# Preparing the Ground for Artistic Freedom: Judicial Censorship of Publications in Pre-Apartheid South Africa, 1890-1948[1]

## Het terrein voor artistieke vrijheid effenen – juridische censuur van publicaties in Zuid-Afrika vóór de apartheid

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**Abstract:** Starting from the premise that trials pertaining to literature might serve as a barometer registering the autonomisation of a literary field, this article explores the way in which the South(ern) African judiciary has regulated publications in the period from 1890 to 1948. Works that would have been characterized by literary experts or the literary socialized public as works of literary merit were not put on trial in this period. However, through a handful of cases that sometimes involved works of fiction or verse, the judiciary did introduce several concepts and practices that prepared the ground for the legal autonomisation of literature. Indeed, the trials analysed in this article suggest that a relative tolerance existed amongst the South (and South-West) African judiciary regarding the written word, classic literature, scientific and scholarly texts, and modern European art and literature – tolerance that was accompanied by a relative intolerance for 'Puritan' positions.

**Keywords:** Institutional Autonomy of Literature; Pre-Apartheid South Africa; Trials Pertaining to Publications; (Colonial) *Exceptio Artis*/Artistic Freedom; *Exceptio Scientiae*; institutionele autonomie van literatuur; Zuid-Afrika voor de apartheid; rechtszaken mbt publicaties; (koloniale) *exceptio artis*; artistieke vrijheid

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Quite some research has been already done on the administrative regulation of both imported and domestically produced literature that was carried out in South Africa during apartheid.[2] The regulation of the medium before apartheid has not yet become the subject of systematic scholarly research. It is, however, highly unlikely that apartheid censorship was left completely unaffected by the nation's pre-1963 tradition of regulating literature – indeed, apartheid censorship did not emerge in a vacuum. Hence, by mapping out the earlier period, one might be able to describe and explain the behaviour of the apartheid censorship boards more accurately. This article will therefore focus on the pre-history of apartheid censorship. More specifically, it will focus on the judicial regulation of publications in the period between, roughly, 1890 and 1948.

There is another reason why this article chooses this focus, however. A systematical historical analysis of judicial publications regulation in pre-apartheid South Africa would not just facilitate a better understanding of the nation's censorship history, it could also provide us with valuable knowledge about another subject, pertaining to another area of research. For it appears that a particular type of analysis of the history of the judicial treatment of literature in a particular state can yield insights into the emergence of a relatively autonomous literary field in the nation in question – knowledge that can be both honed and lifted to a supranational level when one compares it to the results of analyses of the judicial treatment of literary texts in other countries. Both systematic historical research about French and Dutch literary trials since the nineteenth century[3] and synchronic and diachronic research that compares the judicial treatment of literature in Germany to the treatment of the medium in the Netherlands[4] have demonstrated this. Departing from an interdisciplinary standpoint combining theories and methods derived from cultural sociological and literary studies, this kind of research has shown that literary trials might serve as a barometer registering the emergence of a relatively autonomous literary field in a country.[5]

A few remarks should be made regarding the concept of relative institutional autonomy. It is used here in the sense of Bourdieu, who defines it as the degree to which the

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[2] See e.g. Theo Coggin (ed.), *Censorship: A Study of Censorship in South Africa by Five Distinguished Authors, Johan van der Vyver, André Brink, Allan Boesak, Ian McDonald and André du Toit. Introduction by Geoff Budlender* (Johannesburg: S.A. Institute of Race Relations, 1983); Margreet de Lange, *The Muzzled Muse: Literature and Censorship in South Africa* (Amsterdam/Philadelphia: John Benjamins, 1997); Walter Ehmeir, *Literature in Time with History: South African Literature in English and Political Change in the 1960s* (Essen: Die Blaue Eule, 1995); Pieter B. Geldenhuÿs, *Pornografie, Sensuur en Reg* (Johannesburg: Lex Patria, 1977); Peter D. McDonald, *The Literature Police: Apartheid Censorship and its Cultural Consequences* (Oxford: Oxford University Press, 2009); Louise Silver, *A Guide to Political Censorship in South Africa* (Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 1984).

[3] See, respectively, Gisèle Sapiro, *La responsabilité de l'écrivain: Littérature, droit et morale en France (XIXe-XXIe siècle* (Paris: Seuil, 2011) and Klaus Beekman and Ralf Grüttemeier, *De wet van de letter: Literatuur en rechtspraak* (Amsterdam: Athenaeum-Polak & van Gennep, 2005).

[4] See e.g. Ralf Grüttemeier, 'Law and the Autonomy of Literature', in *The Autonomy of Literature at the Fins de Siècles (1900 and 2000): A Critical Assessment*, ed. by Gillis J. Dorleijn, Ralf Grüttemeier, and Liesbeth Korthals Altes (Leuven/Paris/Dudley, MA: Peeters, 2007), pp. 175-92.

[5] Cf. Ralf Grüttemeier and Ted Laros, 'Literature in Law: *Exceptio Artis* and the Emergence of Literary Fields', *Law and Humanities* 7.2 (2013), 205, 217.

functioning of a field is governed by rules that are more or less independent from those that govern other fields.[6] The degree of institutional autonomy that a field enjoys is hard to assess, especially since Bourdieu only hints at what the 'system of characteristics constitutive of an autonomous field'[7] precisely consists of.[8] However, an important marker of the autonomisation process appears to be the increase in the number of literary magazines and reviews, which form privileged sites for dialogue amongst peers, relatively secure from administrative and economic constraints.[9] At a certain point, moreover, the judgment of peers and literary experts gets to be recognised by both the state and the market, the two 'poles that determine literary activity'.[10] At the level of legal regulation of literature, such state recognition can manifest itself inter alia in the allowance of literary expert evidence in court. The fact that legal elites start to (legally) recognise literary elites – in practice often literary academics – at some point, might be explained through Bourdieu's concept of homology[11]: this recognition might be indicating that as of such a point, one might speak of a (structural and functional) homology between the (authoritative) position that the legal and literary elites occupy within their respective fields. The fact that this recognition is known to have also manifested itself in the adoption by judiciaries of conceptions of literature that were dominant amongst contemporary literary elites,[12] or: the fact that one can point out homologies between the aesthetic norms adhered to by both elites might be regarded as further evidence of such institutional homology. Recognition by and homology with the field of power thus seem to represent two important characteristics defining the relative autonomous literary field.

A few remarks should also be made regarding the particularities of the South African literary field, that is, about the problems that confront the scholar seeking to analyse this field according to Bourdieuian principles. Firstly, that until the 1940s, even well into the 1970s, the English-language subfield was to a considerable extent bound up with the metropolitan literary centres of London and New York.[13] Secondly, that the South African literary field, as a consequence of inter alia its multilingual, multicultural and postcolonial character, is a highly

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[6] Grüttemeier and Laros, 'Literature in Law', 205.

[7] Cf. Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field*, trans. by Susan Emanuel (Cambridge: Polity, 2008); Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature*, ed. by Randal Johnson (Cambridge: Polity, 2008), p. 38.

[8] Grüttemeier and Laros, 'Literature in Law', 205.

[9] Gisèle Sapiro, 'The Literary Field between the State and the Market', *Poetics* 31 (2003), 451.

[10] Sapiro, 'The Literary Field between the State and the Market', 451.

[11] See Bourdieu, *The Field*, pp. 44, 84, 97 *et passim*.

[12] See Grüttemeier, 'Law and the Autonomy of Literature', p. 193f *et passim*; Grüttemeier and Laros, 'Literature in Law', 215 *et passim*.

[13] Peter D. McDonald, 'The Book in South Africa', in *The Cambridge History of South African Literature*, ed. by David Attwell and Derek Attridge (Cambridge: Cambridge University Press, 2012), pp. 804, 810; Andrew van der Vlies, 'South Africa in the Global Imaginary', in *The Cambridge History of South African Literature*, ed. by David Attwell and Derek Attridge. (Cambridge: Cambridge University Press, 2012), pp. 707ff; Margriet Christien van der Waal, The Battle Over the Books: Processes of Selection in the South African Literary Field' (unpublished doctoral thesis, University of Groningen, 2006), p. 51.

complex field.[14] This complexity should fully be accounted for when setting out to describe (an) aspect(s) of the field from an 'inside perspective', i.e., through the analysis of inner field phenomena. As this article focuses on the way in which *extra-literary*, namely judicial, institutions positioned themselves vis-à-vis the field, and on what the judicial positioning might tell us about the stage of the field's institutional development, it is not necessary to theoretically untangle all the complexities of the South African field. Indeed, it would be quite redundant to do so. The 'barometer' function that the judicial treatment of literature can perform is necessarily a somewhat crude instrument that will merely offer a rough measure of the overall amount of institutional autonomy a literary field has reached at a certain time and the societal reach that literary conceptual positions might have. It is not an instrument that can be applied to describe the internal structure of the field in a detailed manner.

No systematic historical research into the South African literary field or of any of its constituent parts, i.e. its African-, Afrikaans- and English-language subfields, has been carried out yet.[15] The analysis of the trials pertaining to literature that were held in pre-apartheid South Africa will thus also be aimed at determining what these trials might tell us about the institutional status that literature (might have) enjoyed before the law in this period – and hence, the institutional development[16] that the field went through.

[14] Cf. Van der Waal, 'The Battle Over the Books', pp. 15ff.

[15] Cf. Van der Waal, 'The Battle over the Books', 3n8. Van der Waal gives an initial impetus to such an endeavour, but her focus is limited to the 1980s and 1990s. Furthermore, as she acknowledges herself, the analysis she presents cannot really be called systematic – she herself describes it to be 'cursory, incomplete and reductionist' (p. 34). However, even though no systematic historical research into the South African literary field or its subfields has been carried out yet, there is of course ample good research available that delivers data on the basis of which one might formulate hypotheses regarding the institutional development and the current state of this field and its subfields. For data regarding the institutions realising both the material and symbolical production and the distribution of literature in South Africa, see e.g. David Attwell and Derek Attridge (eds), *The Cambridge History of South African Literature* (Cambridge: Cambridge University Press, 2012), and in particularly the contributions by Driver, Johnson, Masilela, McDonald, Swanepoel and Willemse; Ursula A. Barnett, *A Vision of Order: A Study of Black South African Literature in English (1914-1980)* (London: Sinclair Browne/Amherst: University of Massachusetts Press, 1983); G. Cronjé et al., *Verslag van die Kommissie van Onderzoek insake Ongewenste Publikasies* (Pretoria: Government Printer, 1957); Francis Galloway and Rudi M. R. Venter, 'Book History, Publishing Research and Production Figures: The Case of Afrikaans Fiction Production during the Transitional Period 1990-2003', *South African Historical Journal* 55 (2006), 46-65; Daniel P. Kunene, 'African-Language Literatures of Southern Africa', in *The Cambridge History of African and Caribbean Literature*, vol. 1, ed. by F. Abiola Irele and Simon Gikandi (Cambridge: Cambridge University Press, 2004), pp. 289-305; Beth le Roux, Willem Struik and Margaret Labuschagne, *Annual Book Publishing Industry Survey Report 2010. Publishers' Association of South Africa* (Publishers' Association of South Africa, 2011), http://www.publishsa.co.za/downloads/industry-statistics/Survey_2010_Report.pdf, last accessed on 2 June 2013; McDonald, *Literature Police*; Corinne Sandwith, *World of Letters: Reading Communities and Cultural Debates in Early Apartheid South Africa* (Scottsville: University of KwaZulu-Natal Press, 2014); Burgert A. Senekal, *Canons and Connections: A Network Theory Approach to the Study of Literary Systems with Specific Reference to Afrikaans Poetry* (Washington, DC: New Academia Publishing, 2014); H. P. van Coller and B. J. Odendaal, *The Emergent Canon: Case Studies of Phenomena in the Afrikaans Literary System and its Relationships with Other Systems* (forthcoming); Van der Waal, 'The Battle Over the Books'.

[16] Cf. Gillis J. Dorleijn, Ralf Grüttemeier and Liesbeth Korthals Altes, '"The Autonomy of Literature": To Be Handled with Care: An Introduction', in *The Autonomy of Literature at the Fins de Siècles (1900 and 2000): A Critical Assessment,* ed. by Gillis J. Dorleijn, Ralf Grüttemeier, and Liesbeth Korthals Altes (Leuven/Paris/Dudley, MA: Peeters, 2007), pp. xvii-xviii.

In performing this two-sided analysis, this article will proceed as follows: section one will sketch out the statutory framework within which literature regulation took place in pre-apartheid South Africa. Subsequently, section two and three will present the actual analysis of the trials – the former of the trials of the pre-Union period and the latter of the trials held after the birth of the South African state in 1910. Finally, section four will formulate an answer to the article's main question as it will at once summarily describe the pre-history of apartheid censorship and hypothesise what this pre-history might tell us about the institutional development of the South African literary field.

## The Statutory Context of Publications Control in Pre-Apartheid South Africa

In the last quarter of the nineteenth century, the statutory and precedential foundations were laid for the legal regulation of literature within the territory of Southern Africa. Until 1963, the regulation of literature – indeed, the regulation of all possible types of publications – took place through a dual system of control, whereby a different set of statutory provisions was used for the control of imported publications from those used for domestically produced ones. The act that lay at the basis of the regulation of the former kind of publications was the Customs Act that came into force in the Cape Colony in 1872. The British Customs Consolidation Act of 1853 heavily inspired this Act.[17] As far as publications were concerned, the Act was aimed at keeping 'indecent or obscene' publications from entering the Colony. The Cape Act, in turn, formed the statutory model for custom laws adopted in the Transvaal (the Customs Management Ordinance of 1902) and Natal (the Customs Consolidation and Shipping Act of 1899). Orange Free State did not create any similar legislation.[18]

As of 1913, there was a uniform system of control of imported publications in what had then already become the Union of South Africa, as in that year the Customs Management Act came into force.[19] This Act took over the Cape Act's provision prohibiting the import of "indecent or obscene" articles word for word, although the latter formula was changed into 'indecent or obscene or objectionable'.[20] Moreover, it stipulated that 'in the event of any question arising as to whether such articles are indecent, obscene, or objectionable, the decision of the Minister shall be final'.[21] The Minister referred to was the Minister of Finance.[22] Unlike in later years, there were no art or literary experts involved in judging publications[23] –

[17] Ellison Kahn, 'When the Lion Feeds – and the Censor Pounces: A Disquisition on the Banning of Immoral Publications in South Africa', *The South African Law Journal* 83.3 (1966), 280.

[18] Letitia van der Poll, 'The Constitution of Pornography', (unpublished doctoral thesis, University of Stellenbosch, 2001), p. 198.

[19] Kahn, 'When the Lion Feeds', p. 280.

[20] Ibid., p. 280.

[21] Customs Management Act, 1913 quoted in Kahn, 'When the Lion Feeds', p. 280.

[22] Geldenhuÿs, *Pornografie*, p. 24.

[23] Cf. Kahn, 'When the Lion Feeds', p. 281.

an indication, or so it seems, that literary texts did not enjoy a special status before the law. As the regulation of imported publications remained in principle an entirely administrative matter throughout the period 1910-1963 – in 1963 however a new Act was passed that was designed to regulate both imported and domestically produced publications: the Publications and Entertainments Act, 1963 – it does not fall within the scope of this essay to go into this any further.[24]

Taking statutory measures to regulate domestically produced publications was a colonial and, as of 1910, provincial affair up until the aforementioned Publications and Entertainments Act of 1963 came into effect, making it a national issue.[25] J. F. Marais, judge on the Transvaal Division of the Supreme Court and a patron of literature and the arts,[26] commented that this did not mean however that the legislation in this area was inadequate, as the standard that was being prescribed was essentially uniform, as was the body responsible for prosecution: the Attorney General.[27] In this area of publications control as well, the Cape Colony was the first of the four regions to introduce legislation. Its Obscene Publications Act 1892 aimed to combat 'indecent or obscene' publications on two fronts: firstly, it incorporated the provisions of the English Obscene Publications Act 1857, which were aimed at supplementing the common law misdemeanour of publishing obscene materials by vesting a magistrate with the power to order the seizure and destruction of such materials.[28] Yet it went further than the English Act in stating that the owner, printer, maker, publisher, distributor etc. of the obscene matter was guilty of an offence.[29] Secondly, it made it an offence to sell, distribute, offer for sale or exhibit any indecent or obscene publication.[30]

Approximately a decade later, the other colonies began to follow suit. In the Transvaal, the Criminal Law Amendment Act of 1909, the provisions of which largely resembled those of the Cape Act,[31] stipulated, amongst other things, that it would be an offence to 'sell, make, print, circulate, exhibit, or publish any indecent book, paper, pamphlet [etc.]'.[32] The Orange Free State made it an offence to sell, distribute or exhibit any 'profane, indecent or obscene'

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[24] McDonald tentatively deals with administrative censorship prior to 1963 in his *Literature Police* (see pp. 104-5 *et passim*).

[25] W.H.B. Dean, 'Judging the Obscene: A Critical Analysis of the Criteria Used for Determining What Are Undesirable Sexually Explicit Materials in South Africa'. *Acta Juridica 1972*, ed. by B. Beinart, W. de Vos and J. D. Thomas (Cape Town: Juta, 1973), p. 78; Kahn, 'When the Lion Feeds', pp. 283, 285; J. F. Marais, 'Regsaspekte van Literêre Sensuur', *Standpunte* 13.6 (1960), 50-1.

[26] Kahn, 'When the Lion Feeds', p. 292.

[27] Marais, 'Regsaspekte', pp. 50-1. With regard to this latter point, Natal formed an exception (ibid., p. 51).

[28] Kahn, 'When the Lion Feeds', p. 284; Obscene Publications Act 1892. *Statutes of the Cape of Good Hope, 1652-1895*, ed. by Hercules Tennant and Edgar Michael Jackson, vol. 3 (Cape Town/Port Elizabeth/Johannesburg: Juta, 1895), p. 3109.

[29] Kahn, 'When the Lion Feeds', p. 284.

[30] Ibid., p. 284.

[31] Geldenhuÿs, *Pornografie*, 26.

[32] Criminal Law Amendment Act 1909 quoted in Kahn, 'When the Lion Feeds', p. 285.

publication through the Police Offences Ordinance of 1902.[33] The only relevant legislative measures that were taken in Natal were local government ordinances that empowered authorities to prohibit the exhibition or sale in a public place or in the public view of any book etc. that they considered to be 'indecent, offensive, unseemly, or objectionable'.[34] In contrast to the legislation regarding imported publications – which made the regulation of this kind of publications an entirely administrative affair whereby customs functioned as the penultimate and the Minister as the ultimate arbiter in matters concerning allegedly obscene publications – the statutory measures regarding locally produced publications taken by the provinces[35] all stipulated that it was up to the courts to decide whether a publication was obscene.[36] No sanctions could be imposed out of court.[37]

Although it seems that little use was made of the statutory provisions to suppress domestically produced books or other publications,[38] five cases were taken to court and these indirectly tell us something about the institutional status of literature before South African law in the pre-apartheid period (namely *Q* v *de Jong* (1894); *G. W. Hardy* v *Rex* (1905); *Rex* v *Shaw* (1910); *Rex* v *Meinert* (1932); and *Rex* v *Webb* (1934)). These five cases are the only cases indicative of the legal status of literature that were dealt with in court in South Africa since the Obscene Publications Act 1892 had entered the statute books.[39] Let us proceed with examining the pre-Union cases. After we have examined these, we will go on to scrutinise the other three cases in order to see how the precedential situation evolved in the Union.

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[33] Kahn, 'When the Lion Feeds', p. 285.

[34] Ibid., p. 285; Marais, 'Regsaspekte', p. 51. In addition to the local measures, the Post Office Act of 1911 prohibited the sending by post of 'indecent or obscene' publications in the Union. The provisions of this Act were later repeated in the Post Office Act of 1958 (Kahn, 'When the Lion Feeds', p. 283) which, apart from consolidating the mentioned prohibition in the Union, also introduced it in South-West Africa (Marais, 'Regsaspekte', pp. 51-2). By that time, South-West Africa had long since become a mandated territory with the Union responsible for its administration. In 1919, Germany had been forced to relinquish its subject territories through the Treaty of Versailles and at that point South-West Africa was placed under the supervision of the Union (Van der Poll, 'The Constitution', 202n57).

[35] Again, Natal formed the exception.

[36] Marais, 'Regsaspekte', p. 52.

[37] Ibid., p. 52.

[38] Alex Hepple, *Censorship and Press Control in South Africa* (Johannesburg: n.p., 1960), 35; Kahn 'When the Lion Feeds', p. 286; Marais, 'Regsaspekte', 52.

[39] On the basis of systematic research into Supreme Court decisions concerning literature, decisions on literary works and memos of the Publications Appeal Board – the administrative body of appeal that was created through new censorship legislation in 1975 – and all of the major South African law journals and existing studies on South African censorship, I would argue that the South African judiciary dealt with five cases during the period 1890-1948 that either directly or more indirectly pertained to literature and its status before the law: two cases before 1910 (*Q* v *de Jong* (1894) and *G. W. Hardy* v *Rex* (1905)) and three cases between 1910 and 1948 (*Rex* v *Shaw* (1910); *Rex* v *Meinert* (1932); and *Rex* v *Webb* (1934)). One of these trials (*Rex* v *Meinert*) took place in South-West Africa, which at that point fell under South African jurisdiction.

# The Pre-Union Trials: Some Key Issues

## *The Isolated-Passage Criterion*

The first pre-Union case, *Q* v *de Jong*, concerned a publication entitled 'Teekenen des Tyds' (Signs of the Times)[40]. The publication was pseudonymously signed 'Door Opmerker' ('By Observer') and had appeared in the *Worcester Advertiser*, a newspaper published in the town of Worcester, on 11 August 1894. In the Supreme Court proceedings, both the defence and the Bench called the piece of writing a 'doggerel'.[41] Thus no claim was made – in any event not before the Supreme Court – that the piece had any literary value.

The Resident Magistrate of Worcester had judged the publication to be 'indecent and obscene' within the meaning of the Obscene Publications Act 1892. Moreover, he had sentenced de Jong, 'the lawful proprietor or editor' of the newspaper,[42] to a fine of £10 or two months' imprisonment. The case constituted the first prosecution under the Obscene Publications Act of 1892.[43] De Jong appealed to the Supreme Court of the Colony of the Cape of Good Hope, which dealt with the case on 2 November 1894. As appeal focused on procedural matters, not on the Magistrate's judgment that the publication was 'indecent and obscene',[44] there is little indication as to the institutional status that might have been conferred to literature or regarding the weight that might have been given to literary conceptual issues by the appealing and responding parties and the judges hearing the case.

There is however an aspect of the judgment that is worth mentioning, namely that it touched upon an issue that seems to be crucial to the judicial treatment of literature at large,[45] to wit the question whether or not a publication might be judged on the basis of the so-called 'isolated-passage criterion'. When applying this criterion, a publication might be deemed to constitute an offence on the basis of a single passage occurring in it, without taking the publication as a whole into account. A direct opposite way of judging a publication, a way that co-existed for a while with the isolated-passage criterion in English law, but that in time would come to replace this latter criterion[46] – as it would in the laws of various other countries as well – is to judge it on the basis of a contextual approach, that is, to judge it 'as a whole', whereby the possibility is left open that the context in which passages occur that in themselves would offend in terms of the law, might redeem such passages. St John-Stevas states that the co-existence of the two tests of obscenity was a consequence of the fact that in case of a prosecution, an indictment should either specify certain passages or be accompanied with a submission of a

[40] All translations in this article are mine unless indicated otherwise.

[41] *Queen* v *de Jong*, 11 S.C.R. 326. Supreme Court of the Colony of the Cape of Good Hope, 1894. *All South African Law Reports 1828 to 1946. LexisNexis South Africa*, n.d., 327, 328, 329. Web, last accessed on 27 October 2012:.

[42] *Q* v *de Jong* 326.

[43] Ibid., 327.

[44] Cf. ibid., 326-8.

[45] Cf. Publications Control Board v William Heinemann Ltd and Others 1965 (4) SA 137 (A). Appellate Division of the Supreme Court of South Africa. 1965. *South African Appellate Division Reports (1910 to date). Juta Law*, n.d., 140. Web, last accessed on 17 February 2011.

[46] See Norman St John-Stevas, *Obscenity and the Law* (New York: Da Capo, 1974), pp. 134-6.

copy of the work complained of. In the former case, the incriminated work would be judged on the specified passages; in the latter case, the work would be judged as a whole.[47]

The contextual approach is known to have represented a fundamental judicial instrument for creating an institutional autonomy for literature within the law in early twentieth-century Netherlands.[48] Moreover, this approach – which appears to have gone by different names such as the 'dominant effect' or 'dominant theme' test,[49] the 'internal necessities test'[50] and the 'dirt for dirt's sake' test[51] – appears to have been instrumental in the institutional autonomisation of literature within the laws of other countries such as Canada, England, and the U.S. too –developments which appear mainly to have taken place between the 1930s and the 1960s.[52]

Yet, although the Cape Bench touched upon the issue in the case of *Queen* v *de Jong*, it is not unequivocally clear whether it applied the isolated-passage criterion, nor whether it held it to be a valid instrument for judging a publication or not. Towards the end of its unanimous judgment the Bench stated that the 'whole tenour [of the doggerel] is somewhat indecent and that some of the lines are offensively indecent',[53] and on that basis it concluded that the publication was obscene. Yet this judgment can be read both ways. One could hypothesise that the judgment was arrived at by applying the isolated-passage criterion, for on the basis of some *offensively* indecent lines the whole piece, of which the 'whole tenour was held to be only *somewhat* indecent, was deemed obscene. On the other hand, one could also interpret the quote as containing the ghost of a contextualist argument, for the Court might have judged the publication to be obscene because it felt that the whole tenor, being of a 'somewhat indecent' nature, could not *save* the 'offensively indecent' lines – in the way a work of literary merit might. Unfortunately, no further clues can be gathered from the judgment that might tip the balance in favour of one of these interpretations. Yet for the Cape Bench the question of the validity of the isolated-passage approach is not likely to have been an issue at all: first of all, the text it had to deal with in De Jong's case was a newspaper piece, not a lengthy book; secondly, English law was still in force in the region at that time, and the validity of the isolated-passage

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[47] Ibid., p. 134.

[48] Beekman and Grüttemeier, *De wet van de letter*, p. 198; Grüttemeier, 'Law and the Autonomy of Literature', p. 178.

[49] Cf. William B. Lockhart and Robert C. McClure, 'Censorship of Obscenity: The Developing Constitutional Standards', *Minnesota Law Review* 45.5 (1960), 119; *PCB* v *Heinemann,* 140; J. E. Hall Williams, 'Obscenity in Modern English Law', *Law and Contemporary Problems* 20 (1955), 645; St John-Stevas, *Obscenity*, p. 134.

[50] David Dyzenhaus, Sophia Reibetanz Moreau and Arthur Ripstein (eds), *Law and Morality: Readings in Legal Philosophy*, 3rd ed. (Toronto/Buffalo, NY/London: University of Toronto Press, 2007), pp. 975-6.

[51] Elisabeth Ladenson, *Dirt for Art's Sake: Books on Trial from* Madame Bovary *to* Lolita. (Ithaca, NY: Cornell University Press, 2007); Dawn B. Sova, *Banned Books: Literature Suppressed on Sexual Grounds*, rev. ed. (New York: Facts on File, 2006), pp. 95-6.

[52] Cf. Ladenson, *Dirt for Art's Sake*, p. 152ff; Lockhart and McClure, p. 88ff; Peter D. McDonald, 'Old Phrases and Great Obscenities: The Strange Afterlife of Two Victorian Anxieties', *Journal of Victorian Culture* 13.2 (2008), 299; see also Geoffrey Robertson, *Obscenity: An Account of Censorship Laws and their Enforcement in England and Wales* (London: Weidenfeld and Nicolson, 1979), p. 61ff; St John-Stevas, *Obscenity*, p. 135; Williams, 'Obscenity in Modern English Law', 636.

[53] *Q* v *de Jong,* 329.

approach appears not to have become an issue in English law before the twentieth century was already long underway.[54]

## *The Argument of the Classics and the 'Ordinary Man'*

In the other pre-Union case, *G. W. Hardy* v *Rex*, two other key issues were taken up. The Supreme Court of Natal dealt with the case on 3 April 1905 in appeal against a decision of the Magistrate's Court of Durban. This lower court had charged a certain G. W. Hardy with the offence of 'public indecency' in that he, as the editor, printer and publisher of a newspaper called *Prince*, had published and disseminated an 'indecent, lewd, scandalous, and offensive article or writing' entitled 'The Black Peril' in the 7 October 1904 issue of that newspaper.[55] It seems that Hardy was charged with public indecency because at that time the Colony of Natal did not have more appropriate legislation to deal with allegedly obscene publications.[56] Just like in *Queen* v *de Jong*, the publication in Hardy's case did not purport to be a work of literature, and neither was it received as such. Rather it represented a journalistic article that described the 'peril' of black men and white women engaging in sexual relations with each other, a 'peril' that was supposedly 'threatening' Durban at the time.[57]

The first aspect of the case that is of interest to our discussion is that the appealing party, with regard to the contents of the publication, argued that the article was not indecent because '[f]ar worse matters are published in England and elsewhere with impunity. The works of standard authors and translations from the classics are freely allowed publication'.[58] This strategy of the appealing party to argue that the incriminated article was no more 'indecent' than any of the classical literature that was free to circulate in England, amongst other countries, seems first and foremost to have been used in order to downplay the allegedly offensive character of the article – indeed, to stress that the article was acceptable in the light of contemporary public morals. More interesting than the particular function of the classics argument in the defence of the newspaper article, however, is the principled stance that the court took vis-à-vis the argument. For just like the contextual approach, the argument of the classics is known to have played an important role in the legal autonomisation of (modern) literature in certain Western countries. It played such a part in the Netherlands in the 1910s,[59] but also in twentieth-century America, as Felice Flanery Lewis points out in her study *Literature, Obscenity, and Law*. As Lewis observes, 'literary value, as established by centuries of acclaim, was the crack in the door through which unusually erotic fiction first squeezed past the censors [in the U.S.]. Once an exception was made of classic art, the next logical step was

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[54] Cf. Robertson, *Obscenity*, p. 61ff; St John-Stevas, *Obscenity*, p. 135f.

[55] *G. W. Hardy* v *Rex*. Supreme Court of Natal. 1905. *All South African Law Reports 1828 to 1946. LexisNexis South Africa*, n.d., 166. Web, last accessed on 27 October 2012.

[56] Cf. *G. W. Hardy* v *R,* 167.

[57] Cf. Geldenhuÿs, *Pornografie*, p. 22.

[58] *G. W. Hardy* v *R,* 168.

[59] See Beekman and Grüttemeier, *De wet van de letter*, p. 65.

the granting of this privileged status to outstanding contemporary art'.[60]

The judges in the Hardy case declared that they did not 'appreciate the negative argument addressed to us by Mr. Hillier [i.e. the appellant's attorney], which was founded upon illustrations from literature', and explained that

> [i]t would be impossible to deny that in the works of many writers of ancient times, as well as in those of standard authors of a later period, passages of an extremely indecent and obscene character are to be found, the publication of which in the newspaper press of the present day would be an offence against good morals amounting to public indecency, inasmuch as the indiscriminate circulation of such matter would undoubtedly tend to deprave and corrupt the minds of some into whose hands it might come.[61]

Therefore, they concluded, Mr. Hillier's classics argument was flawed,[62] adding quite categorically that 'the fact that indecent publications in the past have not been made the subject of prosecution cannot relieve the Court of the duty of considering such a publication upon its own merits when brought before it in a criminal prosecution'.[63]

The Court's rejection of Hillier's classics argument was in line with the position taken on this issue by Chief Justice Cockburn in the English appeal case of *Regina* v *Hicklin* in 1868. The judgment that Cockburn handed down in this case set a crucial precedent not only for obscenity trials held throughout the last third of the nineteenth and the first half of the twentieth centuries in territories belonging to the British empire, South Africa included, but also for such trials held in that same period in the United States. With regard to the classics argument, Cockburn emphatically asserted in his judgment that

> [i]t is perfectly true . . . that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject-matter for indictment in many of the works which have been referred to[64] (reference had been made to the sixth satire of Juvenal and to more modern classics such as Chaucer, Milton and Byron – TL).

However, Cockburn continued,

> it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this

[60] Ibid., p. 45.

[61] *G.W. Hardy* v *R,* 171.

[62] Ibid., 171.

[63] Ibid., 171.

[64] R v Hicklin (1868), L.R. 3 Q.B. 360. *Wikisource*. Wikimedia Foundation, 24 October 2010. Web, last accessed on 13 Oct. 2011. See http://en.wikisource.org/wiki/Regina_v._Hicklin

prosecution, namely, that obscene works are the subject-matter of indictment.[65]

By dismissing the classics argument as it was used in the Hardy case, the Natal Bench seemed first and foremost to aim – just as Cockburn appears to have done in the Hicklin case – at protecting potential readers who were considered vulnerable, in this case in particular 'the young and inexperienced'[66] and even more so the 'native population'.[67] Such a position did not necessarily rule out granting a certain amount of freedom to stronger readers though. And indeed it does not appear that the judges in the Hardy case thought it would. The word 'indiscriminate' in the above passage from the Hardy case seems telling in this respect: it appears that when it came to the more principled question of 'passages of an extremely indecent and obscene character' occurring in literary classics, the Bench was merely of the view that the *indiscriminate* circulation of such matter ought to be prevented so that it would not reach vulnerable readers. The medium through which the dissemination occurred appears to have played a crucial role in this regard: 'publication . . . in the newspaper press of the present day' of such passages – NB taken out of the context of the whole work – would constitute an offence against good morals, the Bench explicitly stated, a statement that seems to imply that matters lay different when such passages were disseminated – NB *within* the context of the whole – through the medium of an expensive book – which indeed would mean: disseminated much more *discriminately*.

The second aspect of interest to our discussion is that the Natal Bench adopted the test of obscenity formulated by Cockburn in his judgment in the Hicklin case. What had to be determined according to the Chief Justice was 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.[68] Yet the Natal judges did not merely adopt Cockburn's test. Importantly, they added a new component to it by stating that '[t]he point of view which we think should be adopted in estimating the tendency of an article . . . is not that of a Puritan on the one hand, or of a profligate on the other, but that of an ordinary man possessed of an average sense of decency'.[69] By adding this component, the Natal Bench introduced a less harsh obscenity test for South Africa: not just any reader, particularly the 'weak' or the 'Puritan' reader, had to be taken into account when judging a publication, only the 'ordinary man' with 'an average sense of decency' should.

On balance, one might conclude on the basis of the above judgments that although there are indications that the judiciary displayed a certain amount of tolerance towards ancient classics and classics of later periods, little or no sign can be discerned in these judgments pointing to judicial benevolence towards contemporary literature. However, this is hardly surprising as there would not have been pressure on the judiciary to create some legal room to play for contemporaneous literature, because as the available literature suggests, a literary field with a high degree of institutional autonomy had not yet developed within the borders of the

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[65] *R* v *Hicklin*.

[66] *G. W. Hardy* v *R,* 172.

[67] Ibid., 172-3.

[68] *R* v *Hicklin*.

[69] *G. W. Hardy* v *R,* 172.

South African Colonies at that point.[70] Of course, the fact that these trials did not centre on literary works would not have helped to *build* any pressure either. However, the next period we will be scrutinising, the period between 1910 and 1955, presents us with a rather different picture.

## The Union Trials: The Tool Kit for Autonomisation

### *Testimony, the Contextual Approach, and Tolerance in Relation to Changing Norms*

The first case about a printing matter that was dealt with in court since the colonies of the Cape, Natal, Transvaal and Orange River had been united to form the Union of South Africa, was the 1910 case of *Rex* v *Shaw*. The case concerned an imported book entitled *The Grip* that had appeared under the pseudonym of Flaneuse. In Bourdieuian terms, the work appears not to have been written for an 'intellectual' audience but rather for a mass audience. It was a work of fiction revolving around a tragic love affair between a young philosopher called Duncan Heriot and a woman called Elena Geisthardt. The author, or authors, behind the name Flaneuse – or Flâneuse, as it was spelled in other works – is, or are, thought to have written both works dealing rather extensively with female sexual desire and works with a seemingly feminist import, as are other authors that were published by the same publishing house – A. M. Gardner & Co. of London – of which the most notable is the bestselling author Elinor Glyn.[71] This might give us a somewhat clearer idea both of the genre that *The Grip* was thought to represent at the time, and of the reason why the book became the subject of a court case.

In first instance, the book was the subject of a case that was brought before the Resident Magistrate for Cape Town. An individual called Robert Shaw, the Cape Town manager of Central News Agency Ltd., was accused of violating a section of the Obscene Publications Act of 1892 in that he had sold, and exposed for sale, the aforementioned book, which was considered to be obscene.[72] The Magistrate also found the publication to be obscene and therefore convicted Mr Shaw of contravening the Act. Subsequently, Shaw appealed to the Cape Provincial Division of the Supreme Court, and on 24 October 1910 the Court dealt with his case. Just like in the *Queen* v *de Jong* case, the appeal focused on procedural matters rather than on the Magistrate's finding that the publication was obscene. Yet here again some aspects of the case were of significant precedential value.

Firstly, witnesses were allowed to testify as to the nature of the book in terms of the law. What is especially noteworthy in this respect is that it does not appear that the witnesses who testified in court used the 'literature' argument nor that they had any special expertise

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[70] See note 10 supra.

[71] Sandra Kemp, Charlotte Mitchell and David Trotter, *Edwardian Fiction: An Oxford Companion* (Oxford/New York: Oxford University Press, 1997), pp. 131, 155, 427. For more information on the life and work of Glyn, see JoAnn E. Castagna, 'Glyn, Elinor (1864-1943)', in *Oxford Dictionary of National Biography*, Oxford University Press, 2004, online edition January 2008, <http://www.oxforddnb.com/view/article/33428>, last accessed on 15 March 2014.

[72] The book had managed to get through customs.

concerning books or literature. The witness who declared the book to be indecent was an agent of the Social Reform Association,[73] a South African anti-vice organisation equivalent to the notorious New York Society for the Suppression of Vice of Anthony Comstock and late eighteenth and nineteenth centuries English prototypes of this organisation.[74] An unspecified number of witnesses called to support the defence of Shaw 'took a very different view of the book', according to the judgment handed down in the case.[75] There is no indication that any of these witnesses were book or literary experts: either they were not or, if they were, the Court did not deem this to be relevant.

Secondly, the Cape Court took a more univocal stance with respect to the isolated-passage criterion than it had in the case of *Q* v *de Jong* fifteen years before. Towards the end of the judgment it states that

> '[i]t may be that if the objectionable parts of the book had been pointed out [no such parts had been pointed out - TL], other parts might have been pointed out which, reading the one with the other, would show that the general tendency of the book was not corrupting'.[76]

It thus seems that the Court believed that it was desirable to apply a contextual approach when assessing books.[77]

Thirdly, the Court seemed to be of the opinion that a general tolerance had to be observed in respect of changing societal norms regarding certain themes – in this case, or so it seems, (female) sexuality. In its unanimous judgment it quite categorically declared that

> '[i]t might have been shown that the book was dealing with problems which some people do not like to be discussed, and which to a certain extent might be indelicate to discuss; but the law was not meant to meet cases of that kind'.[78]

In sum, the Court displayed a degree of benevolence towards contemporary works of fiction that appeared to go further than the judiciary had been willing to go in the pre-Union cases we examined.

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[73] *Rex* v *Shaw*, Cape Provincial Division of the Supreme Court of South Africa, 1910. *All South African Law Reports 1828 to 1946*. *LexisNexis South Africa*, n.d., 428. Web, last accessed on 27 October 2012.

[74] Cf. Kahn, 'When the Lion Feeds', pp. 284-5. For an analysis of both Comstock's organisation and its English prototypes, see Alec Craig, *The Banned Books of England and*

*: A Study of the Conception of Literary Obscenity* (Westport, CT: Greenwood, 1977), pp. 36-7, 138-9.

[75] *R* v *Shaw,* 429.

[76] Ibid., 429.

[77] Cf. *PCB* v *Heinemann,* 140.

[78] *R* v *Shaw,* 429.

## *A Colonial Exceptio Artis*

After the Shaw case, it took around two decades until the next court case that tells us something about judicial attitudes towards literature. This case was not brought before a Union court, however, but before the High Court of South-West Africa. The case is relevant though because, as mentioned, at the time South-West Africa fell under South African jurisdiction and the judgment could therefore be seen as representative of the judicial climate prevailing within the Union.[79] The case I am referring to is the case of *Rex* v *Meinert*, which was dealt with by the Court on 10 and 12 August 1932. This year is significant in at least two respects: a year earlier, the Statute of Westminster had namely been passed by the British Parliament, effectuating legislative independence for South Africa; a year later, moreover, the *Ulysses* case, which appears to have heralded a paradigm shift regarding publications regulation in the Anglophone world,[80] was first brought to court in the U.S.[81]

Again, the case did not concern a work of literature, yet it does tell us something about judicial attitudes towards literature and the role that arguments with respect to its institutional position could play in court at the time. The case represented an appeal against a judgment handed down by the Magistrate of Windhoek. The Magistrate had convicted Mr Meinert of contravening the Obscene Publications Suppression Ordinance 5 of 1926 – an ordinance that did not essentially differ from the laws that were applicable in South Africa[82] – in that he had had copies for sale in his possession of a German magazine called *Die Schönheit* (Beauty) containing some photographs of nude males and females and also that he had sold a copy of the issue in question. The first page of the magazine gave an impression of the genre that it belonged to, as it said there that the magazine represented a 'Mit Bildern geschmückte Monatschrift für Kunst und Leben, Mit Beiblatt "Licht, Luft, Leben" vereinigt mit "Der Mensch", Monatschrift für Schönheit, Gesundheit, Geist, Körperbildung: Begrundet [sic] 1902' (Monthly magazine for art and living with pictures, With supplement "Light, Air, Living" merged with "Man", monthly magazine for beauty, health, mind, physical education: Established 1902).

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[79] The fact that this case is indeed quite relevant to our discussion is further underlined by the multiple references made to it in the landmark trial against Wilbur Smith's novel *When the Lion Feeds* that took place in 1965 (see *PCB* v *Heinemann,* 139, 142, 143, 144, 151).

[80] Cf. Ladenson, *Dirt for Art's Sake*, p. 78ff *et passim*; Felice Flanery Lewis, *Literature, Obscenity, and Law*, (Carbondale/Edwardsville, IL: Southern Illinois University Press, 1976), p. 44; 'Obscenity and the First Amendment: The Search for an Adequate Test', *Duke Law Journal* 7 (1958), 119; Williams, 'Obscenity in Modern English Law', 645.

[81] It was brought to Court twice: it was heard by the District Court for the Southern District of New York on 25-26 November 1933. On 6 December 1933, the single judge dealing with the case, Judge Woolsey, handed down his decision. Woolsey cleared Joyce's work of the charge of obscenity and furthermore brought about a greater institutional autonomy for literature vis-à-vis US law, inter alia by suggesting that literary works had to be judged in their entirety. An appeal was subsequently lodged against the judgment to the Court of Appeals for the Second Circuit. On 7 August 1934, the appeal was upheld by a 2-1 majority. The judgment of the majority also confirmed that a literary book had to be judged as a whole. See https://penusa.org/united-states-v-one-book-entitled-ulysses [last accessed on July 20, 2015].

[82] Cf. *Rex* v *Meinert*, High Court of South-West Africa, 1932. *The South African Law Reports [1927] South-West Africa: Decisions of the High Court of South-West Africa. January to December 1927*, ed. by I. Goldblatt and R. E. G. Rosenow (Cape Town and Johannesburg: Juta, 1928), pp. 57-8; cf. also Marais, 'Regsaspekte', pp. 50-1.

The main strategy of the appealing party consisted in emphasising that the nature of the publication in terms of the law had to be measured on the basis of the actual standards of the community, and that these standards ought to be determined in an empirical fashion on the basis of inter alia the kind of literature that was circulating within the community. The report somewhat telegraphically records the attorney of the appellant as stating:

> Question to be decided in the first instance: What is the state of morality at the particular time and place? Court has to enquire into the actual state of moral notions of population on the whole. Impossible to assume some imaginary ethical standard which does not prevail and to say that this is an offence against that standard.[83]

The appealing party implied that in order to determine the community standards relevant to this particular case and others that would be similar to it, one had to investigate what the 'cultural notions' of the people making up the community – in this case, the inhabitants of Windhoek – were, and what kind of literature they read. It furthermore stressed that the moral standards of a community were subject to 'constant progress and evolution'.[84]

In reaction to the argument of the appealing party, the attorney for the responding party stated firstly that '[t]he current literature in Windhoek does not establish anything. It does not reflect the standard generally applicable in this community'[85]; and secondly that '[m]any books current in Windhoek might be indecent, but, because these have not yet been the subject of a prosecution it cannot be contended that the present publication is no worse and should therefore not be declared indecent'.[86] The latter contention was of course rather congruous with the way the argument of the classics had been handled in both the judgment delivered in the Hardy case and the one handed down in the English case of Hicklin.

In his decision, Bok, the judge handling the case, evidently not only adopted the Hicklin test – as the obscenity test formulated by Chief Justice Cockburn was labelled at some point – in order to judge the case, but he also gave his own twist to it, just as the judges had done in the Hardy case. Yet in doing so, Bok went further than the Natal judges. He emphasised, as the Court had done in the Shaw case, that themes regarding sexuality were not off-limits per se. Such themes, he added,

> are discussed with ever increasing freedom in the literatures of all civilised peoples and to hold that all such books are obscene within the meaning of the law in this territory, because on the minds of immature, uneducated or uncivilised persons they might have a deleterious affect [sic], would mean to deprive educated people from contact with modern literature and thought in other countries and I cannot think that such could have been the intention of the Legislature.[87]

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[83] *R* v *Meinert,* 56.

[84] Ibid., 57.

[85] Ibid., 57.

[86] Ibid., 57.

[87] Ibid., 60.

What is most remarkable about Bok's stance here is not so much that he was evidently breaking a lance for a certain amount of thematic freedom. As we saw above, this position had already been defended in the Shaw case on the grounds that tolerance had to be observed with respect to changing public norms. As becomes clear elsewhere in Bok's judgment, his tolerance regarding thematics was underpinned by this belief too, albeit only partly.[88] What is more noteworthy – as evidenced by the statement quoted above – is that Bok's positioning was also based on the contention that a certain amount of tolerance had to be observed with regard to evolving norms concerning modern literature. As a matter of fact with this statement Bok was taking a rather unprecedented standpoint vis-à-vis the institutional status of literature. The institutional position awarded by Bok to literature might indeed best be described as a colonial *exceptio artis*: a very early form of *exceptio artis* in Southern Africa – indeed, the first time it seems to have appeared in South(ern) African law – which also represented a very specific form of the concept, inter alia because it was based solely on the valuation of *imported* literature.

Bok evidently accepted that literature and the arts had gained a certain amount of freedom to depict or write about sexual matters internationally, but he also allowed literature to enjoy this amount of autonomy within South-West African law. Bok quite clearly gave priority to the right to read of literary socialised readers, or 'educated people', at the expense of the right of non-literary socialised readers, or 'immature, uneducated or uncivilised persons', to be protected from potentially harmful material. By granting literary socialised readers this special right, he at once, albeit implicitly, bestowed upon 'modern literature'– NB Bok was only speaking of modern literature *from abroad* – a(n) (relative) *exceptio artis*. A few lines further, Bok underlined his point again, possibly even more unequivocally, by declaring that he felt that 'the test [of obscenity] cannot be whether there are persons who, incapable of understanding the real spirit of the writing, might suffer morally by being allowed to read it'.[89]

It might be telling that a distinctive feature of Bok's Hicklin test was that he did not apply the concept of the ordinary man, as introduced in the Hardy case, but rather relied on the concept of a 'reasonable' man instead. Obscenity had to be determined by estimating not what the 'ordinary man' but what the 'reasonable man' would deem to have the tendency to deprave and corrupt.[90] Bok's emphasis on the right to read of educated audiences rather than the right to protection of 'immature, uneducated or uncivilised' audiences appears to imply that his concept of the reasonable man did not equal that of the ordinary man as laid down in the Hardy case. Indeed it seems rather certain that Bok's priority was not to defend public morals on the basis of criteria of the 'ordinary man' as defined in *Rex* v *Hardy*. Rather, his priority lay with defending the literary norms that had arisen in 'modern literature and thought in other countries', that is to say, *European* countries, which he seemed to have first and foremost in mind.[91]

In conclusion to our discussion of the Meinert case, two more elements should be noted. Firstly, that in his closing remarks Bok somewhat qualified the position he had taken throughout the case, a position where judicial 'realism' and favouring a certain autonomy vis-à-vis the law for art in general and modern literature in particular so clearly play a part – as to the

[88] Ibid., 61.

[89] Ibid., 60.

[90] Cf. ibid., 60.

[91] Cf. ibid., 63.

latter, one only has to point towards the repeated references to and indeed concern for literature that can be discerned in the judgment in a case that did not revolve around a work of literature anyway. Bok slightly toned his position down by stating that he arrived at his conclusion 'with considerable hesitation bearing in mind the large uncivilised class of our population'[92] and that his conclusion

> must not be understood as implying that conditions peculiar to a country like this do not necessitate a stricter view of what is permissible in this respect in the interests of art and culture, than might possibly be accepted in European countries.[93]

Prioritising the right to read of the 'civilised' over the right to protection of the 'large uncivilised class' of the South-West African population was thus not categorical; it had to be balanced against the latter right and at some point, it seemed to imply, the scales would tip in favour of the 'uncivilised class'. However, Bok clearly considered it vital for those living in Southern Africa to be able to keep in touch with 'civilised' thought.

The second thing that should be noted is that with all the emphasis laid on *foreign* literature, both by the appealing party and the judge, it seems that literature in Southern Africa (i.e. South-West Africa and South Africa) was not really an important factor yet, institutionally speaking. Indeed, Bok's judgment clearly showed a worry that Southern Africa might become isolated from literary and intellectual developments taking place in the former mother countries, rather than a concern for an emerging Southern African literature. When these two distinctive features, i.e. the sole emphasis on foreign literature and the relatively weak form that the institutional freedom for literature as conceptualised by Bok took because of the colonial context in which the medium had to operate, are added up, the term 'colonial *exceptio artis*' is an adequate description of the institutional position that literature should be granted according to this judge.

## *An Exceptio Scientiae*

Approximately two years after the Meinert case was dealt with by the High Court of South-West Africa, the case of *Rex* v *Webb* came before the Appellate Division of the Supreme Court of the Union of South Africa. This case would become a crucial precedent for years to come – it played a significant part for instance in the major 1974 trial of André Brink's novel *Kennis van die aand*.[94] The Webb case was first brought before the Magistrate's Court of Johannesburg, where the accused, Mr. Webb, was charged with the crime of blasphemy for publishing a very short story entitled 'A Nun's Passion: A Xmas Story', a piece which had appeared in the December 30, 1933 issue of a newspaper called *The Ringhals*, of which he was the editor. Webb was also charged with contravening sec. 2 (7) of the Criminal Law Amendment Act of 1909, the principal

[92] Ibid., 63.

[93] Ibid., 63.

[94] See Ted Laros, 'Literary Autonomy on Trial: The 1974 Cape Trial of André Brink's *Kennis van die aand*', in *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial*, ed. by Awol Allo (Surrey: Ashgate, forthcoming).

act aimed at combatting indecent and obscene publications in the Transvaal, which we have already encountered at the outset of this article. He had published a letter in the same paper, which was supposed to be indecent and therefore constitute an offence in terms of the abovementioned Act. Webb was convicted by the Magistrate and subsequently lodged an appeal with the Transvaal Provincial Division of the Supreme Court who dismissed the appeal. As a result Webb finally brought an appeal against the decision of the Transvaal Court before the Appellate Division of the Supreme Court. This Division dealt with the case on 18 and 20 April 1934.

The appealing party based its case primarily on the arguments that '[t]he essential of the crime of blasphemy is to revile' and that '[t]he idea of the poem was to display the sentiments of the nun, not to revile Christ'.[95] Ergo, the piece could not be considered to be blasphemous within the meaning of the law. The latter quote also shows that the appellant used a literary defence of sorts. Indeed, at some point he referred to the piece as a 'prose poem'.[96] This literary defence appears to have been somewhat half-hearted though, as it was not recorded in the law report as having constituted an essential point of the appellant's argument. The basic point of the argument of the respondent was that the story was blasphemous as 'Christ [was] associated with indecent ideas' in it.[97]

In its unanimous judgment, the Court showed it found the appellant's apparent literariness claim questionable: at one point the judgment states that '[t]he applicant calls it a "prose poem"'[98] and elsewhere it refers to 'the so-called story'.[99] The Court itself referred to the piece as 'publication or story',[100] or simply 'publication'.[101]

As to the question of intent, the Court argued that

> [t]he intent . . . is not of the essence of the crime of blasphemy and none of the authorities cited to us say so. They all agree that the question of intent is important in determining the punishment but that is all. If the words are blasphemous the intent is inferred.[102]

Indeed, the rules dictating that intent was automatically inferred when the fact of an offence had been established and that intent could only be relevant in determining a matching punishment were applicable in all criminal cases.[103] The only question still to be answered was therefore: was the publication, 'objectively' judged – i.e. on the basis of the facts as

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[95] *Rex* v *Webb*, 1934 AD 493. Appellate Division of the Supreme Court of South Africa. 1934. *All South African Law Reports 1828 to 1946. LexisNexis South Africa*, n.d, 494. Web, last accessed on 27 October 2012.

[96] Ibid., 494-5.

[97] Ibid., 494.

[98] Ibid., 494-5.

[99] Ibid., 498.

[100] Ibid., 494.

[101] Ibid., 494.

[102] Ibid., 495.

[103] Cf. *G. W. Hardy* v *R,* 169-70; *R* v *Meinert,* 60.

appearing in the publication itself and disregarding the alleged authorial intent – blasphemous?

Having presented a summary of the story, the Court declared that

> there is not the slightest doubt, that the whole publication suggests that the nun in her erotic ecstasy or hallucination had a vision and imagined that she had had carnal connection with Jesus. That it is a crude, vulgar and indecent production admits of no doubt, but the question is whether it is blasphemy according to our law.[104]

Evidently the Court had some difficulty in determining whether it did. Was it blasphemy, the Court asked, 'to portray an erotic nun as having a vision of Christ appearing to her and imagining that she has carnal connection with the subject of the vision?'[105] In answering the question, the Bench observed that 'the idea of a woman having a vision or dream that she has carnal connection with a godhead is not uncommon in Greek literature and in that of other countries'; one only had to refer to 'the vision of the mother of Alexander the Great'.[106] Essentially, however, the question was whether the fact 'that the vision [wa]s that of Jesus ma[d]e the publication blasphemy'.[107]

As the Court's unanimous judgment unfolded, it emerged that it was based on a number of the same crucial criteria regarding publications control as had been formulated in the Shaw and Meinert cases. First of all, the Court was keen to stress that community standards were subject to change.[108] The Appellate Division clearly held this to be an important point as was further evidenced in later cases decided on the basis of laws that fall outside our focus of attention (e.g. in a 1936 case in which two newspaper editors had been convicted by a lower court on a charge of *crimen laesae venerationis* in that they had dishonored the Majesty of the King and his government and injured their dignity and power).[109] It is also worth noting that in inter alia the latter case, the Court, which consisted of three of the four judges who had been called upon to deal with the Webb case, also gave clear evidence of being strongly committed to South Africa's institutionalised democratic values in general and to freedom of thought and speech in particular.[110] The wording of the judgment in the case indeed seems telling: '. . . under the conditions of our modern civilization and development and of our political liberty and freedom of thought and speech', it declared, the Court 'cannot be expected to accept the narrow and restricted views' of earlier centuries.[111]

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[104] *R* v *Webb,* 495.

[105] Ibid., 496.

[106] Ibid., 496.

[107] Ibid., 496.

[108] See ibid., 496.

[109] See Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50*, (Cape Town/Wetton/Johannesburg: Juta, 1984), pp. 53-4.

[110] Corder, *Judges*, p. 53; cf. also p. 54.

[111] *R* v *Roux and Another* quoted. in Corder, *Judges*, p. 53.

Secondly, the Court made it clear that it was not the story's subject, but the manner in which the subject was treated that mattered in this case.[112] Thirdly, the Bench proved to have read the work according to the contextual approach. In its conclusion with regard to the question whether the story was blasphemous, it stated:

> There is no doubt if we read the so-called story as a whole, we can come to no other conclusion than that it was designed to hurt the feelings of professing Christians. It is therefore a blasphemous publication and on this part the appeal fails.[113]

Although the Court's judgment thus largely achieved continuity in publications control, it also introduced a new criterion. For the judgment in so many words instituted an *exceptio scientiae* of sorts when, in coming to its conclusion regarding the story, it declared that

> if the erotic passion of a nun for the eidolon of Jesus were dealt with in a book on psychology or in a medical treatise or even in guarded language in some other publication, I do not think that a statement to the effect that a nun imagined that she had had carnal connection with Jesus would *per se* constitute blasphemy'.[114]

A remarkable aspect of this passage is that although the Court, through the hypothetical examples it gave, came to formulate a fairly explicit support of science exemption, it did not expressly entertain the hypothetical possibility of 'the erotic passion of a nun for the eidolon of Jesus' being dealt with in a work of literature, in non-guarded language that is – in other words, it did not address the question of art exemption. However, the fact that it did support science exemption is at least as remarkable. Indeed, it seems that the Court's stance in this matter represents the first time that the concept emerged in South African law. It would take two more decades before the concept would enter the statute books, for it was only in 1953 that the concept was incorporated into the Customs Management Act. With regard to domestically produced publications the concept would not be statutorily introduced until 1963. On the constitutional level, finally, the concept would not be used until 1993.

It should be noted, however, that the Court's support of a science exemption was not remarkable because of the support *per se*. On the contrary, from an institutional point of view, the emergence of an *exceptio scientiae* within South African law through the 1934 case of *R* v *Webb* can be seen as the result of both the fairly advanced stage of development of the Union's academic field at that time and of the keen interest the state had manifested in further encouraging this development.[115] The legal recognition of the academic field in the form of an *exceptio scientiae* can therefore partly be explained as a manifestation of a structural homology (*sensu* Bourdieu) between the judicial and the academic field: the judicial elite recognises the

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[112] Cf. *R* v *Webb,* 497-98.

[113] Ibid., 498.

[114] Ibid., 497.

[115] Cf. Saul Dubow, *Scientific Racism in Modern South Africa*, (Cambridge: Cambridge University Press, 1995), p. 11ff; Saul Dubow, *A Commonwealth of Knowledge: Science, Sensibility, and White South Africa 1820-2000*, (Oxford: Oxford University Press, 2006), p. 7ff.

existence of an academic elite and acts on this recognition by granting this elite the (relative institutional) autonomy to discuss matters according to the professional norms that prevail amongst this newborn elite. Indeed, the recognition implies ascribing a rather far-reaching authority to (dominant) experts belonging to this elite when it comes to dealing with matters that fall within their scientific/scholarly 'jurisdiction'.[116]

## Conclusion

But let us return to the institutional status that literature (may have) enjoyed at the time. As we saw, in the period 1910-1948 there have been no trials dealing with works that would have been characterised by literary experts or the literary socialised public as representing works of literary merit. Nevertheless, in the cases discussed, which sometimes involved works of fiction or verse, the judiciary introduced several concepts and practices that could and would also be applied in the judicial (and semi-judicial) assessment of works of literature in later decades. Furthermore, the judiciary occasionally referred to and took a position on literary institutional issues during this period. At the same time, both the concepts and the methods introduced, as well as the positions taken are revealing of the stance of the judicial elite vis-à-vis literature.

As early as 1910 in a trial revolving around the book *The Grip* by Flaneuse, i.e. the case of *Rex* v *Shaw*, three important parameters for approaching texts were set. Firstly, witnesses were allowed to testify about the nature of the book in terms of the law. However, no witnesses with literary expertise appear to have been called upon to testify in this case. Secondly, the Court held that a general tolerance had to be observed with respect to changing societal norms regarding certain themes – in the concrete case at hand, regarding (female) sexuality. Thirdly, the Court employed the contextual method of assessing publications. The latter two aspects would also be applied in the cases decided in the 1930s. All three aspects show South Africa to have been in step with developments taking place in Anglo-American law. As these concepts and procedures played a crucial role in the autonomisation of literature in the Anglo-American legal sphere, it can be said that in the period 1910-1948, the ground was prepared for the legal autonomisation of literature in South Africa.

Furthermore, from the 1930s onwards, i.e. in the 1934 case of *R* v *Webb*, the judicial elite shows to be in favour of an *exceptio scientiae*. In the 1950s the Parliament followed suit. Evidently, the academic field had reached a mature stage by that time – which is something that in all probability cannot be said of the contemporary literary field. True, there is an indication that a judicial inclination towards the conceptual twin of the science exemption, the *exceptio artis*, existed, an inclination that became manifest in the 1932 case of *Rex* v *Meinert*. Yet the institutional autonomy that the judge handling the case was willing to grant literature solely pertained to *imported* literature. The judge's only concern seemed to be modern European literature and thought, not literature produced in Southern Africa, which would make sense, as no elaborate and differentiated literary infrastructure and activity seems to have been present in the region at that point. Apart from providing us with an indication that no relatively autonomous literary field (*sensu* Bourdieu) had developed in Southern Africa in the 1930s – no signs for this can be found in the later cases either – the tendency of the judge in the case of

[116] What should perhaps also be mentioned in this conclusion to our analysis of the Webb case is that the part of the judgment dealing with the indecent letter, the other component of the indictment, does not contain any facts relevant to our discussion.

Meinert towards what might be termed a *colonial* art exemption also reinforces the other observation made just now: that in South Africa – and South-West Africa – in the period 1910-1948, the ground was prepared for the legal autonomisation of literature. A relative tolerance seemed to exist amongst the South (and the South-West) African judiciary regarding the written word, classic literature, scientific and scholarly texts, and modern European art and literature – a tolerance that was accompanied by a relative intolerance of 'Puritan' positions. With the rise to power of Afrikaner Nationalism in 1948, things were about to change, however.[117]

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[117] For an analysis of the semi-legal – i.e. administrative – treatment of literature during apartheid, see McDonald, *Literature Police*. For an analysis of the proper legal – i.e. judicial – regulation of literature in this period, see Laros, 'Long Walk to Artistic Freedom'.

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