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The roots of xenophobia in 19th century imperialism

The contribution provides an explanation of inner-African xenophobia as being rooted in the countermovements to 19th century imperialism. Distinctive property rights constituted different modes of production and notions of a *common society* among Basotho and Tswana people on the one hand and Trekboers on the other, which made them resist the incorporation into an imperial world market by the British Empire. Although the moderate expansive mode of Basotho and Batswana seemed more compatible with the free market approach of the Britons than the exclusive property concept of the Trekboer, the political result was different. We argue that finally the British *expansion without conquest* could be allied with the Trekboer *conquest without integration* due to the invention of SACU as the first customs union of the world, which began as Customs Union Convention in 1889. It allowed for a continuation of a pre-Enlightenment exclusionary property right that fuels xenophobia until today.

Keywords: economic history, imperialism, law, property, xenophobia

Introduction

South Africa is continually affected by violent and widespread xenophobia, and many commentators and politicians are struggling with its condemnation due to their own support of limiting *human* rights to those with a state-granted legal residence permit (Gumbi 2022; on debates inside the ANC see Tandwa

2022).[1] Although they obviously would like to reject popular violence against non-South Africans and some even acknowledge the innocence of the victims, they cannot resist supporting the exclusion of so-called "illegal immigrants". By arguing in such an obscure way, they accidentally address a problem contained in the Constitution of 1996. The preamble promises that "South Africa belongs to all who live in it", but limits the protection of the law to "every citizen" a few sentences further on. Section 1 of the Constitution grants an unconditional "*human* dignity" (own emphasis), but section 3 restricts it to a "citizenship" that it puts at the mercy of legislators and, hence, an electoral majority.

The purpose of our article is to root the causes of xenophobia in this contradiction between normative claims to all-encompassing human rights and, on the other side, discrimination and expulsion of minority groups due to the *territorialisation* of these rights. The inconsistency derives from the political decision to constitute a postcolonial democracy as a sub-unit of a competitive world economy. Therefore we analyse the historical interdependence of Southern African *nation states* as defined territories organised around the competition for property on the one hand with the *transnational* establishment of a customs union as regional framework for negotiating the local participation in the world economy on the other .

A vague promise of human rights that is continually broken through the denial of citizenship provokes the violent rioting between groups of the destitute, each fighting for inclusion into an exclusive community of market exchanges. *Citizenship* is tantamount to a basic entitlement of being involved, qualified by individual descent and performance. Some inferior and often temporary standards of residential rights are explicitly justified by the demand "to make a meaningful contribution to broadening the economic base of South Africa" (South African Government 2022) and resemble distant prospects to an undefined future that are always threatened by revocation.[2]

Status as a foreigner turns people into an illegitimate crowd. This is not a natural situation but the political result of linking a defined territory to a specific population. This territorialisation is internally implemented by the establishment of private property, its acquisition is providing the basement for inclusion. Without property nobody is a stakeholder (Ferguson 2015: 89-117). The establishment of property as a fundamental institution of a competitive market is required to

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2 The announcement of the South African government to revoke the *Zimbabwean exemption permits* is an example of this (Madubela 2021).

reduce individuals from *natural* members of their community to *applicants* for the inclusion into a humanity-as-world-market by accumulating property. Its validity becomes clear from current demands for "possession of a permanent work offer", "exceptional skills or qualifications", the establishment of a "business" or financial independence as prerequisites for a permanent residence and, hence, protection of non-national residents by the law in South Africa (South African Government 2022).

Hence, we follow Neocosmos (2010) in his finding that xenophobia is the result of an institutional setting of society rather than an individual attitude or opinion. However, we claim the necessity to extend the analysis to the humanity-as-world-market as a precondition for exclusionary nation states to make sense. The relative position of the African nation states in the global hierarchy of wealth accumulation has a decisive effect on inner-societal hostilities (Nyamnjoh 2006: 1-13). Therefore we focus our analysis on two specific and interconnected developments in the second half of the nineteenth century, the creation of *property* from exclusive captures of land and the conception of the Southern African Customs Union as an intermediary of the region to the world market.

The article begins with an explanation of our basic argument in relation to the existing literature on xenophobia in Southern Africa. The second section analyses the relation of territory, society and provision for the future, which in modern societies is governed by the institutions of property and contract. It analyses the three historical cases of Basotho and Batswana, Trekboers[3] and British imperialists, whose relationships had been identified as crucial for the constitution of the South African nation state early on (Macmillan 1963 [1928]). In the third step we reconstruct the foundation of the South African Customs Union (SACU), which integrated Southern Africa as a beneficiary into the world market. We interpret it as a countermovement to the establishment of exclusionary nation states because it generated the means to repair the social fabric that was damaged in the process of territorialisation. In the final section we summarise our argument.

Inclusion and exclusion in a closed territory

In this section we review the understanding of xenophobia as a struggle between inclusion and exclusion as the problematic mode of a constitutional democracy in a competitive world economy. In Southern Africa, the conflict arose as a late effect of warfare in the 19th century, in the course of which the territory came under

3 We deem this to be an appropriate self-description of still divergent groups who would unite as *Afrikaners* soon.

full control of powers that claimed the exclusive possession of land (Ngcukaitobi 2018: 9-38). This happened in parallel with the market economy reaching planetary expansion (Polanyi 2001). As a consequence, the settling of closed territories as nation states was accompanied by a growth-oriented economic mode that ever since has depended on an appropriate *internal* structuring of societal relations because the *external* expansion had come to an end. In other words, after the Berlin Conference 1884-5, the restoration of social orders inside fixed borders became the local side of a coin whose global flip side consisted of the establishment of a competitive world market.

Authoritarian regimes are able to regulate the exclusionary effect of markets by assigning the losses to discriminated sections of the own population, as the Union of South Africa did (Ngcukaitobi 2018: 231-55). But in democratic states of law, citizenship becomes problematic because its legitimacy depends on equal chances for all, whereas market competition generates losers deprived of their possessions. Losses and poverty of some can only be legitimised by reference to a basic equality of *everyone* before the law. This is usually justified by the unconditional promise of universal human rights but it conflicts with the definition of a qualified and exclusive constitutional people. In other words, the legitimation of worldwide economic rivalry depends on the abstract vision of a humanity with equal rights and chances, but the effective safeguarding of participants, their resources and gains is realised by territorially limited nation states with their defined populations (Weber 1978: 311-38). Foreigners are included as potential competitors and excluded as non-citizens.

The state itself is justified as defender against violations of this equality/inequality and hence is general *and* particular at the same time. The promise of equality to everyone is at odds with the debarment of non-fellows and the discrimination against minorities (Arendt 1973: 267-302). With Marilyn Strathern (1999: 157) we argue that citizenship as basic entitlement to human rights is a paradox because it *banishes* inequality before the law precisely because it *generates* it in the exclusion of non-citizens. Citizenship denies basic rights to an undefined group of *outsiders*, and xenophobia is a violent popular movement, in which citizens empower themselves to execute exclusion, expulsion and extermination against them in the competition for limited chances.

On the African continent, citizenship was introduced as part of imperialist conquest and domination. Mamdani (1996) explained how the destruction and division of existing identities and the invention of new ones served the purpose of stabilising the domination of settlers and improving the option of exploitation of the autochthonous people. This means that exclusion was realised inside nation states as a racist division, based on fixed ascriptions, and the racially subjugated

people were further divided and inflamed against each other as "imagined communities" (Anderson 1991). This procedure questions the definition of racism as "a branch of xenophobia" by Akinola (2018: 1) because historically the African cases suggest an inverse relation. In accordance with the classic text of Fanon (2001: 166-189) we find it more convincing to see xenophobia as a subcategory of racism, which usually addresses much larger groups than the former. Racism refers to broad ascribed characteristics, whereas xenophobia addresses more restricted qualities like language, religion, culture or similar aspects, often fused to an *ethnicity*.

Although we agree with Akinola's (2018: 3) understanding of xenophobia as "a systemic political, social and economic expression of imperialism" that is aggravated by "deepening impoverishment" and "inter-state labour mobility", we deviate from the interpretation of it as an individualistic reaction to broken rules. Economic competition frames the conflicts, but "nefarious activities of some foreigners" (Akinola 2018: 4) are no explanation because violations of the law belong as task to the criminal justice system of a state. Xenophobia appears as rioting acts of nationalistic self-empowerment in excess of a punishment of offences and is characterised by its ignorance of questions of individual culpability and responsibility. Its conviction of foreigners already precedes any wrongdoing.

Oloruntoba in his plea for a pan-African reaction to xenophobic upheavals reflects the ambiguity of politicians who want to condemn the violence because he also insists on unequal eligibilities to resources. On the one hand, he questions why the shared religiousness and solidarity of Africans with an allegedly resulting "communitarian nature of the African society" (Oloruntoba 2018: 13) does not prevent the widespread violence against fellow Africans. However, his own definition of the African humaneness is exclusionary when he claims that the "Arabs" in the Maghreb "have identified more with the West than other parts of the continent" (Oloruntoba 2018: 9), which would preclude them from participation in pan-African solidarity. Such a division is a mirroring of the imperialistic inclusion of competitors that are excluded as non-citizens. In a way, protagonists of expelling Zimbabweans, Nigerians or Somalis in South Africa are replicating this kind of disaffiliation that Oloruntoba practises against Arabs.

Brobbey (2018) shows in a case study of Ghana how xenophobia is kept alive and fuelled by political parties as a tactical resource in elections campaigns. This is very important for understanding the attempts of benefiting strategically from the mobilising power of hatred against foreigners and should be read carefully by political analysts of South Africa. Of course, this cannot *explain* the reasons for attacking foreigners instead of other possible targets like rich elites or specific professions (Neocosmos 2010: 3).

We see our point of view supported by the study of Tella (2018) on xenophobia in the South African institutions of higher education. Despite the universities' (self-)understanding as a soft power for the building of societies according to globally valid norms, they are not immune to xenophobia. In this finding we see support of our approach to look for more deeply rooted origins of xenophobia in the more basic institutions of society. In distinction from Tella (2018: 90) we are not so much surprised by the paradox between the "cosmopolitan character" of these institutions and racist and xenophobic incidents because the academic cosmopolitanism is a kind of preliminary stage for the economic competition of the world economy. The future actors of this rivalry meet here in their preparatory stages, so to say.

So we continue our argument with digging one level deeper, and historically a century earlier. In accordance with Neocosmos we suggest the core institutions of society to be decisive, and we focus on the interrelated establishment of exclusive private property, protected by nation states, and inclusion into the world market, provided by a transnational customs union.

Owning land and belonging to a polity

In the following we compare three competing and mismatched understandings of property, and their relating political constitutions of inclusion into a society in the 19th century. We begin with the Basotho and Batswana and their cognate understandings of property residing in the stability of their communities. It will be important as argument for the possibility of political alternatives. We then proceed with the religiously and colonially framed concept of a *dominium* by the Trekboers. It builds the characteristic of the "mixed legal tradition" with which South Africa differs from most other countries (van der Merwe et al. 2014). Then, we introduce the difference of the imperialist British understanding of property that dominated the establishment of the world market. Remarkably, in South Africa the imperialist conception was subordinated to the understanding of property as a *dominium*.

The community-conserving property of Basotho and Batswana

In the case of Batswana and Basotho we have no autochthonous written sources or documents from the early 19th century because these people maintained a mode of production which operated almost in copresence. Normative information was easy to obtain because it was part of the established social modes of interaction. Some found their expression in well-known proverbs. "The vast

majority, however, are inherent in the social system of the people. They occur simply as established usages and observances which have developed in the course of time." (Schapera 1955: 35) Hence, we have to analyse their customs and rituals from anthropological and historical sources, which we critically examine in regard to the perspective and intention of the authors.

For the Basotho, we have an early record by Reverend Casalis (1861), which is complemented by the more systematically elaborated works of Duncan (1960) and Ashton (1967). In the case of the Batswana a huge collection was gradually improved and repeatedly published by Isaac Schapera (1953; 1955), which he compared himself with the contemporary records by Robert and Mary Moffat and David Livingstone from the early to the mid-19th century. His findings accord to a report on the *Bechuanaland Protectorate* by Margaret Hodgson from 1932. All of this was once more extended and elaborated by Comaroff and Comaroff (1991).

For all of this it is important to note that since 27 January 1847 the Governor of the Cape of Good Hope was also appointed as "high commissioner for the settling and adjustment of the affairs of the territories in Southern Africa adjacent or contiguous to the eastern and north-eastern frontier of the colony" (Theal 1908: 38). This means that the British Empire had extended its claims to an undefined area of Southern Africa, in which it was neither present nor exerted control. Although this ruling was made with little knowledge about the region it spoke of, it had two important consequences, which have to be kept in mind when pondering the customary law of Basotho and Batswana. First of all, the local customs could be overruled whenever a settler or imperialist of European descent felt dissatisfied with them (Aguda 1973: 54-56). It only required approaching the High Court or Subordinate Courts, which usually decided without involving local representatives. Enforcement of judgments depended on the capabilities of colonial powers though, which became likely only after the gradual military conquest of the territories. Secondly, the Roman-Dutch law, which will be discussed in the next subsection, became the common law of all the areas as far as the state was involved (Aguda 1973: 57). Hence, the Tswana and Sotho norms received unlimited validity only in the absence of intruders.

However, the Basotho and Batswana actually managed to keep the Britons and Trekboers at bay in some important regards. The Basotho protected a retreat area in the Kathlamba mountains, well equipped with water. Their leader Moeshoeshoe managed to secure their survival by a sophisticated strategy of diplomacy and trade (Eldredge 2007: 28-31). The Tswana resided in an arid area, whose natural parsimony imposed on them a flexibility of their internal social organisation, but it also caused temporary hostilities towards neighbouring groups. In times of crises due to bad harvests or perishing cattle, they either recombined their communities into forms with better chances of survival, or they raided other

groups. Throughout, they dominated Masarwa and Kgalagadi people (Okihiro 1973: 104; Schapera 1955: 32).

After 1816, migrating people from the east coast invaded the areas of Sotho and Tswana people and caused a significant increase in warfare.[4] The character of conflicts changed after Mzilikazi's Matabele moved north-eastwards, and Trekboers and Capetonians approached from the South after 1836. Moeshoeshoe repulsed Cape incursions at Viervoet in 1851 (Thompson 2001: 95).

An alliance of Batswana *merafe* under the leadership of Sechele repelled another attempt of conquest by the Trekboers in 1852 and 1853, which secured them a certain degree of autonomy in internal affairs for the next decades (Ramsay 1991; Okihiro 1973). The successful defence of partial independence was confirmed by the study of Hodgson (1932: 24-25), who reported that the Proclamation No. 43 of the High Commissioner from 10 June 1891 had prevented the acquisition of land by settlers west of the route from Mafikeng to the Tati district.

Initially, the Basotho as well as the Batswana organised themselves in almost self-sufficient groups. They traded only for a limited range of items like beads, iron hoes or copper ornaments, which they could not produce themselves (Denoon 1999). Their internal supply was arranged in a sophisticated system of "wealth-in-people" (Comaroff and Comaroff 1991: 141), in which each provisional relationship was governed by its own "value register" (Guyer 1993). This means that economic provision was achieved by inclusion in the social groups, in which protection and allegiance were balanced according to status, capabilities and needs of people. Individuals could not simply fall out of society.

Exchanging items that were calculated according to exchange value was a rare complement to this, mainly in exterior relations for the acquisition of goods that could not be produced locally. The range of such items and registers was enhanced as a consequence of the contact with Europeans from the south, introducing guns, horses and distilled alcohol as the most significant novelties (Okihiri 1973: 105; Ashton 1967: 134).

The political heads were leaders of segmentary polities, i.e. groups with similar internal orders and dynamics. These groups showed a tendency of expansion only if the environmental conditions allowed for it. Among the Batswana, membership of a *morafe* resulted from the place of birth as a rule, but it was negotiable in case of conflict. A switch of allegiance required the approval of the new chief. Although it resulted in an inferior position in the new community at first, accepted

4 We cannot discuss the *difaqane* here, but for the huge difference of its understanding and the role of myth and historical invention compare Bryant (1905) with Hamilton (2009).

foreigners were granted a say and could prove themselves. Almost all Tswana communities comprised such groups of migrants (Schapera 1955: 5, 21, 23). The Basotho had constituted themselves from groups actively resisting the attacks of settlers under the leadership of Moeshoeshoe. Political rivalries with the Baphuthi of Moorosi were finally fought out to the advantage of Letsie, the son of Moeshoeshoe (Thabane 2002b).

In Batswana polities, families of kin were grouped into larger units, the *makgotla*. "Its members co-operate in such major tasks as building and thatching huts, clearing new fields, weeding, and reaping; and they help one another with gifts of food, livestock, and other commodities. If big enough, the group may have its own little *kgotla*, presided over by its hereditary elder (*mogolwane*), the senior male descendant of the common ancestor whose name it bears." (Schapera 1955: 16) The political heads of these units were often the sons of the *kgosi*, and there existed a hierarchical division of labour. In the higher ranks of society, subordinate *malata* were assigned to them "to help them herd their cattle and to perform other tasks for them" (Schapera 1955: 20). The headmen were responsible towards the *kgosi*, and were ranked in their status according to historical origin and descent. Consequently, the *makgotla* of foreigners initially had the lowest status, but this could be gradually changed by intermarriage (Schapera 1955: 23-31).

This internal organisation of tasks and distribution of labour shaped the meaning of the vocabulary for *work*. It was not understood as an exchange value, but either as an activity to improve one's own family or as part of a more encompassing contribution to the maintenance of the community. It did not proceed without rivalry for social status, but purely selfish and instrumental work was despised (Comaroff and Comaroff 1991: 140-144).

The family groups belonged to the bigger unit of a *morafe*. Its leader had the main responsibility for managing possessions, assisted by the headmen of the *makgotla*. "All members of the tribe are entitled to the use of as much land as they need; and the tribal authorities must see that their claims are gratuitously satisfied." (Schapera 1955: 196) Also women, although not treated as equals, had the right to a strip of land of their own (Schapera 1955: 28; Ashton 1967: 146). This means that catering to the needs of own supporters and their well-being built the centre of ruling politics, and land was a *means* to achieve this goal. The complexity of mutually negotiated claims and needs built the "value registers" in the meaning of Guyer. If values of one register could not be translated into a different one, negotiations had to be extended to other registers and involve other needs, more people or longer periods.

The economic mode of production of Tswana tribes was agricultural and aristocratic, and it was growth-oriented in so far as successful cattle breeding led

to an expansion of the *morafe*. "As the cattle in its care increased, new cattleposts were formed and new wards of commoners created to look after them. The Chiefs also gave cattle and adherents to their sons in other houses, and placed each of these groups with its royal headman in one or other of the sections." (Schapera 1955: 26) Land was put to use in a diverse range of activities, which required a sophisticated governance on the part of the leaders. "They erect their settlements on it, cultivate it, graze their livestock upon it, and hunt over its surface. They use its water for domestic purposes and for their herds and flocks; they eat the wild fruits and other foods it produces, and make medicines from its vegetation; they convert its wood into fences, sleds, poles, rafters, and various utensils, and its reeds and grass into thatch and basketwork; they extract from it ornamental washes, the clay for their pots, and the earth for the walls and floors of their homesteads." (Schapera 1955: 196)

Among Basotho and Batswana, the ownership of the land rested in the leaders, but they were subdued to the fundamental goal of satisfying the justified needs of all members of their groups (Schapera 1955: 196; Ashton 1967: 144). Among the Batswana, there was even a stockpiling of land to meet the foreseeable needs of future generations (Schapera 1955: 200). In case of insufficient resources, it was the duty first of the head of the *makgotla*, and subsequently and finally of the leader of the *morafe*, to find a solution. The usual way was local extension or migration, less common was the splitting of the *morafe*, and warfare was the rarest solution because it was the most risky one.

This means that possessions were a means to serve the preservation of the community, and that the power of the leader depended on his ability to satisfy those who supported him. His power derived from their well-being, and their fortune was maintained by his successful allocation of resources. The mode of production indicated that a conflict-free continuation of a growing population depended on the availability of arable land, which came to an end in the early 19th century. Until then, conflicts were regulated by a combination of a fine-meshed process of socialisation of the adolescent and the exceptional option of exit from the community.

The hierarchy-preserving property of the Trekboers

Although it is common to refer to *the Roman-Dutch law* as the source of legal understandings of the Trekboers (Watermeyer 1963), it represents neither a unified and unequivocal system nor does it show a continuous chronology in the history of this group of people. To the contrary, the farmers on the frontiers of the colony constituted themselves as a deliberate *opposition* towards state authority since the first release of employees from the service of the *Vereenigde Oost-Indische*

Compagnie (VOC) in 1657. It was their decided *rejection* of the "government men" (Du Toit and Giliomee 1983: 79), which fed the later imagination of an *Afrikaner nation*.

Instead, it seems to be more appropriate to talk of a deeply rooted *custom* of property as a *dominium*, i.e. an absolute power obtained over a thing, which has its paradigmatic form in a plot of land. It was predestined for a racist and xenophobic society because of its explicit assumption of non-free attendees of society (Njotini 2017: 139). Although this concept is of ancient Roman origin, it belongs to the pre-classical era and is barely compatible to the Christian character that guided the collection and ordering of legal texts by the Dutch Enlightenment philosophers de Groot, Groenwegen, Voet, Vinnius and others, which constituted the legal tradition that is justifiably called Roman-Dutch law.

Only in a period that Thomas et al. (2000: 45-60) aptly called a "second life" of Roman law, theories and legal principles were developed from single cases and judgments. This body of knowledge unquestionably influenced South African courts which, however, did not appear north of the Cape of Good Hope until 1882. Before the British occupation of 1878 there was explicitly *no* distinction between the political and military authority, the religious leadership and the power of ultimate legal decision of the *Volksraad* as the governing body of the Trekboer communities. *Landdrosts* and *heemraden* were their executive personnel.

According to the addendum of the constitution of the Zuid-Afrikaanse Republiek (ZAR) from 19 September 1859, their principle of legal decision making was feudal by definition because it first named the order of the Dutch legal scholars Johann van der Linden, Simon van Leeuwen and Hugo de Groot as authorities to adduce, and then authorised their own central leadership to make a decision should these sources remain silent (Jeppe 1887: 116; Eybers 1910: 417). This procedure was in full accordance with the "lex citationum" of the Roman Emperor Valentinian III from 426 (Thomas et al. 2000: 33-34).

Moreover, there is a significant gap in the chronology of access to legal texts and legal institutions at least between the implementation of Graaf-Reinet as government post in 1786 and the first explicit reference to the legal works of van der Linden, van Leeuwen and de Groot north of the Gariep river in 1859. In article 21 of the famous "Drie en Dertig Artikelen" (*Thirty-three articles*) as the initial founding document of the Trekboer communities from 1844, which was confirmed in 1849, the legal principle had still been referenced in a rather unspecified way as "de Hollandsche wet" (*the law of Holland*; Jeppe 1887: 4). It seems not reasonable to assume the availability of legal or normative texts besides the Bible and other basic Christian texts after the beginning of the trek in 1835 (Du Toit and Giliomee 1983: 78-80). The circulation and awareness of authoritative Dutch legal texts

before that date has been seriously questioned early on (van Zyl 1907). Hahlo and Kahn (1960: 14) explicitly stated that the *Hollandsche Placaaten* "did not apply of their own force" but required an explicit enactment. But the *absence* of enacting authorities was a main cause of the conflict between Trekboers and the governmental authorities since the 1830s.

Hence, in accordance with our analysis of property among the Basotho and Batswana we have to analyse the social practices of the Trekboers, supplemented by a few written testimonies. More important than Roman-Dutch law was a very specific religious interpretation of the Bible. Sections 20 to 22 of the constitution of 1858 explicitly authorised the "Nederduitsch Hervormde Godsdienstleer, zooals deze in de jaren 1618 en 1619 door de Synode te Dordrecht is vastgesteld", (*Dutch Reformed Religion as laid down in the years 1618 and 1619 by the Synod of Dordt)* (Jeppe 1887: 37; Eybers 1910: 366) and its Heidelberg Catechism as the sole religion of the state. Nowhere else in the practices, sources and constitutions do we find a notion of order of such a precision.

There are two decisive points about the Synod of Dordt. First of all, it divided humanity into the two halves of redeemed and doomed individuals, rejecting any notion of freedom of will in this regard. It was foundational for the rejection of human rights and became constitutive in article 9 of the constitution of the ZAR from 1858: "Het volk wil geene gelijkstelling van gekleurde met blanke ingezetenen toestaan, noch in Kerk noch in Staat." (*The people do not want to allow equality of coloured with white residents, neither in Church nor in the State*) (Jeppe 1887: 36; Sinnema 2011).

Secondly, it justified the constitution of the Trekboer communities as segmentary societies, in which the external order of the world, the social constitution of the community, and the individual consciousness were explicitly *unified* and defended against any process of differentiation. The thirty-three articles of 1844 as well as the constitution of 1858 claimed the sovereignty to define the members of their community, constituted the state council as the sole institution imbued with political, military and legal authority consolidated on *religious* grounds, and marked each individual violation as a reason for exclusion. The inherent contradiction of this worldview consisted in the exclusion of obviously present "gekleurde", on whose labour force they depended.

The property of the Trekboers consisted in land they occupied with their families as they had done since 1657. Officially a "leningsplaats" (*leasehold*) from the despised government, it was governed by the ancient Roman idea of exertion of physical power over a defined area, including everything that could be qualified as a *thing*. Legitimacy of property rested in the process of seizure.

Internally, property was transferred by a defined procedure, justified by an acknowledged legal reason, or it could be acquired by taking control of a vacant thing without being objected to on legal grounds. The latter option of "occupation" was the attractive option for colonists, because it treated the land of other communities as "res nullius", i.e. land without a proprietor (Thomas et al. 2000: 178). The Calvinist confession in reference to the Synod of Dordt added the option to justify violent conquest of *heathens* to it.

The precise understanding of property became obvious from the reactions of Trekboers on the new legal order that the British Empire had introduced gradually to the Cape of Good Hope since 1811. Initial attempts to transform leaseholds into quitrent property were widely ignored (Harlow 1963: 211). The Ordinance 50 of 1828 removed some discriminations of autochthonous people in the legal order that had been colonially imposed on them, and the institution of slavery was abandoned in 1833. Consequently, former slaves and servants could move freely in this territory to which they had been transported or had been born in. However, this *natural* consequence was qualified as "vagrancy" and a violation of property rights by the Trekboers and could be qualified as an early precursor of today's xenophobia. The inevitable impasse of extending civil rights to all inhabitants without providing them with the means of subsistence was ignored by the Cape government, too.

In a letter from 19 November 1839 to an government official, the settler Swanepoel reported on the futility of applying *formal* rules of Roman law towards freed compatriots: "They have occupied land measured and allotted to me at Whaaikraal. Then I told them before witnesses that they were to leave, but they did not want to …" (Letter from P.J. Swanepoel to Mr Mijntjes, Beaufort West, see Du Toit and Giliomee 1983: 111). The dispute continued without a governmental solution. The feudal concept of exclusively owned land provided no solution because it neither imposed normative obligations nor offered economic benefits for sharing the limited resource of land. The Trekboer leader Piet Retief clearly declared his departure from the Cape Colony as a countermovement to the situation because he imagined to be able to continue the traditional way of life beyond the border of the Cape Colony (Du Toit and Giliomee 1983: 113-4). Actually, this exit reached the limit of the finite land even faster than the moderate expansion of the Batswana.

The trade-mobilising English property of the British Empire

After finally taking over the Cape of Good Hope from the Dutch in 1806, the British Empire gradually started to address deficiencies of a desired order, which they had already identified during their first occupation of the colony from 1795 to

1803. Although the strategy of the Empire had changed from direct to a more indirect rule after the loss of the United States in 1783, the economic expansion with the ever-growing need of resources and sales markets forced them into a transformation of Southern Africa.

Contrary to the Roman tradition conveyed by the Trekboers, the English common law understanding of property, which enabled and dominated the expansionist market economy of the British Empire, was based on the regulation of social relationships.[5] Not unlike property among Basotho and Batswana, the English institution had developed as a consequence of regulating competing demands in an aristocratic society. In an attempt to protect the current possession of land by tenants, but to safeguard the overarching long-term command of land by the lord at the same time, it generated property as a *bundle of rights* that regulated the different sorts of interests in land.

However, the difference was that the compromises of the 12th century required the establishment of an *independent* judiciary as a third instance between aristocratic leadership and local governance, which was endowed with the power to regulate the conflicts. It split the decision about equity from the exertion of political authority on the one hand, and the maintenance of a social equilibrium on the other. In other words, it differentiated law from politics. The independent social body of law gradually developed into a powerful, bureaucratic instance of the societal order, which protected the access to economic resources and safeguarded the mode of production. "Property derives from the state; it cannot exist prior to the state." (Palmer 1985: 7)

Although the British Empire refrained from revolutionary changes after taking over the Cape of Good Hope from the Dutch, it decisively began to establish its legal order. In 1811 and 1812, the new government sent out circuit courts to make the rule of law present in the areas distant from the Cape settlement. It respected the existing distribution of land, but subjected it to its own state bureaucracy with a "proclamation" about the "conversion of loan places to perpetual quitrent" by Lieutenant-General Cradock on 6 August 1813 (Jackson 1906: 12-5; Harlow 1963). The proclamation withdrew the paramount control of the government over leased land, and transformed it against the payment of revenues into autonomously controlled property of the farmers. It had the double effect of assigning rights to the farmers, while forcing them to generate gains from it at the same time. Karl Polanyi has analysed the effect of such a double move of freeing persons from personal dependency and, simultaneously, imposing the obligation to earn their

5 Although the *law of obligations*, which regulates social relations, constitutes an important part of the Roman-Dutch law, it does not deal with property.

own livelihood from producing and selling something on a market. Where Marx and Engels (1976: 487) had stated that "[a]ll that is solid melts into air", Polanyi (2001: 136-40) found that even deprived and subjugated people had no choice but to *repair* their social fabric by the constitution of "countermovements".

The countermovements to the British marketisation proceeded in two phases. The first was characterised by the imperial goal to make the colony self-sustaining in order to reduce the costs. Internally, the government encouraged the equality of all inhabitants before the law in order to encourage them to become economically active. The second phase was characterised by the imperial interest to extract profits from the mineral resources of the countries and, hence, to mobilise subjugated people for wage labour.

In the first period, the extension of a legal system to the colony soon revealed the political effects of the exclusionary concept of property that had been established by the farmers on the frontier. Andries Stockenström, son of a *landdrost*, urged the governing Lieutenant-General in a 1828 memorandum to remove legal restrictions from the non-white population to provide a "chance of the natives recovering themselves", because they could otherwise become "dangerous to their conquerors" (Du Toit and Giliomee 1983: 104-5). It resulted in a procedure of legal equalising that stimulated the countermovement of the Trekboers, as discussed in the previous section.

Timothy Parsons (2014: 6) explained the rationale behind the disposition of the British Empire to wage a bitter conflict with the Trekboers. "Confident in the supremacy of the Royal Navy and laissez-faire capitalism and lacking significant economic or political competitors, British free traders, Christian evangelicals, and budget-conscious politicians and military strategists viewed most of the overseas remnants of the first British Empire as an unnecessary expense … Why spend the resources and manpower to conquer and govern exotic non-Western societies when British merchants, backed by Royal Navy gunboats, easily found new opportunities for lucrative trade and investment in Latin America, Africa, the Middle East, and Asia on their own?" As part of this strategy, the Cape of Good Hope was granted limited self-governance until 1853 (Jackson 1906: 491-530). This limited independence indeed encouraged economic industriousness. In 1853, the export of copper ore amounted to just £3,346 of total exports worth £733,245. This amount was increased to £25,056 in 1854 and more than doubled to £54,337 in 1855. The rest of the exports consisted mainly of agricultural produce and ivory (Theal 1908: 136).

It was this profitability of mineral resource extraction that initiated the transition to the second phase of British imperialism in Southern Africa. The period of change from a market economy aimed at the exchange of goods between

equals towards a racist economy with the intention to exploit humans and mineral resources to the maximum can be dated from the *Masters and Servants* Ordinance from 1 March 1841 to the enactment of the *Glen Grey Act* on 31 August 1894.

The *Masters and Servants* Ordinance transformed every economic and labour relationship into a contractual one. It explicitly ruled that "any person employed for hire, wages, or other remuneration" (Jackson 1906: 570) or contracted as an apprentice had to be furnished with a contract according to the definition of the ordinance. Terms of engagement were limited, and any automatism in regard to family members like inheriting the service of women or children was out-ruled. Should contracting parties show themselves unable to agree on wages, state authorities would step in. Of course, this law still allowed for the exploitation of workers, but it directed the development towards a state in which all kind of labour would be performed by any qualified person based on a contractual agreement for some remuneration.

However, the exploitation of industrially valuable minerals and the development of new means of transportation and communication encouraged the imperial powers to support a different path of economic advancement, which aimed at a maximisation of profits. It was characterised by the Glen Grey Act of 1894 (Thompson and Nicholls 1993). It regulated the inheritance of a piece of land "according to the rule of primogeniture by one male person to be called the heir" (Jackson 1906: 3378), which meant that only one child per family was able to remain on the land. Part IV of the law introduced a "labour tax" of initially 10 shillings per head, which compelled the people to seek wage labour. The Glen Grey Act turned the path of development back to discrimination against, and the exclusion of, inhabitants of the country.

The development from the Master and Servants Ordinance to the Glen Grey Act showed how British imperialism integrated the normative racism of the South African settler society, which became finally institutionalised with the Constitution of South Africa Act of 1909 and the Land Act No. 27 of 1913 (Ngcukaitobi 2018: 231-55). The latter still builds the barrier for the redress of colonial dispossessions according to Section 25(7) of the South African Constitution of 1996.

Integrating Southern Africa into the imperialist world market

The political solution of unifying these different and competing modes of property consisted in the establishment of the first customs union in the world. The history of SACU dates to the last quarter of the 19th century. Today members South Africa, Lesotho, Botswana, Eswatini, and Namibia joined under different historical and geopolitical conditions. SACU came out of a series of customs conventions

and agreements in 1889, 1898, 1903, 1906 and 1910 until it was transformed into a customs union in 1969 when it assumed its current name and institutional form.

Its establishment was an interesting option as exploitation began of minerals, diamonds and gold because it required financial resources for knowledge and investments (Beinart and Dubow 2021: 109-54). SACU could generate this money by levying taxes on exports.

Territorialisation, on the other hand, became ever more rigidly defined in extraction and exploitation of resources and the control of the labour force. There was a clearer shift from general forms of autonomy and sociality to more systemically hierarchical forms hinged on racial supremacy and to territorial borders that would mature into nation-states. The period saw an asymmetric integration of the African communities into the capitalist global market economy. The preconditions for this transition were land dispossession, commoditisation of production and labour, and the introduction of colonial commerce (Maliehe 2021a; Keegan 1985).

Initially, the Basotho were among the first groups to seize economic opportunities that came with the exploitation of the minerals. By the 1870s, the missionaries observed that the Basotho's territory was the "granary" of some emerging mining towns (Germond 1967: 459). For example, Paul Germond (1967: 324) observed in 1874: "Although far removed from the main current of events, the Basuto have nonetheless reaped their share of the general prosperity."

British imperialism produced its own anti-thesis, the African counter-movements in protests for autonomy and self-rule. By the end of the 1870s, various African societies went to war against the British. For example, the Anglo-Zulu War was fought in 1879. The same year, the Xhosa and Baphuthi people went to war with the British, and the rest of the Basotho in 1880 (Feinstein 2005; Maliehe 2021).

These African responses affected British policies. Instead of outright conquer and subjection of the African people, the British had to deploy different tactics to ensure the extraction of cheap labour. In such cases, they allowed the African to maintain a degree of relative autonomy back home while providing cheap labour in the mining epicentres of Kimberley and the Witwatersrand. The routinisation of a cheap labour migration system that emerged depended on local leaders extracting labour in the villages to service mining interests in the big cities in return for sporadic commissions and benefits. In this regard, the chiefs enforced colonial tax and rules (Wolpe 1973; Maliehe 2021a). In the historiography of African history, a term used to define the strategy that was employed by the British to

govern its subjects was a system of "indirect rule", a "divide and rule" style of governance (Mamdani 1996).

As a corollary to this, the system laid fertile grounds for persistent xenophobic clashes among the Africans since then, escalating in the post-independence period. A regional economy developed that coerced and attracted people to its centre from around the region. Freedom of movement collapsed while stringent policing measures, along racial lines and exclusive identities, increased with the consolidation of national identities in fixed new colonial borders (Feinstein 2005: 47-73).

The new economic and political arrangement was oddly paradoxical: designed along nation-state doctrines, it constructed fictitious identities and belongings of simultaneous inclusivity and exclusivity. It was layered. In some cases, communities that belonged together were separated by colonial borders, while others were brought together. As a result, conflicts brewed from within national borders.

Economically, the African communities were excluded from emergent domestic economies, on the one hand, and the regional centres, on the other. Both the national and regional economies came to be dominated by settlers and imperialist mercantile groups. The result was that the African majority belonged meaningfully to neither economy. They assumed identities of migrants, sojourners with loss of ties to domestic economies and the city. They occupied economic and political spaces of marginality, with no meaningful say or participation in the affairs that affected their lives. At the same time, their legal status was increasingly discriminated against by the rulers (Plaatje 1982).

The British began to integrate the African colonial economies into formal regional economic institutions in order to structure the relation between local expenses and imperial profits. The role of what is today SACU was indispensable. The state regulated the people and their movements. Economic institutions controlled the movement of money and goods.

The Cape of Good Hope and the Oranje Vrijstaat established the customs union, the CUC, in the Customs Union Tariff Act No.1 of 1889 to resolve their trade disputes. Signed on 7 June 1889, the convention established a common external tariff and free trade zone. Trade disputes emerged due to the fact that by the mid-19th century, the British controlled global trade, and the movement of goods in and out of the region by conquering major seaports and heavily taxing the landlocked economies. The main contracting parties of the Customs Union Act of 1897 determined customs duties on the advisement and consent of their legislative councils and assemblies in order to finance the internal establishment

of industries and market infrastructures. The rate of customs was determined by the market value of the goods.

These developments conflicted with the interests of the still autonomous ZAR because the British were particularly keen to stop the Trekboers from reaching the seaports, which would give them more autonomy (Theal 1883: 170). Access to seaports would reduce the Trekboers' dependence on the British-controlled seaports, and the "the Free State would be able to import arms and ammunition without having to secure permission from British officials in the Cape" (Thabane 2002a: 91). The ZAR negotiated access to the seaports with Portugal, hoping to gain access to seaports through Lourenço Marques (Lundahl and Peterson 1992: 98-9).

It was only after the 1898 Convention that the ZAR joined the customs union following lengthy persuasions. In 1899, the republic finally signed a *Treaty of Friendship and Commerce* with the Oranje Vrijstaat and accordingly signed up for inclusion into the customs union. Natal also joined the same year (Lundahl and Peterson 1992: 98-9). Nevertheless, opting to distance itself from the British, the ZAR had charted their own import routes with the Portuguese. After the Delagoa Bay railway line between Pretoria and Lourenço Marques was completed in 1890, it imported goods (Maasdorp 1982: 12).

From the late 1890s, the British were integrating their colonies into the customs agreement as a way to consolidate their power and imperial network. They acknowledged the new geopolitical entities while claiming suzerainty and economic control. The social flip side was the production of perpetual and conflicting politics of identity, as people competed for resources. This awkward and systemic simultaneity of inclusion and exclusion combined into self-perpetuating terrains of resentments among the people on the ground, xenophobia as it were. This new order determined who were "citizens" and "subjects", or "insiders" and "outsiders" to borrow Mahmood Mamdani (1996) and Francis Nyamnjoh's (2006) analogies.

Failing to incorporate the British High Commission Territories (Bechuanaland, Swaziland and Basutoland) into South Africa in 1909, the British integrated them into a customs agreement with the latter, the 1910 Customs Union Agreement, CUA (Maliehe 2021b). Together with colonial tax, customs became one of the main ways through which first the Cape Colony and then Britain financed the colonial administrations (Thabane 2017: 13-14).[6]

6 After independence in 1966, SACU revenues became one of the main sources of national income, constituting averagely 60% of the annual national income.

When Basutoland and Bechuanaland were integrated into the customs union, they were included "under a separate protocol which categorised them as second-class members with diminishing rights", and with no voting rights. The prevailing justification at the time was that the High Commissioner would act in their interest because "their imports were insignificant in comparison with those of the colonies and they did not attach very great importance to the tariff" as Maasdorp (1989: 13) observed.

A temporary resolution came out of a short document signed four times by Gladstone, the Governor of the Union and High Commissioner, on behalf of the three territories. This was the 1910 Customs Union Agreement (CUA) signed on 29 June 1910 in Potchefstroom. The agreement established an economic partnership between the Union and the Territories.[7] Controlled from the Union's Treasury, the agreement established a revenue-sharing mechanism through which members proportionally received an average amount of the total customs and excise duties collected and placed in a common revenue pool (Gibb 2006: 589).

By including these territories into the customs union, the British Empire achieved the inclusion of the various territories of Southern Africa, regardless of their political order and imagined community, into the profit-oriented world market. The CUC would guarantee the transfer of value to the distant centres of capitalism in Europe and North America. At the same time, it seized all benefits of the inequality of populations in Basutoland, Swaziland, South Africa and Bechuanaland.

To this day, SACU revenues constitute a significant share of national incomes of member states. Major contributors are trade in services, production and equipment in agriculture, mining, energy, communications, distribution trade, transport, financial and business services, general government procurements and personal consumption items (SACU 2021).

The statistics above demonstrate two perpetual tensions; economic and political inequality, which mutated into the 21st century. South Africa, the economic giant, continues to attract various African communities from around the region, with new waves of migrants coming from other parts of the continent in search of a livelihood. These new waves are pushed by various economic and political hardships back home. In South Africa, they run into conflict with the marginalised African majority in competition for scarce economic opportunities. Without citizenship documents, many migrants today endure "a new apartheid" (Mpofu-Walsh 2021) in South Africa.

7 South-West Africa (Namibia) was included in 1921 after South Africa took over from the Germans in 1915.

Xenophobia as a phenomenon of a competitive South Africa

Our analysis started from the argument that xenophobia is rooted in the contradiction between the legitimation of democracy by granting unconditional human rights and the requirement of competitive nation states on the world market, which have to secure the interests of their citizens. This specific constellation is historically rooted in the building of nation states and the establishment a global capitalistic economy in the 19th century.

The historical analysis of the specific case of South Africa is interesting for three reasons. To begin with, its mixed legal tradition provides a special protection of illegitimate and violent dispossessions of the undemocratic past. This feeds the most extreme social inequality of the world, which provokes xenophobic attacks by South Africans against other African nationals. The second reason is the establishment of the first customs union of the world in the endeavour to generate income for a number of colonies – besides South Africa these are today's Lesotho, Eswatini, Namibia and Botswana – for the internal expenses of the market economies. This is interesting even today as it offers a supranational and regional foundation for participation in global trading. Finally, the side-lined concepts of African property contain elements for an alternative concept of citizenship and the world economy. We explain this last point by summarising our arguments.

We showed that the English common law concept of property has similarities with the traditional understandings of the Basotho and Batswana, because it was initially established to regulate conflicts between present users of land and paramount owners, who had the capabilities to protect their possessions. Although the principle of exclusive private ownership became dominant for the expansion of the British Empire, its basic justification by the legal equality of all subjects was not transferred to Southern Africa.

Instead, it only built the framework for the survival of Roman-Dutch private law in South Africa (Van den Bergh 2012). The problematic result of this legal tradition consists in its still effective justification of violent land captures during colonial wars (see s 25(7) Constitution of South Africa). We argued that *occupatio* as a legal principle of the Trekboers to acquire allegedly freely available land had only survived as a custom of the settlers, who neither performed formal legal procedures nor documented the seizure of farm land after 1835. Their land theft was formalised only retroactively, as was the establishment of Roman-Dutch legal procedures.

Additionally, the legal principle of the Trekboers was rooted more in their racist interpretation of Christianity according to the Synod of Dordrecht than in

the law as outlined by the Roman-Dutch tradition. They utilised the exclusionary effect of the Calvinist distinction between redeemed and doomed humans to justify their social division between "*blanke ingezetenen*" and "*gekleurde*" that remained valid until 1994. By integrating this legacy into common law, the British carried the illegitimate dispossessions on. It still shapes the spaces of the South African landscape today (Mpofu-Walsh 2021: 35-56).

The coalition between British commerce and settler racism not only laid the foundation for the exclusionary effects on property-less people, it also sidelined an alternative conception in African communities. In the traditions of Basotho and Batswana, land was functionally subordinated to the maintenance of the community. Instead of conceptualising it as the foundational resource of market exchanges, it was utilised to achieve the principal and overarching goal of supplying the community and organising its social interaction. Of course, this mode was applied in a still open environment that allowed the size of communities to adjust. However, it was superior to the concept of human rights with its paradoxical consequence of making a *denial* of humaneness conceivable by restricting citizenship. Defining land and property as subservient to sustainable development did not allow the legitimacy of a person to be taken into question.

The history of SACU showed that the alliance between imperialists and settlers was performed as an element of integrating South Africa into the world market. In other words, it was the global competition for profits that caused the institution of African nation states as communities based on private property. However, the character of SACU has changed during the decades, and it became the foundation of regional revenue generation. And at least Botswana, South Africa and Namibia developed into constitutional states. Therefore we hope that our historical analysis offers arguments for the further development of truly human democracies, in which poor foreigners receive solidarity instead of xenophobic hatred.

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