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Law and the Literary Field in South Africa, 1910–2010

Ted Laros

There is a fairly significant body of research available on the administrative regulation – that is, censorship – of both imported and domestically produced literature that was carried out in South Africa in the period between, roughly, 1870 and 1990 (cf. e.g., Coggin 1983; Silver 1984; Ehmeir 1995; de Lange 1997; McDonald 2009). In this body of research, the period 1948–90, the period of apartheid censorship, has long since formed the focus of attention. The period before the rise of Afrikaner nationalism has been underrepresented in scholarly studies on South African censorship of literature. The *judicial* treatment of literature has also been covered only minimally. This essay attempts to partly fill this gap as it presents an overview of the way in which literature has been treated by the South African judiciary in the period 1910–2010. Among other things, it intends to demonstrate that when one seeks to adequately understand apartheid censorship of literature, one cannot ignore the way in which the judiciary dealt with the medium both prior to and during the period 1948–90.

Furthermore, it aims at exploring what the judicial treatment of literature in twentieth-century South Africa might tell us about the autonomization of the nation's literary field. Departing from the premise that literary trials might serve as a barometer registering the presence – or absence – of a relatively autonomous literary field in a country and that by submitting literary trials to an institutional and literary conceptual analysis one might be able to put this barometer function to use (cf. Grüttemeier and Laros 2013), this essay will present the results that such analyses have yielded with regard to the case of South Africa.¹ That is to say that it will attempt to formulate an answer to the question how the institutional and literary conceptual treatment that literature was given by the South African judiciary since 1910 – the year in which the nation became independent – might be described and explained.

In doing so, it will proceed as follows: the next section will treat the trials held in the period 1910–55 that in a direct or more indirect manner pertained to literature. After that, my essay will deal with the trials that were held in the period 1955–75, that is, the 1965 trials of Wilbur Smith's novel *When the Lion Feeds* and Can Themba's short story 'The Fugitives' and the 1974 trial of André Brink's *Kennis van die Aand* (translated by himself as *Looking on Darkness*). Continuing chronologically, I will go into the judicial treatment of literature in the period 1975–80, first and foremost into the 1978 case concerning Etienne Leroux's *Magersfontein, O Magersfontein!* The penultimate section will go into the legal and semi-legal regulation of literature in the period 1980–2010, followed by conclusions that formulate an answer to the essay's main question.

Legal groundwork, 1910–55

Until 1963, when a whole new censorship act was introduced, the regulation of literature produced abroad was an entirely administrative affair in South Africa: customs was responsible for banning offensive works of literature, and appeals against customs' decisions were dealt with by the responsible minister – who until 1934 was the Minister of Finance and as of 1934 the Minister of the Interior (cf. Geldenhuys 1977: 24). The regulation of domestically produced literature, on the other hand, was partially an administrative and partially a judicial affair in the period prior to 1963. Taking statutory measures so as to direct the regulation of domestically produced publications was a colonial and, as of 1910, provincial affair up until the 1963 censorship act came into effect, making it a national issue (Marais 1960: 50–1; Kahn 1966: 283, 285; Dean 1973: 78). J.F. Marais, judge of the Transvaal Division of the Supreme Court and a patron of literature and the arts (Kahn 1966: 292), commented that this did not mean that the legislation in this area was inadequate though, as the standard that was being prescribed was essentially uniform, as was the body responsible for prosecution: the Attorney General² (Marais 1960: 50–1).

Although apparently little use was made of the statutory provisions to suppress domestically produced books or other publications (Hepple 1960: 35; Marais 1960: 52; Kahn 1966: 286), four cases were taken to court that in a more indirect manner tell us something about the institutional status of literature within the law in the period that South Africa formed a Union (namely *Rex v. Shaw* [1910]; *Rex v. Meinert* [1932]; *Rex v. Webb* [1934]; and *Goeie Hoop*

Uitgewers v. CNA and Another [1953]). Two cases concerning allegedly obscene publications that were heard in the decades immediately preceding the birth of the Union (*Queen v. de Jong* [1894] and *G. W. Hardy v. Rex* [1905]) are of concern too, as they by common law logic would go on to form precedents on which later cases would be built. These six cases form the only cases indicative of the legal status of literature that were treated in court in pre-Union South Africa and in the actual Union since South Africa's first censorship act, the Obscene Publications Act of 1892, entered the statute books.³

Although no works were put on trial in this period that would have been characterized by literary experts or the literary socialized public as representing works of literary merit, the judiciary did come to introduce a number of concepts and procedures that would go on to play a crucial role in the legal autonomization of literature within the nation. Firstly, it required for adjudicators to apply a contextual approach when dealing with literature: incriminated passages should be judged in the light of the whole work, not in isolation. Secondly, it ruled that testimonies regarding an incriminated work might be admitted. Thirdly, it required that adjudicators would, as a matter of principle, observe tolerance with respect to changing societal norms regarding certain themes. Indeed, in the 1932 case of *Rex v. Meinert*, the presiding judge, Bok, specifically contended that a certain amount of tolerance had to be observed with regard to evolving norms concerning modern literature. In regard to the question of themes concerning sexuality, he emphatically declared that such themes

are discussed with ever increasing freedom in the literatures of all civilised peoples and to hold that all such books are obscene within the meaning of the law in this territory, because on the minds of immature, uneducated or uncivilised persons they might have a deleterious affect [sic], would mean to deprive educated people from contact with modern literature and thought in other countries and I cannot think that such could have been the intention of the Legislature. (60)

With this statement, Bok was actually taking a highly remarkable standpoint vis-à-vis the institutional status of literature. The status that Bok was granting literature with his positioning amounted to what might best be described as a colonial *exceptio artis*,⁴ a very early form of *exceptio artis* in South Africa – indeed, the first time it seems to have appeared in South African law – which also represented a very specific form of the concept.

Evidently, Bok respected that a certain amount of freedom to depict or write about sexual matters had been conquered by literature and the arts

internationally, and what is more is that he also allowed for literature to enjoy this amount of autonomy within South-West African law. Bok quite clearly gave priority to the right to read of literary socialized readers, or 'educated people', at the expense of the right of non-literary socialized readers, or 'immature, uneducated or uncivilised persons', to be protected from potentially harmful material. By granting literary socialized readers this special right, he at once, albeit implicitly, bestowed upon 'modern literature' a (relative) *exceptio artis*. Indeed, he declared that 'the test [of obscenity] cannot be whether there are persons who, incapable of understanding the real spirit of the writing, might suffer morally by being allowed to read it' (*Rex v. Meinert* 1932: 60).

The concepts and procedures which the judiciary thus came to introduce in the first half of the twentieth century effectively prepared the ground for a future recognition of a relative institutional autonomy of the South African literary field by the nation's judiciary – an autonomy which in this period did not seem to be a reality yet. That one could not speak of a relatively autonomous literary field in this period appears to be confirmed by the fact that no trials regarding 'proper' literary works were held in the Union period. Further evidence for this seems to lie in the fact that when Justice Bok in the 1932 case of *Rex v. Meinert* evidenced to be in favour of an *exceptio artis* pertaining to literature, he was exclusively referring to *foreign* literature, that is, modern European literature – not to domestically produced literature at all. Bok's advocacy of what might be termed a colonial *exceptio artis* did not receive the judicial and statutory consolidation that its conceptual relative, the *exceptio scientiae* – a concept that appears to have been introduced in another 1930s case, namely that of *R. v. Webb* of 1934 (cf. Laros 2013: 42ff) – did receive in South Africa at the time. This also seems to underline the hypothesis that the literary field, unlike its academic counterpart, had not yet reached a mature stage in this period.

Hesitant legal recognition, 1955–75

By the time South Africa became a Republic, that is, by the early 1960s, this appeared to have changed. A first indication for this can be found in the fact that the new censorship act introduced at this point, the Publications and Entertainments Act of 1963 (hereafter: PEA), contained sections that provided for literary experts to take up positions within the new censorship bureaucracy. Another indication can be found in the fact that the act introduced the

concept of the likely reader, a concept which had been borrowed from the English Obscene Publications Act, 1959. This concept had been introduced in the latter act to adapt the old Hicklin test, a test that had been dominant within the Anglophone world since 1868. The concept of the likely reader effectuated that courts no longer had to estimate what the effect of a publication would be on the *possible* reader but what its effect would be on the *probable* reader. With this concept in hand, one did not necessarily always have to take ‘weak’ readers (according to prevalent thought, youth, women, uneducated people, native populations, etc. fell under this category) into account when judging a publication: now it was also possible to postulate a readership comprised of ‘strong’ readers (i.e. adults, [well-] educated citizens, literary socialized people, etc.). The fact that in the 1960s, the first trials concerning works of fiction written by South African literary actors took place – namely the 1965 trials of Wilbur Smith’s *When the Lion Feeds* and the 1965 trial concerning Can Themba’s ‘The Fugitives’ – provides even further evidence for the hypothesis that the South African literary field had reached a higher stage of development around that time.

When one examines the trials regarding Smith’s novel and Themba’s short story that were held in the Cape Provincial Division of the Supreme Court, one can discern that the majority of this court was of the opinion that a certain degree of institutional autonomy should be granted to the literary field. In the Cape trial of Smith’s work, both the majority and minority judgements contained critiques of the new act: both lamented that literature had not been given enough protection under the PEA and that the act had not followed to a greater extent the line of the English Obscene Publications Act of 1959. Whereas the latter act had instituted an explicit *exceptio artis* pertaining to literature through its four fundamental instruments of the contextual approach, the likely reader test, the public good test and the admissibility of expert evidence, only one of these instruments had been incorporated into the former act – the concept of the likely reader. This notwithstanding, the majority of the Cape Court appeared to employ a number of means it had at its disposal to guarantee a certain degree of institutional autonomy for literature after all. They found a way to demand that the contextual approach be applied and a publication thus be judged as a whole and not on the basis of isolated passages; they appeared to be applying the concept of freedom of expression as an argument for granting literature some (legal) space; and, finally, for the very same purpose, they applied the likely reader test. The unanimous Cape judgement in the case of Can Themba’s ‘The

Fugitives' cohered with the judgement concerning Smith's *Lion* in that it secured a considerable amount of legal autonomy for the 'intellectual' reader (cf. *S v. Insight* 1965: 777; Laros 2013: 76).

In the Appellate Division (hereafter: AD) trial concerning Smith's *Lion*, a quite different position was taken, however. To be sure, two minority opinions were filed that followed the same autonomy-oriented line as the majority judgement in the Cape trial of Smith's novel and the judgement in the trial of Themba's 'Fugitives' had mapped out. Yet, the majority came to set a quite different precedent. Among other things, they stipulated that literary expertise could play only a minimal role in judicial proceedings regarding literary works. Furthermore, they restored the isolated-passage criterion, thus making it possible to ban books on the basis of isolated passages. They declared it legally invalid to compare an incriminated work with other books, whether modern or classic. And lastly, they added an extra clause to the likely reader test, thereby effectively rendering it an average reader test, comparable to the one that had been applied before the statutory changes of 1963. For the majority, the PEA was aimed *inter alia* at combating contemporary sexually explicit literature; with their judgement, they provided the judiciary with a number of instruments with which to do this.

Some ten years later, the Cape trial of André Brink's *Kennis van die Aand* reversed much of the heteronomy-oriented line of approach that had been laid down by the AD in the *Lion* case. True, one of the three judges hearing the case, Justice van Wyk, adopted a position that for the largest part cohered with the position of the majority in the case of Smith's *Lion*, yet van Wyk did reveal to be recognizing the value of literary expert evidence. Indeed, he determinedly underpinned his judgements with the literary conceptual analyses of the literary behaviour of Brink that had been delivered by the literary experts testifying on behalf of the Publications Control Board, the party defending the banning of Brink's novel. To be sure, the amount of legal autonomy that van Wyk effectively granted the literary field through the validation and employment of expert evidence was relatively insignificant when viewed in the light of the most fundamental aspect of his position: for him, the sovereignty that the field of power enjoyed over the literary field was namely virtually absolute. Yet, at the same time the very fact of his recognition of literary expertise did appear to reveal that the literary field had already reached a considerable degree of (internal) institutional autonomy.⁵

The supposition that the literary field had already reached a significant degree of institutional autonomy by 1974, the year in which the trial took place, was further underlined by the motivations of the Justices Diemont and Steyn. The opinions of these two judges were much more autonomy-oriented and thereby effectively rendered the position of van Wyk the minority position. Both Diemont and Steyn allowed the literary field a quite significant degree of autonomy vis-à-vis the law. This was brought about first of all because both categorically favoured a freedom-oriented approach to publication regulation. Moreover, it came about because of the way in which the two judges conceptualized the likely reader, both on the more theoretical and on the more practical levels. The recognition of the (judicial) value of literary expertise and the application of arguments advanced by such experts represented a third way in which it was brought about. Lastly, the legal recognition and, indeed, judicial employment of literary conceptual arguments adhered to by contemporary literary actors⁶ contributed to the creation of an institutional autonomy of literature vis-à-vis the law. Yet, although both adopted a position that established a considerable degree of artistic freedom for literature, this freedom clearly remained but relative. In the end, both namely declared that Brink's novel was undesirable in terms of the PEA and that the ban on the novel thus had to be upheld, because both found that it had transgressed the boundaries of the permissible by its thematization of religion, that is, Christianity – not with its thematizations of 'political' or 'moral' issues. Apparently, the amount of institutional autonomy that the two were willing to grant literature was smallest when it came to religion.

Despite rollback efforts, ongoing recognition, 1975–80

By the time that the judgement was delivered in the case of Brink's *Kennis*, the Vorster administration had already begun making an apparently determinate effort to reduce the amount of autonomy that literature had acquired vis-à-vis the law at that point. The PEA of 1963 was repealed and replaced with the Publications Act, 1974 (hereafter: PA). With the latter act, the Legislator had chosen to get rid of the only two instruments incorporated into the former statute with which literature could be granted a certain amount of legal autonomy. Firstly, the concept of the likely reader was scrapped from the statute books.

And secondly, it was no longer stipulated that individuals could be appointed members of one of the censorship bodies by virtue of their 'special knowledge of art, language and literature': the provisions of the old act that had enabled literary experts to take such central positions in the censorship bureaucracy had also completely vanished in the new act. Moreover, the right to appeal to the Supreme Court against decisions of the censors was also abolished. A semi-judicial body called the Publications Appeal Board (hereafter: PAB) was set up to deal with such appeals instead, and the only role that the Supreme Court was left to play was to review decisions of this PAB, when it was called upon to do so. Censorship thus became an entirely executive affair – an affair that was indeed firmly in the hands of the Minister of the Interior.

Indeed, the approach towards literature taken in the initial phase of the PAB's existence, that is, the period 1975–8, effectively reduced the amount of autonomy that literature had come to attain over the years considerably. Chaired by former Supreme Court Justice J.H. Snyman, the board substituted the concept of the average man for the concept of the likely reader. As the latter concept had proven to be one of the most important instruments for effectuating a significant amount of legal autonomy for literature in South Africa, the re-implementation of the concept of the average reader effectively cut off one of the foremost paths to an artistic freedom for literature. Two other aspects of the PAB's approach further underlined its rather heteronomist orientation. Snyman's board refused to admit evidence aimed at comparing an incriminated work to other works circulating within the community, as it reasoned that the act had clearly been meant to be interventionist and that it was, therefore, aimed at reducing the rights of literature rather than promoting them. Furthermore, the board appeared not to be following the precedent that had been set by the Supreme Court in the 1972 case of *PCB v. Republican Publications* – this case did not revolve around a work of literature but around a popular magazine – with regard to the question of contextualism, another instrument that had proven to be fundamental to the institutional autonomization of literature in South Africa. Whereas former Chief Justice Ogilvie Thompson had in the latter case explicitly ruled out the isolated-passage criterion and declared that a careful contextual approach be applied when it came to the written word, the board did not adopt such a principled contextual approach. In fact, by adopting the criterion of the average reader and declaring that this reader would not read contextually, the board in effect seemed to be disregarding the precedent that had been established by Ogilvie Thompson. In these three crucial ways, Snyman's board considerably reduced

the amount of institutional autonomy that the literary field had reached in the period before the PA had come into force.

The approach of the PAB also revealed that Snyman et al. did realize that the literary field had become a societal fact that could not be ignored, however. The board made sure to carefully stress that literary merit was a factor that had to be taken into account when adjudicating works in terms of the PA and that functionality, that is, the functionality of textual elements within the entire text, was also a factor that had to be taken into consideration. Furthermore, the board admitted evidence by literary experts, and in principle it did indeed leave the establishment of the literary merits of an incriminated work entirely up to them. In practice, this ostensible recognition of a certain amount of autonomy of the literary field did not amount to much, however, as the PAB case of Etienne Leroux's *Magersfontein, O Magersfontein!* clearly demonstrated. For although the literary experts delivering testimony in this case generally held this work to be of outstanding literary value, it still had to succumb to the supposed convictions and feelings of the postulated average man.

The heteronomy-oriented approach of Snyman's PAB was not entirely endorsed by the Supreme Court, however. In fact, in the Transvaal Provincial Division's review of the PAB's decision on *Magersfontein*, the court came to invalidate the most fundamental features of the board's line of approach. First of all, it effectively salvaged the concept of the likely reader, the concept that had been eliminated from the statute books and that, on the basis hereof, was considered to be no longer lawful by the PAB. The court underpinned this decision by referring to the judicial tradition with regard to censorship, that is to say that it referenced opinions that had been handed down in the trials of Smith's *Lion* and Brink's *Kennis* and the judgement delivered by former Chief Justice Ogilvie Thompson in the case of *PCB v. Republican Publications*. As the concept of the likely reader had proven to be of such vital importance for the legal autonomization of literature in South Africa, the court's decision delivered a quite crucial contribution to shoring up the amount of institutional autonomy that the literary field had come to attain in the period before the Vorster Cabinet and Snyman's apparent rollback efforts. The second way in which the court came to check the heteronomist efforts of Snyman's Board lay in its emphasis that the contextual approach was the only valid approach when it came to judging works of literature. The court again underpinned its decision by pointing towards the nation's judicial tradition: it again referred to the AD case of *Lion* and the judgement of Ogilvie Thompson in the *PCB*

v. Republican Publications case. As the contextual approach had proven to be about as decisive an instrument in the legal autonomization of literature within the nation as the concept of the likely reader had, the court's position taking in this issue was indeed crucial too. The final way in which the court came to restrengthen literature's position vis-à-vis the law was through its ruling that a strong meaning should be attached to the all-important statutory term of 'offensiveness'. The strategy of attaching a strong meaning to the terms that the statutes pertaining to censorship gave for testing whether or not a work was 'undesirable' had also proven to be a means by which the freedom of literature could be increased. By maintaining this principle, the court thus secured yet another legal instrument with which the literary field could be granted an amount of autonomy vis-à-vis the law.

Yet, although the Transvaal Bench so clearly respected the autonomy-oriented course that the Supreme Court had come to take over the years, it did choose to disregard a very important precedent that had been set by the majority in the case of Brink's *Kennis*, namely the precedent pertaining to the question of the relevance of the concept of the likely reader for the religious provisions of the act. The *Kennis* trial had been the only literary trial in which this question had come up. In this trial, the majority of the judges had declared in so many words that it was relevant, both to the religious and to the political provisions of the law. Both Diemont and Steyn had advanced that it was of vital importance to determine who was going to read a book when one was to adjudge it in terms of the law. Indeed, as Steyn argued, it was absurd to ban a publication because it would offend people who were not going to read it. Diemont and Steyn's position taking effectively expanded the (relative) legal autonomy of literature to also cover the religious and the political stipulations of the law: their position effectuated that the literary reader was the determinate factor not merely when it came to the moral provisions of the law but also when it came to the law's religious and political provisos. The Transvaal Court, however, chose not to follow the precedent set by the majority of the Cape Bench in the *Kennis* case but to adopt the position that van Wyk had taken in the same trial instead. The latter had stated that the likely reader should not be read into the religious and political sections of the act. So, although the judgement of the Transvaal Court effectively shored up the institutional autonomy of literature in three very significant ways, at the same time, it effectuated a crucial setback when it came to the autonomy of the literary field vis-à-vis the religious stipulations of the act. As a consequence of its principled position taking, the court had to uphold

the PAB's judgement that Leroux's *Magersfontein* constituted an undesirable work in terms of the PA and should therefore be banned.

The furore accompanying the *Magersfontein* case prompted the new Minister of the Interior, Alwyn Schlebusch, to break with the heteronomy-oriented approach towards literature that had been instigated by his predecessor Mulder through the PA. By amending the act, he enabled the PAB to grant literature a more autonomous position vis-à-vis the law than it had had since the PA had come into force. The Publications Amendment Act of 1978 made it in principle possible to grant literary socialized readers more freedom of choice once again by allowing the board to release books under an age restriction. Moreover, the act arranged for literary experts, who had effectively been written out of the statutory regulations regarding censorship through the PA, to once again play a more prominent role within the system. The response to these statutory amendments of Snyman's Board was quite indifferent, however. Indeed, despite the changed statutory framework and despite the fact that the majority of the cultural, judicial, and political elites apparently felt that the literary field should be granted a relative institutional autonomy vis-à-vis the law, the board chose to continue its restrictive approach. But with both the judiciary and the government being in support of a relative freedom for literature, the board could not keep up its line of approach very long. In fact, the next year, at a point at which Snyman's tenure was coming to an end, the retired judge was not given a second five-year term as Chairman of the PAB. Instead, the 37-year-old J.C.W. van Rooyen, the PAB's Deputy Chairman of the period 1975–80, was appointed Chairman for the next five years.

Decisive legal recognition, 1980–2010

With van Rooyen taking over from Snyman, the board started to consistently continue the approach towards literature that the Supreme Court had taken in the period 1963–78. Van Rooyen's Board came to guarantee a fairly high degree of institutional autonomy for literature through the instruments of the contextual approach, the concept of the likely reader, a fundamental tolerance towards the written word, and a consistent recognition of literary expertise. Moreover, the board increased the degree of freedom that the Supreme Court had granted the literary field through its particular application of the adjudicating factor of literariness – an application that

was justified through van Rooyen's interpretation of the Publications Amendment Act of 1978: as he declared, this latter act had expressly been aimed at acknowledging what he termed the 'minority rights' of literature.

The board further expanded literature's institutional autonomy by consolidating the recognition that Justice Steyn had given to pragmatic literature (*sensu* Abrams 1975) in the trial of Brink's *Kennis*. In addition to giving (semi-) legal recognition to the autonomist conception of literature that the contemporary disciples of van Wyk Louw adhered to – a recognition that this poetics had enjoyed ever since the first Publications Control Board had been instigated in 1963 (cf. McDonald 2009) – the board namely chose to also recognize the pragmatic conception of literature that was dominant amongst black literary actors; it did so on the basis of its own concept of protest literature. In effect, van Rooyen's approach, with its crucial explanation of the concept of literariness, amounted to the institution of a quite far-reaching institutional autonomy for literature. The semi-legal freedom that van Rooyen's Board instigated for the medium did have its limits though, certainly when it came to religion. The 1979 and 1984 bans of Anthony Burgess's novel *Man of Nazareth* represented a clear demonstration of this.

In the interim period 1990–4, van Rooyen's successors continued the autonomy-oriented approach of the latter's Board. The relatively precarious position of literature vis-à-vis the religious stipulations of the PA was also reaffirmed when Burgess's *Man of Nazareth* was again brought before the PAB in 1992. For the third time, the board declared the novel to be undesirable, and it did so basically on the same grounds as van Rooyen's Board had done earlier.

The way in which literature has been regulated since 1994, that is, since South Africa became a non-racial constitutional democracy, cannot be regarded as an absolute break with the past. The infrastructure set up for regulating literature and other media through the Films and Publications Act of 1996 (hereafter: FPA) largely resembles the one that was in place under the Publications Act since 1975. The statutory superstructure guiding the regulation of literature did change quite drastically, however. First and foremost, an *exceptio artis* pertaining, *inter alia*, to literature was instituted on the constitutional level. Moreover, on the level of the FPA, some quite significant statutory changes were also effectuated. For the first time in South Africa's legal history, the contextual approach was proscribed statutorily. Furthermore, literature was granted absolute exemption from the Act's stipulations regarding XX and X18 classification.⁷ These statutory novelties were not entirely new to the nation's history of literature regulation at large,

though. Both of them had been implemented before: the contextual approach by the judiciary, and the literature exemption – albeit in rudimentary form – by van Rooyen's PAB in the 1980s. Indeed, the new statutory superstructure stands firmly in the nation's century-long tradition of literature regulation. This is borne out by other evidence too: The FPA's spirit of promoting freedom of choice for adults, while at the same time protecting children against harm continues a tradition that had begun as early as 1932 with the judgement of Bok in the *Rex v. Meinert* case.⁸ Likewise, the insistence of the FPA's draftsmen that in dealing with an alleged literary work, the literary merits of such a work should be assessed 'objectively' by literary experts, on the basis of a text-oriented approach, continues a long tradition in the nation's legal regulation of literature. The new statutory dispensation thus for a large part brought continuity in the regulation of literature within the nation, although the instigation of a constitutional *exceptio artis* and the guaranty of what seemed to be absolute protection to art on the level of the FPA of course both effectuated a proper legal ratification to the merely semi-legal art exemption that van Rooyen's PAB had instigated. Furthermore, the Constitution and FPA's respective ways of protecting literature effectively expanded the art exemption that had been instituted by van Rooyen's Board: Whereas the board had given but a relative protection to works of literary merit on the level of the PA, such works now received a significantly higher degree of protection on the level of the FPA. What is more, is that literature had now been given (relative) protection on the level of the sovereign Constitution.

As it turned out, however, the apparently absolute protection given on the level of the FPA was perhaps not as absolute as it seemed. The 2002 Film and Publication board case of Rushdie's *Satanic Verses* namely demonstrated that the in principle absolute exemption on the level of the act did in effect not prevent the new board from imposing sanctions on Rushdie's work in terms of the act read together with the Constitution. Whereas the FPA explicitly granted literature absolute exemption from the Act's stipulations regarding XX and X18 classification, the board decided to give an X18 classification to the book anyhow, and even added extra restrictions to it. This despite the fact that the FPB, *inter alia*, on the basis of the judgements of literary experts, held the book to represent a work of *bona fide* literature. As a result of the board's decision, a far-reaching ban on distributing Rushdie's novel remains intact in today's South Africa – a ban that is not that different from the one that was initially instigated in 1988. Apart from the fact that the case of *The Satanic Verses* appeared to reveal that literature in practice did not enjoy absolute protection on the level of the

FPA, the case seemed also to be evidencing that the institutional autonomy of literature as it is being recognized through the Constitution and the FPA is still most likely to be restricted when it comes to religious issues.

In recent years, the artistic freedom of literature has been subjected to a certain degree of erosion. The far-reaching protection that was given to literature on the level of the FPA was reduced to a certain extent through the Films and Publications Amendment Act of 2009. When it comes to child pornography, literature is no longer exempted from the act's stipulations. However, considering both the century-long tradition of the legal treatment of literature in South Africa and the way in which the FPB dealt with Rushdie's *Satanic Verses*, it is highly unlikely that the 2009 amendments could in practice have the result of restricting the institutional autonomy of literature vis-à-vis the law to such an extent as to render possible a total ('XX') ban on a work that would 'objectively' – by literary experts, that is – be labelled a work of literature. It is not probable that the administrative or judicial bodies entrusted with the task of regulating literature would go further than to impose certain restrictions on the distribution of a work of literature – as the FPB did in the Rushdie case. Over the past fifty years, the recognition of a relative institutional autonomy of literature has gradually become so firmly rooted in South African law that it is virtually unthinkable that any graver sanctions than a limitation of distributional rights would be imposed on works of literature. Besides, existing research suggests that when an *exceptio artis* is established in a parliamentary democracy, it is far too robust to easily disappear from the legal – let alone constitutional – stage.

Conclusion

Systematic research into the judicial – and semi-judicial – treatment of literature in South Africa in the period 1910–2010 reveals that the 1994 institution of a constitutional *exceptio artis* pertaining, *inter alia*, to literature did not represent an unprecedented novelty in the nation's legal tradition. Rather, it formed the constitutional culmination, and crystallization, of a process that had already been set in motion in the period 1910–55. This legal autonomization of South African literature appears to have unfolded along different lines than it did in former motherland the Netherlands or in other continental European nations such as Germany and France, for instance (cf. Beekman and Grüttemeier 2005;

Grüttemeier 2007; Sapiro 2011). The *exceptio artis* that was established in South African law was for the largest part established through different parameters than it was in the latter nations. This is undoubtedly due to South Africa's orientation towards UK and US law, instead of the continental legal tradition. Yet, as South African law began to go its own way in the 1950s, the particular parameters it came to set with regard to literature regulation cannot entirely be explained by its orientation towards the latter two countries. As the Legislature revealed to be heavily inspired by Australian and Irish law when developing its PEA in the 1960s and its PA in the 1970s (cf. Laros 2013: 57ff.), it might prove to be fruitful to compare the legal treatment of literature in South Africa to the way in which it was regulated in these latter two countries. It appears, indeed, that the commonalities in the legal infra- and superstructures implemented for governing literature regulation in these countries – not to speak of the shared roots of these nations' respective legal systems in UK law – do not provide the only rationale for undertaking such an endeavour. The fact that the institutional autonomy of literature in South Africa has revealed to be rather weak when it comes to religion might provide a further ground for doing so, as religion also seems to play an important role in the censorship histories of Australia and Ireland (cf. Kennedy 1990; Moore 2012). The fact that just like South Africa, these two nations appeared to have been quite restrictive in their legal dealing with literature, compared to other Anglophone nations (cf. Kennedy 1990; Moore 2012), provides yet a further reason for comparing the three countries. Perhaps, indeed, systematic comparative research into the legal treatment of literature in these three countries will reveal that their literary fields underwent a markedly 'postcolonial' process of institutional autonomization – a process that represents a relatively slow progression towards artistic freedom.

Notes

- 1 This essay presents some of the main findings of my dissertation 'Long Walk to Artistic Freedom: Law and the Literary Field in South Africa, 1910–2010' (Carl von Ossietzky University of Oldenburg 2013). The dissertation was written within the framework of the German Research Foundation funded project 'The Judicial Treatment of Literature in Belgium and South Africa'.
- 2 With regard to this latter point, Natal formed an exception (Marais 1960: 51).

- 3 On the basis of systematic research of Supreme Court decisions in cases concerning literature, decisions on literary works and memos of the Publications Appeal Board – the administrative body of appeal that was created through new censorship legislation in 1975 – and all of the major South African law journals and existing studies on South African censorship, I would argue that ten cases have been treated by the South African judiciary from pre-Union times until today that either directly or more indirectly pertained to literature and its status within the law. In addition to the six cases mentioned above, there were four cases between 1963 to today (namely *Publications Control Board v. William Heinemann, Ltd and Others* (1965), i.e. the Smith case; *S v. Insight Publications (Pty) Ltd and Another* (1965), that is, the Themba case; *Buren Uitgewers (Edms) Bpk en 'n Ander v. Raad van Beheer oor Publikasies* (1975), that is, the Brink case; and *Human & Rousseau Uitgewers (Edms) Bpk v. Snyman NO* (1978), that is, the Leroux case). One of these trials, namely the 1932 case of *Rex v. Meinert*, took place in South-West Africa, which at that point fell under South African jurisdiction.
- 4 The concept of *exceptio artis* implies that utterances that in principle constitute an offence can be judged otherwise when they occur in a literary work (Grüttemeier and Laros 2013: 204).
- 5 For a lucid discussion of the concept of internal field autonomy, cf. Dorleijn, Grüttemeier and Korthals Altes (2007: xvii).
- 6 Diemont endorsed the autonomist conception of literature that Brink had defended in court and Steyn quite elaborately came to defend a conception of literature that appeared to be rather coherent with the Louwian poetics that was dominant particularly amongst the older generation of the Afrikaans literary establishment at the time. Moreover, he explicitly referenced Henry James as a literary theoretical authority. (For a more systematic reconstruction of the conceptions of literature employed by the judges in the *Kennis* trial, cf. Laros, forthcoming.)
- 7 The FPA's classification XX amounts to an absolute ban. X18 limits distribution to persons of eighteen years or older. XX classifications are reserved for publications that contain visual representations of *inter alia* extreme forms of pornography, notably child pornography, and extreme violence. X18 classifications are given to publications that contain 'explicit sexual conduct'.
- 8 In his judgement in *Meinert's* case, Bok qualified his position regarding literature exemption somewhat by stating that he should add that he arrived at his conclusion 'with considerable hesitation bearing in mind the large uncivilized class of our population' (63) and that his conclusion 'must not be understood as implying that conditions peculiar to a country like this do not necessitate a stricter view of what is permissible in this respect in the interests of art and culture, than might possibly be accepted in European countries' (63). The prioritization of the right to read of the

‘civilized’ over the right to protection from harm of the ‘large uncivilized class’ of the South-West African population was thus not categorical; it did have to be balanced against the latter’s right and at some point, it seemed to be implied, the scales would tip in favour of the ‘uncivilized class’.

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