the brief glimpses of women's agency presented in the previous chapters, are relatively accurate. Furthermore, the court cases are compared with the findings of chapter 5 to determine whether or not the law as set out in law books was implemented accordingly.

2. Women in court cases

The cases that will be discussed in this chapter were chosen from amongst reported cases found in the Law Reports of the Transvaal from 1877 to 1899,¹ which were scrutinized for cases with women as applicants or defendants. The discussion is supplemented with information from the actual court cases found in archives, as well as comments from two newspapers, *De Volksstem* and *The Press*.² The contextualization of the reported cases is uneven since the relevant court cases and documents used did not yield the same information in every instance. Therefore, bibliographical detail provided is denser in some cases than others, and places of residence are provided when made apparent.

In the discussion that follows, the cases are sub-divided into the categories that have been designed in chapter 5. Some cases relate to more than one category, but they are grouped together by topic to see similarities and differences between cases of the same nature. For some cases there is no legal framework in chapter 5, just as there are some laws for which

¹ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*; J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*; J.G. Kotzé, *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). August 1881-December 1884*; S.H. Barber & W.A. Macfayden, *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). Jan 1881 to Dec 1892*; J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*; F.B. Tobias e.a., *Officieele rapporten van het Hoog Gerechtshof der ZAR. 2e kwartaal 1894*; W.S. Webber, *The official reports of the High Court of the South African Republic. Vol II. 1895*; J.G. Kotzé, *The official reports of the High Court of the South African Republic. Vol IV. 1897*.

² Some cases did not feature in newspapers, and some editions of newspapers were unavailable. If at all possible, newspapers were studied and are mentioned here. The same goes for the court cases, as not all the original copies of cases referenced in the Law Reports were found in the National Archives in Pretoria.

there are no cases. They are still included, however, because of the significance of the absence of a specific law for a case that went to the High Court. The cases do not all contradict the law as set out in chapter 5. Some cases are significant in that they show that the court upheld some laws.

a. Marital status and marital power

The cases found dealing with marital status and marital power concentrated mostly on a woman's legal right to act as the executor of her husband's estate. In the case of *Van Eeden vs Kirstein* in 1880, the court confirmed that a married woman needed the assistance of her husband in law. Cornelia Catharina Carolina Petronella van Eeden of Zeerust, as executrix of her first husband's estate, employed someone as her agent to collect money for that estate. Since she was married again, she had to proceed with her second husband's assistance, even though the second husband was not involved in that specific case. The significance is that a second marriage, which automatically placed the women under her husband's marital power, trumped her rights as executrix of the first estate.³ The report in *De Volksstem* stated that "[t]here was an application for an extension of an interdict to restrain [the] respondent, [un]till the Court should sit at Zeerust, from selling, mortgaging or otherwise alienating his landed property ..."⁴ The fact that they had to wait until the Court sat in Zeerust again, is a clear illustration of accessibility to the court being a factor.

Another instance where a court case confirmed the existing law was in a married woman's right to carry on her own business and make her own contracts as a public trader without her husband's interference. According to *Von Ronn, Schabbel & Co v Ferraro*, (Ferraro is the women) she was responsible for accounts sued if it belonged to her, and the court assumed

³ TAB. ZTPD. 232/1880. Illiquid case. *Van Eeden versus Kirstein.*, p. 186; TAB. ZTPD. 433/1880. Application. *Van Eeden versus Kirstein.*, p. 5. J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 182-185; J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, pp. 3, 200. Case dates 14 May, 9 Sep 1880. [Kot Tral 182] *De Volksstem*, 1880-01-30 (High Court. {Before Mr. Justice Kotzé}. Tuesday, January 13, 1880). *De Volksstem*, 1880-09-11 (High Court. {Before Mr. Justice Kotzé}. Thursday, September 9).

⁴ *De Volksstem*, 1880-02-14 (High Court).

that if she incurred the debt she was acting on her own behalf.⁵ The case confirms that where her business was concerned, she was on the same legal footing as a man.

Another case where a woman could not act as executor was when she was declared insane. In *Ex parte application Potgieter*, which went before the court in December 1882, Susanna Jacoba Dreyer, born Holzhausen, was “declared incompetent to administer the estate of her late husband ...”⁶ because she was “van tyd tot tyd en dikwels maande achtereen krankzinning, sonder gesonde verstand en dientengevolge geheel onbekwaam is eenige besigheid te verrigten.”⁷ Her son-in-law replaced her as executor. The issue in this case does not seem to have been gender, but the capability to do her legal duty. What has to be kept in mind is that the limitations on Mrs. Dreyer’s agency may have been reinforced by the widely held Victorian belief that women were more prone to insanity than men.⁸ Furthermore, it is curious why her son-in-law, and not her daughter, was appointed as executor – the law would, after all, have allowed for the latter. It may serve as an example of social and cultural factors preventing a woman from appropriating a position of authority she had been entitled to legally.

In cases where men were declared insane, women were treated with sympathy and a presumption that they had the responsibility to stand in for their husbands. This is shown in the case in September 1882 of *Vuyk vs Vuyk*, where a woman from Pretoria, Johanna Vuyk, “is competent to institute an action to have her husband declared of unsound mind,” if the husband, Leendert Vuyk, is clearly proved to be of unsound mind. She gained control not only over her personal life, but she was also enabled to become the executor of the estate and go to court in that capacity. In the case, it is stated that “de gezegde LV [Leendert Vuyk] gehul en al onbekwaam is om achter zyne besigheden te zien, zoodat het van het groots

⁵ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 353. [2 SAR 231]

⁶ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, pp. 146-147. Case dates: 1882. [In re Potgieter [1 SAR 53]. J.G. Kotzé, *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). August 1881-December 1884*, pp. 53-54. Case date: 18 Dec 1882. Potgieter is the person who brought the case before the court, and not the surname of the women.

⁷ TAB. ZTPD. 1085/1882. Unopposed application. *Ex parte application Potgieter.*, p. 98. Translation: ‘from time to time and sometimes for months in a row insane, without healthy faculties and is therefore wholly unable to transact any business.’

⁸ B.T. Gates, *Victorian suicide: Mad crimes and sad histories*; J.N. Ainsley, Some mysterious agency: Women, violent crime and the insanity acquittal in the Victorian courtroom, *Canadian Journal of History* 35(1), April 2005.

belang is dat de gezegde JV [Johanna Vuyk] met bystand van einen Curator de besigheid gedurende de krankzinnigheid van haren Echtgenoot behartigend.”⁹ Furthermore, “voor de laatste veertien dagen zijne Echtgenoot [the wife] gevaar heeft geloopt van onnatuurlijke mishandeling, door de rust van haar huis dag en nacht te verontrusten.”¹⁰ In Kotzé’s judgement: “Not only is her interest in the estate affected; her personal safety must also be regarded.”¹¹

In this instance, the telling diversion from the law is that the wife was allowed to appear in court without her husband’s consent, a clear exception to the rule that a married women could only appear in court with the assistance of her husband.¹² And yet there is a slight difference between this case and the one in which Mrs Dreyer was declared insane and incompetent as executrix. Mrs Dreyer was relieved of her responsibility altogether, whereas, in this case, the sane wife of the insane man is advised to take care of her husband’s affairs, with the assistance of a (probably male) curator, for the duration of his insanity – the possibility is left open that the man might still recover from his condition, despite the declaration that he was completely incompetent to take care of his business. One must also question whether the requirement that a curator should assist Mrs Johanna Vuyk is inserted because the judge wanted to strengthen her agency or whether he mistrusted her competency in the masculine sphere of dealing with the business of her husband.

The way of addressing people shows something of the court’s attitude, or, in the second case, the judges’ attitude towards women. In *Dow and Co vs Mears and Walker* the defendant is named Mrs. L.S. Walker, where the men are just referred to by initials and surname, for example J.S. Mears, suggesting that the instance of a defendant or applicant being a woman was something that needed to be highlighted. Of course, since the legal

⁹ TAB. ZTPD. 320/1882. Illiquid case. Vuyk versus Vuyk., p. 4. Translation: ‘the said LV is completely unable to look after his business, and therefore it is of the greatest interest that the said JV with support of a Curator manage the business during the insanity of her Husband.’

¹⁰ TAB. ZTPD. 320/1882. Illiquid case. Vuyk versus Vuyk., p. 4. Translation: ‘for the last fourteen days the spouse (the wife) was in danger of unnatural abuse, and the calm of her house was spoiled by day and night.’

¹¹ J.G. Kotzé, *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). August 1881-December 1884*, pp. 19-20.

¹² J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, pp. 267-268. Case date: 30 Sep 1882. [1 SAR 19]

entitlements for married and unmarried women differed, her married or unmarried status needed to be a matter of legal record, which would not have been the case with men.¹³ In two cases, there is a telling difference between the reported case and the case itself. In the *Transvaal Silver Mines vs Jacobs, le Grange and Fox*, June and July 1891, the one defendant, Jacobs, is referred to in the reported case as “the widow Jacobs”.¹⁴ Placing women in categories rather than seeing them as individuals also happens in *Ferguson vs Pretorius and other*, where the applicant is named as the “widow Ferguson”. Both these women’s names are available in the court cases (Catharina Elizabeth la Grange and Mary Ferguson), but Kotzé, who compiled the reports for that year, chose rather to refer to them by their titles as widows.¹⁵ It is revealing that the women are defined by their marital status (or their lack thereof, since both were widowed), but it was important for their legal standing that they were widows: no longer under the husband’s marital power, and, since they were not married again, had the same rights as unmarried women. Although seemingly sexist from Kotzé’s side (one cannot imagine that he would have referred to a man in a legal sense as the ‘widower Jones’), legally this might have been the easiest way for him to distinguish women, and therefore their legal status. This proves the point made in Chapter 2 by A. Dubler that women, whether married or unmarried, could claim and were denied various rights and entitlements in connection with their proximity to marriage.

b. Women’s property rights

Three reported cases on the property rights of women showed significant interpretations of the law as discussed in the previous chapter. The case of Mrs. Ferguson reveals the agency that came about with widowhood.

In *Ferguson vs Pretorius and others* on 12 November 1879 Mary Ferguson of the farm Mooifontein, whose occupation was storekeeper, took some men to court because they held a meeting in the vicinity of her land, and some of the members’ cattle destroyed her

¹³ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 220-223. Case dates: 20, 25, 27 November 1884.

¹⁴ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 116-120. Case dates: 20, 22, 23 June, 4 July 1891.

¹⁵ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 157-158. Case dates: 12 November 1879. TAB. ZTPD. 610/1880. Unopposed application. Ferguson versus Pretorius and others., p. 176. TAB. ZTPD. 1772/1891. Illiquid case. Transvaal Silver Mines versus Jacobs, le Grange and Fox., p. 226.

fences, enclosures and crops. Ferguson lost the case on a legal technicality, but she clearly had the rights of a landowner, and the land is referred to throughout as the “plaintiff’s land”.¹⁶ *De Volksstem* reported the facts, but the woman is referred to as the *eischeresse* (plaintiff), and nothing is said specifically about her being a woman.¹⁷ The remarkable aspect of this case is the very prominent individuals whom Ferguson took to court, which makes the legal technicality on which she lost the case seem rather dubious: M.W. Pretorius, M.J. Viljoen, S.T. Prinsloo, J.P. Mare, P.J. Joubert, M. Vorster, H. Schoeman, S.J.P. Kruger and W.E. Bok, many of whom were leaders of the Transvaal and members of the “committee of the people”.¹⁸ The men’s stature was clearly not a deterrent for Ferguson. Though hers was possibly an isolated incident, Ferguson’s decision to become plaintiff against some of the most powerful men in the Transvaal does indicate some agency.

In the case *Dow and Co vs Mears and Walker* on 20, 25 and 27 November 1884, James Eduard Mears obtained leave from the Court to join Lily Louisa Walker as co-defendant in a case where they were sued for diverting water from the Aapies River [sic] illegally. Mears and Walker lost the case, and the “defendant Mears is further ordered to pay the sum of £60, as damages to the plaintiffs.”¹⁹ The significance is the following: She is referred to in the reported case as “Walker (born Cameron)”,²⁰ the last part indicating that she was married, but no mention is made of her husband who by law is supposed to support her. Although this does not necessarily mean he was not involved, it is peculiar that he is not mentioned, unless Walker’s ownership of the property was for the purpose of her public trade, in which she was exempted from her husband’s guardianship. The case makes it clear that Walker not only owned her own property, but went to court and defended her property rights. *De Volksstem* covered the case, although only with the barest of facts.²¹

¹⁶ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 157-158. Case dates: 12 November 1879. TAB. ZTPD. 610/1880. Unopposed application. Ferguson versus Pretorius and others., p. 176.

¹⁷ *De Volksstem*, 1878-12-02 (Hooge Hof. {Voor Regter Kotzé}. Woensdag, 12 November).

¹⁸ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 157-158. Case dates: 12 November 1879.

¹⁹ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 220-223. Case dates: 20, 25, 27 November 1884.

²⁰ TAB. ZTPD. 487/1884. Illiquid case. Application. Dow and Co. versus Mears and Walker., p. 95.

²¹ *De Volksstem*, 1884-11-25 (Zaterdag, 22 November; Maandag, 24 November); *De Volksstem*, 1884-11-28 (Saturday, November 22; Monday, November 24); *De Volksstem*, 1884-12-05 (Thursday, November 27).

The case of *Fuchs vs Lys*,²² also seems to be one in which a woman was exempted from male guardianship in the practising of her public trade. Lys was a woman who leased land to a man and gave him permission to erect buildings both on his and her land. Later she pulled the structures down for her own alterations on her land, but reconstructed his buildings and offered him compensation. He applied for an interdict which the court refused, because “the person who grants permission to have a building on **his** ground can withdraw such permission at any time without damage or loss.”²³ Not only is Lys evidently perceived to be an equal to the man, based on her ownership of the land, but the application of masculine language to a woman is also striking.

With all three these women, the reported cases reinforced the public roles they had taken upon themselves as property owners, acting independently of male guardians.

c. Antenuptial contracts

As one of the few areas where married women had rights equal to men,²⁴ the cases about the interpretation of antenuptial contracts are noteworthy in as far as they reinforce these rights. In *Van der Merwe vs Turton and Juta*, on 12 November 1879, the court confirmed Emily van der Merwe’s rights that anything secured under antenuptial contract was hers independent of her husband. They were married without community of property, and she therefore claimed to possess her own goods. When her husband was declared insolvent, his creditors sold her belongings to pay off his debts. The court ordered the creditors to pay her the money back, not the £35.12.1 that they owed her, but £100, to make up for “the inconvenience she suffered through the sale of her furniture and kitchen utensils ...”²⁵

The actions of the creditors may show widely-held assumptions at the time that women did not generally own property independently from their husbands. Significantly, the judge seems to have gone beyond what the law demanded of him, in order to confirm the

²² No case date available in the Law Report.

²³ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 38. [3 SAR 36] My emphasis.

²⁴ See chapter 5, pp. 99-100.

²⁵ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 155-157. J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 14. Case dates: 31 July, 4 Nov 1879. [Kot Tral 155] TAB. ZTPD. 171/1879. Illiquid case. Van der Merwe versus Turon and Juta, pp. 79-80.

women's legal status, lessen her loss, and punish the creditors for their ignorance of the law and the possibility of an existing antenuptial contract. In a successive case, it comes to light that Mrs. van der Merwe used her "kitchen utensils" to generate an income through baking. The mentioning of these specific details shows that the judge chose not to limit her to the private, feminine sphere, and saw that the creditors had damaged her business, and her ability to earn a living and sustain her family – the creditors, therefore, were sabotaging her otherwise masculine role of providing an income. Mrs. van der Merwe's seeming transcendence of gender through her antenuptial contract is a remarkable example of agency, not to mention the lengths to which the judge went in emphasising it in his ruling.

In the successive case, the creditors got their revenge. Mrs. van der Merwe was the defendant in the *Curator of Van der Merwe's estate vs Van Der Merwe* in November 1879, where the court found that an antenuptial contract cannot give the wife her husband's property in competition with his creditors: "Mrs. van der Merwe, in order to assist her husband, who was a carpenter by trade, in supporting themselves, and the children of the marriage, engaged in dress-making, and also later on started a bakery. With money so earned, she improved and made certain additions to the house built by her husband." In his judgement, which was for the creditors, Kotzé did remark: "No doubt this decision is a hard one as regards Mrs. van der Merwe, who, with money earned by her own industry, assisted her husband not only in support of the family, but, as her children grew up, made additions and improvements to the house originally built by the husband. The law is, however, too well settled ..." ²⁶ The difference is that there is property owned by the wife independently, and property owned jointly, and the latter was under the husband's control. Noteworthy, however, is Kotzé's remark that the 'law is too well settled', which suggests that the law in some cases was not so well settled. Implied is that judges could rule in favour of women in cases where there was more leeway to interpret the law. ²⁷

²⁶ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 14. J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 148-155.

²⁷ An interesting aside in the Turton and Van der Merwe case is the following stated in the newspaper: "...the Chief Justice [De Korte] remarking to counsel to advise the local practitioners and the landdrosts in all future cases to consult and quote the Roman-Dutch law and the numerous decisions of the Supreme Court in the Cape Colony on the point, as it appeared to him the landdrost knew very little of law..." *De Volksstem*, 1980-07-17 (High Court. Before the Chief Justice and Mr. Justice Kotzé. Friday, July 2).

In a subsequent case the interpretation of antenuptial contract was again strongly sympathetic to the woman. In *Ex parte Westerdijk*,²⁸ a case where a woman's husband left her (malicious desertion), the court stated that she could alienate or mortgage her own fixed property, even if it was not so stated in the antenuptial contract.²⁹

d. *Echtscheiding, overspel*³⁰ and its influence on guardianship over children

The majority of court cases which involve women concern divorce and almost all of them underline the arbitrary nature of the legal system.

In *Finegan vs Finegan*, the husband, William Joseph Finegan, sued his wife, Dorothea Wilhelmina Finegan for divorce in November 1879.³¹ The details of the case, as stated by the plaintiff, were "that from and by reason of the act of adultery ... the said Defendant conceived and became pregnant of a female child, of which the said Plaintiff is not and could not be the father, which child was born in Rustenburg on or about the 24th day of June 1879 and which child was and must have been procreated during the absence of the Plaintiff from home whilst he was engaged in the operatives against Seccocoeni [sic] and subsequently laid up in hospital in Pretoria in consequence of a wound received ..." ³² Mrs. Finegan admitted to the adultery, and that it was not her husband's child. Even knowing this, the husband attempted to have intercourse with her. The defendants claimed *condonation*, which is to forgive someone for committing an act upon them that harmed them in some way, but the court found that his actions did not necessarily mean condonation. In the end, they were granted a divorce, and the child was declared illegitimate.³³

Two issues stand out. The first is the invasion of privacy. Mention is made that "[the husband] had tea with his wife and attempted to have connection with her, but she was not then in a fit state for the purpose." Later, it is stated that "the putting of his hand under the

²⁸ No case date available in the Law Report.

²⁹ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 200. [1 OR 286]

³⁰ Translation: 'Divorce, adultery,'

³¹ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 159-160. Case dates: 13, 14 November 1879 [Kot Tral 159]

³² TAB. ZTPD. 174/1879. Illiquid case. Divorce. Finegan versus Finegan., p. 3. Seccocoeni is usually spelt Sekhukhune.

³³ TAB. ZTPD. 174/1879. Illiquid case. Divorce. Finegan versus Finegan., p. 1.

wife's clothes ... was a silent invitation, or offer, which was not accepted by the wife."³⁴ There could be various reasons for the behaviour of the two people in this case. By condoning the act, the husband may have been trying to help his wife by claiming the pregnancy. On the other hand, it may have been possible that he was simply trying to save his own honour. On the wife's side, by not allowing him to do so, it seems as if she wanted the other man's child, and she wanted a divorce: a clear indication that she was acting on her own, and was maybe trying to use the court to satisfy her own means.

This case also draws attention to a discrepancy in applying the law, which clearly stated that a married woman found guilty of adultery was to be banished.³⁵ The wife in this case committed adultery and admitted to it, but no mention is made of her banishment from the Transvaal. The court resolved it by simply pronouncing divorce.

Valid reasons in law for divorce included malicious desertion and adultery, and **not** mutual consent.³⁶ Nonetheless, in the case of *P. Kok v JMEPCJ Kok*, the defendant (the wife) "stated that she refused to return to the plaintiff," and the Court dissolved the marriage, without first granting *a rule nisi*, which would have forced her to return to her husband and try to make the marriage work.³⁷ Since further details are not given, one must assume that the court had a valid reason, however, it does show that the court was flexible in its rulings.

In another divorce case, *Truter vs Truter*, in April 1878, the husband, Jan George Truter, left his wife, Maria Katrina Truter, and she sued him for restitution of conjugal rights, which was a court order ordering the husband to return to his wife. The story, however, is more complex, as can be seen in the case notes: "... at Potchefstroom [Jan Truter] committed and was duly convicted of the crime of theft and by judgment of the court of landdrost and heemraden, was sentenced to imprisonment for ... 18 months and incarcerated accordingly in the gaol at Potchefstroom. And whereas ... Truter escaped out of the gaol ... about the

³⁴ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 159-160. Case dates: 13, 14 November 1879 [Kot Tral 159]

³⁵ See chapter 5.

³⁶ See chapter 5.

³⁷ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [5 OR 31 March] The year of the case is not available in the Law Report.

month of May 1868, and after his escape out of gaol as aforesaid, his place of abode as last known to ... M.K. Truter was in ... Bloemfontein within the Orange Free State Republic ...”³⁸

The court accepted her appeal, and published a decree in the *Transvaal Government Gazette*, the *Express* newspaper in Bloemfontein, and put a copy on the door of the High Court building in Pretoria, ordering the husband to return to his wife. When the husband failed to return, the court pronounced *divorce a vinculo* in April 1878.³⁹ Although it might be an invasion of privacy to force your husband to return home by publishing it in newspapers, the protection of her privacy was probably not the main motivating factor for Maria Truter. A reason might be that during her husband’s earlier trial her privacy had already been invaded, and one would imagine that her goal was to get a divorce, and that this was her only option.

In divorce cases before the court on the charge of adultery, one may assume that sometimes matters became ugly and very public. An example is the rather sensational case in July 1893 of *Edward D Chester v Helen Chester and Graham*. Edward and Helen met in London. While living there, “she sometimes took liquor to excess, for which reason the plaintiff, who was attached to his wife, on their departure from England for South Africa in August 1891, engaged a certain Mrs. Hewat to act as her nurse and watch over her, and so protect her against falling.”⁴⁰ It is doubtful that a woman would want this kind of information to become public knowledge.

Additional facts of the case invaded their privacy even more: The husband suspected his wife of adultery, because while he was away, Graham visited his wife one day. Mrs. Hewat was sick and in bed that day. Graham brought bottles of spirits with him, and slept over in the house. In Mrs. Hewat’s testimony, she stated that at 2:00 in the early morning she heard them talking in Mrs. Chester’s bedroom, and they were calling each other “by their Christian

³⁸ TAB. ZTPD. 25/1878. Illiquid case. Restitution of conjugal rights. Truter versus Truter., p. 78.

³⁹ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, pp. 34-35. Case dates: 4, 9 April 1878. *Divorce a vinculo*: Divorce from all the bonds of marriage (annulment) TAB. ZTPD. 25/1878. Illiquid case. Restitution of conjugal rights. Truter versus Truter., p. 79.

⁴⁰ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [10 CLJ 340 and H 157]. J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 157-164. Case date: 22 July 1893.

names.”⁴¹ The house worker who brought them coffee in the morning stated that he found them at 5:00, Graham lying in Mrs. Chester’s bed, and Mrs. Chester in her underclothes in Mrs. Hewat’s room. Mrs. Chester said she slept in Mrs. Hewat’s bed, but Mrs. Hewat denied this, and said she only came to her room in the morning. The same house worker said that he found some of Mrs. Chester’s under linen on the dining room floor. Another worker testified that Graham came to the house and spent time with Mrs. Chester in the dining-room with the blinds closed. The coachman testified that he took Mrs. Chester to Graham’s hotel, where she stayed once for half an hour, and instructed the coachman not to tell Mr. Chester. Graham denied that Mrs. Chester was ever at his hotel room, and said that he only slept at the Chester house because he had business with Mr. Chester, and that he could not go home as it was raining (this was proved). He denied improper intercourse.⁴²

In Kotzé’s judgment, he stated that Mrs. Chester’s previous escapades were not important, because Mr. Chester “married her with full knowledge of those circumstances, and there is enough before us to satisfy me that portion of her career is deserving of compassion rather than censure.” His final finding was that the “mere imprudence of suspicious conduct, however grave, coupled with an opportunity for committing the act alleged, is not sufficient to bring us to the conclusion that adultery was actually committed ...”⁴³ The benefit of the doubt went to the woman, but this case is a clear example where someone’s private life was made very public. Also remarkable is the testimony of the Chesters’ servants, who, by virtue of their position, should have been invisible, were now thrust into the spotlight, and were forced to make public comments about the private lives of their employers.

That the court’s decisions were mostly fair can also be seen in *Jacobs v Jacobs*, where the wife sued her husband *in forma pauperis* (someone who is without the funds to pursue a

⁴¹ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [10 CLJ 340 and H 157]. J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 157-164. Case date: 22 July 1893.

⁴² J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [10 CLJ 340 and H 157]. J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 157-164. Case date: 22 July 1893.

⁴³ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [10 CLJ 340 and H 157]. J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 157-164. Case date: 22 July 1893.

law suit) in action for divorce. Although the wife did own some property, the court approved her action because she “had no means of support for her and two children, [and her] said property could not be regarded as means available for the purposes of the action.”⁴⁴

Another incident where the husband was forced to pay his wife’s law costs in a divorce case against him occurred in May 1893 in the case of *WJM Henning v WDA Henning*. The wife had property, but as she was married, she could not do anything with it without her husband’s consent, and she received no revenue from it. The couple was married with antenuptial contract but without community of property, so “by virtue of his marital power, [he had] the right to prevent her from encumbering her property.” Essentially, the wife had no money to proceed against her husband in an application for the restitution of conjugal rights, or failing that in an action for separation *a mensa et thoro* (legal separation not divorce – separation of table and bed). The court ordered the husband to provide a sum of money to cover his wife’s law costs.⁴⁵

Another extraordinary case was that of *Amanda A. Brown (née Schilling) v Charles A. Brown* in July and September 1897. The wife sued the husband for adultery, and furthermore, she stated that the husband made donations to her to the value of £35,000 during their marriage, which she wanted back. The interesting part of this case, however, is that the court found that “the facts with regards to divorce are of little consequence ... both the parties had committed adultery, and that consequently there could be no order for the dissolution of the marriage.”⁴⁶ The parties made all kinds of agreements with each other during the marriage, amongst others: “By the second agreement the parties undertook not to sue for divorce on the ground of the misconduct of the other party, and they agreed to live apart.”⁴⁷ Without the facts, and some biographical information, one can only speculate as to what the situation was, but it seems like a very progressive, possibly even staged,

⁴⁴ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, pp. 200-201. [1 OR 370] Unfortunately, the Law Report does not provide a date or more information, for example why the women would have wanted the divorce, and the case was not found in the archives.

⁴⁵ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, pp. 374. [H 48]; J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 48-49. Case date: 20 May 1893.

⁴⁶ J.G. Kotzé, *The official reports of the High Court of the South African Republic. Vol IV. 1897*, pp. 282-286. Case date: 12,13,20 July, 10 September 1897.

⁴⁷ J.G. Kotzé, *The official reports of the High Court of the South African Republic. Vol IV. 1897*, pp. 282-286. Case date: 12,13,20 July, 10 September 1897.

marriage. Adultery was not an issue; they even gave each other leave to commit it. However, the law still disadvantaged her, because she did not get her money back. This case was mentioned in *The Press* four times, every day that it went to court, and reported facts like: "... the defendant, during 1891, committed adultery with a certain Mrs. Jansen ..", "... she claimed a dissolution of the marriage ...", the "... defendant denied the adultery ... and further ... during the year 1886, [claimed] the plaintiff had, at Bulawayo and Johannesburg, committed adultery with various persons ... He, therefore, prayed for a divorce ..." ⁴⁸ and so on, which again is an example of the private becoming public.

In the case of *G.J.W le Roux v L.M. le Roux (born Van den Berg) and C.C. Joel* in 1897, the husband, G.J.W le Roux sued for divorce on the grounds of adultery, and sued the co-defendant (Joel) for damages. Joel's defence was that he was a minor, and should have been assisted by his father, which was the court's finding. ⁴⁹ When one looks at *The Press's* coverage, the story gets a lot more interesting. As part of the evidence, the husband stated that he "first learned to know the defendant when she was a barmaid. She was not then known as a woman of loose character ... He did not know that she associated with men during the time that she was away from him," suggesting that later he knew that she was indeed a woman of loose character. One of the things that were under scrutiny in the case was her character, and a few people commented on it. Joel "admitted that he had connection with the defendant, but pleaded that he at the time did not know that she was a married woman, and, further, that she was virtually a common prostitute, and that he was thus not responsible for any damage plaintiff may have suffered." Other witnesses testified that she "was well known as a woman of loose character. She had consorted with a certain David and George," and "Montague Hart deposed that he knew the defendant since 1887. He always knew her as a woman of loose character." ⁵⁰ The outcome of the case is not known (the reported cases' issue was with Joel's minority), and thus it is unknown whether she was found guilty of these offences. The evidence as given in the newspaper seems to point to her guilt, and the newspaper only reported actual (seemingly objective, not to

⁴⁸ *The Press*, 1897-07-13 (High Court of Justice. Monday, July 12), p. 3. *The Press*, 1897-07-15 (High Court of Justice. Wednesday, July 14), p. 3. *The Press*, 1897-07-21 (High Court of Justice. Saturday, September 11), p. 3. *The Press*, 1897-07-21 (High Court of Justice. High Court of Justice. Tuesday, July 20), p. 3.

⁴⁹ J.G. Kotzé, *The official reports of the High Court of the South African Republic. Vol IV. 1897*, p. 74. No specific dates available in the Law Report.

⁵⁰ *The Press*, 1897-07-19 (High Court of Justice. Saturday, July 17, 1897), p. 3.

mention, salacious) proceedings. The extraordinary thing about this case is that a married woman had a life, and lived it, independently of her husband. If the issue is not her morality, but her agency, there is no doubt that she had plenty.

Another example deals with the intricate story of the Weatherleys and Gunn of Gunn. It includes a few cases, including *Ex parte Weatherley*⁵¹ and *Weatherley vs Weatherley*, but they all took place in a relatively short time frame, from around November 1878 to Jan 1879, and are discussed as a unit.

The facts of the case of *Weatherley vs Weatherley* are the following: The husband left the Transvaal for Cape Town and left his wife under the guardianship of Charles Grant Murray Somerset Seymour Stuart Gunn. He did this with the knowledge that Gunn had an affair with a coloured woman named Malattie. In the case he said that this was due to his trusting nature(!) While in Cape Town he found out that Gunn was an imposter (he said he was a Captain in the Hussars, while he was actually a Lieutenant in the 45th Regiment). Instead of letting his wife know that she should stop seeing Gunn, Weatherley sent her a telegram approving of her standing by Gunn. When he came back home, his sons informed him of what had taken place – their mother and Gunn were having an affair – yet he did not stop Gunn from visiting their house. His defence was that he did not seriously believe in her guilt. He thought that she acted imprudently, but he also knew that “ill-feeling existed between the mother and her sons.”⁵²

When he found out, his attorney sent her the following letter: “My dear Mrs Weatherley, Colonel Weatherley will sue for divorce, but will give you £400 at once, and from the £45 per month will give you £30. The life interest you have in home property in expectance will be yours, and on your death to revert to the children. If he obtains an appointment your monthly allowance will be increased. You can see Capt. Gunn at any time you like to fix for the appointment. Please communicate with him and arrange for an interview ...”⁵³ Furthermore, at some point during the events, the two Weatherleys agreed amongst

⁵¹ *Ex parte Weatherley*: “Alimony to the wife refused where she had ample means of her own, and the husband’s income was limited.” [Kot Tral 67]

⁵² J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 94. Case dates: 22-30 Nov 1878, 2,9-11 Dec 1878, 20 Jan 1879.

⁵³ TAB. ZTPD. 99/1879. Illiquid case. Divorce. *Weatherley versus Weatherley*, p. 114.

themselves that Mrs. Weatherley and Gunn should be married once they were divorced.⁵⁴ However, since Transvaal law forbade marriage between Gunn and Mrs. Weatherley, Weatherley eventually sued for divorce, on the grounds of his wife's adultery, and he also wanted the custody of the children born in their marriage. The wife's pleas were denial of adultery, connivance and condonation. At the end of the whole story, divorce was granted, but it is not clear what happened to the children, or whether Mrs. Weatherley and Gunn resumed their relationship.⁵⁵

But more may be said about this case. *Connivance* occurs when "the plaintiff, by his acts and conduct has either knowingly brought about or conduced to the adultery of his wife; or where he has so neglected and exposed her to temptation as under the circumstances of the case he ought to have foreseen would, if the opportunity offered, terminate in her fall."⁵⁶ The wife argued that Weatherley, once he became aware of the improper intimacy between Mrs Weatherley and Gunn, "remains passive and permits the intimacy to continue, taking steps to protect his wife and to avert the coming danger, he will be held to have connived at her subsequent adultery."⁵⁷ With *condonation*, Mrs. Weatherley suggested that her husband agreed to take her back, and thus condoned her actions.⁵⁸

The issue of *domicile* in this case was also central: "The Court has jurisdiction, on the ground of adultery committed in the Transvaal, to dissolve a marriage contracted in England between the parties, whose domicile is English, but who are *bona fide* residents in the Transvaal." The domicile issue seemed to take up a large amount of time in the court. What is important is that married women probably had a different legal standing in England than in South Africa. The issue was that a marriage contracted in England could not be annulled here, and grounds for divorce differed in England and the Transvaal. Kotzé in his judgement

⁵⁴ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 96. Case dates: 22-30 Nov 1878, 2,9-11 Dec 1878, 20 Jan 1879.

⁵⁵ See chapter 5.

⁵⁶ J.G. Kotzé, *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*, p. 66. Case dates: 22-30 Nov 1878, 2,9-11 Dec 1878, 20 Jan 1879.

⁵⁷ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 123. [Kot Tral 66]

⁵⁸ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 122. [Kot Tral 67]

said that “solid policy, expediency, and justice demand that jurisdiction should be assumed,” and therefore he could pronounce on their marriage.⁵⁹

A host of other observations can be made about this case. Firstly, the Weatherleys and Gunn agreed amongst each other on divorce, and that Mrs. Weatherley should marry Gunn. Assuming the people had agreed in principle on divorce, they must also have agreed on who would take care of the children, and since Mr. Weatherley wanted the children, Mrs. Weatherley must have decided that she did not want them. Such an inference raises questions of her supposed femininity, because a mother who did not want to take care of her children does not fit into the picture of Transvaal society who expected all women to have as their first priority the care of their family.

The character of Charles Gunn itself is fascinating. In the transcripts of the cases, he is quoted as “otherwise styling himself Gunn of Gunn”, and this is how he is referred to throughout, which, in some respects, meant that he must have been a bit of a showman.

The defence questioned Mr. Weatherley’s trusting nature. The letter that he wrote suggests that he wanted Mrs Weatherley and Gunn to get together after the divorce, and his defence was that he wanted her happiness. The defence’s reply was that “The Colonel was fully apprised of Gunn’s character ... [and] actually suggests a marriage between [them] ... It is absurd to suppose that when he proposed Mrs. Weatherley should marry Gunn, whom he knew to be a man of the blackest character, he was as has been suggested, solicitous for her welfare and happiness.” If one accepts the defence’s reasoning, the motivation had to come from somewhere else.

A fairly controversial statement made by the judge is: “The age of the defendant should also not be lost sight of. Mrs. Weatherley is no longer a young woman, she is 45 years of age and a grandmother. Had she been twenty years younger, there may have been some weight in the argument that Colonel Weatherley ought to have been a little more cautious.” Does this statement mean that the judge did not perceive of Mrs. Weatherley as a sexual being, on

⁵⁹ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 234. [Kot Tral 66]

account of her age? Otherwise, it might simply be the judge reflecting his time and society's perceptions, on a woman who was probably a bit of an exception for him.

This case was comprehensively covered in *De Volksstem*.⁶⁰ An extract serves as an example of what the reporting of the day looked like, and what people read:

Mrs. Weatherley has been under examination since Thursday morning. Yesterday afternoon, at half-past twelve, the witness complained that she could not stand the strain much longer, upon which the Court adjourned till half-past two. On returning, Mrs. W. complained of several indignities to which she alleged to have been subjected and appealed to the public. The Judge [Kotzé] warned her that she was injuring her case, repeatedly told her she could have redress in the proper Courts, said that his court was not a political or theatrical platform, and that he could not allow her to appeal to the public there. Mrs. W. replied, she did not care; she was being crushed and trampled upon, and she would speak out. The Judge intimated to her that he would be under the disagreeable necessity of upholding the dignity of his Court, but she replied that he could do as he pleased, punish her and send her to the tronk, but she would speak. She knew there were gentlemen in the Court who would sympathise with her, lonely and crushed women as she was. The Judge then ordered the sheriff to remove the witness. Witness first refused to go, but presently went, saying she now left the case to take care of itself. After Mrs. W. had left, his Lordship said, no use could be made of the evidence of this witness. Mr. de Vries [Mrs. Weatherley's attorney] called to his Lordship to consider the excited state of his client, and allow him to try to bring her to better thoughts. His Lordship said he would hear her further, provided she apologised and expressed her regret next morning, upon which the case was postponed ...⁶¹

In two cases: *Alexander vs Alexander* and *J.A. Bailey vs J.M.S. Bailey* the custody of the minor children in the marriage was entrusted to the guilty party, if it was in the best interest of the children. *Alexander vs Alexander* on 16 August 1893,⁶² the report minimally states

⁶⁰ With the exception of the start of the case, since *De Volksstem* was not published for nearly two months in 1878 due to a shortage of paper. *De Volksstem*, 1978-11-30 (De Weatherley-zaak); *De Volksstem*, 1978-11-30 (Supplement tot 'De Volksstem', Zaterdag November 30, 1878); *De Volksstem*, 1978-11-30 (Supplement to 'De Volksstem', Saturday November 30, 1878); *De Volksstem*, 1878-11-30 (Extra tot 'De Volksstem', 30 November 1878); *De Volksstem*, 1878-12-07 (General), p. 1; *De Volksstem*, 1878-12-07 (Hooge Hof. {Voor Regter Kotzé}. Maandag, 25 November, Dinsdag, 26 November); *De Volksstem*, 1878-12-07 (Extra tot 'De Volksstem', 7 December 1878); *De Volksstem*, 1878-12-14 (Supplement to 'De Volksstem', Saturday 14 December 1878); *De Volksstem*, 1878-12-21 (Supplement to 'De Volksstem', Saturday, 21 December 1878); *De Volksstem*, 1878-12-28 (Bijvoegsel tot 'De Volksstem', 28 Dec. 1878); *De Volksstem*, 1878-01-11 (Hooge Hof {Voor Regter Kotzé}. Vrijdag, 29 November, Zaterdag, 30 November, Maandag, 9 December).

⁶¹ *De Volksstem*, 1978-11-30 (The Weatherley case).

⁶² J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 48. [H 183]

that “the Court will always consult the interests of the minors, without necessarily granting the preference to the innocent parent.”⁶³

In the Bailey case of April 1893, the wife left her husband to live with another man, because, as it appeared from the evidence, “the plaintiff [the husband] had sometimes taken too much liquor, and that on such occasions he had more than once treated his wife in a brutal manner.” The husband took the wife to court for divorce on the grounds of malicious desertion and adultery, and also wanted the care of the minor child to be entrusted to him. There were two children, and the child at stake was the younger, six years old, who lived with his mother who “refused to give him up to the father.” In the meantime the husband had stopped drinking (proof was offered). The marriage was dissolved by the court, and the court “granted the mother the right to retain the child under her care, giving the plaintiff leave to make application to have the child transferred to his care when he had grown older, and the father could show that it was in the child’s interests that he should be so transferred.” The reason for the judgement: “The life she is living as the ‘kept woman’ of another man cannot in it be said to be so immoral that the young child will be injured by it. The mother has already looked after the child for a period of three years, and has always cared well for it.” The court thought the child still required the care of a mother, and since she did not neglect it, it was not reason enough to take child away.⁶⁴

Two matters were raised. First, as the child was still a minor, the court took it for granted that the mother was more capable than the father of taking care of a young child. The second was a morality issue. The fact that the women lived an extra-marital life was not an important enough issue for the court. It can be assumed, through this, that the court took ‘fair’ and not ‘moral’ decisions, and was by extension defying the conservative views of the Afrikaner establishment for the presumed well-being of the child.

⁶³ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 48.

⁶⁴ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 48. [H 44]. J.B.M. Hertzog, *Cases decided in the High Court of the South African Republic during the year 1893*, pp. 44-45. Case date: 14 April 1893.

e. Women's agency and political rights

This is the one area discussed here where there are no laws specifically dealing with the cases. It is for this reason interesting for the application of law, because it signifies the way things were in reality. The one case deals with agency; the other is a woman testing her legal-political position, somewhat in contradiction with what we know about the lack of political consciousness in the Transvaal amongst women.

In the case of *Hannah Hart vs Myer Yates* in April 1897, Yates seduced Hart under promise of marriage. She brought to the court an "action for breach of promise of marriage", and the Court awarded her £5 000 in damages.⁶⁵ This seems to be an extremely generous sum, and the question could be asked whether that was what the court considered a women's virtue (virginity) to be worth. If one considers the overall religious nature of the Transvaal, and the conservatism that went with it, maybe this is not so surprising, and must have been a deterrent for men to repeat this offense.⁶⁶

Only one case was found where a woman tested her political rights, namely in the case of *C.E. Hollard v The Field-Cornet of Pretoria* in November 1892, where Hollard wanted to be placed on the Burgher list as a burgheress of the State, because according to law, "where a man is acknowledged as a burgher of this Republic, his wife shall also for that reason be acknowledged as and remains a burgheress of this Republic."⁶⁷ This case was troubling for the court, and exciting for this study, in the issues that it raised. The judge asked questions

⁶⁵ J.P.R. van Hoyteman & S. Raphaely (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*, p. 37. [3 OR 210] This case is mentioned in *The Press*, but only to state that it was up for report. This probably means that the case was reported on sometime, but I couldn't find an earlier reference for it. *The Press*, 1897-09-10 (High Court of Justice. Thursday, Sept 9), p. 3.

⁶⁶ This case has a twist. Yates was clearly an unsavoury character. He was in two other cases I found. In the first one he was found guilty of subornation, *The Press*, 1897-04-26 (Myer Yates. Found guilty), p. 3. In the second, *The State v Meyer Yates*: "Meyer Yates unlawfully, wrongfully, and fraudulently, and with a view of benefitting himself and injuring one Hannah or Anna Hart, and in order to have her arrested and prosecuted on a charge of perjury, induced ... certain three persons to appear before a justice of the peace and to make sworn depositions, which the said Meyer Yates well knew contained allegations which were false." He was found guilty and sentenced to three years' imprisonment with hard labour. J.G. Kotzé, *The official reports of the High Court of the South African Republic. Vol IV. 1897*, pp. 134-136. Case date: 16 April 1897.

⁶⁷ Volksraadsresolution 18/6/1855. F. Jeppe (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1949-1885*, p. 31.

like: Would she then have the same rights as a man? Will she have the vote? Is she then subject to military service? Does it make her eligible for the Presidency or other office?⁶⁸

Ultimately, the application was dismissed because “it did not appear that acknowledging a woman as burgheress meant that she was entitled to all the rights of a burgher.” The judge stated that there was “nothing in the Franchise Law which is inconsistent with female suffrage. It speaks of “persons”; he reasoned that allowing the application meant that the franchise system needed to be redone.” Another reason was that “it would be unjust to unmarried women were every woman to become a burgheress because she married a burgher.”⁶⁹

The situation in the Transvaal regarding women’s suffrage has been outlined earlier and those findings make this case even more remarkable. It would be noteworthy to know what the motivation was for the woman to initiate this case. Equally, the role of her husband must be kept in mind: legally, he had to assist her, which meant he had to allow her to make this application, and it is reasonable to conclude that he approved of it. The response of the judge is also telling: his arguments were not so much against a woman having the rights as what the implications would be on the political front. His remark about the franchise is also noteworthy.

3. Conclusion

Newspapers covered court cases erratically, but reports appeared often enough, and in enough detail to enable female readers to see that women could indeed go to court, and win. Coverage of such cases by a newspaper suggests that they had to be either unusual or noteworthy; the case of the Weatherleys covered by *De Volksstem* is a good example.

Although there is some male bias in the court’s treatment of women, specifically with regard to addressing them, the overall treatment of women seems to have been relatively fair. There is no proof in the interpretation and application of the law that women were discriminated against based purely on their gender. (There may have been subconscious

⁶⁸ J. Hoytema & S. Raphaely, *Digest of law reports of the late South African Republic, for the period 1877-1899*, pp. 74-76. Case date: 22 Nov 1892.

⁶⁹ J. Hoytema & S. Raphaely, *Digest of law reports of the late South African Republic, for the period 1877-1899*, pp. 74-76. Case date: 22 Nov 1892.

discrimination, but not enough information is available to prove that.) The discrimination that does exist was legally entrenched, so that judges had no choice but to perceive women in a certain legal way based on their gender, even if they felt that the treatment was not morally correct.

VII. CONCLUSION

This thesis shows the usefulness of a study of legal history, for what it can contribute to social history, and an understanding of trends in a society during a certain period. In future studies, more information from legal sources can be added to complete the picture further. This could include an even more detailed study of court cases, biographical information and government publications like *Volksraadsnotules* (minutes of Volksraad meetings), which could assist one to gain an idea of what the leadership's feelings towards women were.

The lives of the women selected for this study had to be imagined on a stage and in a system that did not provide for them specifically, namely the Transvaal between 1877 and 1899, an area and a period in which research on them tends to be narrow-minded and unoriginal. Since women have now been written into this picture, many noteworthy inferences can be made about women in the Transvaal through court cases, as the previous chapter has illustrated.

If one reads legal documents for what they conclude about contemporary society, the preliminary nature of the findings in the court cases is only a first step in illustrating that in the traditionally perceived 'conservative' Transvaal, there was definitely scandal. The majority of Transvalers may have been seen as pious and conservative, but that is an over generalisation, and even more so when one considers the inhabitants of towns.

White Transvaal had a kaleidoscopic face, and included inhabitants of different spheres of society, including Afrikaners, English and Dutch, and also urban and rural. Since there has been a greater historiographic focus on Afrikaners than English in the period under scrutiny, English women have been even more neglected than Afrikaner women. Yet, in chapter 6, there are at least two clear examples of English women in the Transvaal in scandalous situations being lifted out of an inconspicuous position as a result of their behaviour, if not their agency. These English women can be an extremely useful area of future research. As was mentioned, the more sensational court cases dealt with English women living in the Transvaal. Considering the legal position of women in Britain in the same period suggests an opportunity for comparative work. More specifically, there is scope for comparative work of

frontier women in the British colonies with women in England, and how these women acted within the law in their respective countries.

Some court cases illuminate that while women's participation in social and economic activities remains unclear, women did actively participate in economic life. For example, by being a shopkeeper and providing for themselves and their families when circumstances forced them to do so. This may not have been mainstream women. One can hardly imagine, for instance, that Paul Kruger's wife, who in the Preface was described as 'strong but invisible', would have gone to court regularly. Not all women were in that position nor did they have the need to do so. However, in Chapter 6 it was shown that if the court was the only avenue open for a woman if she needed to fight for her livelihood, her right to be free from her husband's marital power, or the right to execute her own affairs if she felt it threatened, the courts were used.

The law, therefore, provided women with options. In the analysis of the legal system and the court cases, there is no proof of any blatant discrimination against women from legal practitioners. (Subconscious prejudices about men being naturally superior are another matter, and that could also be explored in future studies.) The laws were applied in favour of women as generously as the (mostly) able male judges felt they could. Therefore, it can be concluded that if a woman knew the law, and could trust the legal system to adhere to its own rules – especially as the century progressed and the legal system solidified its standards – they may have felt the freedom to use the legal system to their advantage.

A lack of agency does not necessarily translate into weakness. Despite the fact that Transvaal women did not appear to demand suffrage, (and the single case of political rights did not revolve primarily around suffrage), they seemed to be prepared to go to court to protect their social and economic rights when they felt these were threatened. Women found it possible in their performances on the legal stage to 'play' the law on both sides. On the one hand, they could act out the role of the helpless victim and be entitled to protection. On the other hand, if women wanted a divorce, there were ways to achieve that goal. This suggests that with regards to the law, women could choose to play a leading role on the stage of their life stories.

SOURCES

I. ARCHIVAL SOURCES

1. UNPUBLISHED

National Archives Repository, Pretoria

PUBLIC RECORDS OF FORMER TRANSVAAL PROVINCE AND ITS PREDECESSORS AS WELL AS OF MAGISTRATES AND LOCAL AUTHORITIES (TAB):

ZUID-AFRIKAANSCHЕ TRANSVAALSE PROVINSIALE DEPARTEMENT

TAB. ZTPD. 25/1878. Illiquid case. Restitution of conjugal rights. Truter versus Truter.

TAB. ZTPD. 174/1879. Illiquid case. Divorce. Finegan versus Finegan.

TAB. ZTPD. 99/1879. Illiquid case. Divorce. Weatherley versus Weatherley.

TAB. ZTPD. 252/1879. Application. Weatherley versus Weatherley.

TAB. ZTPD. 255/1879. Application. Weatherley versus Weatherley.

TAB. ZTPD. 171/1879. Illiquid case. Van der Merwe versus Turton and Juta.

TAB. ZTPD. 610/1880. Unopposed application. Ferguson versus Pretorius and others.

TAB. ZTPD. 433/1880. Application. Van Eeden versus Kirstein.

TAB. ZTPD. 232/1880. Illiquid case. Van Eeden versus Kirstein.

TAB. ZTPD. 1085/1882. Unopposed application. Ex parte application Potgieter.

TAB. ZTPD. 320/1882. Illiquid case. Vuyk versus Vuyk.

TAB. ZTPD. 487/1884. Illiquid case. Application. Dow and Co. versus Mears and Walker.

TAB. ZTPD. 1772/1891. Illiquid case. Transvaal Silver Mines versus Jacobs, le Grange and Fox.

II. GOVERNMENT PUBLICATIONS

AMESHOFF, H.A (red.), *De locale wetten der Zuid-Afrikaansche Republiek, 1888-1889*. Pretoria, 1893.

BARBER, S.H & W.A. MACFAYDEN, *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). Jan 1881 to Dec 1892 (Vol IV)*. Cape Town, 1903.

COSTER, H.J (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende de jaren 1890, 1891, 1892 en 1893*. Pretoria, 1894.

COSTER, H.J (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1894*. Pretoria, 1895.

- COSTER, H.J (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1895*. Pretoria, 1896.
- HERTZOG, J.B.M., *Cases decided in the High Court of the South African Republic during the year 1893*. London, 1903.
- HOYTEMA, J & S. RAPHAELY, *Digest of law reports of the late South African Republic, for the period 1877-1899*. Grahamstown, 1906.
- JEPPE, F (red.), *De locale wetten der Suid-Afrikaansche Republiek, 1849-1885*. Pretoria, 1877.
- KOTZÉ, J.G., *Cases decided in the High Court of the Transvaal Province. July 1877-June 1881*. London, 1912.
- KOTZÉ, J.G (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek, 1886-1887*. Pretoria, 1888.
- KOTZÉ, J.G., *Reports of cases decided in the Supreme Court of the South African Republic (Transvaal). August 1881-December 1884*. Cape Town, 1894.
- KOTZÉ, J.G., *The official reports of the High Court of the South African Republic. Vol IV. 1897*. London, 1907.
- SCHAGEN VAN LEEUWEN, J.A (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1896*. Pretoria, 1897.
- SCHAGEN VAN LEEUWEN, J.A (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1897*. Pretoria, 1898.
- STOCKENSTRÖM, A (red.), *De locale wetten en volksraadsbesluiten der Zuid-Afrikaansche Republiek gedurende het jaar 1898*. Pretoria, 1899.
- TOBIAS, F.B, A. MULLER & J.B.M. HERTZOG, *Officieele rapporten van het Hoog Gerechtshof der ZAR. 2e kwartaal 1894. Deel I. Afd. II*. Pretoria, 1894.
- VAN HOYTEMA, J.P.R & S. RAPHAELY (eds.), *Digest of law reports of the late South African Republic (including cases decided during the British occupation prior to 1881) for the period 1877-1899*. Grahamstown, 1906.
- WEBBER, W.S., *The official reports of the High Court of the South African Republic. Vol II. 1895*. London, 1903.

III. PERIODICAL PUBLICATIONS

The Press, 1897.

The Volksstem, 1878-1899.

IV. JOURNAL AND NEWSPAPER ARTICLES

- AINSLEY, J.N., 'Some mysterious agency': Women, violent crime, and the insanity acquittal in the Victorian courtroom. *Canadian Journal of History* 35(1), April 2005.
- ANKERSMIT, F.R., The linguistic turn, literary theory and historical theory. *Historia* 45(2), 2000.
- BATLAN, F., Engendering legal history. *Law and Social Enquiry* 30(4), Fall 2005.
- BERGH, J.S., Die veranderende grense van 'Transvaal 1840-1994. *Historia* 41(2), Nov 1996.
- BERWICK, T., The vitality of Roman-Dutch Law. *Journal of Comparative Legislation (New Series)* 3(1), 1901.
- BOTTING, E & C. CAREY, Wollstonecraft's philosophical impact on nineteenth-century American women's rights advocates. *American Journal of Political Science* 48(4), Oct 2004.
- BRADFORD, H., Women, gender and colonialism: Rethinking the history of the British Cape Colony and its frontier zones, c.1806-1870. *The Journal of African History* 37(3), 1996.
- BURMAN, S. & M. NAUDÉ., Bearing a bastard: The social consequences of illegitimacy in Cape Town, 1896-1939. *Journal of Southern African Studies* 17(3), Sep 1991.
- CHANOCK, M., Writing South African legal history: A prospectus. *The Journal of African History* 30(2), 1989.
- CHUSED, R., Women, money and the law: Nineteenth-century fiction, gender and the courts. *Journal of American History* 93(4), March 2007.
- COMBS, M.B., A measure of legal independence: The 1870 Married Women's Property Act and the portfolio allocations of British wives. *Journal of Economic History* 65(4), Dec 2005.
- COMBS, M.B., Cui Bono: The 1870 Married Women's Property Act, bargaining power, and the distribution of resources within marriage. *Feminist Economics* 12(1-2), Jan/Apr 2006.
- CRAIES, W.F., The law of South Africa. *Journal of the Society of Comparative Legislation (New Series)* 2(2), 1900.
- DAGUT, S., Gender, colonial 'women's history' and the construction of social distance: Middle-class British women in later nineteenth century South Africa. *Journal of Southern African Studies* 26(3), Sep 2000.
- DAVIES, M., Unity and diversity in feminist legal theory. *Philosophy Compass*, 2(4), 2007.
- DEACON, H., Midwives and medical men in the Cape Colony before 1860. *The Journal of African History* 39(2), 1998.
- DOOLING, W., The decline of the Cape Gentry, 1838 - c.1900. *The Journal of African History* 40(2), 1999.
- DUBLER, A., In the shadow of marriage: Single women and the legal construction of the family and the state. *Yale Law Journal* 112, 2003.
- DUFF, S.E., From new women to college girls at the Huguenot Seminary and College, 1895-1910. *Historia* 51(1), May 2006.
- DU TOIT, M., The domesticity of Afrikaner nationalism: Volksmoeders and the ACVV, 1904-1929. *Journal of Southern African Studies* 29(1), March 2003.

- ERLANK, N., 'Thinking it wrong to remain unemployed in pressing times': the experiences of two English settler wives. *South African Historical Journal* 33, Nov 1995.
- FARLAM, I., Some reflections on the study of South African legal history. *Fundamina: A Journal of Legal History* 9, 2003.
- FRIDMAN, G.H.L., Possession and desertion in Australia. *The Modern Law Review* 17(1), Jan 1954.
- GAITSKELL, D., Housewives, maids or mothers: some contradictions of domesticity for Christian women in Johannesburg, 1903-1939. *Journal of African History*, 1983.
- GAITSKELL, D., The imperial tie: Obstacle or asset for South Africa's women suffragists before 1930? *South African Historical Journal* 47, Nov 2002.
- GEORGE, J.H., Matrimonial domicile. *The Modern Law Review* 13(3), Jul 1950.
- GOLDER, H & D. KIRKBY., Mrs. Mayne and her boxing kangaroo: A married woman tests her property rights in colonial New South Wales. *Law and History Review* 21(3), Fall 2003.
- GREEN, M.J. & C.C. SONN & J. MATSEBULA., Reviewing whiteness: Theory, research, and possibilities. *South African Journal of Psychology* 37(3), 2007.
- GRAYCAR, R., Gender issues and the law. *Legaldate* 14(4), Aug 2005.
- GRIFFIN, B., Class, gender and liberalism in parliament, 1868-1882: The case of the Married Women's Property Acts. *The Historical Journal* 46(1), 2003.
- HERSHBEIN, B., Milestones in working women's legal history. *Regional Review* 14(3), 1st quarter 2005.
- HETHERINGTON, P., Women in South Africa: The historiography in English. *The International Journal of African Historical Studies* 26(2), 1993.
- HOFMEYR, I., Jonah and the swallowing monster. Orality and literacy on a Berlin mission station in the Transvaal. *Journal of Southern African Studies* 17(4), 1991.
- HOGAN, L.S., Wisdom, goodness and power: Elizabeth Cady Stanton and the history of women's suffrage. *Gender Issues* 23(2), Spring 2006.
- HUNTER, R., Australian legal histories in context. *Law and History Review* 21(3), Fall 2003.
- Journal of the Society of Comparative Legislation (New Ser)*. The fate of the Roman-Dutch law in the British colonies. 7(2), 1906.
- KAHN, E., The history of the administration of justice in the South African Republic I. *South African Law Journal* 75(3), 1958.
- KAHN, E., The history of the administration of justice in the South African Republic II. *South African Law Journal* 75(4), 1958.
- KAHN, E., The history of the administration of justice in the South African Republic III. *South African Law Journal* 1959.
- KAMMEN, M., Review of I. Irwin-Zarecka's 'Frames of Remembrance'. *History and Theory* 34, 1995.

- KELLETT, J., One-woman-one-vote: Annie Lane, 'Lucinda Sharpe' and the female franchise in late 19th century Queensland. *Hecate* 30(2), 2004.
- KERBER, L.K., Separate spheres, female worlds, woman's place: The women's history. *The Journal of American History* 75, 1988
- KITCHIN, S.B., The judicial system of South Africa. *University of Pennsylvania Law Review and American Law Register* 62(6), April 1914.
- KRIEL, L., Intersections of gender and race in the missionary correspondence of deaconess Anneliese Dörfer, East and South Africa, 1936-1976. *Historia* 53(2), Nov 2008.
- KRIEL, L & A. KIRKALDY., 'Praying is the work of men, not the work of women': The response of Bahananwa and Vhavenda women to conversion in late nineteenth-century Lutheran missionary territories. *South African Historical Journal* 61(2), 2009.
- LEE, R.W., Roman-Dutch law in the law reports. *Journal of the Society of Comparative Legislation (New Series)* 9(2), 1908.
- LEE, R.W., The history of the Roman-Dutch law. *Journal of the Society of Comparative Legislation* 10(2), 1910.
- LEE, R.W., The intestate succession of husband and wife in Roman-Dutch law. *Journal of the Society of Comparative Legislation (New Series)* 12(2), 1912.
- LEE, R.W., What has become of Roman-Dutch Law? *Journal of Comparative Legislation and International Law (3rd Series)* 12(1), 1930.
- MACKARNES, F., Roman-Dutch law. *Journal of the Society of Comparative Legislation (New Series)* 7(1), 1906.
- MCCLENDON, T.V., Tradition and domestic struggles in the courtroom: Customary law and the control of women in segregation-era Natal. *The International Journal of African Historical Studies* 28(3), 1995.
- MCCULLOCH, J., The struggle for women's suffrage in Queensland. *Hecate* 30(2), 2004.
- MCKENZIE, K., 'My own mind dying with me': Eliza Fairbairn and the reinvention of colonial middle class domesticity in Cape Town. *South African Historical Journal* 38(1), 1993.
- MORTON, F., Female inboekeling in the South African Republic, 1850-1880. *Slavery and Abolition* 26(2), Aug 2005: 199-214.
- OWENS, A., Property, gender and the life course: Inheritance and family welfare provision in early 19th century England. *Social History* 26(3), Sep 2001.
- PELZER, A.N., Die 'arm-blanke' in die Suid-Afrikaanse Republiek tussen die jare 1882-1899. *Historiese Studies* 2(4), 1941.
- QUIGGIN, J., A relationship taken on trust. *Australian Financial Review*, 16 April 1997.
- RAY, P.O., The world-wide woman suffrage movement. *Journal of Comparative Legislation and International Law (3rd Series)* 1(3), 1919.

- RÜTHER, K., 'Sekukuni, Listen! Banna! And to the children of Frederick the Great and our Kaiser Wilhelm': Documents in the social and religious history of the Transvaal, 1860-1890. *Journal of Religion in Africa* 34(3), 2004.
- RYAN, P., 'College girls don't faint': The legacy of elsewhere. *JLS/TLW* 20(1/2), Jun 2004.
- SCULLY, P., Rape, race and colonial culture: The sexual politics of identity in the nineteenth-century Cape Colony, South Africa. *The American Historical Review* 100(2), Apr 1995.
- SHANLEY, M.L., 'One must ride 'behind': Married women's rights and the Divorce Act of 1857. *Victorian Studies* 25(3), Spring 1982.
- SIMKINS, C & E. VAN HEYNINGEN., Fertility, mortality and migration in the Cape Colony, 1891-1904. *The International Journal of African Historical Studies* 22(1), 1989.
- SPECIAL FEATURE: Women and gender in South Africa. *South African Historical Journal* 43, Nov 2000.
- TOMLINS, C., Framing the field of law's disciplinary encounters: A historical narrative. *Law and Society Review* 34(4), 2000.
- TRAPIDO, S., Landlord and tenant in a colonial economy: The Transvaal, 1880-1910. *Journal of Southern African Studies* 5(1), 1978.
- VAN DER WATT, L., The comradesly ideal and the volksmoeder ideal: Uncovering gender ideology in the Voortrekker tapestry. *South African Historical Journal* 6(39), Nov 1998.
- VAN HEYNINGEN, E., The diary as historical source: A response. *Historia* 38(1), 1993.
- VAN HEYNINGEN, E.B., The social evil in the Cape Colony 1868-1902: Prostitution and the Contagious Diseases Acts. *Journal of Southern African Studies* 10(2), Apr 1984.
- VAN HEYNINGEN, E & P. MERRETT., The healing touch: The guild of loyal women of South Africa, 1900-1912. *South African Historical Journal* 47, Nov 2003.
- VINCENT, L., A cake of soap: The Volksmoeder ideology and Afrikaner women's campaign for the vote. *The International Journal of African Historical Studies* 32(1), 1999.
- WALKER, E., The franchise in Southern Africa. *Cambridge Historical Journal* 11(1), 1953.

V. LITERATURE

- ALBERTI, J., *Gender and the historian*. Harlow, 2002.
- ALLEN, V., *Kruger's Pretoria. Buildings and personalities of the city in the nineteenth-century*. Cape Town, 1971.
- ANONIEM, *Die waardes van die Afrikaner. Referate gelewer by die Jaarvergadering van die Suid-Afrikaanse Akademie vir Wetenskap en Kuns in Junie 1968 in Bloemfontein*. Bloemfontein, 1969.
- ANONYM, *The polity reader in gender studies*. Cambridge, 1994.

- ATTREE, E.M., The closer union movements between the OFS, SAR and Cape Colony. 1838-1863. *Archives yearbook for South African history* 12(1), 1949.
- BEINART, W & P. DELIUS & S. TRAPIDO (eds.), *Putting a plough to the ground. Accumulation and dispossession in rural South Africa, 1850-1930*. Johannesburg, 1986.
- BELIËN, H & G.J. VAN SETTEN (reds.), *Geschiedschrijving in de twintigste eeu. Discussie sonder eind*. Amsterdam, 1991.
- BERGER, D., *White poverty and government policy in South Africa, 1890-1934*. D.Phil. thesis, Temple University, 1982.
- BERGH, J.S (red.), *Geskiedenisatlas van Suid-Afrika. Die vier noordelike provinsies*. Pretoria, 1998.
- BERGH, J & F. MORTON (eds.), *To make them serve: The 1871 Transvaal commission on African labour*. Pretoria: Protea, 2003.
- BEST, W.M., *A treatise on the principles of evidence and practice as to proofs in courts of common law: With elementary rules for conducting the examination and cross-examination of witnesses*. 2nd edition. London, 1855.
- BEYERS, C.J (red.), *Suid-Afrikaanse biografiese woordeboek IV*. Durban/Pretoria, 1981.
- BEYERS, C.J & J.L. BASSON (reds.), *Suid-Afrikaanse Biografiese Woordeboek V*. Pretoria, 1987.
- BHABHA, H., *The location of culture*. London, 1994.
- BISHOP, J.P., *Commentaries on the law of marriage and divorce, and evidence in matrimonial suits*. Revised 3rd edition. Boston, 1859.
- BLOM, I & K. HAGEMANN & C. HALL (eds.), *Gendered nations: nationalisms and gender order in the long nineteenth century*. Oxford/New York, 2000.
- BOZZOLI, B., *Town and countryside in the Transvaal : Capitalist penetration and popular response*. History Workshop (2nd : 1981 : University of South Africa). Johannesburg, 1983.
- BREYTENBACH, J.H., Andries Francois du Toit. Sy aandeel in die Transvaalse geskiedenis. *Argiefjaarboek vir Suid-Afrikaanse geskiedenis* 5(2), 1942.
- BRIDGEMAN, J & S. MILLNS, *Feminist perspectives on law: Law's engagement with the female body*. London, 1998.
- BROWNING, E.W., *An exposition of the laws of marriage and divorce*. London, 1872.
- BUCKNER, P & R. DOUGLAS FRANCIS (eds.), *Rediscovering the British world*. Calgary, 2005.
- BURGE, W., *Commentaries on colonial and foreign laws generally: and in their conflict with each other: and with the law of England*. London, 1838.
- BURKE, P., *New perspectives on historical writing*. 2nd edition. University Park, Pennsylvania, 2001.
- BURKE, P., *Varieties of cultural history*. Ithaca, New York, 1997.
- BURKE, P., *What is cultural history?* Cambridge, 2004.
- CARPZOVIVUS, B & J.S.F. BÖHMÉRUS, *Quaestionum fere universarum decisiones in materia processus criminalis*. Francofurti Ad Moenum, 1758.

- CHANOCK, M., *The making of South African legal culture 1902-1936. Fear, favour and prejudice.* Cambridge, 2001.
- CHARTIER, R., *Cultural history: Between practices and representations.* Ithaca, 1988.
- CILLIÉ, G., *Gewyde sang en koorsang gedurende die Anglo-Boereoorlog, 1899-1902.* Bloemfontein, 2000.
- COCK, J., *Colonels and cadres: War and gender in South Africa.* Cape Town, 1991.
- DARIAN-SMITH, K. & L. GUNNER & S. NUTTALL (eds.), *Text, theory, space. Land, literature and history in South Africa and Australia.* London/New York, 1996.
- DAVEY, A., *The British pro-Boers.* Kaapstad, 1978.
- DAVEY, A.M., The siege of Pretoria 1880-1881. *Archives Yearbook for South African History* 19(1), 1956.
- DE KOCK, W.J (red.), *Suid-Afrikaanse biografiese woordeboek I.* 2e druk. Kaapstad, 1976.
- DE KOCK, W.J & D.W. KRÜGER (reds.), *Suid-Afrikaanse biografiese woordeboek II.* Kaapstad, Johannesburg, 1972.
- DELIUS, P., *The land belongs to us: The Pedi Polity, the Boers and the British in the nineteenth-century Transvaal.* Johannesburg, 1983.
- DEVITT, N., *Famous South African trials.* Pretoria, 1930.
- DUBOW, S., *A Commonwealth of knowledge. Science, sensibility, and white South Africa 1820-2000.* Oxford, New York, 2006.
- DUMINY, A.H. & W.R. GUEST (eds.), *Fitzpatrick: South African politician: Selected papers 1888-1906.* New York, c1976.
- ELPHICK, R. & H. GILIOMEE (eds.), *The shaping of South African society, 1652-1840.* Middletown, 1988.
- ENGELBRECHT, S.P., *Thomas Francois Burgers. 'n lewensskets.* Pretoria/Kaapstad, 1933.
- ERLANK, N., *Letters home: the experiences and perceptions of middle-class British women at the Cape, 1820-1850.* M.A. dissertation, University of Cape Town, 1995.
- ERSKINE, J & J.B. NICHOLSON, *An institute of the law of Scotland.* New edition. Edinburgh, 1871.
- EYBERS, G.W (ed.), *Select constitutional documents illustrating South African history 1795-1910.* New Yorks, 1969.
- FIRST, R & A. SCOTT., *Olive Schreiner. A biography.* London, 1989.
- GASA, N (ed.), *Women in South African history.* Cape Town, 2007.
- GATES, B.T., *Victorian suicide: Mad crimes and sad histories.* Princeton, 1988.
- GEFFEN, I.A., *The laws of South Africa affecting women and children.* Johannesburg, 1928.
- GEERTZ, C., *The interpretation of cultures: selected essays.* New York, 2000.
- GILIOMEE, H., *The Afrikaners.* Cape Town, 2003.

- GORDON, C.T., *The growth of Boer opposition to Kruger, 1890-1895*. Cape Town, 1970.
- GROBLER, J.E.H., *Jan Viljoen (1812-1893). 'n Transvaalse wesgrenspionier*. M.A.-verhandeling, Universiteit van Pretoria, 1976.
- GROBLER, J (ed.), *The war diary of Johanna Brandt*. Pretoria, 2007.
- GROBLER, J.E.H., *Uitdaging en antwoord. 'n Vars perspektief op die evolusie van die Afrikaners*. Pretoria, 2007.
- GROTIUS, H., *The introduction to Dutch Jurisprudence of Hugo Grotius* (With notes by S. van Groenewegen, Translated by A.F.S. Maasdorp). Cape Town, 1878.
- HAHLO, H.R., *The South African law of husband and wife*. Cape Town, Wynberg, Johannesburg, 1963.
- HAHLO, H.R & E. KAHN, *The South African legal system and its background*. Second Impression. Cape Town, Wynberg, Johannesburg, 1973.
- HARRISON, D., *The white tribe of Africa. South Africa in perspective*. Braamfontein, 1981.
- HOBBSAWM, E & T. RANGER (eds.), *The invention of tradition*. Cambridge, 1983.
- HOFMEYR, I., *We spend our years as a tale that is told: Oral historical narrative in a South African Chieftom*. Johannesburg, 1993.
- HOSTEN, W.J & C.J. NAGEL & C.G. VAN NIEKERK (eds.), *Introduction to South African law and legal theory*. Durban, 1977.
- HUNT, L., *The new cultural history*. Los Angeles, 1989.
- HUTTON, P., *History as an art of memory*. Burlington/Hanover, c1993.
- KESTELL, J.D., *Met die Boerekommando's*. Pretoria, 1999.
- KEW, J.W., *John Gilbert Kotzé and the Chief Justiceship of the Transvaal, 1877-1881*. M.A. dissertation, UNISA, 1979.
- KRÜGER, D.W & C.J. BEYERS (reds.), *Suid-Afrikaanse Biografiese Woordeboek III*. Kaapstad, 1977.
- KRUGER, L., *Gender, community and identity: Women and Afrikaner nationalism in the Volksmoeder discourse of Die Boerevrou (1913-1931)*. M.A. dissertation, University of Cape Town, 1991.
- KRUGER, L.S., *Die rol van dr. E.P. Jorissen in die geskiedenis van die ZAR*. P.Phil.-proefskrif, Universiteit van die Oranje-Vrystaat, 1975.
- LANDMAN, C (ed.), *Digging up our foremothers. Stories of women in Africa*. Pretoria, 1996.
- LANGE, M.S., *The making of the white working class: Class experience and class identity in Johannesburg, 1890-1922*. S.I., 1998.
- LE ROY LADURIE, E., *Montaillou. Cathars and Catholics in a French Village* (Translated by Barbara Bray). Middlesex, 1980.
- LEWSEN, P., *John X. Merriman: Paradoxical South African Statesmen*. Johannesburg, 1982.
- LUGTENBURG, A.H., *Geskiedenis van die onderwys in die S.A. Republiek (1836-1900)*. Pretoria, 1925.
- MACRAILD, D.M & A. TAYLOR, *Social theory and social history*. New York, 2004.

- MAISEL, P & L. GREENBAUM, *Foundations of South African law. Critical issues for law students.* Durban, 2002.
- MARAIS, J.S., *The fall of Kruger's republic.* Oxford, 1961.
- MARAIS, P., *Die vrou in die Anglo-Boereoorlog 1899-1902.* Pretoria, 1999.
- MARKS, S. & S. TRAPIDO (eds.), *The politics of race, class and nationalism in twentieth-century South Africa.* London/New York, 1987.
- MATTHAEUS, A., *De criminibus commentarius.* Utrecht, 1644.
- MAXWELL, P.B., *On the interpretation of statutes.* London, 1875.
- MERULA, P., *Manier van procederen, in de provintien van Holland, Zeeland ende West-Vriesland, belangende civile zaaken: getrouwelijk ende met neerstigheid by een vergaderd.* Delft, 1705.
- MOORMAN, J & J.J. HASSELT., *Verhandeling over de misdaden en der selver straffen.* 3rd edition. Dordrecht, 1772.
- MUNSLOW, A., *Deconstructing history.* London/New York, 1997.
- MUNSLOW, A., *The Routledge companion to historical studies.* London/New York, 2000.
- NATHAN, M., *Paul Kruger. His life and times.* Durban, 1941.
- NICHOLSON, L (ed.), *The second wave: A reader in feminist theory.* New York, 1997.
- NIXON, J., *The complete story of the Transvaal.* Cape Town, 1972. (Reprint) London, 1885. (Original)
- PEACOCK, R., *Die geskiedenis van Pretoria 1855-1902.* M.A.-verhandeling, Universiteit van Pretoria, 1955.
- PELZER, A.N., *Geskiedenis van die Suid-Afrikaanse Republiek I. Wordingsjare.* Kaapstad, Amsterdam, 1950.
- PHILLIPS, C.P., *The law concerning lunatics, idiots, and persons of unsound mind.* London, 1858.
- PLOEGER, J., *Die Nederlanders in Transvaal.* Pretoria, 1994.
- POTGIETER, F.J., Die vestiging van die blanke in Transvaal (1837-1886) met spesiale verwysing na die verhouding tussen die mens en die omgewing. *Argiefjaarboek vir Suid-Afrikaanse geskiedenis* ??(2), 1958.
- RAATH, A.W.G. & R.M. LOUW, *Vroueleed: Die lotgevalle van die vroue en kinders buite die konsentrasiekampe 1899-1902.* Bloemfontein, 1993.
- ROBERTS, B., *Those bloody women. Three heroines of the Boer War.* London, 1991.
- ROOS, N., *Ordinary Springboks: White Servicemen and social justice in South Africa, 1939-1961.* Hants/Burlington, 2005.
- ROSCOE, H., *Digest of the law of evidence on the trial of actions at nisi prius.* 14th edition. London, 1879.
- RÜTHER, K., *The power beyond: Mission strategies, African conversion and the development of a Christian culture in the Transvaal.* Münster, 2002.

- SALOMON, L., *Socio-economic aspects of South African history, 1870-1962*. D.Phil. thesis, Boston University, 1962.
- SCHOLTZ, G.D., *Die ontwikkeling van die politieke denke van die Afrikaner III. 1854-1881*. Johannesburg, 1974.
- SCHOLTZ, G.D., *Die ontwikkeling van die politieke denke van die Afrikaner IV. 1881-1899*. Johannesburg, 1977.
- SCOTT, L., *Die rol van die volkskomitee in die geskiedenis van Brits-Transvaal, 1877-1880*. M.A.-verhandeling, Universiteit van Pretoria, 1979.
- SIMONS, H.J., *African women: Their legal status in South Africa*. Johannesburg, 1968.
- SMITH, K., *Alfred Aylward. The tireless agitator*. Johannesburg/Cape Town, 1983.
- STORY, J & M.M. BIGELOW, *Commentaries on equity jurisprudence, as administered in England and America*. 13th edition. Boston, 1886.
- STORY, J & M.M. BIGELOW, *Commentaries on the conflict of laws, foreign and domestic in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments*. 8th edition. Boston, 1883.
- THERON, B., *A social history of Pretoria during the first phase of the Anglo-Boer War: October 1899-1900*. M.A. dissertation, University of Pretoria, 1984.
- THERON, B (ed.), *Dear Sue. The letters of Bessie Collins from Pretoria during the Anglo-Boer War*. Pretoria, 2000.
- TOSH, J., *The pursuit of history*. Revised third edition. Edinburgh, 2002.
- TURKSTRA, H., *Die Gereformeerde Gemeente Pretoria 1859-1930. 'n Kultuurhistoriese studie*. M.A.-verhandeling, Universiteit van Pretoria, 1988.
- VAN BYNKERSHOEK, C., *Quaestionum juris privati libri quatuor : quarum plerisque insertae sunt utriusque in Hollandia curiae res de his ipsis quaestionibus judicatae*. Leiden, 1752.
- VAN DEN HEEVER, C.M & P. DE V. PIENAAR (reds.), *Kultuurgeskiedenis van die Afrikaner I*. Kaapstad, Bloemfontein, Port Elizabeth, 1945.
- VAN DER KEESSEL, D.G., *Select theses on the laws of Holland and Zeeland, being a commentary of Hugo Grotius' Introduction to Dutch jurisprudence and intended to supply certain defects therein, and to determine some of the more celebrated controversies on the law of Holland*. Leyden, 1800.
- VAN DER LINDEN, J., *Institutes of Holland or manual of law, practice and mercantile law* (Translated by Henry Juta). Cape Town/Johannesburg, 1891.
- VAN DER MERWE, C.G & J.E DU PLESSIS (eds.), *Introduction to the law of South Africa*. The Hague, 2004.
- VAN LEEUWEN, S., *Commentaries on the Roman-Dutch law*. London, 1820.
- VAN JAARVELD, F.A., *Lewende verlede*. Pretoria, 1961.

- VAN ONSELEN, C., *New Babylon, new Nineveh: Everyday life on the Witwatersrand 1886-1914*. Johannesburg, 2001.
- VAN ONSELEN, C., *The seed is mine: The life of Kas Maine, a South African sharecropper, 1894-1985*. Cape Town, 1996.
- VAN WYK, A.C., *Jode in Transvaal tot 1910. 'n Kultuurhistoriese oorsig*. D.Phil.-proefskrif, Universiteit van Pretoria, 2003.
- VAN ZYL, M.C., *Die protes-beweging van die Transvaalse Afrikaners, 1877-1880*. Pretoria/Kaapstad, 1979.
- VAN ZYL, P., *Die onderwys van die Afrikaanse kind aan die Witwatersrand 1886-1921. 'n Voorlopige evaluering*. Johannesburg, 1975.
- VISSER, D.P. (ed.), *Essays on the history of law*. Cape Town, Wetton, Johannesburg, 1989.
- VOET, J., *Commentarius ad Pandectas*. 6th edition. Hagae-Comitum, 1734.
- WALKER, C., *The women's suffrage movement in South Africa*. Cape Town, 1979.
- WALKER, C. (ed.), *Women and gender in South Africa to 1945*. Cape Town/London, 1990.
- WALKER, E.A., *Lord de Villiers and his times. South Africa 1842-1914*. London, 1925.
- WELKE, B.Y., *Recasting American liberty: Gender, race, law, and the Railroad revolution, 1865-1920*. Cambridge, 2001.
- WESSELS, A., *Die militêre rol van swart mense, bruin mense en Indiërs tydens die Anglo-Boereoorlog, 1899-1902*. Bloemfontein, 1998.
- WESSELS, E & L. HANEKOM, *Meer kosbaar as korale: 'n Oorsig oor die rol van die Afrikaner- en Uitlandervroue en kinders binne en buite Anglo-Boereoorlog konsentrasiekampe 1899-1902*. Bloemfontein, 1999.
- WESSELS, J.W., *History of the Roman-Dutch law*. Grahamstown, 1908.
- WICHMANN, F.A.F., *De wordingsgeskiedenis van die Zuid-Afrikaansche Republiek (1836-1860). Argiefjaarboek vir Suid-Afrikaanse geskiedenis 4(2)*, 1941.
- WILSON, M & L. THOMPSON (eds.), *The Oxford history of South Africa II. 1870-1966*. Oxford, 1971.
- WOODWARD, W & P. HAYES & G. MINKLEY (eds.), *Deep histories: Gender and colonialism in South Africa*. New York, 2002.
- ZELEZA, P.T., *Manufacturing African studies and crises*. Senegal, 1997.
- ZIMMERMAN, R & D. VISSER (eds.), *Southern cross. Civil law and common law in South Africa*. Cape Town, 1996.

VI. LITERARY SOURCES

- BRYCE, J., *Impressions of South Africa*. New York, 1897.
- BULPIN, T.V., *Lost trails of the Transvaal*. Cape Town, 1965.
- CACHET, F.L., *De worstelstrijd der Transvalers*. 3e druk. Amsterdam/Pretoria, c1898.
- DIXIE, F., *In the land of misfortune*. S.l., 1882.
- FITZPATRICK, J.P., *The Transvaal from within. A private record of public affairs*. Third impression. London, 1899.
- HECKFORD, S., *A lady trader in the Transvaal*. S.l., 1882.
- JEPPE, C., *The kaleidoscopic Transvaal*. Cape Town, 1906.
- JOSSON, M., *Schets van het recht van de ZAR*. Gent, 1897.
- KOTZE, J., *Biographical memoirs and reminiscences*. Cape Town, s.a.
- KRUGER, P., *The memoirs of Paul Kruger I*. London, 1902.
- KRUGER, P., *The memoirs of Paul Kruger II*. London, 1902.
- KUIT, A., *Transvaalse gister*. Pretoria, 1942.
- KUIT, A., *Transvaalse verskeidenheid*. Pretoria, 1940.
- MACDONALD, J.R., *What I saw in South Africa*. London, 1902.
- MACDONALD, T., *Transvaal story*. Cape Town, 1961.
- SANDERSON, J., *Memoranda of a trading trip in the Orange River (Sovereignty) Free State and the country of the Transvaal Boers*. Pretoria, 1981.
- TROLLOPE, A., *South Africa II*. Modern edition. Gloucestershire, 2005.

VII. MISCELLANEOUS

- CAINE, B., Australian feminism and the British militant suffragettes. Papers on parliament no. 41. In *One Hundred Years of Women's Suffrage in Australia*. Centenary Issue, June 2004.
- SMITH, Y., Taking time: A historical women's data kit. *Union of Australian women*. Melbourne. 1988.

ABSTRACT

This dissertation creates a background for studying white women in the Transvaal between 1877 and 1899. Legal documents are used as primary sources, as they are invaluable for researching women's history, in that they provide a new perspective. When writing women's history, it must be grounded in theory, as, especially when it comes to history in court cases, concepts like 'history as performance' and 'occasionalism' are significant. Of course, an eye must also firmly be held on concepts such as 'gender' and 'deconstruction', since it dictates how one should approach one's sources. A history of the Transvaal is necessary, for when studying the court cases one must be able to position the women within a framework of their lives, and what type of living they made. Therefore, part of the dissertation is a political, but also social and economic, history of the Transvaal, written with specifically white women in mind. Sources for the socio-economic historical framework include literary accounts and secondary works on the period. The framework for the court cases further includes creating a legal stage on which to position women, which is accomplished by using legal sources like law reports, but also laws and resolutions. It is only once a detailed framework has been created that one can scrutinise court cases for issues surrounding white Transvaal women's legal position, and agency.

KEYWORDS

Transvaal	Kotzé
Legal history	Zuid-Afrikaansche Republiek
Women's history	Court cases
Gender	High Court
Legal sources	Roman-Dutch Law

OPSOMMING

Hierdie verhandeling skep die agtergrond vir 'n studie van wit vroue in Transvaal tussen 1877 en 1899. Regsdokumente word as primêre bronne gebruik, aangesien dit van onskatbare waarde is in die ondersoek van vrouegesiedenis, deurdat dit 'n nuwe perspektief bied. Die skryf van vrouegesiedenis moet in teorie gegrond wees, aangesien konsepte soos 'history as a performance' en 'occasionalism' belangrik is, veral wanneer dit kom by geskiedenis in hofsake. 'n Ferm blik moet natuurlik ook gehou word op konsepte soos 'gender' en 'dekonstruksie' aangesien dit bepaal hoe die bronne benader moet word. 'n Geskiedenis van Transvaal is nodig, want dit moet moontlik wees om vroue te posisioneer binne die raamwerk van hulle lewens en die tipe bestaan wat hulle gevoer het. 'n Gedeelte van die verhandeling behels derhalwe 'n politieke, maar ook 'n sosiale en ekonomiese geskiedenis van Transvaal, geskryf spesifiek met wit vroue in gedagte. Bronne vir die sosio-ekonomiese historiese raamwerk sluit verder in die skep van 'n regsverhoog waarop die vroue geposisioneer kan word. Dit word daargestel deur gebruik te maak van regsbronne soos wetsverslae, asook wette en besluite. Eers wanneer so 'n uitvoerige raamwerk gekonstrueer is, kan die hofsake bestudeer word vir kwessies rondom wit Transvaalse vroue se regsposisie, en hulle betrokkenheid by hulle eie agenda.

SLEUTELWOORDE

Transvaal	Kotzé
Regsgeskiedenis	Zuid-Afrikaanse Republiek
Vrouegesiedenis	hofsake
Gender	Hooggeregshof
Regsbronne	Romeins-Hollandse Reg