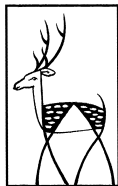


BY DUE PROCESS OF LAW?



By Due Process of Law?  
*Racial Discrimination and the Right to  
Vote in South Africa 1855–1960*

by  
IAN LOVELAND  
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• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

1999

Hart Publishing  
Oxford and Portland, Oregon

Published in North America (US and Canada) by  
Hart Publishing c/o  
International Specialized Book Services  
5804 N.E. Hassalo Street  
Portland, Oregon  
97213-3644  
USA

Distributed in the Netherlands, Belgium and Luxembourg by  
Intersentia, Churchillaan 108  
B2900 Schoten  
Antwerpen  
Belgium

Distributed in Australia and New Zealand by  
Federation Press  
John St  
Leichhardt  
NSW 2000

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Hart Publishing is a specialist legal publisher based in Oxford, England.  
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publications please write to:

Hart Publishing, 19 Whitehouse Road, Oxford, OX1 4PA  
Telephone: +44 (0)1865 434459 or Fax: +44 (0)1865 794882  
e-mail: hartpub@janep.demon.co.uk

British Library Cataloguing in Publication Data  
Data Available  
ISBN 1 84113-049-4 (cloth)

Typeset by Hope Services (Abingdon) Ltd.  
Printed in Great Britain on acid-free paper  
by Bookcraft, Midsomer Norton.

To  
*the memories of*

GANIEF HARRIS  
EDGAR FRANKLIN  
WILLIAM COLLINS  
*and*  
EDGAR DEANE

*For having the courage to try  
and the faith to believe*



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# Preface

The South African case of *Harris v (Donges) Minister of the Interior* is one familiar—if only fleetingly—to most students of British constitutional law. The case was triggered by the South African government's attempt in the early 1950s to disenfranchise non-white voters in the Cape province. In British legal education, it is passed briefly by as an illustration of the point that—irrespective of the constitutional limitations which may restrain the legal authority of legislatures in countries which were formerly British colonies—it is not legally possible for the United Kingdom Parliament to produce a statute which limits the powers of successive Parliaments. The correctness of that dominant view as a matter of constitutional law, and its desirability as a matter of constitutional morality, continue to provoke disagreement among constitutional theorists in Britain, and in its final chapter this book adds further strands to that already tightly woven tapestry of political and legal analysis.

However, the book's primary objective is to offer a rather fuller picture of the story underlying the *Harris* litigation. In part, the book has been written to satisfy my own historical curiosity about the process of British acquisition of and disengagement from the government of its 'white' colonies in southern Africa and then—in the new (post-1909) country of South Africa—the consequential emergence and consolidation of *apartheid* as a system of socio-political organisation. Perhaps equally importantly, the book tries to use the South African experience to speak to broader, contemporary and British concerns about the nature of our Constitution, and the role of our legislature and our courts in determining just how that Constitution is to work. In the main, this purpose is pursued implicitly rather than explicitly, and may therefore be most evident to readers who already have at least a passing familiarity with the main elements of British constitutional law. The issue has of course gained an added urgency and topicality at the present time, given the victory in the 1997 general election of a Labour party which professes itself committed to promoting fundamental reform to the British constitutional system.

*Harris v Donges* was only the first and—from both a legal and political viewpoint—the least interesting and significant of three closely interlinked pieces of litigation. The second and third cases, *Harris (No. 2)* and *Collins*, raise far more legally complex and politically contentious questions, and they are each afforded as extensive an analysis as *Harris (No. 1)* in this book. But since the book is largely concerned with telling a political and moral story, law reports, statutes, legal textbooks and articles in legal periodicals are not the main sources of data on which I have relied. Neither is the text dominated by the abstract thoughts of constitutional and jurisprudential theorists. Both types of data

feature prominently in the analysis offered, but they share equal billing with studies of economic, social and political history, with the biographies and autobiographies of politicians, judges and political activists, and with contemporaneous reportage from more exoteric sources such as political weeklies and newspapers.

The text becomes rather more ‘legal’ in its later chapters, as litigation increasingly assumes centre stage within the constitutional drama. However, I have assumed that virtually all of the political and historical context surrounding *Harris* will be at best vaguely familiar to a British audience. The book’s early chapters are therefore largely devoted to offering a brief history of British colonial policy in southern Africa and the subsequent emergence of South Africa as an autonomous (1910) and then independent (1931) country. This general historical task has recently been admirably performed by several academic historians. Leonard Thompson’s *A History of South Africa* (1995) is perhaps the leader in the field; William Beinart’s *Twentieth Century South Africa* a worthy challenger. The curious reader will also find a substantial range of ‘liberal’ histories of South Africa written in the 1960s and 1970s. This book is not intended to replicate those texts, but to offer a distinctively more ‘legally aware’ interpretation of southern African political history.

General histories of South Africa treat the country’s legal system, and especially the role of its courts, as at best an incidental contributor to constitutional development; at worst, they ignore it altogether. This text places judicial decisions in a distinctly more prominent position. The reasoning adopted by the various courts hearing the *Harris* litigation was firmly rooted in a series of ostensibly contradictory precedents reaching all the way back to the years before the second boer war. Many of the most significant legislative initiatives taken by successive South African parliaments were enacted as direct responses to judicial decisions which frustrated achievement of discriminatory objectives. In contrast, a substantial number of political protests launched by white liberals and black pressure groups were expressly prompted by case law which seemed unnecessarily accommodating to discriminatory sentiments. The South African courts, and the laws they made, perhaps deserve a higher profile in their country’s political history than they have hitherto been granted. This book takes a modest step in that direction.

There are obvious shortcomings to the approach I have taken. It is written at a considerable distance—chronologically, geographically, and racially—from the story it tells. The last caveat is the most important, and operates at two levels. The first is that much of the documentation surrounding this controversy is the product of white elites, whether British or South African. History, we are often told, is simply the story told by the winners. We need equally to bear in mind that the raw materials from which future histories are constructed may also be tainted and are undoubtedly incomplete. Some non-white stories simply cannot be told. The second level is simply a result of my being a white middle-class liberal in a relatively mature democracy—I can only guess at the motiva-

tions and beliefs of many of the key players in this episode. I began the book holding the view that many of the substantive policies that successive South African governments pursued between 1910 and 1960 were irredeemably evil, and the legal arguments they deployed to support those policies were feeble and mendacious. Nothing I have encountered since then has led me to modify those views, beyond the emergence of a feeling that some of the politicians who governed South Africa in the 1950s were insane rather than evil. But that initial conclusion was apparently by no means self-evident even in the 1950s to observers who would presumably have regarded themselves as ‘liberals’: from the ‘liberal’ vantage point of 1910, 1920 or 1930 (be it British, American or southern African) it would have been hotly disputed. I have tried as best I can to acknowledge the sincerity with which those beliefs were held by at least some of their proponents.

Notwithstanding these unavoidable weaknesses, I hope that the book will serve some useful political and jurisprudential purposes. The first is to act as a counterweight to the traditional esotericisation of constitutional law and constitutional theory within British political culture. That citizens of the United Kingdom have in the main enjoyed the good fortune of not having suffered under an overtly tyrannical government in the modern era has perhaps led us to take the constituent principles which mould our society rather for granted. We therefore need to travel beyond international boundaries to become sensitised to our own internal political realities. The *Harris* saga conveys perhaps better than any episode of British political history the enormous significance of the choices a country makes (or fails to make) concerning its constitutional arrangements. If this book has one overriding objective, it is to stress that constitution-building is a task far too important to be left to politicians, and *much* too important to be left to the vagaries of party politics.

#### *A note on terminology*

Readers will notice as the text progresses that it contains two spellings of Afrika(a)ner. This is not a typographical error, but is rather an attempt to identify two distinct political ideologies which existed at varying times within the white South African population. ‘Afrikaner’ denotes an ideology which sought to foster a sense of equality within the white community across linguistic and cultural divides. ‘Afrikaaner’ is intended to convey in contrast an ideology which sought to establish the dominance of one faction of the white community over another. Readers familiar with South African history will no doubt appreciate the point I am trying to make; I would hope that those who lack such familiarity will appreciate its significance as the narrative in the book unfolds.

IAN LOVELAND  
London, Autumn 1998

## *Acknowledgments*

I owe thanks to several people and organisations for assisting me to finish this book. Richard Hart stands at the head of that list. His enthusiasm for the project in its early stages was extremely heartening. The British Academy offered very generous financial support for my research, enabling me both to visit South Africa to conduct some archival and interview-based research and to employ a long-range research assistant to dig into data sources that I would not have had the time to explore myself. David Borgstrom performed that task for me with great enthusiasm, diligence, and initiative. I owe him a great debt, as I do to Hugh Corder of the University of Cape Town who had the very good sense to recommend David to me as my assistant. Dean Danie Visser was kind enough to extend the hospitality of UCT's Law Faculty to me during (our) summer of 1998.

As might be expected in relation to events which occurred some fifty years ago, few of the principal actors in this episode of constitutional history remain alive. I was however fortunate enough to be able to meet and speak with several political activists and lawyers involved in the events of the time. Brian Bunting and Reggie September—both now MPs in South Africa—were kind enough to find the time to speak to me about the political context in which the cases occurred. Harry Snitcher, who acted on behalf of the plaintiffs in the litigation, also provided me with invaluable insight into the formulation and presentation of their arguments. My greatest debt however is owed to Denis Cowen, formerly Professor of Comparative Law at the University of Cape Town. His role in the *Harris* litigation is examined at length in Chapter 8. At this point, I simply take the opportunity to thank him for giving so generously of his time, his memories and his own archival material in assisting me to complete this project.

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# *The European Colonisation of Southern Africa: A Brief History*<sup>1</sup>

## I. THE INITIAL INVASIONS 1650–1806

The Portuguese were the first Europeans to reach the Cape, arriving in the late sixteenth century. However the Dutch East India Company began the era of European imperialism by establishing a base at the Cape to serve as a supply post and victualling station for its ships as they sailed to and from the Indies. The Company formalised its presence on the Cape in 1652, when it established a small settlement and authorised a handful of its employees to manage agricultural smallholdings in the immediately adjoining areas. The settlers encountered three distinct groups of native Africans in the Cape, whom they referred to as Bantu, Hottentots and Bushmen.<sup>2</sup>

The weight of modern day archaeological and anthropological evidence suggests that native Africans had been present in southern Africa in appreciable numbers for several thousand years.<sup>3</sup> While the bulk of the population initially supported itself through a nomadic hunter-gatherer lifestyle, there are clear indications that many groups had developed a pastoral form of agricultural economy, based primarily on cattle ownership, by the seventeenth century. Within the next hundred years, tribes in the eastern half of southern Africa had also taken advantage of that region's more favourable climate to develop a farming system that mixed both pastoral and arable agricultural techniques. The Dutch East India company entered a land that was sparsely populated by European standards, but it was by no means empty.

<sup>1</sup> I am much indebted in this chapter to the following works: F. Troup, *South Africa: an Historical Introduction* (London: Methuen, 1972); L. Marquard, *The Story of South Africa* (London: Faber and Faber, 1955); W. Beinart, *Twentieth Century South Africa* (Oxford: OUP, 1994); L. Thompson, *A History of South Africa* (New Haven: Yale University Press, 1995); T. Pakenham, *The Scramble for Africa* (London: Abacus, 1992); T. Lloyd *The British Empire 1558–1995*, 2nd edn. (Oxford: OUP, 1996); T. Davenport, *South Africa: a Modern History*, 2nd edn. (Cambridge: CUP, 1978).

<sup>2</sup> Marquard, n. 1 above, pp. 17–25. The 'Bushmen' identified themselves as the San, while the 'Hottentots' referred to themselves as the Khoikoi; see L. Thompson, *The Political Mythology of Apartheid* (New Haven: Yale University Press, 1985), ch. 1. This book follows the indigenous people's self-endowed names except when it is referring explicitly to the descriptions applied to them by white colonists. For an assessment of the significance of the 'names' attached to non-whites by whites in southern Africa see A. Ashforth, *The Politics of Official Discourse in Twentieth Century South Africa* (Oxford: Clarendon Press, 1990).

<sup>3</sup> The literature is compellingly surveyed in Thompson (1995), n. 1 above, ch. 1. See also Thompson (1985), n. 2 above, pp. 78–80.

## 2 *The European Colonisation of Southern Africa*

The Company formally required its employees to respect the autonomy and traditions of the indigenous population, although the colonists themselves seemed to honour this rule more in the breach than the observance. By 1658, the settlers had begun to use military force to seize land and water supplies from the Khoikoi population. From the outset, the Company allowed its formal rules to be compromised when faced with an expansionist *fait accompli* by the settlers.

Barely 150 colonists had arrived in the Cape by 1670. Somewhat ironically, given later developments, the Company urged its employees to boost their population by inter-breeding with the indigenous black tribes, thus sowing the seeds (literally as well as metaphorically) of what later generations were to describe as the Cape Coloured population of South Africa.<sup>4</sup> Much of this sexual contact took place outside the marriage relationship, but marriages according to christian rites between whites (men) and natives (women) were by no means uncommon.<sup>5</sup> The racial heterogeneity of the Cape population was increased from 1657 onwards by the institution of slavery, the initial slaves being peoples of Malay extraction from Madagascar. In subsequent years, the Company also imported slaves from Asia and Mozambique. The Dutch laws of slavery which were adopted in the Cape afforded owners virtually absolute property rights over the life and body of their slaves. The Company itself seems (by contemporary standards) to have been an ‘enlightened’ slave master. Slave children were offered rudimentary schooling, and a small number of slaves who embraced Christianity were baptised and manumitted, subsequently living as free men and women in the Cape Town area. The treatment meted out to slaves owned by white settlers was markedly less benign.<sup>6</sup>

In 1680, the Company formalised the settlers’ *de facto* policy of internal expansion and established a second settlement at Stellenbosch, a little to the north and east of Cape Town. In the same year, the Company permitted some 200 French Huguenot exiles to immigrate. The Huguenots were in the main extreme Calvinists, fleeing persecution by France’s Catholic regimes. The Company’s motives in permitting such immigration appeared to owe more to commercial than humanitarian or religious concerns: an increased white farming population was seen as a necessity if the Cape was to become sufficiently productive to service the increasing tonnage of the Company’s trade to and from India. The French aspect of these *immigrés*’ identity was rapidly submerged (other than in the retention of obviously Gallic surnames)<sup>7</sup> beneath the continuing stream of Dutch immigration, but their religious faith served if anything to

<sup>4</sup> On the racial heterogeneity of the ‘Coloured’ population of Southern Africa see G. Lewis, *Between the Wire and the Wall* (Cape Town: David Phillip, 1987), pp. 2–4.

<sup>5</sup> Thompson (1995), n. 1 above, pp. 44–45; A. Sachs, *Justice in South Africa* (London: University of Sussex Press, 1973), pp. 20–27.

<sup>6</sup> Thompson (1995), n. 1 above, pp. 42–46.

<sup>7</sup> As we shall see in later chapters, the descendants of the de Villiers family were to occupy many positions in the elite ranks of the South African legal profession.

reinforce the doctrinal fundamentalism of many of the Dutch settlers.<sup>8</sup> Despite the introduction of slave labour into the Colony, the settlers found the Cape's land insufficiently fertile to permit the intensive cultivation of vegetable and cereal crops. Sheep and cattle farming seemed the obvious alternative, but agriculture of that sort required substantial amounts of grazing land. From 1680 onwards, the Company had leased farms in the outlying areas of Cape Town and Stellenbosch to the Hugenots and existing Dutch settlers. By the turn of the century, this policy had expanded into a more systematic encouragement of so-called 'Trekboers'. The Trekboers headed north, west and east to lay claim to 600-acre 'loan farms', nominally leased to them by the Company at extremely low rents.<sup>9</sup> The Company maintained its formal policy of land acquisition by purchase and negotiation, although the practical history of European imperialism in South Africa in the eighteenth century seemed to owe more to violence and betrayal than to consensual techniques.<sup>10</sup>

Violence was also an endemic feature of the boer communities' criminal justice 'system'—the word is used guardedly. Floggings, torture, mutilation and execution were commonplace punishments. The system was imported from Holland, rather than being the novel creation of the boers' slave-owning society. Whites as well as blacks were subject to this brutal regime, although it seems likely that such discretion as the system permitted was exercised to the benefit of white rather than native black 'criminals'.<sup>11</sup>

The Company had neither the inclination nor the resources to staff a standing army in the Cape. Nor were the settlers sufficiently populous to maintain such a force themselves. Their military power derived instead from what was termed the 'commando' system. All adult males were required to serve in a decentralised militia, which could be summoned into action at any time, ordered into units which served under elected commanders. Commando training placed great emphasis on developing each individual's equestrian and marksmanship skills. The settlers' horses and firearms—buttressed by shiftingly opportunistic alliances with the indigenous peoples—enabled the Trekboers to fight effectively against the much larger native tribes, who in the main fought on foot and were armed only with spears.

The commando was not a purely defensive force. It served also as the vehicle for episodic raids against the native black population. From 1770 onwards, the Trekboers waged what was in effect a genocidal war (on occasion with Khoikoi assistance) against the San tribe which occupied lands north of Cape Town itself. By 1800, few San were left alive; most of those were enslaved either *de jure*, or *de facto* through an oppressive 'apprenticeship' system which fastened

<sup>8</sup> The linkages between the settlers' religious convictions and developments in Dutch theology are concisely explored in I. Hexham, 'Afrikaner Nationalism 1902–1914' in P. Warwick (ed.), *The South African War* (London: Longman, 1980), pp. 386–390.

<sup>9</sup> Thompson (1995), n. 1 above, pp. 46–50.

<sup>10</sup> T. Bennet, 'African Land—a History of Dispossession', in R. Zimmerman and D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996).

<sup>11</sup> Sachs (1973), n. 5 above, pp. 23–27.

on the San's colour as a justification for not permitting them to make freely negotiated employment contracts with their employers in the way that white workers were permitted to do. The Khoikoi's sporadic complicity in this campaign afforded them little long term benefit. By the late eighteenth century they too had been virtually eradicated as a distinct tribal group, their surviving members (many of whom found themselves in the same unfavourable employment situation as the remnants of the San) had been absorbed into the evermore variegated genetic heritage of the Cape coloured population.

Nor were episodes of ostensibly peaceful co-existence necessarily a boon to the native inhabitants of southern Africa. In addition to guns and Calvinism, the boer settlers brought European diseases into the colonies. Smallpox wrought particularly severe consequences on the Khoikoi, and was to prove a constant ally to the boers as they moved northwards from the Cape in future years.<sup>12</sup>

The settlers nevertheless met stiff resistance when they tried to expand eastwards. Their treks into the eastern Cape coincided with the consolidation of the Xhosa tribe's southward drift into the same area. By this time, the Xhosa had become adept practitioners of a stable form of mixed pastoral and arable agricultural subsistence. The Xhosa were also both more numerous than the San and Khoikoi, and more successful in repelling the trekboers' military adventurism. The East India Company attempted (somewhat half-heartedly and largely ineffectually) to maintain agreed borders with the Xhosa and other native tribes in the Eastern Cape, but had no way of forcing the trekboers to respect them. White eastern expansion consequently continued episodically—and violently—throughout the final decades of the century.<sup>13</sup>

By 1800, the white Cape had become an expansive society in terms of the land its members occupied. Yet its population was, by European standards, negligibly small, comprising some 16,000 white and Coloured inhabitants, living alongside some 17,000 slaves and (a very rough estimate) 20,000 native blacks.<sup>14</sup> The trekboers' preferences for large farms necessarily condemned them to forego the close physical proximity of other whites in any significant numbers. Yet paradoxically, this seemed to strengthen rather than attenuate the ties which bound the whites into a coherent boer 'community'.<sup>15</sup> In the absence either of any formal education system or the progressive dynamic of urbanisation and industrialisation—factors increasingly prevalent in societies on the European continent—the trekboers sought an identity in the simple certainties of Calvinist fundamentalism. The dogmatic tenets of Calvinist faith were well-suited to a people whose waking hours were spent wholly in subsistence farming in largely uncharted lands, especially since Calvinism's perception of its

<sup>12</sup> Beinart (1994), n. 1 above, pp. 3–6.

<sup>13</sup> For a polemical perspective see H. Simons and R. Simons, *Class and colour in South Africa 1850–1950* (Harmondsworth: Penguin, 1969), ch. 1.

<sup>14</sup> Marquard, n. 1 above, p. 56.

<sup>15</sup> For a discussion of the contending views of southern African historians on this point see Beinart (1994), n. 1 above, pp. 44–46.

adherents as an elite, chosen few (fortuitously?) offered a ‘divine’ justification for the settler’s dominant economic and political ambitions:<sup>16</sup> these being first to appropriate, by violence if necessary, the lands and cattle tended by native tribes; and secondly to consign the natives themselves to a markedly inferior, indeed in its most extreme form, essentially non-human status.<sup>17</sup>

Yet by 1800, the cultural and geographical isolationism of the trekboers began to contrast with an increasingly cosmopolitan core community in Cape Town itself. From 1780 onwards, the French had shown an increasing interest in the Cape. Their presence as traders stimulated a period of economic boom, which was accompanied (especially in the years immediately following the French Revolution) by an influx of political and cultural ideas which sat most uncomfortably with the inward-looking Calvinist fundamentalism to which so many of the Cape’s early settlers had pledged their ideological allegiance. The growth of French influence was facilitated by the evermore dire financial straits into which the Dutch East India Company was sinking. The Company finally collapsed in 1794, leaving the government of the Cape as something of a colonial vacuum, a vacuum which the already established French promptly filled.

The French dominance was, however, to prove short-lived. France and Britain were again at war, and the British navy seized control of the Cape in 1795, recognising it as having vital strategic importance as a base from which to control European access to India and the East. The 1803 Treaty of Amiens restored the Cape to France, which entrusted its government to a French client state, the Dutch Batavian Republic. But some three years later, the British invaded once again. In the aftermath of Waterloo, the British occupation was legitimised (at least in the eyes of the European powers) by the Congress of Vienna. By 1815, the Cape had become a colony of the British crown.

### The ‘legal’ basis of European colonisation

The European colonial powers had by this time begun to develop an elaborate jurisprudence to ‘justify’ their colonisation of foreign lands, whether in Africa, the Indies, or Australasia. The audiences for such justification were primarily the colonising governments themselves: the emergence of a mutually acceptable set of international law principles to regulate colonial land acquisition served as a useful (and much cheaper) addition to war as a tool for the conduct of foreign

<sup>16</sup> For a detailed examination of the Dutch roots of this particular brand of Calvinism see Moodie, *The Rise of Afrikanerdom* (London: University of California Press, 1975), pp. 22–27, 51–53.

<sup>17</sup> Cf. the comments of J.F. Van Oordt, a prominent boer historian in the late nineteenth century; “According to the Boer idea, the kaffer, the Hottentot, the Bushman belong to a lower race than the whites. They carry, as people rightly called it, the mark of Cain; God, the Lord, destined them to be ‘drawers of water and hewers of wood’, as presses subject to the white race . . . I do not believe that I go too far when I express my feeling that the Boers as a whole doubt the existence of a Kaffer- or a Hottentot-soul”; quoted in Thompson (1985), n. 2 above, p. 85.

policy. The model of international law created by the European colonial powers recognised several techniques through which a country could acquire sovereignty over lands beyond its original borders. The most significant were conquest, cession and occupation of *terra nullius*. The principle that a conquering people acquired sovereignty over the lands which they subjugated was, in legal terms, unproblematic. Acquisition of territory through cession—that is to say through treaties negotiated with the present government of the land concerned—raised slightly more legal difficulty. The colonising power had to be sure, for example, that its co-signatory was indeed possessed of the sovereignty it purported to be relinquishing. Questions might also arise as to the extent to which the former governments of acquired territories had exercised informed consent in treaty negotiations,<sup>18</sup> or had acted under duress; if not the threat of conquest by the negotiating European power, then the offer of ‘protection’ against other European powers who might offer even less advantageous terms in future.

The legal uncertainties attaching to territorial acquisition through conquest and cession were a matter of significance more for the regulation of the European colonial powers’ claims against each other than against the colonised lands. The third mode of acquisition, occupation, raised similar difficulties. The substance of the technique of ‘occupation’ underwent a significant change during the nineteenth century.<sup>19</sup> Occupation could only be effected on land which was *terra nullius*. As originally conceived by the Spanish jurist Vittoria, *terra nullius* was narrowly construed to denote only land that was utterly devoid of human population.<sup>20</sup> The colonising power which discovered such lands was able to acquire sovereignty by establishing effective occupation of the territory, in the sense of creating an organised form of colonial government. Attempted colonisation of unpopulated land could provoke disputes among European powers over such matters as which of them had initially discovered the territory, and whether or not a country’s presence there did indeed amount to ‘occupation’. But such land did not, of course, present the additional complication of how to address the presumably competing claims to sovereignty of indigenous peoples.<sup>21</sup> The presence of such peoples would mean that the land was not *terra nullius*, and that colonising powers could gain sovereignty over it only by either cession or conquest.

<sup>18</sup> See generally Pakenham’s riveting analysis (n. 1 above) of the European colonisation of Africa, and especially his account of the ‘negotiations’ between the French and a Sudanese chief at p. 536.

<sup>19</sup> I am much indebted in the following passages to J. Crawford, *The Creation of States in International Law* (Oxford: Carendon Press, 1979); R. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963); M. Akehurst, *A Modern Introduction to International Law*, 4th edn. (London: George Allen and Unwin, 1982); B. O’Kere, ‘The Western Sahara Case’ (1979) 28 *ICLQ* 296; R. Lumb, ‘Native Title to Land in Australia: Recent High Court Decisions’ (1993) 42 *ICLQ* 84.

<sup>20</sup> See O’Kere, n. 19 above; P. Fitzpatrick, ‘The Constitution of the Excluded: Indians and Others’, in I. Loveland (ed.), *A Special Relationship* (Oxford: Clarendon Press, 1995).

<sup>21</sup> Akehurst, n. 19 above, pp. 142–145.

The perception of *terra nullius* as wholly unpopulated land was also accepted in English law in the mid-eighteenth century. Sir William Blackstone's authoritative *Commentaries on the Laws of England* suggested that English law recognised occupation as a route to sovereignty only in respect of land that was 'desart and uncultivated' or 'uninhabited'.<sup>22</sup> The *Commentaries* also suggested that there was no moral justification for colonial 'occupation' of lands which demanded the displacement or enslavement of an existing native population:

"how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour . . . was consonant to nature, to reason or to christianity, deserved well to be considered by those who have rendered their names immortal by thus civilising mankind".<sup>23</sup>

Blackstone's moral scruples worked but little influence on the political leaders of nineteenth century European colonial powers. Even by 1800, there were few parts of the world that were entirely unoccupied by human beings. This proved an inconvenient demographic truth for European governments, since it seemed to remove the possibility of using occupation as a means to gain sovereignty of colonised lands. The solution adopted was not to abandon occupation, but to bolster its utility by redefining the concept of *terra nullius* to include lands whose indigenous peoples were not 'civilised' in the European sense.

The 'civilisation' test was expressed with varying degrees of sophistication. The English courts offered a relatively crude label in the 1863 case of *Advocate-General of Bengal v Ranee Surnomoye Dossee*:<sup>24</sup>

"Where Englishmen establish themselves in an uninhabited or *barbourous* country, they carry with them not only the laws but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws" (emphasis added).<sup>25</sup>

A 'barbarous' people was necessarily not a 'civilised' one, and its lands were thus ripe for occupation as *terra nullius*. But the label conveys little precise meaning. Later writers added a somewhat more elaborate gloss to this 'enlarged' notion of *terra nullius*, drawing on such considerations as whether the inhabitants were Christian or whether they organised their collective relations into a stable, permanent form of political government that could maintain internal order, make effective provision for the internal transfer of political power, and represent the people as a whole in dealing with other sovereign states.

The test had some meaning as a mechanism to regulate disputes between the European powers, but it was manifestly a Euro-centric concept which

<sup>22</sup> Cited in Crawford, n. 19 above, p. 179.

<sup>23</sup> 17th edn., 1830, Bk II, ch. 1, p. 7; quoted by Brennan J. of the Australian High Court in *Mabo v State of Queensland* (1991–1992) 175 CLR 1 at 33.

<sup>24</sup> (1863) 19 ER 786.

<sup>25</sup> Per Lord Kingsdown *ibid.* at 800.

constructed 'civilisation' largely in accordance with European historical and political traditions. That the Dutch East India Company claimed (on the Dutch government's behalf) to have *occupied* the Cape rather than gained it through cession or conquest indicates that the Dutch did not see the the Khoikoi and San as 'civilised' peoples. Neither, presumably, did either the French or the British who successively acquired through treaties the sovereignty of the Cape which the Dutch occupation had evidently established.

The enlarged notion of *terra nullius* was also manifestly a concept whose boundaries might expand or contract according to changing perceptions among European colonial governments as to the desirability of further colonial expansion. Throughout much of the nineteenth century, the European powers regarded a great deal of southern and south central Africa as *terra nullius* (in the enlarged sense).<sup>26</sup> This may have been a happy conclusion from a jurisprudential perspective, since it removed the legal impediment to colonisation that might be offered by a people already in occupation of the territory concerned. The conclusion seemed however to lack any defensible factual basis in respect of much (if not all) of the land in question, which had long accommodated indigenous African peoples with viable agricultural economies and stable political societies.<sup>27</sup> That inconvenience was not seen as an insuperable barrier to occupation of new lands, still less to expansion through conquest and cession, either by European governments themselves or by the colonists with whom they were increasingly populating their newly claimed lands.

## II. THE CONSOLIDATION AND FRAGMENTATION OF BRITISH RULE 1806–1880

The red ink with which British cartographers identified the physical limits of the British Empire pockmarked much of the map of the globe by the time Britain assumed control of the Cape colony. That mapmakers should colour the southern tip of Africa in the same hue was in itself an unremarkable consequence of Britain's restlessly, if episodically, expansionist imperial policy; the addition was a modest one to an Empire that already embraced Australia, New Zealand, India, the islands of the West Indies and what is now Canada. Nor was there anything unusual in the fact that British rule in the new colony was being imposed by a white governing class on a land where the great majority of the population was not white. Such would always be the case in India, Egypt and the West Indies; and in Canada and Australasia many years were still to pass before white settlers outnumbered the native peoples. The atypical feature of the Cape—shared only and to a much lesser extent by the Canadian colonies—was that British rule was being imposed on a society in which the great majority of the colony's *white* population were not of British descent, and had no

<sup>26</sup> Pakenham, n. 1 above, p. xxiii.

<sup>27</sup> Thompson (1985), n. 2 above, pp. 204–205; Sachs, n. 5 above, pp. 28–29.

obvious reason for looking fondly on British interference with their traditional culture and mode of government. This brute political fact posed especial difficulties to peaceful and successful imperial government from the outset. And as the nineteenth century progressed, Britain's failure to produce a unified white 'race' was to have increasingly draconian consequences.

### The formative years

The guiding principle underlying British policy towards the government of its imperial possessions during the eighteenth century has been described by one commentator as 'salutory neglect'.<sup>28</sup> The North American colonies in particular had been largely left to govern their internal affairs according to their own devices. Colonists were encouraged to create their own elected assemblies responsible for enacting laws for local application. The British government maintained a formal presence in each colony in the shape of a Governor, who as well as being the *de jure* head of the executive branch of the colony's government, functioned as the British government's mouthpiece. In theory, the British Parliament had the power to override any colonial legislation of which it disapproved. But the power was rarely exercised so long as colonial assemblies confined their attention to domestic issues.<sup>29</sup>

The loss of the American colonies in the 1770–1780s suggested a need for a slightly less cavalier British approach to the administration of the country's growing empire. In the Cape, Britain attempted to impress itself on the existing population in both a physical and cultural sense. In the first two decades of the colony's existence, it was ruled as virtually a personal fiefdom by a Governor, appointed by and directly responsible to the Secretary of State for the Colonies. The first appointees to the Governor's office took modest steps to heighten the influence of British culture on the colony's predominantly Dutch white population, particularly by establishing a small school system whose pupils were imbibed with the evident benefit of an anglo-centric curriculum. Given the virtual absence of schools of any sort among the boer community outside Cape Town, this initiative was not overtly threatening to the maintenance of the boer population's cultural identity.

Furthermore, those settlers who feared that British rule heralded the end of *all* the values they held dear were promptly offered some reassurance in the matter of relations with the native tribes: one of Britain's first legal initiatives was to introduce a law requiring native blacks to carry passes if they wished to enter 'white' areas of the colony.<sup>30</sup> This was rapidly followed by a law imposing compulsory ten year apprenticeships to white masters on native children, which

<sup>28</sup> T. Lloyd (1996), n. 1 above, p. 1.

<sup>29</sup> *Ibid.* pp. 67–68, 96. See also B. Bailyn *The Ideological Origins of the American Revolution* (Cambridge, Mass: Harvard UP, 1969), pp. 198–229.

<sup>30</sup> Marquard, n. 1 above, pp. 99–100; Troup, n. 1 above, pp. 83–84.

was redolent of the system used by the Dutch East India company in respect of the San at the turn of the century.<sup>31</sup>

The apprenticeship laws also imposed certain obligations on employers concerning the physical treatment of native workers, and recognising their right to receive the stipulated payment for services performed. This represented something of a departure from orthodox boer principle, in which the habit of not paying black workers for the services they performed enjoyed an elevated status. This departure was heightened when it transpired that the Cape government was prepared to ensure that such provisions were enforced. Nonetheless, many boer settlers, even in the outlying areas, seemed to see some virtues in British rule.

This was evidenced most clearly in 1815, when the majority of boers in the Slagtersnek region of the Cape took up arms in alliance with British forces to suppress a rebellion initiated by a small group of boer farmers unwilling to recognise that ‘Kaffers’ had any legal rights at all. The ringleaders of the rebellion were subsequently convicted of treason and hanged.<sup>32</sup>

In 1820, some 5,000 British settlers were brought to the Cape to settle on farms around the Fish river. The rationale behind the immigration was both economic—to boost the productivity of the Cape’s still sparsely populated and poorly farmed agricultural land—and political—to counterbalance the boer dominance of the colony’s outlying agricultural population. Parliament voted funds of £50,000 to launch the scheme, which allocated settlers plots of around 100 acres.<sup>33</sup> The policy soon proved a failure on both counts. Many British settlers were unwilling to endure the initial hardships, borne so readily by their boer predecessors, involved in establishing productive farms in the Cape hinterlands. This reluctance stemmed in part from the relatively poor quality of the land concerned, but more from the unfortunate fact that most of the immigrants had been town dwellers rather than farmers in England. Unsurprisingly, many settlers left the colony’s rural hinterlands, preferring instead to earn a living in the Cape’s emergent urban areas, especially around Cape Town itself, and engaged in a reverse ‘trek’ of very modest proportions which threatened to create a cleavage in Cape white society that was not simply one of *boer versus Briton*, but also simultaneously of *urban versus rural*.<sup>34</sup>

The fragmentation of the white community was reinforced by a series of initiatives taken by the British government in the 1820s. From 1820 onwards, Britain permitted the creation of several so-called ‘Griqualand republics’ on the northern banks of the Orange river. The republics were comprised predominantly of Cape coloureds who had been brought up as Christians in mixed race families, and of native tribes whose chiefs had fallen under the influence of

<sup>31</sup> Thompson (1995), n. 1 above, pp. 58–60.

<sup>32</sup> See Thompson (1985), n. 2 above, ch. 5; Moodie, n. 16 above, pp. 3–4.

<sup>33</sup> Thompson (1995), n. 1 above, pp. 53–55.

<sup>34</sup> Lloyd, n. 1 above, pp. 140–143.

British missionaries and consequently embraced both Christianity and British rule.<sup>35</sup>

The full importance of this policy was not to become evident until almost half a century later, when South Africa's vast diamond reserves were first discovered. The immediate impact was nevertheless significant. The creation of the republics placed a formidable legal and practical obstacle in the path of trekboers who wished to continue their by now long established lifestyle of seizing native lands and displacing the former inhabitants. Within the republics, the resistance to Boer expansion now rested on guarantees underwritten by the British government, rather than, as had been the case in respect of those lands just south of the Orange river prior to British rule, by the spears of native tribes and the ineffectual promises of the Dutch East India Company.

These physical restraints on boers' capacity to express their traditional identity—an identity premised at least in part on relentless territorial expansionism—were accompanied by equally restrictive cultural limitations. In the late 1820s, the British government promoted several reforms to the Cape's government structures and legal system which markedly 'anglicised' the colony's political character.<sup>36</sup> Insofar as the white settlers had a functioning legal system prior to 1800 (and in the remote areas of the Cape there was no meaningful system of any sort), its officers were in the main overtly political appointees who administered a bastardised system of Roman-Dutch law. The 'Charter of Justice' introduced into the Cape modified both the substance and the administration of the colony's legal system. Roman-Dutch criminal law and criminal procedure was largely replaced by English common law;<sup>37</sup> a new Supreme Court, staffed only by qualified lawyers, was created to hear appeals from all inferior courts; and the decisions of the Supreme Court were themselves to be subject to appeal to the Privy Council.<sup>38</sup> The colony's executive and 'legislative' organs were also modified. In 1825, the British government established a body called the 'Council of Advice', consisting of the Governor and four officials, appointed by the Governor himself. The Council was given the power to make 'ordinances', a power which superseded the Governor's own authority to pass laws by proclamation. The Council of Advice was in turn replaced by a twelve member 'Legislative Council' in 1834, and a new 'Executive Council' was created in the same year. Both of these bodies broadened the basis of governmental power in the Cape, but the Governor still retained *de jure* and *de facto* responsibility for

<sup>35</sup> The initial leaders of the Griqualand Republics were the distinctly boer-sounding Andries Waterboer and Adam Kok: see Troup, n. 1 above, pp. 93–95; Simon and Simon, n. 13 above, p. 28; Thompson (1995), n. 1 above, pp. 50, 94. For a more expansive account of the emergence of the republics see R. Ross, *Adam Kok's Griquas* (Cambridge: CUP, 1976), esp. chs. 1–4.

<sup>36</sup> Thompson (1985), n. 2 above, pp. 146–147; Sachs, n. 5 above, pp. 38–39; J. Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978), pp. 8–9.

<sup>37</sup> Dugard (1978), n. 36 above, pp. 8–9, 268–269. See also H. Corder, 'The Judicial Branch of Government: an Historical Overview', in D. Visser (ed.), *Essays on the History of Law* (Cape Town: Juta & Co., 1989).

<sup>38</sup> The Privy Council was in effect the judges who were members of the House of Lords.

both legislation and administration, and was himself directly subordinate to the Secretary of State for the Colonies.

The Cape colony's governmental structure thus possessed a recognisably 'British' form, in that it was clearly separated into legislative, executive and judicial branches. What it manifestly lacked, even to the limited degree then accepted in Britain itself, was a 'representative' character in the sense of having some of its members chosen by popular election. Successive British governments were evidently unwilling to sanction this reform for fear in part that the Dutch and French settlers, who outnumbered the British, would use a representative assembly to foster anti-British sentiment. The alternative fear was that white settlers would manage to suppress their own disagreements in order to impose oppressive laws on the non-white population.<sup>39</sup> The first, cautious steps towards a representative system were subsequently taken in 1836, when a number of elected municipal councils were established.

The 1836 reforms followed measures to liberalise the laws governing the press introduced in 1828. The colony's first commercial newspaper, the *South African Commercial Advertiser*, was founded by two recent English *émigrés*, one a poet and the other a clergyman.<sup>40</sup> The *Advertiser* professed a commitment to support the liberty of the press and harmonious race relations; and rapidly incurred the displeasure of the colony's then Governor, Lord Charles Somerset for publishing material critical of his administration. Somerset twice attempted to ban the paper, and also tried to exercise pre-publication powers of censorship over its contents. Somerset's authoritarian tendencies were overridden by the British government, which instructed the Council of Advice to issue a Press Ordinance in 1828. The ordinance required publishers to lodge a sum of £300 as a surety against future libel liabilities. Having done so, their legal position was analogous to that enjoyed by their English counterparts; no prior restraints would be exercised on the contents of their newspapers, but they ran the risk of suffering post-publication liability for any defamatory, blasphemous or criminal material that they might publish. The Press Ordinance encouraged further growth in the Cape's newspaper industry. A Dutch language paper—*De Zuid Afrikaan*—was established in 1830.

Of more pervasive significance to the Cape's social and political mores was the 50th Ordinance, introduced in 1828, following sustained pressure in Britain from the Anti-Slavery Society, with the active support of liberally inclined members of the boer population.<sup>41</sup> The ordinance, colloquially referred to as the 'Hottentot Charter',<sup>42</sup> repealed the pass laws introduced in 1809, and established as a general principle that laws in the Cape colony were to be 'colour-blind' in their form and application.

<sup>39</sup> See S. Trapido, 'The Origins of the Cape Franchise Qualifications of 1853' (1964) 5 *Journal of African History* 37.

<sup>40</sup> Information in this paragraph is drawn from E. Potter, *The Press as Opposition* (London: Chatto and Windus, 1975), pp. 31–33.

<sup>41</sup> Thompson (1995), n. 1 above, pp. 60–62.

<sup>42</sup> Marquard, n. 1 above, p. 101.

That all residents were now permitted to own land in the Cape was not of much immediate benefit to any non-whites, given that so few of them had the resources with which to purchase it. Nonetheless a substantial portion of the Cape Coloured community was soon to be sufficiently affluent to be able to exercise its rights in this respect. Nor did the measure obviously assist the black population, since traditional tribal patterns of land ownership were cast predominantly in communal rather than individuated form, insofar as tribal chiefs were recognised as having the authority to allocate given parcels of land to particular individuals and families, and to revoke such allocations. In terms of ‘occupancy’ as opposed to ‘ownership’, land tenure systems were markedly more individual/family-oriented: many parcels might be farmed and occupied by the same family group for a period spanning several generations.<sup>43</sup>

The more immediately significant impact of the Ordinance was felt in the labour market. The new law placed all races on a footing of formal equality in the negotiation of employment contracts. In consequence, the identifiable vestiges of the Khoikoi and the many Cape Coloureds who had been trapped in grossly exploitative employment relationships with white settlers became free to seek employment wherever they wished within the Cape, and thereby gained the means to become landowners in the longer term.

It would be misleadingly romantic to characterise the 50th Ordinance as a purely ‘liberal measure’—as the triumph of humane and enlightened British values over the reactionary bigotry of the majority of the boer community. There is no doubt that such sentiments played some role in the formation of British policy. By 1830 the British Parliament was beginning to enact measures which lent British society a tentatively ‘democratic’ character. The lines of Tory/Whig division in the struggle over the Great Reform Act were by then clearly drawn, Peel had risked the unity of the Tory party over the issue of Catholic emancipation, and was shortly to promulgate a progressive social policy agenda in his famous ‘Tamworth Manifesto’. But it is equally the case that the removal of caste-based restraints on labour mobility and property ownership are a regularly occurring phenomenon in industrialising societies. The dynamics of capitalist (and increasingly urbanised) economic development require both workers and consumers in large numbers.

It also seems clear that the racial ‘equality’ produced by the Ordinance was to a large degree rhetorical and symbolic rather than practical in its effect. The

<sup>43</sup> See Thompson (1995), n. 1 above, pp. 23, 71; Troup, n. 1 above, pp. 19–21. Bennet, n. 10 above, has suggested that the notion of ‘communal’ land tenure was a European fiction, intended to enable Europeans to justify their presence in southern Africa by offering some native blacks the chance to ‘progress’ towards a more ‘civilised’ form of individuated ownership of land. The question is perhaps one more of anthropology than law. Bennet suggests evidence from the former discipline supports his view, while evidence from the latter tends to refute it. This is hardly surprising, given that the ‘law’ was written by Europeans whose interest in ‘civilising the native’ co-existed with a wish to legitimise white usurpation of native lands. The law was in effect a micro-level manifestation of the enlarged concept of *terra nullius*. See however Mandela: “[In early African societies] the land, the main means of production, belonged to the whole tribe and there was no individual ownership whatsoever”; N. Mandela, *Long Road to Freedom* (London: Abacus, 1995), p. 391.

difficulties that non-whites faced in becoming landowners have already been alluded to, and it seemed evident that the nominally race-neutral labour relations laws were consistently applied in a manner that disadvantaged non-white workers.<sup>44</sup>

To an appreciable extent therefore, whether driven by liberal idealism or economic necessity, the 50th Ordinance represented the triumph of increasingly pervasive imperial values rather than a carefully targeted attack on boer society or a spirited defence of liberal idealism. But while this may have seemed a familiar, even natural process to British officials in the Cape, and to those members of Cape society who maintained close links with developments in Europe, it was perceived as invasive and alien by the more culturally and geographically isolated members of the colony's boer community.

In the early 1830s, that community suffered two further intrusions into its traditional way of life. The first involved the abolition of the 'loan farm' system, a mechanism which had permitted impecunious settlers to lay an effective legal claim to vast tracts of undeveloped land. The British government would in future require trekking settlers to *buy* the land they wished to farm in as yet unoccupied (by whites) areas of the Cape. For the children of many boer families, such a purchase was a financial improbability, becoming the more so because the 50th Ordinance appreciably increased the cost of hiring non-white labourers.

In 1834, that improbability became an impossibility when the British Parliament offered further evidence of its embrace of formally democratic and liberal values by abolishing the institution of slavery in the British Empire. The gap in the cheap labour force created by the 'Hottentot Charter' could no longer be filled by the even less expensive expedient of buying or breeding slaves. Such compensation as the emancipation legislation offered to slave-owners was regarded as entirely inadequate by many boers, a large number of whom were effectively denied any recompense by technicalities in the Act's rules.<sup>45</sup>

That the ownership of one human being by another was *per se* unacceptably immoral was not an argument with which many boers could empathise, especially when the 'property' in issue was a non-white. That slavery continued to be an accepted practice in the USA, a country which might lay some claim to being the most constitutionally advanced of the western democracies, lent further weight to the boers' sense of grievance.<sup>46</sup> For some members of the boer community, the interactive effect of these measures was sufficient to push them

<sup>44</sup> Simons and Simons, n. 13 above, ch. 1.

<sup>45</sup> Thompson (1995), n. 1 above, pp. 57–65; Lloyd (1996), n. 1 above, pp. 153–156; Pakenham, n. 1 above, pp. 45–46.

<sup>46</sup> Bailyn, n. 29 above, pp. 232–245; E. Malz, 'Slavery, Federalism and the Structure of the Constitution' (1992) *American Journal of Legal History* 466; W. Frehling, 'The Founding Fathers and Slavery' (1972) *American Historical Review* 81; *Dred Scott v Sandford* (1857) 19 Howard 393; E. Corwin 'The *Dred Scott* decision in the light of contemporary doctrines' (1911) *American Historical Review* 52. A further thirty years were to pass, culminating in a bloody civil war, before the legal status of slavery was formally abolished in the USA.

out of the Cape and strike out northwards, passing through and by the Griqualand republics into the largely uncharted (by Europeans) terrain north of the Orange river.

### The Great Trek and the creation of the Boer Republics

The ‘Great Trek’ began in the mid-1830s. The ‘Great’ soubriquet owes rather more to the ambitions of the project, than to its size. Those ambitions were threefold. The first was to escape what was perceived as an increasingly oppressive ‘British’ regime in the Cape. One of the trekboers’ leaders, Piet Retief, borrowed heavily from Thomas Jefferson’s *Declaration of Independence*, drafted in 1776 to justify the American colonists’ revolution against British rule, in writing a manifesto explaining the reasons for the trek. The second and third ambitions were less lofty, amounting to little more than the trekboers’ desires to find new supplies of cheap land<sup>47</sup> and to impose their own preferred form of oppression on the territory and the native Africans who dwelt there to the north of the original colony.

The trekkers numbered initially in the hundreds rather than the thousands, although many other discontented whites were soon to follow them out of the Cape. They travelled in carts drawn by oxen, making extraordinarily slow progress to the north and the north east. One group, led by Andre Pretorious, ventured into what would subsequently become Natal province, a land then occupied almost exclusively by the Zulu tribe. The venture was, inevitably, a bloody affair. The Zulus’ initial resistance to the invasion merely reinforced the trekboers’ taste for genocide: Pretorious himself led a commando in December 1838 which slaughtered some 3,000 Zulus, an event subsequently to be embellished and then honoured in boer history as ‘The Day of the Covenant’.<sup>48</sup> Some three years later, Pretorious announced the formation of the Republic of Natalia, with its capital in Pietermaritzburg. The Republic had a population of barely 25,000, of whom just 6,000 were white: all the others were native Africans.<sup>49</sup>

A second group of trekkers had settled somewhat earlier in the lands between the Orange and Vaal rivers. At that time, this area appeared to have virtually no indigenous native population, a fact which lent some credence to trekkers’ claims that they were legitimately colonising *terra nullis* (in the narrow, original sense of the term). The trekkers rapidly established a ‘Volksraad’, a representative body with fused legislative and executive power, formed small towns at Blomfontein and Winburg, and set up large farms in the sparsely populated

<sup>47</sup> Thompson (1995), n. 1 above, pp. 68–69. On the ‘theological’ rationale underpinning the boers’ genocidal tendencies see Moodie, n. 16 above, ch. 1, esp pp. 1–6.

<sup>48</sup> See Thompson (1985), n. 2 above, ch. 5. On the later significance of the date see pp. 210–211. below.

<sup>49</sup> Troup, n. 1 above, pp. 108–120.

veld. By the mid-1840s they claimed to have created a new 'white' country in the central-northern lands of southern Africa—the Orange Free State.

A third wave of settlers struck out northwards across the Vaal river, trekking north and northwest as far as the Limpopo river, and northeast as far as the Lebombo mountains, which marked the western limits of the coastal colony of Portuguese East Africa (now Mozambique). This territory was not as 'empty' as the land which was claimed as the Orange Free State; boer control was established by a mixture of conquest and cession. For these '*trans-Vaalers*', the obvious name for their newly conquered 'country' would be the Transvaal. It too would be governed by a Volksraad; and as in the Free State, all white male boers would be entitled to participate in the election of the Volksraad's members. In terms of its acreage, the Transvaal was larger than the Free State and Natal combined. However its white population was tiny in comparison to the numbers of native Africans who occupied the land concerned. The initial centres of the white population were concentrated in Potchefstroom—on the south-western border with the Free State, in Pretoria in the centre of the country, and in Lydenburg in the north-east. But as in the Free State, the majority of the Transvaal's white population was widely scattered: it adhered to a rural culture sustained by an agricultural economy.

The relative speed with which the boer trekkers colonised large swathes of the northern regions of southern Africa owed much to their technologically advanced weaponry. Boer leaders also proved adept at exploiting existing divisions (and creating new ones) between different groups of the native people. Their forays northwards from the Cape coincided with a period of aggressive expansionism by Zulu tribes into areas previously inhabited by other native peoples. This *Mfecane* ('time of troubles') ensued that the boers were never faced with the prospect of overcoming a united indigenous population.<sup>50</sup> Nor, in the main, did the boers entertain any moral qualms about the techniques of warfare which they employed. Many trekker commandoes implemented a 'scorched earth' strategy, destroying native people's means of subsistence and thereby subjecting woman and children to a slow and lingering version of the death which their menfolk met in a more abrupt and bloody fashion on the field of battle.<sup>51</sup> International law recognised the legitimacy of claims to sovereignty by a conquering people. It offered no strictures concerning the way in which that conquest was carried out.

While the trekboers sought to escape British rule in practice, their activities nominally remained subject to British control. Britain had formally annexed Natal in 1843, and administered it as a sub-division of the Cape. In the 1850s, the British government encouraged substantial white immigration into Natal,

<sup>50</sup> Thompson (1995), n. 1 above, pp. 81–83; Davenport (1978), n. 1 above, pp. 43–56. The extent and duration of the *Mfecane* are subjects of sharp dispute among South African historians. For a survey see J. Omer-Cooper, 'The Mfecane Survives Its Critics' in C. Hamilton (ed.), *The Mfecane Aftermath* (Johannesburg: University of Witwatersrand Press, 1995).

<sup>51</sup> Thompson (1995), n. 1 above, pp. 70–72.

with the result that the region's boer population became quantitatively insignificant. Natal's extensive coastline lent it appreciable strategic importance,<sup>52</sup> and also, prior to the construction of a railway system in southern Africa, made communications between Cape Town and Durban (Natal's main port) relatively straightforward.

Neither factor applied to the landlocked Free State and Transvaal. By 1850, successive British governments had grown sufficiently weary of attempting to police the behaviour of the trekboers that they were willing to grant both societies a substantial degree of formal legal autonomy: the principle of 'salutory neglect' still had a role to play in calming the political waters of potentially turbulent (and strategically insignificant) colonial possessions. The 1852 Sand River Convention granted the Transvaal effective control over all of its internal affairs.

One of the Transvaal government's first steps was to change the colony's name; henceforth it would be known as the South African Republic. The Volksraad subsequently drew up a constitution (*Grondwet*) which confirmed that; "there should be no equality between black and white with regard to matters of church and state". Britain's solicitousness for the legal status of blacks in the Republic had not stretched so far as ensuring that the Sand River Convention forbade such provision within the Republic's laws.

The Free State was granted a similar degree of 'independence' by the Bloemfontein Convention of 1854.<sup>53</sup> Its leaders fashioned a governmental structure to regulate its internal affairs which drew heavily on principles embodied in the American constitution. In ensuing years, a substantial number of Anglophile Cape whites moved northwards into the Free State, lured by the prospect of cheap farmland and cheap black labour, and reassured by a constitutional structure that did not obviously expose 'British' whites to substantial legal disabilities.

Boer ideology was markedly more fragmented in the Republic than in the Free State. This fragmentation was rooted largely in religious differences. A particularly extremist sub-sect of the Calvinist faith had been formed in the Transvaal in 1859.<sup>54</sup> The *Gerformeerde Kerk von Suid Afrika* (the 'Dopper Kerk') established effective control over the Transvaal's theological college (and subsequently university) at Potchefstrom, so gaining an institutional base which would enable it to exercise political influence out of all proportion to its numbers in the coming years.<sup>55</sup>

Britain made no attempt through the terms of either the Sand River or Blomfontein Conventions to interfere with the boers' religious autonomy.

<sup>52</sup> Lloyd (1996), n. 1 above, pp. 155–159.

<sup>53</sup> Thompson (1995), n. 1 above, pp. 95–96.

<sup>54</sup> Troup, n. 1 above, pp. 125–127.

<sup>55</sup> Hexham, n. 8 above; Moodie, n. 16 above, pp. 61–62 offers a useful summary of the Dopper Kerk's theological rationale and its subsequent influence on late nineteenth century boer political ideology.

However, the British government retained control over native affairs in both ‘countries’. It also forbade the boer governments to conduct their own ‘foreign policies’, a concept which included their relationships with each other and with native Africans living outside their boundaries, as well as with other European states and their respective colonies.

This proscription took various forms. The most blunt example followed a series of military skirmishes between the Free State and a segment of the Sotho tribe living in an area bordering the south-west corner of Natal, the south east of the Free State and the north east of the Cape. At the ‘invitation’ of the Sotho chief, Britain formally annexed the region, which it styled Basutoland (now Lesotho) in 1868, thereby preventing any further boer territorial expansion.<sup>56</sup>

The drift towards colonial self-government for the whites of southern Africa, at least in respect of internal affairs, was also evident, albeit conducted through a more consensual process, in the Cape. In 1853, the colony was given a new constitution which granted it ‘representative government’. This system permitted the colony’s electorate to choose members of both a House of Assembly (loosely comparable to the British House of Commons) and a Legislative Council. However the Governor retained the power to block the wishes of either body; they were in constitutional terms no more than advisory fora.

‘Representative government’ may be contrasted with ‘responsible government’, a status to which at that point the Cape could merely aspire. Under the latter system, the colony’s governmental structure would mirror that used in Britain. The party leader who could command majority support in the House of Assembly would be invited by the Governor to form a Cabinet of his own choosing and assume *de facto* control of the colony’s internal affairs. The system provided (*de facto* if not *de jure*) freedom for colonial governments to pursue policies of which the British government might disapprove. The Governor’s role in respect of internal matters would become analogous to that of the Queen *vis-à-vis* the British Cabinet—namely to act on her Ministers’ advice. The colonial government’s foreign policy, however, would continue to be controlled by the British government via the Governor-General.

As in Britain, the system of responsible government in the colonies rested largely on conventional or political understandings rather than on an explicit legal base.<sup>57</sup> Canada had been the first colony to be granted responsible government, in 1847:<sup>58</sup> in the mid-1850s the system was extended to New South Wales, Tasmania and New Zealand.

In its early years, the relationship between the newly ‘responsible’ colonial governments and the British government also rested on conventional rather than legal foundations. The British Parliament attempted to impose a legal structure upon the new system by enacting the Colonial Laws Validity Act in

<sup>56</sup> Thompson (1995), n. 1 above, pp. 105–106.

<sup>57</sup> A. Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933), pp. 99–104.

<sup>58</sup> Lloyd (1996), n. 1 above, pp. 162–167.

1865.<sup>59</sup> The Act is a remarkably short and opaque document. The legislation defined the powers of colonial legislatures primarily in negative terms. Section 2 provided that any colonial law which conflicted with English primary or secondary legislation which Parliament intended to have effect in the colony concerned would be void to the extent of the inconsistency.<sup>60</sup> This suggested, by omission, that colonial legislatures were competent to override rules of common law<sup>61</sup> and to depart from more amorphous understandings of the moral or political principles inherent in ‘English law’. The latter point had previously been the source of some confusion in respect of colonial constitutions which provided that colonial legislatures could not pass law ‘repugnant to the laws of England’, a phrase which had on occasion been taken to include common law and abstract notions of the rule of law and separation of powers as well as Acts of Parliament.<sup>62</sup>

Somewhat bizarrely, given its political objectives, the Act made no reference at all to ‘responsible government’. Section 5 instead drew a legal distinction between ‘colonial legislatures’ and ‘representative legislatures’. The legal distinction bore little obvious relationship to political practice. ‘Representative legislatures’, defined as those in which at least half of the members were elected by the colony’s residents, enjoyed greater powers than colonial legislatures. They were empowered to alter their own powers and composition in whatever way they thought fit, subject only to the proviso that the procedures through which such alterations were made complied with the ‘manner and form’ specified by any British or colonial law in force in the colony at the time the alteration was made. ‘Colonial legislatures’ were not given such powers. They were however granted full authority to alter their respective court systems to suit their own preferences.

In the early 1850s, the political maturity of Cape society remained some distance short of meriting the grant of responsible government. Yet in some respects, the Cape’s system of representative government did appear to be in advance of its time. The right to vote for members of the representative assembly established under the Cape’s 1853 constitutional arrangements was restricted, but on a ‘colour blind’ basis. The franchise was granted to all adult male British subjects who either earned an income of at least £50 per year or who occupied (whether as owner or tenant) property with an annual rental value of £25 or more.<sup>63</sup> This was broadly in line with the franchise in Britain, where the right to vote was contingent upon being a male adult who owned appreciable amounts of property: the notion of a universal franchise based

<sup>59</sup> A. Keith, *Responsible Government in the Dominions* (Oxford: Clarendon Press, 1912).

<sup>60</sup> Section 1 provided that a British Act or statutory instrument would be presumed to be effective in the colony only if its text (either expressly or by necessary implication) unambiguously conveyed that intention.

<sup>61</sup> The term is used here in the loose sense, to embrace all forms of judicial law-making.

<sup>62</sup> *R v Marais, ex parte Marais* [1902] AC 51.

<sup>63</sup> S. Trapido, ‘The Origins of the Cape Franchise Qualifications of 1853’ (1964) *Journal of African History* 37.

solely on adulthood was considered an eccentric, even dangerous notion at that time, and would remain so for over sixty years.<sup>64</sup>

The level of the Cape franchise qualification, and its embrace of all racial groups, had been the subject of fierce controversy in the Cape and Britain in the 1840s and early 1850s.<sup>65</sup> Despite vigorous requests from Cape whites for a representative system, the British government doubted that Cape society could produce a legislature that would not be riven by bitter Anglo-Dutch and/or white versus non-white factionalism. That the concession to local sentiment was eventually made in 1853 owed much to the Liberal government's decision in the 1840s to settle convicts in the Cape against the wishes of the colony's white inhabitants. The policy offered the Dutch and the more liberal members of the British community a cause in which to unite against continued British government control of all their affairs.

William Porter, then the Cape Attorney-General, drafted much of the 1853 constitution. He was an ideological liberal, who took the view that all men possessing at least a rudimentary education and modest financial means should be entitled to participate in the election of their law-makers. His advocacy of a colour-blind franchise also had a pragmatic basis:

"I would rather meet the Hottentot at the hustings voting for his representative, than meet the Hottentot in the wilds with his gun over over his shoulder".<sup>66</sup>

Dutch settlers had no intrinsic enthusiasm for this principle, but were driven to accept it by the fact that they could thereby muster overwhelming support within the white community overall for a franchise level that was sufficiently low to ensure that most Dutch men were granted the right to vote. This support, coupled with the approval of leaders of the Coloured community, was sufficient to garner the British government's approval for Porter's proposed constitution.

The significance of the franchise law should perhaps not be overstated. Although *de jure* colour blind, the Cape's monetary qualification was *de facto* disproportionately beneficial to whites, whose superior economic status translated directly into superior political power.<sup>67</sup> It was nonetheless the case that Cape political society contained a strong vein of what would then have been regarded as 'liberal' ideology. This was reinforced in 1857 when Saul Solomon, a Cape MP, established the *Cape Argus* newspaper. Solomon was known in Cape circles as a 'negrophilist', and his newspaper—in addition to campaigning vigorously for responsible government in the Cape—pursued a markedly liberal policy on race relations.<sup>68</sup>

<sup>64</sup> See I. Loveland, *Constitutional Law* (London: Butterworths, 1996), ch. 7. Indeed, in the 1830s, advocates of the principle had been convicted of sedition; see Z. Chafee, 'Freedom of Speech in Time of War' (1919) *Harvard LR* 932 at 950–951.

<sup>65</sup> Information in the following paragraphs is drawn from Trapido (1964), n. 63 above.

<sup>66</sup> *Ibid.* at 53.

<sup>67</sup> Thompson (1995), n. 1 above, pp. 64–65; G. Lewis, n. 4 above, pp. 8–9.

<sup>68</sup> Potter, n. 40 above, pp. 37–38.