

A legal history of oath-swearing

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Dissertation submitted in fulfilment of the requirements for
the degree *Master of Law* at the Potchefstroom Campus of
the North-West University

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April 2017

ACKNOWLEDGEMENTS

During the course of this study, I incurred several debts and I wish to acknowledge the following people and institutions for their support during this endeavour:

- My study supervisor, **Prof Willemien du Plessis**, for her support and guidance. I would like to thank her for the role she played in making this dissertation possible and for not giving up on me when the going got tough; and for always reminding me to "put it in a foot note."
- **Prof Heléne Combrinck** for her words of motivation, for listening to me talk about this topic for hours and always responding with: "It's a good idea, but I think it's too long."
- **Dr Paul J du Plessis** for graciously providing me with his unique input.
- My friends and colleagues at the North-West University, the Faculty of Law, the School for Languages, and the School for Legal Practice for their continued support. I would like to mention the following people in particular: **Chantelle Feldhaus, Gerda Wittmann, Helanie Jonker, Inge Snyman and Michéle Schoeman.**
- **Christine Bronkhorst** and the staff of the Ferdinand Postma Library of the North-West University Potchefstroom Campus for always being ready and able to help me find sources, even if those sources were located in the dark corners of the archives.
- **Prof Rena van den Bergh** for her wise words: "Philip, it's a dissertation, not a lifestyle. Finish it!"
- **Liezl Wildenboer** for receiving me for a very beneficial research visit.
- **My parents and brothers**, who provided continued support and who made it possible for me to write this dissertation.
- The **Southern African Society of Legal Historians** and its members for their support and guidance throughout this endeavour.
- **Elmari Snoer** for the language editing and proofreading of the dissertation.

- The library staff at the **Universidad Pontificia de Salamanca** in Spain.
- Lastly, I would like to thank **God** for getting me here in the first place.
Proverbs 4:7 "The beginning of wisdom is: Acquire wisdom; And with all your acquiring, get understanding." I hope in the end I got understanding.

ABSTRACT

South Africa has a diverse population with various cultures, religions and traditions, all of which enjoy equal protection. This position may cause conflict in areas where the law and religion intersect. One of these areas is oath-swearing. Due to the legal pluralistic nature of South Africa, it is necessary to examine these areas of intersection to ensure that the Constitutional rights and values are adhered to. Oath-swearing is a legal action with religious implication as a proclamation of the truth or promise and is manifested in two forms, an assertory oath or a promissory oath. The purpose of this study was to determine how the external and internal legal history of oath-swearing influenced the practice of oath-swearing during specific selected eras in South African legal history to make some recommendations for the South African law. A transdisciplinary investigation of the practice of oath-swearing is undertaken by applying selected theories of legal theory, linguistics and communication, sociology and religion to the practice of oath-swearing. This study followed the development of the practice of oath-swearing, in both its assertory- and promissory oath forms in selected eras in the Roman law and the Roman-Dutch legal history, which are some of the pillars of the South African legal system. Selected eras in the development of the practice of oath-swearing were furthermore investigated as it developed in South Africa from its settlement until the current Constitutional era. In addition, the legal pluralistic nature of the South African legal system is taken into consideration and oath-swearing in Islam, Judaism, Hinduism, and African Customary law are briefly investigated. The study concluded that the current legal position regarding the practice of oath-swearing in South Africa constitutes unfair indirect discrimination on the basis of religion and culture. In order to promote fairness and equality in the administration of justice, it is recommended that the relevant sections which require an oath to be sworn are rewritten to provide intended swearers with the option of swearing an oath according to his or her own religion. It is also recommended that the person who administers the oath, inform the intended swearer of the implications of oath-swearing, what constitutes perjury or the breaking of an oath, and the consequences thereof.

Key words: oath, oath-swearing, promissory oath, assertory oath, Roman law, Roman-Dutch law, legal history, legal pluralism, and oath-swearing in Islam, Judaism, Hinduism, and African Customary law

OPSOMMING

Suid-Afrika het 'n diverse bevolking met 'n verskeidenheid kulture, gelowe en tradisies waarvan almal gelyke beskerming geniet. Hierdie posisie mag moontlik konflik veroorsaak waar die reg en geloof mekaar oorvleuel. Een van hierdie gedeeltes behels eedaflegging. Weens die regspluralistiese aard van Suid-Afrika is dit noodsaaklik om hierdie oorvleuelings onder die loep te neem en vas te stel of dit aan die Grondwetlike regte en waardes voldoen. Eedaflegging is 'n regsaksie met 'n geloofsimplikasie as die verklaring van waarheid of belofte en bestaan in twee vorms, 'n assertoriese eed en 'n promissoriese eed. Die doel van hierdie studie was om vas te stel hoe die interne- en eksterne regsgeeskiedenis van eedaflegging die gebruik van eedaflegging beïnvloed het. Die studie het spesifiek gefokus op geselekteerde eras in die Suid-Afrikaanse regsgeeskiedenis ten einde aanbevelings vir die Suid-Afrikaanse reg te maak. Derhalwe word in transdissiplinêre studie van eedaflegging onderneem, deur geselekteerde teorieë in regsteorie, linguistiek en kommunikasie, sosiologie en geloof toe te pas op eedaflegging. Die studie volg die ontwikkeling van eedaflegging vir beide die assertoriese- en die promissoriese eed gedurende die spesifieke eras in die Romeinse reg en die Romeins-Hollandse regsgeeskiedenis wat sommige van die pilare van die Suid-Afrikaanse regsisteem vorm. Geselekteerde eras in die ontwikkeling van eedaflegging is ook ondersoek in die ontwikkelingsgeskiedenis van Suid-Afrika vanaf vestiging deur die Nederlanders tot die huidige Konstitusionele era. Die regspluralistiese aard van die Suid-Afrikaanse regsisteem is ook in ag geneem deur eedaflegging in Islam, Judaïsme, Hindoeïsme en Afrika gewoontereg te ondersoek. Die studie het bevind dat die huidige regsposisie met betrekking tot eedaflegging in Suid-Afrika, onregverdige indirekte diskriminasie op grond van geloof en kultuur uitmaak. Ten einde regverdigheid en gelykheid in die regspleging te bevorder, word daar aanbeveel dat die relevante artikels wat die sweer van 'n eed vereis, herskryf moet word om vir voorgenome sweerders die opsie te gee om 'n eed af te lê ingevolge sy/haar geloof. Daar word verder aanbeveel dat die persoon wat die eed afneem, die sweerder moet verwittig van

die implikasies van eedaflegging, wat meineed of eedbreuk is, en wat die gevolge daarvan sal wees.

Sleutelwoorde: eed, eedaflegging, promissoriese eed, assertoriese eed, Romeinse reg, Romeins-Hollandse reg, regsgeskiedenis, regspluralisme, en eedaflegging in Islam, Judaïsme, Hindoeïsme en Afrika gewoontereg

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LIST OF ABBREVIATIONS

CT	Codex Theodosius
D	Digest
G	Institutes of Gaius
GG	Government Gazette
GKSA	Reformed Church of South Africa (Gereformeerde Kerk van Suid-Afrika)
GN	Government Notice
Inst	Institutes of Justinian
NP	National Party
Proc	Proclamation
UDF	Union Defence Force
VOC	Vereenigde Oost-Indische Compagnie (Dutch East India Company)
ZAR	Zuid-Afrikaansche Republiek

Chapter 1 Introduction

There is a history of oath-taking. Homer's heroes swore; the gods swore; the Romans swore by their swords and their Caesars; the Egyptians by cats and onions; the East Indian by holding a cow by the tail ...¹

South Africa's population is diverse and different groups act in accordance with their culture and religion,² as recognised within the greater South African society.³ This recognition may cause a magnitude of problems with the application of certain legal rules. One of these rules is the swearing of an oath.⁴ An oath can be broadly defined as a legal action with religious implication, or a solemn proclamation of the truth of a matter.⁵

Silving⁶ is of the opinion that the oath which is used today in most modern jurisdictions can be traced back to the pre-animalistic period of culture. People believed in the magical powers of supernatural beings and if someone should

¹ The Congressional Record *Daily Alta California* 2.

² The author will use some linguistic devices to maintain the chronology of the historic narrative throughout this study. One of these devices is the use of the historic present tense only in specific required circumstances. This tense serves to partition and order the information in segments in support of the narrative. The usual structure of the historical present is not a blatant disregard for the past tense; it is merely the shifting between tenses and variation on tenses, to accurately describe events which are unfolding concurrently in a narrative. The general structure of the application of this tense will begin with what is referred to as the "abstract" which includes the purpose of narrative - this is done in the past tense. This is followed by an "orientation" which includes the basic facts necessary to understand the rest of the narrative - this is done in the past tense as well. After the orientation the plot will follow - this is where a large percentage of the verbs might be in the historical present to indicate the order of actions and their relationship to other aspects of the narrative. The narrative will usually conclude using past tense verbs to ensure that the chronology is preserved. This linguistic device is quite useful in historical studies, but constant application thereof might cause confusion. Therefore, the historic present tense will only be applied in cases where several historical events occur at the same time and it is necessary to divide the events through verb tenses. For more information on the use of the historical present, refer to Wolfson 1979 *Language* 168-182.

³ Sections 15, 30 and 31 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

⁴ It is important to note here that this study pertains to the invocation of a Divine deity for a specific legal and/or religious reason. This differs from a situation where *swearing* refers to using expletives and profanities, sometimes in connection with a reference to a deity, for another reason, and in another fashion, completely removed from the motivations identified below (see Chapters 1 and 2 below). It is for this reason that the author actively chose the spelling *oath-swearing*. This is done to differentiate it from *oath swearing*, which may cause confusion as it could cause the term *oath* to be defined as an expletive, and *swearing* as a verb - the act of using an expletive.

⁵ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 1-2.

⁶ Silving 1959 *Yale Law Journal* 1330.

curse another the supernatural beings will give effect to this curse. This is why the oath is considered to be *judicium dei*, where divine judgment awaits those who deign to lie. The oath can be likened to a kind of *magical* act in the form of a self-curse. A person would swear an oath where the maker of a promise swears about events of the past or the future and if this promise should be broken a curse would befall the swearer as divine retribution.⁷ The swearer will, due to a great fear, adhere to this oath.⁸ The modern monotheistic religions all still refer to the procedure for the swearing of an oath and God is recognised as the only entity with the inherent ability to punish perjury. The oath in its ancient form developed in accordance with the latest rationalisations of the oath in religion and law. The followers of these religions would adhere to the oath by virtue of their faith, provided that the oath was sworn in accordance with the principles recognised by their faith.⁹

According to Milhizer,¹⁰ oath-swearing is virtually a universal custom but cannot be studied from its earliest histories due to the fact that the swearing of the oath predates recorded history and academics can only infer from context that oath-swearing took place by studying texts like religious texts and surviving works of literature and culture. Bearing this in mind, different ages recognised a myriad of oaths which were sworn in a variety of ways all for the same reason – truth or loyalty.¹¹ Most of these oaths are no longer in existence because the conditions that prompted the swearing of these oaths have long since become obsolete.¹² Some of the oaths survived because the persistence of the circumstances which made the swearing of the oath essential.¹³ Mann¹⁴ is also of the opinion that the practice of oath-swearing is one aspect of human behaviour shared by all the peoples of the world. Agreeing with this statement, Milhizer¹⁵ assumes that the

⁷ Tyler *Oaths; Their Origin, Nature and History* 9-11. The curses that would befall someone who commits perjury are discussed in Chapter 6. Farid 2006 *New England Law Review* 556.

⁸ Silving 1959 *Yale Law Journal* 1330.

⁹ Silving 1959 *Yale Law Journal* 1331-1332.

¹⁰ Milhizer 2009 *Ohio State Law Journal* 6.

¹¹ Farid 2006 *New England Law Review* 557.

¹² Mir 1990 *Islamic Studies* 7.

¹³ Mir 1990 *Islamic Studies* 7; Tyler *Oaths; Their Origin, Nature and History* 9-16.

¹⁴ Mann 1917 *The American Journal of Theology* 260.

¹⁵ Milhizer 2009 *Ohio State Law Journal* 6.

oath is a universal phenomenon, but this assumption of the universality of the oath might not be correct. Although the oath is prevalent across scores of nations and millennia of cultural and legal development, Silving¹⁶ states that the oath is not absolutely universal as China has no oath-swearing tradition. When Silving and Milhizer are taken into account, it seems that the oath is, to a certain extent, somewhat universal in its swearing and structure in that most nations and civilisations used oath-swearing for religious or legal purposes. This causes the oath to be ubiquitous rather than universal.

Tyler¹⁷ approaches the motivation required for the swearing of an oath with some scepticism by stating that the swearing of an oath might be religiously moot and a mere formalistic process. The reason he provides for this conclusion is that it is quite unnecessary to call upon a deity to witness the proceedings and punish falsehoods, because the deity (in this case the Christian God) is always a witness to what humans do and will punish wrongdoing without being asked (or invoked) to do so.¹⁸ It can be argued that the swearer does not call the Christian God's attention to the proceedings, rather that the swearer's attention should be drawn to God in this time of swearing to take cognisance of the impending punishment in the case of falsehood or perjury.¹⁹ Farid²⁰ makes an argument for the relevance, albeit marginal, of the oath in legal proceedings. She states that a sense of guilt derived from the invocation of the name of the divine or swearing on a holy book might cause swearers to be motivated because of the shame they might suffer in the case of perjury.²¹

South Africa has in essence two types of oaths.²² The first oath is the assertory oath. This oath is sworn by people who want to assert something, which took

¹⁶ Silving 1959 *Yale Law Journal* 1337.

¹⁷ Tyler *Oaths; Their Origin, Nature and History* 13-14.

¹⁸ Tyler *Oaths; Their Origin, Nature and History* 13-14.

¹⁹ Tyler *Oaths; Their Origin, Nature and History* 14. See 7.4 for an example of an oath, which indicates that it is sworn in the presence of God.

²⁰ Farid 2006 *New England Law Review* 555-556.

²¹ Farid 2006 *New England Law Review* 556. See Chapter 4 for the reaction of Dutch legal historians on the practice of touching objects to amplify oath-swearing.

²² Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 18-23. This study pertains to oaths sworn verbally and matters requiring oaths-swearing in a written form are excluded from this study, for example affidavits.

place in the past, as the truth. This oath is most frequently used in affidavits or courts of law across South Africa.²³ This type of courtroom oath is intended to add weight to the testimony of witnesses by emphasising the importance of the undertaking and of the truth in the matter. The second is the promissory oath.²⁴ This oath may be defined as an oath sworn by a swearer regarding future endeavours. The swearer will either do something or will refrain from doing something, for example, the oath of office of presidents and statesmen.²⁵ This study investigates both these oaths, with their functions in law and with reference to religion and society.

The courtroom oath has a dual function in both society and the courts. The first is that it is a legal action. One swears the oath in courts because it is part of the procedure of a trial and it can be seen as purely formalistic. There is, however, another function that the oath also performs which differs greatly from the purely formalistic oath-swearing that takes place in courts. This function is religious in nature and grave in execution. This is the action where a deity is called upon to bear witness to proceedings and take action if the swearer should perjure himself or herself.²⁶ What this entails is that a follower of a certain religion makes an oath to the deity of that religion, and in doing so an obligation vests in the deity and the deity is charged with the responsibility to ensure that the follower speaks the truth.²⁷ The general expectation is that the deities, who are now parties to this case, will not sit idly by while oaths are sworn and broken in their name.²⁸ The swearer uses his or her religion as an added motivation to tell the truth. The swearer risks the reward stipulated by the religion for a life lived according to the religious prescriptions.²⁹ This risk is not taken lightly and is therefore the most valuable method of ensuring that the swearer tells the truth.³⁰ If the swearer,

²³ As per s 162(1) *Criminal Procedure Act* 51 of 1977.

²⁴ Please note here that although the Hippocratic oath is a form of promissory oath, it will not be discussed in this study, because of the fact that the Hippocratic oath has very little legal substance.

²⁵ Schedule 2 of the *Constitution*.

²⁶ Silving 1959 *Yale Law Journal* 1330-1331; Milhizer 2009 *Ohio State Law Journal* 6.

²⁷ Silving 1959 *Yale Law Journal* 1330-1331; Milhizer 2009 *Ohio State Law Journal* 6.

²⁸ Hartland *Primitive Law* 174.

²⁹ Coriden, Green and Heintschel (eds) *The Code of Canon Law: A Text and Commentary* 844.

³⁰ Birney *Salisbury Oath* 30.

however, has no religious affiliations whatsoever, the swearing of an oath might not have the same bearing on the mind and soul of the non-believer than it has for the devout follower of a religion with a deity presiding such swearing.³¹ It might be more suitable for this person to make an affirmation with bearing on the conscience of the affirmer rather than the dependence on a religion.³² The only person responsible for ensuring that the truth is told is the affirmer himself or herself, for if this person should swear an oath to a deity he does not believe in, the oath could prove to be void of all binding power.³³

It is therefore necessary to define the term *oath* for purposes of this study and to determine its purpose; whether religious, ritualistic or legal, or any combination thereof.³⁴ In this study, many definitions of *oath* will be supplied, but in most instances, the definitions seem incomplete and somewhat wanting. For present purposes, it is apropos to merely give a delicately worded description of the oath³⁵ which is that the person who makes an oath should declare that a deity is a witness to the events and that it is the swearer's responsibility to the deity, as the "Judge of mankind,"³⁶ to judge on the matter. The swearer is then subject to punishment,³⁷ but does not call upon the vengeance of said deity.³⁸

1.1 Law and religion

As stated above, during the ages the oath was linked to religion or religious activities or rites. Religion and law was at times in the past intermingled to such an extent that the one could not be distinguished from the other.³⁹ This situation was further exacerbated by religious systems, which also had a legal function,

³¹ Milhizer 2009 *Ohio State Law Journal* 23.

³² Milhizer 2009 *Ohio State Law Journal* 22.

³³ Milhizer 2009 *Ohio State Law Journal* 22-23.

³⁴ See below and Chapter 2.

³⁵ This description is provided by Tyler *Oaths; Their Origin, Nature and History* 15-16.

³⁶ Tyler *Oaths; Their Origin, Nature and History* 16.

³⁷ It is important to note that this dissertation is not aimed at exploring the criminal law as it pertains to perjury as a criminal offence. It is merely used to describe the legal (or earthly) repercussions of breaking an oath in its assertory form in civil and criminal matters, and in its promissory form in the instances where this course of action was taken.

³⁸ Tyler *Oaths; Their Origin, Nature and History* 16.

³⁹ Hervada *Introduction to the study of Canon Law (English Translation of Introducción al estudio del Derecho Canónico)* 10-41.

such as the Canon law or religious systems that embodied a legal system, such as Islam, Judaism, and Hinduism.⁴⁰

Before a study of a specific rule within the law can therefore be undertaken, it is necessary to first establish what can be described as law and what as religious rules. This distinction is not always possible, especially when investigating more primitive legal systems or religious systems.⁴¹ However, it is not the purpose of this study to investigate religion in general.⁴²

1.2 The oath in Roman law

As stated above,⁴³ the oath can be traced back to a pre-religious and pre-animalistic period where supernatural beings possessed magical powers.⁴⁴ The oath carried on this trajectory and religion was used to govern rules regarding the interaction between man and the supernatural beings. This beginning is the root of the modern-day religious nature of the oath.⁴⁵

This study commences with the Roman law (753 BCE-565 CE),⁴⁶ where the oath was initially religious in nature. The entities called upon by the swearing of the oath were the Roman gods, in most instances, however, *Iupiter*. This persisted through the centuries and as the Roman Empire became more Christian, the oath had some Christian influence. Two main periods will be used to create an image of the development of the oath in Roman law. These periods are pre-Justinian

⁴⁰ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 1-2. Note here that this study deals with the practice of oath-swearing which is both legal and religious. Other religious promises like vows are not included in this study as it has very little to no legal application or consequences. Nuns, for example, may take vows of chastity, obedience and poverty, but these, though very religious, lack the legal aspect present in oath-swearing practices. See 7.1 and 7.3 below of an exposition of the legal and religious aspects of oath-swearing. See also Casteras 1981 *Victorian Studies* 157-184 for information on vows in the Catholic Church.

⁴¹ Milhizer 2009 *Ohio State Law Journal* 6; Bailey *The Religion of Ancient Rome* Chapter IX.

⁴² This study focuses on the influence of the external legal history of oath-swearing (e.g. religion) on the internal legal history. See research method 1.4 below.

⁴³ See 1 above.

⁴⁴ Silving 1959 *Yale Law Journal* 1330.

⁴⁵ Silving 1959 *Yale Law Journal* 1330.

⁴⁶ The Roman law is one of the pillars of South African law. See Chapter 3 below.

and Justinian.⁴⁷ Special attention will be given to the role of the community in the development of oath-swearing as well as the social and religious factors which may have had an influence on the development of oath-swearing.

1.3 The oath in the Netherlands

The practice of oath-swearing is also present in legal systems post 1500.⁴⁸ This section focuses its investigation on jurisdiction of the Netherlands. The Netherlands is relevant due to its influence on the South African legal system.⁴⁹ The Roman-Dutch legal system (*Romeins-Hollandse regsisteem*) was the product of labour by the courts and jurists in northern Netherlands (Holland) in the centuries following the fifteenth century.⁵⁰ This legal system was brought to South Africa when it was settled by the Dutch in 1652.⁵¹ The nature of the oath and the effect it has on law and justice is a topic of discussion by De Groot.⁵² These principles are discussed below and applied to the legal system which prompts the swearing of the different oaths and enforcing the consequences of perjury.⁵³

1.4 The oath in South Africa

As most other countries in the world, South Africa also uses the practice of oath-swearing,⁵⁴ including the promissory oath and the assertory oath. The promissory oath is used when the president swears an oath in front of the Chief Justice indicating that he will act in accordance with the Constitution.⁵⁵ The assertory

⁴⁷ These periods include the The Monarchy (753-510BCE), the Republic (510-31BCE), the Principate (31BCE-284CE), and the Dominate (248-476CE) as the pre-Justinian period. The post Justinian period include the history and law starting with the reign of Justinian and ending in 565 CE. See 3.1 below.

⁴⁸ Milhizer 2009 *Ohio State Law Journal* 14-15.

⁴⁹ See Chapter 4 and 1.4 below.

⁵⁰ Turpin 1963 *Acta Juridica* 21.

⁵¹ Van Zyl *Romeins-Hollandse Reg* Chapter 5.

⁵² Whewell *Grotius on the Rights of War and Peace* 167.

⁵³ See Chapter 4.

⁵⁴ Schedule 2 of the *Constitution*; S 162(1) of the *Criminal Procedure Act* 51 of 1977.

⁵⁵ Schedule 2 of *the Constitution*.

oath takes on the form of the witness oath in court proceedings.⁵⁶ In civil trials the oath is not prescribed, but the recommended oath is:⁵⁷

I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.

The *Criminal Procedure Act*⁵⁸ provides two possible ways to confirm evidence in courts. The first is the swearing of an oath, according to section 162(1) of the *Criminal Procedure Act* 51 of 1977.⁵⁹ This oath is identical to the one suggested in civil matters and it indicates that the swearer calls upon the Christian God⁶⁰ for assistance in the testimony that the swearer is about to give. It is unclear from this specific oath whether the swearer wants the "deity" to intervene or merely witness. Regardless of the role the "deity" is to perform, the oath caters for only one religion and is still used in a country that prides itself on equality.⁶¹ There is another possibility to those who do not want to swear an oath to the Christian God. This is provided for in section 163 of the *Criminal Procedure Act* 51 of 1977 and states that an affirmation can be made *in lieu* of an oath. This affirmation carries the same legal force and effect as the oath.⁶²

On the surface the arrangement between sections 162 and 163 of the *Criminal Procedure Act* 51 of 1977 seems ideal, but the multicultural nature of South Africa may have to be taken into account.⁶³ South Africa recognises freedom of religion,

⁵⁶ Section 162(1) of the *Criminal Procedure Act* 51 of 1977.

⁵⁷ Section 112 of the *Magistrates' Courts Act* 32 of 1944.

⁵⁸ Section 162(1) of the *Criminal Procedure Act* 51 of 1977.

⁵⁹ Section 162(1) of the *Criminal Procedure Act* 51 of 1977. The phrasing of the oath is the same as the civil oath quoted above.

⁶⁰ The section only uses the word "God". The fact that the word is capitalised and the fact that the religion of the ruling party, the National Party (NP), was Dutch Reformed Christian, an inference may be made that the legislation passed by them during this period, will not logically reference another deity. The author will act on the assumption that it was the intent of the legislature to reference the Christian God specifically. Devenish 2009 *A Commentary on the South African Bill of Rights* 162.

⁶¹ Section 9 of the *Constitution*. See 6.3.1 below.

⁶² Section 163 of the *Criminal Procedure Act* 51 of 1977.

⁶³ South Africa is comprised of several cultures, as is evidenced by the 11 official languages (s6 of the *Constitution*) These languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu, and are a linguistic representation or manifestation of culture. However, these are not the only cultures present in South Africa. South Africa is home to various religions, including Christianity, Islam, Judaism, Hindu, and other less mainstream religions. These cultures are tolerated, if not embraced, and South Africa and the legal systems attached to these religions are subject to

belief and opinion in section 15 of the Constitution⁶⁴ and in sections 30 and 31 the rights of language, culture and the cultural, religious and linguistic communities.⁶⁵ These rights include recognition of and protection for the African traditional religions,⁶⁶ Islam,⁶⁷ Hindu,⁶⁸ and Jewish⁶⁹ communities. The binding power of the affirmation is located in the moral and ethical nature of the person who makes the affirmation and the value the affirmer vests in his own words. However, if the affirmer has low moral values and is perjurious in nature the affirmation may, in effect, be useless.⁷⁰ It is therefore necessary to discuss the use of the oath as well as the development thereof in South African law, before and after the introduction of the Constitution to understand the context and its social and religious purpose.⁷¹

1.5 Religious based legal systems and African Customary law

Lord Edward Coke⁷² states that the Christian God is almighty and omniscient and that a witness is bound by his oath due to the fact that the Lord is called upon and this makes the oath sacred. Coke further states that the "heathen" (or non-Christian) is not to be believed and only Christian oaths are to be accepted in courts. This is rooted in the fear that if these "heathen" or "pagan" oaths were allowed in courts it would anger the true God.⁷³ This is a unique view on the multi-religious coexistence of the oath. The oath, however, plays a prominent role in the Islam, Hindu and Judaic religions. It also plays an important role in the African Customary law.

the Constitution, but are still practiced in South Africa. See Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" in general.

⁶⁴ Section 15 of the *Constitution*.

⁶⁵ Sections 30 and 31 of the *Constitution*.

⁶⁶ See Chapter 6 and below.

⁶⁷ See Chapter 6 and below.

⁶⁸ See Chapter 6 and below.

⁶⁹ See Chapter 6 and below.

⁷⁰ Coriden, Green and Heintschel (eds) *The Code of Canon Law: A Text and Commentary* 844. This is also true of people with religious affiliations swearing to (or in front of) a different god. There will then be no fear of repercussions.

⁷¹ See Chapter 5 and 6.2-6.4 below.

⁷² As quoted by Milhizer 2009 *Ohio State Law Journal* 22.

⁷³ Milhizer 2009 *Ohio State Law Journal* 22.

In a pre-Christian Israel, the practice of oath-swearing was widely used and it was of great value in judgements. When investigating the oaths in the Bible (especially the Old Testament) a type of oath is introduced that is described as an oath, which is direct and produced additional evidence, the decisory oath.⁷⁴ The oath is not merely a guarantee of the witness' reliability and trustworthiness. This oath provides evidence rather than making sure the evidence is truthful.⁷⁵ This oath may have been a product of the development of the community to fulfil a certain need.⁷⁶

In addition to the abovementioned, Milhizer⁷⁷ refers to certain actions which accompanied the swearing of an oath in the Old Testament.⁷⁸ These actions included gestures like shaking hands and placing hands on artefacts and objects as supplementary to the swearing of the oath and invoking God. The oath was sworn by ending with the words "Amen, Amen".⁷⁹

The Islam religion is rooted in antiquity and documented in the Holy Scripture, the Quran.⁸⁰ The Quran is the "paramount religious, moral, legal, political, economic, and social authority (of the Muslims)."⁸¹ Muhammad was a Prophet and the Messenger of God and the teachings contained therein are binding on all Muslims.⁸² The Quran makes the following *dictum*: "Believers! Fear God, and be with the sincere".⁸³ This places a moral and religious burden on the followers of the Islam faith to tell the truth. Great emphasis is placed on the swearing of the oath and on being truthful at all times.

⁷⁴ See Chapter 2.

⁷⁵ Milhizer 2009 *Ohio State Law Journal* 6-9. This is in stark contrast to other oaths found in the succeeding chapters.

⁷⁶ Milhizer 2009 *Ohio State Law Journal* 6-9.

⁷⁷ Milhizer 2009 *Ohio State Law Journal* 6-8.

⁷⁸ Milhizer 2009 *Ohio State Law Journal* 9.

⁷⁹ Milhizer 2009 *Ohio State Law Journal* 6-9.

⁸⁰ Please note that the reference in this study to the Quran is unique. This source is the online version of the Quran translated from the original Arabic with specific verse indications and an index. No specific bibliography of the verses and *Suras* will follow, but each of the verses and *Suras* referred to, can be located on this website: Quran Explorer 2016 <http://www.quranexplorer.com/>.

⁸¹ Milhizer 2009 *Ohio State Law Journal* 45.

⁸² Milhizer 2009 *Ohio State Law Journal* 43.

⁸³ Quran 9:120.

The Hindu religion also uses the oath as part of social and judicial practices. A Hindu oath, sworn in India, includes the drinking of holy water from the Ganges and eating leaves of a sacred plant.⁸⁴ A Brahmin is to administer the water and the plants.⁸⁵ Other oaths could also be sworn on the holy books or on animals such as tigers, or the elephants or even the tail of a holy cow, as indicated in the first quote.⁸⁶

Customary law encompasses a magnitude of religious and cultural practices, and within this paradigm, the South African legal system should recognise the practices of African customary.⁸⁷ The African customs regarding the oath can be seen in the contemporary oath practices of some African communities. These are modelled on the ancient practices of their forefathers (forefathers are the basis of their religion).⁸⁸ These oaths are specific to the society which contributed to the swearing. Similar practices in different contexts are discussed below⁸⁹ in order to determine their influences on the developmental history of the practice of oath-swearing.

1.6 Research question

How did the external and internal legal history influence the development of the practice of oath-swearing in selected eras in South African legal history?

1.7 Objectives of the study

The primary objective of this dissertation is to determine how the external and internal legal history of oath-swearing influenced the practice of oath-swearing in selected eras in South African history in order to make some recommendations for

⁸⁴ Rogers 1897 *The Green Bag* 59; Milhizer 2009 *Ohio State Law Journal* 16.

⁸⁵ Rogers 1897 *The Green Bag* 59; Milhizer 2009 *Ohio State Law Journal* 16.

⁸⁶ Rogers 1897 *The Green Bag* 57-59; Milhizer 2009 *Ohio State Law Journal* 16. This is somewhat comparable to certain other religious practices and due to the oath's definition as a religious act with a legal implication.

⁸⁷ Phelps "Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?" 140.

⁸⁸ Masondo "The Practice of African Traditional Religion in Contemporary South Africa" 20.

⁸⁹ See Chapter 2 for a general background regarding the society specific context of certain oaths.

the South African law. To reach this objective it is necessary to state the following secondary objectives:

- (1) To provide a theoretical background by defining *oath* and *oath-swearing*, distinguish between law and religion and to indicate the role of language in legal historical studies.
- (2) To determine the external and internal legal history of oath-swearing in the Roman law.
- (3) To determine the external and internal legal history of oath-swearing post-1500 in the Netherlands.
- (4) To determine the internal and external legal history of oath-swearing in South Africa before and after the *Constitution* with particular reference to legal pluralism.
- (5) To come to a conclusion and to make recommendations for the future of the practice of oath-swearing in South Africa.

1.8 Research method

The research method that was used for this study is the legal historical method. This method is effective in research which aims to investigate the development of a single rule or principle as it existed in societies and legal systems which influenced or contributed to a legal system such as the current South African legal systems. Hoetink⁹⁰ states "*het recht is een historisch verschijnsel*".

External legal history is the study of all the various factors which influenced,⁹¹ or could have influence, the development of law in a specific period. External legal

⁹⁰ Hoetink "Historische Rechtsbeschouwing".

⁹¹ Due to the word amount limitations places on a dissertation for a Master's degree, the following aspects have been removed from this study and will be used in a further investigation of this theme: Canon law and the influence it had on the legal developmental history of South Africa; Germanic law and the oath in a Germanic context with specific focus on the old-Germanic period until 500, the Frankish period from 500-1000, the Feudal period 1000-1500, and the implications these oaths had on the development of oath-swearing in that geographical era. The development of oath-swearing in the English law after 1500 and

history scrutinises social, economic, political, religious and/or cultural circumstances and the philosophical and jurisprudential reasoning surrounding, in this case, oath-swearing. Internal legal history, in contrast with external legal history, concerns the development of material or substantive law. It is the development of substantive legal norms and customs, in the case of oath-swearing itself.⁹² The internal legal history will be studied in light of the external legal history to obtain an acceptable result. In this study it would be necessary to indicate that religious, social and language factors may influence the study and the intricacies of the legal historical method will have to be explored. The social and religious nature of the oath will be the main focus of the external legal history component.

Furthermore, the research entails a literature review of some of the sources relevant to legal history and the swearing of an oath.⁹³ In order to ensure that the research has sufficient structure⁹⁴ to enable it to perform the necessary checks and balances, the use of the sources will take on a specific structure. An informally applied three-tiered approach was followed. The first tier or level is general historical sources to provide a background to the specific time period investigated. This is necessary because of the far-reaching effect that the social

the framework it created for the swearing of an oath, as well as the oaths sworn in contemporary England were also removed. Finally, an in-depth discussion on and investigation of the oaths sworn in the Islam, Hindu, Jewish religious tradition with a focus on the religious sources and a practical relationship between the religion and the law in this matter, and the prescriptions in this regard by the African Customary law and its place within the current South African law were also removed from the study. It is regrettable that these aspects could not have been placed in this manuscript, but this matter will be addressed in subsequent research.

⁹² Du Plessis "The Historical Functions of Law: From the Roman to the Canonical Period" 47. In some instances, secondary sources and translated sources will have to be used because access to primary sources is severely limited in some cases. In addition to the problem of the practical attainability of the original sources, the researcher did not always have the necessary fluency in the original languages of the sources to be able to flawlessly translate and interpret the sources, attempting to do so could have introduced additional ambiguity; and to translate and interpret selected sources could also have contributed to ambiguity or inconsistency. Bearing this in mind the researcher took all the necessary steps to ensure that the sources used are of the best translations and commonly accepted as a true and accurate reflection of the original.

⁹³ Van Zyl "Die Regshistoriese Metode" 1-10.

⁹⁴ This study is a small part of what proves to be much larger study. The parameters of this study are enforced in order to ensure that the requirements of the dissertation are not exceeded.

and religious factors can have on such a rule if it is proved that oath-swearing has a continual developmental history. The second tier, described in conjunction to the first tier, will consist of information regarding the general legal, political and/or religious considerations of the society of the time period (external legal history) where only relevant issues are referenced and not the entire developmental history of that period. The final tier will be information specifically focused on the different oaths used in the time period in order to answer the legal question (internal legal history).⁹⁵ In matters where assertory oaths are sworn, reference will be made to perjury, where relevant, in order to place in context the legal implications created by the practice of oath-swearing. Perjury is, however, not be the primary focus and features used only as a means of providing more information on the consequences of oath-swearing. This structure enables the reader, as well as the researcher, to measure all the information systematically and without bias to make deductions that are sound and, as far as can be ascertained, correct. This approach is also prescribed by Venter *et al*,⁹⁶ who states that legal historical research can only be successful if appropriate consideration is granted to the ever-varying socio-economic, philosophical, and constitutional contexts of each period. It is for this reason that in certain periods, where legal sources are either absent or unclear on the practices of oath-swearing, the practice of oath-swearing is discussed with reference to a general historical record or chronicle. The necessary context and argument is provided in closing. The specific oaths referred to which are difficult or onerous to find, are quoted, either in the text, or in the footnote. Oaths are also quoted if the wording of the oaths is important to argument across chapters, or the relation of an historical overview. If an oath is not quoted and, merely referenced, it is either easy to find, or the exact wording is of lesser importance.

During the course of legal historical research, there are two main approaches that can be followed when a legal rule is investigated in a legal historical context. The

⁹⁵ These chapters cover sources and events that are selected on the basis of trustworthiness and usefulness. It is beyond the scope of this study to provide a comprehensive and encyclopaedic investigation of all historical and legal events in this regard. The study focuses on notable events and legal documentation that directly influence the research question.

⁹⁶ Venter *et al Regsnavoring* 161.

first is to approach the study purely geographically and the second is to approach it chronologically. When the study is approached geographically, the research focuses on the development of law and politics within a geographically determinate area. This approach would result in repetition of information in certain periods in history and development, and may cause obfuscation of the line of argument. A purely geographical approach would therefore not have contributed to the aims of this study.

The second approach is a chronological approach where legal rules are investigated within the context of historical events or historical development. If the chronological approach were to be followed without considering the geographical area and geopolitical events, the historical aspect of the study would have dominated the research and the legal aspect would have been undermined.⁹⁷

In this study, therefore, a combined method had been followed where the legal systems, which had influenced or might have influenced the South African legal system were broadly divided into geographical areas. These geographical areas were then studied in chronologic order with reference to the sources available.⁹⁸ Where circumstances required a choice as to which approach to follow, chronology or geography, preference was be given to the chronological consideration. It must also be acknowledged that this study does not aim to be an encyclopaedic discussion of all the practices of oath-swearing in the legal history of all the aforementioned contributing legal traditions,⁹⁹ but the study rather identified instances of oath-swearing within these systems in order to address the research question.

It must, furthermore, be borne in mind that when a historical study is undertaken there are various pitfalls that can influence or hinder the research.¹⁰⁰ According to Tomlins and Comaroff¹⁰¹ legal history is intertwined with the concept of law as a phenomenon which can be separated from society, but this is in most cases

⁹⁷ Venter *et al Regsnavorsing* 65, 67, 161 and 162.

⁹⁸ See Chapters 3, 4, 5 and 6.

⁹⁹ See earlier footnote.

¹⁰⁰ Venter *et al Regsnavorsing* 161-162.

¹⁰¹ Tomlins and Comaroff 2011 *UC Irvine Law Review* 1047.

considered to be a misnomer. If legal historians were, however, to ignore the historical aspect of the research and merely focus on the findings and translate texts, the legal historian might find it difficult to extrapolate the translated findings, or to apply and contextualise these findings logically in its given environment of application.¹⁰² There may be, for example, influences which might alter the function, purport and purpose of oath-swearing in a modern South Africa. Furthermore, these influences can exacerbate the current problems which surround the seemingly innocent oath-swearing practice in courts by witnesses and by politicians and statesmen. As explained above, there are certain instances that may have influenced the developmental history of oath-swearing. These instances should be examined and certain aspects scrutinised for their contribution to the practices of oath-swearing. To illustrate this, certain excerpts will be taken from history. These include law and the nature of law as an abstract concept; language, communication and society as it interrelates as well as its relation to oath-swearing and the history thereof. It is important to determine whether the practice of oath-swearing retained the spirit and purpose in which it was developed.

1.9 Study outline

In this study, the research question¹⁰³ was addressed in a structured manner. After this introduction (Chapter 1), Chapter 2 follows with the theoretical literature review with a specific focus on the transdisciplinary nature of this legal historical study.

Chapter 3 commences with the historical development of oath-swearing in Rome, from the ancient times to the end of the reign of Justinian.¹⁰⁴ The Roman legal system is one of the pillars of the South African legal system. The investigation of

¹⁰² Du Plessis 2008 *Roman Legal Tradition* 46-48.

¹⁰³ See 1.2 above.

¹⁰⁴ The legal history of Rome, for current purposes, starts at 753BCE and ends in the year 565CE. Germanic law is divided into three parts which are: first, old-Germanic period which ends in the year 500; second, the Frankish period which starts in the year 500 and ends in 1000, and finally, the Feudal period which commences in 1000 and, for purposes of this study, ends in 1500. See Van Zyl *Romeins-Hollandse Reg* 13-80.

a legal rule, such as oath-swearing, necessitates a discussion of the developmental history of the rule within the context in which it has developed.

Chapter 4 focuses on the development of relevant oath-swearing practices in the Netherlands. The Netherlands, especially Holland, was also greatly influenced by the Roman law and, in turn, influenced the South African legal system. Therefore, it is prudent to include the Netherlands in this study as it traces the persistence of oath-swearing and the subsequent transplant thereof in South Africa. This investigation commences in the 1500s and extends to the current position as far as is required for the oath-swearing practices of the Netherlands' influence on the oath-swearing practices in South Africa.

Chapter 5 investigates the oath-swearing practices with regard to promissory and assertory oaths in South Africa from 1652 until 1960 which marks South Africa's independence. Special attention is given to the various influences of the different geographical area in a historical context.

Chapter 6 commences with the change of constitutional dispensation of South Africa in 1961. The second part of the chapter commences with enactment of the *Constitution* 1996 and its influence on the practices relating to oath-swearing. This chapter investigates the current position of oath-swearing in South Africa with a focus on the interrelationship between the oath and the *Constitution*. Furthermore, the discussion of law and religion within society in Chapter 2 is applied to the religious based legal systems in the cursory investigation of oath-swearing, together with the post-1996 constitutional, legal pluralistic nature of South Africa in order to identify reciprocity in the development of oath-swearing in South Africa.

Chapter 7 concludes the development of oath-swearing and reiterates the current position of these practices. The chapter makes recommendations aimed at further developments of oath-swearing in the South African context.

Chapter 2 The oath: law, language and religion

2.1 Introduction

The purpose of this chapter is to provide the theoretical foundations of the transdisciplinary perspective of the history of oath-swearing. The aspects that may have influenced oath-swearing and the developmental history of oath-swearing are discussed with reference to the practices ancillary to the swearing of an oath. In this instance, these include, *inter alia* the oath itself (phrasing), the traditions of holding up hands or touching certain articles, and using oath-helpers.¹⁰⁵ This chapter also discusses the nature of law as it functions in different contexts. This is done to ensure that due consideration is given to differences between the nature and purport of the term in both secular (constitutional) as well as religious contexts.

Edwards¹⁰⁶ suggests that the same factors that influence other aspects of community life, such as geography, politics and religion, influenced and tempered the legal system. All of these factors contribute to the nature and development of a legal system. When a reference is made to *law* in a study like this, it is very difficult to establish what the author intends with the word *law*. However, it is not the purpose of this chapter to give a comprehensive description and definition of what law is. Such a discussion is bound for failure from its inception, due to the basic nature of the law and the general uncertainty regarding the subject of its definition. A further reason for this is that a definition, no matter how wide or narrow, binds the researcher to the limitations set by the definition. Another inherent defect of a definition is that it can be filled with assumptions flowing from the language used, that the researcher could not have foreseen.

This poses a problem to any researcher because the reader might interpret the findings in a specific way as a result of the unforeseen assumptions made in the definition. It is therefore the purpose of this chapter to create an environment where the true subject of this study, oath-swearing, can function properly and can

¹⁰⁵ These auxiliary actions are also discussed in context in the chapters that follow.

¹⁰⁶ Edwards *The History of South African Law: An Outline* 1.

be thoroughly researched. Furthermore, the chapter aims to equip the reader with certain conceptual tools with which to understand the later discussion relating to the oath. This discussion will only separate the law from that which it is not.

The second aspect that is considered is language and communication. Language is integral to a study of this nature due to the fact that the law needs to be communicated in an understandable medium in order to ensure satisfactory execution of the stipulated principles by those who are subordinate to the law.¹⁰⁷ Another aspect that is considered in conjunction with language and communication is society. It is important for the law and specific legal rules to correspond with the nature of the society in which it functions. The theoretical foundation of the role of law and oath-swearing is provided below¹⁰⁸ and is applied in the chapters that follow.

2.2 Law

For the argument on the development of the practice of oath-swearing to be applied correctly, there must be a distinction between *law* and *non-law*.¹⁰⁹ Law is not a real thing that can be picked up and examined by a scientist.¹¹⁰ This is the main reason why legal academics have tried, mostly in vain, to describe what law is so that they can apply it correctly to whatever element of the law they are studying. A further problem that adds to the confusion is the difference between *ius* and *lex*.¹¹¹ Would it, however, be necessary to define law? Justice Potter Stewart¹¹² skilfully addresses the need for definitions in a matter regarding pornography where he famously said that "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know

¹⁰⁷ Donovan 1995 *Constitutional Law Journal* 25.

¹⁰⁸ See 2.2 and 2.3 below.

¹⁰⁹ The term *non-law* merely refers to those actions which cannot form part of law and should rather be placed under another heading like norms or customs. The science cannot survive without identifying and describing what the subject of their study is. Bohannon 1965 *American Anthropologist* 33-34.

¹¹⁰ Donovan *Legal Anthropology: An Introduction* 4.

¹¹¹ Schiller *Roman Law: Mechanisms of Development* 221-224.

¹¹² *Jacobellis v Ohio* 378 US 184 (1964). Additionally, see Donovan *Legal Anthropology: An Introduction* 4.

it when I see it, [...]" This does not, however, settle the matter for most academics as the need for a definition is quite great as a definition creates borders. The researcher or jurist can then decide what to include, what to exclude and to what extent liability can be avoided. The above statement easily enables those primarily concerned with the practice of the law to define law as they see fit, leaning more towards their own clients' interest and less to that of the community.

There is therefore a reason why another definition will serve this study better. A few of the current definitions are used to determine the best possible definition. Cicero defines law as: "[The] distinction between things just and unjust made in agreement with the primal and most ancient of all things, Nature."¹¹³ This is somewhat in contrast with Thomas Aquinas¹¹⁴ who stated that law is "[nothing] else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." This definition is more community centred than Cicero's but still contains within it a truth with regard to how law is perceived.

When these perceptions of law are considered, it becomes apparent that these definitions hinge on a theoretical and/or ceremonial understanding of law. These understandings are not irrelevant or without purpose, but lack the practical or functional aspect needed by the practitioner of law. The ceremonial aspect needs to be circumvented in order to apply the functionalistic aspect. The terminology must be adapted to this kind of thinking from – "Law is..." like the definitions by Aquinas and Cicero above; to "Law as..." – in effect "Law is/as".¹¹⁵ By way of illustration, one could say "*law is* a body of rules, or *law is* distinction between

¹¹³ As quoted by Donovan *Legal Anthropology: An Introduction* 6-7.

¹¹⁴ As quoted by Donovan *Legal Anthropology: An Introduction* 6-7.

¹¹⁵ This specific designation stems from the article by Tomlins and Comaroff "*Law As . . .*": *Theory and Practice in Legal History* (Tomlins and Comaroff 2011 *UC Irvine Law Review*). This article aims to move away from the more traditional view of "Law is..." where it tries to give an explanation of what the law is, separate from what it does; and move toward an explanation of "Law as" which is primarily focused on the purpose of law and the identity of law as a social construct. This theory will, in part, be considered as a point of departure when dealing with the law in general. This same theory will also be applied to the sections following this one.

things just and unjust...¹¹⁶ or *law is* [nothing] else than an ordinance of reason for the common good."¹¹⁷ With these statements, a certain aspect of the law is being defined or calculated to mean something we can understand and dilute.

In contrast to the "Law is..." definition, the "Law as..." definition serves a more practical and pragmatic purpose. When the attention is shifted from the theoretical question of what law is, to what applications can be provided for the law, the value of the findings are more relevant. In order to make this approach more relevant for this study and studies similar to this, it is important to not only draw on the *corpus* of research within the specific field of law or just the larger field of legal history, but even broader and beyond. This can be attained by drawing on fields like sociology and anthropology to be able to define law within a system like religious based legal systems or African customary law, which do not resemble the Roman-Dutch law or similar legal systems. The definitions need to be wide enough to allow for all the different legal systems, yet narrow enough to distinguish law from other social interactions.

When law is studied through the eyes of other fields of study, certain aspects of the law can be better explained. Durkheim¹¹⁸ states that "to explain a [social] fact ... it is not enough to show the cause on which it depends. We must also ... discover the part that it plays in the establishment of that general harmony." It is therefore important to determine the function of a social act as it pertains to the establishment of social order. Law, in general, is a social fact because a society cannot function without law, whether it is formal or informal, written or unwritten. It is therefore necessary to indicate that law serves a function in society and is not merely a ritualistic or ceremonial procedure with little or no practical or functional application.¹¹⁹

¹¹⁶ Cicero as quoted by Donovan *Legal Anthropology: An Introduction* 6-7; Schiller *Roman Law: Mechanisms of Development* 221-222; Seagle *Quest for Law* 3-6; De Vos *Regsgeschiedenis* 1-3.

¹¹⁷ Thomas Aquinas as quoted by Donovan *Legal Anthropology: An Introduction* 6-7.

¹¹⁸ Durkheim *The Rules of Sociological Method* 125; as well as Liska and Bellair 1995 *American Journal of Sociology* 579.

¹¹⁹ Stapley 2010 <http://www.cf.ac.uk/socsi/undergraduate/introsoc/durkheim8.html>.

Oath-swearing is essentially a social fact due to its near universal presence in communities from antiquity to now.¹²⁰ It has considerable influence on people and their social interaction because oath-swearing draws on religion and community relationships to enforce the desired outcome of oath-swearing – truth.¹²¹ In order for the legal historical development of the oath to be relevant and authentic a discussion on the particular function it serves in the community must be undertaken. The mere fact that oath-swearing can be construed as a social fact does not indicate or imply that oath-swearing is always functional rather than ritualistic because what needs to be evaluated is which social need it satisfies. If the social need is that proper procedure must be followed, then it is ritualistic rather than functional. In contrast, when the social need is that it is a means to ensure that either the witness tells the truth (in the case of the assertory witness oath) or that a judge will act justly and fairly (in the case of the promissory judicial oath) then the oath is functional. It seems that this function is rational in the modern era.¹²²

As is evident from the discussion above, the term *law* is used in different situations with varying definitions. These definitions are largely dependent on the context in which it is used and the purpose for which the definition is required. *Law* in the context of a religion differs from *law* in the context of contemporary court in South Africa.¹²³ In some cases, laws can prescribe a certain manner by which something should be done.¹²⁴ These acts can be required for practical (or functional) purposes, or for mere formalistic purposes, which are largely dependent on the society in which it exists.

¹²⁰ See Chapters below.

¹²¹ Milhizer 2009 *Ohio State Law Journal* 4.

¹²² Stapley 2010 <http://www.cf.ac.uk/socsi/undergraduate/introsoc/durkheim8.html>; as quoted by Liska and Bellair 1995 *American Journal of Sociology* 579.

¹²³ See Chapter 6 below for an investigation of a single rule of a legal system within a religious system.

¹²⁴ Stapley 2010 <http://www.cf.ac.uk/socsi/undergraduate/introsoc/durkheim8.html>; as quoted by Liska and Bellair 1995 *American Journal of Sociology* 579.

2.2.1 The nature of law

This study is primarily historical, therefore the discussion of what the law is will commence with the law in history. The common law system in South Africa is, amongst others, based on the legal system which developed in Rome.¹²⁵ The Roman law was as elusive then as it is now. *Institutiones* 1.2.3¹²⁶ states the following:

Constat autem ius nostrum aut ex scripto aut ex non scripto, ut apud Graecos:
τῶν νόμων οἱ μὲν ὑ ἀγραφοί, οἱ δὲ ἄγραφοι.

This indicates that the unwritten law in Rome, according to the *Institutiones* of Justinian, had the same (or at the very least, similar) legal power or power of law as that of written law. The type of law that was used in Rome during its earliest times was unwritten law. Du Plessis¹²⁷ states that this kind of law was mostly comprised of custom concealed as royal decree. This law was coined as *Ius non scriptum* and the *Corpus Iuris Civilis* calls this law custom (*lex et consuetudo*).¹²⁸

Ius non scriptum translates to *law that is not written/unwritten*.¹²⁹ When taking into account that this type of law refers to some of the earliest forms of law in Rome, it is reasonable to assume that a very small part of the population was literate, and most people therefore could not read the law even if it were written

¹²⁵ Van Zyl *Romeins-Hollandse Reg* 1; Venter *et al Regsnavoring* 23; De Vos *Regsgeskiedenis* 1.

¹²⁶ "Our law exists either in writing or in unwritten form, just as among the Greeks some laws were written, others unwritten." Translation by Sandars *The Institutes of Justinian* 9 (*Institutiones* 1.2.3.); and Thomas *Textbook of Roman law* 27.

¹²⁷ Du Plessis *Roman Law* 27.

¹²⁸ See Thomas *Textbook of Roman law* 27-30. Du Plessis states that Roman law in its entirety is nothing other than custom. See Du Plessis *Roman Law* 28.

¹²⁹ When one interprets term *law* in a two-fold way, it becomes necessary to consult different points of view and interpretations on the subject. One of these is the theory by Bohannan. Bohannan focused on the legal institution itself and the *translation* of local legal systems into a language other than that which is locally spoken. The type of study done by Bohannan is particularly relevant in cases where the law as such was created in a language either foreign to the researcher or a language that fell into disuse (for example Latin). Roman law was created in Latin and it is therefore necessary to translate the law. Still, translation of law should at all times occur with reference to the culture that had developed the law. The translator must ensure that cultural translation takes place and make sure that the socio-cultural elements are preserved. See Bohannan 1965 *American Anthropologist* in general; Donovan *Legal Anthropology* 112-122 where this theory is applied to another context and Delisle and Woodsworth *Translators through History* 191-192.

down. This unwritten law was in essence nothing more than custom so deeply engrained in the civilisation that it has, by default, the power of law.

In contrast to this statement made by Du Plessis,¹³⁰ Bohannan¹³¹ suggests that a distinction must be made between three key aspects, namely: laws, custom¹³² and norms.¹³³ Norms are what society considers being appropriate or accepted behaviour, or what people *ought* to do in their dealings with other people. These, however, have no authority and cannot be enforced due to vagueness. Custom, on the other hand, functions like law and, in certain instances, appears to act like law within a defined society. Custom could fulfil the function of law, were it not for a defect within the nature of custom. This defect is that custom do not have the force of law. It cannot be used by one party to enforce rights or obligations. Law, in this instance, is more effective than norms and custom because it can be used as protection by one person or to compel another. Laws are essentially custom (or general will) portrayed in such a manner that it enables it to be effective. It is apparent that laws are greatly influenced by the society of people who lives under the law. The will of the society becomes the law of the land, whether custom or law, the society is bound by it. The conversion of a norm to a custom to a law, in order to improve the regulation of societal interaction, is a

¹³⁰ Du Plessis *Roman Law* 27.

¹³¹ Bohannan 1965 *American Anthropologist* 34-40; and for a practical illustration of Bohannan's theory, see Donovan *Legal Anthropology* 117-118.

¹³² It is imperative to note here that for the purposes of this study, a distinction is drawn between *custom* and *customary law*. Bohannan's perspective on this matter can be described as that of an American anthropologist and should not be confused with the current perspectives on similar matters in contemporary South Africa. He defines the term *custom* as being a body of norms which are regularly followed in practice. Customs can vary in degrees of strictness and can cause some coercion in the moral and ethical behaviour of people within a society. This is different from customary law as it functions in South Africa. Customary law regulates the cultural practices which has bearing on the individual's dealings and interactions with one another and has the force of law because it is a recognised system of law. (Customary law is discussed in Chapter 6 below.) It is important to consider that this division is important in order to determine the actual effect of oath-swearing in legal proceedings. What should also be noted is that Bohannan was an American researcher and his definitions were not intended to be binding on the current South African context. His definitions are merely useful as tools in constructing arguments in support of the research question.

¹³³ Bohannan states: "Just as custom includes norms, but is both greater and more precise than norms, so law includes custom, but is both greater and more precise. Law has the additional characteristic that it must be ... 'justiciable'" Bohannan 1965 *American Anthropologist* 34-35.

social act along with law-making and institutionalisation, which are also social acts.¹³⁴

In addition to the societal aspect of law, another facet of law is the role power plays in law and the role law plays in the acquisition of power. Foucault¹³⁵ states that while law is crucial when it comes to power, the power of law is limited if law is described as prohibitory. This prohibitory function of law is responsible for much of what is lost in the functioning of law.¹³⁶ The guarantees law make in determining the truth of something is enshrined in the prohibitory function of law. The guarantee of truth is the epicentre of the function and workings of the oath, generally. The oath may be described in this sense as a negative force of law, which is prohibitory and may result in a negative control of people.¹³⁷

This *negative* system may have a negative influence on the oath and how it is sworn. It may create and foster a culture of a negative truth in law.¹³⁸ In a case where failure to provide information during a trial, which could undermine justice and law, is condoned by the negative power of law, perjury will become obsolete and the processes of law will be rendered null and moot.¹³⁹ The same situation arises in cases where a person swears a promissory oath and interprets the wording of an oath to provide for a negative truth. The swearer will remove elements of the oath which they have no intention abiding by.¹⁴⁰

It follows from the above discussion therefore that the law should contain both a negative or prohibitory side, as well as a positive or prescriptive side. The negative side of the law prevents poor behaviour by prescribing what people should not do or refrain from doing. The positive side prescribes what people

¹³⁴ Bohannan 1965 *American Anthropologist* 34-36.

¹³⁵ Foucault *Discipline and Punish* 27; Wickham "Foucault and Law" 218.

¹³⁶ Foucault *Discipline and Punish* 26-36; Wickham "Foucault and Law" 218. The prohibitory function of law is the one end and the counterpart can be described as a prescriptive function.

¹³⁷ Foucault *Discipline and Punish* 26-36; Wickham "Foucault and Law" 218.

¹³⁸ The term negative truth refers to a situation where the truth is only told as far as it is necessary to protect an individual from perjury; and not to disclose the truth to the court.

¹³⁹ Foucault *Discipline and Punish* 26-36; Wickham "Foucault and Law" 219.

¹⁴⁰ Ullman *Jurisprudence in the Middle Ages* 181-182.

ought to do or must do. This dual system ensures that the person, subject to the law, has knowledge of both prohibitions and prescriptions.

If applied to oath-taking, the oath should thus be phrased in such a manner that both these elements (positive and negative) are contained in the swearing of an oath. A part of the phrasing of the oath should be dedicated to what a swearer firstly, should not do (lie) and secondly, what a swearer should do (tell the truth), regardless of the fact whether or not it was expressly asked.¹⁴¹ This duality within oath-swearing is evident of the interrelationship between the law and the society described above. The general will would describe a situation where truthfulness in support of justice is favoured above all else. As mentioned above and below,¹⁴² perjury is the legal reaction to breaking an oath. This imposes an immediate sanction as opposed to the divine reaction expected from the deity in whose name the oath was sworn.¹⁴³

2.3 Language, communication and society

Language may be considered as another external influence on oath-swearing. Although language does not have a direct influence on the law, it is a method to interpret the law into an understandable medium.¹⁴⁴ This oftentimes requires the translation of information.¹⁴⁵ This medium, or translation, can unwittingly influence law and may have far-reaching effects. This need for translation and the possible negative implications of an incorrect translation is best illustrated by the Oaths of Strasbourg where the oaths, fulfilling the function of a peace treaty, were translated into a language the opposing army could understand.¹⁴⁶ Donovan¹⁴⁷ states that language is an integral part of the rule of law and that

¹⁴¹ Wickham "Foucault and Law" 218-219. See 5.3.1 and 6.2.1 for arguments to this effect with regard to the current form of the oath.

¹⁴² See Chapter 1 and subsequent chapters where the position regarding perjury was placed into historical context and practical execution within the legal system.

¹⁴³ Perjury, as a sanction, is used to illustrate the negative action of the law and will not be the main focus of this study. This study is concerned with the development of oath-swearing in selected eras in the legal historical development of South Africa. See Chapters 5 and 6.

¹⁴⁴ Bohannon 1959 *American Anthropologist* 161-163.

¹⁴⁵ See 1.4 above for the use of translations as part of the research methodology of this study.

¹⁴⁶ See Ewert 1935 *Transactions of the Philological Society* 16-35.

¹⁴⁷ Donovan 1995 *Constitutional Law Journal* 25.

whichever form law takes must be converted into an understandable form if ordinary people are expected to follow its prescriptions. Language is also part of the culture of a society and develops with the society. When one interprets the language of an oath, the context is of paramount importance, as the meaning of individual words would largely depend on the context in which it is used bearing in mind that certain words adopt different meanings in different situations.¹⁴⁸

A legal system is only one of several cultural elements of a community as the community is a product of its own history.¹⁴⁹ In a legal historical study one sometimes has to rely on translations as researchers lack the necessary fluency in the ancient languages. They may not have mastered the skills required to use these languages critically and optimally. This is not necessarily a failing in a researcher's training or education; it is merely a product of what is called progress. In many instances only translated texts of ancient texts are available. Translators are burdened with the responsibility of eliminating the differences between languages to ensure that the researchers who use the translated source do not make grievous mistakes in the interpretation of the source.¹⁵⁰ This is not always possible, because the translator cannot always know in which context a word was used. They must apply their mind and produce a translation with as much accuracy as they can. Translators further may apply words as it is understood and used today, to terms that were used many years ago.

As stated above, language develops. It develops as the society develops and it is obvious that the translator cannot always find words that adequately depict a past occurrence, primarily due to the lack of context and vocabulary. A religious or legal rite used 2000 years ago can be called an oath, but this does not mean that the definition of an oath as it is understood today can be applied to that act. There is a lack of context and vocabulary and therefore one must always be

¹⁴⁸ Ghadessy (ed) *Text and Context in Functional Linguistics* 1-24.

¹⁴⁹ Edwards *The History of South African Law: An Outline* 1.

¹⁵⁰ Delisle and Woodsworth (eds) *Translators Through History* xiii-xvi.

careful not to error on these terms.¹⁵¹ It would therefore be necessary to indicate the role of law and language in the development of the oath.

Communication, society, and semiotics are not common terms found in legal historical studies. However, these terms have significant bearing on the point of discussion in this study.¹⁵² The physical swearing occurs when a person utters words in a legal setting. These words might have meaning to the swearer and to the audience, but the fact that words are spoken may create a problematic situation.¹⁵³

Communication is a part of societal interaction¹⁵⁴ and semiotics are part of communication.¹⁵⁵ This becomes relevant when a study focuses on a communicative action with societal implications, like the oath: "Language functions as a link in concerted human activity as a piece of human behaviour."¹⁵⁶ A cursory study of these terms might create a set environment in which a person must swear the oath.

Communication will be discussed first. The act of oath-swearing must be evaluated to ascertain if it can be described as communication. Communication is not easily defined. This can be ascribed to the multifaceted nature of communication or to the mere abstract nature of communication. Communication can take on various forms, like talking to someone, hailing a taxi, sending a letter or even whistling at someone on the street.¹⁵⁷ These are examples of verbal and non-verbal communication. The oath is always verbal, but can have non-verbal actions that accompany it, like placing a hand on the Bible, raising the right hand or even touching sacred objects.¹⁵⁸

¹⁵¹ Ghadessy (ed) *Text and Context in Functional Linguistics*.

¹⁵² The subject of this study is the historical development of oath-swearing.

¹⁵³ See Chapters 3-6 where the exact wording of oaths are discussed within the relevant context.

¹⁵⁴ Fauconnier *Aspects of the Theory of Communication* 31.

¹⁵⁵ Broekman, Mootz and Penack "Preface-Semiotics in the Seminar" v.

¹⁵⁶ Downes *Language and Society* 368.

¹⁵⁷ Downes *Language and Society* 368.

¹⁵⁸ See below.

These verbal and non-verbal actions constitute communication. Fauconnier¹⁵⁹ defines communication as "the process by which we understand others and in turn endeavour to be understood by them. It is dynamic, constantly changing and shifting in response to the total situation." This definition states that it is a *process*. This process can be applied to the swearing of an oath. The oath is a verbal or verbal and non-verbal process by which one person undertakes to relate events in the past honestly; or to do something or refrain from doing something in the future. Therefore, the oath can be labelled as communication.

It is further made clear that communication requires an action; someone must *do* something. Utterances, like saying words to invoke a deity's wrath if a swearer should be devious, are acts in communication and these acts should be done intentionally.¹⁶⁰ This creates another boundary for the oath. The implication is that the oath is a positive action and cannot be sworn or made by inaction or omission. This positive action must be intended. The agent (or oath-swearer) must do it for some purpose or to achieve a goal. The swearer must actively and intentionally swear an oath.¹⁶¹

These positive actions described above, corresponds with Hägerström's¹⁶² description of modern law as a collection of ritualistic exercises. He refers to the ceremony that takes place during coronation, the wearing of a black cap by a judge before he pronounces a death penalty; and the role of the wedding ring by a couple getting married.¹⁶³ The swearing of an oath can be likened to these ceremonial actions. The president swears an oath of office; the witness swears an oath in court and various other instances where an oath is a ritual, part and parcel to a legal action.¹⁶⁴

¹⁵⁹ Fauconnier *Aspects of the Theory of Communication* 29.

¹⁶⁰ Downes *Language and Society* 368-369.

¹⁶¹ See Chapters 4-6.

¹⁶² As quoted by Freeman and Smith "Law and Language: An introduction" 2.

¹⁶³ Freeman and Smith "Law and Language: An introduction" 2.

¹⁶⁴ See Chapter 5 and 6 for specific examples of these actions.

Olivecrona¹⁶⁵ was greatly influenced by Hägerström and the rituals described above, when he analysed legal language. In this analysis, Olivecrona¹⁶⁶ discussed a part of legal language which he calls *performatives*. These are legal words and actions used to produce certain desired results (like saying "I do" when getting married, bonds two people in the eyes of the law).¹⁶⁷ Performative utterances are thus words with great legal power. These performative utterances in legal language are referred to as *speech acts* which are part of linguistics.

Speech acts are a part of general communication, not only reserved for formal instances like the church or the courtroom. A speech act is communication but has the added function of affecting institutional states of affairs. This takes place in one of two ways: firstly, the speaker judges something to be the case; and secondly, to make something the case.¹⁶⁸ When a speaker judges something to be the case, it is like situations when the judge in a trial gives a ruling on a specific case (for example guilty).¹⁶⁹ When a speaker makes something the case the speaker has the intention to create a new state of affairs. These are cases when a judge sentences the guilty party to imprisonment.¹⁷⁰

There exists an interrelationship between language (including all the elements relating to it) and society. The language and its practices develop from society when a need for its application arises. This is done for language, law and all other aspects of social life to reflect the society. As law is an integral part of society and the practices of a legal nature also have social implications.¹⁷¹ The oath is a legal act because it is sworn for legal purposes for example to proclaim the truth of a matter and to ensure the validity of oral evidence. This legal act contains a societal element within it because certain legal systems require the swearer to swear along with others from the community (oath-helpers).¹⁷² The oath and

¹⁶⁵ As quoted by Freeman and Smith "Law and Language: An introduction" 2.

¹⁶⁶ Freeman and Smith "Law and Language: An introduction" 2.

¹⁶⁷ Freeman and Smith "Law and Language: An introduction" 2.

¹⁶⁸ Kent Bach 2005 <http://online.sfsu.edu/kbach/spchacts.html>.

¹⁶⁹ It is to be remembered that the judge's ruling did not make the person guilty. The person was guilty the moment he broke the law. The judge merely made a statement to that effect.

¹⁷⁰ Note here that the judge is changing a situation. The guilty party was free, now he is not.

¹⁷¹ See 2.2 above.

¹⁷² See Chapter 3 below.

oath-swearing have qualities of a social nature and legal nature which contribute to the developmental history of oath-swearing. These are both influenced by the religion of the swearer, the religion of the community and the point in history when the oath was sworn.¹⁷³ These religious aspects need to be considered in order to answer the research question.

2.4 Religion

Religion and its place in law is unique in that they contain within the aspects of both social life as well as individual life.¹⁷⁴ As mentioned above,¹⁷⁵ the oath has a religious facet to it. Tyler,¹⁷⁶ working towards a definition for *oath*, states that the oath can be described as having a dual nature. The first is the calling on the deity to witness the swearing and the second, invoking the wrath, vengeance or disfavour, should the swearer not perform the promise.¹⁷⁷ Due to this aspect of religion enshrined in the letter and essence of the oath it becomes necessary to investigate the religious nature of oath-swearing.

The Reference Bible¹⁷⁸ expands upon the description above and relates instances of *interpartes* oath-swearing practices, as was common during the Old Testament, as a situation where a person calls upon God as a guarantor for the truthfulness of a person. This guarantee is exercised by way of divine judgment in that God can intervene in situations where the swearing party commits perjury. The judgment of God in perjury situations can, in certain instances take on the form of a self-curse where a person guarantees his devotion to honesty by invoking God's name and declaring that if he or she should commit perjury, and if it is God's will,

¹⁷³ See 2.4 below.

¹⁷⁴ Donovan 1995 *Constitutional Law Journal* 26.

¹⁷⁵ See Chapter 1 above.

¹⁷⁶ Tyler *Oaths; Their Origin, Nature and History* 9.

¹⁷⁷ Tyler *Oaths; Their Origin, Nature and History* 9.

¹⁷⁸ Verwysingsbybel 1630. Aside from the specific instances of oath-swearing discussed here, there are several other such instances in the Bible. A list of the most notable among them follows: Genesis 14:22, 21:23, 21:31, 22: 16-17, 24:2, 24:7, 26:33, 47:29; Exodus 22:11; Book of Numbers 5:21-22; Deuteronomy 4:31, 29:12, 32:40; Psalm 89:4, 95:11, 105:9, 106:26, 132:11; Matthew 23:16-23; Marcus 6:23-26. See Verwysingsbybel 1630 for a complete list.

then something horrible will befall the perjurer.¹⁷⁹ Later, during the New Testament, Matthew records that any oath, regardless of the manner in which it is sworn, is binding and that God will judge these oaths.¹⁸⁰ This seems to be where the principle of consistent truthfulness is required of Christians.¹⁸¹

The argument above, made in favour of religious interference with legal actions, can be countered by the argument on whether a Christian, for example, is allowed to swear an oath. Tyler¹⁸² makes an argument that it might be the case that the religious manual for Christians, the Bible, limits oath-swearing. In the Old Testament, Deuteronomy 6:13,¹⁸³ states the following with regard to the swearing of an oath: "Fear the LORD your God, worship Him, and take [your] oaths in His name."¹⁸⁴ This is indicative of a limitation of the swearing freedom since Christians, and those who adhere to the Old Testament, can only swear to the God of the Bible and should they swear their oaths before any other deities it will constitute a religious trespass and render the oath null.¹⁸⁵ A further occurrence of oath-swearing in the Old Testament is to be found in Exodus 22:10-13, which states that:¹⁸⁶

[w]hen a man gives his neighbour a donkey, an ox, a sheep, or any [other] animal to care for, but it dies, is injured, or is stolen, while no one is watching, there *must* be an oath before the LORD between the two of them to determine whether or not he has taken his neighbour's property. Its owner *must* accept the oath, and the other man does not have to make restitution. (Own emphasis)

The relationship between the law and religion becomes more blatant where the swearing of an oath is concerned. If the oath can be identified as a legal action with religious implication, or a solemn proclamation of a declaration's truth,¹⁸⁷ then there is a place for both law and religion in the nature and working of an

¹⁷⁹ Verwysingsbybel 1630. See also discussion below.

¹⁸⁰ Verwysingsbybel 1630; Verklarende Bybel 32-33 Matteus 23:16-23.

¹⁸¹ Verwysingsbybel 1630; Verklarende Bybel 32-33. See also discussion below.

¹⁸² Tyler *Oaths; Their Origin, Nature and History* 17.

¹⁸³ Holy Bible: Deuteronomy 6:13; Verklarende Bybel 200-201.

¹⁸⁴ Holy Bible: Deuteronomy 6:13; Verklarende Bybel 200-201.

¹⁸⁵ Verklarende Bybel 32; Tyler *Oaths; Their Origin, Nature and History* 17.

¹⁸⁶ Holy Bible: Exodus 22:10-13; Verklarende Bybel 94-95.

¹⁸⁷ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 1-2, see discussion below.

oath.¹⁸⁸ Earp¹⁸⁹ refers to a term called *religious metaphysics* which is stated to include community rights, religious continuity and obedience to divine command.¹⁹⁰ These religious metaphysics tend to occupy the same space as the now-common constitutional freedoms and rights. One of the manifestations of religious metaphysics is the *obedience to divine command* and should this be taken into consideration when studying the swearing of an oath it becomes clear that the follower of a certain religion will feel compelled to adhere to the prescriptions of the oath.¹⁹¹ The practical implication of this is that the aim of the oath will be easily attainable if pressure be exerted on the swearer.¹⁹²

In this instance, it is in the interest of the law and justice that religion be used to promote the ends of justice and to make the letter of the law more effective than it would have been without it. For this purpose, most religious systems contain within them a legal system to enforce the religious rules.¹⁹³ These legal systems might appear to be primitive in design as well as in execution. The rules stated within the teachings of a religion appear to an outsider to be a *paper tiger* because of the apparent inability to enforce the rules. The most common form that the governing rules take in religions is the negative force¹⁹⁴ and a negative control of people. This negative control is rooted in the "thou shalt not..." structure of the religious laws.¹⁹⁵

This is true for the practice of oath-swearing. The religious aspect of the oath is that the deity in whose name the oath was sworn will ensure that the swearer does not perjure himself or herself. The swearer will tell the truth for fear of the

¹⁸⁸ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 1-2, see discussion below.

¹⁸⁹ Earp 2013 *The Philosopher's Magazine* 2.

¹⁹⁰ It is relevant to indicate that the author of this article (Earp 2013 *The Philosopher's Magazine*) is referring to a 2012 German court ruling which concluded that the circumcision of children constituted a violation of the child's constitutional rights to bodily integrity and self-determination. This is yet another example of where religion and law collides.

¹⁹¹ Earp 2013 *The Philosopher's Magazine* 1-4.

¹⁹² It is further relevant to state that undue stress could, theoretically, be placed on the swearer due to the fear the swearer might experience and could be comparable to coercion. Should the swearer be placed under such stress, and should it be possible that the ends of justice could be defeated by this, the swearer could still make an affirmation in lieu of the oath.

¹⁹³ Legal-religious systems like the Catholic religion (canon law), and the Islam religion (*Shari'a* law) are prime examples.

¹⁹⁴ See 2.2 above. And see the references made to perjury in this regard.

¹⁹⁵ See Chapter 6 below.

deity's wrath. This is the theoretical basis for the swearing of an oath.¹⁹⁶ It is doubtful if modern swearers fear an immediate action (like fire from the heavens or a lightning bolt) from the deity in whose name they swear. It seems to be more of a delayed judgement, which will occur after death. It is suggested that because of this delayed reaction that the "thou shalt not..." structure of this religious law might be flawed and not sufficiently threatening to ensure that the swearer gives a true testimony, or an honest adherence to the promises made.

In this case it seems that the swearing of an oath is not merely permitted but required as part of the formal proceedings in a matter, as set out above. The party provides evidence of his innocence by way of oath (swearing that he is such)¹⁹⁷ and the opposing party accepts the oath, it seems, because the swearer would not lie with God bearing witness, or is compelled to accept the oath because of the grave religious implications. This method and process of oath-swearing indicates that the practice is ingrained in the community's religious and legal understanding. The Old Testament does not forbid oaths. Three aspects that should not be part of an oath are: firstly, that oaths must never be sworn to any deity other than God, secondly, oaths taken before God must not be perjurious, and thirdly, oaths must not be sworn for trivial matters.¹⁹⁸ This creates the precedent that swearing an oath is not essentially a sinful act. The transition from the Old Testament to the New Testament brings about many changes to commonly acceptable behaviour, one of which is oath-swearing.

In the Gospel according to Matthew, which is the first book of the New Testament, Christ, after going up on the mountain,¹⁹⁹ addressed His disciples and began teaching them. In chapter 5:33-37, He states the following:²⁰⁰

¹⁹⁶ Hartland *Primitive Law* 174; Coriden, Green and Heintschel (eds) *The Code of Canon Law: A Text and Commentary* 844; Birney *Salisbury Oath* 30; Milhizer 2009 *Ohio State Law Journal* 22-23.

¹⁹⁷ Verklarende Bybel 95. There are various instances of oaths similar to this below. See Chapters 3, 4, 5 and 8 in particular.

¹⁹⁸ Tyler *Oaths; Their Origin, Nature and History* 20. See 6.2.1 below.

¹⁹⁹ The exact name and location of this mountain is not specified, aside from it being "beyond the Jordan" see Holy Bible: Matthew 4:24-5:38; Verklarende Bybel 5-8.

Again, you have heard that it was said to your ancestors, you must not break your oath, but you must keep your oaths to the Lord. But I tell you, don't take an oath at all: either by heaven, because it is God's throne; or by the earth because it is His footstool; or by Jerusalem, because it is the city of the great King. Neither should you swear by your head, because you cannot make a single hair white or black. But let your word 'yes' be 'yes,' and you 'no' be 'no.' Anything more than this is from the evil one.

This quote indicates strongly that although the mere act of swearing is not necessarily a sinful act, it is a very serious undertaking.²⁰¹ People should keep the oath to God, but other instances of swearing should not be necessary because of the truthfulness of Christians (their 'yes' is 'yes' and their 'no' is 'no').²⁰² Should swearing then be necessary, it might be that it was prompted by another (unchristian) situation altogether (the evil one). The mere swearing of an oath is not prohibited or encouraged, but the stringent rules regarding the swearing might be two-pronged: firstly, to not swear habitually and then turn the act into a situation akin to taking the Lord's name in vain (which is a sin);²⁰³ and secondly, to swear to God and not earthly things or false idols (which is also a sin).²⁰⁴

This similar rule is also present in James 5:12.²⁰⁵ There it is stated that Christians should not swear "either by heaven or by earth or with any other oath". The reason provided for this caution is that if their 'yes' is not 'yes' and their 'no' is not 'no' and an oath is required to ensure the truth of their words, then they might "fall under judgment",²⁰⁶ which is just further evidence of their apparent general untruthfulness. This application of the religious prescriptions in a legal context seems to be a *caveat* to discourage thoughtless swearing or even discourage swearing altogether. It seems that the religious nature of oath-swearing can, in

²⁰⁰ Holy Bible: Matthew 5:33-38. This similar rule is also present in James 5:12. There it is stated that they should not swear "either by heaven or by earth or with any other oath." Verklarende Bybel 8.

²⁰¹ "You must not break your oath, but you must keep your oaths to the Lord." Holy Bible: Matthew 5:33-38. Verklarende Bybel 8.

²⁰² See above.

²⁰³ Holy Bible: Exodus 20:7. Tyler *Oaths; Their Origin, Nature and History* 23 states the following as support for the statement above: "It has been a general vice, in almost every age, to swear lightly and without consideration; such is our evil-mindedness, (*sic*) we do not reflect how grievous a sin it is to abuse the name of God. Verklarende Bybel 200-201 notes 10-14.

²⁰⁴ Holy Bible: Exodus 20:4; Verklarende Bybel 200-201 notes 10-14.

²⁰⁵ Holy Bible: James 5:12.

²⁰⁶ Holy Bible: James 5:12.

certain instances, be in contrast with its legal nature. If the context of the prohibition on swearing in James 5:12²⁰⁷ is considered, it can be interpreted that this prohibition is a warning not to take the Lord's name in vain, rather than courtroom oaths.²⁰⁸ The relationship between law and religion in the context of oath-swearing is still a matter of great debate and interpretation. The practical aspects of oath-swearing should provide for the diverse nature of oath-swearing and the contrasting approaches to oaths, their swearing and what power they have, because a too rigid approach might influence the efficacy thereof.

2.5 Conclusion

The purpose of this chapter was to review the theoretical foundations of the transdisciplinary perspective of the history of oath-swearing. This theoretical background is applied to the investigation of the history of oath-swearing in the subsequent chapters. Aspects which may have influenced the developmental history of oath-swearing were examined and certain aspects were scrutinised for their contribution to the practices of oath-swearing. These include law and the nature of law as an abstract concept; language, communication and society as it interrelates as well as its relation to oath-swearing and the history thereof.

A functional description of the term *law* was provided *en lieu* of an all-encompassing definition. As is stated above, this study's transdisciplinary approach requires a definition that can adapt to disparate environments and still has a uniform application. The functional description of law was firstly concerned with the distinction between what is law and what is non-law.²⁰⁹ After such distinction was made, that which was identified to be *law*, was further divided into two categories, "law is..." and "law as...".²¹⁰ The first is a jurisprudential and theoretical contemplation whereas the latter is a more practical definition as it can easily be applied cross-culturally as well as across different periods.²¹¹

²⁰⁷ Holy Bible: James 5:12.

²⁰⁸ Verklarende Bybel 334.

²⁰⁹ Bohannon 1965 *American Anthropologist* 33-34.

²¹⁰ Tomlins and Comaroff 2011 *UC Irvine Law Review*.

²¹¹ Tomlins and Comaroff 2011 *UC Irvine Law Review*.

The societal considerations involved in the definition of law also played an important role in classifying the practice of oath-swearing as a social fact.²¹² The practice of oath-swearing can either be categorised as functional or ritualistic. This distinction is made, depending on the social need it fulfils within a community, and what actual consequences are expected to arise from the swearing of an oath. If it is to ensure that the witness provides truthful testimony, then it is functional. If it is to ensure that the proper procedure is followed and no actual expectation of truth is expected, then it is ritualistic.²¹³

Additionally, the chapter reviewed the nature of that which is defined as law by separating law from non-law.²¹⁴ The division between function and ritual in the definition above was extrapolated and reapplied to a sociological conception of law within a historical context. That which forms the building blocks of law were identified as norms, custom and law.²¹⁵ Norms, being a collection of general principles of appropriate behaviour, differ from custom in that custom is a body of norms which are certain and regularly followed.²¹⁶ Law is then described as a compendium of customs which are certain, enforceable and generally applicable, portrayed to be effective as the general will of the people.²¹⁷

Law, within the above context, was further divided into functions of law, being prohibitory and prescriptive.²¹⁸ The presence of both these functions in law is important in order for the legal system to function properly. The prohibitory function, or negative system, prevents poor behaviour because it prescribes what behaviour is unacceptable and from which behaviour people should refrain.²¹⁹ The prescriptive function, or positive system, keeps order as it prescribes what people should do or ought to do.²²⁰ Should this theory be applied to the practice of oath-swearing, it seems that the phrasing of the oath should be clear and

²¹² Durkheim *The Rules of Sociological Method* 125.

²¹³ Milhizer 2009 *Ohio State Law Journal* 4.

²¹⁴ Bohannan 1965 *American Anthropologist* 33-35.

²¹⁵ Bohannan 1965 *American Anthropologist*; Donovan *Legal Anthropology*.

²¹⁶ Bohannan 1965 *American Anthropologist* 33-35; Donovan *Legal Anthropology* 117-118.

²¹⁷ Bohannan 1965 *American Anthropologist* 33-35; Donovan *Legal Anthropology* 117-118.

²¹⁸ Foucault *Discipline and Punish* 218.

²¹⁹ Foucault *Discipline and Punish* 218.

²²⁰ Foucault *Discipline and Punish* 218.

unambiguous, containing both these aspects, negative and positive. This will place a negative duty on the swearer to provide truthful evidence, but also as duty to disclose truth, even in the absence of an explicit inquiry into the matter. The dual system could cause truthfulness in favour of justice.

An additional aspect ancillary to the swearing of an oath is the matter of language and communication. These are external to the legal focus of the practice of oath-swearing, but its indirect influence is vested in the fact that both lay, generally, and an oath needs to be interpreted into an understandable form to enable people to follow the prescribed commands. These commands can only be properly understood if the language system and the legal system are compatible so as to allow for communicating complex legal jurisprudence.²²¹ Language will then develop in tandem with the legal system to ensure that the *certainty* aspect of law is maintained.²²²

The law, or in particular the oath, is at its most basic form a form of communication. Communication, being a societal interaction, can be understood as a situation where two (or more) parties actively strive to make themselves understandable and at the same time understanding each other.²²³ This very broad definition allows for the objective of oath-swearing to be included. This communication can be verbal, non-verbal, written or merely a sound; and the oath can either be solely verbal, or verbal in conjunction with another action.²²⁴ This process can be summarised as follows: intent is converted into language (oath) in order to impart said information (swear) to another – communication. Communication, or oath-swearing, in this instance can only function within a community and the societal aspects are important in the success or failure of the oath as is commonly applied.

²²¹ Bohannan 1959 *American Anthropologist* 161-163.

²²² Fauconnier *Aspects of the Theory of Communication* 31.

²²³ Fauconnier *Aspects of the Theory of Communication* 29.

²²⁴ See subsequent chapters.

These societal aspects are, amongst others, language,²²⁵ communication²²⁶ and religion.²²⁷ Religion is integral to the composition of the oath as well as to the process and practice of oath-swearing. For this reason, oath-swearing can be described as a legal action with a religious implication.²²⁸ The purpose of oath-swearing is, in most cases, legal; whereas, the compulsion to adhere to the terms of the oath is vested in religion. The objective of the oath is then easily attained when the religious duty and the community exert pressure on the swearer to not commit a religious sin for a legal reason. The necessity to be truthful is then twofold. The exact requirements regarding oath-swearing are discussed below in the context of the religion and their unique approaches.²²⁹ The approaches may include words, actions, rituals or an aversion to the process of swearing as a whole. These differing approaches to oath-swearing from a religious point of view may, in some instances, be in conflict with the legal motivations or prescriptions provided for oath-swearing.²³⁰ That which provides power and authority to the oath, may also obstruct the objective of the oath. An investigation into the practices of oath-swearing in the Roman law from its founding until the death of Justinian follows below. Due consideration is given to the aspects of law, communication and religion.

²²⁵ See 2.3.

²²⁶ See 2.3.

²²⁷ See 2.4

²²⁸ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 1-2.

²²⁹ See Chapters 3 and 6.

²³⁰ See Chapter 6.

Chapter 3 The oath in Roman law (753BCE-565CE)

3.1 Introduction

The legal system of Rome in antiquity is a system that governed the behaviour of the people within its jurisdiction.²³¹ The Roman Empire developed from the customs and practices of a primitive village state to a legal system that influences a great many countries' understanding of law.²³² This developmental process occurred over a period of several centuries.²³³ The principles of the Roman legal system did not stay within the confines of the great walls or borders of Rome.²³⁴ Rome was one of the most influential cities, and later on, states in the world.²³⁵ It was by all accounts an empire.²³⁶ The Roman law forms the basis of various other legal systems and is still used in modern courts to facilitate justice. Schiller²³⁷ states that there is still a necessity to study the Roman law, as the Roman understanding of law forms the basis of the law and jurisprudence used by practitioners of law to develop the law in their own jurisdictions.

The history of the Roman law is vast and only a very small part thereof is directly applicable to this study. As a means of organising the history of Roman law and its influence across Europe and other countries, various divisions can be used. The two most commonly used divisions are (a) the periods according to the constitutional history of Rome and (b) is the division according to the development of Roman law.²³⁸ This study will focus on two periods, pre-

²³¹ Kaser *Römisches Privatrecht* 2-8; Venter *et al Regnavorsing* 162-164.

²³² Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 15; Venter *et al Regnavorsing* 162-170.

²³³ Kaser *Römisches Privatrecht* 2-8; Venter *et al Regnavorsing* 161-196.

²³⁴ Kelly *Roman Legal and Constitutional History* 3. The Roman-Dutch law and the position of oath-swearing in the Netherlands, as influenced by the Roman law, are explored in Chapter 4.

²³⁵ Kelly *Roman Legal and Constitutional History* 3.

²³⁶ An empire can be defined as "a political construct in which one state dominates over another state, or a series of states ... [an] empire is an unequal relationship between a core state and a periphery of one or more states controlled from the core." Ancient History Encyclopedia 2015 <http://www.ancient.eu/empire/>.

²³⁷ Schiller *Roman Law: Mechanisms of Development* 9.

²³⁸ This period will not be used in this study, but reference to it is necessary. The division according to Roman law follows similar avenues of division but differs from the constitutional development in the following way, the Ancient period ranges from 753–250 BCE where the first date marks the beginning of Rome and the second the beginning of Rome's expansion

Justinian²³⁹ and Justinian.²⁴⁰ The approach that is followed under these two periods is the division according to the constitutional history; which is as follows:²⁴¹ from 753–510 BCE was the Monarchy²⁴² and started at the legendary founding of Rome²⁴³ and continued through a period where seven kings²⁴⁴ ruled

beyond what is now known as Italy. The Pre-Classical period starts at 250 BCE and is brought to an end in 27 BCE with the end of the Republic. The Classical period can be described as the time of the great Roman jurists and "golden age" of the Roman law and this period falls within the same time as the Principate (27 BCE–284 CE). The Post-Classical period is also the same period as the Dominate (284–565 CE); and finally the period 527–565 CE is known as the Justinian period, so-named for the judicial labour of Justinian during his reign. Feenstra *Romeinsrechtelijke Grondslagten van het Nederlands Privaatrecht* paras 1-2 and the *tijdtafel* 310-311; Feenstra "Romeins Recht en Europese Rechtswetenschap" 101-103; Edwards *The History of South African Law: An Outline* 4-6; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1-7; Du Plessis *Roman Law* 1-23; Joubert *Romeinse Reg* 1-37. See 1.2 above.

²³⁹ See 3.2 below.

²⁴⁰ See 3.3 below.

²⁴¹ For a clear exposition of the history as it pertains to the above divisions, see Thomas *Essentialia van die Romeinse Reg* 13-17; Van Warmelo *Die Oorsprong en Betekenis van die Romeinse Reg* 21-214; Joubert *Romeinse Reg* 1-37; Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 15-16. See 1.2 above.

²⁴² See 3.2.1 below.

²⁴³ The Romans celebrate the founding of the city of Rome annually on 21 April. Tradition and legend estimates, and most academics and historians agree, that the founding date of Rome is 753 BCE. What is, however, certain, according to Bernard (*The First Year of Roman Law* 2), is that a small town was built around the middle of the eighth century BC. Du Plessis (*Roman Law* 1-23) relates the traditional tale of the founding of Rome. He states that the founder of Rome was Romulus, brother to Remus. It was said that they were the sons of Mars (god of war) and Rhea Silvia (daughter of the king of Alba Longa who was apparently raped by Mars and imprisoned for the crime of allowing herself to be raped) and that Romulus would build the city of Rome on the Mons Palatinus. Some connection between the Greeks and the founding of Rome is made by connecting the Trojan war and their own history to the history and founding of Rome by averring that the descendants of Aeneas (Aeneas was a hero in the now legendary Trojan War and son of the Greek goddess Aphrodite.) built Rome. It is said that Aeneas escaped Troy with a handful of survivors and eventually settled on the banks of the Tiber. It is important to note that the vast majority of Romans during this time refused to entertain the idea that their beloved city might have been founded by people other than Romulus (descendent of Aeneas), like or example the Etruscans. See Livius T *Ab Urbe Condita Libri* (Translated by Roberts C *The History of Rome* (JM Dent and Sons Ltd London 1905) (hereafter Roberts *The History of Rome*) paras 1.1-1.4; Du Plessis *Roman Law* 1-23 and Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1-2 in general. Du Plessis further notes that the Romans refused to be ruled by the Etruscans after the well-known tale of the rape of Lucretia. It is said that Tarquinius Superbus the last king of the Monarchy, who was of Etruscan origin, had a son who sexually abused the daughter of a very important Roman man. This spurned revolution in the hearts and minds of the Roman-born citizens and signalled the end of the Monarchy. It is therefore a self-evident truth that the hatred of the Etruscans was so deeply engrained in the hearts of the Romans as a society and that is why it is improbable that the Romans would accept this hated nation as the founder of the city of Rome. See Joubert *Romeinse Reg* 1-40.

²⁴⁴ Romulus, Numa Pompilius, Tullus Hostilius, Ancus Marcius, Tarquinius Priscus, Servius Tullius and Tarquinius Superbus. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 2. See Joubert *Romeinse Reg* 1-40.

Rome for roughly the first 250 years starting with Romulus and ending with Tarquinius Superbus.²⁴⁵ After the kings were expelled, the Republic was formed (510–31 BCE); the Principate was from 31 BCE–284 CE, when Augustus became *princeps* functions as a marker for this time period; 284–476 CE is called the Dominate when Diocletian introduced the totalitarian monarchy and ended with Romulus Augustus who was the last emperor of the West. The end of Rome is (for these purposes) marked by the passing of Justinian in 565 CE.²⁴⁶

The Latin term used to describe the process of oath-swearing is *sacramentum*. The development of the oath in each period is investigated while taking into account the nature of the law that functioned during that particular period in time. Both the internal and the external legal history are taken into account to determine how the oath and the practice of oath-swearing developed during the respective periods. The theory as discussed above is applied to the oath to consider the different elements which influences the oath or the influences the oath has on other social dealings. The pre-Justinian period is discussed first, starting with the Monarchy, followed by the Republic, then the Principate, and lastly the Dominate. The Justinian period follows and brings this chapter to a close with the conclusion.

3.2 Pre-Justinian (753 BCE-527 CE)

3.2.1 Monarchy

The history of the ancient Rome in this period is somewhat interlaced with legend and much of what is known could prove to be legend or a dramatised version of

²⁴⁵ Du Plessis *Roman Law* 1-23. Du Plessis states that it is improbable that each king could rule for an average of 35 years. See Thomas *Textbook of Roman law* 13-26 in this matter generally. The regal, single-ruler system contributed significantly to the Roman government. The first king, Romulus, established a consultative body comprising of elders and prominent members of the society which formed the Senate. The descendants of these first members were known as the patricians (*patricii*) and they were not unlike royalty. This unwittingly divided the citizens of Rome into different classes. Thomas states that there are three main elements in the constitution of that time, namely: the King (*rex*), the *senatus* (senate) and the *comitia* (assembly). Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1. See Joubert *Romeinse Reg* 1-40.

²⁴⁶ Edwards *The History of South African Law: An Outline* 4; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1-7. See Joubert *Romeinse Reg* 1-40.

the actual occurrences.²⁴⁷ Much of what is known today regarding the Monarchy was written later, probably during the early Republic.²⁴⁸ The community and its practices characterises the first two centuries of Rome.²⁴⁹ Certain societal developments during the Monarchy persisted during subsequent periods. One such development is the development of the Roman civil religion.²⁵⁰ Silk²⁵¹ states that one factor to which the Roman success as a state can be contributed is religion. Numa Pompilius, the second king of Rome, is widely considered to be the paragon of religious innovation within the Roman state.²⁵² An interesting consequence of this religious innovation is, according to Silk,²⁵³ the Roman preoccupation with the gods and the roles the gods play in their lives. This caused them to become a sacral society, in addition to being a litigious society,²⁵⁴ which further blurred the lines between that which is religion and that which is law. Numa's religion then became the civil or state religion for many years and caused the Romans to be generally more susceptible to religion. This religious predisposition was the foundation upon which paganism, and later Catholicism, was built.²⁵⁵ It can be argued that the civil religion, established by Numa, had an indirect effect, whether intended or unintended, the religion was used to aid in governing the people, where law fails, religion succeeds.²⁵⁶ Pious people are easier to govern and a religion of a peace-loving nature promotes justice and curbs violence and wrongdoing.²⁵⁷

²⁴⁷ Edwards *The History of South African Law: An Outline* 4-6; Du Plessis *Roman Law* 1-23; Van Lunteren *Overzicht* paras 11-16. See earlier footnotes as well.

²⁴⁸ Joubert *Romeinse Reg* 2-3; Edwards *The History of South African Law: An Outline* 4-6; Du Plessis *Roman Law* 1-23; Van Lunteren *Overzicht* paras 11-16.

²⁴⁹ Edwards *The History of South African Law: An Outline* 4; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1-7. See Joubert *Romeinse Reg* 1-40; Du Plessis *Roman Law* 1-23.

²⁵⁰ Silk 2004 *Journal of the American Academy of Religion* 863-896.

²⁵¹ Silk 2004 *Journal of the American Academy of Religion* 864.

²⁵² Roberts *The History of Rome* para 1.18; Silk 2004 *Journal of the American Academy of Religion* 864-865; Le Glay *et al A History of Rome* 22-23; Du Plessis *Roman Law* 2. It is also possible that Numa is largely responsible for the religious oath-swearing practices, which seem to have persisted in Roman law and tradition. Moore 1911 *Law Student Helper* 15

²⁵³ Silk 2004 *Journal of the American Academy of Religion* 866.

²⁵⁴ Silk 2004 *Journal of the American Academy of Religion* 866-867.

²⁵⁵ Silk 2004 *Journal of the American Academy of Religion* 872-876.

²⁵⁶ Silk 2004 *Journal of the American Academy of Religion* 872.

²⁵⁷ Silk 2004 *Journal of the American Academy of Religion* 872.

Moore²⁵⁸ states that there is some ceremony involved in the swearing of an oath as suggested by Numa. Initially the practice of oath-swearing came from Greece, as did some other cultural practices, where the requirement of a valid oath was that the swearer has to invoke the three greater deities of the pantheon, Jupiter, Neptune and Minerva.²⁵⁹ Numa, however, required that oaths be sworn with the invocation of Fides as witness to the swearing.²⁶⁰ In certain cases the swearer could even pick up a stone from the ground, throw it away and state that in the case of perjury, Diospiter²⁶¹ can cast the perjurer away, and by so doing, cause a self-curse to be the binding force of the oath.²⁶² The swearing seems to be primitive, but religious and heartfelt.

Archaeologists suggest that the early Romans were farmers and were mainly concerned with agriculture which they practiced in a very primitive fashion.²⁶³ Community life centres on the *gens* (which translates to tribe or clan) and consists of a group of families related to each other by virtue of marriage or another bond.²⁶⁴ The different units that make up the *gens* are the *familia* and the *paterfamilias*, who is the head of this smaller entity. The *paterfamilias* has considerable power over the rest of the *familia* and this power can be likened to law as the *paterfamilias* can alter legal institutions like marriage.²⁶⁵ The *paterfamilias* is, in turn, unassailable and beyond reproach. This is a very strict patriarchal society and the source of the authority vests in the head of the family.²⁶⁶

In a similar way that the *paterfamilias* rules the family unit and has the power to govern the family without question, the leader of Rome, during this period, is a

²⁵⁸ Moore 1911 *Law Student Helper* 15.

²⁵⁹ Moore 1911 *Law Student Helper* 15.

²⁶⁰ Moore 1911 *Law Student Helper* 15.

²⁶¹ Also called Iupiter.

²⁶² Moore 1911 *Law Student Helper* 15.

²⁶³ Edwards *The History of South African Law: An Outline* 4-6; Du Plessis *Roman Law* 1-23.

²⁶⁴ Schiller *Roman Law: Mechanisms of Development* 133-135.

²⁶⁵ Van Zyl *Romeins-Hollandse Reg* 18-20; Van Lunteren *Overzicht* paras 11-16; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 2 and 82-84; Edwards *The History of South African Law: An Outline* 4-6.

²⁶⁶ Van Zyl *Romeins-Hollandse Reg* 18-20; Edwards *The History of South African Law: An Outline* 4-6.

king who governs and rules over the people of Rome.²⁶⁷ The king of Rome is elected and he remained the king for as long as he lived.²⁶⁸ It is said that the kings were traditionally elected by means of *interregnum*.²⁶⁹ Livius²⁷⁰ recounts the election of Numa Pompilius after the death of Romulus. The *interrex* called an assembly and stated that a new king is to be elected and if this person is worthy according to the senate,²⁷¹ they will ratify the choice and that person will then serve as king.²⁷²

The king has various obligations under the following three categories: He is the head of the state religion, the head of state administration, and he is responsible for the administration of justice.²⁷³ In his capacity as the administrator of justice he has the power to condemn someone to death or to exile. What is known today about the nature of the law that governed the Roman people during the Monarchy is largely founded on tradition.²⁷⁴ This historical tradition is based on references made to this time by later authors and these stated that the law was largely *leges regiae* (royal law or law of kings).²⁷⁵ The exact content of this *legis regiae* is pure conjecture at this point due to the poverty of sources but it most likely contained sacral or religious law. These were comparable to ordinances as there is no proof that such law was ever made in this specific period with such content.²⁷⁶ Regardless, the law in this time can be described as very primitive as is evidenced by the fact that the head of the state was also the head of the religion.²⁷⁷ The lines between what act²⁷⁸ is religious and what act is secular were

²⁶⁷ Van Zyl *Romeins-Hollandse Reg* 14-20; Edwards *The History of South African Law: An Outline* 4-6; Du Plessis *Roman Law* 1-23; Van Lunteren *Overzicht* paras 11-16. See Thomas *Essentialia van die Romeinse Reg* 14-18 regarding the roles of the senate and the *comitia curiata* (volksvergadering).

²⁶⁸ Van Zyl *Romeins-Hollandse Reg* 14-20; Edwards *The History of South African Law: An Outline* 4-6; Du Plessis *Roman Law* 1-23; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 2; Van Lunteren *Overzicht* para 12.

²⁶⁹ Schiller *Roman Law: Mechanisms of Development* 137.

²⁷⁰ Roberts *The History of Rome* para 1.17.

²⁷¹ The first king of Rome, Romulus, established the senate. See Du Plessis *Roman Law* 2.

²⁷² Roberts *The History of Rome* paras 1.17-1.18. This is discussed here because of the oath-swearing practices, which later accompanied coronation.

²⁷³ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 2.

²⁷⁴ Joubert *Romeinse Reg* 2-3.

²⁷⁵ Joubert *Romeinse Reg* 3; Edwards *The History of South African Law: An Outline* 4-6.

²⁷⁶ Joubert *Romeinse Reg* 3; Edwards *The History of South African Law: An Outline* 4-6.

²⁷⁷ Van Zyl *Romeins-Hollandse Reg* 14.

blurred by the dual function of the king. This gives way to a position where the priests actually dispense justice and interpret the law.²⁷⁹

In addition to being head of the religion, one of the king's functions was that he was responsible for the administration of justice in that he was burdened with the legislative as well as the judicial authority.²⁸⁰ This armed the king with legislative power as he could *speak* law; but as the law and religion could not function independently from each other and the king could just as easily have *spoken* religion.²⁸¹

The Romans were simple and quite primitive²⁸² in their administration of their everyday lives.²⁸³ As mentioned above, the law and religion was intertwined from the beginning of the Roman history but this relationship separated somewhat as the period of the Kings draws to an end.²⁸⁴ The distinction which arises between that which is law and that which is religious in nature was not so clearly defined. Although law and religion were separated, religion still influenced the law as the law was based on tradition and customs which accumulate over time. Traditions and customs were in all probability also marked by religion.²⁸⁵ This interrelationship also influenced the oath-swearing practices during this time. Silving²⁸⁶ describes the purview and aspect of the oath or *sacramentum* by placing the term in the historical context of 753-150CE and the *legis actiones* where the

²⁷⁸ To be understood as action and not legislation.

²⁷⁹ Van Zyl *Romeins-Hollandse Reg* 14; Van Zyl *Geskiedenis en Beginfels van die Romeinse Privaatreg* 3. A division between these two functions gave rise to the development of terminology to separate them. *Ius* is to be understood as a legal rule or a rule of law and *fas* is to be understood as a religious prescription.

²⁸⁰ Edwards *The History of South African Law: An Outline* 4-6.

²⁸¹ Berman *The Interaction of Law and Religion* 25.

²⁸² This word is used in comparison to the sophisticated society that this small city-state would turn into in the coming centuries.

²⁸³ Van Zyl *Romeins-Hollandse Reg* 14.

²⁸⁴ Van Lunteren *Overzicht* paras 11-16; Edwards *The History of South African Law: An Outline* 4-6.

²⁸⁵ Van Lunteren *Overzicht* paras 11-16; Edwards *The History of South African Law: An Outline* 4-6.

²⁸⁶ Silving 1959 *Yale Law Journal* 1338.

term was applied to a pledge or a wager where the oath taker who loses said wager had to forfeit the object to the priests.²⁸⁷

Van Lunteren²⁸⁸ describes the general practice of *sacramentum* as part of the legal procedure where cases were decided upon on the grounds of prior decisions by the king. Both parties to a legal matter were required to take an oath and the parties were very much aware that the oath was operative, according to the religious beliefs at that time.²⁸⁹ An example of an oath-swearing process based very much on religion is a person who undertakes the swearing of an oath is to slaughter a pig whilst praying that in the event of perjury the heaven might fall on his or her head.²⁹⁰ The operative function of the oath is that it was generally understood that the perjuring of an oath sworn on Iupiter was punished by a lightning strike; and if the person were to lie, then the obligation rests upon the shoulders of Iupiter to punish the perjurer.²⁹¹ Such an oath, once sworn, was considered to be absolute proof and was not subject to further evaluation by the judge (the truth of the matter was established by the oath).²⁹² This aspect of the oath was adopted into later developments of the Roman legal system and it was only later that the presiding officer considered the oath as it related to the other evidence provided during the trial.²⁹³

Livius²⁹⁴ draws a distinction between the effects created by oath-swearing and that of strict laws and penalties. He finds that the pious nature of the people and the religious foundations of the oath causes there to be almost no difference between the effects of either.²⁹⁵ Regardless, the practice of oath-swearing was

²⁸⁷ Silving 1959 *Yale Law Journal* 1338. A further description of the *sacramentum* in the context of *legis actio sacramento* follow under 3.2.2.

²⁸⁸ Van Lunteren *Oversicht* para 14.

²⁸⁹ Silving 1959 *Yale Law Journal* 1335.

²⁹⁰ Rogers 1897 *The Green Bag* 57.

²⁹¹ Oath-swearing was a very important part of the legal and religious proceedings in early Rome, in that persons who were struck by lightning and died were not buried in the regular way because lightning was Iupiter's way of punishing perjurers. Silving 1959 *Yale Law Journal* 1335.

²⁹² Silving 1959 *Yale Law Journal* 1335.

²⁹³ Silving 1959 *Yale Law Journal* 1335.

²⁹⁴ Roberts *The History of Rome* para 1.21.

²⁹⁵ Roberts *The History of Rome* para 1.21. He did, however, give a slight edge to laws and penalties.

widely used during the Monarchy.²⁹⁶ Livius²⁹⁷ recounts an instance of oath-swearing as part of a treaty between Alba and Rome where, in an effort to minimise the loss of life during battle, two sets of triplet brothers, one from Alba and one from Rome, were to do battle against each other as champions and the winners of the fight would win victory for their army.²⁹⁸ This agreement was sealed with an oath which sanctioned the treaty.²⁹⁹ The oath is as follows:

Hear, O Jupiter, hear! thou *Pater Patratus* of the people of Alba! Hear ye, too, people of Alba! As these conditions have been publicly rehearsed from first to last, from these tablets, in perfect good faith, and inasmuch as they have here and now been most clearly understood, so these conditions the People of Rome will not be the first to go back from. If they shall, in their national council, with false and malicious intent be the first to go back, then do thou, Jupiter, on that day, so smite the People of Rome, even as I here and now shall smite this swine, and smite them so much the more heavily, as thou art greater in power and might.³⁰⁰

From this oath the invocation of the divine is clear and the intention of the parties to adhere to the terms of the treaty is made. Livius³⁰¹ goes further to describe that the Albans swore their oaths through the military leader and priests according to the formula, which seems to include some positive action to accompany the words of the oath, and this entailed the striking of a swine (pig) with a flint.³⁰² After the oath was sworn, the champions did battle and the Roman brothers, Horatii, emerged victorious.³⁰³ By all accounts the oath was honoured by both parties and the matter was settled.

The religious nature of the people, after the reign of Numa Pompilius, contributed to the state of the oath during this period. The oaths were mainly religious in nature and the swearers stressed the religious component of the oath by invoking the gods, calling them by name and pronouncing a self-curse as part of the

²⁹⁶ Roberts *The History of Rome* para 1.21 and 1.24.

²⁹⁷ Roberts *The History of Rome* para 1.24.

²⁹⁸ Roberts *The History of Rome* para 1.23-1.25.

²⁹⁹ This oath was sworn by process of a protracted formula, though he neglected to describe the exact nature of the formula, the wording remained preserved. Roberts *The History of Rome* para 1.24.

³⁰⁰ Roberts *The History of Rome* para 1.24.

³⁰¹ Roberts *The History of Rome* para 1.24.

³⁰² It is unclear from the text why the oath-swearing process required the swearer to strike a pig. For another instance of an animal being part and process of an oath, see Chapter 6.

³⁰³ Roberts *The History of Rome* para 1.24-1.26.

consequences of the oath. The change of political dispensation from a monarchy to a republic harbours other consequences for oath-swearing.

3.2.2 Republic

The period of the Kings or the monarchy came to an end when Tarquinius Superbus³⁰⁴ (an Etruscan) became increasingly tyrannical and caused an aristocratic revolt to be launched against him.³⁰⁵ During the first century of the Republic a class struggle between the *plebeii* and the *patricii* ensued, in part, due to the inequality of access to law.³⁰⁶ The *patricii* were well versed in the unwritten law; and this caused the *plebeii* to always fall victim to the *patricii*, due to lack of knowledge, in dealings where the *plebeii* were case opposite the *patricii*.³⁰⁷ In addition to the lack of access to, and knowledge of, the law, the *plebeii* also grew increasingly discontent with the fact that only the *patricii* could gain entrance to the magistracy which contributed to diminished access to magistrates to aid in resolving legal disputes,³⁰⁸ so a standardisation of the generally applicable law was required and it was provided in the form of the *Lex Duodecim Tabularum*.³⁰⁹

The changes in government, constitutional dispensation and the codification of law, gave way to several changes in the various spheres of government, law and society. During the first few centuries of the Republic, magistrates were installed

³⁰⁴ See above.

³⁰⁵ Du Plessis *Roman Law* 3. He was accused of raping the wife (Lucretia) of a Roman nobleman and that was said to have caused the revolt.

³⁰⁶ Joubert *Romeinse Reg* 3; Du Plessis *Roman Law* 3-6; Thomas *Essentialia van die Romeinse Reg* 18-19.

³⁰⁷ Joubert *Romeinse Reg* 3; Du Plessis *Roman Law* 3-6; Thomas *Essentialia van die Romeinse Reg* 18-19.

³⁰⁸ The chief magistrates during the Republic were: the *Consuls*, *praetors*, *quaestors*, *Censors*, *tribunes*, *aediles*.

³⁰⁹ Joubert *Romeinse Reg* 3; Yale Law School Lillian Goldman Law Library 2008 http://avalon.law.yale.edu/ancient/twelve_tables.asp; Thomas *Essentialia van die Romeinse Reg* 18-19. This code was composed by twelve (initially ten) men, it was engraved on twelve bronze tablets and these were displayed in the Forum of Rome.³⁰⁹ The process started in 451 BCE and was ratified in 499 BCE. Thomas states that the *Lex Duodecim Tabularum* is a significant milestone in legal history because it was the first systematic codification of the Roman law which promoted legal certainty, it was separated from religious laws and the concise formulation provided for extensive commentary and interpretation by scholars and jurists. Thomas *Essentialia van die Romeinse Reg* 18.

to fulfil functions that became necessary in the new order.³¹⁰ The magistrates were ordered according to hierarchy with the two Consuls, who were supreme magistrates and in whom vested the power that earlier would have been the king's.³¹¹ The two Consuls governed for one year in tandem by *consulting* with each other.³¹² The *praetors* were specially appointed to deal with the administration of the Roman legal system in 367 and had jurisdiction over citizens within Rome.³¹³ The *praetors* assisted the citizens³¹⁴ with the *formula* and ensured that they followed the correct steps.³¹⁵ They also determined whether a legal remedy is available.³¹⁶ The judge, who is a lay person, then hears the case and makes a decision upon the facts.³¹⁷ This administration of the legal system also developed the legal system and contributed to legal certainty among the people.³¹⁸

The *quaestors*³¹⁹ were to financial matters as the *praetors* were to legal matters.³²⁰ They were charged with supporting and advising the Consuls about financial

³¹⁰ Van Lunteren *Overzicht* 18; Thomas *Essentialia van die Romeinse Reg* 15; Du Plessis *Roman Law* 3-4. Refer to Jolowicz *Historical Introduction to the Study of Roman Law* 43-55 for an indepth discussion on the functions of these magistrates and their interactions with Roman society.

³¹¹ Van Lunteren *Overzicht* 18; Schiller *Roman Law: Mechanisms of Development* 181; Thomas *Essentialia van die Romeinse Reg* 15; Du Plessis *Roman Law* 3-4.

³¹² Du Plessis *Roman Law* 3; Thomas *Essentialia van die Romeinse Reg* 14-15. Van Lunteren notes that there was a failsafe built into the system that would allow for a *dictator* to take control during times of great necessity where decisive leadership was essential. This *dictator* could only function in that office for a maximum of six months, or earlier if the crisis had been dealt with, after the *dictator* had to abdicate power back to the elected Consuls. Van Lunteren *Overzicht* para 18. Livius also mentions the practice of creating a *dictator*, but also communicates the people's hesitation as they did not want a repeat of the catastrophe, which caused the end of the Monarchy. Roberts *The History of Rome* 2.27-232. Schiller *Roman Law: Mechanisms of Development* 181.

³¹³ Thomas *Essentialia van die Romeinse Reg* 15; Schiller *Roman Law: Mechanisms of Development* 181-182; Du Plessis *Roman Law* 4.

³¹⁴ The *praetor*, more specifically the *praetor urbanus*, was concerned with the administration of justice in matters concerning Roman citizens. The office of *praetor perigrinus* was later established to deal with matters concerning foreigners. See Du Plessis *Roman Law* 33; Schiller *Roman Law: Mechanisms of Development* 182.

³¹⁵ Thomas *Essentialia van die Romeinse Reg* 19-20; Schiller *Roman Law: Mechanisms of Development* 182.

³¹⁶ *Ubi remedium, ibi ius*. See Thomas *Essentialia van die Romeinse Reg* 31.

³¹⁷ Thomas *Essentialia van die Romeinse Reg* 19-20; Schiller *Roman Law: Mechanisms of Development* 182.

³¹⁸ Schiller *Roman Law: Mechanisms of Development* 182; Du Plessis *Roman Law* 4.

³¹⁹ Van Lunteren *Overzicht* para 18; Schiller *Roman Law: Mechanisms of Development* 186-187. See Latte 1936 *Transactions and Proceedings of the American Philological Association* in general.

instances, but their duties extended well beyond mere financial issues; they advised the Consuls on matters regarding the administration of justice and eventually became the principle law officers regarding the military, administration and the judicature.³²¹ The fourth was the *censores* who conducted the census for voting purposes.³²² The fifth was *tribunes*³²³ who served to protect parties against possible arbitrary exercise of power. The final was the *aediles*³²⁴ whose functions were administrative in nature in that they tended to the general management of Rome by ensuring food and water security and various other administrative acts, all of these were done by faith as the functions of the magistrates were governed by promissory oaths.³²⁵ All these magistrates were important role-players in the administration of justice, giving effect to law and managing the city. These positions were created out of necessity and contributed to the development of the law to a more formal system.

Thomas³²⁶ states that there are three factors which influenced the development of the law during the Republic.³²⁷ These are the *Lex Duodecim Tabularum*, the *praetor* and the jurists.³²⁸ The principle source of the law, as stated above, during this period was, initially, the *Lex Duodecim Tabularum* as it managed various aspects of legal and civil life and interactions.³²⁹ It governed matters of substantive law as well as procedural law, both within and outside the court. The law has been duly promoted and developed by the magistrates in their capacity as set out above.

³²⁰ Du Plessis *Roman Law* 4; Schiller *Roman Law: Mechanisms of Development* 186-187.

³²¹ Thomas *Essentialia van die Romeinse Reg* 15; Du Plessis *Roman Law* 4.

³²² Van Lunteren *Overzicht* para 18; Du Plessis *Roman Law* 4-5; Schiller *Roman Law: Mechanisms of Development* 186-187.

³²³ Schiller *Roman Law: Mechanisms of Development* 183-185.

³²⁴ Schiller *Roman Law: Mechanisms of Development* 185-186.

³²⁵ Van Lunteren *Overzicht* para 18; Du Plessis *Roman Law* 5; Schiller *Roman Law: Mechanisms of Development* 180-187.

³²⁶ Thomas *Essentialia van die Romeinse Reg* 17.

³²⁷ The sources of the law during the Republic was: *mos* (customs, see Chapter 2), *lex* (decisions by the *comitia*), *plebiscitum* (decisions by the *concilium plebis*), *Senatus Consultatum* (decisions by the senate), *Edicta* (edicts by officials such as the *praetor*), and *interpretatio and responsa* (jurist made law). Thomas *Essentialia van die Romeinse Reg* 21.

³²⁸ Thomas *Essentialia van die Romeinse Reg* 17.

³²⁹ Refer to Jolowicz for a discussion on the trial proceedings of *legis actio* and the *formula* system within a practical context. Jolowicz *Historical Introduction to the Study of Roman Law* 180-189.

The *legis actiones* is considered to be the oldest form of procedural law known to have been practiced in the Roman legal tradition.³³⁰ This procedure is identified by the required recitation of formal words in conjunction with performing a set of formal acts.³³¹ There are five types of *legis actiones* which can be characterised according to their functions, of which there are two.³³² Three of these *legis actiones* are used to settle a dispute and the remaining two are used for execution.³³³ The *legis actiones* are: *legis actio sacramento*,³³⁴ *legis actio per iudicis arbitrive postulationem*; *legis actio per conditionem*; *legis actio per manus iniunctionem*; and *legis actio per pignoris capionem*. For the current purpose, only the *legis actio sacramento* will be discussed as it involved the swearing of an assertory oath. The *legis actio sacramento* is the oldest of the *legis actiones* and as such involves an extended process which is discussed below.³³⁵

The *actio legis sacramento*³³⁶ can be used either to enforce a real right, in which case it would be the *actio legis sacramento in rem*, or to enforce a personal right, in which case it would be *actio sacramento in personam*.³³⁷ The *legis actio* is termed *sacramento* as the process requires an oath as part of the process.³³⁸ The process *in rem* commences with the thing³³⁹ being brought before the *praetor* and

³³⁰ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 369; Mousourakis *Fundamentals of Roman Private Law* 310-317.

³³¹ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 369; Thomas *Essentialia van die Romeinse Reg* 34; Mousourakis *Fundamentals of Roman Private Law* 310-317.

³³² Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 369; Thomas *Essentialia van die Romeinse Reg* 34; Mousourakis *Fundamentals of Roman Private Law* 310-317.

³³³ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 369-370; Thomas *Essentialia van die Romeinse Reg* 34; Mousourakis *Fundamentals of Roman Private Law* 310-317.

³³⁴ This may be the process to which Van Luntren referred, see 3.2.1 above.

³³⁵ See introductory remarks in Sandars *The Institutes of Justinian* lxviii-lxiv.

³³⁶ This same process is described at great length by Buckland, see Buckland *A Text-Book of Roman Law* 610-617. Buckland also relates the exact words pertaining to the prescribed *legis actio sacramentum* referred to in this study.

³³⁷ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 369-370; Thomas *Essentialia van die Romeinse Reg* 34; Mousourakis *Fundamentals of Roman Private Law* 310-317.

³³⁸ This process is discussed using a slave as the subject of the trial. Sandars refers to Gaius using this example and it is used here to illustrate the formula of the words spoken. See introductory remarks in Sandars *The Institutes of Justinian* lxiv.

³³⁹ Or a symbol of the thing (like a sick or a piece of turf) in cases where the *legis actio sacramento* concerns immovable property. Sandars *The Institutes of Justinian* lxiv; Thomas *Essentialia van die Romeinse Reg* 34.

the parties then touch the object with a rod called *festuca* or *vindicata* and recited the following formal words:³⁴⁰

Hunc ego hominem ex iure Quiritium meum esse aio secundum suam causam, sicut dixi. Ecce tibi vindictam imposui.

I assert that this man is mine by Quiritatian right; see, as I have said, I have put my wand on him.³⁴¹

The opposing party would then respond with the same recitation. After these words were spoken and the gestures with the *vindicata* were made, the *praetor* would order the parties to let go of the object "Mitte ambo hominem" and this ritual intervention was seen as a type of magical intervention.³⁴² The plaintiff would then challenge the defendant by asking the following:³⁴³ "Postulo anne dicas qua ex causa vindicaveris." (I demand this: will you say on what ground you have made your claim?).³⁴⁴ The defendant then answers: "Ius facti sicut vindictam imposui."³⁴⁵ (I have done right and thus I have laid my wand on him).³⁴⁶ The parties then challenge each other to an amount of money and the parties then each deposited the relevant sum of and the person, who loses the suit, forfeits the money to the treasury.³⁴⁷

Although it does not necessary make a specific reference to the oath it, however, states in *Tabula 8*,³⁴⁸ that "[W]hoever is convicted of speaking false witness shall be flung from the Tarpeian Rock." This gives a clear impression of the fact that witnesses were to provide a true recounting of events to which they are witnesses. It also provides some incentive for telling the truth, which means that if a witness commits perjury, he or she will be thrown off a cliff.

³⁴⁰ See introductory remarks in Sandars *The Institutes of Justinian* lxiv.

³⁴¹ Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 180.

³⁴² See introductory remarks in Sandars *The Institutes of Justinian* lxiv; Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181; Thomas *Essentialia van die Romeinse Reg* 34.

³⁴³ See introductory remarks in Sandars *The Institutes of Justinian* lxiv.

³⁴⁴ Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181.

³⁴⁵ Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181.

³⁴⁶ Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181.

³⁴⁷ See introductory remarks in Sandars *The Institutes of Justinian* lxiv; Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181; Thomas *Essentialia van die Romeinse Reg* 34.

³⁴⁸ Yale Law School Lillian Goldman Law Library 2008
http://avalon.law.yale.edu/ancient/twelve_tables.asp.

The punishment referenced above was mentioned elsewhere in *Tabula 8* and the words "shall be thrown from the rock"³⁴⁹ indicating the punishment for a range of other trespasses. A reason for the shift of the obligation to punish perjurers seems to have shifted from the gods, to those whom the perjury offends. Silving³⁵⁰ suggests that it was believed that all lies and all liars will be punished, whether they swore an oath or not.³⁵¹ This belief caused the oath to decline in importance because there was a lack of fear of reprisal from Olympus and without fear the populace regarded the oath as innocuous.³⁵² It became necessary to fortify the divine retribution (at some later stage, possibly) with secular punishment (immediately).³⁵³ This was used in an effort to re-establish the oath as a significant and essential aspect of trial proceedings. According to Whewell,³⁵⁴ De Groot states that the oath, which is a religious affirmation, calls a deity as a witness to ensure that the swearer keeps his or her word.³⁵⁵

A specific instance of a trial the *legis actio sacramentum* was used was a case in 79 or 78 BCE regarding citizenship.³⁵⁶ Cicero acted on behalf of a woman who was held as a slave but averred that she could not be held as a slave because she was a citizen.³⁵⁷ In this case the formal procedure of *actio legis sacramento in personam* was observed and the plaintiff was required to take an oath and present testimony in the prescribed manner: "aio hanc mulierem esse liberam ex iure Quiritium."³⁵⁸ This did, however, create a problematic situation as it was the citizenship that was in question. The opposing party stated that the woman's testimony should be discounted, regardless of it being supported by an oath,

³⁴⁹ Yale Law School Lillian Goldman Law Library 2008
http://avalon.law.yale.edu/ancient/twelve_tables.asp.

³⁵⁰ Silving 1959 *Yale Law Journal* 1337.

³⁵¹ Silving 1959 *Yale Law Journal* 1337.

³⁵² Silving 1959 *Yale Law Journal* 1337.

³⁵³ Silving 1959 *Yale Law Journal* 1337.

³⁵⁴ Whewell *Grotius on the Rights of War and Peace* 167.

³⁵⁵ During the Republic, Rome was populated by pagans who worshipped the Roman Pantheon of Gods (Iupiter, Juno, Mars etc.). See Benko *Pagan Rome* in general for information on Pagan Rome and the early Christianity which would grow to official religion of the state a mere few hundred years later.

³⁵⁶ Frier *The Rise of the Roman Jurists* 99-100.

³⁵⁷ Frier *The Rise of the Roman Jurists* 99-100.

³⁵⁸ "I aver this woman is free by citizen's right." Frier *The Rise of the Roman Jurists* 99. See above.

because it is not valid or *iustum* because this woman's citizenship had been removed and for that reason, she might be free, but her freedom cannot vest in her by virtue of citizen's right, as was sworn.³⁵⁹ The deity that was invoked for this purpose is not stipulated, but the swearing of an oath during this time did require the invocation of a deity.³⁶⁰ The outcome of this matter seems to indicate that, though important, the oath was not accepted merely because it is an oath the other formalistic and legalistic requirements need to be met.³⁶¹

Mousourakis³⁶² states that although not a lot is known of the *legis actio sacramentum*, it did originally require the swearing of an oath. Jolowicz and Nicholas³⁶³ concur that the earlier forms of this *actio* required the parties to swear a solemn oath validating their claim and from there the term *sacramento* (oath), but Thomas³⁶⁴ argues that the oath was used to ensure that aggrieved parties only approached the *praetor* if the suit was well founded, lest they risk the wrath of the gods. This was not much of a deterrent and another method was required to achieve the outcome intended with the swearing of an oath, which was money.³⁶⁵ If the risk to the parties was too high they will not institute action for frivolous reasons or on unfounded grounds.³⁶⁶

3.2.3 *Principate*

During the Principate, the reigning religion of the Roman people was a religion with a pantheon of gods. The Principate is also referred to as the Julio-Claudian dynasty and the first *Imperator* of this period was Augustus *Divi filius*.³⁶⁷ Thomas³⁶⁸ states that the new constitutional and political dispensation of the Principate immediately influences the law. He avers that a large portion of the legal power resorts with the *Imperator* and the senate, though still active and

³⁵⁹ Frier *The Rise of the Roman Jurists* 100.

³⁶⁰ Frier *The Rise of the Roman Jurists* 100.

³⁶¹ Frier *The Rise of the Roman Jurists* 101.

³⁶² Mousourakis *Fundamentals of Roman Private Law* 313.

³⁶³ Jolowicz and Nicholas *A Historical Introduction to the Study of Roman Law* 181.

³⁶⁴ Thomas *Essentialia van die Romeinse Reg* 35.

³⁶⁵ Thomas *Essentialia van die Romeinse Reg* 35.

³⁶⁶ Thomas *Essentialia van die Romeinse Reg* 35.

³⁶⁷ "Son of a god." Scarre *Chronicle of Roman Emperors* 18.

³⁶⁸ Thomas *Essentialia van die Romeinse Reg* 24.

functioning, is used by the *Imperatores* for their own devices.³⁶⁹ The *praetor*, jurists and *Imperator* all influenced the development of the Roman law during the Principate. The investigation into the practice of oath-swearing during the Principate starts with the assertory oaths sworn as part of the trial processes.³⁷⁰ The swearing of promissory oaths during this period mainly centres on the *Imperatores*, therefore the promissory oaths are discussed in that context below.

The *legis actiones*, discussed above,³⁷¹ fell into disfavour due, largely, to the extremely formal and arduous procedure. The *formula* procedure was developed towards the end of the Republic and grew in popularity during the Principate.³⁷² The process receives its name from the *formula* which is, according to Van Zyl,³⁷³ a written account of the dispute between the parties. This is in stark contrast to the *legis actio procedure* where no written account of the dispute is recorded and the dispute is declared during a formal and intricate interaction between the parties where the information regarding the dispute is forced into the oath-dialogue.³⁷⁴ The *formula*³⁷⁵ procedure provided for a more *user-friendly* approach to justice and was developed by the *praetor* for matters unsuited to the *legis actio* procedure.³⁷⁶

The process is easily divided into two phases, *pre-litis contestatio* and *post-litis contestatio*.³⁷⁷ The process *pre-litis contestatio* is referred to as the procedure *in iure* where the aggrieved party initiates the suit by approaching the magistrate (*praetor*) who will then refer the matter to trial and declare which procedure should be followed.³⁷⁸ The process *post-litis contestatio* is referred to as the procedure *apud iudicem* and took place either before a single judge (*iudex*) (a lay

³⁶⁹ Thomas *Essentialia van die Romeinse Reg* 24.

³⁷⁰ The *formula* procedure which developed during this time is discussed below and reference to the assertory oaths sworn in this regard is made only by way of illustrating the process.

³⁷¹ See 3.2.2 above.

³⁷² Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 373.

³⁷³ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 373.

³⁷⁴ See 3.2.2 above. G 4.11 and 4.39.

³⁷⁵ See Mousourakis *Fundamentals of Roman Private Law* 317-330 for a simplified explanation of how the *formula* was used.

³⁷⁶ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 373-374.

³⁷⁷ G 3.180.

³⁷⁸ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 367, 378-379.

person), or, in certain cases the *praetor* could appoint more than one judge (*recuperatores*), who has to decide the matter based on the information provided by *oratores*.³⁷⁹ The *praetor* would *dare recuperatores* and instruct them to decide on the *formulae*³⁸⁰ which were prepared by the parties. The *iudex* or the *recuperatores* were to swear an oath that they would fulfil their function according to law and truth.³⁸¹ The appointed judges in charge of the trial met with the parties to determine and set down a date for the trial.³⁸² At the trial, the *oratores* address the *iudex* or the *recuperatores* and present evidence, much in the same way as is done in contemporary courts. Witnesses who presented evidence to the *recuperatores* were to do so under oath and perjury was punished, although similar problems regarding the prosecution of perjury probably affected the prosecution thereof.³⁸³ Perjury was considered to be a serious transgression,³⁸⁴ the reason for which is that it interfered with the administration of justice.³⁸⁵ In addition to perjury being a crime, the subornation of perjury was also considered to be a criminal act. Perjury also causes the person against whom perjurious testimony is given to suffer as a result.³⁸⁶

The judges must then return a verdict. If they cannot return a verdict due to lack of clarity, they may swear an oath to this effect.³⁸⁷ The exact wording of this oath vanished in the recesses of time and the only information available is the content and phrasing of this oath that is recorded in the Digest.³⁸⁸ Judges were required to decide cases *cum veritae et legum observatione*.³⁸⁹ Furthermore, *fides* necessitated that the judges not give in to personal feelings, both negative and

³⁷⁹ Then the judges are called *recuperatores*. Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 367, 379-380.

³⁸⁰ *Nominatio iudicis, intentio and condemnatio*.

³⁸¹ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 379.

³⁸² Frier *The Rise of the Roman Jurists* 203.

³⁸³ Frier *The Rise of the Roman Jurists* 208. See 6.3.3 for an overview of the issue.

³⁸⁴ It is relevant to note here that it is unclear what fate would befall a person who breaks a promissory oath, but from the poverty of evidence in that regard, it can be deduced that to break a promissory oath was not considered to be a criminal offence.

³⁸⁵ Hunt *South African Criminal Law and Procedure* 105.

³⁸⁶ See 6.2.2 below.

³⁸⁷ D 4.8.13.4; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 379; Frier *The Rise of the Roman Jurists* 203.

³⁸⁸ D 4.8.13.4; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 379.

³⁸⁹ Frier *The Rise of the Roman Jurists* 204.

positive, they might feel towards the parties.³⁹⁰ This ensured that the judges decide matters on truth and not personal motivation. It is not always possible to remove from humans the human urge to protect friends or exact revenge upon those who might have wronged them; but it is admirable that these judges sealed their resolve to promote truth with an oath.

The swearing of an assertory oath during this period was not merely reserved for *formula* procedures. Mousourakis³⁹¹ describes the practice of oath-swearing as a means of concluding a contract verbally (*contractus verbis*) where *sponsio* is a contract that requires the parties to swear to one another in a dialogue format.³⁹² The one party would make a statement regarding the terms of the contract and conclude it with "Spondesne?" (Do you solemnly promise?) and the other party would then respond in the affirmative with "Spondeo" (I solemnly promise). Mousourakis³⁹³ indicates that the origins of this practice of concluding verbal contracts are rooted in religion. The contract entered into by the recitation of formal words in the form of an oath indicates that the necessity to swear an oath is a means of preventing breach of contract by invoking a deity to aid in the successful conclusion of the contract.³⁹⁴ The secularised version of this same contracting process is called *stipulatio* and this practice must have been used towards the end of the Republic, but the practice thereof grew in popularity during the Principate, which causes it to be more logical to mention it here in the in conjunction with the process which it replaced.³⁹⁵

The rules regarding the practice of oath-swearing, generally, in the classical Roman law during this period are reflected in the Digesta.³⁹⁶ Today the works of the classical jurists are lost and reliance is to be made on Justinian's

³⁹⁰ Frier *The Rise of the Roman Jurists* 204.

³⁹¹ Mousourakis *Fundamentals of Roman Private Law* 214-216.

³⁹² Mousourakis *Fundamentals of Roman Private Law* 214.

³⁹³ Mousourakis *Fundamentals of Roman Private Law* 214.

³⁹⁴ Mousourakis *Fundamentals of Roman Private Law* 214.

³⁹⁵ Mousourakis *Fundamentals of Roman Private Law* 214-216; Du Plessis *Roman Law* 154, 259; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 38.

³⁹⁶ D 12.

codifications.³⁹⁷ It would make better logical sense to discuss the practices of oath-swearing within the context of their creation rather than their codification. Particularly given the fact that the subject of the study, being oath-swearing, has strong ties with religion. It is important to note that the state religion during the creation period differs from the state religion of the codification period. Digesta 12.2: *De iureiurando sive voluntario sive necessario sive iudiciali* (Concerning the taking of an oath, whether voluntary, compulsory, or judicial) commences with Gaius who notes that oath-swearing plays an extremely important role in litigation due to the fact that oaths, the swearing of which either authorised by the judge or agreed upon by the parties, can promptly dispose of litigation as the religious nature inherent to the oath has this power.³⁹⁸ Paulus³⁹⁹ seems to agree with Gaius by noting that the swearing of an oath in this context, and for purposes of putting an end to the trial, is somewhat of a compromise and that carries more value than a judgement made by the courts. This observation by Paulus is akin to the difference between contemporary mediation and trials, where the oath functions as the mediation agreement. Should the parties agree to end the suit and come to their own conclusion on their own terms, they create a win-win situation rather than a win-lose situation created by the courts. The mere swearing of an oath seems to have a powerful legal tool with the potential to influence law as well as religion during this period.

Ulpinian⁴⁰⁰ provided some exposition on the manner in which an oath might be sworn during this period and the first statement made is that the *praetor* states

³⁹⁷ Schultz states that Justinian merely collected the laws of this period and preserved it. Schultz *Classical Roman Law* 1-3. The period being the reign of Augustus to Diocletian. See 3.3 below for the codification attempt by Justinian. See 3.3 for some discussion on this matter.

³⁹⁸ D 12.2.1. *Maximum remedium expediendarum litium in usum venit iurisiurandi religio, qua vel ex pactione ipsorum litigatorum vel ex auctoritate iudicis deciduntur controversiae.*

³⁹⁹ D 12.2.2. *Iusiurandum speciem transactionis continet maioremque habet auctoritatem quam res iudicata.*

⁴⁰⁰ D 12.2.3. *Ait praetor: "Si is cum quo agetur condicione delata iuraverit". Eum cum quo agetur accipere debemus ipsum reum. Nec frustra adicitur "condicione delata": nam si reus iuraverit nemine ei iusiurandum deferente, praetor id iusiurandum non tuebitur: sibi enim iuravit: alioquin facillimus quisque ad iusiurandum decurrens nemine sibi deferente iusiurandum oneribus actionum se liberabit.*

1. Quacumque autem actione quis conveniatur, si iuraverit, proficiet ei iusiurandum, sive in personam sive in rem sive in factum sive poenali actione vel quavis alia agatur sive de interdicto.

that the party against whom the matter is brought, must swear an oath and the *praetor* must administer said oath in order for it to be of legal value. He further indicates that the swearing of an oath is always beneficial to the litigant, regardless of the nature of the matter.⁴⁰¹ Ulpinian⁴⁰² further requires some balance in the swearing of an oath in that it is required to swear an oath in the terms in which it was administered. He states that it is possible to swear by your head. Paulus⁴⁰³ expands the options to swearing an oath on the heads of one's sons. Ulpinian⁴⁰⁴ states, however, that oaths not sworn in the same terms will have no effect and that illegal oaths or oaths prohibited by religion will have no effect and it would be as if these oaths were never sworn. The literature clearly confirms that the oath played an integral role in the law during the Principate and that the rules regarding the swearing of an oath are complex and comprehensive so as to deter any abuse of the process.

Tiberius, son of Augustus of the Julio-Claudian dynasty, succeeded his father in reign.⁴⁰⁵ During the rule of Tiberius, the people of Rome, according to Tacitus,⁴⁰⁶ descend into a caste system where the rank of people dictates their behaviour. The hierarchical structure of society quickly paves the way to, and necessitates the swearing of allegiance to the *Imperator* as head of state and church, in this

2. *Sed et si de condicione personae fuerit iuratum, praetor iusiurandum tuebitur: ut puta detuli iusiurandum et iurasti in potestate mea te non esse: tuendum erit iusiurandum.*

3. *Unde Marcellus scribit etiam de eo iurari posse, an praegnas sit mulier vel non sit, et iuriurando standum: denique ait, si de possessione erat quaestio, servari oportere, si forte quasi praegnas ire in possessionem volebat et, cum ei contradiceretur, vel ipsa iuravit se praegnatam vel contra eam iuratum est: nam si ipsa, ibit in possessionem sine metu, si contra eam, non ibit, quamvis vere praegnas fuerit: proderitque, inquit Marcellus, mulieri iuranti iusiurandum, ne conveniatur quasi calumniae causa ventris nomine fuerit in possessionem neve vim patiatur in possessione. Sed an iusiurandum eo usque prosit, ut post editum partum non quaeratur, ex eo editus sit an non sit cuius esse dicitur, Marcellus tractat: et ait veritatem esse quaerendam, quia iusiurandum alteri neque prodest neque nocet: matris igitur iusiurandum partui non proficiet: nec nocebit, si mater detulerit et iuretur ex eo praegnas non esse.*

4. *Iurari autem oportet, ut delatum est iusiurandum: ceterum si ego detuli ut per deum iurares, tu per caput tuum iurasti.*

⁴⁰¹ D 12.2.3.1.

⁴⁰² D 12.2.3.

⁴⁰³ D 12.2.4.

⁴⁰⁴ D 12.2.5.1 and D 12.2.5.3.

⁴⁰⁵ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.1-1.2.

⁴⁰⁶ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.7.

instance, Tiberius.⁴⁰⁷ A possible reason for this is the general mistrust which reigned during this tumultuous time in Roman history. Scarre⁴⁰⁸ indicates that there were many treason trials, and executions for treason. Tacitus⁴⁰⁹ states that the first to swear this oath were the consuls and soon thereafter, and in their presence, various other key role-players swore allegiance. This act is profoundly important to the office of the *Imperator* because it created an outward appearance of legitimacy which would be difficult to breach. The political benefits derived from the ceremonial swearing of allegiance are not overlooked. Valerius proposed an annual renewal of the oath of allegiance.⁴¹⁰ It might have been a good idea to remind the populace on a regular basis that they are honour bound to Tiberius. This is not a practice found elsewhere and it would create the impression that an oath has an expiry date after which it has to be renewed or it lapses.

A question that may now be posed is whether the legal, political or religious bodies provided for a remedy as recourse for perjury. Tacitus⁴¹¹ recounts an instance where equestrians⁴¹² broke their oaths and "violated, by perjury, the divinity of Augustus"; to which Tiberius answered that if the gods were deceived, the gods should take action by stating: "Wrongs done to gods were the gods' concern." From this it is clear⁴¹³ that Tiberius thought it not his place to act on behalf of the gods, perhaps for fear of disfavour. The apathetic reaction to perjury by the reigning monarch is evidence of a relaxed view of perjury and this equates to an oath of diminished value. Tiberius transferred this depreciation in the value of the oath to the reign of his successor.

⁴⁰⁷ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.7.

⁴⁰⁸ Scarre *Chronicle of Roman Emperors* 28. Le Glay *et al A History of Rome* 213 relates the same.

⁴⁰⁹ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.7.

⁴¹⁰ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.8.

⁴¹¹ Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.73.

⁴¹² *Equitibus Romanis*.

⁴¹³ In this matter, the argument is based on Tiberius's conduct, generally, and speculation as to his motivation, is, nearly two millennia later, just speculation. Another argument might be that he did not care enough about perjury to take notice thereof or that there was no important historical fact to relate in this regard.

Gaius Julius Caesar Germanicus (hereafter Caligula⁴¹⁴), who was possibly the most tyrannical emperor in the history of Rome, ascended to the throne after the murder of his grandfather, and erstwhile emperor, Tiberius.⁴¹⁵ Caligula was extremely popular in the first few months, but he later lost this popularity when his actions became severe and tyrannical (bordering on insanity).⁴¹⁶ One interesting change in the practice of oath-swearing was that Caligula included his sisters, Drusilla, Agrippina and Livilla, in the oath that everyone had to take:

... I will not value my life or that of my children less highly than I do the safety of the Emperor Gaius and his sisters!⁴¹⁷

This seems to include the sisters as the subject of a general oath of allegiance. Caligula took a peculiar step in that it provided some evidence in support of the apparent of the unsavoury relationship he had with his sisters, particularly Drusilla.⁴¹⁸ He further awarded his sisters with honours in that they were also included in the soldiers' oath of allegiance.⁴¹⁹

After the death of Drusilla in 38CE Caligula was documented to have been distraught about her passing and since then he took important oaths, not in the names of the Roman pantheon of gods, but he swore by the holiness of Drusilla, and in his mind, she was akin to the likes of Aphrodite.⁴²⁰ It seems oddly out of context that a man would swear an oath by his sister instead of a god, goddess or

⁴¹⁴ Caligula was raised in the barracks and was attired in the army uniform from a young age and wore a half-boot or *caliga*; from there the name Caligula. Tacitus *The Annals & The Histories* Book I: (14-15 CE) para 1.41. Le Glay *et al A History of Rome* 214. Scarre *Chronicle of Roman Emperors* 37; Graves 1957 <http://www.ourcivilisation.com/smartboard/shop/suetnius/caligula.htm>. The names of the Roman rulers are so similar and may cause confusion, so the name Caligula will be used to distinguish this character from others who were also called Gaius, Germanicus, Julius or Caesar.

⁴¹⁵ Le Glay *et al A History of Rome* 213; Scarre *Chronicle of Roman Emperors* 37; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴¹⁶ Le Glay *et al A History of Rome* 214; Scarre *Chronicle of Roman Emperors* 36; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴¹⁷ Barret *Caligula: The Abuse of Power* 120; Graves 1957 <http://www.ourcivilisation.com/smartboard/shop/suetnius/caligula.htm>.

⁴¹⁸ Scarre *Chronicle of Roman Emperors* 38; Barret *Caligula: The Abuse of Power* 120; Graves 1957 <http://www.ourcivilisation.com/smartboard/shop/suetnius/caligula.htm>; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴¹⁹ Barret *Caligula: The Abuse of Power* 120; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴²⁰ Barret *Caligula: The Abuse of Power* 120; Graves 1957 <http://www.ourcivilisation.com/smartboard/shop/suetnius/caligula.htm>.

sacred object. Events that transpired later indicate that Caligula fashioned himself a god. So much so, that he demanded statues of himself to be erected in all the temples across the empire.⁴²¹ This particularly offended the Jews who refused to erect a statue of him at the Temple at Jerusalem.⁴²² The fact that Caligula likened himself to a god provides for extensive problems regarding the invocation of a deity in the swearing of an oath. Shortly thereafter, the Praetorian Guard assassinated him along with his wife and daughter.⁴²³

3.2.4 Dominate

During the reign of Constantine I,⁴²⁴ who ascended to the throne in 331 certain measures were taken to ensure that the Christian religion was standardised.⁴²⁵ This standardisation process was facilitated by councils, decrees and *constitutiones*.⁴²⁶ During this process, the oath was integrated into Christianity in 334 by folly, when Constantine required in the Constitution of Naissus witnesses to swear an oath.⁴²⁷ Although done in the sincere belief that it was a recognised Christian ritual, states Farid,⁴²⁸ but it is in actuality contrary to the one of the founding principles of Christianity, which is to always be truthful.⁴²⁹ Regardless of the processes that lead the oath to be required by witnesses, the legal processes during the Dominate required witnesses to swear an oath.⁴³⁰ In this regard, it should be borne in mind that, according to Van Zyl,⁴³¹ the Dominate is the period

⁴²¹ Barret *Caligula: The Abuse of Power* 120; Barret *Caligula: The Corruption of Power* 182-186; Scarre *Chronicle of Roman Emperors* 40-41; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴²² Barret *Caligula: The Corruption of Power* 182-186; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴²³ Barret *Caligula: The Corruption of Power* 182-186; BBC History 2014 http://www.bbc.co.uk/history/historic_figures/caligula.shtml.

⁴²⁴ Constantine I's reign was from 311 to 337 and he played a significant role in the Christianisation of the Roman Empire which had a significant effect on the development of oath-swearing. Brundage *Medieval Canon Law* 5-17.

⁴²⁵ Silving 1959 *Yale Law Journal* 1337.

⁴²⁶ Delph 1996 *Journal of the History of Ideas* 72-75; Farid 2006 *New England Law Review* 557.

⁴²⁷ Farid 2006 *New England Law Review* 57.

⁴²⁸ Farid 2006 *New England Law Review* 57-58.

⁴²⁹ See 2.4 above and Chapters 5 and 6 below.

⁴³⁰ See below.

⁴³¹ Van Zyl *Romeins-Hollandse Reg* 27.

marked by the stagnation and regression of the jurisprudence.⁴³² Although this view is not unanimous,⁴³³ the implications of which are to be understood at the onset of the investigation regarding the oath-swearing practices which were followed during this period.

The *formula* procedure, described above,⁴³⁴ gave way to the *cognitio* procedure⁴³⁵ for much the same reasons⁴³⁶ as were provided for the transition from the *legis actio* to the *formula* procedure. Moreover, the government's increased interference in the legal relationship between parties is mainly responsible for the development of the *cognitio extraordinaria* procedure.⁴³⁷ The main differences between the *cognitio extraordinaria* and the *formula* procedure are rooted in the implementation of the *cognitio* procedure. This resulted in: (a) the expiration of the use of *formulas*; (b) the abolishment of the *in iure* and *apud iudicem* phases; (c) the fact that a defendant could be summoned to court against his or her will and refusal would result in an arrest; (d) the creation of a hierarchy of courts; (e) the trial changed into an inquisitorial system where the magistrate played an active role, as opposed to the passive roles of the *iudex* and *recuperatores* in the *formula* procedure; and (f) that the judge in the *formula* procedure was a

⁴³² Jolowicz attributes this stagnation and regression to the decrease in the formalities concerning procedural law, as well as the significant lack of judicial creativity due to the *Imperator's* increased judicial power. Jolowicz *Historical Introduction to the Study of Roman Law* 457-484.

⁴³³ See Du Plessis *Roman Law* 51-54.

⁴³⁴ See 3.2.3 above.

⁴³⁵ Du Plessis states that the *formula* procedure was formally abolished only in 342 CE but that the practice fell into disuse long before. Du Plessis *Roman Law* 79. Buckland provides an interesting account of the *condictio* procedure. See Buckland *A Text-Book of Roman Law* 617-618.

⁴³⁶ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385; Du Plessis *Roman Law* 79.

⁴³⁷ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82. The process derives its name from *cognitio* which means *investigatio* and *extraordinaria* which indicates that the government magistrate presiding over the matter is *unusual*. Some explanation is required for the choice of including this process during the Dominate as opposed to during the Principate. It was possible for the *Imperator* or someone acting in his stead to decide cases and make verdicts, but due to the extraordinary nature of the occurrence, the process was not formalised, it was merely termed *cognitio extraordinaria*. This process was, however, commonly used by the senatorial provinces. The *cognitio extraordinaria* was used in Rome, though sporadically and informally. At the end of the third century the *cognitio extraordinary* replaced the *formula* procedure and during the Dominate it was almost exclusively used due to the simplicity as opposed to the intricate in formal *formulae process*. See Mousourakis *Fundamentals of Roman Private Law* 335-336. It is for this reason that this particular choice is made.

layperson and in the *cognitio extraordinaria* procedure the judge was a government official.⁴³⁸ Van Zyl⁴³⁹ remarks that the nature of the political structure influenced the legal system in that the imperial autocracy caused the government to play a more active role in the justice system. Du Plessis⁴⁴⁰ agrees with this assessment and states that the use of lay judges expired and they were replaced with "salaried bureaucrats."

The *cognitio extraordinaria* is initiated when the plaintiff approaches a relevant court and enters a written claim and request of the court to have the summons served on the defendant.⁴⁴¹ A judicial officer will then serve the *libellus conventionis* on the defendant which document includes the particulars of the claim as well as the court date upon which he or she has to appear before the appointed magistrate.⁴⁴² The defendant was then allowed a period of time to enter an intention to defend along with payment of surety that he or she will appear in court, failing to do so would result incarceration.⁴⁴³ The defendant can then enter a *libellus contradictionis* and on the scheduled date, the trial commences.⁴⁴⁴

The trial commenced with the parties and their legal representatives⁴⁴⁵ swearing an oath of good faith.⁴⁴⁶ It is, at this point in time, almost expected that litigants swear an oath, but what is interesting is that the legal representatives were expected to swear an oath of good faith before every trial according to the *cognitio extraordinaria* procedure. After the required oaths are sworn, the facts of the matter are presented in the following manner: the plaintiff's legal representative sets out the plaintiff's case "*narratio*," the defendant's legal

⁴³⁸ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82.

⁴³⁹ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385.

⁴⁴⁰ Du Plessis *Roman Law* 79.

⁴⁴¹ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82; Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁴² Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82; Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁴³ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82; Thomas *Essentialia van die Romeinse Reg* 43-44. If the defendant fails to attend court, and after three summonses, the court may make an order in his or her absence.

⁴⁴⁴ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 385-388; Du Plessis *Roman Law* 79-82; Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁴⁵ See 6.3.3 for the slightly similar practice in contemporary Netherlands.

⁴⁴⁶ Mousourakis *Fundamentals of Roman Private Law* 338.

representative sets out the defendant's case "*responsio*."⁴⁴⁷ After these formalities have been met, witnesses⁴⁴⁸ are called to testify, such testimony is to be provided under oath.⁴⁴⁹ The judge's judgement is then written down and read aloud.⁴⁵⁰ The losing party may appeal the judgement to another court.⁴⁵¹ This process is not too dissimilar from current western court procedure, with one or two exceptions, and the practice of oath-swearing becomes more similar to the practice of oath-swearing as is practiced in South Africa today.⁴⁵²

A further provision regarding oath-swearing is found in the *Codex Theodosius* where it is stated that in matters where conspirators swear an oath to the effect of their criminal conspiracy (like treason); they will be sentenced as if they actually committed the criminal action.⁴⁵³ The Codex further states that the *Imperator* must swear an oath which provides that if a person should be found to have committed fraud during the course of a trial, and used the trial proceedings to aid in criminal actions, a fine will be imposed which is equal to the suit.⁴⁵⁴ The *Imperator* must swear this oath because, as can be seen above, the courts are the responsibility of the government and the *Imperator*, as head of the government, must enforce the promotion of justice.

3.3 Justinian (527-565 CE)

The Justinian period, known as such because of his immense influence on the Roman legal system of this period, as well as several other legal systems centuries removed from his reign.⁴⁵⁵ Justinian was the Roman *Imperator* in the

⁴⁴⁷ Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁴⁸ Note here the standard of: "*unus testis, nullus testis*." (One witness is no witness.) This is interesting with regard to the lack of trust placed in the solitary witness. This was also a founding principle of the Germanic rules regarding the testimony of witnesses. Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁴⁹ Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁵⁰ Thomas *Essentialia van die Romeinse Reg* 43-44.

⁴⁵¹ Thomas *Essentialia van die Romeinse Reg* 43-44. Such appeals are now possible given the hierarchical court structure. (The *Imperator* is the highest instance to whom can be appealed.)

⁴⁵² See Chapters 5 and 6.

⁴⁵³ CT 9.14.3.

⁴⁵⁴ CT 11.30.3. A similar provision is found in D 4.3.21.

⁴⁵⁵ Van Zyl *Romeins-Hollandse Reg* 27.

east, Constantinople from 527-565 CE.⁴⁵⁶ Justinian's aim was to record and codify, in one text, all the sources of the Roman law.⁴⁵⁷ This Herculean task was undertaken in several phases. A cursory discussion of these phases follows. The first phase was the amalgamation of the existing codices (*Gergorianus*, *Hermogenianus* and *Theodosianus*) along with the *constitutiones* in order to eliminate repetition and to systematise the law into one comprehensive *codex* – *Codex Iustinianus*.⁴⁵⁸ Due to the ever-evolving nature of the law, the *codex* needed to be updates. The original codex was renamed to *Codex Vetus*.⁴⁵⁹ Justinian then codified the literature of the jurists, *Quinquaginta Decisiones*. The Digest, which, according to du Plessis,⁴⁶⁰ can be considered to be Justinian's most important work, as it consists of fifty books, mainly on private law and mostly written by Gaius, Paulus, Papinianus, Ulpinianus and Modestinus.⁴⁶¹ The Digest was well preserved and remained, mostly, intact.⁴⁶² Another source, intended to be a textbook, was commissioned nearly simultaneous with the Digest, and is called the *Institutiones*.⁴⁶³ After the completion of the codices above, Justinian revised the *Codex Vetus* and produced the new *Codex Iustinianus*.⁴⁶⁴ The law was now codified, but it did present a new problem: what happens in a situation where the law is developed or there is a new law? Should the abovementioned sources be changed? The solution to this issue was the creation of a new source:

⁴⁵⁶ Van Zyl *Romeins-Hollandse Reg* 7,57.

⁴⁵⁷ Van Zyl *Romeins-Hollandse Reg* 7; Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁵⁸ Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁵⁹ Which has since been lost to time. Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶⁰ Du Plessis *Roman Law* 55.

⁴⁶¹ Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶² Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶³ Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶⁴ Also called *Codex repetitae praelectionis*. Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

Novellae, which intended to address the new necessities.⁴⁶⁵ This is the compendium of laws now referred to as the *Corpus Iuris Civilis*.⁴⁶⁶

Constantine I solidified the classification of the practice of oath-swearing as both a Christian and a legal obligation within trials when he, in an attempt to standardise the Christian religion, accidentally incorporated the practice of oath-swearing into the religion.⁴⁶⁷ This was, in turn, transplanted into Justinian's codifications largely due to the fact that the practice of oath-swearing, albeit not technically allowed by the Christian religion, became part of the law by repetition and centuries' worth of tradition.⁴⁶⁸ The rules regarding the swearing of an assertory and promissory oath within this period correlate with the same processes followed during the Principate at the height of the Roman law innovation by classical Roman jurists. This is mainly because the writings and teaching of the jurists of that period were used in the compilation of the Justinian laws. The interpretation and reinterpretation of the classical Roman law regarding the practices of oath-swearing are extremely interesting in the current context, but refer mostly to the position during the Principate.⁴⁶⁹ Additional investigation would not provide a significant contribution to this study.

3.4 Conclusion

In this chapter, the aim was to investigate how the external and internal legal history influenced the development of the practice of oath-swearing during this period. Certain excerpts of history and law were extracted and it was demonstrated that the Roman legal tradition, which aimed to regulate the

⁴⁶⁵ Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶⁶ Du Plessis *Roman Law* 54-61; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 57-66.

⁴⁶⁷ See 3.2.4 above.

⁴⁶⁸ Silving 1959 *Yale Law Journal* 1337.

⁴⁶⁹ See 3.2.3 above. It must also be borne in mind that the *Codex* also included Canon law and that Canon law formed part of the legal tradition by means of incorporation of general will. See generally the following sources: Brundage *Medieval Canon Law*; Coriden, Green and Heintschel (eds) *The Code of Canon Law: A Text and Commentary*; Helmholz *Roman Canon Law in Reformation England*; Hervada *Introduction to the study of Canon Law*; Larroque *The Rejection of Judicial Witnesses and their Testimony*; Van Zyl *Romeins-Hollandse Reg*; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg*.

relationship between individuals as well as the relationship between individuals and the state, developed over many centuries. This developmental history was divided into two periods – the first being pre-Justinian and the second, Justinian. The constitutional dispensations were used to organise and cursorily chronicle the legal history of the practice of oath-swearing within the Roman law.⁴⁷⁰ As described above, it was necessary to view the internal legal history within the context of the external legal history. Therefore, the political and/or social history of the different periods and sub-periods were investigated. The first period under examination is Monarchy in 753 BCE, continuing until the death of Justinian in 565 CE.⁴⁷¹ Numa Pompilius' introduction of an organised state religion forged the foundation for the religious nature that would come to be ingrained in certain aspects of the law, such as oath-swearing. The investigation then followed the development of the legal framework that would come to support the practice of oath-swearing and its various applications.⁴⁷²

The relatively primitive legal system of the Monarchy, when compared to later periods, depicts the king as a ruler, a lawmaker and priest. The oath-swearing practices were influenced accordingly.⁴⁷³ The *legis actio sacramento*, which was commonly used during the Monarchy and Republic, was one of the earliest legal proceedings and forms of proof used, and as evidenced above, contained a religious aspect and self-curse.⁴⁷⁴ During the Republic, judicial reform was necessary due to the class struggles and change of constitutional dispensation. Magistrates were installed to facilitate governance.⁴⁷⁵

The *legis actio sacramento*, as indicated above, was chiefly used during the Monarchy and the Republic. It initially contained an oath-swearing practice which fell into disuse and lost some of the more overt religious aspects. The *Lex Duodecim Tabularum* provided for the penalty related to perjury during these proceedings and amounted to a death penalty. The *sacramentum* procedure was

⁴⁷⁰ See 3.1 above.

⁴⁷¹ See 3.2.1 above.

⁴⁷² See 3.2 above in general.

⁴⁷³ See 3.2 above in general.

⁴⁷⁴ See 3.2.2 above.

⁴⁷⁵ See 3.2.2 above.

illustrated by referring to a matter where Cicero acted on a woman's behalf and the various elements of the procedure were highlighted as it pertains to the practice of oath-swearing.⁴⁷⁶ Oath-swearing as a way to ensure that the courts are not unduly burdened with trivialities and that litigating parties maintain honesty during the proceedings were discussed with a reference to the religious aspects present.⁴⁷⁷

The *formula* procedure replaced the religious *legis actio sacramentum* procedure during the latter part of the Republic and gained popularity during the Principate.⁴⁷⁸ The *formula* procedure was discussed with reference to the role of religion and oath-swearing in this procedure. The *legis actio sacramentum* procedure was an oath sworn to the Roman gods in a dialogue form, whereas the *formula* procedure required a written account of the case, witnesses providing testimony under oath, and a lay judge who deliberates and judges under oath. The *formula* procedure was also used to conduct verbal contract with the oath as the binding element.⁴⁷⁹ In addition to the general use of oath-swearing as part of the trial and entering into verbal contracts using oath-swearing, the practice of oath-swearing was also used to end disputes.⁴⁸⁰ Gaius⁴⁸¹ indicates that when oath-swearing is used in litigation it can end the matter, as an oath of compurgation in effect clears the party of all wrongdoing. Various methods of oath-swearing accompanied the application of the oath-swearing, and during the Principate, illustrates the integral role the swearing of an oath played in law and society.

The practice of swearing promissory oaths to kings, consuls and *imperatores*, by soldiers and citizens were also prominent in the Roman society. This required the invocation of a divine deity who would then enforce the terms of the oath.⁴⁸² Each *Imperator* altered the terms of these oaths. During the Principate, Caligula required the promissory oath of allegiance to include such allegiance to his sisters.

⁴⁷⁶ See 3.2.2 above.

⁴⁷⁷ See 3.2.2 above.

⁴⁷⁸ See 3.2.3 above.

⁴⁷⁹ See 3.2.3 above.

⁴⁸⁰ See 3.2.3 above.

⁴⁸¹ D 12.2.1-12.2.2.

⁴⁸² See 3.2.2-3.2.4 above.

After his sister, Drusilla's death, this deviation extended to Caligula taking oaths by her holiness.⁴⁸³

Christianity was introduced into the Roman tradition during the Dominate.⁴⁸⁴ This changed the practice of oath-swearing as the oaths were sworn to the Christian God in favour of the Roman pantheon of gods. Along with this change of state religion, the *formula* procedure also fell into disuse and was replaced by the *cognitio extraordinaria* procedure. This procedure caused the Roman law of procedure to be significantly simplified when compared with the earlier procedures.⁴⁸⁵ Oaths were commonly used during these procedures to ensure that the litigants were acting in good faith and that the presiding officer and administrators of justice were also acting in good faith.

The following period, which started with *Imperator* Justinian, is known for the immense strides taken towards the codification of the Roman legal system.⁴⁸⁶ Justinian compiled a codification of the various existing codices and ordered the recording of the laws outside the ambit of the pre-existing codices. This was done in an attempt to provide for the new developments in law and to ensure that the laws contained within the codices were in fact the reflection of the general will of the people. The practice of oath-swearing, as is discussed above, remained largely similar to the Christian oath which had, at this stage, been in use since the reign of Constantine I.⁴⁸⁷ These oath-swearing practices correlated with the practices used during the Principate as the writings and teachings used were of that time period.

From the discussion in this chapter, it is apparent that oath-swearing was a general occurrence in the Roman law. The assertory and promissory forms of oath-swearing were applied to various situations and the development of the oath was, to a certain extent, dependant on the religion of the region (or state), the political and social situation as well as the nature of the legal system itself. The

⁴⁸³ See 3.2.3 above.

⁴⁸⁴ See 3.2.4 above.

⁴⁸⁵ See 3.2.4 above.

⁴⁸⁶ See 3.3 above.

⁴⁸⁷ See 3.2.4-3.3 above.

practice of oath-swearing seems to have developed according to necessity and with reference to the practices of the past. The investigation into the development of oath-swearing in the Netherlands,⁴⁸⁸ as one of the relevant periods in the development of the South African law, follows in Chapter 4 below.

⁴⁸⁸ See Chapter 4 below. After which, South Africa will be discussed in order to make conclusions.

Chapter 4 The oath in the Netherlands post 1500s

4.1 Introduction

It is relevant to refer to the development of oath-swearing within the context and geography of the Netherlands due to the legal and religious traditions which influenced South Africa and the South African legal system at its inception.⁴⁸⁹ This can serve as a frame of reference and departure point for the practice of oath-swearing in South Africa.⁴⁹⁰ The investigation of the practice of oath-swearing within the Netherlands can be broadly divided into historical oaths and oaths in contemporary Netherlands. For purposes of creating context for the application of the developmental history of the oath, the legal system is cursorily discussed.

Van Zyl⁴⁹¹ as well as Hahlo and Kahn⁴⁹² mention that the reception of the Roman law in Holland and West Friesland are a near complete reception and quite noteworthy for purposes of this study.⁴⁹³ The Roman law influenced the Dutch law, which in turn influenced various aspects of the South African law to the effect that South Africa adopted the Roman-Dutch legal system as foundational.⁴⁹⁴ The Roman-Dutch legal system entailed labour by the courts and jurists in northern Netherlands (Holland) in the centuries following the fifteenth century.⁴⁹⁵ The Roman-Dutch law (*Romeins-Hollandse regsisteem*) was the product of the reception of the Roman law in the province of Holland and to varying degrees of reception in other provinces of the Netherlands from the twelfth to well into the

⁴⁸⁹ Venter *et al Regsnavorsing* 23. See also Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 14-98; Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596.

⁴⁹⁰ Hahlo and Kahn *The South African Legal System and its Background* 566-596.

⁴⁹¹ Van Zyl *Romeins-Hollandse Reg* 279.

⁴⁹² Hahlo and Kahn *The South African Legal System and its Background* 515-517.

⁴⁹³ See below. See also Thomas 1999 *South African Law Journal* 784.

⁴⁹⁴ It must at all times be borne in mind that although the South African legal system is chiefly based on the Roman-Dutch legal system, the influence of the indigenous law and the laws of other religious based legal systems should not be overlooked. South Africa has a unique legal system with a myriad of influences. Due to the limitations of this study, it is impractical to discuss all of these here. See Chapter 6 for a cursory discussion of the influences of the African customary law and the religious based legal system. The English law was purposefully not discussed due to the aforementioned limitations. Van Zyl *Romeins-Hollandse Reg* 279; Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596; and Venter *et al Regsnavorsing* 30.

⁴⁹⁵ Turpin 1963 *Acta Juridica* 21.

fifteenth century.⁴⁹⁶ The reception of Roman law was not a comprehensive legal and cultural transplant, rather a systematic adaptation and blending of the Roman law with the indigenous law of the area by courts and jurists in the Netherlands, more particularly, Holland.⁴⁹⁷ The Roman-Dutch law of the sixteenth and seventeenth century is described as Roman law with influences of Germanic tribal law, feudal law, and canon law.⁴⁹⁸ Van Leeuwen⁴⁹⁹ explained this concept and states that the law commonly used in the Netherlands during this period was the Roman law, but in instances where the Roman law did not provide an action or remedy, canon laws or feudal laws applied. The natural law influences cannot be ignored as some of the most authoritative figures during this century wrote extensively from this perspective.⁵⁰⁰ Jurists like De Groot deferred to natural law in an attempt to promote justice and fairness in the administration of justice.⁵⁰¹ This melting pot of legal principles, norms and philosophies arrived at the Cape in fact and in act.⁵⁰²

The Roman-Dutch law arrived in South Africa in 1652 as a management strategy.⁵⁰³ The motivation was that if Van Riebeeck establishes a judicial body, it would be easier to govern the newly settled Cape. The law that was applied by the judicial body (*Daeglijcxen Raed* and *Justitie ende Chrijghsraet*) was the

⁴⁹⁶ Van Zyl *Romeins-Hollandse Reg* 290-291; Venter *et al Regsnavorsing* 23; Van Reenen 1995 *South African Law Journal* 278; Hosten *et al Introduction to South African Law and Legal Theory* 307-311; Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596.

⁴⁹⁷ Van Zyl *Romeins-Hollandse Reg* 290-291; Van Reenen 1995 *South African Law Journal* 278; Hosten *et al Introduction to South African Law and Legal Theory* 307-311; Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596; Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 14-26; Thomas 1999 *South African Law Journal* 786-788.

⁴⁹⁸ Van Zyl *Romeins-Hollandse Reg* 290-291; Venter *et al Regsnavorsing* 23; Van Reenen 1995 *South African Law Journal* 278; Hosten *et al Introduction to South African Law and Legal Theory* 307-311; Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596; Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 14-26; Thomas 1999 *South African Law Journal* 786-788.

⁴⁹⁹ Van Leeuwen *Commentaries* 1.1.12 (Kotzé)

⁵⁰⁰ Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 14-26; Venter *et al Regsnavorsing* 23. See 6.3 below.

⁵⁰¹ Van Zyl *Romeins-Hollandse Reg* 312-313. Additionally, De Groot subscribed to the philosophy of Pentecostalism. See De Groot *De Iure Belli Ac Pacis* 2.13 for an application of this philosophy.

⁵⁰² Hahlo and Kahn *The South African Legal System and its Background* and 566-596; Venter *et al Regsnavorsing* 23; Thomas 1999 *South African Law Journal* 786-790.

⁵⁰³ Van Zyl *Romeins-Hollandse Reg* 429.

Roman-Dutch law as it was at that point in time.⁵⁰⁴ The Roman-Dutch law provided for several instances of oath-swearing, any of which could have migrated to South Africa during the seventeenth and eighteenth century. It is therefore necessary to investigate the developmental history of the practice of oath-swearing in the Netherlands, because such developments and innovations influenced the oaths sworn in South Africa today and in history.

The next section succinctly examines the various oaths sworn during the developmental history of the Roman-Dutch legal system. The religious aspects as well as the legal implications are considered with a distinct separation between historical oaths and contemporary oaths in order to ascertain the actual and verifiable development of both the practices ancillary to oath-swearing as well as the actual swearing. The assertory oaths, as well as the promissory oaths are discussed with reference to the function and purpose of each oath within the legal, social and historical context of the period.

4.2 Historical oaths in the Netherlands

In the Netherlands the practice of oath-swearing was used and was regarded as an act of profound religious significance.⁵⁰⁵ De Groot⁵⁰⁶ echoes this profound religious significance when he states that the oath holds such great authority in that the oath is respected even by those who are not part of the Christian tradition or has no faith to speak of.⁵⁰⁷ De Groot⁵⁰⁸ goes further by stating that historically the punishment for perjury was quite severe and that "even the will to commit perjury ... would bring down punishment."⁵⁰⁹ The discussion and lines of argument below will commence with a theoretical description of oath-swearing by

⁵⁰⁴ Van Zyl *Romeins-Hollandse Reg* 429.

⁵⁰⁵ Turpin 1963 *Acta Juridica* 34.

⁵⁰⁶ De Groot *De Iure Belli Ac Pacis* 2.13.1. See introductory remarks De Groot *De Iure Belli Ac Pacis* regarding the natural law foundations of this work. For an exposition of natural law and the related theories, see Van Caenegem *Geschiedkundige Inleidinge tot het Privaatrecht* 99-126.

⁵⁰⁷ De Groot *De Iure Belli Ac Pacis* 2.13.1.

⁵⁰⁸ De Groot *De Iure Belli Ac Pacis* 2.13.1; Whewell *Grotius on the Rights of War and Peace* 167-168.

⁵⁰⁹ De Groot *De Iure Belli Ac Pacis* 2.13.1-2.13.2; Whewell *Grotius on the Rights of War and Peace* 167.

De Groot and Voet, after which the swearing of an assertory oath as part of trial procedure follows. This section is then brought to a close with an investigation into the swearing of a promissory oath.

The relevance and application of oath-swearing during this period is important as De Groot deems it necessary to investigate the point in time where the uttering of an oath acquires the power to inflict punishment for perjury.⁵¹⁰ This investigation leads De Groot along an argument of "words + intention = punishable oath" versus "words = oath"; and by so-doing questions whether intention should be a requirement for an oath.⁵¹¹ The one side of De Groot's⁵¹² argument is that in order for there to be an oath and for the swearer to have bounded himself or herself to the oath, there has to be willingness to be bound. For instance, a situation where a person utters an oath in a moment of emotional upheaval lacking intent cannot be held to the stipulations of the oath.⁵¹³ An initial statement is made to the effect that if a party were to swear willingly, it is evidence of his or her willingness to be bound due to the close relationship between the oath and the obligation it instils.

The one question that arises from this first argument is what the position of perjury might be if a person swears, but is not bound to the oath. This question is answered by separating the legal or social act of oath-swearing from the religious act and saying that should a person swear without the intention to be bound, he or she cannot be held to the oath. This does not exempt the perjurer from all wrong doing as he or she still commits a religious trespass, or sin, which is outside the realm of law or society to punish or enforce.⁵¹⁴ Van Leeuwen⁵¹⁵ expands upon this by stating that there are instances where an oath can be sworn, but that these are unknown to the Roman law and that the canon law

⁵¹⁰ De Groot *De Iure Belli Ac Pacis* 2.13.2; Whewell *Grotius on the Rights of War and Peace* 167.

⁵¹¹ De Groot *De Iure Belli Ac Pacis* 2.13.2; Whewell *Grotius on the Rights of War and Peace* 167-171.

⁵¹² De Groot *De Iure Belli Ac Pacis* 2.13.2

⁵¹³ De Groot *De Iure Belli Ac Pacis* 2.13.2-2.13.3; Whewell *Grotius on the Rights of War and Peace* 167-171. It is unclear whether De Groot considered the self-preservation response of an accused whose life is in jeopardy.

⁵¹⁴ De Groot *De Iure Belli Ac Pacis* 2.13.2-2.13.3; Whewell *Grotius on the Rights of War and Peace* 167-171.

⁵¹⁵ Van Leeuwen *Commentaries* 1.1.11-1.1.12.

should be consulted in this regard. This statement is not entirely true as the Romans used the practice of oath-swearing widely and extensively,⁵¹⁶ and the laws provided for the swearing of oaths, but what Van Leeuwen might refer to is the fact that the action is religious, not legal, and the transgression is a sin, not a crime, and it is God who is responsible for oaths, not the law. It seems that Van Leeuwen has disdain for the practice of oath-swearing as he too easily files it under "ecclesiastical matters," unlike De Groot who commits scores of pages to the topic.⁵¹⁷

De Groot disregarded the first argument above based on a flaw in the practical application of this exception. De Groot⁵¹⁸ states that if a person should swear of his or her own volition, without coercion, and calling upon God to witness the promise, it is his or her obligation to ensure that the oath is made true. In his writings, De Groot quotes Cicero in support of this argument because a swearer is obliged to adhere to that which is sworn.⁵¹⁹ In this regard, De Groot⁵²⁰ elaborates by stating that the act of swearing creates an obligation which is "processed from a deliberate mind" and applies it practically and theoretically. This clearly illustrates the seventeenth century religious nature of the people in that a person can be held to their oath because God is a witness to the swearing thereof, this fact discounts the possibility of swearing in jest or without intention or obligation.

Perjury is, at least in part, also a religious trespass and due to its dual nature, the definition regarding perjury is somewhat more involved than can be expected.⁵²¹ The gist of the very wide and involved definitions by some of the jurists indicates that perjury is the detestable act of using God as a tool in order to defeat the ends of justice, or to prejudice another.⁵²² Therefore, the "deliberate mind" concept referred to above, is quite relevant. Perjury, in this sense, is a religious crime, punishable by law.

⁵¹⁶ See Chapter 3 above.

⁵¹⁷ De Groot *De Iure Belli Ac Pacis*.

⁵¹⁸ De Groot *De Iure Belli Ac Pacis* 2.13.2; Whewell *Grotius on the Rights of War and Peace* 168.

⁵¹⁹ De Groot *De Iure Belli Ac Pacis* 2.13.2.

⁵²⁰ De Groot *De Iure Belli Ac Pacis* 2.13.2; Whewell *Grotius on the Rights of War and Peace* 168.

⁵²¹ Hunt *South African Criminal Law and Procedure* 105-106.

⁵²² Some of whom are described above and below.

During the Frankish period,⁵²³ and particularly in the Netherlands, it is apparent that the Church infiltrated the society and this could have affected the law. Bearing the separation of state and church in mind, the religious affiliations of the greater portion of the population must be taken into consideration, as it has the power to influence the nature of the law.⁵²⁴ The religious affiliations of the people gave rise to a system of church courts which intended to deal with cases where religion infiltrated the law to such an extent that it could almost be said that any court other than the aforementioned church courts will not have the necessary jurisdiction to deal with these matters.⁵²⁵ These church courts heard cases where dealings between parties needed to be bound by an oath as the oath could only be administered by a church official. Examples of such church court matters include: wills, heresy, blasphemy, adultery, incest, violation of the Sabbath, usury and wagering.⁵²⁶ This wide variety of offences that fell into the jurisdiction of the church courts muddled the lines between ecclesiastical authority and law. This instance further illustrates the close relationship between religion and law in matters where the oath is concerned.

In a civil matter, the position was that a plaintiff could verify (or support) the claim with an oath and this statement by oath can then be taken into consideration by the court.⁵²⁷ Voet⁵²⁸ also describes this practice and states that the purpose of the aforementioned oath is a declaration of a right. Wedekind⁵²⁹ states that there are elements the court should take into consideration when evaluating this statement made by the plaintiff, and these include: that the quality of the person should be considered, the nature of the case, and any other aspect the court might deem relevant. It is notable that the first element of consideration is that the quality of the person undertaking the act of swearing should be considered. This may indicate that the court has to discern whether the plaintiff is

⁵²³ See Van Zyl *Romeins-Hollandse Reg* and De Vos *Regsgeskiedenis* in general.

⁵²⁴ Turpin 1963 *Acta Juridica* 34-35. See Chapter 2 for the arguments in favour of law being a product of general will and tradition.

⁵²⁵ Turpin 1963 *Acta Juridica* 34-35.

⁵²⁶ Turpin 1963 *Acta Juridica* 34-35.

⁵²⁷ Wedekind *Bijdrage tot de Kennis* 65.

⁵²⁸ Voet *Commentarius ad Pandectas* 7.2.17-7.2.18. (Ganes)

⁵²⁹ Wedekind *Bijdrage tot de Kennis* 65-66.

a trustworthy person who can provide trustworthy evidence or whether the person has a perjurious character. The second is that the nature of the case can influence the truth-value of the oath. If the stakes are high, the temptation to lie may also be elevated, which can, in turn, cause the plaintiff to perjure himself or herself. The last element is a catch all, which can consider various social or political factors. If the court accepts the plaintiff's oath and decides in his or her favour, the case is settled. On the contrary, if the court is either not satisfied that the plaintiff has made out a clear case, or that the plaintiff's oath cannot be trusted, the defendant is absolved of all charges.⁵³⁰

Wedekind⁵³¹ comments on the process of placing witnesses under oath, which differs greatly from the trial process described above. This process entails the commissioner to administer the following oath to the witness:⁵³²

... dat sy zeggen zullen al 't ghene dat sy weten van 't ghene dat men haar vragen zal, aegaende ende nopende 't stuc daer op hy beleet is, alzo wel om d'een paartjie als om d'ander, ende dat hy niet laten en sal, om geenderhande zake, die 'therte gepeynsen oft mont ghespreken macht.

This oath, which requires sincerity in providing evidence, is required to be sworn in the presence of both parties, prior to the presentation of evidence, bearing in mind that for each averment made, a witness is required to address said averment.⁵³³ The commissioner then listens to all the evidence and decides the case on the law applicable, as well as the facts provided by the witnesses.⁵³⁴ It is the responsibility of the commissioner to decide what the weight is of the fact provided by the witness, bearing in mind the quality of the person testifying, the nature of the case or other aspects relevant.⁵³⁵

Voet⁵³⁶ states that oath-swearing plays an important role in settling disputes between parties and attributes the power of this *judicial tool* to the binding force of the oath in general. He does, however, require the swearer to swear this oath

⁵³⁰ Wedekind *Bijdrage tot de Kennis* 65-66.

⁵³¹ Wedekind *Bijdrage tot de Kennis* 106-107.

⁵³² Wedekind *Bijdrage tot de Kennis* 106-107.

⁵³³ Wedekind *Bijdrage tot de Kennis* 106-107.

⁵³⁴ Wedekind *Bijdrage tot de Kennis* 107.

⁵³⁵ Wedekind *Bijdrage tot de Kennis* 106-107.

⁵³⁶ Voet *Commentarius ad Pandectas* 7.2.1.

freely, without coercion and with a full understanding of the implications of the oath by stating that a person "speaks from the soul" because it is a "religious declaration of the truth, or calling upon the name of the Deity in support of the truth."⁵³⁷ Voet⁵³⁸ refers to the practice of touching objects considered to be holy as a way of amplifying the religious aspect of the oath and states that it is unnecessary to do so. Nonetheless, Voet⁵³⁹ accepts the practice of witness oaths but requires the oath to be sworn voluntarily and, again, warns against perjury.

As part of the warning against perjury, Voet⁵⁴⁰ reflects upon the customs related to perjury, which has been completed. He recalls that it is practice to raise the index finger and the middle finger upwards, towards heaven, when the oath is sworn.⁵⁴¹ It was customary to cut off these two fingers for it was with these two fingers that the perjurer offended God.⁵⁴² This is by far the most extreme reaction to perjury, yet acceptable in the historical and social context, during this period. Even so, as in the matters discussed above, the character and past actions of the offender should be taken into consideration. The offender's actions ancillary to the perjury⁵⁴³ should also be taken into account when the judge decides upon a sentence.

In closing, a further example of the oath in the Netherlands is the oath sworn by judicial officers. Van Leeuwen⁵⁴⁴ indicates that the judges of the courts of Holland must, in their judgements, observe the laws and swear an oath to that effect. Similarly the president of the *Hooge Raad* was compelled to swear an oath before he could assume responsibilities he swore that his judgements will be fair and without favour or disfavour.⁵⁴⁵

⁵³⁷ Voet *Commentarius ad Pandectas* 7.2.1.

⁵³⁸ Voet *Commentarius ad Pandectas* 7.2.1.

⁵³⁹ Voet *Commentarius ad Pandectas* 7.2.2 and 7.2.5.

⁵⁴⁰ Voet *Commentarius ad Pandectas* 7.2.18.

⁵⁴¹ Voet *Commentarius ad Pandectas* 7.2.2 and 7.2.32.

⁵⁴² Voet *Commentarius ad Pandectas* 7.2.32.

⁵⁴³ An example of the ancillary action is whether the perjurer tried to correct the perjury, bearing in mind that the attempted perjury was just as serious as the completed perjury. See Voet *Commentarius ad Pandectas* 7.2.32.

⁵⁴⁴ Van Leeuwen *Commentaries* 1.1.11-1.1.12.

⁵⁴⁵ Ellison 1954 *South African Law Journal* 23. A similar oath was also used in the lower courts.

From the discussion above, it seems that the practice of oath-swearing was, in fact, ubiquitous in the developmental history of the Netherlands. The Dutch jurists and the courts developed the understanding of oath-swearing and dictated the manner in which it is applied. This historical development at the roots of the legal development in the Netherlands continued from the Roman tradition and continued the process into contemporary Dutch law. The instances relating to the practice of oath-swearing in the Netherlands today are discussed below. The next section covers the swearing of assertory oaths and promissory oaths, coupled with a discussion on the relevance of said oath-swearing practices.

4.3 Oaths in contemporary Netherlands

The practice of oath-swearing, having a long developmental history in this geographical area⁵⁴⁶ is still commonly used in the Netherlands today for much the same reasons as stated above. The oath-swearing practices have, however, evolved in an inclusive manner in order to not exclude persons who subscribe to the teachings of a faith other than the Christian faith.⁵⁴⁷ The oaths that can be sworn in the Netherlands are the assertory oaths, mainly in courts, and the promissory oaths, mainly by the monarchy and other governmental functionaries.⁵⁴⁸ There are several legal stipulations regarding, the most notable of which are investigated below.

For an oath to be sworn in the Netherlands it has to conform to certain conventions. On 17 July 1911⁵⁴⁹ an act was enacted with the aim of elucidating the growing uncertainty with regard to the acceptable oath-swearing conventions.⁵⁵⁰ Section 1 of the act⁵⁵¹ states the following:

Hij, die ter uitvoering van een wettelijke voorschrift mondeling een eed, belofte of bevestiging moet afleggen, zal: a. indien hij een eed aflegt, onder het

⁵⁴⁶ See 4.1.1 and Chapter 2 above.

⁵⁴⁷ Section 3 *Eedswet* 1971 states that the oaths preceding the *Eedswet* of 1971 did not provide for any oaths to be sworn other than the Christian oaths.

⁵⁴⁸ See below.

⁵⁴⁹ *Wet vorm van de eed*.

⁵⁵⁰ This act also confirmed the position regarding promises and solemn declarations. See *Wet vorm van de eed*.

⁵⁵¹ Section 1 *Wet vorm van de eed*.

opsteken van de twee voorste vingers van zijn rechterhand, uitspreken de woorden: "Zoo waarlijk helpe mij God Almachtig", b. indien hij een belofte aflegt, uitspreken de woorden: "Dat beloof ik", indien hij een bevestiging aflegt, uitspreken de woorden: "Dat verklaar ik", tenzij hij aan zijn godsdienstige gezindheid den plicht ontleent den eed, de belofte of de bevestiging op ander wijze te doen.

This rather succinct piece of legislation states that if a person is required, by some other law, to swear an oath, make a declaration or promise, he or she can do any of the following: he can either swear an oath by raising the index and middle finger of the right hand, provide the necessary information, formulation or formula, as required by the particular act or legal rule, and say in closing "Zoo waarlijk helpe mij God Almachtig".⁵⁵² This oath will, for purposes of this discussion, be referred to as *the Dutch way*.⁵⁵³ The second option provides two processes; a person can either promise in the prescribed manner, or make a declaration in the prescribed manner. The promise is used in cases where a promissory oath would normally be sworn (for example an oath of office), and a declaration is used where an assertory oath would normally be sworn (for example a witness oath). The important portion of the quote above is the closing. Section 1⁵⁵⁴ provides that should a person's religion require an oath to be sworn and prescribe the manner in which the oath must be sworn, the person is allowed to swear the oath according to the conventions prescribed by the religion. This provision is quite progressive with regard to the time period in which it was enacted.⁵⁵⁵ So much regard is given to the fact that someone might feel the need to swear an oath in another manner so as to effectively bind the conscience of the swearer to the terms of the oath.⁵⁵⁶

⁵⁵² Section 1 *Wet vorm van de eed*. Unless the specific act or legal rule requires another closing, see section 2 *Wet vorm van de eed*. Section 3 of the act provides alternate options to persons who cannot swear an oath in the prescribed manner as a result of impossibility, for example persons who do not have a right hand or cannot speak, by providing that the person should swear an oath to the extent, and in the manner which is possible.

⁵⁵³ This is done in order to avoid unnecessary repetition of the process.

⁵⁵⁴ Section 1 *Wet vorm van de eed*.

⁵⁵⁵ 1911.

⁵⁵⁶ See Chapter 2 and Chapter 6 for description of some of the oath-swearing practices required by certain religions.

Some time after this act was enacted, the need arose for clarification of the act and the *Eedswet* was created in order to address possible issues.⁵⁵⁷ Section 1 of the act provides the following:⁵⁵⁸

In elk geval waarin een wettelijk voorschrift het afleggen van een eed vordert of daaraan rechtsgevolgen verbindt, kan ter keuze van de betrokkene in de plaats van de eed de belofte worde afgelegd of, in voorkomend geval, de bevestiging worden gegeven.

This section makes it clear that should the need arise, for example from an act, for an oath to be sworn, the swearer can choose to either swear the Christian oath in the Dutch way, or to make a promise or a solemn affirmation to the same effect of an oath⁵⁵⁹ as stated in section 2 of the Act.⁵⁶⁰

This Act seems to underscore the fact that the swearer has a choice as to which process to follow should an act compel him or her to swear an oath. The most important part of the *Eedswet* for the purposes of this study is the provision that states that the legal consequences in terms of promises, declarations and oaths are the same.⁵⁶¹ The differentiation between the religious oath and the secular promise or declaration is merely a matter of personal religious preference and cannot be used to favour or disfavour any party. The value of such a provision is that it provides the intended swearer with the option of swearing an oath which is binding upon his or her conscience without the fear of discrimination or bias.

With regard to the practical swearing of an oath in civil matters, the *Wetboek van Burgerlijke Rechtsvordering*, which deals with matters relating to civil suits provides for the swearing of an oath.⁵⁶² Book 1 of the *Wetboek van Burgerlijke Rechtsvordering* deals with the procedures relating to the different courts, namely: *Rechtsbank*,⁵⁶³ *Gerechtshof*,⁵⁶⁴ and *Hoge Raad der Nederlanden*.⁵⁶⁵ Section

⁵⁵⁷ See preamble of the *Eedswet* 1971. Note also that the act was initially signed into law in 28 April 1961, but subsequent alterations in 1971 changed the citation of the act.

⁵⁵⁸ Section 1 *Eedswet* 1971.

⁵⁵⁹ As seems to be the norm. See Chapter 5 and Chapter 6 below.

⁵⁶⁰ Section 2 *Eedswet* 1971.

⁵⁶¹ Sections 1 and 2 *Eedswet* 1971.

⁵⁶² Dutch Code of Civil Procedure. *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶³ District courts. *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶⁴ Superior courts. *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶⁵ Dutch High Court. *Wetboek van Burgerlijke Rechtsvordering*.

177⁵⁶⁶ deals with the procedure of swearing in witnesses. Subsection 1⁵⁶⁷ states that the judge should ask the witness questions regarding the personal details of the witness as well as the relationship, if any, between the witness and the parties to the matter. Subsection 2⁵⁶⁸ states that the witness, before any testimony can be heard, must swear an oath in the prescribed manner⁵⁶⁹ that the information provided under oath will be the "whole truth and nothing but the truth".⁵⁷⁰

Subsection 3⁵⁷¹ provides for exceptions to subsections 2 and 3 by explaining the process to be followed should the witness be unable to comprehend the extent and importance of the oath sworn. This includes two categories of people; the first is, people with intellectual disabilities that could diminish cognitive ability of the witness; and secondly, children under the age of seventeen.⁵⁷² Witnesses within these categories are reminded to tell the whole truth and nothing but the truth. A problem that presents itself is how the judge should deal with information provided in terms of section 177(3) and to what extent it can be used in a verdict. The provision states that the judge should record in the verdict the extent to which the abovementioned testimony influenced the verdict. The final provision in the *Wetboek van Burgerlijke Rechtsvordering* regulating oaths,⁵⁷³ states that in the event of testimony being provided without the bearing of an oath, the judge should record it in the verdict and expand upon the reasons as to why the oath was not administered and why this could not be corrected. The use of oath-swearing in civil matters in the Netherlands is ubiquitous to the extent that the provision regulating failure to comply with the stipulations of the act, section 184,

⁵⁶⁶ Section 177 *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶⁷ Section 177(1) *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶⁸ Section 177(2) *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁶⁹ The Dutch way, described above, is commonly used.

⁵⁷⁰ "... de gehele waarheid en niets dan de waarheid te zullen zeggen." S 177(2) *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁷¹ Sections 177(3) and 177(2) *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁷² Section 177(3) *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁷³ Section 177(4) *Wetboek van Burgerlijke Rechtsvordering*.

exempts section 177 and declares that failure to comply with the provisions in section 177 would cause the whole procedure to be void.⁵⁷⁴

The nuanced approach to oath-swearing featured in an appeal case before the *Hoge Raad der Nederlanden* in 2002⁵⁷⁵ where one of the facts in dispute is that the respondent was a witness in the case before the court *a quo* and he swore the relevant witness oath according to section 1(a) of the *Wet vorm van de eed*.⁵⁷⁶ The respondent swore the oath by raising his index and middle finger⁵⁷⁷ and uttered the following words: "Zo waarlijk helpe mij God Almachtig."⁵⁷⁸ This would normally have been accepted, but the appellant states that the witnesses were all members of the Islamic faith and were obliged to take the oath in accordance with the religious rules of the Islamic faith, which entailed the placing of a hand on the Quran in terms of section 1(b) of *Wet vorm van de eed*.⁵⁷⁹

This irregularity is used by the appellant to convince the court to discount the testimony of the witnesses as the oath sworn was not sincere and because the respondent was Muslim he was not bound by the, apparent, Christian oath.⁵⁸⁰ The argument is that the oath sworn in the Dutch way did not hold any meaning to the swearer and without the potential religious ramifications inherent to the swearing of an oath, there would be no motivation to tell the truth and the aim of

⁵⁷⁴ Section 184 *Wetboek van Burgerlijke Rechtsvordering*.

⁵⁷⁵ ECLI:NL:HR:2002:AE7368

(<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2002:AE7368>). Names are omitted from the published copy. The facts of the case are found in para 1 of the case, but a short description follows: In this matter the respondent in the appeal sued the appellant for the payment of an amount of money. The appellant contested the matter and the court *a quo* decided in favour of the respondent. One of the issues stated in the appeal was that certain testimony should have been disregarded because of irregularities regarding the oath. (For the court *a quo* case see ECLI:NL:PHR:2002:AE7398 (<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2002:AE7368>))

⁵⁷⁶ ECLI:NL:HR:2002:AE7368 para 3.1(v). S 1(a) *Wet vorm van de eed*.

⁵⁷⁷ See 4.1.1 for information on this custom.

⁵⁷⁸ ECLI:NL:HR:2002:AE7368 para 3.1(v).

⁵⁷⁹ ECLI:NL:HR:2002:AE7368 para 3.1(vi). S 1(b) *Wet vorm van de eed*: "... tenzij hij aan zijn godsdienstige gezindheid den plicht ontleent den eed, de belofte of de bevestiging op ander wijze te doen." See the investigation of oaths according to the Islamic faith in chapters 1, 2 and 6, the argument for placing a hand on a holy item in 4.1.1 above.

⁵⁸⁰ ECLI:NL:HR:2002:AE7368 para 3.1(viii). S 184 *Wetboek van Burgerlijke Rechtsvordering*.

the oath-swearing procedure in court is nullified.⁵⁸¹ The court, after having considered the arguments of the appellant, stated that section 1(b) of the *Eedswet*⁵⁸² merely creates the option of swearing an oath in a manner other than the Dutch way, but does not create an obligation to that extent.⁵⁸³ It is clear that the court's interpretation of the relevant section is that the intention of that provision is not to force a party to declare religious affiliations prior to swearing and to predetermine the oath-swearing process to be followed. The provision is permissive and not obligatory.

The practice of providing testimony under oath in the Netherlands is not limited to the civil law, but criminal law also deals with oath-swearing. The *Wetboek van Strafrecht*⁵⁸⁴ regulates perjury in book 2, title IX. Section 207(1)⁵⁸⁵ states the following:

Hij die in de gevallen waarin een wettelijke voorschrift een verklaring onder ede vordert of daaraan rechtsgevolgen verbindt, mondeling of schriftelijk, persoonlijk of door een bijzonder daartoe gemachtigde,⁵⁸⁶ opzettelijk een valse verklaring onder ede aflegt, wordt gestraft met gevangenisstraf van ten hoogste zes jaren of geldboete van de vierde categorie.

The excerpt clearly defines perjury as an intentional action of providing false testimony under oath.⁵⁸⁷ This definition is relevant for prosecution purposes because the state will have to prove that the defendant had the expressed intention to provide false evidence and that perjury cannot be negligently committed. The burden on the state is quite significant in that the defendant can aver that the perjury was done negligently.⁵⁸⁸ This makes the prosecution of perjury extremely difficult, which also discourages prosecution. These cases will

⁵⁸¹ This and other similar situations were probably the motivating factors which influenced the 1911 act *Wet vorm van de eed* in so far as the accommodation of other faiths is concerned. See above and *Wet vorm van de eed*.

⁵⁸² Section 1(b) *Eedswet* 1971.

⁵⁸³ ECLI:NL:HR:2002:AE7368 para 3.2.

⁵⁸⁴ Section 207 *Wetboek van strafrecht*.

⁵⁸⁵ Section 207(1) *Wetboek van strafrecht*. S 207a *Wetboek van strafrecht* provides much the same stipulations with regard to perjury in matters where the Kingdom is a party.

⁵⁸⁶ From this stipulation, it is clear that a person can commit perjury through agency.

⁵⁸⁷ Section 207(3) *Wetboek van strafrecht* states that declarations and promises are equal to the oath and perjury of a declaration or oath is treated the same as the oath. See s 2 *Eedswet* 1971.

⁵⁸⁸ The defendant can aver that the perjury was committed by accident, in which case the intention to commit perjury is absent.

only be instituted if there is a possibility of success, for example repeated contradictory statements.

The consequences of perjury are provided by sections 207(1) and (2) and states that if a person should be found guilty of perjury by a competent court, he or she can be imprisoned for a period not exceeding six years (or a fine of the fourth category),⁵⁸⁹ but if the perjury, during the course of a criminal trial, was done to the disadvantage of the accused, the perjurer can receive a sentence of imprisonment for a period up to nine years (or a fine of the fifth category).⁵⁹⁰

The *Wetboek van strafvordering*, in section 295,⁵⁹¹ governs the process of the prosecution of perjury. Section 295(1)⁵⁹² states that if a witness is seen to have committed perjury the judge can recommend that the he or she be prosecuted for perjury. If this should occur, the registrar of the court should compile the *proces-verbaal*⁵⁹³ immediately and the judge(s) must sign it.⁵⁹⁴ The *process-verbaal* is read to the witness, after which the witness is requested to sign it.⁵⁹⁵ The witness can then decide if he or she wants to sign the *process-verbaal*, if he or she does not want to sign it, the reasons for the refusal must also be recorded.⁵⁹⁶ After this process has been completed, the judge will hand the *process-verbaal* over to the prosecutor and order him or her to investigate the matter and take applicable action.⁵⁹⁷ The process is then complete and section 207 of the *Wetboek van Strafrecht* will then be used in the prosecution of the crime of perjury.

The assertory oaths sworn in the Netherlands are sworn in a civil and well as a criminal context for similar motivations and with similar consequences. The practice of oath-swearing in the Netherlands is not only limited to assertory oaths,

⁵⁸⁹ Section 207(1) *Wetboek van strafrecht*.

⁵⁹⁰ Section 207(1) *Wetboek van strafrecht*.

⁵⁹¹ Section 295 *Wetboek van strafvordering*.

⁵⁹² Section 295(1) *Wetboek van strafvordering*.

⁵⁹³ This is merely a statement of the facts of the case akin to a record or transcript. *Wetboek van strafvordering*.

⁵⁹⁴ Section 295(2) *Wetboek van strafvordering*.

⁵⁹⁵ Section 295(3) *Wetboek van strafvordering*.

⁵⁹⁶ Section 295(3) *Wetboek van strafvordering*.

⁵⁹⁷ Section 295(4) and (5) *Wetboek van strafvordering*.

but the swearing of promissory oaths is widely used in the Netherlands.⁵⁹⁸ The oaths sworn by the monarchy and government officials are discussed below. Following which is an investigation of oath-swearing outside the realm of public service. The advocates' oath and the bankers' oath bring this investigation of the oaths in contemporary Netherlands to a close.

The Netherlands, being a monarchy, changes monarchs from time to time and such an exchange of office is done by way of oath-swearing.⁵⁹⁹ This oath-swearing process in this regard takes on the form of a dialogue between the new monarch and the *Staten-Generaal*. Section 32 of the *Constitution of the Netherlands*⁶⁰⁰ states that the new monarch should be sworn in as soon as possible in the manner provided for by an act for that purpose.⁶⁰¹ Section 1 of the *Wet beëdiging en inhuldiging van de koning*⁶⁰² requires the monarch swears the following oath:

Ik zweer (beloof) aan de volkeren van het Koninkrijk dat ik Statuut voor het Koninkrijk en de Grondwet steeds zal onderhouden en handhaven.

Ik zweer (beloof) dat ik de onafhankelijkheid en het grondgebied van het Koninkrijk met al Mijn vermogen zal verdedigen en bewaren; dat ik de vrijheid en de rechten van alle Nederlanders en alle ingezetenen zal beschermen, en tot instandhouding en bevordering van de welvaart alle middelen zal aanwenden welke de wetten Mij ter beschikking stellen, zoals een goed en getrouw Koning schuldig is te doen.

Zo waarlijk helpe Mij God almachtig!
(Dat beloof ik!)

The purpose of these promises is to ensure that the monarchy does not attempt to usurp all power and cause a revolution, as may occur in certain instances. The monarch in effect promises to be a kind and benevolent ruler whose main goals are to protect the people and to ensure their prosperity. After the monarch makes these promises under oath according to section 1 of the Act, section two of the

⁵⁹⁸ See below.

⁵⁹⁹ *Wet Beëdiging en Inhuldiging van de Koning*.

⁶⁰⁰ Section 32 *Grondwet* (hereafter, *Constitution of the Netherlands*).

⁶⁰¹ Section 32 *Constitution of the Netherlands* states further that the inauguration should take place in Amsterdam during a public meeting of the *Staten-Generaal*. The act referred to is the *Wet Beëdiging en Inhuldiging van de Koning*.

⁶⁰² Section 1 *Wet Beëdiging en Inhuldiging van de Koning*.

Act requires the chairman of the *Staten-Generaal* to reply to the oath in the following manner.⁶⁰³

Wij ontvangen en huldigen, in naam van de volkeren van het Koninkrijk en krachtens het Statuut voor het Koninkrijk en de Grondwet, U als Koning; Wij zweren (beloven) dat wij Uw onschendbaarheid en de rechten van Uw Koningschap zullen handhaven.

Wij zweren (beloven) alles te zullen doen wat getrouwe Staten-Generaal, Staten van Aruba, Staten van Curaçao en Staten van Sint Maarten schuldig zijn te doen.

Zo waarlijk helpe ons God almachtig!
(Dat beloven wij!)

This interaction between the monarch and the *Staten-Generaal* indicates a relationship where the king or queen reigns by consent as much as by right. The order in which the oaths are sworn can be interpreted as an "if-then" relationship, for example, if the monarch keeps his or her oath, then the *Staten-Generaal* will keep their oath. Much depends on this relationship as the failure to adhere to the terms of the oath can cause either party to falter in the governing of the territories to the detriment of the whole.⁶⁰⁴

The exchanges of oaths, discussed above, are not the only oaths sworn in order to ensure a functioning government. The *Constitution of the Netherlands*⁶⁰⁵ provides for the swearing oaths by the ministers and state secretaries, in terms of section 49 of the Constitution,⁶⁰⁶ and members of the parliament, in terms of section 60 of the Constitution.⁶⁰⁷ These oaths are sworn in the presence of the reigning monarch upon acceptance of their duties. The requirements of this oath

⁶⁰³ Sections 1 and 2 *Wet Beëdiging en Inhuldiging van de Koning*.

⁶⁰⁴ In addition to the act above, a further promissory oath can be sworn by the monarchy. This oath concerns a regent. This oath is not discussed here as it would be superfluous as no new information can be gained from the inclusion thereof. See *Wet Beëdiging van de Regent* and s 37 of the *Constitution of the Netherlands*.

⁶⁰⁵ Section 49 of the *Constitution of the Netherlands*.

⁶⁰⁶ Section 49 of the *Constitution of the Netherlands*.

⁶⁰⁷ Section 60 of the *Constitution of the Netherlands*. These are not the only parties compelled to swear an oath. Galle states that the following individuals are to swear oaths: doctors, nurses, advocates, judges, notaries, government officials, members of parliament, journalists, Olympic athletes, and since 2013, bankers. (Galle *Van Financiële Crisis naar Bankierseed* 18). It would be impractical to investigate all of these oaths and the manner in which they are sworn. In order to address the research question in a succinct manner with regard to this portion, four instances of oath-swearing are selected for purposes of discussion, two in the public sector and two in the private sector. See Galle *Van Financiële Crisis naar Bankierseed* in general, for additional information on the topic.

are much the same as that of an oath of allegiance.⁶⁰⁸ They promise to adhere to the stipulations of the Constitution and to fulfil the functions of their office faithfully and to the best of their ability.⁶⁰⁹ The *Burgerlijk Wetboek*⁶¹⁰ requires an official in the *burgerlijke stand* to also swear an oath to the effect that they will fulfil their function honestly, ethically and that their behaviour would be beyond reproach.

The notion that an oath can compel a person to act honourably and ethically in their chosen profession is well founded among the Dutch.⁶¹¹ This is not merely limited to the public sector where a tradition of this manner of oath-swearing is well founded in history.⁶¹² Two professions within the private sector that may benefit from such an oath are advocates and bankers. These two professions have a dubious history and the swearing of an oath aims to rectify this generalisation.⁶¹³ The advocates' oath is governed by section 3 of the *Advocatenwet*⁶¹⁴ which states the following:

Ik zweer (beloof) getrouwheid aan de Koning, gehoorzaamheid aan de Grondwet, eerbied voor de rechterlijke autoriteiten, en dat ik geen zaak zal aanreden of verdeiden, die ik in gemoede niet gelove rechtvaardig te zijn.

This oath, though simple and concise, is in essence an oath of fealty and allegiance to the Crown, country and Constitution. The oath requires the swearer to act with honour and in favour of justice as opposed to personal gain. Regardless of the intention of the legislator in requiring this oath to be sworn prior to accepting duty as an advocate, this seems to be a *paper tiger* as it provides no sanction and requires subjective deliberation and introspection.⁶¹⁵ The purpose of the oath does not rest in the sanction which can be imposed, but rather in the manner in which it should be sworn. This oath is to be sworn in

⁶⁰⁸ See Chapter 3 above.

⁶⁰⁹ Section 49 of the *Constitution of the Netherlands*.

⁶¹⁰ Section 16 *Burgerlijk Wetboek*.

⁶¹¹ See above.

⁶¹² See chapters 2 and 3 generally.

⁶¹³ Galle *Van Financiële Crisis naar Bankierseed* 21.

⁶¹⁴ Section 3(2) and (3) *Advocatenwet*.

⁶¹⁵ Galle *Van Financiële Crisis naar Bankierseed* 21.

public and before the judiciary.⁶¹⁶ The intent could be that the advocate would be held to his or her oath by the public. A similar situation arises with regard to the bankers' oath. In the aftermath of the financial crisis, it became necessary to restore the nations' faith in bankers and the financial sector. The legislator turned to the rich oath-swearing history of the Netherlands for a solution. The bankers' oath, governed by the *Regeling Eed of Belofte Financiële Sector 2015* and the formulation of the oath is provided for by *Bijlagen 1* and provides the following:⁶¹⁷

Ik zweer/beloof dat ik mijn functie integer en zorgvuldig zal uitoefenen. Ik zweer/beloof dat ik een zorgvuldige afweging zal maken tussen alle belangen die bij de onderneming betrokken zijn, te weten de van de klanten, de aandeelhouders/leden, de werknemers en de samenleving waarin de onderneming opereert. Ik zweer/beloof dat ik in die afweging het belang van de klant centraal zal stellen en de klant zo goed mogelijk zal inlichten. Ik zweer/beloof dat ik mij zal gedragen naar de wetten, de reglementen en de gedragscodes die op mij van toepassing zijn. Ik zweer/beloof dat ik geheim zal houden wat mij is toevertrouwd. Ik zweer/beloof dat ik geen misbruik zal maken van mijn kennis. Ik zweer/beloof dat ik mij open en toetsbaar zal opstellen en ik ken mijn verantwoordelijkheid voor de samenleving. Ik zweer/beloof dat ik mij zal inspannen om het vertrouwen in de financiële sector te behouden en te bevorderen.

Zo waarlijk helpe mij God Almachtig!/Dat verklaar en beloof ik!

This oath is considerably longer and more involved when compared to the advocate's oath above. It is clear that the purpose of this oath is to rebuild trust in the financial sector. One issue, identified by Galle,⁶¹⁸ is that the oath, though noble, can only play a limited role in the rebuilding of trust in the financial sector. The oath calls for honourable and fair action by the banker and continues to provide a whole host of other responsibilities upon the swearer. Most of these obligations and responsibilities are not tied to the individual, but are products of the banking system at large. The greater issue is the fact that the negative and reprehensible actions by individuals are only the symptoms of a system which needs to change for the trust to be restored to the financial system. The swearing of an oath can have extraordinary consequences,⁶¹⁹ but the ability to change a whole financial sector is perhaps beyond the power of the oath, especially given

⁶¹⁶ Section 3(1) *Advocatenwet*.

⁶¹⁷ *Bijlage 1 Regeling Eed of Belofte Financiële Sector 2015*.

⁶¹⁸ Galle *Van Financiële Crisis naar Bankierseed* 39.

⁶¹⁹ Like lightning bolts coming down from heaven to punish perjury as the Romans believed, see Chapter 3 above.

the fact that those who swear the oath have limited powers to effect said change. Galle⁶²⁰ states that the system itself needs to change, not merely the role-players. What is still unclear is whether oath-swearing still retains its religious function or if it merely burdens the conscience.

4.4 Conclusion

This chapter investigated the law of the Netherlands from the 16th century in order to determine how the internal and the external legal history influenced the development of oath-swearing in the Netherlands. Excerpts were taken from the legal history of the Netherlands within two broadly defined categories historical oath-swearing and contemporary oath-swearing practices in order to demonstrate the persistence of an oath-swearing tradition.

The investigation into the development of the oath-swearing tradition commenced with an examination of the consequences of the reception of the Roman law into the legal systems of the Netherlands.⁶²¹ This reception caused the nature and the identity of the law, particularly in Holland, to exhibit characteristics of Roman, Germanic, Feudal and Canon law.⁶²² These influences precipitated the creation of a new, hybrid legal system – Roman-Dutch law. This influence was impressed upon the early South African legal system which consequences are still discernable in the contemporary South African legal system. The oath-swearing practices of the Dutch in early and modern times were examined in order to provide for the continual development of oath-swearing as these developments influenced the oath-swearing practices of South Africa.

Both the assertory and the promissory oaths sworn in the Netherlands were ingrained with religion and these religious aspects should not be overlooked in a study such as this. It is also certain that religion influenced the development of the oath-swearing tradition of the Netherlands as the oaths investigated above were initially religious in nature. This religious aspect gradually diminished in

⁶²⁰ Galle *Van Financiële Crisis naar Bankierseed* 39.

⁶²¹ See 4.1 above.

⁶²² Hahlo and Kahn *The South African Legal System and its Background* 515-517 and 566-596; Venter *et al Regsnavorsing* 23.

importance and influence and swearers later had the option of swearing an oath without the religious bearing and consequences. Initially, oath-swearing was considered to be an act of profound religious significance.⁶²³ Severe punishments for perjury were the corollary of the significant religious aspect of oath-swearing. De Groot⁶²⁴ remarks that the oath, and the religious aspect thereof, were to be respected by all and extend this to oaths unsworn or yet to be sworn.⁶²⁵ It further suggests that the social and religious factors influenced, not only the nature of the oath, but also way in which the oath was understood and sworn in the community and in courts. By way of limitation, De Groot⁶²⁶ mentions that ultimately for an oath to be punishable the swearer had to have the intention to swear which creates a willingness of the swearer to be bound by the oath. This argument was, however, a mere legalistic argument and the religious trespass persists in the aforementioned instance, regardless of the legal consequences.

Oaths were sworn in civil matters to function as an assertion of a right where the plaintiff, for example, states a case in the form of the oath and the court then has to evaluate the statement, determine the truth-value of the oath and consider various other elements in the deliberation. The oath can then settle the matter on the basis of the oath. The practice of administering an oath to a witness about to present evidence was also present in the relevant legal system, but the aim seems to have been to ensure the witness' sincerity in providing the evidence. It is necessary to mention that the character of the testifying party was also taken into consideration and, already at this stage, and there are reservations about the efficacy of oath-swearing.

Regardless of the limitation mentioned above, the oath was still used and retained some of its erstwhile power – the power to end the dispute.⁶²⁷ This was extended to include the binding force of religion and strengthens the relationship between

⁶²³ Turpin 1963 *Acta Juridica* 34. See above.

⁶²⁴ De Groot *De Iure Belli Ac Pacis* 2.13.1-2.13.2. See above.

⁶²⁵ This refers to the intention to commit perjury or the subornation of perjury. See above.

⁶²⁶ De Groot *De Iure Belli Ac Pacis* 2.13.2. See above.

⁶²⁷ See Chapter 3 above for similar occurrences.

religion, law and the oath. Voet⁶²⁸ relates the practice of extending the index finger and the middle finger of the right hand⁶²⁹ towards heaven as part of the act of swearing, as well as the practice of touching holy objects⁶³⁰ in an attempt to amplify the oath. Certain specific oaths for specific instances were also referenced and cursorily discussed which provides a segue into the contemporary oaths sworn in the Netherlands.

These oath-swearing practices in both the assertory as well as the promissory forms still retained the religious aspect but relied heavily on the law for its enforcement, because the intervention of a deity was not actively expected. Steps were taken in order to ensure that the oaths sworn adhered to certain minimum requirements. This was done in 1911 in the form of legislation.⁶³¹ The Act provides for the swearing of an oath as well as the actions ancillary to the act of swearing. The Christian God was still summoned to take heed of the oath and the swearer was also able to swear an oath in a manner other than the manner provided for if the religious considerations required alternative actions to accompany the oath. Provision was also made for the swearing of an oath religious implication in the *Eedswet*.⁶³² Various additional acts were enacted to further address the issues regarding oath-swearing in civil as well as criminal matters. The current state of the practice of oath-swearing in the Netherlands closely resembles the position in South Africa.⁶³³ The swearing of an oath extends beyond the courtroom and the palace, offices of government and the judiciary. Bankers are also expected to swear an oath to regain the trust of the public and bring about change to the financial sector.⁶³⁴

It is clear from the discussion above that the practice of oath-swearing was ubiquitous and had a continual development. The courts and jurists were key role-players in the aforementioned development and the legislature ensured that

⁶²⁸ Voet *Commentarius ad Pandectas* 7.2.2, 7.2.5 and 7.2.18.

⁶²⁹ See 4.2 as well as 2.3 above.

⁶³⁰ See Chapters 1, 2 and 3 above as well as 4.2.

⁶³¹ Section 1 *Wetvorm van de eed*.

⁶³² Section 1 1971.

⁶³³ As is discussed in Chapters 5 and 6.

⁶³⁴ See 4.3 and *Regelering Eed of Belofte Financiële Sector 2015*.

the regulation of the practice of oath-swearing adhered to the cultural and religious norms of the time period concerned. The assertory oaths and the promissory oaths all retained the spirit in which it was developed. The influences on the South African legal system are discussed below with due consideration given to the separate but continual development on two different continents.

Chapter 5 The oath in South Africa: From settlement to Union (1652-1961)

5.1 Introduction

It is the purpose of this chapter to investigate the development of the practice of oath-swearing in South African law in both its assertory and promissory forms. The chapter is divided chronologically according to the political dispensation of the period.⁶³⁵ The different sections of the chapter commence with a brief overview of political and other relevant histories of the period in order to create the required context to which the development of the practice of oath-swearing is then applied. The first section of this chapter concerns the early history and constitutional development of South Africa when it had just been settled and follows the development of the four colonies until the unification of the four colonies in 1910.⁶³⁶ The second section is regarding the development of the legal system of the Union government as it pertains to the practice of oath-swearing, where after, in the third, a conclusion is made. The subsequent chapter deals with the development of oath-swearing since 1961, an independent South Africa, from the Republic to the current constitutional dispensation.

The purpose of this chapter is not to provide an encyclopaedic overview of all the instances of oath-swearing which took place in South Africa. It will rather show that the oath-swearing practices in South Africa had a continual developmental history which can be traced back to the same instances of swearing that were part of some the legal systems which influenced South African law.⁶³⁷

⁶³⁵ This method was also followed in Chapter 3.

⁶³⁶ See 5.2 below.

⁶³⁷ As indicated above, due to the length limitations and scope of this study, the English and Canon law legal systems could not be discussed. See, however, the following sources for information in this regard: Bell *A History of Feudalism, British and Continental*; Bellengère *et al The Law of Evidence*; Brundage *Medieval Canon Law*; Canon Law Society of Great Britain and Ireland in Association with The Canadian Canon Law Society *The Canon Law Letter and Spirit: A Practical Guide to The Code of Canon Law*; Churchill *A History of the English-Speaking Peoples Volume I*; Colman 1971 *The Journal of Interdisciplinary History*; Coriden, Green and Heintschel (eds) *The Code of Canon Law: A Text and Commentary*; De Vos *Regsgeskiedenis*; Du Plessis "The Historical Functions of Law: From the Roman to the Canonical Period"; Du Plessis and Olivier "'n Samevloei van Twee Regstelsels: Siviële

5.2 Colonial background (1652-1910)

The Dutch East India Company formed a settlement in the Cape to facilitate the trade relations between the British and other colonies.⁶³⁸ The Dutch East India Company intended to have the area around Table Mountain turned into a refreshment station to serve the ships when they undertake extended voyages to the East.⁶³⁹ This initial intention and humble beginning was merely the first step in the settlement that would last centuries.⁶⁴⁰ The Dutch East India Company and the orders of the *Heeren XVII* were the sources of the authority and management of the settlement; this would carry on for 143 years.

During the reign of the Dutch East India Company in the Cape in the period between 1652 and 1795 several governing bodies were established to organise and manage the settlement.⁶⁴¹ The earliest of these were the *Schepenenbank* formed in 1620 and the Court of Justice (*De Raad van Justitie*),⁶⁴² formed in 1626.⁶⁴³ These *fora* form part of the Dutch East India Company⁶⁴⁴ and later adjudicate civil and criminal matters in the Cape and have the jurisdiction to see

Prosesreg in die Kaapse Howe: 1806-1828"; Green *History of the English People Volume I*; Green *History of the English People Volume III*; Hahlo and Kahn *The South African Legal System and its Background*; Hancock 1953 *Ohio State Law Journal*; Helmholtz *Roman Canon Law in Reformation England*; Hervada *Introduction to the study of Canon Law*; Holt 1983 *Transactions of the Royal Historical Society*; Hosten *et al* *Introduction to South African Law and Legal Theory*; Larroque *The Rejection of Judicial Witnesses and their Testimony*; Lesaffer *European Legal History*; Martin *Richard's Two Bodies and the Deposition of a Divine Right King*; Oldham 1994 *American Society for Legal History*; Peters *Penal Procedural Law in the 1983 Code of Canon Law*; Shack 1979 *European Journal of Sociology*; Smith *The Constitutional History of England*; Vanancio and Carro *Domingo de Soto y su Doctrina Juridica: Estudio teologica-juridico e historico*; Vinogradoff *Roman Law in Medieval Europe*.

⁶³⁸ Botha *Ons Suid-Afrika* 1-8; Van Zyl *Romeins-Hollandse Reg* 423-435. See Theal *History of South Africa* in general.

⁶³⁹ See Theal *History of South Africa* in general. Van Zyl *Romeins-Hollandse Reg* 424.

⁶⁴⁰ Van Zyl *Romeins-Hollandse Reg* 423; See also Du Plessis and Olivier "'n Samevloeie van Twee Regstelsels: Sivele Prosesreg in die Kaapse Howe: 1806-1828" generally.

⁶⁴¹ Van Zyl *Romeins-Hollandse Reg* 428. For a detailed exposition of the historical, political and legal situation during this period (1652-1910), refer to Van Zyl *Romeins-Hollandse Reg* 420-476. See Chapter 4 above.

⁶⁴² The *Raad van Justitie* was officially renamed as *Court of Justice* during the First British Occupation.

⁶⁴³ Balk *et al* *The Archives of the Dutch East India Company* 119-122; Van Zyl *Romeins-Hollandse Reg* 428-429.

⁶⁴⁴ Balk *et al* *The Archives of the Dutch East India Company* 119-122.

to the practical aspects of justice.⁶⁴⁵ Van Lunteren⁶⁴⁶ states that the Dutch law was not a new law rather that it developed from the Roman law. It follows that the law brought to the Cape of Good Hope was the law that was used in Holland, thus Roman-Dutch law.⁶⁴⁷

A few decades after the establishment of the refreshment station in the Cape, the *Commissarissen van Kleinen Zaken*⁶⁴⁸ was instituted to aid in the resolution of smaller disputes among the colonists.⁶⁴⁹ The *Landdrost en Heemraden* developed later on and adjudicated primarily smaller civil and criminal cases.⁶⁵⁰ These courts administrated the litigious nature of the colonists and provided opportunity for further litigation to the *Raad van Justitie*⁶⁵¹ for more serious matters or if further litigation should prove necessary.⁶⁵² During the First British Occupation,⁶⁵³ the *Landdrost en Heemraden* were provided with a greater jurisdiction which caused an influx of cases that would usually have been heard by the *Raad van Justitie*.⁶⁵⁴

Visagie⁶⁵⁵ states that the *Raad van Justitie*, which consisted of an equal number of officials and citizens, was the highest court for both civil and criminal matters in the Cape during this period.⁶⁵⁶ Justice was done in the name, and by the

⁶⁴⁵ Balk *et al The Archives of the Dutch East India Company* 119-122; Van Zyl *Romeins-Hollandse Reg* 428-429.

⁶⁴⁶ Van Lunteren *Overzicht* para 3.

⁶⁴⁷ See Chapter 4 above. See Thomas 1999 *South African Law Journal* 786-790 and Du Plessis and Olivier "'n Samevloei van Twee Regstelsels: Siviele Prosesreg in die Kaapse Howe: 1806-1828" in general.

⁶⁴⁸ In 1682. See Van Zyl *Romeins-Hollandse Reg* 430.

⁶⁴⁹ Patterson *Eckard's Principles* 1.

⁶⁵⁰ Patterson *Eckard's Principles* 1.

⁶⁵¹ See above. See also Van Zyl *Romeins-Hollandse Reg* 428-430; Venter *et al Regsnavorsing* 27-28.

⁶⁵² Patterson *Eckard's Principles* 1.

⁶⁵³ See below.

⁶⁵⁴ Hosten *et al Introduction to South African Law and Legal Theory* 348.

⁶⁵⁵ Visagie *Regspleging* 44-45. Patterson avers that the *Raad van Justitie*, though being a court of law, could possibly have been merely an extension of political power as the court provided a means of governing the people. Patterson *Eckard's Principles* 1.

⁶⁵⁶ Visagie *Regspleging* 44-45.

authority, of the *Staten-Generaal*,⁶⁵⁷ and attorneys and advocates were used to aid litigants in courts.⁶⁵⁸

The British occupied the Cape in 1795 for the first time. Although it was an interim occupation and as such caused minimal changes to the then prevalent legal system,⁶⁵⁹ it was the catalyst which caused large scale changes in the legal system in the coming years.⁶⁶⁰ One major change that was brought about during this interim occupation, which ought to be mentioned here, is that justice was done in the name of His Majesty the King of England instead of the *Staten-Generaal*.⁶⁶¹ This seems to be a very small change, but the effects thereof were profound. Visagie⁶⁶² notes that the ruler of a nation (in this case the King of England) could, by divine right, change the law of the land to emulate the spirit and nature of the land. This could have had an influence on the oath-swearing practices during this period. The religion, which is an integral part of the oath, of the country changed from the Dutch denomination to the Church of England. Both of these are protestant denominations,⁶⁶³ but the dogma and other teachings were somewhat different.⁶⁶⁴ The alterations, in this matter, were short-lived because control of the Cape reverted to the Dutch in 1803.⁶⁶⁵

Although the control of the Cape did revert to the Dutch in what would be called the *Batavian interlude*,⁶⁶⁶ this reversion created a power vacuum, which influenced the *Raad van Justitie* and the *Landdrost en Heemraden* negatively due to the close relationship between the political powers of the Cape and the courts.⁶⁶⁷ The effects of the Batavian interlude were short-lived as the British took control of the

⁶⁵⁷ The *State-Generaal*, according to Hosten, was a governing body who oversaw the overseas interests of the United Netherlands. They could make laws, pass judgement. Hosten *et al* *Introduction to South African Law and Legal Theory* 348.

⁶⁵⁸ Visagie *Regspleging* 45. See Chapter 6 below, as well as *The Magistrates' Courts Act* 32 of 1944; *The Supreme Court Act* 59 of 1959.

⁶⁵⁹ Van Zyl *Romeins-Hollandse Reg* 428-430; Venter *et al* *Regsnavoring* 29.

⁶⁶⁰ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 447-448; Hosten *et al* *Introduction to South African Law and Legal Theory* 346-347.

⁶⁶¹ Visagie *Regspleging* 91-93.

⁶⁶² Visagie *Regspleging* 95.

⁶⁶³ Catholicism was still prevalent in the relevant countries during this time.

⁶⁶⁴ Deming *Understanding Religions of the World: An Introduction* 325-389.

⁶⁶⁵ Visagie *Regspleging* 95.

⁶⁶⁶ Venter *et al* *Regsnavoring* 29.

⁶⁶⁷ Hosten *et al* *Introduction to South African Law and Legal Theory* 348.

Cape in 1806.⁶⁶⁸ The legal system was influenced greatly by this military event. The courts resumed its function of dispensing justice in the name of His Majesty the King; the relationship between politics and the courts resumed in that the governor was responsible for the appointment of presiding officers (most of whom were ill equipped to be presiding officer)⁶⁶⁹ and also, more importantly, the removal of presiding officers.⁶⁷⁰

The English legal system was gradually incorporated into the then legal system of South Africa.⁶⁷¹ This is evident by two historical events, the first of which is that in 1827 English was the only language permitted in courts; and the second is the fact that the judges appointed would either be English or harbour strong affiliations and sympathies for the English.⁶⁷² The incorporation of the English legal system within the legal system of the Cape was also facilitated by the enactment of statutes.⁶⁷³ The province of Natal made an attempt at self-governance, but in subsequent years succumbed to the rule of the Cape in certain areas and this created a legislative domino effect where legislation change in the Cape would cause the same legislation change in Natal.⁶⁷⁴ In contrast to this position, the ZAR⁶⁷⁵ decided to follow the *Hollandsche Wet*⁶⁷⁶ and, as far as possible, maintained this position. The ZAR did not accept the law and allowed for it to stagnate but, rather created supplement legislation which would cater for needs specific to the people of the ZAR. Several of these acts provided for the establishment of courts and the selection and appointment of judicial officers and

⁶⁶⁸ Hosten *et al Introduction to South African Law and Legal Theory* 349-351.

⁶⁶⁹ Venter *et al Regsnavorsing* 29.

⁶⁷⁰ Hosten *et al Introduction to South African Law and Legal Theory* 349-351.

⁶⁷¹ Venter *et al Regsnavorsing* 29-32.

⁶⁷² Hosten *et al Introduction to South African Law and Legal Theory* 350.

⁶⁷³ Venter *et al Regsnavorsing* 25, 32; Hosten *et al Introduction to South African Law and Legal Theory* 356.

⁶⁷⁴ Venter *et al Regsnavorsing* 32; Hosten *et al Introduction to South African Law and Legal Theory* 357.

⁶⁷⁵ Transvaal Republic. Hereafter, Zuid-Afrikaansche Republiek (ZAR). See Dreyer and Botha 1995 *HTS* for information on the relationship between the Church and State in the ZAR.

⁶⁷⁶ The ZAR accepted the following sources: *Koopmans Handboek*, Van der Linden; *Inleiding tot de Hollandsche Rechtsgeleertheyd*, De Groot; and *Roomsch-Hollandsch Recht*, Van Leeuwen. See sections 1-4 of *Bijlage 1* of Volksraadbesluit of 5 May 1859. See Venter *et al Regsnavorsing* 33 additionally.

other functionaries of the states.⁶⁷⁷ The situation in the Orange River Colony was a midway between the Natal and the ZAR position. The Orange River Colony, governed by a constitution modelled on the Constitution of the United States of America,⁶⁷⁸ created legislation and precedent as a means to cater for their own needs.⁶⁷⁹ If they were to require Roman law, they incorporated such law as was necessary into the common law by way of proclamation.⁶⁸⁰ They did, however, refer to the Cape if challenges were to present themselves.⁶⁸¹ These disparate approaches in legal development⁶⁸² caused for interesting developments and approaches in the practice of oath-swearing. As is evident from the preceding chapter, the practice of oath-swearing is ubiquitous in the legal and socio-political history of the Netherlands, which played a large part in the development of the legal system of South Africa.

The swearing of assertory oaths that were required by law during this period are discussed below, after which an investigation of the promissory oaths sworn during the same period will follow.

5.2.1 Assertory oaths (1652-1910)

Assertory oaths sworn in the courts or in pursuit of justice were common practices during the early years of South Africa. The Cape of Good Hope, Natal, the Orange River Colony and the Zuid-Afrikaansche Republiek⁶⁸³ in Transvaal all had legal provisions related to these practices. These are discussed below in order of

⁶⁷⁷ Venter *et al Regsnavorsing* 33. Several of these acts can be located electronically at University of Pretoria 2015 <http://repository.up.ac.za/handle/2263/56530>.

⁶⁷⁸ See below.

⁶⁷⁹ Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 1-42; Venter *et al Regsnavorsing* 34. They incorporated the relevant law by way of proclamation.

⁶⁸⁰ Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 1-42; Van Zyl and Van der Vyver *Inleiding tot die Rechswetenskap* 214-215.

⁶⁸¹ Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 1-42; Hosten *et al Introduction to South African Law and Legal Theory* 359.

⁶⁸² Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 1-42; Venter *et al Regsnavorsing* 25.

⁶⁸³ Hereafter ZAR.

chronology.⁶⁸⁴ The oaths, described below, had religious undertones and, as can be seen, were taken seriously during this period.

Nel⁶⁸⁵ states that the position regarding the swearing of an assertory oath, more particularly by witnesses in a court, at the Cape in 1830 provided for the swearing of an oath but did not provide a uniform form of the oath.⁶⁸⁶ Some consideration was given to instances where the person who is expected to testify under oath is unable to completely comprehend the implications of such swearing and could, therefore, not swear an oath as it would defeat the purpose of the oath.⁶⁸⁷ This particular grouping of people includes children, for the reason that children cannot possibly comprehend the religious implications of a violation of an oath. Nonetheless, the requirement was that they were allowed to testify, provided they undertake to tell the truth because the latter concept is much easier to describe to a child.⁶⁸⁸

Hunt⁶⁸⁹ notes that the first instance of perjury was in 1875 in the *R v Korck* case followed by an increasing number of perjury cases in the South African courts.⁶⁹⁰ The comingling of English and Roman-Dutch law contributed to a definition of perjury as any violation of a promise made under oath.⁶⁹¹ This pertained to assertory as well as promissory oaths, but these matters were mainly pursued in matters of judicial perjury,⁶⁹² a situation that would change in subsequent years.⁶⁹³

Assertory oaths were not sequestered to the confines of the formal courts; Act 17 of 1896⁶⁹⁴ deals with a variety of alcohol related affairs, including the issuing of

⁶⁸⁴ See 1.8 above.

⁶⁸⁵ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 69.

⁶⁸⁶ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 69.

⁶⁸⁷ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 69.

⁶⁸⁸ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 69. This was also extended to persons with a certain religion.

⁶⁸⁹ Hunt *South African Criminal Law and Procedure* 106-107.

⁶⁹⁰ Hunt *South African Criminal Law and Procedure* 107.

⁶⁹¹ Hunt *South African Criminal Law and Procedure* 107.

⁶⁹² Which is to say, a violation of the promise to tell the truth during trial. Hunt *South African Criminal Law and Procedure* 107.

⁶⁹³ See below.

⁶⁹⁴ *Wet 17 of 1896*. The vocabulary contained within the title of this act is regrettable, but it is important to understand this in the context of the time period in which it was enacted – 1896.

the licenses required to trade in alcohol, and the establishment of a commission to deal with these matters. Section 17 deals with this particular function of the commission.⁶⁹⁵ This section gives the commission the power to place any person under oath and subject this person, witness, to questioning. Section 17⁶⁹⁶ goes further and states that if the commission is of the opinion that a witness, questioned under oath, is not being truthful, or if the statements made by the witness proved to be false, then said witness must be tried and punished for perjury. This Act does not provide the wording of the oath that was required or other relevant information, but what can be gleaned from this section is the definition of perjury in this context. The section states:⁶⁹⁷

... indien het bevonden wordt dat de getuie [onder eede] eene valsche verklaring heeft afgelegd, zal hij beschouwd worden te hebben gepleegd de misdaad van meeneed en volgens wet gestraft worden.⁶⁹⁸

This eloquently phrased (though long) clause provides a somewhat simplified description of perjury. It defines perjury as any false statement made under oath. This definition would change in subsequent years, as well as the application thereof in different contexts.⁶⁹⁹

5.2.2 *Promissory oaths (1652-1910)*

Promissory oaths were commonly sworn by functionaries of state or judicial officers who had to be sworn in order for them to assume office. This was, however, not the only applications of the practice of swearing promissory oaths. As is evident from the history of this tumultuous period in time, the swearing of oaths of allegiance was also a common occurrence. In the paragraphs that follow, the most notable of these practices are described with reference to the development thereof.

In this study this act will be referred to as *De Wijnwet*. Refer to the bibliography for further elaboration.

⁶⁹⁵ Section 17 *De Wijnwet*.

⁶⁹⁶ Section 17 *De Wijnwet*.

⁶⁹⁷ Section 17 *De Wijnwet*.

⁶⁹⁸ Own insertion.

⁶⁹⁹ See below.

The *College van Schepenen* was operational as of 24 June 1620 and the officers functioning in the *College van Schepenen* were carefully selected to represent the Dutch East India Company and its interests.⁷⁰⁰ This forum required the functionaries to swear oaths, two of which are *den eed van purge* and *den eed voor schepenen*.⁷⁰¹ *Den eed van purge* was basically an oath of compurgation⁷⁰² where the swearer purifies himself or herself with the oath the functionaries remaining in service of the *College* would swear this oath.⁷⁰³ *Den eed voor schepenen* was the oath that the newly chosen functionaries would swear before formally taking up service.⁷⁰⁴ These two oaths are in effect judicial oaths to ensure justice prevails and that the actions of the presiding officers or functionaries would emulate this.

A time of great upheaval at the Cape was the British annexation of the Cape. Van Zyl⁷⁰⁵ notes that during the First British occupation not much changed regarding the sources of the law used. The *Kaapse Plakkaatboek* was still commonly referred to as a notable source.⁷⁰⁶ The *Kaapse Plakkaatboek* makes mention of oath-swearing for a very unique purpose – this purpose being propaganda. The publication uses propaganda and fear to prevail upon the colonists to swear allegiance to the King of England. On 7 October 1795 the *Kaapse Plakkaatboek*⁷⁰⁷ states that the Cape of Good Hope surrendered, on 16 September 1795, to "His Britannic Majesty" and he, "...in his paternal goodness...", wants to make the colony prosperous and urges the people of the Cape to make this "...publicly(*sic*) known, to the end that all persons may be acquainted therewith...". This statement alludes to much more than it says at this stage. The aim of the publication was to evoke feelings of loyalty to the King of England and accept him as sovereign; they provide reasons for this, for example that the King is like a father who only wants the best for his children. Later on the same page the

⁷⁰⁰ Balk *et al* *The Archives of the Dutch East India Company* 119-122.

⁷⁰¹ Balk *et al* *The Archives of the Dutch East India Company* 121.

⁷⁰² See Chapter 3.

⁷⁰³ Balk *et al* *The Archives of the Dutch East India Company* 121.

⁷⁰⁴ Balk *et al* *The Archives of the Dutch East India Company* 121.

⁷⁰⁵ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 448.

⁷⁰⁶ Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* 448.

⁷⁰⁷ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 3-8. This references subsequent direct quotes.

publication urges the people to renounce any other allegiances they may hold and provides a threat to support this, "... [these] persons ... will be subject to such pains and penalties as may be fitting."⁷⁰⁸

The propaganda-method applied here is in full force when the subsequent paragraph states that acknowledging the King of England as ruler and swearing allegiance to him is "... essential ... to the peace and happiness of society ..." ⁷⁰⁹ A date is given at which the peace and happiness will commence "... all may be informed of our *just* expectation on the part of His Majesty, we have thought it *expedient* by our proclamation of this day's date, to call on the inhabitants to take the oath of allegiance and fidelity, ..." ⁷¹⁰ at which time all such "... inhabitants ... are now bound to His Majesty ...". ⁷¹¹ This shows the purpose and effect of the oath in this setting, but it is the paragraph immediately after that solidifies the reason and force of the oath of allegiance. The publication states:

... [a]nd, altho'(sic) relying on that *religious sense of duty* which *must* operate upon the *minds* of all who are not wickedly bent upon *destroying* the peace and happiness of others...

The oath must, according to this document, be sworn, selflessly, for peace and happiness, and because of a religious duty to do so. This is propaganda with a sort of "carrot and stick" approach the carrot being the "peace and happiness" they will have if they do so and the stick being the "pains and penalties" they will suffer if they do not do so. This also contains a safeguard that will prevent them from going back on their word. They have to invoke God and call him as a witness to the swearing and it is their "religious sense of duty" which will prevent them from breaking this oath of allegiance. This was also common practice in other periods and parts of the world. ⁷¹²

⁷⁰⁸ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 4 (Own insertion).

⁷⁰⁹ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 4.

⁷¹⁰ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 4 (Emphasis added).

⁷¹¹ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 4.

⁷¹² See Chapters 2, 3 and 4

The manner in which the oath should be sworn is described in the subsequent paragraphs:⁷¹³

... [T]he inhabitants [who] ... chuse to become subjects to His Majesty the King [are]..to take the oath of allegiance and fidelity...[W]hich oath the Landdrost...is impowered and required to administer...and to transmit to us the name[s] of such persons as shall take [the oath]. ... [I]t is decaired that all persons...continuing to reside in the Colony ... will ... be considered as having...acceded thereto (the oath) ... (all *sic*)

This contains practical matters like who should preside over the oath and who should receive the names of those who swore the oath. Yet, it does contain an interesting deviance from the normal practice. It states that everyone must swear it and if they do not swear the oath and they stay in the colony, they will have sworn the oath by default. This is a very strange application of the oath where they can, in effect, swear an oath without swearing an oath. Although it might just be an attempt to minimise the administration related to the consequences of the oath due to the primitive (by today's standards) nature of the government and its lack of ability to administrate.

The *Kaapse Plakkaatboek* does not quote the exact wording of the oath of allegiance of 1795, but it might be similar to the oath of allegiance of 1797, which is quoted in the *Kaapse Plakkaatboek*.⁷¹⁴ On 28 or 29 June 1797, the *Kaapse Plakkaatboek* states the taking of the oath of allegiance took place on 15 and 16 June 1797, in accordance with the proclamation of 28 May 1797, which stated that all the inhabitants of Cape Town, as well as those people who live within four hours' driving distance, should assemble in the Castle and:⁷¹⁵

...subscribe in a book for that purpose in (*sic*) behalf of themselves and fellow burghers the following oath of allegiance to His Majesty the Sovereign of this Colony.

And then the exact wording of the oath which is as follows:

⁷¹³ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 6.

⁷¹⁴ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 87.

⁷¹⁵ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 88.

I do swear that I will be faithfull (*sic*) and bear true allegiance to His Majesty George the Third by the grace of God, King of Great Britain, France and Ireland, Defender of the Faith &c. &c. &c.

This oath calls God down to witness the swearing and references the person to whom allegiance is promised.⁷¹⁶ The publication goes on to declare the following about those who did not swear the oath:⁷¹⁷

...[a]ll...who shall not have taken and subscribed the said oath before the 10th day of July next will be considered as disloyal subjects...[and]...are therefore warned and commanded to hold themselves in readiness to depart (from) this Colony within the space of 30 days hereof...

From this proclamation the conclusion is drawn that a person can elect not to swear an oath, but that said person is to leave the jurisdiction. Failure to do so resulted in various penalties.⁷¹⁸

The oath, as described above, seems to have an expiry date, after which the oath has to be sworn again or renewed.⁷¹⁹ This date of expiry occurs when a new "Governor and Commander-in-Chief" is elected. In 1799 Sir George Yonge was appointed as the Governor and Commander-in-Chief of the Colony (Cape) and issued, on 18 December 1799, a proclamation stating that the oath of allegiance and fidelity has to be renewed.⁷²⁰ The proclamation states that this practice is customary when the composition of government alters and goes on to describe what process will be followed and how the swearing must be done.⁷²¹ Those persons who are required to take the oath is described as: "[a]ll persons holding any place of trust, within the said settlement..."⁷²² It is not clear what Yonge means by the "place of trust". It might refer to the current officials responsible for the administration of the colony, prospective officials, "*Landrosts*" (*sic*) or

⁷¹⁶ The names of those who swore the oath are recorded.

⁷¹⁷ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 89.

⁷¹⁸ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 89-91.

⁷¹⁹ See this same argument with regard to a proposition made by Valerius, 3.2.3.

⁷²⁰ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 191.

⁷²¹ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 191.

⁷²² Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 191.

magistrates. Later in the same proclamation he does refer to the "heads of families" and insinuates that an oath is required of them as well.⁷²³

After the description of the people who should swear the oath is a description of the process of swearing. It divides the potential swearers into three groups. The first is "those within the Cape Town",⁷²⁴ the second is "[t]hose within the district of Stellenbosch, Paerl (*sic*) and Drakenstein &c",⁷²⁵ and the third is "[t]hose of Zwelldam (*sic*) and of Graaff-Reinet."⁷²⁶ On 24 December 1799, the first group must, in the presence of Governor Yonge, swear allegiance and fidelity and have their names recorded.⁷²⁷

During the colony period of South African history, the oath was not merely used to ensure that the government governs only well-behaved subjects, but the ZAR required a military oath to be sworn. The ZAR provided in section 24 of *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896 for the swearing of a service oath for individuals who enlisted in the *Korps Staats-Artillerie*.⁷²⁸ This oath was to be sworn in the presence of the *Commandant-Generaal*⁷²⁹ and as such, was intended as an oath of office as well as a tool to enforce military justice, if necessary. Section 25 extends this provision by adding that the oath is sworn before accepting duty and if an officer should be promoted,⁷³⁰ he will have to swear a new oath as per section 24 above.⁷³¹ Though no mention is made in

⁷²³ Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 191.

⁷²⁴ It is not clear if this refers to people residing in Cape Town, working in Cape Town or if it includes everyone who should find themselves in Cape Town at the time of the swearing.

⁷²⁵ See note above regarding those in Cape Town.

⁷²⁶ The wording differs from the above references to location and this causes another problem. The "those of..." phrase suggests two possibilities. The first is those who originally hail from those places but currently resides elsewhere, or secondly, those who live there now.

⁷²⁷ The proclamation provides for some flexibility on this rule for people who live in (the) Cape Town, but could not swear the oath in the presence of Governor Yonge on 24 December 1799, and states that they have until 1 February 1800 to swear this oath in the Castle of Good Hope between the hours of 10 o'clock and 12 o'clock, in the presence of the Secretary of the Colony. Naudé *Kaapse Argiefstukke: Kaapse Plakkaatboek Deel V (1795-1803)* 191.

⁷²⁸ Section 25 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷²⁹ According to s 4 of the act, the *Commandant-Generaal* is the highest authority in the *Korps*. S 4 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³⁰ Officers are promoted according to s 38 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³¹ Sections 24-25 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

this act regarding the phrasing of the oath,⁷³² the sections dealing with religion and religious practices⁷³³ in conjunction with the regulation on the promotion of religion,⁷³⁴ which provide for the prohibition on using profanities, particularly the blasphemous kind, indicate quite clearly the importance of religion in this context. The punishment for breaking the service oath,⁷³⁵ by rendering himself unfit for duty with the intent of gaining dismissal from duty, is punishable by imprisonment, with or without hard labour, not exceeding one year during peacetime and five years during wartimes.⁷³⁶

De Grondwet der Zuid-Afrikaansche Republiek,⁷³⁷ of that same year, provided for a number of oath-swearing incidences as a means of ensuring a functioning government. The most note-worthy of which are shortly discussed below. The first mention of the swearing of a promissory oath in *De Grondwet* is an oath of office sworn by every member of the *Volksraadvergadering* which is administered by the Chairman.⁷³⁸ The oath clearly intends to ensure that the members of the *Volksraadvergadering* are fit to perform their duties in terms of law and conscience.⁷³⁹ In addition to the members of the *Volksraadvergadering*, the President, upon his appointment and invitation by the members and secretary, also had to swear an oath of office at the first meeting of the *Volksraad*.⁷⁴⁰ The

⁷³² It can be argued that the wording corresponds with that of the oath of office provided for by s 69 and 106 of *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896.

⁷³³ Sections 98-99 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³⁴ Regulation II *Reglement van Krijgstucht of Discipline Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³⁵ Section 25 *Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³⁶ Sections 33-34 of *Reglement van Krijgstucht of Discipline Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek* 1 of 1896.

⁷³⁷ Section 47 *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896.

⁷³⁸ Section 47 *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896. "Als verkozen tot lid van den Eersten (of Tweeden) Volksraad van de Volksvertegenwoordiging dezer Republiek, verklaar, beloof en zweer ik plechtig, dat ik aan niemand eenige gift gedaan of beloofd heb om tot die waardigheid te geraken; dat ik in die waardigheid getrouw zal zijn aan het volk en zijne onafhankelijkheid mij zal getragen overeenkomstig de Grondwet en de andere wetten dezer Republiek, naar mijn beste kennis en geweten; en steeds te beoogen de bevordering van het geluk en welzijn der ingezetenen in het algemeen. Zoo waarlijk helpe mij God."

⁷³⁹ Section 47 *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896.

⁷⁴⁰ Section 69 *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896. The phrasing of the oath is found in s 106 of *De Grondwet der Zuid-Afrikaansche Republiek* 2 of 1896 and is as follows: "Als verkozen tot Staatspresident dezer Republiek, beloof en zweer ik plechtig, dat ik getrouw zal zijn aan het volk; dat ik in mijne betrekking naar recht en wet zal handelen, volgens mijn beste kennis en geweten, zonder aanzien des persoons; dat ik aan niemand eenige gunst zal

general formula and requirements are the same as those contained within the oath of the members of the *Volksraadvergadering*.⁷⁴¹

A further oath which was provided for by *De Gondwet der Zuid-Afrikaansche Republiek* is a judicial oath. The judicial oath is the oath that the *Rechters* and the *Landdrosten* were required to swear upon acceptance of their duties.⁷⁴² This oath is slightly longer than that of the president and the terms of the oath are indicative of the ZAR's concern that justice should be done correctly.⁷⁴³ The *Rechters* and *Landdrosten* swear to be impartial, law abiding, honourable and that they will not accept bribes or do anything that would defeat the ends of justice.

The main themes of these oaths are honourableness and dedication. This means that the swearers indicate that they will act honourably, for example that they entered into the position by merit and not by favour, that they will not succumb to corruption in the exercise of their duties and that they will perform these duties to the best of their ability and in accordance with the law.⁷⁴⁴ The oaths also

aannemen, wanneer ik vermoeden kan, dat die gift of gunst gedaan of bewezen zou worden, met het oogmerk om van mij een besluit te voordeele van den begunstiger of gever te gewinnen; dat ik mij zal gedagen overeenkomstig de Grondwet dezer Republiek en niets anders bedoel dan de bevordering van het geluk en welzijn van hare ingezetenen in het algemeen. Zoo waarlijk helpe mij God."

⁷⁴¹ See above.

⁷⁴² Section 145-147 *De Gondwet der Zuid-Afrikaansche Republiek* 2 of 1896 provides for the appointment of, and acceptance by the *Landrosten*. The oath is contained in s 148 *De Gondwet der Zuid-Afrikaansche Republiek* 2 of 1896, and states the following: "Ik beloof en zeer plectig trouw aan het volk en de wetten dezer Republiek, in mijne betrekking en ambt rechtvaardig, billik, zonder aanzien des persoons, overeenkomstig de wetten en naar mijn beste kennis en geweten te zullen handelen; van niemand eenige gift of gunst te zullen aannemen wanneer ik kan vermoeden, dat deze gedaag of bewezen zou worden om mij in mijne uitspraak of handeling ten voordeele van den gever of begunstiger over te halen; buiten mijne betrekking als rechter te zullen gehoorsamen volgens de wet aan de bevelen der boven mij gestelden, en in het algemeen niets anders te beoogen dan de handhaving van de wet, recht en orde, tot bevordering van den bloei, de welvaart en de onafhankelijkheid van land en volk. Zoo waarlijk helpe mij God."

⁷⁴³ To this end, s 149 *De Gondwet der Zuid-Afrikaansche Republiek* 2 of 1896 provides for a jury oath. This oath was sworn by the members of the jury before the trial commenced. The terms and stipulations of the oath are not crucial to this study as juries are not used in South Africa, but with reference to the similar practices of the preceding centuries, it is worth mentioning that this oath provides for similar terms to that of the judicial oath. The *Wet op het Delven van en Handeldrijven in Edele Metalen en Edelgesteenten in de Zuid-Afrikaansche Republiek* 21 of 1896 requires of oath of office to be sworn by the *Mijn commissaris* and s 23 stipulates that this oath is same oath that the *Landdrost* swears.

⁷⁴⁴ These are but a few of the oaths of office for government officials provided for by the *De Gondwet der Zuid-Afrikaansche Republiek* 2 of 1896. Others include: general government officials, s 102, with the phrasing stipulated in s 129; the oath for members of the executive

contain elements similar to those expected in an oath of allegiance.⁷⁴⁵ The President, executive council and the *Commandant-Generaal* all swear allegiance to the Republic and its people. This practice was common during the Feudal period, but not in this form, and was also widely used in England for a myriad of reasons.⁷⁴⁶

The oaths described here contain references to God, as can be expected if other factors are taken into account, but what is most notable is that these include the words "*Zoo waarlijk helpe mij God.*"⁷⁴⁷ This practice and exact phrasing are present in the Dutch oaths.⁷⁴⁸ From this it can be deduced that the practice of swearing promissory oaths was transplanted into the South African legal system, which at this stage is still relatively young. The religious influences on oath-swearing in the Netherlands, particularly Holland, infiltrated the law of Holland at that time, and by extension, the law of South Africa.

In the *Staats-Courant der ZAR* of 2 May 1888⁷⁴⁹ it was announced that the president, SPJ Kruger was to be sworn in as president for the second time, in the manner referred to above, on 8 May 1888. Two years later, a proclamation was placed in the *Government Gazette: Extraordinary*,⁷⁵⁰ which was addressed to the "Inhabitants of the South Africa Republic" and the content of the proclamation⁷⁵¹ can be summarised and a notice of annexation of the country, a plea for a peaceful transition of power, and a warning not to interfere with the annexation by any means. A subsequent *Government Gazette*, dated 16 June 1900, repeated

council and *Commandant-Generaal*, 115, with the phrasing stipulated in s 130 and is as follows: "Ik beloof en zweer plechtic trouw aan het volk dezer Republiek; in mijne betrekking naar wet, recht en billijkheid te zullen handelen volgens mijn beste kennis en geweten, zonder aanzien des persoons, dat ik aan niemand eenige gift, gunst gedaan of beloofd heb om tot die betrekking te geraken; van niemand wanneer ik vermoeden kan dat deze gedaan of bewezen zou sorden om mij in mijne betrekking over te halen; te zullen gehoorzamen aan de bevelen der boven mij gestelden, volgens de wet, en niets anders te beoogen dan den bloei, de welvaart en onafhankelijkheid van het land en volk dezer Republiek. Zoo waarlijk helpe mij God."

⁷⁴⁵ See Chapters 3 and 4 above.

⁷⁴⁶ See Chapter 2 above.

⁷⁴⁷ Section 47 *De Gondwet der Zuid-Afrikaansche Republiek* 2 of 1896.

⁷⁴⁸ See Chapter 4 above.

⁷⁴⁹ GN 148 *Staats-Courant der ZAR* of 2 May 1888.

⁷⁵⁰ Proclamation 1 *Government Gazette Extraordinary* of 9 June 1900.

⁷⁵¹ This proclamation is too long to quote here.

this notice, and this time it was accompanied by an oath and stated that any person who swears the attached oath will be protected.⁷⁵² The oath states the following:⁷⁵³

I, the undersigned,
of the District of

Do hereby solemnly make Oath and declare that I have handed in and given up all the Arms and Ammunition demanded of me by the British Authorities, namely all Rifles and Rifle Ammunition of whatsoever description they may be. And I solemnly swear that I know of none such being concealed or withheld by anybody whatsoever.

And I further swear that I will not take up Arms against the British Government during the present War, nor will I at any time furnish any member of the Republican Forces with assistance of any kind, or with information as to the numbers, movements, or other details of the British Forces that may come to my knowledge. I do further promise and swear to remain quietly at my home until the war is over.

I am aware that if I have in any way falsely declared in the premises, or if I break my Oath, or Promise as above set forth I shall render myself liable to be summarily and severely punished by the British Authorities.

I make this above declaration solemnly believing it to be true, So Help Me God.
Before me(*sic*)

This oath has strong parallels with the fealty oaths and the oaths of allegiance sworn by the Romans,⁷⁵⁴ and in the Netherlands.⁷⁵⁵ Notable differences are, however, that in this instance, the oath was technically a written oath. The intended swearer needed to swear this oath by filling in his or her particulars and the swearing of the oath was concluded with a signature. Swearing an oath in a written form is not without precedent as it was previously done in the Cape.⁷⁵⁶ The motivation for requiring an oath to be sworn this way may include several reasons, but the most obvious among them seem to have been three in number. The first, due to the fact that the oath states that swearers will be provided with protection, a record of such persons is required. The second is the practical reason that it would be difficult to administer these oaths to large groups of people with whom they are technically at war. The third instance, the terms of the

⁷⁵² Proclamation 1 *Government Gazette Extraordinary* of 16 June 1900.

⁷⁵³ Proclamation 1 *Government Gazette Extraordinary* of 16 June 1900.

⁷⁵⁴ See Chapter 3 above.

⁷⁵⁵ See Chapter 4 above.

⁷⁵⁶ See above.

oath above are quite extensive and for the oath to be effective, the intended swearers need clarity on the terms of the oath, as well as the limitations and stipulations of the oath.

It is unclear how successful this oath was, but its mere presence is indicative of the fact that England referred to its history in order to solve an issue regarding invasion and annexation of a country, in the hope that the success in the past could be transplanted into the current situation.⁷⁵⁷ What can, however be gleaned from the *Government Gazette* of 12 August 1900⁷⁵⁸ is that the British was not satisfied with the lack of cooperation from the *Burghers* during this annexation by the British. This Proclamation 12 of 1900 states six important aspects, the first and second that earlier proclamations and notices⁷⁵⁹ are repealed and only those who have taken the Oath of Neutrality are exempted.⁷⁶⁰ The third aspect refers to instances where persons have taken the aforementioned oath, but that they broke the oath in some manner or another. The punishment for such an action is the following:⁷⁶¹

..., and those who have in any way broken such oath, WILL BE PUNISHED WITH EITHER DEATH, IMPRISONMENT, OR FINE.

It is clear that the British took the oath very seriously and to prescribe death as punishment for the breaking of an oath indicates that it was considered to be a grave trespass. Point four further exempt those who swore the aforementioned oath from prisoner of war status. Point five is what would be called the "scorched earth policy" and point six underscores the intention to do violence to anyone who intends to harm British property such as the railway.

⁷⁵⁷ Refer to the following sources generally: Bell *A History of Feudalism, British and Continental*; Bellengère *et al The Law of Evidence*; Churchill *A History of the English-Speaking Peoples Volume I*; De Vos *Regsgeschiedenis*; Green *History of the English People Volume I*; Green *History of the English People Volume III*; Lesaffer *European Legal History*; Smith *The Constitutional History of England*; Vinogradoff *Roman Law in Medieval Europe*.

⁷⁵⁸ Proclamatie 12 *Staats-Courant der ZAR* of 22 August 1900.

⁷⁵⁹ See above.

⁷⁶⁰ This basically means that the British no longer desires a peaceful transition and that they are willing to take it by force. Whether the aforementioned peaceful transition was truly an attempt at peace is a subject of debate.

⁷⁶¹ Proclamatie 12 *Staats-Courant der ZAR* of 22 August 1900, see point 3, note capitalisation.

What is clear from the range of proclamations and other notices, however, is that the war turned in Britain's favour⁷⁶² and was ultimately ended in 1902.⁷⁶³ To signify the end of the war and to underscore British supremacy, a peace treaty was signed at Vereeniging on 31 May 1902.⁷⁶⁴ In addition to the signing of the treaty, an oath of allegiance had to be sworn to the King of England, King Edward VII.⁷⁶⁵ This oath required them to accept the sovereignty of the King and that they will not take action against the King.⁷⁶⁶ This practice is also very common in the legal history of England⁷⁶⁷ and the oath at Vereeniging paved the way for the eventual unification of the four colonies under British rule.

5.3 The Union (1910-1961)

The diverse nature of the legal systems of the four colonies necessitates more explanation, because their ultimate amalgamation will cause create legislative labour. The Orange River Colony was a republic with a constitution modelled on that of the United States of America.⁷⁶⁸ The ZAR was also a republic, but differed from the Orange River Colony in that the executive exercised an inordinate amount of power and, it seems, the constitution and other laws were easy to amend, override or ignored.⁷⁶⁹ The Cape and Natal were essentially extensions of whosoever should hold the power, be it the Netherlands, VOC or England. The independence of these two colonies was limited.

⁷⁶² GN 4 *Staats-Courant der ZAR* of 15 August 1900 states that the Orange River Colony surrendered to the British. At this stage the ZAR did not seem to have any desire to surrender as in the same gazette it is advertised that a medical team is compiled to aid in the war effort.

⁷⁶³ Van der Schyff "Vrede van Vereeniging, 31 Mei 1902: 'n Perspektief" [3-5].

⁷⁶⁴ Van der Schyff "Vrede van Vereeniging, 31 Mei 1902: 'n Perspektief" [3-9].

⁷⁶⁵ Van der Schyff "Vrede van Vereeniging, 31 Mei 1902: 'n Perspektief" [3-9].

⁷⁶⁶ Van der Schyff "Vrede van Vereeniging, 31 Mei 1902: 'n Perspektief" [3-9].

⁷⁶⁷ Refer to the following sources generally: Bell *A History of Feudalism, British and Continental*; Bellengère *et al The Law of Evidence*; Churchill *A History of the English-Speaking Peoples Volume I*; De Vos *Regsgeskiedenis*; Green *History of the English People Volume I*; Green *History of the English People Volume III*; Lesaffer *European Legal History*; Smith *The Constitutional History of England*; Vinogradoff *Roman Law in Medieval Europe*.

⁷⁶⁸ Refer to the constitutions: *Die Konstitusie van 1854*; *Die Konstitusie van 1866*; *Die Konstitusie van 1879*; Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 186-203. Devenish 2012 *Fundamina* 1.

⁷⁶⁹ Refer to the constitutions: *Die Konstitusie van 1854*; *Die Konstitusie van 1866*; *Die Konstitusie van 1879*; Scholtz *Die Konstitusie en die Staatsinstellings van die Oranje-Vrystaat* 186-203. Devenish 2012 *Fundamina* 1-2.

These four disparate colonies were unified under England⁷⁷⁰ on 31 May 1910 and this brought about a multitude of changes with regard to the legal history of South Africa.⁷⁷¹ The Union government had a great task before it in the unification process. The disparate legal systems⁷⁷² were to be united as well. This gave way to a magnitude of laws that needed to be combined, created or rewritten in order to meet the legal and judicial needs of the people. Due to the differences in the four legal systems, a standardisation process was embarked upon.⁷⁷³ During this time, the world was tumbled into war and South Africa along with it. The tumultuous external relationships began to affect South Africa and in the aftermath of the Anglo-Boer War, it was inconceivable that *Afrikaners*, just coming out of a war, would fight alongside their erstwhile enemies and current oppressors.⁷⁷⁴

Due to the already prevalent oath-swearing practices and the similarities in the practice of oath-swearing in the four colonies, there did not seem to be an immediate need to amend the oath-swearing practices in respect of either the assertory oath or the promissory oath.⁷⁷⁵ The legal development under the Union, however, did have some impact on oath-swearing. A brief discussion of instances of oath-swearing follows, with assertory oaths being discussed first in the context of trial procedure, followed by the practice of promissory oath-swearing for purposes of holding public office or other government related reasons.

5.3.1 *Assertory oaths (1910-1961)*

During the unification process which took place in 1910, the judges and magistrate were expected to amalgamate the legal systems of the four colonies into their judgments. One such matter was the 1912 case of *R v Ah Chee*⁷⁷⁶ where

⁷⁷⁰ It is relevant to note that the Reigning English Monarch never personally interfered with the affairs of South Africa. See Devenish 2012 *Fundamina* 2.

⁷⁷¹ Hosten *et al* *Introduction to South African Law and Legal Theory* 359, 952-953.

⁷⁷² See above.

⁷⁷³ Hosten *et al* *Introduction to South African Law and Legal Theory* 365-366.

⁷⁷⁴ See below. See also Devenish 2012 *Fundamina* 2-3. It seems to be a pattern that oath-swearing accompanies rebellion and war time before it commences and when it ends.

⁷⁷⁵ See below.

⁷⁷⁶ *R v Ah Chee* 1912 AD 231

the applicability of perjury to judicial matters was concerned. The judge remarked that if someone were to make a false statement while under oath, he or she could only be prosecuted for perjury if the false statement was made during the course of a judicial matter.⁷⁷⁷ It was the purpose of this court case to provide clarity on the matter of perjury under the new Union government. The court states that it is not possible for a person to commit perjury if the promise that was violated was outside of judicial matters.⁷⁷⁸ This includes all promissory oaths such as oaths of office, judicial oath etc. The court provides a reason for his summation of the legal position, by stating that provisions for the swearing of promissory oaths in the legislation of the four colonies provide for a course of action if the promissory oath were to be broken, the so-called *if-then* provisions. This indicated to the court that it was purposefully done in order to remove the violation of promissory oaths from the common law context of perjury. By so doing the court upheld the fact that perjury of assertory oaths, sworn during the course of judicial matters, are still relevant in the context of the Union legal system, which is in fact just an amalgamation of the legal systems of the four colonies.⁷⁷⁹ This finding of the court sequestered perjury to the courtrooms and judicial proceedings and exempted swearers in different settings from perjury.

In 1917 and as a product of increased legislative activity, the *Wet op de Kriminele Procedure en Bewyslevering* 31 of 1917 came into operation. This act provided that an oath must be sworn in support of testimony.⁷⁸⁰ Section 309⁷⁸¹ is important and states that if a matter should arise which is regrettably not provided for by this Act, the English law applies. Aside from underscoring the relationship between South Africa, the Union at this stage, and England, it did provide some clarity in so far as the oath and religion is concerned. The Act did not provide for persons to swear, according to the definition of swearing as opposed to making

⁷⁷⁷ *R v Ah Chee* 1912 AD 237.

⁷⁷⁸ *R v Ah Chee* 1912 AD 237.

⁷⁷⁹ See below for application of this judgment in 1967.

⁷⁸⁰ Sections 265-267 *Wet op de Kriminele Procedure en Bewyslevering* 31 of 1917.

⁷⁸¹ Section 309 *Wet op de Kriminele Procedure en Bewyslevering* 31 of 1917.

an affirmation, in terms of any other religion aside from Christianity.⁷⁸² This practice of referring to the English law resonates through subsequent years.

In 1917 a case of perjury served in the Transvaal Provincial Division.⁷⁸³ In this case a Hindu man was charged with perjury, which was allegedly committed in a courtroom during the course of a judicial matter, to which charge the accused pleaded not-guilty and avails him on the argument that he cannot be found guilty of perjury by virtue of his religion. The oath was administered to him according in the usual way and he did not, at that time, raise an objection to the administration of said oath.⁷⁸⁴ The accused states that due to the nature of the oath and the manner in which it was administered it was not binding upon his conscience and he can, therefore, not be guilty of perjury. The only way in which such an oath could be binding upon his conscience would be for the oath to be in the form prescribed by his religion.⁷⁸⁵ The court considered this argument and held that it is the responsibility of the swearer to inform the court that the oath, administered in the usual form, is not binding upon the conscience of the swearer and the swearer would like to take the oath in another manner.⁷⁸⁶ The swearer cannot, *ex post, facto* state that he or she did not give a true account of affairs because the oath was not binding on his or her conscience; it would be a miscarriage of justice.⁷⁸⁷ From this judgement it seems that the court assumes that if the swearer is silent he or she is content with the manner in which the oath is administered. The accused was sentenced to pay a fine of £15 or two months' hard labour.⁷⁸⁸

In light of the sentence of £15 or two months' hard labour,⁷⁸⁹ which was imposed by the court in the preceding matter, the court in the 1930 appeal case of *R v Samuels*⁷⁹⁰ underscores the seriousness of perjury and describes it in terms of an

⁷⁸² *Wet op de Kriminele Procedure en Bewyslevering* 31 of 1917.

⁷⁸³ *R v Karakara* 1917 TPD 463.

⁷⁸⁴ *R v Karakara* 1917 TPD 463.

⁷⁸⁵ *R v Karakara* 1917 TPD 463.

⁷⁸⁶ *R v Karakara* 1917 TPD 463.

⁷⁸⁷ *R v Karakara* 1917 TPD 463.

⁷⁸⁸ *R v Karakara* 1917 TPD 463.

⁷⁸⁹ *R v Karakara* 1917 TPD 463.

⁷⁹⁰ *R v Samuels* 1930 CPD 67 71.

attack on justice. The court mentions further that if the courts, perhaps subsequent courts, refrain from dealing with perjury and the breaking of an oath, the people may start to lose faith in the justice system⁷⁹¹ which could have adverse effects on the community and the administration of justice. This call for harsh judgements was countered eighteen years later in *R v Mokwena*.⁷⁹²

*R v Mokwena*⁷⁹³ pertains to a matter where the appellant was convicted of perjury in 1947 and pursued the matter on appeal, on the basis of *unlawfulness*. This matter succeeded due to the Honourable Judge Blackwell's interpretation of the nature of perjury. He stated⁷⁹⁴ that the mere making of a false statement under oath does not constitute perjury. The act of perjury must be done wilfully, causing said action to be unlawfully done; failure to do so would result in a situation where the purpose of the oath is undermined, but not by the swearer's wilful act.⁷⁹⁵ It is also necessary to make mention of the fact that the judge did take the appellant's age, 21 years, into consideration. He stated that imposing a sentence of £25 on "a young man of 21 with no previous record does impress the Court as being on the severe side."⁷⁹⁶ This case, as well as the previous case, indicates the complex relationship between the oath and law. The call for harsh judgments in the interest of ensuring that people trust the justice system is in conflict with the call for conservative judgments in favour of the justice system.

In order for the justice system to be adequately served, the position regarding the accused's evidence and the swearing of an oath was scrutinised in the 1950 case of *R v Nqubuka*.⁷⁹⁷ The court held that the magistrate must inform the accused of his or her right to give evidence under oath or, if that is undesirable, to make a statement. The 1953 case of *R v Mahaloa*⁷⁹⁸ reiterated this position and agreed that some regard should be given to the lack of knowledge of court proceedings but that the court cannot require the accused to provide evidence under oath.

⁷⁹¹ *R v Samuels* 1930 CPD 67 71.

⁷⁹² *R v Mokwena* 1948 4 SA 772 (T).

⁷⁹³ *R v Mokwena* 1948 4 SA 772 (T).

⁷⁹⁴ *R v Mokwena* 1948 4 SA 772 (T) 774.

⁷⁹⁵ *R v Mokwena* 1948 4 SA 772 (T) 774.

⁷⁹⁶ *R v Mokwena* 1948 4 SA 772 (T) 774.

⁷⁹⁷ *R v Nqubuka* 1950 2 SA 363 (T).

⁷⁹⁸ *R v Mahaloa* 1953 1 SA 454 (T).

It is quite important to provide detailed information on the prosecution of perjury, as such it is discussed a great length below, due to the fact that this position is still the current position in South Africa (with minor exceptions) and the discussion of the current position would be much better served here. Most of the case law, which are relevant to the construction of the argument below, is contained in the argument above. This is done in order to maintain the historical context of the investigation of the consequences of defeating the ends of oath-swearing.⁷⁹⁹ In 1955, the *Criminal Procedure Act* 56 of 1955, in section 319(3),⁸⁰⁰ addressed the issue of *mens rea* with regard to perjury. As stated above⁸⁰¹ for a person to be guilty of perjury he or she must have had the intention to commit perjury. This is extremely onerous to prove and barring blatant lies and the admission of same, impossible to meet the burden of proof. This section aids in this matter as it provides the following:⁸⁰²

If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such firstmentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.

This section neatly provided the state (Crown) with the opportunity to prosecute matters relating to perjury as it is much easier to meet the requirement for conviction.⁸⁰³ Before this section came into effect, the burden was on the state to prove that the accused did provide contradicting statements under oath and that he or she had the intention to deceive the court, or tribunal during judicial proceedings.⁸⁰⁴ This burden is extremely difficult to meet, due, in part, to the fact that the accused parties could say that they changed their minds or that they made a mistake. These defences would have succeeded due to the fact that they

⁷⁹⁹ This method also improves the readability of this chapter.

⁸⁰⁰ Section 319(3) *Criminal Procedure Act* 56 of 1955.

⁸⁰¹ See above and Chapter 6.

⁸⁰² Section 319(3) *Criminal Procedure Act* 56 of 1955.

⁸⁰³ It should be mentioned that this section is still in force and this reflect the current situation as well.

⁸⁰⁴ See above.

discount intention and without intention, perjury is just a mistake. Hunt⁸⁰⁵ defines perjury in this context, and taking the above into account, as:

Perjury consists in the unlawful and intentional making, upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker foresees may be false.

From this definition Hunt⁸⁰⁶ identifies five elements which must all be present in order for perjury to succeed and by so doing prove that a person violated an assertory oath. These five elements are unlawfulness, making a statement, on oath (or affirmation or admonition),⁸⁰⁷ in the course of judicial proceedings before a competent tribunal, and lastly, *mens rea*.

Unlawfulness is quite important in that a person who is found to have provided a false statement on oath could have a defence for said action, which would affect the outcome of the matter. Consider the case of *R v Mokwena*⁸⁰⁸ where the court found that unlawfulness should at all times be present for a conviction of perjury to succeed. Hunt⁸⁰⁹ commented on the aforementioned case, and respectfully stated that in this matter, the court may have erred in this judgement, as the current matter affected the *mens rea* of the appellant and not the *lawfulness* of the act. From the arguments provided by the Court⁸¹⁰ and by Hunt,⁸¹¹ it can reasonably be deduced that both these elements were absent in that the appellant did not have *mens rea* and that the Crown⁸¹² did not make a case as to the wilfulness or not of the appellant in this regard.

The second element is *making a statement* which is essential, albeit somewhat obvious at first glance, as perjury is the result of the violated oath. Hunt⁸¹³ states that a statement, in this context, is made orally and the subsequent breaking of

⁸⁰⁵ Hunt *South African Criminal Law and Procedure* 108.

⁸⁰⁶ Hunt *South African Criminal Law and Procedure* 109.

⁸⁰⁷ Which are not discussed in this study.

⁸⁰⁸ *R v Mokwena* 1948 4 SA 772 (T). Discussed above.

⁸⁰⁹ Hunt *South African Criminal Law and Procedure* 109.

⁸¹⁰ *R v Mokwena* 1948 4 SA 772 (T).

⁸¹¹ Hunt *South African Criminal Law and Procedure* 109.

⁸¹² The Crown did, however, rely heavily on a linguistic and semantic argument to support the argument for wilfulness, but did not succeed, by any account. Hunt *South African Criminal Law and Procedure* 109; *R v Mokwena* 1948 4 SA 772 (T).

⁸¹³ Hunt *South African Criminal Law and Procedure* 110.

the statement can constitute perjury, bearing the other elements in mind. The making of a false statement requires some close attention in that a statement can be, technically, truthful, but ambiguity in the statement causes it to not be the whole truth.⁸¹⁴ This situation poses some problems for the prosecution of perjury. The position in South Africa regarding this contentious issue is that it is contrary to the interests of justice to withhold information from the court by telling lies as well as *half-truths*, misrepresenting a matter and misleading the court.⁸¹⁵ Therefore, this element is defined in relatively broad terms to accommodate for this.

The third element is that the aforementioned statement should be made on oath as a person cannot violate an oath if none were sworn.⁸¹⁶ Hunt⁸¹⁷ stresses two aspects relevant to this element: firstly, that the oath should be administered by one who is competent to do so⁸¹⁸ and secondly that the swearer should be aware of the consequences of said oath. The former is a requirement due thereto that the person who swears an oath should be aware of the binding power of the oath upon his or her conscience. If this is consistently done by designated persons as required by, for example section 112 *Magistrates' Courts Act*,⁸¹⁹ a person cannot aver at a later stage that the oath was administered improperly and therefore was not binding. The latter requirement is that the oath formula⁸²⁰ should be standard in that the swearer is, at all times aware of the terms of the oath so as to promote legal certainty.⁸²¹ This element can be construed in the contemporary South African context due to the limited scope, provided by the sections dealing with the phrasing of the oath, with regard to the freedom of religion.⁸²² The current, and in the South African context historical, formula of said oaths are

⁸¹⁴ See Chapters 2 above for a discussion of truth as an integral part of oath-swearing.

⁸¹⁵ Hunt *South African Criminal Law and Procedure* 110-112.

⁸¹⁶ Hunt *South African Criminal Law and Procedure* 113. It has to be reiterated that although the option of an affirmation *en lieu* of an oath is provided for, it is the purpose of this study to only give regard to the swearing of an oath.

⁸¹⁷ Hunt *South African Criminal Law and Procedure* 113.

⁸¹⁸ See below for a discussion of later case law on this matter.

⁸¹⁹ Section 112 *Magistrates' Courts Act* 32 of 1944.

⁸²⁰ See *R v Karakara* 1917 TPD 463, as discussed above, for a perspective to counter the strictly legalistic argument offered here.

⁸²¹ Hunt *South African Criminal Law and Procedure* 113-114.

⁸²² Section 15 of the *Constitution of the Republic of South Africa*, 1996.

Christian in nature and this results in a situation where the only religion in terms of which an oath can be sworn in South Africa is Christianity.⁸²³ The argument for consistency of practice is valid in that too much deviation from this consistency can result in an influx of perjury related problems.

The fourth element is that the oath should be sworn during the course of judicial proceedings.⁸²⁴ This element is addressed above and the arguments raised above are also quite relevant in this current context. The fifth, and final, element is *mens rea*.⁸²⁵ Hunt⁸²⁶ references an 1883 case of *R v Swart*⁸²⁷ where the court found that perjury cannot be committed by mistake and that the alleged perjurer should actually have foreseen that the information provided is false, and despite having foreseen this, still presented the false information.⁸²⁸

Hunt⁸²⁹ even further defines *mens rea* relevant to perjury by creating a further five elements which have to be present for *mens rea* to have been present. The alleged perjurer had to have foreseen:⁸³⁰ (a) that the statement was made under oath, (b) that the aforementioned oath was lawfully administered, (c) that it was done during the course of judicial proceedings, (d) that the court or tribunal had the required jurisdiction and competence, and (e) that his or her conduct was unlawful.

In the 1966 case of *R v Shongwe*⁸³¹ the court found that all the elements need to be met before *mens rea* is present. If the alleged perjurer did not foresee a few as one of these elements, then the perjury was a mistake, because *mens rea* was not present. Section 319(3) *Criminal Procedure Act*,⁸³² though still helpful, did not quite solve the problems with the prosecution of the violation of an oath. The requirements are quite rigid and difficult to prove, even taking into account the

⁸²³ This argument is addressed below.

⁸²⁴ Hunt *South African Criminal Law and Procedure* 115.

⁸²⁵ Hunt *South African Criminal Law and Procedure* 118-119.

⁸²⁶ Hunt *South African Criminal Law and Procedure* 118.

⁸²⁷ *R v Swart* 1883 1 Buch AC 191.

⁸²⁸ Hunt *South African Criminal Law and Procedure* 118.

⁸²⁹ Hunt *South African Criminal Law and Procedure* 118-119.

⁸³⁰ Hunt *South African Criminal Law and Procedure* 119.

⁸³¹ *R v Shongwe* 1966 1 SA 390 (SRA).

⁸³² Section 319(3) *Criminal Procedure Act* 56 of 1955.

attempt by the legislator to lighten this burden, perjury is still very hard to prove and prosecute. The religious aspect might be of help here in that the fear of divine judgement, in life or thereafter, might be a sufficient deterrent for most would be perjurers.⁸³³

5.3.2 Promissory oaths (1910-1961)

The Union of South Africa Act, 1909 was the British parliamentary act which constituted and established the Union of South Africa.⁸³⁴ This act provided for the swearing of a promissory oath, an oath of allegiance. Section 51⁸³⁵ requires that every member of the House of Assembly must, before accepting the seat, swear an oath which confirms allegiance to the monarch of England, and this oath must be sworn in the presence of the Governor-General (who acts on behalf of the monarch). The oath is as follows:⁸³⁶

I, A.B., do swear that I will be faithful and bear true allegiance to His Majesty [here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being] His [or Her] heirs and successors according to law. So help me God.

The same section⁸³⁷ provides for the making of an affirmation *en lieu* of an oath, but there is no mention of the possibility of swearing this oath to any deity other than the Christian God. The purpose of this oath is clear – allegiance. The British government wanted to ensure that they do not have cause to enter into another costly and long war in South Africa. They referred to their history in this regard and found that the practice of having former enemies swear an oath of allegiance has the effect of religion and religious obligation acting as a preventative measure against future upheaval and violence.⁸³⁸ As is also apparent from the investigation of the English practice of oath-swearing, the oath is only effective if it is easily accessible through memory and sight.⁸³⁹ It is therefore that this oath is destined

⁸³³ See Chapter 2 above.

⁸³⁴ *The Union of South Africa Act*, 1909.

⁸³⁵ Section 51 *The Union of South Africa Act*, 1909.

⁸³⁶ Section 51 *The Union of South Africa Act*, 1909.

⁸³⁷ Section 51 *The Union of South Africa Act*, 1909.

⁸³⁸ See above.

⁸³⁹ See above.

to be repeated regularly and that by so doing, the terms of said oath will be respected for longer and the temptation to break it will also diminish.

After the Union was formed, the governmental and political matters were stabilised, only to become troublesome again with the Second World War raging on in other parts of the world. The Second World War brought about some difficulties in the swearing of a promissory oath in South Africa. South Africa declared war against Germany on 6 September 1939⁸⁴⁰ and in doing so entered into the second war taking place on a global level, this one the larger of the two.⁸⁴¹ The UDF was severely under-staffed, as had a very small number of white soldiers between the ages of 18 and 44 willing to fight in a war they viewed as European.⁸⁴² It became increasingly important for men to either enter into military service willingly, or be drafted into military service in order to create a strong fighting force in the war.

Regardless of the need for a strong fighting force, the political view of the war was influenced by the country's history of the Anglo-Boer wars and caused general Smuts to announce that no volunteer would be forced to fight this war outside of South Africa's geographical borders.⁸⁴³ This was strategically done to ensure that South Africa had a strong fighting force consisting out of volunteer rather than people drafted into service.⁸⁴⁴ The volunteers who elected to enter the fray on the provision that they do so in Africa were required to sign a document stating that they would be prepared to fight anywhere on the African continent – this was called the Africa Oath.

Those who took the Africa Oath were volunteers and they wore orange-scarlet (red) shoulder tabs on their uniforms.⁸⁴⁵ The red tabs caused strife among the members of the fighting force because it served as a reminder that some people

⁸⁴⁰ Wessels 2000 *Military History Journal* para 2.

⁸⁴¹ Wessels 2000 *Military History Journal* para 2.

⁸⁴² Wessels 2000 *Military History Journal* para 2; Blignaut 2012 *Historia*.

⁸⁴³ Wessels 2000 *Military History Journal* para 2; Blignaut 2012 *Historia* 69.

⁸⁴⁴ Wessels 2000 *Military History Journal* para 2.

⁸⁴⁵ This is where the Africa Oath got the nickname Red Oath or *Rooi Eed*.

were volunteers, some were members of the general service⁸⁴⁶ and others were opposed to South Africa's involvement in the war.

This opposition to the war was a countrywide opposition where some members of the public were so opposed to the war that on 22 June 1940 9 870 women protested South Africa's involvement in the war and marched from Church Square to the Union Building in Pretoria to hand General Smuts a document containing a "request for neutrality." The women were not the only ones opposed to the nation's involvement in a foreign war. Two days after the women's protest, on 24 June 1940, a member of the public, Mr Broodryk, signed the Africa Oath because of coercion and duress.⁸⁴⁷ He claimed that he was forced to sign this oath and tried to cancel this oath because it created an obligation on him, which he had no desire to keep.⁸⁴⁸ He was violently escorted to a military camp where he was fined for his resistance.⁸⁴⁹ He turned to the court for aid and pleaded coercion and duress.⁸⁵⁰ The court applied the general rules of contract law to determine if an obligation arose from his signing the Africa Oath. The court determined that he did not have free will when he entered into the agreement (oath) and that he could not be bound contractually to the stipulated terms.⁸⁵¹

This case is an example of a promissory oath, which creates an obligation for the swearer. The oath can be compared to a contract, as the court did above, and this arms the oath with the necessary governing rules to enable the courts to

⁸⁴⁶ Another document was used during this period. This document known as the General Service Oath (or the Blue Oath) and this document allowed for the undersigned to fight in the war on overseas battlegrounds.

⁸⁴⁷ Pienaar 2015 <http://www.litnet.co.za/slim-jannie-se-rooi-eed/>. Broodryk was a government official at the time that the document was signed. He claimed that two other government officials told him that if he did not sign the Africa Oath he would lose his job and furthermore that he would be sent to an internment camp or prison. They also promised that should he indeed sign the oath he would not be drafted for military service. He then signed the oath and was subsequently drafted for military service as a volunteer would fight the war on the African continent. *Broodryk v Smuts NO 1942 TPD 47*.

⁸⁴⁸ Pienaar 2015 <http://www.litnet.co.za/slim-jannie-se-rooi-eed/>; *Broodryk v Smuts NO 1942 TPD 47*.

⁸⁴⁹ Pienaar 2015 <http://www.litnet.co.za/slim-jannie-se-rooi-eed/>; *Broodryk v Smuts NO 1942 TPD 47*.

⁸⁵⁰ Pienaar 2015 <http://www.litnet.co.za/slim-jannie-se-rooi-eed/>; *Broodryk v Smuts NO 1942 TPD 47*. See above.

⁸⁵¹ Pienaar 2015 <http://www.litnet.co.za/slim-jannie-se-rooi-eed/>; *Broodryk v Smuts NO 1942 TPD 47*.

adequately deal with the process, the termination and the enforcement thereof. In the periods that came before the enforcement was largely left to the deity burdened with said responsibility and perjury was discouraged because of it. This case created a structure according to which oaths, containing an obligation, can be enforced. It must be born in mind that this particular oath was written down and not just verbally sworn, and it is unclear whether a similar outcome would be achieved had the oath not been written down like a contract.⁸⁵²

In the *Magistrates' Courts Act 32* of 1944,⁸⁵³ provision was made for the swearing of an oath by the assessor assisting the magistrate during a trial.⁸⁵⁴ The oath was used to ensure that the assessor act honourably and give a fair judgement according to the evidence⁸⁵⁵ after which such an oath is sworn the assessor is deemed part of the court and testimony may commence. This practice was also mirrored in the 1959 *Supreme Courts Act*⁸⁵⁶ with regard to stenographers. Section 31(21)⁸⁵⁷ states that anyone who is to make a record of court proceedings may only do so under oath, as they will then be an officer of the court. The oath is as follows:⁸⁵⁸

I, A.B, do swear that I shall faithfully, and to the best of my ability, record in shorthand, or cause to be recorded by mechanical means, as directed by the judge, the proceedings in any case in which I may be employed as an officer of the Court, and that I shall similarly, when required to do so, transcribe the same or, as far as I am able, any shorthand notes, or mechanical record, made by any other stenographer or person employed to make such mechanical record, maybe by any other stenographer or person employed to make such mechanical record.

This oath is indicative of the importance of the function people like stenographers and assessors play in the court proceedings and the administration of justice. The oath ensures that the necessary checks and balances are present in such administration and that the function of these role-players within the court context is linked to their religious obligations. It is notable that this oath does not provide

⁸⁵² See above for other instances of promissory oaths sworn like contracts.

⁸⁵³ *Magistrates' Courts Act 32* of 1944.

⁸⁵⁴ Section 93 *Magistrates' Courts Act 32* of 1944. See the assertory oath portion as well.

⁸⁵⁵ Section 93 *Magistrates' Courts Act 32* of 1944.

⁸⁵⁶ Section 31(21) *Supreme Court Act 59* of 1959.

⁸⁵⁷ Section 31(21) *Supreme Court Act 59* of 1959.

⁸⁵⁸ Section 31(21) *Supreme Court Act 59* of 1959.

for a "So help me God" closing, but the "I, A.B., do swear ..." precursor to the terms of the oath fulfills that function. This promissory oath links with the assertory oaths, described above, in that they are concerned with the administration of justice, albeit in diverging ways.

5.4 Conclusion

The aim of this chapter was to investigate how the internal and external legal history influenced the development of oath-swearing in South Africa from its settlement and through the unification of the four colonies. Certain excerpts of history and law were used to demonstrate the developmental processes of the practice of oath-swearing during this period.⁸⁵⁹ The aim was not to provide a complete history of oath-swearing in the history of early South Africa; the focus was to illustrate that oath-swearing had a continual development in South Africa. These and similar oath-swearing practices can be traced back to the earlier histories described in the chapters above.⁸⁶⁰ The chapter was divided into two portions; the first being the early history of South Africa when it consisted of four colonies (or territories) namely the Cape Colony, the Colony of Natal, the Orange River Colony and the ZAR.⁸⁶¹ The second part of the chapter focused on the Union of South Africa when the four colonies were unified under British rule in 1910.⁸⁶² The investigation followed the development of the legal framework that came to provide for the practice of oath-swearing and cause it to become ingrained in South African law.⁸⁶³

The Dutch East India Company formed a settlement in the Cape to serve as a refreshment station and soon thereafter, they established governing bodies to aid in the management of the outpost.⁸⁶⁴ The law that was used to support this management was the Roman-Dutch law and these influences still ripple through

⁸⁵⁹ See above.

⁸⁶⁰ See Chapters 3 and 4.

⁸⁶¹ See 5.2 above.

⁸⁶² See 5.3 above.

⁸⁶³ See above and Chapter 6 below.

⁸⁶⁴ See 5.1 above.

to the current legal system in South Africa.⁸⁶⁵ Various courts and commissions were established to dispense justice in the Cape these include the *Raad van Justitie*, the *Commissarissen van Kleinen Zaken* and the *Landdrost en Heemraden*.⁸⁶⁶ This attempt at a judiciary was briefly interrupted when the British occupied the Cape for the first time in 1795.⁸⁶⁷ This occupation was short lived and the Cape reverted to the Dutch in 1803, but England regained control of the colony in 1806 which would last for several years.⁸⁶⁸

The English law was gradually incorporated into the legal system at the Cape and these changes proved to last for several years to come.⁸⁶⁹ The Natal Colony attempted self-governance, but ultimately succumbed to the leadership of the Cape.⁸⁷⁰ The ZAR, in contrast with the Cape and Natal, followed the Dutch law and their own constitution and legislation.⁸⁷¹ The Orange River Colony was mainly governed by their constitution and sources of the Dutch law; they did, however, refer to the legal developments in other jurisdictions for guidance if the need arose for such measures.⁸⁷²

As the general legal developments progressed, the development of the practice of oath-swearing, in both its assertory and promissory forms, developed with reference to the historical and social situations of the geographic area. In the Cape in 1830, the practice of oath-swearing was recognised, but there was no provision for the general form of the oath.⁸⁷³ There was, however, certain grouping of persons who were barred from swearing an oath due to the inability to comprehend the purview of the oath (children) and those who subscribed to a religion other than Christianity.⁸⁷⁴ The crime of perjury was a crime that could follow the breaking of an assertory as well as a promissory oath. Assertory oaths

⁸⁶⁵ See above as well as Chapters 4 and 6.

⁸⁶⁶ See 5.1 above.

⁸⁶⁷ Venter *et al Regsnavorsing* 29; Visagie *Regspleging* 95. See 5.1 above.

⁸⁶⁸ Venter *et al Regsnavorsing* 29; Visagie *Regspleging* 95. See 5.1 above.

⁸⁶⁹ Venter *et al Regsnavorsing* 29; Visagie *Regspleging* 95. See 5.1 above.

⁸⁷⁰ See 5.1 above.

⁸⁷¹ See 5.1 above.

⁸⁷² See 5.1 above.

⁸⁷³ See Chapter 4 for an indication of what this would entail. See 5.2.1 above.

⁸⁷⁴ See 5.2.1 above.

were initially used in judicial matters and later the application was extended to perjury arising from the swearing of an oath in terms of a specific section of an act.⁸⁷⁵ These acts would provide recourse for instances of perjury and did not rely on the common law to address these matters.⁸⁷⁶

The promissory oaths sworn during the colonies were mainly used to facilitate the appointment of functionaries of state or judicial officers.⁸⁷⁷ One other application of the practice of swearing a promissory oath was the swearing of the oath of allegiance. As was described above, these two oaths were used together to support a smooth transition of power during an occupation or *coup d'état*.⁸⁷⁸ During the early struggles for control of the colony, these oaths were used to affirm and substantiate the legitimacy of the functionaries of the state. Though this practice was commonly used across the four colonies, there were other applications for the swearing of a promissory oath. Certain laws required the swearing of a promissory oath and this act of swearing was described by the act and the act also made provision for failing to adhere to the oath that was sworn.⁸⁷⁹

Promissory oaths were not always used in support of the state, as seems to be the case above, but in one instance mentioned above, an invading nation, Britain, required the inhabitants of the territory of South Africa to swear an oath of neutrality to Britain.⁸⁸⁰ This oath was intended to be used to disarm the people of South Africa which would result in an easy victory for the British.⁸⁸¹ The oath had a limited effect and this caused the British to rethink their strategy and declared strict recourse against perjurers.⁸⁸² The war ended, as it began, with a swearing of an oath. The signing of the peace treaty was accompanied by an oath of allegiance to King Edward VII and the implication of this oath was that an

⁸⁷⁵ See 5.2.1 above.

⁸⁷⁶ See 5.2.1 above. This is still the case in contemporary South African law.

⁸⁷⁷ See 5.2.2 above.

⁸⁷⁸ See 5.2.2 above.

⁸⁷⁹ See 5.2.2 above.

⁸⁸⁰ See 5.2.2 above.

⁸⁸¹ See 5.2.2 above.

⁸⁸² See 5.2.2 above.

immediate renewed conflict was unlikely.⁸⁸³ This oath can be seen as the cornerstone of the ultimate unification of the four colonies under British rule.

The unification of the four colonies occurred in 1910 and this brought about the creation and promulgation of several pieces of legislation. The law needed to reflect the nature of the current dispensation and the jurisprudential considerations of the time in order to forge a new legal identity. The practice of oath-swearing was already ubiquitous in the four colonies and this aspect of law was also transplanted and reinforced in the unification of the colonies. The practice of oath-swearing, as it pertains to assertory oaths, was addressed early by the new Union government by adding a requirement to the crime of perjury. It was stated in 1912 in *R v Ah Chee*⁸⁸⁴ that a person could only be guilty of perjury if the swearer made false statements during the course of a judicial matter. The term *judicial matter* was defined to be a court case or similar matter and this actively excluded promissory oaths. The inevitable result was that a person cannot commit perjury by breaking a promissory oath. The argument was that if an act or oath requirement states that a person must take an oath outside of a judicial matter, that act or requirement must make provision for the consequences of the breaking of such an oath.

In 1917, during a case,⁸⁸⁵ a Hindu man made the argument that the case that the oath and religion are so intertwined that the elements of perjury are largely based on religion. He averred that as a Hindu man, and by virtue of his faith, he could not be found guilty of perjury. He swore an oath according to the prescribed method (Christian) and as such, the oath was not binding upon his conscience and the requirements of perjury could not be met. The accused was found guilty on the basis that he had to take the necessary steps to ensure that the oath was administered in such a way that it could ultimately be binding on his conscience.⁸⁸⁶ The 1930 case of *R v Samuels*⁸⁸⁷ the court continued the hand down harsh

⁸⁸³ See 5.2.2 above.

⁸⁸⁴ *R v Ah Chee* 1912 AD.

⁸⁸⁵ See 5.3.1 above and *R v Karakara* 1917 TPD 463.

⁸⁸⁶ See 5.3.1 above and *R v Karakara* 1917 TPD 463.

⁸⁸⁷ See 5.3.1 above and *R v Samuels* 1930 CPD 67 71.

sentences for perjury to ensure that the community trusts the justice system, but in 1948 in *R v Mokwena*⁸⁸⁸ the court remarked that all the elements present in the case must be taken into before a sentence is imposed. He cited, for example, that the person's age should be taken into consideration and whether the elements of wilfulness and unlawfulness are met. In subsequent cases, this principle was followed and the procedure regarding informing a party of his or her right to swear an oath or to make a statement. The improvement of court proceedings in this regard developed the nature of oath-swearing in criminal matters. Hunt⁸⁸⁹ later compiled five elements of perjury which must all be present before a person could be found guilty of perjury. These are unlawfulness, making a statement, on oath (or affirmation), during the course of judicial proceedings before a competent tribunal, and *mens rea*.⁸⁹⁰ These elements were developed from case law and are still relevant.

When the Union was formed, promissory oaths became relevant in the new political dispensation. The government used promissory oaths a tool to ensure the complacency of the people. The members of the House of Assembly were compelled to swear an oath of allegiance. This oath aimed to underscore the subjugation of the South African territories under British rule. This practice resurfaced a few years later when the Second World War reawakened the need for oath-swearing. Soldiers who were willing and able to enter into the international conflict were to swear the Africa Oath that restricted their service to the borders of Africa. This oath was in all aspects an oath, but was required to be written down.⁸⁹¹ The courts approached this oath as if it were a contract and stated that similar rules should apply. In the matter discussed,⁸⁹² the court underscored the requirement that the person should take the oath out of their free will and not be subjected to coercion. These political and military applications were not the only applications of the promissory oath. An example of the role oath-swearing plays in litigious matters was assessors who assisted magistrates

⁸⁸⁸ *R v Mokwena* 1948 4 SA 772 (T).

⁸⁸⁹ Hunt *South African Criminal Law and Procedure* 108-120.

⁸⁹⁰ Hunt *South African Criminal Law and Procedure* 108-120.

⁸⁹¹ The practice of recoding an oath in writing was also done in earlier times. See above.

⁸⁹² Wessels 2000 *Military History Journal*; Blignaut 2012 *Historia*; and see above.

during court proceedings were to swear a promissory oath which required them to act honourably.⁸⁹³ This was also extended to include those who were responsible for the compilation of the court record. The oath underscores the importance of the administrative roles relevant to court proceedings.

This chapter followed the development and application of the various oaths sworn for a myriad of purposes through the early developmental era of South Africa until the latter part of the Union of South Africa. During this period, the oath was commonly in use and developed according to the needs of the community. The functions of the differing practices of oath-swearing remained fairly similar to the oath-swearing practices that came before and these oath-swearing practices were carried forward into the Republic of South Africa and into the Constitutional era, as will be discussed in the following chapter.

⁸⁹³ See above and s 21(21) *Supreme Courts Act* 59 of 1959.

Chapter 6 The oath in South Africa: From the Republic to the Constitutional era (1961-2016)

6.1 Introduction

The purpose of this chapter is to investigate the development of the practice of oath-swearing from 1961 to the current Constitutional era. This chapter comprises of three main parts. The first is an investigation into the practices of oath-swearing during the Republic from independence from England in 1961 until the 1996 Constitution.⁸⁹⁴ The second is an examination of the practice of oath-swearing under the Constitution with a focus on the application of certain sections of the Bill of Rights⁸⁹⁵ to the current oath-swearing tradition.⁸⁹⁶ Lastly, the oath-swearing practices of different religious based legal systems are investigated in the theological and legal pluralistic context of each of the relevant religions.⁸⁹⁷

The first section of the chapter examines the courtroom oaths during the Republic and the consequences of perjury.⁸⁹⁸ The promissory oaths in the 1961⁸⁹⁹ and 1983⁹⁰⁰ Constitutions are also investigated to see the continual development of this practice regardless of the political dispensation.⁹⁰¹ Legislation and case law are used to trace the development and application of oath-swearing in courts and by state officials.⁹⁰² The second section of this chapter focuses on the role played by the 1996 Constitution in the development of the practice of oath-swearing in South Africa.⁹⁰³ Sections 9,⁹⁰⁴ 15,⁹⁰⁵ 30,⁹⁰⁶ 31⁹⁰⁷ and 36⁹⁰⁸ of the Constitution are

⁸⁹⁴ See 6.2 below.

⁸⁹⁵ Chapter 2 of the *Constitution*.

⁸⁹⁶ See 6.3 below

⁸⁹⁷ See 6.4 below.

⁸⁹⁸ See 6.2.1 below.

⁸⁹⁹ *Act to Constitute the Republic of South Africa and to provide for matters incidental thereto* 32 of 1961.

⁹⁰⁰ *Constitution of the Republic of South Africa* 110 of 1983.

⁹⁰¹ See 6.2.2 below.

⁹⁰² See 6.2.2 below.

⁹⁰³ See 6.3 below.

⁹⁰⁴ Section 9 of the *Constitution*. Equality.

⁹⁰⁵ Section 15 of the *Constitution*. Freedom of religion, belief, and opinion.

⁹⁰⁶ Section 30 of the *Constitution*. Language and culture.

⁹⁰⁷ Section 31 of the *Constitution*. Cultural, religious and linguistic communities.

⁹⁰⁸ Section 36 of the *Constitution*. Limitation of rights.

used to evaluate the developmental process of the practice of oath-swearing in South Africa. The current oath-swearing practices are examined in the context of constitutional values and equality and freedom of religion.⁹⁰⁹

The final section of this chapter cursorily investigates the oath-swearing practices of specific religions,⁹¹⁰ Islam,⁹¹¹ Judaism,⁹¹² Hinduism,⁹¹³ African Customary law and religious traditions.⁹¹⁴ The purpose of the inclusion of this investigation is to illustrate the role that oath-swearing plays in the legal and religious nature of these religions and to determine if these religions have noteworthy oath-swearing traditions.⁹¹⁵ The religions are investigated to ascertain whether there is scope within the religion to have their oath-swearing practices included in oath-swearing provisions in South African legislation.⁹¹⁶

6.2 Republic of South Africa (1961-1996)

On 31 May 1961, the Republic of South Africa was announced⁹¹⁷ and soon thereafter South Africa exited the Commonwealth.⁹¹⁸ This change in government and constitutional dispensation gave way to an increased influx of racial based legislation, which seems to have already been the norm in South Africa⁹¹⁹ since 1909⁹²⁰ and 1948⁹²¹ and this aided in the transformation of the legal system in a multitude of ways.⁹²² In matters concerning the authority of the executive, wide

⁹⁰⁹ See 6.3 below.

⁹¹⁰ See 6.4 below.

⁹¹¹ See 6.4.1 below.

⁹¹² See 6.4.2 below.

⁹¹³ See 6.4.3 below.

⁹¹⁴ See 6.4.4 below.

⁹¹⁵ See 6.4 below.

⁹¹⁶ See 6.5 below.

⁹¹⁷ The executive at the centre, replaced the Westminster system of government. Due to the continuity of law, the foundation created by the Union government, however, continued to resonate in subsequent years; in fact, initially not much changed. Devenish 2012 *Fundamina* 7; Hosten *et al Introduction to South African Law and Legal Theory* 953-954.

⁹¹⁸ Devenish 2012 *Fundamina* 3; Hosten *et al Introduction to South African Law and Legal Theory* 953.

⁹¹⁹ Legislation of this nature within the geographical area of South Africa is not without precedent. See above for an example of such legislation.

⁹²⁰ Currie and de Waal *The Bill of Rights Handbook* 3.

⁹²¹ Currie and de Waal *The Bill of Rights Handbook* 3; Devenish 2012 *Fundamina* 3.

⁹²² Devenish 2012 *Fundamina* 3.

legislative power was provided.⁹²³ This caused an increase in state sanctioned discrimination and oppression and a racial based political and legislative function.⁹²⁴

Regardless of the blatant negative and oppressive nature of the government, legislature and other organs of state, the developments with regard to procedural law, specifically developments related to perjury, are appreciable. Therefore, the swearing of assertory oaths is discussed with specific reference to perjury. The political climate of the government also created a fertile environment for the use of promissory oaths. These are cursorily discussed below.

6.2.1 Assertory oaths (1961-1996)

At the inception of the discussion of assertory oaths during this period, it is relevant to refer to a religious perspective of the practice of oath-swearing. In 1964 at the annual synod meeting of the Reformed Church of South Africa (GKSA) the question regarding oath-swearing in courts was discussed.⁹²⁵ In this matter the church was concerned that the practice of oath-swearing would give way to an abuse of the Lord's name and in light of this the church made suggestions to government in this regard.⁹²⁶ The church refers to the practice of oath-swearing as a highly religious act and it is because of the implications of such an action that it should not be done without due consideration.⁹²⁷ The church states that this practice should be reserved only for serious instances where the calling of God's name will have the necessary effect.⁹²⁸ Neither the legislator, nor the courts took

⁹²³ Hosten *et al Introduction to South African Law and Legal Theory* 954.

⁹²⁴ Hosten *et al Introduction to South African Law and Legal Theory* 957.

⁹²⁵ Handleiding van die Vyf-en-Dertigste Sinodale Vergadering 329-330.

⁹²⁶ Handleiding van die Vyf-en-Dertigste Sinodale Vergadering 329-330.

⁹²⁷ Handleiding van die Vyf-en-Dertigste Sinodale Vergadering 329-330. This is the exact opposite of the opinions of the Catholic Church. See Chapter 2 for reference in this regard.

⁹²⁸ Handleiding van die Vyf-en-Dertigste Sinodale Vergadering 329-330. The church also comments on the phrasing of the current oath, "*So help my God,*" and states that this is a troublesome translation in that it does not convey the fact that the oath is actually a prayer and religious practice. The GKSA suggests "*Mag God my help.*" as a better translation. The aforementioned Afrikaans phrasing seems to merely be the product of the Dutch roots. and the church did not consider the history of that phrase, "*Zo helpe mij God.*" See above and Chapter 4

this into consideration and this and related practices continued and the practice of oath-swearing continued on the same trajectory.

In the 1967 case of *S v Carse*⁹²⁹ the court referred to the 1912 case of *R v Ah Chee*⁹³⁰ in order to determine the applicability spectrum of perjury. The case was pertaining to an insolvency matter where the accused divulged information under oath, during a creditor's meeting, which proved to be false.⁹³¹ The court referred to the aforementioned case and found that the requirement that the alleged perjury had to take place during a judicial proceeding had not been met; and as such the court could not find the accused guilty of perjury, but stated that the procedure as contained in section 139(2) of the *Insolvency Act*⁹³² was proceeding during which perjury can be committed.⁹³³ The court further defined a judicial proceeding as an instance where two parties, who are in dispute with one another,⁹³⁴ bring the issue to a court or tribunal for purposes of attaining a final determination⁹³⁵ in order to resolve the dispute. The final requirement is that the determination made by the aforementioned court or tribunal must affect the rights of the parties⁹³⁶ in question.⁹³⁷

The person whose responsibility it is to administer the oath was once again the subject of scrutiny in the 1971 case of *S v Bothma*.⁹³⁸ It was stated that the magistrate should administer the oath and according to section 112 of the

⁹²⁹ *S v Carse* 1967 2 SA 659 (C) 663.

⁹³⁰ *R v Ah Chee* 1912 AD 231. As discussed above in 5.3.1 and 5.4.

⁹³¹ *S v Carse* 1967 2 SA 659 (C) 659-663.

⁹³² Sections 65(2)(b) and 139(1) of the *Insolvency Act* 24 of 1936. It is relevant to note here that the constitutionality of s 66(3) *Insolvency Act* 24 of 1936 was tested in the matter of *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) and the court found (860) that the presiding officer may only imprison a party in contravention of the aforementioned section if the presiding officer is a magistrate. Though technically this matter should resort under the discussion of 7.5 below, discussing it cursorily here is apropos.

⁹³³ *S v Carse* 1967 2 SA 659 (C) 663-664.

⁹³⁴ The judge includes the possibility of a party in dispute with the state, as is the case with criminal matters. *S v Carse* 1967 2 SA 663 (C) 663.

⁹³⁵ The judge qualifies this statement by including the options for appeal or review as it could temper the *final determination* requirement.

⁹³⁶ The judge extends this to also include liabilities or the rights and liabilities of persons who could potentially be affected by the determination but are not in court or a party to the matter.

⁹³⁷ *S v Carse* 1967 2 SA 663 (C) 663-664.

⁹³⁸ *S v Bothma* 1971 1 SA 332 (C). A person who administers the oath should be competent to do so. This was discussed above.

Magistrates' Courts Act 32 of 1944⁹³⁹ the magistrate may identify a fit and proper person who can administer the oath on his behalf. In the 1966 case of *R v Shongwe*⁹⁴⁰ the court merely stated that the oath is to be administered by a competent person. This requirement which was subsequently scrutinised by *S v Bothma*⁹⁴¹ was the following:⁹⁴²

The oath to be taken by any witness in any civil proceedings in any court shall be administered by the officer presiding at such proceedings or by the clerk of the court (or any person acting in his stead) in the presence of the said officer, or if the witness is to give his evidence through an interpreter, by the said officer through the interpreter or by the interpreter in the said officer's presence.

From this section it is clear that the person who is identified by the magistrate is not defined, merely the circumstances under which he or she may administer the oath. The person who is identified by the presiding officer to administer the oath must act as the mouth piece of the court, but it is not necessary for said person to be an officer of the court.⁹⁴³ *S v Bothma*⁹⁴⁴ finds that the oath may not be administered by the prosecutor in a case for fear of confusing the swearer which may result in an irregularity.

On 22 July 1977 the new *Criminal Procedure Act* 51 of 1977 came into operation and therein requires oath-swearing for a multitude of reasons, which include: assessors who are to assist the court;⁹⁴⁵ witnesses who are to provide information to the court must do so under oath;⁹⁴⁶ and that the oath may be administered through an interpreter or intermediary.⁹⁴⁷ The section dealing with the form of the oath as it pertains to criminal matters, as mentioned before, is provided for by

⁹³⁹ Section 112 *Magistrates' Courts Act* 32 of 1944.

⁹⁴⁰ *R v Shongwe* 1966 1 SA 390 (SRA) 392.

⁹⁴¹ *S v Bothma* 1971 1 SA 332 (C).

⁹⁴² Section 112 *Magistrates' Courts Act* 32 of 1944.

⁹⁴³ *S v Bothma* 1971 1 SA 332 (C).

⁹⁴⁴ *S v Bothma* 1971 1 SA 332 (C).

⁹⁴⁵ Section 145(3) *Criminal Procedure Act* 51 of 1977.

⁹⁴⁶ Section 162(1) *Criminal Procedure Act* 51 of 1977.

⁹⁴⁷ Section 165 *Criminal Procedure Act* 51 of 1977.

section 162.⁹⁴⁸ This section comprises of two subsections, the first of which provides the phrasing and terms of the oath which must be sworn:⁹⁴⁹

I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.

From this phrasing it is clear that the utterance is in fact an oath and that the swearer cannot avail himself or herself on the third element identified by Hunt,⁹⁵⁰ described above,⁹⁵¹ which provides that the swearer should be aware of the fact that he or she is swearing an oath, as well as the relevant and applicable consequences.⁹⁵² The following aspect which is notable is that the prescribed form of the oath requires the swearer to swear that he or she will not only provide truthful evidence, but that there is a positive obligation on the swearer to provide a relation of the whole truth, which could include providing relevant information not expressly requested.⁹⁵³

In the case of the abovementioned oath, which provides for the telling of the truth, the whole truth and nothing but the truth, can be influenced by the principle of a negative control of a person and the purpose of an oath could more effectively be reached if space could be created in the normal process of law where the swearer or witness is given the opportunity to properly express himself or herself and relate to the court any other information with bearing on the case at hand.⁹⁵⁴ The aim of the "... [the] whole truth and nothing but the truth..." part of the oath, it can be seen as an attempt to remedy the possible inherent failures of an oath. If no such opportunity is given, the oath might be undermined and it is a mere negative truth. In the case of assertory oath where the swearer swears to act in a specific manner in the future, the swearer should be given the

⁹⁴⁸ Section 162 *Criminal Procedure Act* 51 of 1977.

⁹⁴⁹ Bearing in mind that the subsequent section deals with instances where the proposed swearer elects to make an affirmation *en lieu* of an oath.

⁹⁵⁰ Hunt *South African Criminal Law and Procedure* 113.

⁹⁵¹ See 5.3.1 above.

⁹⁵² See 2.2 and 2.4 above.

⁹⁵³ See 2.2 and 2.2.1.

⁹⁵⁴ Wickham "Foucault and Law" 218-219. See Chapter 2 above.

opportunity to state what he or she will not do and the mere recitation of a few lines prescribed by law is not sufficient to express the real purpose of the oath.⁹⁵⁵

The final part of the oath is an invocation of the Divine by praying for assistance from God to aid the swearer in meeting the terms of the oath, and possibly, though it is not stated, invoke the wrath of God if the swearer fails to adhere to the terms of the oath.⁹⁵⁶

A further method of ensuring that the truth plays a significant role in the testimony of a swearer, the legislator allows for the swearer to raise his or her hand in an attempt to amplify the effect of the oath.⁹⁵⁷ The practice of raising a hand, the index and middlefinger of the right hand, the touching of sacred objects and other related actions, are found in the legal history of South Africa, and this concession shows that the practice of oath-swearing aims to ensure that the swearers of oaths are equipped with the necessary religious and ceremonial tools in order to provide honest and truthful evidence in courts. The ancillary actions are, however, not required or prescribed by the *Criminal Procedure Act*.⁹⁵⁸

Section 164(1)⁹⁵⁹ makes provision for perjury under the aforementioned Act and states that if a person cannot, for some reason accepted by the court, understand the implications related to the swearing of an oath (or affirmation), he or she can provide evidence in the absence of the oath, provided that he or she shall tell the truth. This is the mirror of the 1830 matter referred to above.⁹⁶⁰ The motivation being that the oath is a difficult concept to explain to, for example, a child. The subsequent subsection⁹⁶¹ provides for instances of violation of the aforementioned instruction to provide truthful testimony and provides that such a person can be prosecuted for perjury according to the common law, or in terms of the statute which required the swearing.

⁹⁵⁵ See Bellengère *et al The Law of Evidence* 10-15 in general.

⁹⁵⁶ See 5.2 above for further exposition and exploration on this theme.

⁹⁵⁷ Section 162(2) *Criminal Procedure Act* 51 of 1977.

⁹⁵⁸ *Criminal Procedure Act* 51 of 1977.

⁹⁵⁹ Section 164(1) *Criminal Procedure Act* 51 of 1977.

⁹⁶⁰ See 5.3.1 above.

⁹⁶¹ Section 164(2) *Criminal Procedure Act* 51 of 1977.

Section 165⁹⁶² provides for instances where the oath is administered in an unusual way, as was indicated in *R v Shongwe*.⁹⁶³ This section deals, more particularly, with instances where the presiding officer administers the oath to the person who intends on using an interpreter or intermediary to give testimony. The section describes this situation as the oath being administered by the presiding officer, through the interpreter or intermediary, to this person; the interpreter or intermediary acting as a conduit for the oath.

One other relevant, and for this purpose final, aspect of the *Criminal Procedure Act*⁹⁶⁴ which needs to be investigated is the 30 May 1961 rule. This is the principle that functions as a *catch all* in terms of possible loopholes that may be present in the South African legislation pertaining to evidence. This rule basically states that if there is an evidentiary matter which is the subject of contention, the state of the law as "... on the thirtieth day of May 1961, shall apply in any case not expressly provided for by this Act or any other law."⁹⁶⁵ This was not the first instance of such an insertion. Bellengère⁹⁶⁶ states that this rule was commonly used in pre-Union South Africa, as well as in legislation during the Union, specifically the *Criminal Procedure Act* 56 of 1955⁹⁶⁷ and the later *Criminal Procedure Act* 51 of 1977. The influence of the English law cannot be underestimated as said influence persists to the current practices related to the law of evidence in civil as well as in criminal matters.⁹⁶⁸ A consequence of this rule, as it relates to the practice of oath-swearing in South Africa, is that, according to Nel,⁹⁶⁹ the English adopted the practice of swearing oaths according to the manner which is prescribed by the religion of the swearer. This rule seemed to have been in practice in England during the years leading up to the 30

⁹⁶² Section 165 *Criminal Procedure Act* 51 of 1977.

⁹⁶³ *R v Shongwe* 1966 1 SA 390 (SRA) 392. See above.

⁹⁶⁴ *Criminal procedure Act* 51 of 1977.

⁹⁶⁵ See ss 190, 201, 202, 203, 206, 227, 230, 252 *Criminal procedure Act* 51 of 1977; as well as Bellengère *et al The Law of Evidence* 6-8.

⁹⁶⁶ Bellengère *et al The Law of Evidence* 6-8.

⁹⁶⁷ See 5.3.1 above.

⁹⁶⁸ Bellengère *et al The Law of Evidence* 6-8.

⁹⁶⁹ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 113-114, 193-199.

May 1961 rule, but was only formally incorporated into the English law at a later stage and is therefore not part of the South African law at this stage in time.⁹⁷⁰

6.2.2 Promissory oaths (1961-1996)

As a by-product of the independence received in 1961, in terms of the *Constitution of South Africa* 32 of 1961,⁹⁷¹ new oaths needed to be sworn to ensure a seamless exchange of power. A discussion follows on the most notable of oaths sworn during the pre-constitutional Republic of South Africa. The first is the oath of office of the State President of South Africa. Secondly, the new oath that the State President was required to swear in terms of the 1983 Constitution.⁹⁷² The discussion is brought to a close with the oath of the State President according to the interim Constitution of 1993.⁹⁷³

Section 12 of the 1961 Constitution⁹⁷⁴ prescribes the oath required by the State President of the Republic of South Africa. It states that the oath is to be sworn before the President can assume his duties as president and the oath is to be administered by the Chief Justice of South Africa or a judge of the Supreme Court and is as follows:⁹⁷⁵

In the presence of the Almighty God and in full realization (*sic*) of the high calling I assume as State President/Acting State President in the service of my people, I A.B., do swear to be faithful to the Republic of South Africa and do solemnly and sincerely promise at all times to promote that which will advance it, to oppose all that may harm it and to dedicate myself to the welfare of its inhabitants, to obey observe, uphold and maintain the Constitution (*sic*) and all other Law of the Republic, to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience, to do justice unto all and to devote myself to the well-being of my people.

May the Almighty by His Grace guide and sustain me in keeping this oath with honour and dignity.

⁹⁷⁰ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 199-205.

⁹⁷¹ *Act to Constitute the Republic of South Africa and to provide for matters incidental thereto* 32 of 1961.

⁹⁷² *Constitution of the Republic of South Africa* 110 of 1983

⁹⁷³ *Constitution of the Republic of South Africa* 200 of 1993.

⁹⁷⁴ Section 12 *Act to Constitute the Republic of South Africa and to provide for matters incidental thereto* 32 of 1961.

⁹⁷⁵ Section 12 *Act to Constitute the Republic of South Africa and to provide for matters incidental thereto* 32 of 1961.

So help me God.

The 1983 Constitution⁹⁷⁶ prescribes the same oath as the 1961 oath, above, but with a subsection⁹⁷⁷ which states that the oath needs to be administered to the State President, after which he has to sign the document confirming his oath and receive the presidential seal of office.

The manner in which this oath⁹⁷⁸ is framed is indicative of the fact that South Africa, in 1961, was a new Republic, with new found sovereignty and the power that accompanies it. The State President needs to communicate in clear terms to his constituents that his appointment to the presidential seat is divinely sanctioned, failing to do so could result in a situation where there is a power vacuum which could have severe consequences. It is worth mentioning that there is no option of an affirmation *en lieu* of an oath and this was the only way in which a State President could assume the office of the president. It is not clear if this was an oversight, a deliberate move to bar non-Christians from becoming presidents, or if they did not foresee the possibility of a non-Christian becoming president of South Africa.⁹⁷⁹

Bearing this in mind, the oath bears strong parallels with the coronation oaths of antiquity where the king or queen reigns by divine right, and as such, a challenge to their sovereignty would be to challenge God. The oath then bears resemblance to an oath of allegiance and the fealty oath,⁹⁸⁰ in that the State President sets out his functions and his dedication to these, in service to the people. The oath explicitly states that the State President is to see to the welfare of the "inhabitants" of South Africa. Though it does not specify whether it includes all the inhabitants, because the racial discrimination contained in the legislation during this period is indicative of the possibility that the State President could have been in violation of the terms of the oath of office in that the Apartheid

⁹⁷⁶ Section 11 *Constitution of the Republic of South Africa* 110 of 1983.

⁹⁷⁷ Section 11(2) *Constitution of the Republic of South Africa* 110 of 1983.

⁹⁷⁸ Both the 1961 and 1983 oaths.

⁹⁷⁹ From the context provided it is most probably the latter.

⁹⁸⁰ See 1.2. 1.3, 1.4, 2.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 4.2, 4.3, 5.2.2 and 5.3.2 above.

legislation, which he had to sign into law, was not in the interest of all the inhabitants of South Africa.

By signing the document, the State President communicates that he will be a benevolent and dedicated ruler of the people. The oath is brought to a close with a final appeal to God for assistance in adhering to the terms of the oath.⁹⁸¹ By this time, the courts have already found that the breaking of a promissory oath does not constitute perjury and as such the only guard against the breaking of this oath is God.⁹⁸²

The constitutional change⁹⁸³ envisioned by the 1993 Constitution was the product of negotiation and compromise.⁹⁸⁴ It was intended as a transitional document that would serve until a final constitution could be drafted.⁹⁸⁵ Section 78 of the 1993 Constitution⁹⁸⁶ states that the President must make and subscribe an oath or solemn affirmation before he or she could act as president. The oath or affirmation is as follows:⁹⁸⁷

In the presence of those assembled here and in full realisation of the high calling I assume as President/Acting President in the service of the Republic of South Africa I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa, and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold and maintain the Constitution and all other Law of the Republic; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of the Republic and all its people.

(In the case of an oath: So help me God.)

The oath follows a similar pattern to that of the preceding oaths, but with glaring differences. The first difference that is notable is the fact that the President has the option of not swearing an oath and in the place of the oath to rather make a solemn affirmation. This affirmation has the same terms and the same effect of

⁹⁸¹ See 1.1, 1.5 and 2.4 above.

⁹⁸² See 5.2 and 5.3 above for an exposition of this position.

⁹⁸³ See below.

⁹⁸⁴ Hosteen *et al* *Introduction to South African Law and Legal Theory* 973-974.

⁹⁸⁵ This process was completed in 1996 and the product is the *Constitution of the Republic of South Africa*, 1996. Hosteen *et al* *Introduction to South African Law and Legal Theory* 973-974.

⁹⁸⁶ *Constitution of the Republic of South Africa* 200 of 1993.

⁹⁸⁷ Schedule 3 *Constitution of the Republic of South Africa* 200 of 1993.

the oath, but does not have the religious implication. This makes the office of the President accessible to persons who are not Christians. The religious overtones present in the 1961 and 1983 presidential oaths are absent in the 1993 oath. There are only two instances which differentiate the oath from the affirmation: the word "swear" and the option provided in parentheses to close the oath with the words "So help me God." This still provides the swearer with the option to have his or her secular civil function be sanctioned by God.

The changes in respect of the oath from the 1983 oath to the 1993 oath are remarkable. These changes are echoed in the 1996 Constitution.

6.3 Oath-swearing and the Constitutional era

Though this section formally commences with the implementation of the Constitution, it is important to give a brief overview of the events that caused the democratic, constitutional dispensation of South Africa. The African National Congress initiated the movement towards democracy in 1912, but for this purpose, 2 February 1990 is used as the landmark for this shift.⁹⁸⁸ This political move by the then-President, FW de Klerk, caused a series of events to occur in the next six years.⁹⁸⁹ Various commissions were established and various negotiations were held in order to ensure a peaceful transition into the new democratic dispensation.⁹⁹⁰ This section will commence with a cursory discussion of the Constitutional values, after which the current position regarding assertory oaths and promissory oaths will be discussed. The relevant sections of the Constitution will be examined and applied to the current oath-swearing practices in South Africa. An investigation into the religious based legal systems within South Africa and the legal pluralistic nature it assumed as a result of the enactment of the Constitution brings this chapter to a close.

⁹⁸⁸ Hosten *et al* *Introduction to South African Law and Legal Theory* 973-974.

⁹⁸⁹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 2 SA 97 (CC).

⁹⁹⁰ Hosten *et al* *Introduction to South African Law and Legal Theory* 973-974; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 2 SA 97 (CC).

Racial discrimination, as a founding principle of government and law, was the first to be removed from the law books⁹⁹¹ and this was replaced with a list of values in which the new law should be formed and to which all subsequent jurisprudential considerations should adhere.⁹⁹² The interim and final constitutions are examples of the development of law to convene to the norms and standards of a community and these contribute to justice, as it affects all other laws, standards, norms and stipulations, no matter how far removed. It is in the interpretation of these rules that the development lays. The legal rule, which is the subject of this study, is not directly related to matters of a political or human rights nature, but the interpretation of these can have a transformative effect.

The interim Constitution of 1993⁹⁹³ came into operation on 27 April 1994⁹⁹⁴ and brought about a whole host of changes. The most noteworthy of these is the Bill of Rights. The 1996 Constitution was signed into law on 10 December 1996 and came into operation on 4 February 1997.⁹⁹⁵ This significant change and transformative action necessitates a re-evaluation of the factors surrounding oath-swearing generally, as well as the more specific aspects relating to assertory oaths and promissory oaths. The Constitution created the legal environment and framework for the development of oath-swearing in a constitutional context with the protections and freedoms contained therein. These protections and freedoms are located in Chapter 2 of the Constitution.⁹⁹⁶ Section 39⁹⁹⁷ provides that when an aspect of the Bill of Rights requires an interpretation, "a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom..."⁹⁹⁸ This stipulation is quite relevant, because the interpretation of the most important rights of the people lies with the people. The values contained within the text and the values held by the society in

⁹⁹¹ See for example *Abolition of Racially Based Land Measures Act* 108 of 1991; *Population Registration Act Repeal Act* 114 of 1991; *Immorality Amendment Act* 2 of 1988; *Immorality and Prohibition of Mixed Marriages Amendment Act* 72 of 1985.

⁹⁹² Hosteen *et al* *Introduction to South African Law and Legal Theory* 973.

⁹⁹³ *Constitution of the Republic of South Africa Act* 200 of 1993.

⁹⁹⁴ Currie and de Waal *The Bill of Rights Handbook* 2.

⁹⁹⁵ Currie and de Waal *The Bill of Rights Handbook* 7.

⁹⁹⁶ Chapter 2 of the *Constitution*.

⁹⁹⁷ Section 39 of the *Constitution*.

⁹⁹⁸ Section 39(1)(a) of the *Constitution*.

the spirit of *ubuntu*.⁹⁹⁹ Kroeze¹⁰⁰⁰ states that the courts have not spent too much time defining the values or the content thereof. It is clear that though the values are not measured and weighed, they contribute to the specific sections of the Bill of Rights to promote the spirit of the Constitution.¹⁰⁰¹

The practice of oath-swearing in South Africa has remained largely unchanged by the Constitution as the same legislation which governed the swearing of assertory oaths during the pre-Constitutional Republic, is still in force and in use.¹⁰⁰² The position of the promissory oaths also remains largely unchanged and is, to a greater extent, governed by Schedule 2 of the Constitution.¹⁰⁰³ These oaths are sworn by the president (or anyone acting in his stead), the deputy president, ministers and deputy ministers, members of parliament, and provincial legislatures, members of the executive councils and judicial officers.¹⁰⁰⁴

The investigation of the development of oath-swearing and the influences of the internal and the external legal history during the Constitutional era requires an examination of the particular sections of the Constitution which influence the practice of oath-swearing. These sections are sections 9, 15, 30, 31 and 36.¹⁰⁰⁵

6.3.1 Equality (Section 9)

Section 9¹⁰⁰⁶ guarantees the fundamental right of equality. This section is relevant in the context of oath-swearing because oath-swearing is a practice which is

⁹⁹⁹ Kroeze 2001 *Stellenbosch Law Review* 267-269. The author distinguishes between *inside the text* and *outside the text* as the possible places where the values are located, but such separation is not necessary for this study.

¹⁰⁰⁰ Kroeze 2001 *Stellenbosch Law Review* 273.

¹⁰⁰¹ Devenish 2009 *A Commentary on the South African Bill of Rights* 11-12.

¹⁰⁰² *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular. See also Schedule 2 of the *Constitution*.

¹⁰⁰³ Schedule 2 of the *Constitution*.

¹⁰⁰⁴ Schedule 2 of the *Constitution*.

¹⁰⁰⁵ Sections 9, 15, 16, 30, 31 and 36 of the *Constitution*.

¹⁰⁰⁶ Section 9 of the *Constitution*. "9 Equality (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age,

regulated and prescribed by the law.¹⁰⁰⁷ The prescriptions are, however, very narrow and are limited to either the Christian oath or no oath at all. The sections in the *Criminal Procedure Act* 51 of 1977¹⁰⁰⁸ and the sections in the *Civil Proceedings Evidence Act* 25 of 1965,¹⁰⁰⁹ as well as Schedule 2 of the Constitution¹⁰¹⁰ actively exclude other religions and religious communities. Section 9(1)¹⁰¹¹ states the following: "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." Devenish¹⁰¹² states that equality, though problematic, is a symbolically significant provision. Equality can be problematic because of the social aspect thereof and this gives rise to a formal interpretation of the concept of equality.¹⁰¹³ Currie and De Waal¹⁰¹⁴ defines this formal idea of equality as a system where people who are situated similarly should be treated similarly, bearing relativism in mind. The inverse then follows where people who are not situated similarly, should not be treated similarly. In the context of oath-swearing, the main point of contention is the aspect of religion¹⁰¹⁵ and bearing the formal idea of equality in mind, the fact that the two aforementioned acts¹⁰¹⁶ disregards all other religions, save for Christianity, suggests that not all religions, and by extension, religious communities, are situated similarly. This seems to be contrary to the aforementioned section of the Constitution.¹⁰¹⁷

disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

¹⁰⁰⁷ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular. See also Schedule 2 of the *Constitution*.

¹⁰⁰⁸ Sections 162 and 163.

¹⁰⁰⁹ Sections 39-41.

¹⁰¹⁰ Schedule 2 of the *Constitution*.

¹⁰¹¹ Section 9(1) of the *Constitution*.

¹⁰¹² Devenish 2009 *A Commentary on the South African Bill of Rights* 37.

¹⁰¹³ Currie and de Waal *The Bill of Rights Handbook* 230.

¹⁰¹⁴ Currie and de Waal *The Bill of Rights Handbook* 230.

¹⁰¹⁵ See below for an investigation of the religious aspect of oath-swearing and the constitution.

¹⁰¹⁶ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41.

¹⁰¹⁷ Section 9(1) of the *Constitution*.

Currie and De Waal¹⁰¹⁸ state that the specific purpose of section 9(1)¹⁰¹⁹ is to prevent arbitrary differentiation between groups of people. Differentiation in general does not constitute a contravention of the equality provision, but differentiation based on illegitimate grounds¹⁰²⁰ constitutes discrimination.¹⁰²¹ These illegitimate grounds include religion, conscience, belief, culture and language, among others.¹⁰²² Motala and Ramaphosa¹⁰²³ state that one approach that can be followed in this and similar situations, is that all legal distinctions can be seen as discrimination. Therefore, if the law creates a distinction, or categorisation, which does not adhere to the stipulations in the limitation clause¹⁰²⁴ it should be treated as discrimination.¹⁰²⁵

A very important aspect concerning discrimination and differentiation is whether the discrimination is fair or unfair. The equality clause prohibits discrimination which is considered to be unfair and not discrimination generally.¹⁰²⁶ Fairness is used to distinguish between legitimate and illegitimate discrimination.¹⁰²⁷ There does not seem to be a well-motivated reason for the distinction between Christianity and other religions in terms of the sections in the *Criminal Procedure Act* 51 of 1977,¹⁰²⁸ the sections in the *Civil Proceedings Evidence Act* 25 of 1965¹⁰²⁹ and Schedule 2 of the Constitution.¹⁰³⁰ One reason which can be put forward to explain the *status quo* is persistence of the pre-Constitutional position where Christianity, more particularly, protestant (Dutch-Reformed Church), enjoyed preferential treatment.¹⁰³¹ Bearing the preliminary discussion on the relationship between distinction and discrimination in mind, Motala and

¹⁰¹⁸ Currie and de Waal *The Bill of Rights Handbook* 243.

¹⁰¹⁹ Section 9(1) of the *Constitution*.

¹⁰²⁰ The listed ground in s 9(3) are considered to be illegitimate.

¹⁰²¹ Currie and de Waal *The Bill of Rights Handbook* 243-244. Refer to the *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) test. See in particular paras 54, 41 and 43-49.

¹⁰²² Section 9(3) of the *Constitution*.

¹⁰²³ Motala and Ramaphosa *Constitutional Law* 254.

¹⁰²⁴ See below. S 36 of the *Constitution*.

¹⁰²⁵ Motala and Ramaphosa *Constitutional Law* 254.

¹⁰²⁶ Currie and de Waal *The Bill of Rights Handbook* 244.

¹⁰²⁷ Currie and de Waal *The Bill of Rights Handbook* 244.

¹⁰²⁸ Sections 162 and 163.

¹⁰²⁹ Sections 39-41.

¹⁰³⁰ Schedule 2 of the *Constitution*.

¹⁰³¹ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

Ramaphosa¹⁰³² state that the Constitutional Court prefers that instances where equality is brought to the fore be dealt with on a case-by-case basis. This is done by ascertaining whether human dignity¹⁰³³ is affected, because the mere fact that the law treats different people dissimilarly is not reason enough to constitute discrimination; such legislation would only be discriminatory if the human dignity of the person is impaired.¹⁰³⁴ The reason why dignity is used to determine fairness is that people "are inherently equal in dignity."¹⁰³⁵ In order to ensure that unfair discrimination does not occur, section 9(4)¹⁰³⁶ requires legislation to be enacted to prevent unfair discrimination. This section places an obligation on the state to ensure that there is sufficient legislation to give effect to this right. The final subsection of the equality clause, subsection 9(5), states, "discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." As mentioned above, the fairness aspect will be settled on case-by-case basis with reference to the human dignity of the person, persons, or communities affected. The religious aspect of oath-swearing contains within it the possibility for discrimination due to the close relationship between the oath and religion. The fairness of the differentiation contained within current legislation must be evaluated in the context of other provisions in the Bill of Rights¹⁰³⁷ which are discussed below, and the Constitutional values.

6.3.2 Freedom of religion, belief, and opinion (Section 15)

The relationship between religion and law is complex due to the role religion played in the development of law in certain jurisdictions.¹⁰³⁸ Bearing this relationship in mind, the Constitution, in section 15,¹⁰³⁹ recognises the right to

¹⁰³² Motala and Ramaphosa *Constitutional Law* 258.

¹⁰³³ See Constitutional values above as well as s 10 of the *Constitution*.

¹⁰³⁴ The authors indicate differentiation as a possible counter to the abovementioned instances of apparent discrimination. Motala and Ramaphosa *Constitutional Law* 258-259. See the discussion of ss 30 and 31 below for an application thereof in context.

¹⁰³⁵ Currie and de Waal *The Bill of Rights Handbook* 244.

¹⁰³⁶ Section 9(2) of the *Constitution*.

¹⁰³⁷ Chapter 2 of the *Constitution*.

¹⁰³⁸ Currie and de Waal *The Bill of Rights Handbook* 336-337; Devenish 2009 *A Commentary on the South African Bill of Rights* 161. See above.

¹⁰³⁹ Section 15 of the *Constitution*. Section 15 states the following "Freedom of religion, belief and opinion: (1) Everyone has the right to freedom of conscience, religion, thought, belief and

freedom of religion, belief and opinion.¹⁰⁴⁰ Devenish¹⁰⁴¹ makes the argument that religion¹⁰⁴² is an innate human practice as religion can be traced to the start of civilisation. Chaskalson J echoes this by stating that adherence to a religion is important and worthy of protection.¹⁰⁴³ The free practice of religion was limited when the Judeo-Christian religion emerged and brought about a regulation of religion and freedom in that regard.¹⁰⁴⁴ This includes religious persecution and the non-acceptance of certain religious practices and its legal implications.¹⁰⁴⁵ This aspect was borne in mind with the drafting of section 15.¹⁰⁴⁶

The relationship between the state and religion has a troublesome past and a tradition of interference by religion in matters regarding the state.¹⁰⁴⁷ Currently, there are two approaches that can be followed; the first being, a single religion state, and the second, a separation between religion and state.¹⁰⁴⁸ In the first option above, the state can actively exclude people on the basis of their religion, if that religion is contrary to the official state religion.¹⁰⁴⁹ This approach presents a whole host of potential problems with regard to the free practice of religion and equality in a constitutional democracy. The second option above is one which provides for the option of freedom of religion and belief without the possibility of exclusion based on religious preference.¹⁰⁵⁰ South Africa follows the second option

opinion. (2) Religious observances may be conducted at state or state-aided institutions, provided that- (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.(3) (a) This section does not prevent legislation recognising- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

¹⁰⁴⁰ Section 15 of the *Constitution*; Devenish 2009 *A Commentary on the South African Bill of Rights* 161.

¹⁰⁴¹ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

¹⁰⁴² Devenish uses the following definition for religion: "[a] human recognition of [a] superhuman controlling power and especially of a personal God or gods entitled to obedience and worship, and the effect of such recognition on conduct or mental attitude."

¹⁰⁴³ *S v Lawrence ; S v Negal; S v Solberg* 1997 2 SACR 540 (CC) 116.

¹⁰⁴⁴ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

¹⁰⁴⁵ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

¹⁰⁴⁶ Section 15 of the *Constitution*.

¹⁰⁴⁷ See 1.5 and Chapter 2 above.

¹⁰⁴⁸ Motala and Ramaphosa *Constitutional Law* 380.

¹⁰⁴⁹ Motala and Ramaphosa *Constitutional Law* 380.

¹⁰⁵⁰ Motala and Ramaphosa *Constitutional Law* 380.

and this was confirmed in *S v Lawrence; S v Negal; S v Solberg*,¹⁰⁵¹ where it was confirmed that religion should be protected and that religion should not cause unjustified breach of the freedom to practice religion of freedom of belief and conscience. This can easily be extended to include non-interference of religion in the state; and that the religious practices and prohibitions cannot inequitably and unfairly be imposed on others or coerce others to adhere to religious practices; and finally that one religion cannot be favoured above others.¹⁰⁵² South Africa, therefore, supports cooperation between religion and the state, provided that such cooperation does not amount to coercion.¹⁰⁵³

Section 15¹⁰⁵⁴ not only ensures that religious persecution does not take place, but also brings about an end to the abuse religion to the detriment of other. In the pre-Constitutional era, the Dutch-Reformed Church was extremely influential and as such, justified and promoted the race based discriminatory legislation and the intolerance against other religions.¹⁰⁵⁵ Religious freedom was absent and this section aims to correct that. The practice of oath-swearing is, as is mentioned above,¹⁰⁵⁶ a religious act, or has a religious implication. The oath-swearing practices within South Africa before this point was almost exclusively Christian.¹⁰⁵⁷ Strong ties between religion and oath-swearing and the single state religion,¹⁰⁵⁸ as was the case in the pre-Constitutional era, resulted in an exclusion of other religions from swearing an oath according to the customs and practices prescribed by the religion. This exclusion, which is still part of the legislation, seems to be in conflict with this section of the Constitution as this section provides specifically for freedom of conscience and that religious observances may be conducted at a state institution (such as a court). The section requires that the aforementioned religious observances must be done on an equitable basis, which, at this stage, is

¹⁰⁵¹ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 114-116.

¹⁰⁵² Motale and Ramaphosa *Constitutional Law* 380-381.

¹⁰⁵³ Motale and Ramaphosa *Constitutional Law* 380.

¹⁰⁵⁴ Section 15 of the *Constitution*.

¹⁰⁵⁵ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163. *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 149.

¹⁰⁵⁶ See Chapters 1 and 2.

¹⁰⁵⁷ See above and Chapter 4.

¹⁰⁵⁸ Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

absent. A person has the choice to either swear a Christian oath,¹⁰⁵⁹ or to make an affirmation en lieu of an oath;¹⁰⁶⁰ and by so doing refrain from swearing an oath at all. The choice between no oath and a Christian oath cannot be said to be equitable and should therefore be seen as contrary to section 15 of the Constitution. This matter was cursorily dealt with in *S v Lawrence; S v Negal; S v Solberg*¹⁰⁶¹ by Sachs J, who commented that religious freedom and the rights concerned therewith are protected by section 15.¹⁰⁶² Sachs J goes on to state that section 15 rights are absolute and can only be limited if such limitation is reasonable and necessary.¹⁰⁶³ Later in the judgement¹⁰⁶⁴ Sachs J states:

...And, eighthly, persons taking official oaths are offered the choice either of swearing the oath and adding the words 'So help me God', or else of making a solemn affirmation without reference to God.

This is praised as the product of the "unwillingness to erect walls of separation between church and State."¹⁰⁶⁵ It seems that the solemn affirmation is seen as the neutral option and can, therefore, not be in contravention of the Constitution. The problem, however, is not in the aspect of coercion to participate in religious practices, but in the denial of participation by all religions and religious communities. The oath can be sworn with the term "So help me God", but the wording only makes provision for the religions that address their deities by that name¹⁰⁶⁶ and actively excludes several other religions. The issue of oath-swearing should be separated from the main issue in *S v Lawrence*¹⁰⁶⁷ as exclusion is not the only problem. What is also relevant is the failure to include. The problem is not the fact that the wording of the oaths includes the Christian religion; the

¹⁰⁵⁹ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular.

¹⁰⁶⁰ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular.

¹⁰⁶¹ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 138 and 144.

¹⁰⁶² The honourable justice referred to the Interim Constitution and s 14, but the mirror of s 14 is s 15 in the 1996 Constitution

¹⁰⁶³ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 142. See below for an examination of the limitation clause.

¹⁰⁶⁴ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 144.

¹⁰⁶⁵ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC) 143.

¹⁰⁶⁶ Christian, and perhaps Judaism and Islam.

¹⁰⁶⁷ *S v Lawrence; S v Negal; S v Solberg* 1997 2 SACR (CC).

problem is that the wording *only* includes the Christian religion. This gives way to indirect discrimination.¹⁰⁶⁸

6.3.3 Language and culture (Section 30) and Cultural, religious and linguistic communities (Section 31)

The relationship between religion, language and culture is unmistakeable in the current multicultural South Africa. Section 30¹⁰⁶⁹ states that "[e]veryone has the right to use the language and to participate in cultural life." Section 31¹⁰⁷⁰ should be read with section 30¹⁰⁷¹ as these sections are, for two reasons, quite relevant in the current context. The first is that if everyone has the right to participate in cultural life and a specific culture prescribes an oath to be sworn in a specific manner, that person should be allowed to swear an oath in accordance with that specific religious and or cultural practice. At this stage, as is mentioned above, this is not the position in South Africa. The practice of oath-swearing in South Africa does not provide for deviation from the strict rules in legislation. Intended swearers can either swear (so help me God) or they can make an affirmation devoid of religious intent, this was also the position in the pre-Constitutional era.¹⁰⁷² The second references language, which can include taking an oath in the language prescribed by the particular culture that might differ from the stipulations in the acts.¹⁰⁷³ Since no provision is made for a deviation from the prescribed method, it is clear that cultural and religious practices, other than the echoes from Apartheid, are largely ignored by legislation. Religion and the free

¹⁰⁶⁸ Currie and de Waal *The Bill of Rights Handbook* 260-263.

¹⁰⁶⁹ Section 30 of the *Constitution*. "30 Language and culture Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

¹⁰⁷⁰ Section 31 of the *Constitution*. 31 Cultural, religious and linguistic communities (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

¹⁰⁷¹ Section 30 of the *Constitution*.

¹⁰⁷² See 6.2.1 above.

¹⁰⁷³ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular. See also Schedule 2 of the *Constitution*.

practice thereof is a cornerstone in the nature of the practice of oath-swearing as it gives the oath the force required to adhere to the terms of the oath.

6.3.4 Limitation of rights (Section 36)

As is referenced above, the current practice of oath-swearing¹⁰⁷⁴ is exclusive in that not all religions are treated the same and that an oath can only be sworn to God and those who do not want to swear to God must make an affirmation and are effectively barred from swearing an oath. Sections 9, 15, 30 and 31 are all relevant and it seems that the current practice of oath-swearing infringes upon some aspects of these fundamental rights.¹⁰⁷⁵ The question that needs to be answered in this regard is whether the infringement amounts to unfair discrimination or whether the aforementioned rights are merely limited according to the limitation clause.¹⁰⁷⁶ Section 36(1)¹⁰⁷⁷ states that certain "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors." In order to ascertain if the exclusion of other religions is legitimate and fair, or not, the practice of oath-swearing will be discussed by first addressing the general applicability of the provision and secondly, the reasonableness and justifiability thereof.

In order to limit a right contained in the Bill of Rights validly, a law of general application must require it.¹⁰⁷⁸ The limitation must be contained in a law, which

¹⁰⁷⁴ *Criminal Procedure Act* 51 of 1977. See in particular ss 162 and 163. *Civil Proceedings Evidence Act* 25 of 1965. See in particular ss 39-41. See also Schwikkard *et al Beginsels van die Bewysreg* 390-425 and 391 in particular. See also Schedule 2 of the *Constitution*.

¹⁰⁷⁵ See above.

¹⁰⁷⁶ Section 36 of the *Constitution*.

¹⁰⁷⁷ Section 36 of the *Constitution*. 36 Limitation of rights (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹⁰⁷⁸ Section 36(1) of the *Constitution*; Currie and de Waal *The Bill of Rights Handbook* 168-169.

has the force of law and this should adhere to the rule of law principle.¹⁰⁷⁹ This would mean that the legislature has the ability to limit a right. The sections in the *Criminal Procedure Act* 51 of 1977,¹⁰⁸⁰ the *Civil Proceedings Evidence Act* 25 of 1965,¹⁰⁸¹ as well as Schedule 2 of the Constitution¹⁰⁸² therefore satisfy the first component of subsection 36(1).¹⁰⁸³ The aspect of general applicability refers to the requirement that the law must apply impersonally and "it must apply equally to all and it must not be arbitrary in its application."¹⁰⁸⁴ By stating that a law must apply equally and impersonally, suggests that a law should not benefit or unduly burden one group of people in favour of another.¹⁰⁸⁵ Currie and De Waal¹⁰⁸⁶ state that equal application does not necessarily mean that the law should apply to everyone; it rather indicates that it should apply to everyone in the same measure. It can be placed in the context of oath-swearing by stating that the oath-swearing sections¹⁰⁸⁷ require everyone to choose between the Christian oath and the affirmation. This seems to be *ex facie* a law of general application because the same choice is presented to everyone equally. The issue is that it does not regulate everyone in the same way, because Christians are presented with the option either to swear an oath according to their religion or to make an affirmation. Pagans, for example, are presented with the option to swear an oath according to someone else's religion or to make an affirmation. In this instance, the two religions and their followers are not regulated in the same way and in the same measure.

Bearing the unequal treatment in mind, the reasonableness and justifiability thereof must be considered in terms of section 36(1) of the Constitution.¹⁰⁸⁸ This requires a limitation of a fundamental right to be acceptable with reference to

¹⁰⁷⁹ Currie and de Waal *The Bill of Rights Handbook* 168-169.

¹⁰⁸⁰ Sections 162 and 163.

¹⁰⁸¹ Sections 39-41.

¹⁰⁸² Schedule 2 of the *Constitution*.

¹⁰⁸³ Section 36(1) of the *Constitution*.

¹⁰⁸⁴ Currie and de Waal *The Bill of Rights Handbook* 169.

¹⁰⁸⁵ Currie and de Waal *The Bill of Rights Handbook* 173.

¹⁰⁸⁶ Section 36(1) of the Constitution; and Currie and de Waal *The Bill of Rights Handbook* 170.

¹⁰⁸⁷ Sections 162 and 163 *Criminal Procedure Act* 51 of 1977; ss 39-41 *Civil Proceedings Evidence Act* 25 of 1965; and schedule 2 of the *Constitution*.

¹⁰⁸⁸ Currie and de Waal *The Bill of Rights Handbook* 176.

human dignity, equality and freedom. Currie and De Waal¹⁰⁸⁹ go further and state that reasonability, in this sense, means that the limitation should not *invade* rights any more than is necessary to achieve its purpose; that the limitation serves a constitutionally acceptable purpose, and that the infringement of the fundamental rights and the benefits envisioned by the law are in proportion. The purpose of the oath-swearing sections¹⁰⁹⁰ is to ensure that the truth is honoured and that the swearers adhere to the promises made. This is very noble and in the interest of justice, but the invasion of the rights is severe as certain religious groups are excluded from the benefit of serving justice according to their religion, as is the case with the Christian oath. One reason that can be presented in favour of the *status quo* is that the current formula for an oath is certain, well defined and widely used; and if all persons were allowed to swear an oath according to their religious faith, it might cause uncertainty or chaos in the courts due to the lack of uniformity. This argument can easily be refuted by referring to the purpose of an oath, which is to guarantee truth and, as such, promotes justice and the right to a fair trial.¹⁰⁹¹ The relevant oath-swearing sections can be rewritten to standardise the practice of oath-swearing which includes all religions and not just one. The limitation of these rights is excessive and the purpose of its envisioned benefits (truth guaranteed by religious faith) is in fact not attained as a result of this limitation.

The final remark in this regard is that the effect of the exclusion of all non-Judeo-Christian religions from the practice of oath-swearing is that one religion is awarded a higher status than the others. In this sense, Christianity is elevated above other religions on an arbitrary basis and the followers of the excluded religions are left without the option to refer to their religious faith in a courtroom to guarantee their truthfulness. As mentioned above, religion is an innate human practice¹⁰⁹² that is worthy of protection¹⁰⁹³ and as such, is closely related to human

¹⁰⁸⁹ Currie and de Waal *The Bill of Rights Handbook* 176.

¹⁰⁹⁰ Sections 162 and 163 *Criminal Procedure Act* 51 of 1977; ss 39-41 *Civil Proceedings Evidence Act* 25 of 1965; and schedule 2 of the *Constitution*.

¹⁰⁹¹ Sections 34 and 35 of the *Constitution*.

¹⁰⁹² Devenish 2009 *A Commentary on the South African Bill of Rights* 161-163.

¹⁰⁹³ *S v Lawrence* ; *S v Negal*; *S v Solberg* 1997 2 SACR 540 (CC) 116.

dignity. If a person is barred from swearing an oath in accordance with his or her religion, merely because that religion is not Christianity, the effect it has on the human dignity of a person far outweighs the motivation to limit the right to swear an oath. This can also serve as an argument in favour of the retention of the religions aspect of the practice of oath-swearing. From this perspective, the current prescribed oath-swearing practices are inconsistent with the Bill of Rights.

6.4 Oath-swearing in religious based legal systems and African customary law

Religious based legal systems are present in many jurisdictions, and South Africa is no different. South Africa is a multicultural society, which provides for the coexistence of a multitude of cultures and their traditions; religions and the embedded legal systems within said religions.¹⁰⁹⁴ The complex interrelationship between the different religious based legal systems and the secular law of South Africa needs to be managed with great care, lest large-scale discrimination and right infringement should occur. The religions discussed below contain within them legal systems that are unique and provide a nuanced approach to the practice of oath-swearing. The management strategy used is termed "legal pluralism." This term, in the context of legal and sociological nomenclature, denotes acceptance of the religious communities and their practice, within the ambit of the civil law (or Constitution).¹⁰⁹⁵

Legal pluralism is a part of the South African legal system and when the development of a legal rule is investigated in the "secular" legal system, it is important to provide for the prevalence of the same rule in the other (religious) legal systems within the same jurisdiction, in order to achieve the desired outcome.

Lord Edward Coke,¹⁰⁹⁶ states that the Christian God is almighty and omniscient and that a witness is bound by his oath because God is invoked. The oath can be

¹⁰⁹⁴ Van Niekerk "Regspluralisme" 3.

¹⁰⁹⁵ Van Niekerk "Regspluralisme" 3.

¹⁰⁹⁶ As quoted by Milhizer 2009 *Ohio State Law Journal* 22.

described in these terms as sacred. Coke further mistrusts the truthfulness of non-Christians and cautions against the acceptance of oaths by followers of other religions. This view is based not only on a fallacy, but also on the fear that God will be angered if the oaths of non-Christians are regarded as equal to that of Christians.¹⁰⁹⁷ This position undermines the principle of legal pluralism. Religion is, to a large extent a community centred body of behavioural rules,¹⁰⁹⁸ which govern all aspects of human existence, from ethics to dietary habits.¹⁰⁹⁹ Nyaundi¹¹⁰⁰ states that religion plays an important role in communities in that it serves to communicate symbols that transcend culture. Religions can be categorised according to the specific social function they have in the community.¹¹⁰¹ The largest world religions are what can be described as salvation or prophetic religions; and these include Confucianism, Taoism, Hinduism and Buddhism, and Judaism, Islam, Christianity and, though not a world religion, Zoroastrianism.¹¹⁰² Of these religions, the only ones relevant for the purposes of the South African legal history are Islam, Hinduism, Judaism and Christianity.¹¹⁰³ The traditional African religions are not included in this list, because this list reflects salvation religions with a globally representative following. The traditional African religions have a different definition of salvation. According to the traditional African religion, it is imperative to gain the favours from spiritual beings¹¹⁰⁴ in order to be better situated in the physical realm.¹¹⁰⁵ It is because of this distinction that it becomes increasingly clear that African traditional religions fulfil a different function in the society. The functions include neighbourliness, brotherliness and magic plays a significant role in a society.¹¹⁰⁶ The oath does play a prominent role

¹⁰⁹⁷ Milhizer 2009 *Ohio State Law Journal* 22.

¹⁰⁹⁸ Nyaundi "African traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" 4.

¹⁰⁹⁹ Bellah 1999 *Journal of the American Academy of Religion* 280-282; Nyaundi "African traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" 4.

¹¹⁰⁰ Nyaundi "African traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" 3.

¹¹⁰¹ Nyaundi "African traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" 3; Bellah 1999 *Journal of the American Academy of Religion* 280.

¹¹⁰² Bellah 1999 *Journal of the American Academy of Religion* 280.

¹¹⁰³ Christianity is embedded into the law and history of certain areas and periods.

¹¹⁰⁴ See below.

¹¹⁰⁵ Ngong 2009 *Studies in World Christianity* 3.

¹¹⁰⁶ See Bellah 1999 *Journal of the American Academy of Religion* in general.

in the Islam, Hindu and Judaic religions. It also plays an important role in the African Customary law. A cursory discussion of the position of oath-swearing in each of these four religions will follow.¹¹⁰⁷

6.4.1 Islam

The Islam religion is one of the great world religions and can literally be translated to mean "submit to God."¹¹⁰⁸ The Islam religion governs all aspects of human life, whether it is social, religious or legal. The prophet Muhammad was born in Mecca in 570 CE and in 610 CE, at forty years of age, the Arch Angel Gabriel (or Gibraeel in Arabic) appeared to him with a divine order to revive the religion "of the one God." For 23 years Muhammad received the revelations of Allah these holy and divine revelations are known as the Quran,¹¹⁰⁹ the primary source of the Islam religion and Islam law.¹¹¹⁰ An introductory discussion of the Islam religion will commence this section, after which a cursory view will be provided of the nature of the Islamic law and religion and the purpose of oath-swearing.

The Quran is considered to be the word of Allah and remains unchanged since its creation 1400 years ago.¹¹¹¹ According to Mir¹¹¹² an oath is a statement confirmed by emphasis. This emphasis is created by identifying glory or excellence within the oath-statement.¹¹¹³ The statement and glorifying emphasis should be linked so that it is understandable and clear in meaning to prove a sufficient link

¹¹⁰⁷ Due to the limitations with respect to the word amount, the oath-swearing practices of abovementioned religions will only be discussed with reference to the place of oath-swearing in the religion and that oath-swearing is a religions practice. An investigation into specific oaths and their consequences will be undertaken in further studies.

¹¹⁰⁸ Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 244-252.

¹¹⁰⁹ Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 247-248; Schlacht *An Introduction to Islamic Law* 6-14.

¹¹¹⁰ Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 247. The practical religious aspects of Islam are divided into various schools of thought. The five major schools of thought are: Ja'fari, Hanafi, Maliki, Hanbali and Shafi'i. See Al Islam 2016 <http://www.al-islam.org>. The five schools of thought are the "paths" to the Quran and the Prophet Muhammad. These schools also have a myriad of sources and books of interpretation to aid them. These sources are beyond the scope of this study and the Quran, as main source of the Islam religion, will be used.

¹¹¹¹ See Al Islam 2016 <http://www.al-islam.org>.

¹¹¹² Mir 1990 *Islamic Studies* 5-6.

¹¹¹³ Mir 1990 *Islamic Studies* 5-6.

between the swearer, the subject and the Divine.¹¹¹⁴ The oath was very common in pre-Islamic Arabic literature, but these varied from the Quranic oaths¹¹¹⁵ in that the formulas used in the swearing process differed.¹¹¹⁶ Mir¹¹¹⁷ states that the language in which the Quran was revealed was language within the geographical area of the Arab tribes; and since it was revealed in Arabic, certain cultural practices were emphasised, for example the practice of oath-swearing.

The first aspect of the oath is the invocation of the Divine name¹¹¹⁸ of Allah to prove fealty unto Him and to emphasise the great power and omnipotence of Allah.¹¹¹⁹ The next aspect is that Muslims may only swear an oath on Allah and that an oath sworn on another deity is considered an unforgivable offence.¹¹²⁰ In the Islamic religion, it is considered better to swear multiple oaths to Allah and break these oaths, than it is to swear any number of oaths to a deity other than Allah.¹¹²¹ One method of making something unlawful is to take an oath to that effect. *Sura* 5 verse 87¹¹²² reads as an urgent plea to the believers not to make something unlawful after Allah has made it lawful. The urgency of the plea is rooted in logic that Allah cannot be served if the believer abstains from that which is required in order to survive.

Oath-swearing in the Islam religion is a very serious undertaking and breaking it is akin to sin. The religious duty to be truthful under oath is motivation for the legal system to allow for the swearing of an oath according to specific religion because the purposes of the law will be better served if the obligation to be truthful under oath is external to the swearer. At this stage the wording of the oath in South African law¹¹²³ merely identifies the deity as "God". This can be

¹¹¹⁴ Mir 1990 *Islamic Studies* 6-9.

¹¹¹⁵ See below, as well as Chapters 1 and 2.

¹¹¹⁶ Mir 1990 *Islamic Studies* 8-10.

¹¹¹⁷ Mir 1990 *Islamic Studies* 8.

¹¹¹⁸ See 2.4 above.

¹¹¹⁹ Silving 1959 *Yale Law Journal* 1332-1333.

¹¹²⁰ Silving 1959 *Yale Law Journal* 1332-1333. See 2.4 above.

¹¹²¹ Silving 1959 *Yale Law Journal* 1333.

¹¹²² Quran 5:87.

¹¹²³ For example the oath in s 162(1) of the *Criminal Procedure Act* 51 of 1977. See above.

interpreted as the Judeo-Christian God or Allah, although it is not stated as such.¹¹²⁴

This being said, it must always be borne in mind that a Muslim may only swear an oath on Allah¹¹²⁵ and even then it must be done with great care and faithful regard.¹¹²⁶ The swearing of an oath can bring legal dealings to a close because parties place their faith in Allah's righteous action, should the situation require it.¹¹²⁷

6.4.2 Judaism

The Jewish religion, or Judaism, is commonly considered to be the root or source of all the monotheistic religions of the world.¹¹²⁸ This monotheistic religion, coupled with tradition, completely governs Jewish behaviour. A cursory overview will be provided of the nature of Judaism and the purpose of oath-swearing within the religion. Islam and Christianity, evolving from Judaism, developed and grew to become individual religions rather than sub-schools or denominations.¹¹²⁹ Judaism's claim that it is the first monotheistic religion is contested, albeit not officially, by the Zoroastrian community in that Barr¹¹³⁰ states that there might have been contact between the Jewish communities and Zoroastrian communities during the time period of the Old Testament. This contact might have been superficial, but the shared geographical area might have created the possibility of interreligious communication. It is uncertain whether the possible contact might have influenced the instances of the practices of oath-swearing referenced by the Jewish *Tanakh* (which consists of the *Torah*, *Nevi'im* and *Ketuvim*). Regardless of the possible interactions between the religions, Fox¹¹³¹ states that though there

¹¹²⁴ This might be the case due to the close relationship and shared history between these monotheistic religions.

¹¹²⁵ Silving 1959 *Yale Law Journal* 1332-1333.

¹¹²⁶ Quran 68: 7-13; 56: 74-80; and 5: 89.

¹¹²⁷ Quran 24: 3-10.

¹¹²⁸ Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 236.

¹¹²⁹ Barr 1985 *Journal of the American Academy of Religion* 201.

¹¹³⁰ Barr 1985 *Journal of the American Academy of Religion* 202.

¹¹³¹ Fox 1967 *Journal of the American Academy of Religion* 129.

are similarities between Judaism and Zoroastrianism, it has to be accepted that they are different and independent of each other.

Judaism, in essence, contains principles, rules and traditions to which Jews must adhere and according to which Jews must live.¹¹³² It is in essence a legal system, attached to a religion, which governs a person's actions and interactions. An oath, according to the Jewish faith, was required to be validated by mentioning God's name or another similar substitute. This was done to invoke God in an effort to have perjurers divinely punished.¹¹³³ Milhizer¹¹³⁴ refers to certain actions which accompanied the swearing of an oath in the *Tanakh*.¹¹³⁵ The *Tanakh* refers to various oaths in conjunction with various acts to ensure the swearing is done properly.¹¹³⁶ These actions included gestures like shaking hands and placing hands on artefacts and objects as supplementary to the swearing of the oath to God. Sacred objects can also be used during this swearing process in order to magnify the effect of the oath.¹¹³⁷ One such oath is found in Devarim,¹¹³⁸ chapter 10 and verse 20.¹¹³⁹ This verse states that oaths should be taken in the name of God, but requires the swearer to fear God, worship him and cleave to God,¹¹⁴⁰ and should such preparation not be done, the person may not take an oath. From this practice, it is clear that in order to swear at all, the swearer should be faithful and obedient. Should these preconditions be met, the swearer may swear, but only in the name of God because no additional or auxiliary deity may be added to the oath.

¹¹³² Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 236-237.

¹¹³³ Greenberg 1957 *Journal of Biblical Literature* 34.

¹¹³⁴ Milhizer 2009 *Ohio State Law Journal* 6-8.

¹¹³⁵ Milhizer 2009 *Ohio State Law Journal* 9.

¹¹³⁶ Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* 272. It is not the function and purpose of this study to provide an encyclopaedic account of the various oaths sworn in the various religious scriptures. Certain noteworthy oaths will be discussed in order to provide a transdisciplinary perspective on the external legal history of oath-swearing in the context of the internal legal history in order to answer the research question of this study. Kindly see Nel *Eedaflegging by Getuienislewering in die Suid-Afrikaanse Reg* in general.

¹¹³⁷ Greenberg 1957 *Journal of Biblical Literature* 37.

¹¹³⁸ Known in the Holy Bible as Deuteronomy.

¹¹³⁹ *Tanakh*: Devarim 10:20. Please note that the reference for this source is unique. This source is the online version of the *Tanakh* (*Torah*, *Nevi'im* and *Ketuvim*) translated from the original Hebrew with specific verse indicators and an index. No specific bibliography of the verses, chapters or books used will follow, but each of these can be located on this website: Chabad 2016 http://www.chabad.org/library/bible_cdo/aid/63255/jewish/The-Bible-with-Rashi.htm.

¹¹⁴⁰ This could mean to adhere to the religious rules imposed by God.

6.4.3 Hinduism

The Hindu religion is one of the oldest religions in the world and contains within it disparate traditions and customs, which centres around communally understood theological foundations.¹¹⁴¹ The theology of the Hindu religion is based more in the sphere of philosophy, rather than theology.¹¹⁴² The argument that Hinduism is a philosophy rather than theology is rooted in the nature of the relationship between the fact that the religion requires its subjects to engage logical analysis and reason in their study of the religious text;¹¹⁴³ whereas the theology focuses on the knowledge of the deity and the ritual worshipping of the deity.¹¹⁴⁴ The theological aspect of oath-swearing will be used to provide a cursory overview of the nature of Hinduism and the purpose of oath-swearing within the religion as well as the reflexive influence shared between the religion and the oath.

Sen¹¹⁴⁵ describes the central and communal belief, shared by all Hindus, as one where the soul is immortal. This immortal soul is subject to a life-cycle which leads from birth to rebirth in an uninterrupted repetition.¹¹⁴⁶ This cycle is governed by one philosophical and theological purpose and this purpose is to achieve all four goals of life or *purusharthas*.¹¹⁴⁷ These goals are: *dharma*, *artha*, *kama* and *moksha*; and these are considered to be of utmost concern for Hindus.¹¹⁴⁸ These four life goals are divided into two categories – spiritual and secular.¹¹⁴⁹ *Moksha* and *dharma* are spiritual values where the former is

¹¹⁴¹ Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 229; Sen *Tagore Law Lectures* 1-2.

¹¹⁴² Edelmann 2013 *Journal of the American Academy of Religion* 427.

¹¹⁴³ Edelmann 2013 *Journal of the American Academy of Religion* 429-430.

¹¹⁴⁴ Edelmann 2013 *Journal of the American Academy of Religion* 430.

¹¹⁴⁵ Sen *Tagore Law Lectures* 1.

¹¹⁴⁶ Sen *Tagore Law Lectures* 1.

¹¹⁴⁷ Sen *Tagore Law Lectures* 1-7; George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 3-5 and 22-24; Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 230. The term *purusharthas* translates to meaning of life. See George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 5.

¹¹⁴⁸ George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 5 and 43; Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 230.

¹¹⁴⁹ George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 43; Bernhard *et al* "Godsdienstige Regstelsels: Algemene Grondslae" 230.

instrumental and the latter is intrinsic.¹¹⁵⁰ *Artha* and *kama* are secular values, the former is instrumental and the latter is intrinsic.¹¹⁵¹

The life goals and the life cycle along with the theological motivations for the attainment of *moksha* should be read and understood in conjunction with the concept of *karma*. *Karma* can be translated as *deed* and Sen¹¹⁵² describes the whole of the process, as set out above, as being fundamentally influenced by the *karma* of the person. What is done in a past life transcends into the next life and a balance is sought where good *karmas* will ensure that there is more pleasure in the current life and bad *karmas* will result in suffering.¹¹⁵³ It follows that each new life is born with a balance sheet where the *karmas* of the previous life are reflected.

The practice of oath-swearing is, in the case of the Hindu law and religion, an important element in fairness and the administration of justice. Oath-swearing in India by the Hindus might seem quite strange in comparison to other traditions. One such tradition of oath-swearing in India is that a party undertaking an oath is to deliver testimony or swear with the tail of a cow in his or her hand.¹¹⁵⁴ The cow is brought into court for the purposes of swearing as it is considered to be sacred, not a deity, but a holy animal, the killing of which is considered to be abhorrent.¹¹⁵⁵ The swearing of an oath on the tail of a sacred, revered and venerated animal might prove to be the motivation required to not give way to untruths and perjury, lest it influence the swearer's *karma* and cause suffering in the next life and further delay salvation by means of attaining *moksha*.¹¹⁵⁶ It may prove too onerous and impractical to use a cow for oath-swearing purposes in modern South African courts.

¹¹⁵⁰ George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 43; Bernhard et al "Godsdienstige Regstelsels: Algemene Grondslae" 230.

¹¹⁵¹ George *Purusharthas: Dharma, Artha, Kama, Moksha: Their Relevance and Currency Today and for Tomorrow* 43; Bernhard et al "Godsdienstige Regstelsels: Algemene Grondslae" 230.

¹¹⁵² Sen *Tagore Law Lectures* 1.

¹¹⁵³ Sen *Tagore Law Lectures* 1-2.

¹¹⁵⁴ Rogers 1897 *The Green Bag* 57.

¹¹⁵⁵ Harris 1979 *Human Nature* 200-202.

¹¹⁵⁶ Harris 1979 *Human Nature* 202-204.

The practice of oath-swearing outside of India is somewhat unclear as each jurisdiction has rules regarding such practices. Seshagiri Rao¹¹⁵⁷ indicates, however, that truthfulness is a Hindu religious obligation and the Hindu religion provides for punishment of people who "act in evil ways."¹¹⁵⁸ It follows that no matter the external influences or the geography, witnesses and other swearers are bound to this obligation. If afforded the opportunity to undertake such an act in accordance with their religious affiliations, Hindus are bound the truth. England allows Hindus to swear to Gita¹¹⁵⁹ and America has also allowed a Congresswoman, Tulsi Gabbard, to swear the oath of office with a hand on the *Bhagavad Gita*.¹¹⁶⁰ These events can be interpreted as harbingers of change¹¹⁶¹ regarding oath-swearing practices in secular governments and legal systems. There seems to be much that Western legal systems can learn from Hindu law.

6.4.4 African Customary law

Myers¹¹⁶² defines culture as, "the total way of a people's life." This definition is somewhat lacking for the purposes of this study, but the definition can be extended to refer to include the different aspects of the life of a people in order to find application for the individual parts. The first aspect to be the subject of investigation is the worldview of a people.¹¹⁶³ This worldview is the basis of the culture's practices and the regulation of the relationships between the members of the society.¹¹⁶⁴ The practices of a cultural community are subject to change, evolution, or destruction, but the underlying worldview remains the same.¹¹⁶⁵ The metamorphosis of these practices and the community development tend to occur concurrently¹¹⁶⁶ which, in turn, was either brought about by religion or influences

¹¹⁵⁷ Seshagiri Rao 1998 *Fordham Law Review* 1188-1190.

¹¹⁵⁸ Seshagiri Rao 1998 *Fordham Law Review* 1188-1190.

¹¹⁵⁹ Nidirect Government Services 2014 <http://www.nidirect.gov.uk/giving-evidence-in-court>.

¹¹⁶⁰ Janmohamed 2016 <http://economictimes.indiatimes.com>.

¹¹⁶¹ See above for an instance concerning a perjury matter in 1917 where a Hindu man was on trial. He states that for the oath to be binding on his conscience it had to have been sworn according to his religion, Hinduism. *Rex v Karakara* 1917 TPD 463.

¹¹⁶² Myers 1987 *Journal of Black Studies* 72.

¹¹⁶³ See above.

¹¹⁶⁴ Myers 1987 *Journal of Black Studies* 73-74.

¹¹⁶⁵ Myers 1987 *Journal of Black Studies* 74.

¹¹⁶⁶ Myers 1987 *Journal of Black Studies* 76.

a reinterpretation of religion.¹¹⁶⁷ An introductory discussion of the African Customary religion will commence this section, after which a cursory view will be provided of the nature of the Customary law and religion and the purpose of oath-swearing.

Religion, though universal,¹¹⁶⁸ is extremely arduous to define, but a definition proposed by Durkheim states that religion is "a unified system of beliefs and practices relative to sacred things."¹¹⁶⁹ This description provides enough space to accommodate the various and disparate applications of a legal rule governed by a religious system. What is important in this matter is to distinguish the actual nature of the African traditional religions and the perception of said religions by certain observers.¹¹⁷⁰ The contemporary nature of the African traditional religions is based on the premise that the universe is a vast and interconnected network consisting of units (or beings) which is imbued by a vital force, stretching out into all directions at once.¹¹⁷¹

This universe, or cosmos, can be described as being the place where the physical and spiritual meet.¹¹⁷² They believe that the units are jointly dependent on the vital force and because of this inter-dependence they are able to influence the other units positively or negatively and strengthen or harm each other.¹¹⁷³ The relationship between humans and the supernatural is also extremely important in the African customary religions as the spiritual and the physical can interact.¹¹⁷⁴ The hierarchy of existence within African religions divides all beings into two groups: visible and invisible beings.¹¹⁷⁵ The invisible beings are beings like the

¹¹⁶⁷ Inglehart and Baker 2000 *American Sociological Review* 19-22.

¹¹⁶⁸ Nyaundi states that humans are inherently religious. Even if all current religions were to die, humans would still be religious. See Nyaundi "African traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism" 2-3.

¹¹⁶⁹ Allen, Pickering and Watts Miller (eds) *On Durkheim's Elementary Forms of Religious Life* 8.

¹¹⁷⁰ Deming *Understanding Religions of the World: An Introduction* 206.

¹¹⁷¹ Deming *Understanding Religions of the World: An Introduction* 210; Lugira *World Religions: African Traditional Religion* 36-63.

¹¹⁷² Ngong 2009 *Studies in World Christianity* 2; Lugira *World Religions: African Traditional Religion* 46-63.

¹¹⁷³ Deming *Understanding Religions of the World: An Introduction* 210.

¹¹⁷⁴ Ngong 2009 *Studies in World Christianity* 2.

¹¹⁷⁵ Deming *Understanding Religions of the World: An Introduction* 210-12; Lugira *World Religions: African Traditional Religion* 36-63.

Supreme Being who can be likened to a god, is in control of the vital force connecting the universe; ancestors and other spiritual beings.¹¹⁷⁶ Humans can intermingle with the ancestors or with the Supreme Being, whatever the manifestation is, and require favours from them in order to improve the life of the human, or to maintain a cosmic balance in all things.¹¹⁷⁷ Ancestors are commonly called upon to fulfil this function. This can easily be reapplied to the practice of oath-swearing as the role of the ancestors are integral to the religious life and practices of the African customary tradition.

In addition to the cosmic world-view of the African traditional religions, the communal nature of the religious communities caused there to be diverse culture and traditions, but these are governed by living customary law.¹¹⁷⁸ Customary law, the law applicable to the religious and cultural communities of the African traditional religions, can be divided into two categories. The first is the official customary law, and second, the living customary law.¹¹⁷⁹ Official customary law would be the state of the custom at the time of recordation. The living customary law is the reflection of the state of the custom in a real-time context, where courts and tribunals can use the current custom as authoritative, rather than precedent or a custom which has long since been in disuse.¹¹⁸⁰

The practices relating to the swearing of oaths as it pertains to the African customary law are diverse and differ from one jurisdiction to another. The underlying motivations, however, remain the same. Oath-swearing was used for a myriad of reasons, either by itself or in conjunction with other forms of proof or promise. The oaths traditionally sworn here were potentially not influenced by Western practices.¹¹⁸¹ These are cursorily discussed below to gain a perspective

¹¹⁷⁶ Lugira *World Religions: African Traditional Religion* 36-45.

¹¹⁷⁷ Ngong 2009 *Studies in World Christianity* 2; Lugira *World Religions: African Traditional Religion* 36-63.

¹¹⁷⁸ Claassens and Mnisi 2009 *South African Journal on Human Rights* 494.

¹¹⁷⁹ Claassens and Mnisi 2009 *South African Journal on Human Rights* 494.

¹¹⁸⁰ For purposes of this study, and because it is a legal historical study rather than an anthropological study, the contemporary official customary will be used as a point of departure.

¹¹⁸¹ Milhizer 2009 *Ohio State Law Journal* 15-16.

on the practical application of oaths in terms of the religious and philosophical world-views described above.

The population in West Africa did, initially, not swear oaths in support of testimony provided by witnesses during trial proceedings.¹¹⁸² It is further unclear as to whether there was any dishonour in perjury as the community based nature of the social and legal system could, to a certain extent, understand the motivations for perjury.¹¹⁸³ The swearer could possibly have just intended to protect his or her neighbour, friend or family member, as is expected by the principle of *ubuntu*. This relaxed approach to perjury is also reflected in the sentences imposed for perjury, which include a warning not to do it again, a fine and, the most severe, flogging.¹¹⁸⁴ The parties involved in litigation did, however, swear an oath; this oath was a form of self-curse where the swearer declares that if he or she should lie, a curse should befall him or her. One such example is that two parties to a dispute take a small animal (for example a fowl), hold it by its legs and cut it in two with a knife. This was used to symbolise the fate of any who would swear falsely, if one should make a false oath it is considered perjury and punishable.¹¹⁸⁵

6.5 Conclusion

In this chapter, the aim was threefold; firstly, to investigate the development of oath-swearing in South Africa from 1961 to 1996, from independence until the Constitutional era.¹¹⁸⁶ The second aim was to explore the development of the practice of oath-swearing in the Constitutional era and to study oath-swearing in the context of the Bill of Rights.¹¹⁸⁷ Thirdly, a cursory examination was undertaken of the practices of oath-swearing in Islam, Judaism, Hinduism and the African Customary law and religious traditions.¹¹⁸⁸

¹¹⁸² Hartland *Primitive Law* 186-187.

¹¹⁸³ Hartland *Primitive Law* 186-187.

¹¹⁸⁴ Hartland *Primitive Law* 186-187.

¹¹⁸⁵ Milhizer 2009 *Ohio State Law Journal* 15.

¹¹⁸⁶ See 6.2 above.

¹¹⁸⁷ See 6.3 above. See Chapter 2 of the *Constitution*.

¹¹⁸⁸ See 6.4 above.

The first part of the chapter commenced with a short introduction and background of the post-Union Republic of South Africa.¹¹⁸⁹ The most noteworthy legal and political consequences of the Republic of South Africa are the increase of race-based legislation and the discriminatory nature of the legal system.¹¹⁹⁰ The two forms of oath-swearing, assertory and promissory oaths, are found to have undergone certain developments during this time; both of which were discussed above. The breaking of assertory oaths during this period constituted the crime of perjury, and this crime was divided into two categories – common law perjury and statutory perjury.¹¹⁹¹ The main difference being that common law perjury was the breaking of an assertory oath prescribed to be taken during the course of civil and criminal cases.¹¹⁹² The statutory crime of perjury was the breaking of an assertory oath prescribed by legislation which also prescribed the consequences of such breaking.¹¹⁹³ Instances of both of these are described above with reference to case law, legislation and the writings of scholars in the field.

The practice of swearing promissory oaths during the period of 1961-1996 followed.¹¹⁹⁴ Promissory oaths are commonly sworn by heads of state and other state functionaries as a way to ensure that they fulfil their functions properly and in the prescribed manner.¹¹⁹⁵ These oaths were examined above with a focus on the legislation that required such oath to be sworn. South Africa's independence was marked by legislation to formalise this event and the 1961 Constitution¹¹⁹⁶ provided certain oaths to be sworn by the president and other functionaries, and the State President oath was described above in this context.¹¹⁹⁷ The 1983 Constitution¹¹⁹⁸ had a similar provision and was also discussed above. This section of the chapter was brought to a close with an examination of the oath of office of

¹¹⁸⁹ See 6.2 above.

¹¹⁹⁰ See 6.2 above.

¹¹⁹¹ See 6.2.1 above.

¹¹⁹² See 6.2.1 above.

¹¹⁹³ See 6.2.1 above.

¹¹⁹⁴ See 6.2.2 above.

¹¹⁹⁵ See 6.2.2 above.

¹¹⁹⁶ *Act to Constitute the Republic of South Africa and to provide for matters incidental thereto* 32 of 1961.

¹¹⁹⁷ See 6.2.2 above.

¹¹⁹⁸ *Constitution of the Republic of South Africa* 110 of 1983.

the president in the 1993 Interim Constitution.¹¹⁹⁹ This act was a harbinger of change for South Africa as it was the first step to democratic South Africa based on the values of equality, freedom and human dignity.¹²⁰⁰ The oath-swearing practices and prescriptions with regard to assertory oaths and promissory oaths did not undergo significant changes from the position during the Republic until the current period.¹²⁰¹

The second section of this chapter commenced with a background to the 1993¹²⁰² and 1996¹²⁰³ Constitutions with a focus on the movement towards a democratic, constitutional dispensation of South Africa. The constitutional values and role in the interpretation of the Constitution were discussed and it was found that the significant changes and transformative effect of the Constitution necessitates a revision of the current oath-swearing practices.¹²⁰⁴ Section 9 of the Constitution was used to see if the current prescribed oaths adhere to the equality clause and it was found that the differentiation in the acts that currently regulate oath-swearing is arbitrary and constitutes unfair indirect discrimination on the basis of religion.¹²⁰⁵

Section 15, which guarantees freedom of religion, belief, and opinion, and sections 30 and 31, concerning religion and culture, were used to examine and evaluate the current oath-swearing practice in South African law; the close relationship between oath-swearing and religion necessitates such a re-evaluation.¹²⁰⁶ The active exclusion of all other religions, save for Christianity, causes inequitable differentiation and exclusion of religions and religious communities from the practice of oath-swearing.¹²⁰⁷ This failure to include undermines the cooperative relationship between religion and law in South Africa.

¹¹⁹⁹ *Constitution of the Republic of South Africa Act 200 of 1993.*

¹²⁰⁰ See 6.3 above.

¹²⁰¹ See 6.3 above.

¹²⁰² *Constitution of the Republic of South Africa Act 200 of 1993.*

¹²⁰³ *Constitution of the Republic of South Africa, 1996.*

¹²⁰⁴ See 6.3 above.

¹²⁰⁵ See 6.3.1 above.

¹²⁰⁶ See 6.3.2 and 6.3.3 above.

¹²⁰⁷ See 6.3.2 and 6.3.3 above.

The limitation clause, section 36 of the Constitution, was examined to see if the aforementioned exclusion of certain religions and cultural groups from the practice of oath-swearing is a justifiable limitation of these fundamental rights.¹²⁰⁸ The aspect of general applicability was the first to be investigated and the impersonal and equal application of the law was found to be lacking.¹²⁰⁹ Everyone is presented with the option of either swearing a Christian oath or making an affirmation. This was found to be an *ex facie* general application, but upon closer examination, the choice of oath or affirmation was placed into context.¹²¹⁰ The law does not regulate everyone in the same way, because one arbitrarily selected group of people are presented with the option either to swear an oath according to their religion, or to make a secular affirmation. The rest of the South African community is presented with the option either to swear an oath according to a religion with which they are not affiliated or to make a secular affirmation.¹²¹¹ The choices presented are not equal due to the unequal results of the choice.

The final aspect to be investigated under this section is whether the invasion of the aforementioned religious and cultural rights constitutes an unreasonable invasion. This is found to be the case seeing as the purpose of the practice of oath-swearing is to employ religion to see that a legal prescription is adhered to. The invasion of that freedom for some religious and cultural communities is disproportionate to the expected results.¹²¹² The unfair indirect discrimination can be easily remedied by presenting intended swearers with a choice to either swear an oath according to their religions or to make a secular affirmation. This change would promote fairness and equality and may even promote the administration of justice.

The final section of this chapter cursorily investigated the oath-swearing practices of specific religions, Islam,¹²¹³ Judaism,¹²¹⁴ Hinduism,¹²¹⁵ and African Customary law

¹²⁰⁸ See 6.3.4 above.

¹²⁰⁹ See 6.3.4 above.

¹²¹⁰ See 6.3.4 above.

¹²¹¹ See 6.3.4 above.

¹²¹² See 6.3.4 above.

¹²¹³ See 6.4.1 above.

¹²¹⁴ See 6.4.2 above.

and religious traditions.¹²¹⁶ Oath-swearing remains relevant for the Islam religion because the religious obligations stated in the Quran are not subject to change and must be applied stringently in all religious dealings. It must further be borne in mind that the Quran also functions as a law book, as well as a religious text in most Middle Eastern countries. The legal pluralistic nature of the South African legal system provides for recognition of the religious duties and obligations provided by the Quran, provided these do not infringe upon the rights contained in the Bill of Rights.¹²¹⁷ For purposes of oath-swearing as a religious duty, it seems that the Islam religion aids the promotion of justice where its followers and the law are concerned by making perjury such a grave religious trespass. Whether such an oath will be followed, will have to be negotiated and discussed with the Muslim Judicial Council.¹²¹⁸

When taking into account the motivations for swearing an oath within the Jewish tradition and the consequences of perjury and oath-swearing, along with the rule of *dina d'malchuta dina* it can be safely inferred that should the state require the swearing of an oath, Jews are allowed to swear such an oath.¹²¹⁹ The swearing of said oath has to be according to the religious principles of a Jewish oath. This means that they have to validate the oath by referencing the name of God, they are allowed to place their hands on the holy books, they are only allowed to swear an oath in God's name and they have to be faithful and obedient.¹²²⁰ All of these aspects can be satisfied with ease in a court of law where assertory oaths are sworn, or in cases where promissory oaths are required (an oath of office, for example).¹²²¹

The role of *karmas* in the Hindu law is described above and the practice of oath-swearing in the Hindu religion must be seen in the light of the *karmas* and the

¹²¹⁵ See 6.4.3 above.

¹²¹⁶ See 6.4 above and 6.4.4 particularly.

¹²¹⁷ Chapter 2 of the *Constitution*.

¹²¹⁸ Muslim Judicial Council 2015 <http://mjc.org.za/>. See for example the *Recognition of Muslim Marriages Bill* in GN 37 in GG 33946 of 21 January 2011.

¹²¹⁹ See 6.4.2 above.

¹²²⁰ See 6.4.2 above.

¹²²¹ See 6.4.2 above.

ultimate realisation of *moksha*.¹²²² It could be more important for an oath-swearer to be truthful according to the Hindu religion, because of the far-reaching consequences of perjury.¹²²³ Perjurers might find themselves with negative *karmas* which could influence the nature of their next lives to such an extent that the realisation of *moksha* is pushed even further out of reach.¹²²⁴ The necessity for truthful testimony might be both externally and ethereally motivated. Oath-swearing can thus be considered as a successful form of ensuring truthfulness in courts and commitment to obligations relating to a certain position or office.

In the section dealing with the practices of oath-swearing according to the African customary traditions, introductory discussions on African traditional religions initiated the investigation.¹²²⁵ The interrelationship between religion and law in this context was underscored by unique forms of oath-swearing; and the unique philosophical and theological considerations imposed by the African traditional religions are seen to have influenced the practices of oath-swearing.¹²²⁶ The active role of ancestors in the administration of justice was discussed with a focus on oath-swearing as a means of calling upon these ancestors for their aid. The unique philosophical and theological considerations imposed by the African traditional religions were seen to have influence the practices of oath-swearing.¹²²⁷ Certain instances of oath-swearing have unique approaches and the relationship between perjury and *ubuntu*¹²²⁸ is noteworthy given the cultural, religious and legal background.¹²²⁹ The aforementioned influences and developmental processes regarding the development of oath-swearing in South African law, and the constitutional influences will be used to make conclusions and recommendations for the position of oath-swearing in South Africa.

¹²²² See 6.4.3 above.

¹²²³ See 6.4.3 above.

¹²²⁴ See 6.4.3 above.

¹²²⁵ See 6.4.4 above.

¹²²⁶ See 6.4.4 above.

¹²²⁷ See 6.4.4 above.

¹²²⁸ See 6.4.4 above.

¹²²⁹ See 6.4.4 above.

Chapter 7 Conclusion and recommendations

South Africa is a diverse and multi-cultural country with a legal system based on constitutional values and legal pluralism.¹²³⁰ The influence of religion in South Africa is unmistakable and the principle of cooperation between religion and law is an important part of the South African legal system.¹²³¹ One of the intersections between law and religion is the practice of oath-swearing. Oath-swearing can be defined as a legal action with religious implication.¹²³² This intersection is not novel, nor is it unique to the South African legal system.¹²³³ Oath-swearing can be broadly divided into two categories. The first category refers to the assertory oaths and the second to promissory oaths.¹²³⁴ Swearers can either attest to the truth of a statement regarding a past occurrence or that they promise to act in a specific manner in the future.¹²³⁵ The assertory and promissory oaths were used throughout history for a myriad of reasons and these oath-swearing practices, which are not products of South African law, were transplanted into South African law through developmental processes.¹²³⁶

This study aimed to investigate how the external and internal legal history influenced the development of the practice of oath-swearing and focused on a few eras in the South African legal history.¹²³⁷ Chapter 2 provided a transdisciplinary perspective for the study of the development of the practice of oath-swearing in South African law,¹²³⁸ and was applied to study the development of the practice of oath-swearing in the Roman law, Roman-Dutch law and the Netherlands,¹²³⁹ as these eras form some of the pillars of the South African legal system.¹²⁴⁰ Selected eras in the development of the practice of oath-swearing in South Africa were followed from the settlement as it developed at the Cape until

¹²³⁰ See Chapter 1 above.

¹²³¹ See Chapters 1, 2 and 6 above.

¹²³² See Chapter 1 above.

¹²³³ See Chapters 1, 2, 3 and 6 above.

¹²³⁴ See Chapters 1 and 2 above.

¹²³⁵ See Chapters 1 and 2 above.

¹²³⁶ See Chapter 2.

¹²³⁷ See 1.6 above.

¹²³⁸ See Chapter 2 above.

¹²³⁹ See Chapter 1 and 2 above.

¹²⁴⁰ See Chapters 3 and 4 above.

the current Constitutional era. The religious aspect of oath-swearing required an investigation into the practices of oath-swearing as it pertained to the religions and practices that prevail in a multi-cultural and legal pluralistic South Africa. These religions and practices are Islam, Judaism, Hinduism, and African Customary law.

7.1 Law and the oath

A distinction was drawn between *law* and *non-law* in order to ascertain the place of the practice of oath-swearing and how it functions in different contexts.¹²⁴¹ Certain definitions were used in an attempt to define law and apply that definition to the practice of oath-swearing.¹²⁴² A functional and pragmatic description of law, which focuses on how it can be applied as a system which is separate from norms and customs, was selected.¹²⁴³ It focused on both the positive and negative functions of law as dictated by general will. The positive function of law is law that allows a party to swear an oath, and the negative function, or the prohibitory side of law, is the sanction that follows in the instance of oath-breaking.¹²⁴⁴ Law and religion prescribed different sanctions, the law perjury and religion divine punishment. However, whenever a promissory or assertory oath is sworn, even in South African law, the swearer calls upon a Divine Authority.¹²⁴⁵ The sanction applied to oaths in law seems to ensure that the swearing of an oath can no longer merely be regarded as a norm or a custom, but that it became a legal stipulation which has the force of law, regardless of the religious aspects present in oath-swearing.

Initially, the Roman law did not have a formal division between law, religion and other aspects of social life, at least, not as it is understood in contemporary terms.¹²⁴⁶ The king was the head of religion as well as the person who was

¹²⁴¹ See 2.2 above.

¹²⁴² See 2.2 above.

¹²⁴³ See 2.2 above.

¹²⁴⁴ See 2.2.1 above.

¹²⁴⁵ This aspect is discussed throughout the study, but see 5.3 and 6.2 in particular.

¹²⁴⁶ See 3.1 above.

primarily responsible for the administration of justice.¹²⁴⁷ This is an indication that religion and law was intertwined in such a manner that religious prescriptions became law, and law became religious prescriptions.¹²⁴⁸ This position later developed into a system of unwritten law, which was somewhat removed from the confines of religion and placed into a codified law, the *Lex Duodecim Tabularum*.¹²⁴⁹ The positive and negative functions of law in the context of oath-swearing are present in the early developments of law in the Roman law.

This separation between law and religion, and the formal codification of the resultant product, continued steadily until the influence of a new religion, Christianity, prompted a renewed comingling of law and religion.¹²⁵⁰ Oath-swearing continued to be consistently used during this period and played an integral part in law, in both its promissory and assertory forms.¹²⁵¹ The Roman-Dutch law is a product of the reception of the Roman law in the Netherlands, particularly Holland, and the law retained the positive as well as the negative function in its application.¹²⁵² Oath-swearing was important in the administration of justice; the breaking of an oath was punished by law and the divine.

The Roman-Dutch law followed the Dutch settlers to the Cape and influenced the understanding of law in the early history and development of South Africa.¹²⁵³ The practice of oath-swearing which accompanied the Dutch settlers was transplanted into the four colonies.¹²⁵⁴ The swearing of an assertory oath as well as a promissory oath, formed part of the law and was regarded as a serious undertaking.¹²⁵⁵ Perjury or breaking an oath was subject to punishment from the government, or the tribunal, and from God. The unification of the colonies presented the government with the option of either including or excluding oath-

¹²⁴⁷ See 3.2.1 above.

¹²⁴⁸ See 3.1 and 3.2 above.

¹²⁴⁹ See 3.2.1 and 3.2.2 above.

¹²⁵⁰ See 3.2.2-3.3 above.

¹²⁵¹ See 3.2 and 3.3 above.

¹²⁵² See 4.1 above.

¹²⁵³ See 4.1 and 5.1 above.

¹²⁵⁴ See 5.2 above.

¹²⁵⁵ See 5.2 above.

swearing in the new, amalgamated, legal system of the Union on South Africa.¹²⁵⁶ The Union government chose to include oath-swearing in the legal system.¹²⁵⁷ Promissory oaths were sworn by state officials and assertory oaths in courts; perjury was prohibited.¹²⁵⁸ In 1961, South Africa gained independence and was presented with the same choice.¹²⁵⁹ The state chose to include oath-swearing in subsequent legislation, which indicates that oath-swearing was so well ingrained in the law that its omission would cause a noticeable chasm in the legal system.¹²⁶⁰ The *Constitution of the Republic of South Africa*, 1996 provided South Africa with yet another opportunity to evaluate oath-swearing as part of the law, but not only did it retain its place in legislation, promissory oaths were also added into the Constitution.¹²⁶¹

Legal pluralism in South Africa, promoted by the Constitution, created an environment where multiculturalism is a positive contribution to the legal system. Each of the four religions and practices referred to, Islam, Hinduism, Judaism and African customary law recognises the practice of oath-swearing, to a greater and lesser degree. The study shows that these four religion practices do provide for the swearing of the oath and for punishment in instances of perjury or the breaking of an oath. In these instances, oath-swearing is a religious and legal undertaking and has both religious and legal prescriptions and prohibitions. As indicated above,¹²⁶² the current oath-swearing legislation does not allow for oaths to be sworn according to religions other than Christianity, and this constitutes unfair indirect discrimination on the basis of religion.¹²⁶³ Not only is it discriminatory, but it also bars followers of other religions from swearing an oath based on their own religion which subtracts from the value of oath-swearing as the religious aspect is ignored and the purpose of oath-swearing is to some extent, undermined.

¹²⁵⁶ See 5.3 above.

¹²⁵⁷ See 5.3.1 and 5.3.2 above.

¹²⁵⁸ See 5.3.1 and 5.3.2 above.

¹²⁵⁹ See 6.2 above.

¹²⁶⁰ See 6.2.1 and 6.2.2 above.

¹²⁶¹ Schedule 2 of the *Constitution*.

¹²⁶² See 6.3 above.

¹²⁶³ See 6.3 above.

Oath-swearing, as a legal stipulation, is considered to be law and not merely a norm or a custom; and therefore oath-swearing has positive and negative functions. It aims to urge swearers to be truthful and it has the means to enforce the breaking of that oath, be it by law or by the divine.

7.2 Language, communication and society

Language is an external influence on oath-swearing and is regarded as a method to interpret the law into an understandable medium. This requires information to be translated, which can in turn influence law. Language is an integral part of the rule of law, because the law must be communicated to ordinary people in an understandable form.¹²⁶⁴ This aspect extends well into the culture of a society as law, culture and society are all interdependent. Language develops as the society develops and it is important to consider its context. A religious or legal rite used 2000 years ago can be called an oath, but it does not mean that the current definition of an oath can be applied to that rite.¹²⁶⁵ The oaths sworn during the selected eras, above, were all inspected in their relevant historical contexts.

Communication, society and semiotics have significant bearing on this point of discussion as the swearing of an oath is a physical action where a person utters certain words in a legal setting. These words, and the manner in which they are delivered, may have meaning to the swearer as well as the audience or society. The act of oath-swearing was also evaluated to see if it could be described as communication. Communication is multifaceted and can include verbal and non-verbal communication as well as interpersonal and intrapersonal communication. The oath is always a verbal process, but there may be non-verbal actions that accompany the verbal oath-swearing. In the pre-Justinian¹²⁶⁶ and Justinian period,¹²⁶⁷ it was common practice to have the swearer touch certain objects or perform certain rituals. This practice is also included in the Dutch and Roman-

¹²⁶⁴ See 2.3 above.

¹²⁶⁵ See 2.3 above.

¹²⁶⁶ See 3.2 above.

¹²⁶⁷ See 3.3 above.

Dutch law¹²⁶⁸ where it is common practice to raise the index finger and the middle finger to heaven or to touch certain sacred objects. The various religions¹²⁶⁹ also prescribe particular rituals to accompany oath-swearing, some of these are more difficult to perform than others. These rituals also added a societal aspect to the swearing of an oath as it was a requirement of the Roman law that oath-helpers assisted with the swearing of an oath.¹²⁷⁰ All these non-verbal processes are considered to be communication and are used to promote the purpose of oath-swearing.

Law contains a collection of ritualistic or ceremonial exercises, all of which are done for a specific legal reason. Oath-swearing is an example of one of these ceremonial actions. The ritual is used for a specific reason and the swearer should be aware of the implied intention when undertaking an oath. De Groot¹²⁷¹ states that an oath is only binding if the swearer has the intention to swear and to give the oath a binding effect. Semiotics, which resort under communication, are part of societal interactions and in the analysis of the vocabulary used in oaths and the circumstances under which oaths are sworn, it is clear that swearing an oath requires performative utterances in order to produce the desired results. These performative utterances are called speech acts which are required to be understood by the hearer as it has the ability to affect the institutional state of affairs.¹²⁷²

The performative aspect of oath-swearing moderates the behaviour of swearers and aims to achieve a desired outcome.¹²⁷³ In certain instances, for example, the Netherlands¹²⁷⁴ and South Africa,¹²⁷⁵ certain parties¹²⁷⁶ were barred from swearing an oath due to the possibility that they might lack the required understanding of the oath and the implied consequences and obligations of the

¹²⁶⁸ See Chapter 4 above.

¹²⁶⁹ See 6.4 above.

¹²⁷⁰ See Chapter 3 above.

¹²⁷¹ See 4.2 and 4.4 above.

¹²⁷² See 2.3 above.

¹²⁷³ See 2.3 above.

¹²⁷⁴ See 4.2 above.

¹²⁷⁵ See 5.2.1 and 6.2.1 above.

¹²⁷⁶ For example children or persons who did not subscribe to a particular religion.

speech act, and may then unwittingly commit perjury. In other instances, oaths were used to facilitate political ends and the swearing of an oath had even greater consequences. Promissory oaths were used for this purpose from the Roman period until the South African constitutional era, in almost all of the eras. In some cases it was used to provide a semblance of legitimacy to rules and in other instances it was used avoid or end wars.¹²⁷⁷ Oath-swearing seems to be a unique social act.

7.3 Religion

Religion adds a unique aspect to law as it contains aspects of social life and religious life.¹²⁷⁸ This relationship between law and religion becomes more blatant where oath-swearing is concerned.¹²⁷⁹ Oath-swearing is a legal principle which employs a religious action for support. Religion is enshrined in the letter and essence of oath-swearing.¹²⁸⁰ The dual function of oath-swearing requires swearers to call upon a deity to witness the swearing, and secondly, the deity's wrath or disfavour is invoked should the swearer fail to adhere to the terms of the oath. Religious metaphysics (which includes community rights, religious rights, religious continuity and obedience to the divine) compels followers of that particular religion to adhere to the prescriptions of an oath sworn to the relevant deity. This is the reason that can be put forth for the recommendation that the swearer be allowed to swear an oath in the name of their own deity according to the prescriptions of their religion.¹²⁸¹

The legal consequence for breaking an oath is, for example perjury. This matter is settled by courts and the presiding officers can prescribe a punishment.¹²⁸² The religious consequence for breaking an oath is that the deity in whose name the oath is sworn is taxed with the responsibility to ensure that oaths are not broken in his or her name. In the Roman period and in some of the religions discussed

¹²⁷⁷ See Chapters 3-6 above.

¹²⁷⁸ See 2.4 above.

¹²⁷⁹ See 2.4 above.

¹²⁸⁰ See 1.1, 1.5 and 2.4 above.

¹²⁸¹ See 6.4 above and 7.4 below.

¹²⁸² See Chapters 5 and 6 above.

above, the swearers feared an immediate reaction from the deity, for example a lightning bolt from the sky, but contemporary swearers are subject to a somewhat delayed reaction where the divine judgment will only occur after death. The swearing of an oath can either be merely formalistic or it can have a functional application. In the Roman law, oaths were sworn because they had a functional purpose and were not merely used as part of the procedure. This function seemed to diminish slightly as people swore easily and according to procedure, but when the Roman Empire became more Christian during the Dominate and the Justinian period, the swearing of an oath regained much of its functional application and the swearer risked much through swearing an oath.

This same decline can be seen in the Roman-Dutch law which initially gave a functional application to the practice of oath-swearing, but in the contemporary Netherlands, the oath is merely a formalistic ritual. It does, however, seem that the oath is becoming more functional in its application in the Netherlands as a result of the increased instances of swearing. The position in South Africa follows the same fluctuating pattern as can be seen above. The oaths sworn during earlier periods in the South African history had a functional application and the fear of breaking the oath was very real. Oath-swearing was widely used and the consequences thereof were feared. In contemporary South African law the oath has lost its functional purpose, regardless its ubiquity. Oath-swearing is a matter of procedure, and it seems that the legal and religious consequences contained in oath-swearing are not explained to swearers. Perjury is also not always prosecuted due to it being arduous to prove.

Religion should be used to promote the ends of justice and it should exist in a symbiotic relationship with the law. The implication is that the aim of the practice of oath-swearing is attainable if swearers were to swear oaths with the implications and the consequences of breaking the oath, firmly in mind.

7.4 Recommendations

On the basis of the above analysis of the development of oath-swearing, the following recommendations can be put forward: The unfair indirect discrimination

which is currently a result of the exclusion of the aforementioned religions from oath-swearing can easily be remedied by firstly, presenting intended swearers with a choice to either swear an oath according to their own religions or to make a secular affirmation, as is already possible. The relevant sections that prescribe oath-swearing can be rewritten to include other religions, or the name of the deity who must be invoked can merely be left blank and the swearer can insert the name of the deity in whose name the oath is taken. Secondly, it is recommended that the person who is responsible for the administration of the oath, be it in the context of an assertory oath or a promissory oath, must inform the intended swearer of the implications of the swearing of an oath; what constitutes perjury or the breaking of the oath; and the religious and legal consequences of committing perjury or breaking an oath. These remedies constitute minimal changes to current legislation, but the advantages of these changes are without measure. This change would promote fairness and equality and may even promote the administration of justice.

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