

# THE THIRTY-THREE ARTICLES AND THE APPLICATION OF LAW IN THE ZUID-AFRIKAANSCHE REPUBLIEK

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## 1 Introduction

The Thirty-Three Articles was adopted by the Potchefstroom Burgerraad<sup>1</sup> on 9 April 1844 and confirmed four years later by the unified Volksraad of the Zuid-Afrikaansche Republiek (ZAR) at Derdepoort near Pretoria on 23 May 1849.<sup>2</sup> The Thirty-Three Articles contained provisions pertaining to general and judicial administration and

- 1 At a public meeting in Potchefstroom in Oct 1840 it was decided that the emigrant territories east and west of the Drakensberg would unite to form one “maatskappy”. Pietermaritzburg would be the main seat of the Volksraad. In Feb 1841 an Adjunct Volksraad, seated at Potchefstroom, was established for the territory west of the Drakensberg. After the British annexation of Natal, the Potchefstroom Adjunct Volksraad declared itself independent and continued as the Burgerraad of Potchefstroom. See FAF Wichmann “Die wordingsgeskiedenis van die Zuid-Afrikaansche Republiek 1838-1860” in *Archives Year Book for South African History (sd)* vol 4(2) (Cape Town, 1941) at 24-25, 27-29, 37-38.
- 2 See the minutes of the general assembly at Derdepoort, published as R.180/49 in HS Pretorius, DW Kruger & C Beyers (eds) *Voortrekker-Argiefstukke 1829-1849* (Pretoria, 1937) at 388-390. Due to political instability and civil strife, there was not a unified legislature in the ZAR after its split from Natal in 1843 until the establishment of the Volksraad at Derdepoort on 22 May 1849: see, generally, JH Breytenbach & HS Pretorius (eds) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel I (1844-1850)* (Cape Town, sd) (hereafter *Volksraadsnotule Part I*) at xxiv-xxvi; Wichmann (n 1) at 47-64, 86-88; AN Pelzer *Geskiedenis van die Suid-Afrikaanse Republiek Deel I Wordingsjare* (Cape Town, 1950) at 115.

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was held out at the time as a kind of constitution.<sup>3</sup> It retained its status as a basic law despite the adoption of the ZAR Constitutions of 1858, 1889 and 1896,<sup>4</sup> and was only repealed in 1901 after the British annexation of the ZAR.<sup>5</sup>

This contribution takes a look at the impact of the Thirty-Three Articles on the legal development of the ZAR, first, by examining the nature and content of the Thirty-Three Articles and, secondly, by studying a few examples of case law in which it was followed.

## 2 The nature of the Thirty-Three Articles

Scholars have described the Thirty-Three Articles by using a myriad of phrases: a mirror of the political views of the Voortrekkers;<sup>6</sup> the foundation of the judicial administration of the ZAR;<sup>7</sup> the primary legislation of the state with regard to judicial administration;<sup>8</sup> “a mixed bag of legal provisions mostly of a criminal nature”;<sup>9</sup> a code of conduct;<sup>10</sup> “a collection of regulations dealing mainly with criminal law”;<sup>11</sup> as belonging to the category of standard state legislation;<sup>12</sup> and as the law code of an undeveloped society.<sup>13</sup>

Scholars disagree on whether the Thirty-Three Articles could be viewed as a constitution.<sup>14</sup> This is understandable because there is no standard definition of a constitution, as will appear shortly. The Thirty-Three Articles arguably contained several elements of a constitution. It indeed reflected the national will and represented

3 Pelzer (n 2) at 115. The question whether it met the requirements for a constitution is considered in the next section.

4 See, respectively, GW Eybers *Select Constitutional Documents Illustrating South African History 1795-1910* (London, 1918) doc 182 at 362-410; doc 218 at 485-488; and doc 227 at 505.

5 Procl 34 of 1901 (Transvaal). In terms of this proclamation, Milner repealed a long list of statutes, government notices and Volksraad resolutions issued by the former ZAR government.

6 Wichmann (n 1) at 38.

7 *Idem* at 41.

8 “[D]ie wet van die staat ... waarvolgens ‘n voorkomende saak in die eerste plek beoordeel is”: Pelzer (n 2) at 115.

9 Ian Farlam “The old authorities in South African practice” (2007) 75 *Tijdschrift voor rechtsgeschiedenis* 399-408 at 403.

10 R van den Bergh “The remarkable survival of Roman-Dutch law in nineteenth-century South Africa” (2012) 18(1) *Fundamina* 71-90 at 88.

11 *Ibid.*

12 Pelzer (n 2) at 116.

13 *Ibid.*

14 WJ Badenhorst *Die Geskiedenis van Potchefstroom* (Johannesburg, 1939) at 61 refers to the Thirty-Three Articles as a constitution. Those who disagree with this view include Pelzer (n 2) at 116; JS du Plessis “Die ontstaan en ontwikkeling van die amp van staatspresident in die Zuid-Afrikaansche Republiek” in *Archives Year Book for South African History* (1955) vol 18(1) (Elsies River, 1955) at 52; and G van den Bergh “Die aandeel van Potchefstroom in Voortrekkerstaat[svestiging]” (2013) 53(3) *Tydskrif vir Geesteswetenskappe* 452-464 at 457-458.

a mirror of the values of that time;<sup>15</sup> was viewed as a key component of the ZAR's legal system;<sup>16</sup> enjoyed the support of the voters;<sup>17</sup> had a higher status than other legislation,<sup>18</sup> rules or laws;<sup>19</sup> and "contain[ed] an effectively established presumption of public rule in accordance with principles or conventions, expressed as law, that cannot easily be suspended".<sup>20</sup> Nevertheless, the Thirty-Three Articles lacks other essential elements of a constitution. Importantly, it does not say anything about the political structure of the state, its governmental institutions, or the relationship between the government and the citizens,<sup>21</sup> nor does it indicate the process for amending the document itself.<sup>22</sup> It is therefore submitted that the Thirty-Three Articles was not a constitution in the true sense of the word and should, at least for purposes of this contribution, not be seen as such.<sup>23</sup>

A closer inspection of the content of the Thirty-Three Articles reveals that the best description is probably that of Sir John Gilbert Kotzé, esteemed Chief Justice of the ZAR in later years.<sup>24</sup> He observed that the Thirty-Three Articles "form[ed] ... a brief code or instruction, prescribing the rule of conduct for the early community of pioneers".<sup>25</sup> The Thirty-Three Articles was not drafted by lawyers, but by the community itself.<sup>26</sup> Its provisions were therefore not formulated in legal or even official language, but rather represented the viewpoints of the general populace.<sup>27</sup>

15 See IM Rautenbach *Rautenbach-Malherbe Staatsreg* 6 ed (Durban, 2012) at 20.

16 *Ibid.*

17 *Ibid.*

18 *Idem* at 21.

19 M Ryan *Unlocking Constitutional & Administrative Law* (London, 2007) at 13.

20 See C Thornhill *A Sociology of Constitutions* (Cambridge, 2011) at 10-11 with regard to the sociological definition of a constitution.

21 Rautenbach (n 15) at 20-21; Ryan (n 19) at 9, 12; Thornhill (n 20) at 11.

22 Ryan (n 19) at 12.

23 Unfortunately, space does not allow for a detailed discussion of this question.

24 President Burgers offered Kotzé the position of Chief Justice of the newly envisaged High Court in 1877; he accepted the offer. On his arrival in Pretoria, unfortunately, he found that Shepstone had already annexed the ZAR on behalf of Britain. Due to a lack of government funds, the British offered Kotzé the position as the only judge of the High Court, and not as one of three as originally planned. He accepted in the expectation that if additional judges were appointed, he would become Chief Justice. After the annexation ended in 1881, Kotzé became Chief Justice of the ZAR. He was dismissed in 1898 after his public spat with President Paul Kruger about the testing powers of the courts. For more on Kotzé, see VG Hiemstra *sv "Kotzé, Johannes Gysbert (Sir John Gilbert)"* in *Dictionary of South African Biography* (hereafter DSAB) vol 1 (Cape Town, 1968) 438-441; and Kotzé's memoirs published as *Sir John Kotze [sic] Biographical Memoirs and Reminiscences* (Cape Town, *sd*) (hereafter Kotze *Memoirs* vol 1) and *Sir John Gilbert Kotzé Memoirs and Reminiscences* vol 2 (Cape Town, *sd*) (hereafter Kotzé *Memoirs* vol 2).

25 Kotze *Memoirs* vol 1 (n 24) at 436.

26 It is uncertain who was responsible for drafting the document. The versions published in *Volksraadsnotule Part I* (n 2) and in Eybers (n 4) doc 174 at 349-356 both bear the signatures of JD van Coller and Pieter Dietrichsen in their respective capacities as chairman and secretary of the Burgerraad. Furthermore, the preferred version published in the *Volksraadsnotule Part I* appears to have been copied from the original by Pieter Dietrichsen before 1849 (at 4). (This is probably the same Pieter Diederiks who translated letters for the magistrate of Winburg in 1843

They were practical guidelines for establishing law and order in a pioneer society. They were, in fact, exactly what they purported to be, namely general provisions and laws relating to judicial administration.<sup>28</sup> This is evident from the provisions themselves, which will be discussed in the next section.

In its time, the Thirty-Three Articles was usually referred to either by name<sup>29</sup> or as the “*Algemeene Bepalingen en Wetten*” (General Provisions and Laws).<sup>30</sup> In only one document was it called “the Constitution”.<sup>31</sup> Ordinary citizens did not hesitate to cite it, usually in conjunction with the (1858) Constitution, when petitioning the Volksraad concerning their rights.<sup>32</sup> Government officials, such as magistrates, commandants and field-cornets, were expected to be familiar with the contents of the Thirty-Three Articles.<sup>33</sup> The magistrate for the district of Wakkerstroom requested copies of the *Government Gazette*, the Thirty-Three Articles and the Constitution because he did not know what was expected of him (“weet my niet te gedragen”).<sup>34</sup>

(See Bylaag 24, 1843 in JH Breytenbach (ed) *Notule van die Natalse Volksraad (Volledig met alle Bylae daarby)* (1838-1845) (Cape Town, *sd*) (hereafter *Natal Volksraadsnotule*) at 457)). Pelzer (n 2) at 115 attributes the document to AH Potgieter, the then political leader at Potchefstroom. Nevertheless, the identity of the individual drafters becomes irrelevant in view of the fact that the document was adopted by the elected body of representatives, the Burgerraad, and approved by the Volksraad five years later. Moreover, its resilience over a period of fifty-seven years and its use, not only by government officials and the courts, but also by ordinary members of the public (see n 32 *infra*), attests to its popularity and acceptance by the ZAR society as a whole.

- 27 Wichmann (n 1) at 38.
- 28 The original title was *Algemeene Bepalingen en Wetten (33 Artikelen) van de Teregtzettingen*. Eybers (n 26) translates the title as “Being General Regulations and Laws for the Law Sessions”.
- 29 That is, as “the Thirty-Three Articles”: see, eg, art 1 of the minutes of the Volksraad of 12 Oct 1863, published in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel IV (1859-1863)* (Cape Town, *sd*) (hereafter *Volksraadsnotule Part 4*) at 171-179; Bylaag 45, 1863 in *Volksraadsnotule Part 4* at 519-520; Bylaag 69, 1860 in *Volksraadsnotule Part 4* at 407; Bylaag 20, 1863 in *Volksraadsnotule Part 4* at 495-496; Bylaag 49, 1865/66 in JH Breytenbach & DC Joubert (eds) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel V (1864-1866)* (Parow, *sd*) (hereafter *Volksraadsnotule Part 5*) at 361-362.
- 30 See, eg, Bylaag 49, 1855 in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel III (1854-1858)* (Cape Town, *sd*) (hereafter *Volksraadsnotule Part 3*) at 367-370; Bylaag 50, 1855 in *Volksraadsnotule Part 3* at 370-377.
- 31 “[D]e bestaande Grondwet, bekend onder den naam van de 33 artikelen” (see art 1 of Bylaag 6, 1856 in *Volksraadsnotule Part 3* (n 30) at 433-434). For more on this document, see n 70 *infra*. It is important to bear in mind that this 1856 document pre-dated the 1858 Constitution.
- 32 See, eg, the petitions and requests mentioned in n 29 *supra*.
- 33 See, eg, art 30 of the minutes of the Lydenburg Volksraad of 23 May 1850 published as “E.V.R. 3, pp. 61-87” in *Volksraadsnotule Part 1* (n 2) at 130-132; and art 10 of the minutes of the Kommissieraad of 20 Nov 1852 published as “E.V.R. 3 pp. 281-288” in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel II (1851-1853)* (Cape Town, *sd*) (hereafter *Volksraadsnotule Part 2*) at 91-96.
- 34 See the undated letter to the Volksraad published as Bylaag 4, *ongedateerd* in *Volksraadsnotule Part 4* (n 29) at 614.

### 3 The contents of the Thirty-Three Articles<sup>35</sup>

Twenty-one of the articles make provision for the prosecution of specific crimes such as theft;<sup>36</sup> murder;<sup>37</sup> libel;<sup>38</sup> assault;<sup>39</sup> perjury;<sup>40</sup> the issuing of false medical certificates;<sup>41</sup> crimes against the public peace;<sup>42</sup> the disruption of court proceedings;<sup>43</sup> the transgression of building regulations;<sup>44</sup> the unlawful opening of post;<sup>45</sup> public defamation of character;<sup>46</sup> non-compliance with the rule that a person had to report

- 35 Various versions of this document are available (see *Volksraadsnotule Part 1* (n 2) at 3-4). For purposes of this contribution, all references to the provisions of the Thirty-Three Articles will be to the version as published in *Volksraadsnotule Part 1* (n 2) at 5-9.
- 36 Art 21. Although a specified penalty was not determined, this provision stated that Dutch law should be followed.
- 37 Art 20 explicitly included patricide, infanticide and poisoning, all of which were punishable by death.
- 38 Art 19. The penalty was a fine of anything between Rds5 to Rds100 payable to the state.
- 39 Art 18. The penalty was a fine of anything between Rds5 to Rds100. The perpetrator also had to pay all (presumably legal) costs. If the victim's injuries were of such a nature that he required bedrest, the perpetrator also had to pay damages for the victim's time, pain and suffering. If the perpetrator was unable to pay these debts, he could be arrested.
- 40 Art 17. A person convicted of perjury would receive a sentence similar to that imposed on the person convicted of the original crime.
- 41 Art 14 applied only to doctors and members of the medical profession who issued false medical certificates or provided false evidence for the purpose of rendering an otherwise healthy person exempt from public service or to benefit such a person; the penalty was a fine of Rds150 or imprisonment in accordance with the facts of the case. A doctor had to obtain the approval of the Burgerraad before being allowed to practise.
- 42 Art 22. The punishment was forced labour.
- 43 Art 3 provided that a person who disrupted the court proceedings and refused to comply with the presiding official's order to leave, could be arrested and imprisoned for twenty-four hours or longer, depending on the circumstances.
- 44 Art 26 provided that a person who ignored a warning not to build too close to his neighbour, would forfeit all rights to that building. The dispute could be settled by way of arbitration before either the field-cornet or the commandant, but if the parties could not reach an agreement, the matter had to be referred to the magistrate and the land commissioners.
- 45 Art 24. The penalty was a fine of Rds50. In cases where treasonous correspondence was suspected, a letter could be opened by a military commander; if the content of the letter proved harmless, the military commander had to deliver it to the correct address as soon as possible. This provision was later repealed by art 183 of the 1858 Constitution. From then, any person found guilty of opening the post of another would be punished severely ("ten strengste") with a fine of Rds500 and in accordance with the merits of the case. A person reporting such a crime could claim half of the fine amount as a reward (see the version of the 1858 Constitution published as *Bylaag 2, 1858* in *Volksraadsnotule Part 3* (n 30) 496-525 at 520).
- 46 Art 27. This crime specifically included insulting or slandering females and further only applied if the defamation caused the victim harm. The penalty was a fine of anything between Rds50 and Rds100, the monies being forfeited to the state. The version used in this contribution also included the following phrase at the end of the provision, namely "schennes, transportatie of de dood, naar de aard der zaak", which was removed from later drafts (*Volksraadsnotule Part 1* (n 2) at 9 n 18; cf Eybers (n 26)). The meaning of this phrase is unclear. "Schennis van de eerbaarheid" is a crime against morality in Dutch law (see art 239 of *Wetboek van Strafrecht* of 1881 available at <http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht.html> (accessed 4 Aug 2015)).

to the field-cornets of the districts from and to which he would be relocating;<sup>47</sup> the removal of indigenous children from their native communities;<sup>48</sup> and the abuse of servants by their landlords.<sup>49</sup>

Quite a number of crimes relate to national security. These included treason;<sup>50</sup> conspiracy;<sup>51</sup> the falsification of official documentation;<sup>52</sup> dereliction of duties by military commanders;<sup>53</sup> as well as the refusal to comply with military orders.<sup>54</sup>

“Schennis” means “ontheiligung” (see *Van Dale Nieuw handwoordenboek der Nederlandse taal* 9 ed (Utrecht, 1984)) which may in turn be translated as desecration, profanation or sacrilege. However, the term “schennis” appears not to have been a standard term; it was not used by Roman-Dutch authors such as Van der Linden, Grotius or Matthaeus, nor does it appear in the Crimineel Wetboek voor het Koningrijk Holland of 1809. The choice of the use of this term by the early ZAR community is therefore curious. The two other terms in the phrase, namely “transportatie” and “de dood”, could be interpreted as alternative punishments, namely that of banishment (see *Van Dale Nieuw handwoordenboek der Nederlandse taal sv “transportatie”*) and the death penalty. If this interpretation is correct, it is possible that “schennes” here referred not to the crime, but to a third possible punishment, similar to the Dutch punishment of being declared dishonourable (see art 25 of the Crimineel Wetboek voor het Koningrijk Holland of 1809; and Joannes van der Linden *Regtsgeleerd, practicaal, en koopmans handboek; ten dienste van regters, practizijns, kooplieden, en allen, die algemeen overzicht van regtskennis verlangen* (Amsterdam, 1806) 2 2 2). It is also possible that the phrase merely represented notes made by the original drafters of the Thirty-Three Articles, indicating their initial thoughts on the crime (“schennis”) and its possible punishments (banishment or the death penalty) which through oversight was not removed before the document was signed.

- 47 Art 25. The penalty was a fine of Rds5. A person was required to report to the field-cornet of the area in which he had settled within fourteen days.
- 48 Art 28. The crime was considered so serious that it was punishable by either a fine of Rds500 or six months’ imprisonment. In addition, the children involved had to be returned to their communities.
- 49 Art 33. A master was allowed to discipline his servants, but no abuse was tolerated. The punishment had to be determined in accordance with the facts of the case.
- 50 Arts 9 and 10. The punishment entailed a fine of Rds500 and banishment. Those who dared to return to the country after being banished could be declared outlawed. Any person who had been found guilty of treason in the past, was not eligible for election to an official position. In addition, anyone who became aware of such treasonous conspiracies and failed to report it to the authorities within eight days, could be punished by a fine of Rds100 and one months’ imprisonment: art 11. (The penalty was later changed to a fine of Rds25 or arrest, depending on the facts of the case, and a two-year suspension of the right to vote: see *Volksraadsnotule Part 1* (n 2) at 7 n 12).
- 51 Art 12. Each perpetrator could be punished by a fine of Rds25 or arrest, in accordance with the facts of the case, and a two-year suspension of the right to vote. This crime also included preventing others by the use of deeds or threats from exercising their rights.
- 52 Art 13. This crime included falsification of signatures, altering documents, subscribing false names of persons or inserting anything into registers or public deeds after they had been finalised. It was punishable with a fine of Rds300 and dismissal.
- 53 Art 8. The penalty was a fine of anything between Rds50 and Rds150 or imprisonment, depending on the circumstances.
- 54 Art 23. The penalty for the first conviction was a fine of Rds20, for the second conviction Rds30 and for the third conviction Rds50 payable to the state.

Although the Thirty-Three Articles does not explicitly provide for the establishment of courts of law,<sup>55</sup> it does make provision for procedural regulations and for maintaining order in the courts. In particular, it stipulates that all court proceedings had to be held in public;<sup>56</sup> that all members of the public who attended such proceedings had to uncover their heads, “maintain a decorous and respectful silence”, follow all the instructions of the President,<sup>57</sup> and not disrupt court proceedings;<sup>58</sup> that all members of the public present were obliged to assist the presiding officer in removing (arresting) disruptive elements from the court;<sup>59</sup> that judicial officers would not be prevented from doing their duties through insults or threats;<sup>60</sup> that a judicial officer could be disqualified in the event of a conflict of interests;<sup>61</sup> that a person had the right to either represent himself or appoint somebody

55 Rather, when read in its entirety, it becomes clear that the document assumed that such courts already existed. A magistrate’s court was created for the territory west of the Drakensberg as early as Sep 1839. The first magistrate to be appointed was J de Klerk (art 3 of the minutes of the Volksraad of 7 Sep 1839 published as “N.1, pp. 26-30” in *Natal Volksraadsnotule* (n 26) at 16-17).

56 Art 1. In the original document, this article referred to “teregtzittingen”. Eybers (n 26) translated the term as “law sessions”.

57 Art 2. The quoted translation is that of Eybers (n 26). It is possible that the use of the term “President” here probably referred to the presiding judicial official. After the arrangements made by the Voortrekkers at Thaba Nchu on 2 Dec 1836 and later on 17 Apr 1837, the chief judicial official (Gerhardus Marthinus Maritz) was referred to by various titles, including that of “rechter” (judge), “president”, “President-Regter” (judge president) and “Magistraat” (magistrate), and that even after Retief had been elected as the political leader: see, eg, GS Preller *Joernaal van 'n Trek uit die Dagboek van Erasmus Smit* (Cape Town, 1988) at 43, 61 and 67; J Bird *The Annals of Natal 1495 to 1845* vol 1 (Pietermaritzburg, 1888) at 367; HB Thom *Die Lewe van Gert Maritz* (Cape Town, 1947) at 228.

58 Art 3. The wording of this provision was very detailed and prohibited disruption through any means whatsoever at any stage of the proceedings, including during the parties’ arguments, the reading of the court’s findings, or the pronouncement of sentence. It specifically prohibited the making of noise, indicating one’s approval or disapproval, or causing disruption through bodily movements. See, also, n 43 *supra* regarding the penalty for non-compliance.

59 Art 4. Although a penalty was prescribed, the article provided for the prosecution of persons who refused to assist the presiding officer.

60 Art 5. Transgressors would be charged and, if found guilty by an independent judicial officer, fined or imprisoned in accordance with the severity of the case.

61 Art 6 mentioned seven grounds for disqualification, namely (1) if he was related to the “beklaagde of beschuldigde” (Eybers (n 26) translates these terms as the plaintiff or the defendant) within the third degree through blood or marriage; (2) if he had a personal interest in the matter; (3) if he had provided any written advice in the matter; (4) if he had received, or had been promised and accepted, any gifts from interested parties during the proceedings; (5) if he was the “voog, toeziende voog, redderaar of vermoedelyke erfgenaam of begiftigde” (guardian, supervising guardian, executor (*cf* Eybers (n 26) who translates “redderaar” as “agent”) or probable heir or beneficiary) of one of the parties; (6) if a high degree of enmity developed or existed between him and one of the parties; and (7) if any insults or threats had been exchanged between him and any of the parties since the start of the proceedings or within six months (it is not clear whether the six months referred to the period before or since the start of the proceedings; however, in light of the restriction that these grounds had to be raised at the start of the proceedings, this period probably referred to the former interpretation). A party to the proceedings or a member of the

to act on his behalf (in legal proceedings)<sup>62</sup> although members of the Burgerraad could not represent others or give advice outside of public meetings;<sup>63</sup> and that the field-cornet was obliged to hand over all so-called “onwilligers”<sup>64</sup> in his district to the magistrate.<sup>65</sup>

In summary, the Thirty-Three Articles contained provisions mostly regarding the regulation of law and order. It was a basic guideline identifying the transgressions that were considered worth prosecuting. These included crimes against the national security as well as crimes against individuals. Further, it made provision for the enforcement of law in an orderly way in those forums where the crimes would be adjudicated. Lastly, it determined the law to be applied by the courts. This will be considered in the next section.

Burgerraad could raise one of these grounds of disqualification in writing or orally at the start of the proceedings and before the hearing commenced (arts 6 and 7 read together). An eighth ground for immediate disqualification appears to have been inserted in art 6 as an afterthought as it concerned not only court proceedings but extended to membership of the Burgerraad as well. It stated that “geene bastaarden … tot het tiende gelid” would be allowed to preside or sit as member of the Burgerraad. Eybers (n 26) translates this phrase as “no half-castes, down to the tenth degree”, but the original meaning could also have been to exclude the illegitimately born, ie, those born out of wedlock, from court proceedings and other official duties.

- 62 Art 16.
- 63 Art 15. Members of the Burgerraad could not act as a “scheidsman” (Eybers (n 26) translates it as an “umpire”) either. The use of this term is ambiguous as it either indicated that members of the Burgerraad were prohibited from presiding in judicial processes or that they could not even try to settle disputes extra-judicially. The former interpretation would imply that there was a separation of powers between the judicial and legislative or executive authorities. Wichmann ((n 1) at 40) is of the opinion that there was no separation of powers at that time and that the Burgerraad also functioned as a court, although probably only as a court of appeal. The question regarding the separation of powers falls outside the scope of this contribution and will not be considered here. It should be noted that art 15 was amended by a decision of the Volksraad in 1864 in that members of the Volksraad were no longer prohibited from representing others in a court of law: see art 19 of the minutes of the Volksraad of 17 Feb 1864 published as “Staats Courant, 1 en 8 Mar. 1864” in *Volksraadsnotule Part 5* (n 29) at 9-14.
- 64 Art 32. The meaning of the term “onwilligers” in this provision is not clear. It is translated by Eybers (n 26) as “undesirables [or, all persons unwilling to serve]”, implying a reference to military service. Wichmann (n 1) does not include art 32 in his discussion of the Thirty-Three Articles (at 38-41). It is submitted that art 32 was not restricted to persons unwilling to serve or perform military duties. Rather, it was meant as a general provision concerning the practical application of law and order, in that it compelled the field-cornets to apprehend any person suspected of any of the crimes mentioned in the Thirty-Three Articles and to hand him or her over to the office of the magistrate to ensure the rule of law and a fair trial. Its purpose could, arguably, have been to prevent vigilante justice.
- 65 Two remaining provisions, namely arts 29 and 30, are not discussed here. They concerned non-judicial matters regarding the settlements of the indigenous peoples and the election of members of the Volksraad respectively. For a discussion of these two provisions, see, eg, Wichmann (n 1) at 40-41.

## 4 Article 31: The law to be applied

The most important provision for purposes of this contribution is article 31 which concerned the applicable law. It provided that in those cases where the legal principles laid down in the Thirty-Three Articles proved insufficient, Dutch law should serve as a guideline, although always in a moderate style and form in accordance with the customs of South Africa and to the benefit and welfare of the community.<sup>66</sup>

As mentioned above, the Thirty-Three Articles was confirmed and approved by the unified Volksraad of the ZAR on 23 May 1849.<sup>67</sup> Despite the apparently clear stipulations, there seemed to have been uncertainty regarding the applicable law. In 1853, Commandant-General AWJ Pretorius received a letter from one J Howell<sup>68</sup> containing some suggestions for the improvement of the newly created Republic. One of these suggestions was for an official declaration on whether English law, Roman-Dutch law, the law of the Cape Colony, or the ZAR's own law should be the law applicable in the Republic.<sup>69</sup>

MW Pretorius and S Schoeman drafted a document in 1856 on the state of the nation<sup>70</sup> in which they acknowledged that certain provisions, including article

66 "In alle gevallen waarin deze wetten te kort komen mogten, de Hollandsche Wet tot bases zal verstrekken, doch op een gematigde styl en vorm en overeenkomstig het costum (costuum) van Zeud Africa en tot nut en welvaard voor deze maatschappy." The wording in the version used by Eybers (n 26) is slightly different: "In alle gevallen waarin deze wetten tekort mogten komen zal de Hollandsche wet tot basis verstrekken, doch op eene gematigde stijlvorm en overeenkomstig van het costuum van Zuid Afrika en tot nut en welvaart van de maatschappij." Eybers translates the provision as follows: "In all cases in which these laws may prove insufficient the Dutch Law shall serve as basis, but only in a moderate way and according to the customs of South Africa and for the prosperity and welfare of the community."

67 See n 2 *supra*.

68 Possibly the same J Howell who was appointed magistrate at Winburg in 1858. He is described as a "Jack of all trades" and had, during his career, served in various capacities including that of soldier, magistrate's assistant, public prosecutor for Natal, attorney, editor of a newspaper (the *Natal Standard and Farmers' Courant*) and author. He was a friend of AWJ Pretorius and had once saved the life of Judge William Menzies. See BJT Leverton sv "Howell, James Michael (Michiel) Gristock" in *DSAB* vol 3 (Cape Town, 1977) 418.

69 See R.493/53 in DW Krynauw & HS Pretorius (eds) *Transvaalse Argiefstukke Staatsekretaris; Inkomende Stukke, 1850-1853* (Pretoria, 1949) at 311-312.

70 See n 31 *supra*. This document was drafted by the then two rival commandants-general, Marthinus Wessel Pretorius (later to be the first president of the ZAR) and Stefanus Schoeman, at a meeting held on 12 Apr 1856 in an attempt to restore order to the country during a period of dissension and the threat of military conflict. One of the aims of the meeting was to review the draft Constitution of 1855 that had provisionally been adopted by the Potchefstroom Volksraad in Nov of that year: see art 8 of the minutes of the Volksraad of 6 Nov 1855 published as "Soutter, pak II No. 8" in *Volksraadsnotule Part 3* (n 30) at 106-107; for an overview of the political events of that period, see, in general, Wichmann (n 1) at 86-194. Schoeman had been elected and sworn in as commandant-general in 1855. He had a stormy relationship with the ZAR government, but appears to have remained, at least officially, on a good enough footing with Pretorius to be entrusted with governmental duties in later years: see Wildenboer "Schoemansdal: Law and justice on the frontier" (2013) 19(2) *Fundamina* 441-462 at nn 7 and 33; OJO Ferreira sv "Schoeman, Stephanus" in *DSAB* vol 5 (Pretoria, 1987) 685-688.

31 of the Thirty-Three Articles, contained inaccuracies that could result in legal uncertainty. Furthermore, they stated that the use of Dutch law, a “[k]oninglyke wet”,<sup>71</sup> was deemed inappropriate in a republic<sup>72</sup> such as the ZAR as it prescribed severe punishments for transgressions. They agreed that it was impossible to govern a country or nation without proper legislation (or law) as experience had shown and that, without it, the inhabitants of an otherwise beautiful and plentiful country would not be prevented from turning to destruction, chaos, discord and mockery. They proposed a separation of powers between the legislature, the executive<sup>73</sup> and the judiciary with an emphasis on the independence of the latter, but did not make any recommendation regarding the law to be applied. Instead, they proposed that all legislation should be promulgated by the legislature (namely the Volksraad) subject to approval by the nation within three months.<sup>74</sup>

Despite the reservations expressed in the abovementioned 1856 document, the 1858 Constitution made no mention of the law to be applied. In the following year this was remedied with the promulgation<sup>75</sup> of an addendum to the Constitution. The purpose of this addendum, known as Addendum 1,<sup>76</sup> was to address the uncertainty surrounding the interpretation of article 31 by providing clarity on the sources of law.<sup>77</sup> It stipulated that the law book of Van der Linden, in so far as it was not in conflict with the Constitution, other legislation or decisions of the Volksraad, would remain the “law book” of the ZAR.<sup>78</sup> If Van der Linden dealt with a matter

- 71 The Kingdom of the Netherlands (*Koninkrijk der Nederlande*) was established in 1815 after Napoleon’s defeat. On 27 Sep 1815 William, Prince of Orange and Nassau, was crowned as King William I. See HR Hahlo & E Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 526.
- 72 The ZAR became an independent state on the signing of the Sand River Convention with Britain on 16 Jan 1852. The name “De Zuid-Afrikaansche Republiek” was adopted by the Volksraad on 19 Sep 1853. See Eybers (n 4) doc 179 at 360. See, also, L Wildenboer “For a few dollars more: Overcharging and misconduct in the legal profession of the *Zuid-Afrikaansche Republiek*” (2011) 44 *De Jure* 339-363 at 339 n 2.
- 73 The proposal regarding the third branch, namely the executive, was recorded in a separate document signed five days later by the same authors: see *Bylaag 7*, 1856 in *Volksraadsnotule Part 3* (n 30) at 434-435.
- 74 This latter suggestion was accepted by the Kommissieraad in May 1856: see minutes of the Kommissieraad of 27-30 May 1856 published as “E.V.R. 5, pp. 484-501” in *Volksraadsnotule Part 3* (n 30) 134-144 at 136.
- 75 Art 52 of the minutes of the Volksraad of 19 Sep 1859 published in *Volksraadsnotule Part 4* (n 29) at 22-24. Art 4 of Addendum 1 stipulated that the Addendum would be implemented three months after it was made public; it was published in the *Government Gazette* of 28 Oct 1859 and therefore came into force on 28 Jan 1860: see *Bylaag 39*, 1859 of *Volksraadsnotule Part 4* (n 29) at 315-316.
- 76 Published as *Bylaag 39*, 1859 in *Volksraadsnotule Part 4* (n 29) at 315-316.
- 77 The preamble stated that the existing uncertainty regarding the applicable Dutch law was to the detriment of the citizens and caused the judicial officers much effort and doubt.
- 78 Art 1 of Addendum 1 referred to the “wetboek van van der Linden”.

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inadequately or not at all, the law book of Simon van Leeuwen and the *Inleiding tot de Hollandsche rechtsgeleertheyd* of Grotius would be binding.<sup>79</sup> Nevertheless, the use of these three legal works<sup>80</sup> remained subject to the restrictions set out in article 31 of the Thirty-Three Articles,<sup>81</sup> namely that it should always be interpreted in a moderate style and form in accordance with the customs of South Africa<sup>82</sup> and to the benefit and welfare of the community.

Addendum 1 in effect created a constitutionally entrenched hierarchy of sources of law. In order of importance, these sources of law were legislation, custom and the specified common-law authors, again in order of importance, Van der Linden, Leeuwen and Grotius.<sup>83</sup>

In 1866, the Volksraad received two petitions from the public regarding article 31. In the first, received from Rustenburg,<sup>84</sup> the petitioners complained, among other matters, that Dutch law was unsuitable and should not apply in the ZAR. They proposed that new and more suitable laws be drafted by two or three representatives from each district who were familiar with the local customs. In the second, received from Potchefstroom,<sup>85</sup> the petitioners complained about the application of foreign, monarchic laws in the “vrije Republiek” of the ZAR. In particular, they were offended by the continued use of Van der Linden as an authoritative source of law. They wanted to know why Van der Linden, who was no longer seen as an authoritative source in his own country, should be so highly regarded in the ZAR. They pointed out that their (ancestors) had left Holland because of the oppressive Dutch laws and called for new legislation to be drafted by the ZAR legislature that would satisfy the general population. Lastly, they complained that the three authoritative works of Van

79 Art 2 of Addendum 1 referred to the “wetboek van Simon van Leeuwen en de Inleiding van Hugo de Groot”.

80 It has been suggested that the choice of these three legal works had a lot to do with the fact that they had been written in Dutch, as knowledge of Latin (the only other language in which some of the other important works on Roman-Dutch law were available at that time) was probably rare in the ZAR during those early years: see Farlam (n 9) at 402. In addition, all three these works had been regarded as authoritative in former Dutch colonies such as the Cape, Guiana and Ceylon (*ibid*).

81 Art 3 of Addendum 1.

82 See n 66 *supra*.

83 L Wildenboer & K Dietrich “*Pretorius v Dietrich* 1872: Klinkende munt of papiergeeld?” (2015) 12(1) *LitNet Akademies* available at <http://www.litnet.co.za/pretorius-v-dietrich-1872-klinkende-munt-of-papiergeeld/> (accessed 20 Aug 2015) 1-22 at 7. See, also, M Jossen *Schets van het recht van de Zuid-Afrikaansche Republiek* (Gent, 1897) at 10-11, 96; HR Hahlo & E Kahn *The Union of South Africa. The Development of its Laws and Constitution* (London, 1960) at 21.

84 Petition dated 13 May 1865 published as *Bylaag* 4, 1866 in JH Breytenbach (ed) *Notule van die Volksraad van die Suid-Afrikaanse Republiek (Volledig met alle Bylae daarby) Deel VI (1866-1867)* (Cape Town, *sd*) (hereafter *Volksraadsnotule Part 6*) at 94-95.

85 Petition dated 20 Aug 1866 published as *Bylaag* 32, 1866 in *Volksraadsnotule Part 6* (n 84) at 114-115.

der Linden, Grotius and Leeuwen were unobtainable and therefore inaccessible to the man on the street.

The Volksraad responded positively and agreed that there was a need to compile the laws of the ZAR in one code (“wetboek”).<sup>86</sup> After much debate and an initial suggestion to appoint a commission to codify the laws of the ZAR which would contain all the legislation previously issued there,<sup>87</sup> it was eventually decided that the President and the Executive Council would be responsible for submitting new laws for approval to the Volksraad. In the interim, the existing position would pertain until such time as it was repealed.<sup>88</sup> In other words, Roman-Dutch law would apply in those cases where the Constitution and the Thirty-Three Articles were silent – not generally though, but in the limited sense referred to above.<sup>89</sup> Moreover, the Volksraad expressed the wish that the citizens would be more supportive of the legislature and invited the public to participate in the process by submitting suggestions for new laws and to raise their grievances regarding any existing repugnant or harmful laws.<sup>90</sup>

Despite the apparent enthusiasm for a complete overhaul of the laws of the ZAR, nothing ever came of the proposed codification. Article 31 of the Thirty-Three Articles remained in force. The courts of the ZAR continued to apply Roman-Dutch law as contained in the three authoritative works of Van der Linden, Leeuwen and Grotius.<sup>91</sup> The next section will consider the application of article 31 by the courts as illustrated by a few decisions.

- 86 Art 190 of the minutes of the Volksraad of 24 Sep 1866 and art 239 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-20 and 22-24 respectively.
- 87 Art 190 of the minutes of the Volksraad of 24 Sep 1866 and art 239 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-20 and 22-24 respectively. The commission had to complete their task within six months.
- 88 Art 242 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 22-24.
- 89 See, also, arts 190 and 191 of the minutes of the Volksraad of 24 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 19-21. These two articles were, however, not adopted by, and were never official decisions of, the Volksraad.
- 90 Art 242 of the minutes of the Volksraad of 26 Sep 1866 published as “Staats Courant, 18 Sept.-19 Des. 1866” in *Volksraadsnotule Part 6* (n 84) at 22-24.
- 91 These three common-law sources were used until the end of the century as is apparent from requests for copies of these works from, eg, the special magistrate for Barberton and the public prosecutor for Middelburg (see, respectively, TAB SS 2595 R15543/90 and TAB SP 195 SPR481/99: this reference is to the National Archives Repository (Pretoria) (TAB) followed by the relevant document series). The works were apparently used not only by lawyers and judicial officials, but also by the public, as is evident from a similar request from a teacher (see TAB OD 0 OR9888/97) for copies of Van der Linden’s “Wetboek” and the “Lokale Wetboek”, the latter probably referring to F Jeppe & JG Kotzé *De Locale Wetten der Zuid Afrikaansche Republiek 1849-1885* (Pretoria, 1887).

## 5 The application of article 31 by the courts

### 5 1 *Rooth v The State*<sup>92</sup>

In *Rooth v The State*, a decision of the High Court of the ZAR in 1888, the Court had to decide whether the applicants could reclaim transfer duties in terms of the *condictio indebiti* on the ground that they had been ignorant of the law. Counsel for the applicants relied on the authoritative sources as prescribed by the Thirty-Three Articles and Addendum 1 to the 1858 Constitution and argued that money paid in error, whether in fact or in law, could be recovered. The Court confirmed that it was obliged to follow the three prescribed texts, but qualified this obligation by saying that “in the interpretation and use of these three textbooks the Court shall always proceed in the manner prescribed by [Art] 31 of the thirty-three Articles”.<sup>93</sup> The Court found that since none of these three works addressed the question before it “satisfactorily or with clearness”,<sup>94</sup> it not only had a discretion to depart from that authority, but was compelled to follow the Roman-Dutch law “yet upon a reasonable system and in accordance with the usage of South Africa, and for the benefit and welfare of the community”.<sup>95</sup> The Court then proceeded to look at various other authorities on Roman-Dutch law, French law, German law and English law and to consider also the opinions of Roman jurists and the commentators, before concluding that monies could not be recovered on the basis of *error iuris*.<sup>96</sup>

### 5 2 *Van Diggelen v Wepener*<sup>97</sup>

*Van Diggelen v Wepener* was a judgement of the High Court of the ZAR in 1894 that concerned the prescription of the fees of law agents. The Court had to decide whether article 16 of the *Placaat* of the Emperor Charles V of 4 October 1540<sup>98</sup> applied in the ZAR.

92 (1885-1888) 2 SAR TS 259. Also reported in (1888) 5 *Cape LJ* 304-309. Unless otherwise specified, all references are to the former citation.

93 At 261.

94 At 262.

95 At 261-262.

96 The Court (Kotzé CJ, with Esselein and De Korte JJ concurring) considered the views of authors such as Van der Keessel, Huber, (Heinrich) Coccejus, Peckius, Vinnius, D’Aguessau, Leyser, Mühlenbruch, Cujacius, Donellus, Merenda, Brunneman, Domat, Voet, Glück, Savigny, Mackeldey, Goudsmit, Windscheid, (Wiardus) Modderman, (Joseph) Story, Burge, Pothier, Austin and the opinions contained in the *Hollandsche consultatiën*.

97 (1894) 1 Off Rep 31; also reported in (1894) 11 *Cape LJ* 218-222. Unless otherwise specified, references to and quotations from this decision are from the latter citation.

98 *Groot placaet-boeck* Part 1 cols 311-322. This *Placaat* is also known as the Perpetual Edict (*Eeuwiche Edict*) and is available online on the Utrecht University Repository at <http://objects.library.uu.nl/reader/index.php?obj=1874-44882&lan=en#page/13/34/56/133456283560534604448817005324474664610.jpg mode=1up> (accessed 9 Sep 2015). JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) summarises the purpose of the *Placaat* as “not a law dealing

The majority found that since the Roman-Dutch authorities<sup>99</sup> were undecided on this question, a decision of the Supreme Court of the Cape<sup>100</sup> and one of the High Court of the Orange Free State<sup>101</sup> should be followed because “this course is pointed out to us by the provision in the Thirty-Three Articles”. However, it did not elaborate further on the reason for this approach. As a result, the Court held that article 16 of the *Placaat* of 1540 indeed applied in the ZAR and that the fees of law agents became prescribed within two years.

with some single subject, but an ordinance which strove to amend existing abuses and to introduce some uniformity into the practice of the courts” (at 221). The preamble of the *Placaat* confirms “that it was promulgated in order to ... remedy the expense connected with lawsuits, and to provide for a pure administration of justice which would deal equally with both rich and poor” (tr Wessels at 218). For more on the Perpetual Edict in general, see Wessels at 218-221; DH van Zyl *Geschiedenis van die Romeins-Hollandse Reg* (Durban, 1983) at 438; Hahlo & Kahn (n 71) at 572; G Abraham “[In] the path of the good Emperor Justinian”: Charles V and the impact of his legacy on the development of the South African common law” (2001) 118 *SALJ* 532-555 esp at 542, 547-552. In short, art 16 of the *Placaat* provided that the fees of advocates, attorneys, secretaries, doctors of medicine, surgeons, apothecaries, clerks, notaries and other labourers prescribed after two years. The only exception to this rule was where the debt had been put in writing, in which case the claim prescribed after ten years. In the event that the principal debtor died, the creditor had two years from the date of hearing of the death to claim the debt from the heir. (For a full translation of art 16, see RW Lee *An Introduction to Roman-Dutch Law* (Oxford, 1931) at 287.) In *President Insurance Co Ltd v Yu Kwam* [1963] 3 All SA 443 (A) at 447 the Appellate Division acknowledged that the common-law principles pertaining to prescription along with the provisions in terms of art 16 of the *Placaat* had been received into the law of (at least) the old Transvaal (ZAR). (Abraham at 550 n 172 argues that it had also been received into the law of the other provinces.) Art 16 of the *Placaat* was explicitly repealed in South Africa by s 15 of the Prescription Act 18 of 1943.

- 99 In the majority judgement, the Court not only referred to the three prescribed authorities, namely Van der Linden, Leeuwen and Grotius, but also consulted the works of Merula, Coren, Groenewegen, Voet, Van der Keessel, Van Alphen and De Haas (at 219). It is interesting to observe that the reference here to Van der Linden was not to the authorised work, the *Koopmanshandboek*, but to his translation and comments on the work of the French jurist, Robert Joseph Pothier: J van der Linden *Verhandeling van contracten en andere verbintenissen door Robert Joseph Pothier... Tweede Deel* (Leyden, 1806) 706 at 261.
- 100 The unreported decision in *Drew v The Executors of Wolfe* (1858). However, a summary of the decision does appear in (1868) 1 Buch 119. In this case, which concerned the prescription of claims for medical fees, the Court held that the 1540 *Placaat* was “not, as to medical men, in disuse”.
- 101 *Rabie v Neebe* 1879 OFS 57. The case also involved the prescription of claims for medical fees. In truth, it is difficult to determine from the report what the Court’s view on the application or not of the 1540 *Placaat* was. The reported judgement appears to contain conflicting views which may possibly be due to the fact that there were majority and minority decisions. On the one hand the Court expressed its doubt (at 58) at the correctness of the decision in *Drew v The Executors of Wolfe* (n 100 *supra*) and held that while the plaintiff had tried to prove that the 1540 *Placaat* had fallen into disuse in the Orange Free State, it would have been sufficient for him to prove that the *Placaat* was no longer in use in the Netherlands. The Court was satisfied that the latter had indeed been proven and even went further to say that those who alleged that the *Placaat* still applied, had to prove that it had been resurrected (“degene die beweert dat het Plakaat van 1540 ergens nog van kracht is, moet bewijzen dat het aldaar wederom in leven geroepen is geworden door eene latere wetsbepaling”) (at 58). The Court consequently held that a prescription period of two years did not apply to medical bills (at 59). On the other hand, however, in the last paragraph, the report states that the Court agreed with the judgement in *Drew v The Executors of Wolfe* and held that the fees of medical doctors prescribed after two years (at 59).

In a dissenting judgement, Morice J gave a very different interpretation of the provisions of the Thirty-Three Articles. He likewise considered the three Roman-Dutch authors,<sup>102</sup> but concluded that according to them, article 16 of the 1540 *Placaat* had fallen into disuse.<sup>103</sup> Furthermore, he was of the opinion that the Cape and Free State decisions referred to by the majority did not constitute evidence of the customs of the ZAR. By contrast, he was of the view that, taking into account local circumstances such as the great distances, the slow means of communication and the fact that “a large proportion of the population live[d] in wagons during half the year”, it was not a custom in the ZAR to recognise the prescription of the fees of law agents within two years. He held that “[a] custom means what is practised amongst ordinary persons, and not an interpretation of Roman-Dutch Law by Judges”. Finally, Morice J emphasised that in terms of the Thirty-Three Articles, Dutch law had to be followed to promote the welfare of the state; in his opinion an interpretation allowing for a prescription of legal fees within two years did not promote that welfare.<sup>104</sup>

### 5 3 The Reform Trial (*S v Phillips, Rhodes and Others*)<sup>105</sup>

The Thirty-Three Articles also influenced the outcome of the controversial Reform Trial<sup>106</sup> that took place in 1896 after the failed Jameson Raid.<sup>107</sup> For various reasons not

- 102 Like the majority, Morice J referred not only to the three prescribed authorities, but also to the works of other authorities, including Van der Keessel, Voet, Groenewegen and Van Alphen (at 221).
- 103 This view is shared by LE Krause “The history and nature of acquisitive prescription and of limitation of actions in Roman-Dutch law” (1923) 40 *SALJ* 26-41 at 36. Krause at 35 n 7 lists a number of judgements that had held that art 16 of the 1540 *Placaat* applied in South Africa, but he is of the opinion that these judgements were decided wrongly. Interestingly, Krause bases his argument on the same text by Van der Linden (see n 99 *supra*) relied on by the majority judgement in *Van Diggelen v Wepener*, but follows a different interpretation.
- 104 Morice J referred (at 222) to a draft Bill on prescription that set the period for prescription for much longer than two years. That Bill had been rejected by the Volksraad in 1892. After the British annexation, a statute was promulgated to amend the law relating to prescription. Art 1 of the Prescription Amendment Act 26 of 1908 (Tvl) replaced all former laws or customs and expressly stated that art 16 of the 1540 *Placaat* was “withdrawn from operation”.
- 105 (1896) 3 Off Rep 216. The judgement was also reported in “High treason” (1900) 17 *Cape LJ* 15-30 by the editors of the journal (see the footnote at 15). However, as pointed out by the presiding judge Gregorowski himself, the latter report differs from the officially reported judgement, which he described as “fairly correct” (see R Gregorowski “Mr Justice Gregorowski and the Reform Trial. Mr Gregorowski’s reply” (1900) 17 *Cape LJ* 311-326 at 311). This was contested by the editors of the *Cape LJ* (see “Note on Mr. Gregorowski’s reply” (1900) 17 *Cape LJ* 326-327 at 326). The two versions do indeed differ, and for that reason both are referred to in this discussion.
- 106 Named for the Reform Committee formed at the time of the Jameson Raid and of which some of the accused had been members.
- 107 Much has been written about the Jameson Raid. For those interested in the historical facts of the Raid, as well as its causes and consequences, the following works might serve as a basic introduction: The State Library *From Manifesto to Trial. A Full History of the Jameson Raid and*

one of the five judges on the High Court bench at the time was available to preside at the trial.<sup>108</sup> In response to this predicament, the ZAR government requested Reinhold Gregorowski,<sup>109</sup> the then State Attorney of the Orange Free State, to preside. He accepted the offer. He was much criticised<sup>110</sup> for his judgement and, in particular, for the way in which he had applied the law.

After Jameson's invasion had been halted and the concomitant rebellion put down, sixty-four persons<sup>111</sup> were accused of high treason and

*the Trial of the Members of the Reform Committee and of Dr Jameson and his Staff* (Pretoria, 1896 repr 1970); Kotzé *Memoirs* vol 2 (n 24) at 231-246 (for his involvement, see n 108 *infra*); HM Hole *The Jameson Raid* (London, 1930) (the author was a contemporary of and had known Jameson and many of the other role players in person); IR Smith *The Origins of the South African War, 1899-1902* (New York, 1996) ch 3.

108 The reasons are set out in Anon "Mr. Justice Gregorowski and the Reform Trial" (1900) 17 *Cape LJ* 164-171 at 164-165. Of the five judges, Kotzé CJ and Ameshoff J had been members of the commission appointed to negotiate with the Reform Committee previously; De Korte J was under threat of suspension for entirely other reasons; and Jorissen J and Morice J could not preside due to their respective political views. De Korte resigned in June 1896 after being charged with misconduct – for more on the charges against him and the finding of the special court in this regard, see Wildenboer (n 72) at 358-359.

109 Gregorowski had been a judge of the Orange Free State Bench from 1881 and the Attorney General there since 1892. He later served on the ZAR Bench from May 1896 and succeeded Kotzé as Chief Justice after the latter's dismissal by President Kruger (see n 24). For more on Gregorowski's life and career, see M Wiechers *sv "Gregorowski, Reinhold"* in *DSAB* vol 2 (Cape Town, 1972) 274-275; Anon "Mr Justice Gregorowski" (1921) 38 *SALJ* 1-2. Both these biographies praise Gregorowski's intellectual abilities and his ability to deliver sound judgements.

110 See, eg, EP Solomon "Mr Justice Gregorowski and the Reform Trial" (1901) 18 *SALJ* 78-99; Anon (n 108); 29 Apr 1896 *The Cape Times*; 30 Apr 1896 *The Manchester Guardian*; and 2 May 1896 *The Grahamstown Journal* (the latter contains a scathing personal criticism of Gregorowski's judicial suitability). He was not only accused of partiality, but it was also opined that his "allegations of fact are erroneous, his conclusions in law are bad, the sentences passed were, if not illegal, too severe, whilst [his arguments in support of those sentences] are unsound and illogical" (Solomon at 99). The direct or indirect involvement in the trial of some of these critics should be noted here. Apart from the general impact on the political affairs in Southern Africa at that time and the passionate debates it stimulated, some of these reviewers had experienced the consequences of the Jameson Raid and the Reform Trial more personally. For example, the editor of the *Cape Law Journal*, the main vehicle for publishing criticism against the judgement, had been one of the accused in the trial. William Henry Somerset Bell had been the editor of the Journal from 1884 until 1896, and resumed this position again from 1900 until 1913 (see WG Schulze "A conspectus of South African legal periodicals: Past to present" (2013) 19(1) *Fundamina* 61-105 at 65-66). EP Solomon, an attorney, had been one of the accused in the trial. The objectiveness of these reviews and criticisms is therefore an open question and the reader is invited to form his or her own opinion in this regard.

111 The so-called "rank and file" (or those other than the first four accused) pleaded guilty to the third and fourth charges but "without any hostile intention to disturb, injure or bring into danger the independence or safety" of the ZAR (see "High treason" (n 105) at 17). They all received sentences of two years' imprisonment and a fine of £2 000. These sentences were later commuted to a fine of £2 000 each with an undertaking to refrain from meddling in the internal or external politics of the ZAR (see the editor's note *idem* at 30). However, these charges and sentences

conspiracy.<sup>112</sup> The first four accused had pleaded guilty to the first charge in that they had “treated, conspired, agreed with and urged Leander Starr Jameson, *an alien residing without the boundaries* of [the ZAR], to come into the territory of [the ZAR] at the head of and with an armed and hostile troop and to make a hostile invasion ...”<sup>113</sup>

The judgement centred around which law was applicable: Roman-Dutch law or the local law of the ZAR? Article 9 of the Thirty-Three Articles provided for the punishment for treason.<sup>114</sup>

Counsel for the defence pointed out that the prosecution had not proved that Jameson was a representative of any foreign government, but simply that he “came in as a private man and was in charge of armed men”.<sup>115</sup> The contention was that the accused were therefore guilty of a lesser crime than that contained in article 9 of the Thirty-Three Articles, which concerned acts of treason with foreign governments, their governors or officials. Since article 9 prescribed the penalty of banishment and a fine of Rds500, counsel argued that a lesser form of punishment accordingly applied.<sup>116</sup>

For its part the prosecution argued that Jameson was a “robber and a freebooter” and that it was “regarded as more serious for persons to conspire with freebooters or robbers against the independence of the country than it would be if they had conspired with the government of a foreign Power”. The prosecution was of the view that article 9 did not apply; instead, Roman-Dutch law as contained in Van der Linden’s textbook had to be followed in sentencing the accused.<sup>117</sup>

The judgement of the Court was brief. Gregorowski J held that article 9 dealt “only with certain open treasonable acts, such as corresponding with a view to [an] invasion by a foreign Power, which is not on the same footing as the present case,

will not be discussed in further detail here as it was accepted that the crimes committed did not constitute high treason and was therefore not judged in terms of art 9 of the Thirty-Three Articles. Moreover, the main controversy surrounding the trial was rather concerned with the death sentence imposed on the first four accused.

112 For more detail on the four charges, see “High treason” (n 105) at 16-17.

113 *Ibid*, emphasis added. It is interesting to observe that at the time, criticism was not only levelled at the severity of the sentences, but also at the counsel of the defendants who advised their clients to plead guilty. See, eg, 30 Apr 1896 *The Manchester Guardian*; 1 May 1896 *The Manchester Guardian*.

114 See n 50 *supra*. Art 9 stipulated as follows: “All those who shall have formed plans or come to an understanding with foreign powers or their governors or officials with a view to inducing them to perform acts of hostility or to undertake the waging of war, or with a view to supplying them with the means necessary thereto, and those who attempt to commit treason, shall be punished with a fine of 500 Rix-dollars and shall be expelled from our community, and on returning shall be declared outlawed” (tr Eybers (n 26)). Gregorowski maintained that art 9 did not apply to the lesser crime of *crimen laesae majestatis* (Gregorowski (n 105) at 323).

115 “High treason” (n 105) at 21.

116 *Idem* at 21-22. See, also, *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 236-238.

where [an] invasion has actually been brought about".<sup>118</sup> As a result, the penalty prescribed in article 9 was not applicable. Rather, the Court was obliged to apply article 31 of the Thirty-Three Articles in terms of which Roman-Dutch law, and in particular Van der Linden's work, had to be followed.<sup>119</sup> The Court then proceeded to impose the death sentence on the first four accused.<sup>120</sup>

As already mentioned, the judgement elicited strong criticism. First, Gregorowski was criticised for not, at the very least, bearing in mind "the mildness of the legislation of the uneducated old Voortrekkers".<sup>121</sup> Secondly, he was criticised for his interpretation of Van der Linden's prescribed punishment. The relevant text in Van der Linden's *Koopmanshandboek* stated that the punishment for high treason was in general the sentence of death, but that the merits of the case had to be taken into account.<sup>122</sup> Gregorowski was lambasted for choosing to interpret Van der Linden's guideline in the strictest sense possible in order to impose the maximum sentence.<sup>123</sup> Thirdly, and (for purposes of this contribution) most importantly, it was pointed out that Gregorowski could have chosen to follow Roman-Dutch law with respect to high treason and *crimen laesio majestatis* as it had been interpreted by the Cape courts.<sup>124</sup>

117 "High treason" (n 105) at 25-26; *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 238.

118 *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 242.

119 See "High treason" (n 105) at 28. In the official report of the judgement, the Court did not explicitly mention Van der Linden, but merely held that the "old punishments of the Roman-Dutch Law" remained in force (at 242).

120 Not one of the four accused was eventually executed. The very next day, President Kruger mitigated each death sentence to fifteen years' imprisonment and again later to a fine of £25 000 each as well as the compulsory signing of an undertaking to refrain from meddling in the affairs of the ZAR (Hole (n 107) at 267-268). Only one of the four refused to sign the undertaking and was subsequently banished. The fines were eventually paid by Cecil John Rhodes, rumoured to have been the centre of the conspiracy: see Smith (n 107) at 95; 1 May 1896 *The Manchester Guardian*.

121 Anon (n 108) at 168. See, also, the arguments of counsel for the defence regarding the mild nature of punishment (at least with regard to European citizens) in terms of the law of the ZAR. Counsel stated: "The Africanders are not a bloodthirsty or vindictive people. Capital punishment is very seldom carried out in this country against a white man. The people of this Republic have published in their law books their humane views with regard to the punishment of high treason" (*S v Phillips, Rhodes and others* (1896) 3 Off Rep 216 at 236-237).

122 Van der Linden (n 46) at 2 4 2: "De straf van deeze misdaad [Hoog-verraad] is in't algemeen de doodstraffe, waar van de zoort en de wijze van uitvoering, naar mate van de meer of min verzuwarende omstandigheden, bepaald wordt" (The punishment for this crime [treason] in general is the death penalty, of which the nature and the method of execution are determined by the aggravating or mitigating circumstances).

123 Solomon (n 110) at 96-97. See, also, Anon "Lawyers in prison" (1896) 13 *Cape LJ* 129-131 where it was bemoaned that Gregorowski had not applied his judicial discretion, allowed in terms of Roman-Dutch law, when passing sentence (at 130).

124 Solomon (n 110) at 98. These cases had been heard by a special court for the trial of cases of high treason. The court had been constituted by s 8 of The Indemnity and Special Tribunals Act 6 of 1900 (Cape) (the Act was promulgated on 12 Oct 1900) and consisted of a three-judge bench of Solomon (not EP, but WH, Maasdorp and Lange. The trials concerned the sentencing of a

The law of the ZAR was decried in that it had “by local legislation been reduced to a hide-bound system”, dependent on three law books which, “however good in themselves, were never intended to form a complete digest of the laws required by a civilised state”.<sup>125</sup> In a jurisdiction such as the Cape, where the interpretation of the Roman-Dutch law was not “bound down to Thirty-three Articles or to the dictum of one single text writer”,<sup>126</sup> the courts were able to exercise their discretion in passing sentences according to the merits of each case.<sup>127</sup>

Surprisingly, Gregorowski responded publicly to these criticisms.<sup>128</sup> He vehemently denied the allegations that he had been prejudiced before or during the trial. Furthermore, he defended his decision to pronounce the death sentence on several grounds, namely the severity of the crimes committed,<sup>129</sup> his suspicion, even before the trial, that any death sentence would be commuted,<sup>130</sup> and the fact that English law punished all treasonous acts by death.<sup>131</sup> He further contended that the prescribed fine in terms of article 9, namely Rds500 (£37 10s at that time) was not “an adequate and proper punishment” for “a parcel of millionaires”.<sup>132</sup>

number of persons convicted of high treason against the British government during the Second Anglo-Boer War. Sentencing in these trials took place on 17 Dec 1900 at Colesberg and on 16 Mar 1901 at Dordrecht respectively, and therefore at least four years *after* the Reform Trial of 1896. The Court took into account the mitigating circumstances of each individual case before passing sentence. This is in contrast with the general sentences passed in the Reform Trial. The judgements of the special court was published in (1901) 18 *SALJ* 164-177. See, also, *R v Malan and Bruyns* (1902) 19 SC 187 where De Villiers CJ expressed his concern at the overlap of the administration of martial law and colonial law, especially where an official could act in both capacities.

125 Anon (n 108) at 166.

126 *Idem* at 171.

127 *Idem* at 170. The reviewer here seems to have lost sight of the fact that the Cape trials were in accordance with statutory prescriptions (see n 124 *supra*). For example, in sentencing Pieter de Villiers, the Court held that it was bound by s 32 of The Indemnity and Special Tribunals Act 6 of 1900 (Cape) and expressed the sentiment that it was unfortunate that they could not sentence the accused to imprisonment but could only impose a fine ((1901) 18 *SALJ* (n 123) at 175-176). Section 32 provided: “No person who complied with the provisions of a certain proclamation relating the laying down of arms by certain residents in the districts of Aliwal North, Wodehouse, and Barkly East, issued by Brigadier-General Brabant, dated at Dordrecht the 22nd day of February, 1900, and who shall have surrendered thereunder shall, if prosecuted under this Act, be liable to the punishment of death or imprisonment.” Unfortunately, I was not able to uncover any further information on Brabant’s proclamation.

128 Gregorowski (n 105).

129 *Idem* at 313-314, 325. He had taken into account factors such as the pre-meditation of the accused, their purpose and intended consequences, as well as the real consequences of the invasion, including that many had lost their lives, property or fortunes as a result of the events.

130 *Idem* at 316.

131 *Idem* at 321-322, 325.

132 *Idem* at 313. Many of the accused were eminent and wealthy persons. Solomon (n 110) at 96 pointed out that the alternative punishment mentioned by Van der Linden, namely banishment for life, would have been a viable and sufficiently severe punishment, especially for those accused with business interests in the ZAR. He criticised Gregorowsky for not imposing this alternative punishment instead.

## 6 Conclusion

Until the end of the nineteenth century, article 31 of the Thirty-Three Articles determined the law to be applied in the ZAR by creating a constitutionally entrenched hierarchy of sources of law. In order of importance, these sources of law were legislation, custom,<sup>133</sup> and the specified authors on Roman-Dutch law, namely, in order of importance, Van der Linden, Leeuwen and Grotius. However, the courts did not always treat article 31 as a rigid rule, but rather as a flexible guideline. For example, antiquated legislation that contradicted existing custom or did not promote the welfare of the state could be declared to have fallen into disuse.<sup>134</sup> Also, if the three prescribed Roman-Dutch authorities were found to be silent on a point or did not provide a clear answer to a question, the court not only had a discretion to depart from them, but was compelled to follow other Roman-Dutch (and other relevant) authorities on that point, provided that it was reasonable, not in conflict with local custom and that it promoted the welfare of the state.<sup>135</sup> The interpretation of article 31 depended to a great extent on the court's approach, and whether it followed a flexible or a rigid<sup>136</sup> interpretation.

## Abstract

The Thirty-Three Articles was adopted by the Potchefstroom Burgerraad on 9 April 1844 and confirmed four years later on 23 May 1849 by the unified Volksraad of the Zuid-Afrikaansche Republiek at Derdepoort. The Thirty-Three Articles contained provisions pertaining to general and judicial administration and was held out as a kind of constitution in its day. It retained its status as a basic law despite the adoption of the constitutions of 1858, 1889 and 1896, and was only repealed in 1901 after the British annexation of the Republic. The Thirty-Three Articles had a lasting impact on the legal development of the Zuid-Afrikaansche Republiek. This contribution examines its nature and content, focusing in particular on article 31 which made provision for the law to be applied. Reference is made to three different approaches in the application of this provision by the courts.

133 Josson (n 83) at 11 stated that custom had the same status as legislation and could replace conflicting legislation. For a custom to be legally acknowledged as such, it had to be supported by good reasons and had to be proven by witnesses or by an uninterrupted series of usages.

134 See, eg, the dissenting judgement of Morice J in *Van Diggelen v Wepener* (1894) 1 Off Rep 31.

135 *Rooth v The State* (1885-1888) 2 SAR TS 259.

136 *S v Phillips, Rhodes and others* (1896) 3 Off Rep 216. In this judgment, the court chose to interpret both art 9 of the Thirty-Three Articles, as well as the prescribed authority, namely Van der Linden, in the strictest possible sense.