

JURISTS, STRUCTURES, AND THE DEVELOPMENT OF THE SOUTH AFRICAN LAW OF CONTRACT

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Jurists have played a crucial role in creating structures aimed at representing the South African law of contract. This Article traces how these structures originated in the civilian tradition, but were also influenced from the nineteenth century onwards by competing common law approaches. The focus is especially on the contribution of the prominent South African contract lawyer, JC de Wet. Key conclusions are that jurists, including De Wet, are strongly influenced by the structures used by their predecessors, and that innovations are often only modest in scope and introduced incrementally. Determining the underlying motivation behind the jurists' structural choices can be a complex matter. However, it is at least clear that De Wet's choices cannot be ascribed to an ideological, "purist" preference for structures followed in the civilian tradition. The effect of this tradition is rather on his method, which is characterized by a rigorous systematic and conceptual approach to setting out the law of contract, and which, at times, is quite pragmatic in its structural choices. This approach has been perpetuated in a number of standard works in the field.

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INTRODUCTION

The first congress of the World Society of Mixed Jurisdiction Jurists, held in 2002, considered various factors that could influence the processes of reception that characterise mixed jurisdictions. There, I argued that one such factor is the influence of certain jurists.¹ The purpose of this Article is to explore this idea further by examining the role that several jurists played in creating structures that set out the law of contract in South Africa.

First, I focus on key players in the civil law tradition in general, and then shift to jurists who wrote major works on the South African law of contract, and especially to its most famous

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1. Jacques du Plessis, *Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems*, 78 TUL. L. REV. 219, 251–52 nn.182–83 (2003) (mentioning such jurists as JC de Wet, Sir John Kotze, Lord President Inglis, and South African appellate judge Toon van den Heever).

twentieth-century exponent, JC de Wet (1912–1990). The cornerstone of this branch of South African law is uncodified seventeenth and eighteenth-century Roman–Dutch law, but it has a mixed nature, because it has also been influenced by English law from the nineteenth century onwards. To determine De Wet’s influence requires first examining approaches that preceded him, then identifying his own approach, especially as set out in his standard work *Kontraktereg*,² and finally assessing its fate in modern law. But before doing so, it may be of value to reflect briefly on what is meant by the “structure” of the law of contract.

The structure of something is essentially the arrangement or organization of its parts. We are therefore concerned with the arrangement or organization of the “parts” that make up the law of contract. Creating these structures has especially been the concern of the authors of standard works in the field, who constantly face the challenge of explaining it as logically and clearly as possible. This is not simply an abstract academic exercise. Clear structural exposition is highly important in legal education and in legal practice, as would readily be acknowledged by a student who first becomes acquainted with a textbook on a particular subject, or by a practitioner who has to identify the principles required to solve a legal problem.³

Through the ages, the key actors concerned with structuring the law of contract have followed a remarkable diversity of approaches. In determining their influence, and that of De Wet

2. JOHANNES C. DE WET & JAMES P. YEATS, *DIE SUID-AFRIKAANSE KONTRAKTEREG EN HANDELSREG* (2d ed. 1953) [hereinafter *KONTRAKTEREG*]. The abbreviated title “*KONTRAKTEREG*” will be used to describe the first part, which dealt solely with the law of contract. The first edition appeared in 1947, the second in 1953, the third in 1964, and the fourth in 1978. The second part of the book dealt with commercial law. James P. Yeats wrote the second part in the first to third editions, and Andreas H. van Wyk in the fourth edition. The fifth edition’s first volume, published in 1992, also dealt only with contract, and was edited by Gerhard F. Lubbe.

3. On the significance of structures in the presentation of the law, see FRIEDRICH KARL VON SAVIGNY, *2 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* § 59, at 406 (Berlin, Veit & Co. 1847). In the context of South African contract law, the significance of structure has been confirmed in reviews of some standard works in the field. See, e.g., L.T.C. HARMS, *South African Mercantile and Company Law*, 30 *TYDSKRIF VIR HEDENDAAGSE ROMEINS–HOLLANDSE REG* [J. CONTEMP. ROMAN–DUTCH L.] 91, 92 (1967) (reviewing J.T.R. Gibson, *South African Mercantile and Company Law* (2d ed. 1966)); J.F. Uys, *The Principles of the Law of Contract*, 1990 *DE REBUS* 271, 271 (reviewing A.J. KERR, *THE PRINCIPLES OF THE LAW OF CONTRACT* (4th ed. 1989)).

in particular, the following exposition of the main developments will pay special attention to certain significant themes. The first theme is the relative weight that these structures accord to the general principles of the law of contract, as opposed to the principles governing specific contracts. Secondly, there is the theme of the relationship between the law of contract and the law of obligations, which (at least) encompasses the laws of contract, delict (tort), and unjustified enrichment (restitution). Whereas South African law had already reached a certain degree of stability in its approach to these themes before De Wet's time, the same cannot be said of the third and final theme, namely the internal arrangement of the subject matter of the law of contract. We will therefore especially consider key elements in this arrangement, such as (1) the requirements for establishing a valid contract; (2) the factors that influence the operation of contracts; (3) the various forms of breach; and (4) the ways to terminate contractual liability.

I. SYSTEMS OF CONTRACT LAW PRECEDING DE WET

A. ROMAN AND ROMAN-DUTCH LAW

The modern South African law of contract is the result of a long and complex developmental process that can be traced back to Roman times. An early milestone in this process was the second-century jurist Gaius's *Institutes*, which was vastly influential in providing structural foundations for modern private law.⁴

4. GAIUS, THE INSTITUTES OF GAIUS 7-10 (W.M. Gordon & O.F. Robinson trans., 1988) ("Gaius is acknowledged as the main source for Justinian's *Institutes*, both in content and in structure. It was from Gaius that Justinian drew his division of the whole outline of private law under the heading of Persons, Things, and Actions [This] institutional structure . . . came to influence all European legal systems to a greater or lesser extent."); A.M. HONORÉ, *Introduction to GAIUS*, at xi, xii (1962) ("[I]f we take the evidence at its face value, Gaius was the originator of no fewer than three types of legal literature. The first is the institutional book. Gaius' *Institutiones* is the first work of this sort of which we know It had many imitators in the ancient world; Florentinus, Ulpian, and Marcianus wrote *Institutiones*, some on a more elaborate scale than Gaius. Justinian used Gaius' book as the basis of his own students' book; and through Justinian Gaius has become the teacher of Europe."); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 10-11, 24-25 (photo. reprint 1992) (1990) (citations omitted) ("In the course of our discussion of the origins of liability we have been referring to contractual and delictual obligations. This is the summa division obligationum, which Gaius . . . introduced in his *Institutes*. It has remained fundamental ever since and is a reflection of the fact that different rules are needed to govern the voluntary transfer of resources between two members of the legal community on the one hand,

Gaius divided his work into three books, of which the second book on “things” (*res*) is of particular significance, since it includes *obligationes* (obligations) as an important example of *res*.⁵ The sources of obligations in turn include *contractus* (contract).⁶ Crucially, Gaius’s *Institutes* does not contain an exposition of general principles of the law of contract, but rather deals with specific contracts.⁷ The termination of contracts is also not discussed in the context of the law of contract, but rather in a section dealing with all obligations, irrespective of their origins.⁸

This approach of focusing on specific contracts, rather than general principles common to them, was also adopted in post-classical Roman law (for example in Justinian’s *Institutes*),⁹ and was followed in the civilian tradition for centuries thereafter.¹⁰ It was only during the Middle Ages, when the natural lawyers placed particular emphasis on the value of promise-keeping, that developments took place which proved decisive for the creation of a “unitary,” as opposed to a “fragmented,” law of contract. As Reinhard Zimmermann stated, “[T]he modern general law of contract has essentially been developed by the natural lawyers, and our conceptual apparatus has thus been devised within the last three centuries.”¹¹

In Roman–Dutch law, however, this development took a rather unusual route. Earlier writers like Hugo de Groot (or Grotius) (1583–1645)¹² and Arnoldus Vinnius (1588–1657)¹³

and possible collisions between their private spheres on the other.”).

5. See ZIMMERMANN, *supra* note 4, at 25 (citations omitted) (“[T]he first attempt [at a logical structuring of private legal material] came from Gaius . . . Looking at the civil law as a whole, he superimposed upon the traditional contents of the civil law . . . a subdivision into persons and things; and as he added a book dealing with actions, he arrived at a tripartite subdivision: ‘Omne autem ius quo utimur vel ad personas pertinent vel ad res vel ad actiones.’”).

6. GAIUS, *supra* note 4, at 3.88–3.181.

7. *Id.* at 3.89–3.162. On the possibility that Roman jurists eventually developed such general principles, see James Gordley, *The State’s Private Law and Legal Academia*, 56 AM. J. COMP. L. 639, 640 (2008).

8. GAIUS, *supra* note 4, at 3.168–3.181.

9. See J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* 226 (1976).

10. See P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition,”* 51 HASTINGS L.J. 479, 523–24 (2000) (“[T]he Romans never developed either a general theory of contract, nor a law of contract; they confined themselves to a law of individual contracts. It is thus apparent that the Civil Law tradition moved in the opposite direction from original Roman law.”).

11. ZIMMERMANN, *supra* note 4, at 561–69. For the development of post-Roman general principles of the law of contract, see *id.* at 561–67.

12. See HUGO GROTIUS, *INLEIDINGE TOT DE HOLLANDSCHE RECHTS-*

engaged in highly complex conceptual analyses of the type of instrument that could give rise to liability. They paid particular attention to promises, but without providing a systematic exposition of general principles. The absence of these principles was especially apparent from the *Commentarius ad Pandectas*¹⁴ of the prominent authority Johannes (or Jan) Voet (1647–1713), who still followed the structure of Justinian's *Digest*. Although, it could be added that these expositions were at least more advanced than the English law of the time (where the systematic presentation of contract was still in its infancy), in fact, English law did not even recognise general categories such as contract or tort—it was instead concerned with different procedural mechanisms in the form of writs, which the plaintiff had to rely on to be successful.¹⁵

It was only towards the end of the Roman–Dutch-era that real progress was made in fashioning general principles of the law of contract. A decisive event was the publication of the *Regtsgeleerd, Practicaal en Koopmans Handboek: Ten Dienste van Regters, Practizijns, Kooplieden, en Allen, die een Algemeen*

GELEERDHEID 31, 33 (F. Dovring, H.F.W.D. Fischer & E.M. Meijers eds., 2d ed. 1965). There Grotius, *inter alia*, deals with the complex notion of the *toezegging* or *promissio*, which he adopted from natural law. See generally MALTE DIESELHORST, DIE LEHRE DES HUGO GROTIUS VOM VERSPRECHEN (1959); ROBERT FEENSTRA & MARGREET AHSMANN, CONTRACT—ASPECTEN VAN DE BEGRIPPEN CONTRACT EN CONTRACTSVRIJHEID IN HISTORISCH PERSPECTIEF 19–20 (1980); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 122–25 (Tony Honoré & Joseph Raz eds., 1991); MARTIN HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 128–30 (2011); ZIMMERMANN, *supra* note 4, at 567–68.

13. See generally ARNOLDUS VINNIUS, TRACTATUS DE PACTIS (L.J. du Plessis trans., Suid-Afrikaanse Regskommissie 1985). Incidentally, De Wet did not care much for this work and described it as “showing off erudition.” J.C. DE WET, DIE OU SKRYWERS IN PERSPEKTIEF 134 (1988). Parts of Vinnius's work do involve rather exhausting struggles with concepts like *pactum*, *conventum*, and *convention*. See ZIMMERMANN, *supra* note 4, at 565–66. However, the *Tractatus* also contains discussions of general themes like plurality of parties, types of terms and the exposition and consequences of obligations. De Wet's criticism of the Roman–Dutch author Simon van Leeuwen was especially severe, when he described Van Leeuwen's *Het Rooms-Hollands-Regt*, as “largely a weak repetition of [Grotius's] *Inleidinge*, supplemented by the works of other authors.” DE WET, *supra*, at 140 (1988). De Wet also attacked Van Leeuwen as a person, dismissing him as “an unreliable polygraph and plagiarist.” *Id.*

14. JOHANNES VOET, COMMENTARIUS AD PANDECTAS: IN QUO PRAETER ROMANI JURIS PRINCIPIA AC CONTROVERSAS ILLUSTRIORES, JUS ETIAM HODIERNUM, & PRAECIPUAE FORI QUAESTIONES EXECUTIUNTUR (n.p. 1726) (translated in PERCIVAL GANE, THE SELECTIVE VOET: BEING THE COMMENTARY ON THE PANDECTS, PARIS EDITION OF 1829 (1955)).

15. See D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 215 (1999).

Overzicht van Regtskennis Verlangen (Koopmans Handboek) by Joannes van der Linden (1756–1835).¹⁶ One need not look far for the inspiration behind this development. Van der Linden greatly admired the eighteenth-century French jurist Robert Joseph Pothier (1699–1772), and he was also responsible for a Dutch translation of Pothier’s *Traité des Obligations: Selon les Régles tant du for la Conscience que du for Extérieur (Traité des Obligations)*,¹⁷ which was published shortly before *Koopmans Handboek*.¹⁸ Pothier’s work, one hastens to add, was in turn strongly influenced by his compatriot, Jean Domat (1625–1696), who made a decisive break from the fragmented approach of the past by elevating the concept of consensus to the cornerstone of a “generalized” law of contract.¹⁹

As reflected in Table 1 below, the similarities in the structure and vocabulary of Pothier and Van der Linden’s works are striking. The original Dutch is retained to remain faithful to the concepts Van der Linden used. Since these similarities have been examined in some detail elsewhere,²⁰ it is only necessary here to mention some salient features that may assist us in later understanding the state of Roman–Dutch law before South African jurists—De Wet in particular—started devising their own contract law structures.

16. The first edition appeared in Amsterdam, in 1806. Van der Linden’s work will hereinafter be cited as KOOPMANS HANDBOEK.

17. The first edition appeared in Orléans, in 1761. Pothier’s work will hereinafter be cited as TRAITÉ DES OBLIGATIONS.

18. In the foreword to the Dutch translation, Van der Linden rather effusively described the *Traité des Obligations* as a “jewel of true and pure legal knowledge, which enables the ready and incontrovertible determination of thousands of questions about the nature and consequences of contracts.” JOANNES VAN DER LINDEN, 1 VERHANDELING VAN CONTRACTEN EN ANDERE VERBINTENISSEN, at ix (Bij A. en J. Honkoop, 1804).

19. See JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL (Paris 1695); see also ZIMMERMANN, *supra* note 4, at 566–67 (“In France, Jean Domat was the great initiator . . . [H]e developed his ideas with such an elegance and clarity that they became, via Pothier and the code civil, the basis of modern French contract law The central significance attached to the law of contract led Domat to place it, very prominently, at the beginning of his new system of private law [and he used] the Roman concept of consensus . . . as a constitutive element for a generalized law of contract.”).

20. See Jacques du Plessis, *JC de Wet en die Struktuur van die Suid-Afrikaanse Kontraktereg*, in A MAN OF PRINCIPLE: THE LIFE AND LEGACY OF JC DE WET 137 (Jacques du Plessis & Gerhard Lubbe eds., 2013) [hereinafter A MAN OF PRINCIPLE].

The first feature is the much stronger separation of general principles relating to contracts, and principles relating to specific contracts. This development was long in the making, given that it had been well established that mere agreement, rather than adhering to specific forms or types of contracts, was the cornerstone of contractual liability.

But merely identifying general principles is not enough; sensible ways must be found to accommodate them structurally, which brings us to the second feature of Van der Linden's approach. As we have seen, obligations arise from a variety of sources. Some of the principles relating to obligations apply irrespective of their origins. A prominent example is the principles on how obligations are fulfilled or how they otherwise terminate. However, other principles only apply to obligations that arise from a specific source, for example those relating to the formation and interpretation of contractual obligations. This prompts the question of where the latter category should belong in a systematic exposition of the law. Pothier's solution was to create two main parts: one based on the "essence," or *wezen*, of obligations (part I, or Deel I, in Table 1), and the other on the termination, or *vergaan*, of obligations (part III, or Deel III). In part I, Pothier devoted a section to "contracts," focusing in a series of sub-sections on the definition of a contract, defective contracts, the capacity to conclude contracts, the subject matter of contracts, their consequences, and rules on interpretation. Thus, a mass of general contractual principles are brought home in a single section devoted to "contracts."

Van der Linden, who was otherwise quite faithful to Pothier, took a different and somewhat unsuccessful route. Like Pothier, he also created sub-headings for topics like defective contracts, capacity, and interpretation. Those sub-headings were not placed under the main heading of "contract," but under the much broader heading of "obligations, and the personal rights arising from them in general" (Afd XIV in Table 1). However, it is quite apparent that, under this heading, Van der Linden essentially deals with principles relating to contractual obligations, rather than principles relating to other sources of obligations, such as delict, "quasi-delict," and "quasi-contract." Principles relating to these sources are also rather inelegantly spread over subsequent sections (Afd XV and Afd XVI). Therefore, it may have been preferable for Van der Linden to have followed Pothier's approach of dealing with contractual principles under a heading specifically devoted to contract, rather than to obligations in general.

Finally, Van der Linden, like Pothier, included a separate section on the termination of obligations (Afd XVIII). But there Van der Linden was also ensnared in structural problems: thus, he dealt with minority, duress, fraud, and mistake as grounds for *restitutio in integrum*, even though he had earlier discussed these topics in the context of defective contracts.²¹ Additionally, Van der Linden again considered performance or fulfilment, even though this topic had already been addressed earlier in a section on the consequences of obligations.²²

It should be apparent from the overview above that, at the beginning of the nineteenth century, Roman–Dutch law had made significant progress in developing general principles of contract, rather than merely remaining focused on specific contracts. Nevertheless, some uncertainty as to structural exposition had persisted, especially regarding both the relationship between the law of contract and the law of obligations, and the internal arrangement of general principles relating to contracts.

These problems may well have been addressed by Roman–Dutch jurists during the nineteenth century, had history not taken a rather unusual turn. Van der Linden’s work had barely been published when France invaded the Netherlands. Shortly thereafter, in 1811, Roman–Dutch law was replaced in its country of origin by a civil code based on the French model. The same fate would undoubtedly have befallen Roman–Dutch law in the Cape, which had been a Dutch colony since the seventeenth century. However, the British annexation of the Cape barely a few years earlier, in 1806 ironically ensured that Roman–Dutch law would remain in force there. This is because British constitutional law required that the laws of a conquered territory remain in force until changed by the conqueror.²³ Likewise, when the British extended their influence to the Natal region, Roman–Dutch law was established there,²⁴ and when the Boer Republics of the Transvaal (or the Zuid-Afrikaansche Republiek) and of the Orange Free State

21. Compare KOOPMANS HANDBOEK, *supra* note 16, at bk. I: pt. XVIII, § 10, with *id.* at pt. XIV, § 2.

22. Compare *id.* at bk. I: pt. XVIII, § 1, with *id.* at pt. XIV, § 7.

23. See C.G. van der Merwe et al., *The Republic of South Africa, in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 95, 104–05 (Vernon Valentine Palmer ed., 2d ed. 2012) [hereinafter MIXED JURISDICTIONS WORLDWIDE]; DE WET, *supra* note 13, at 176–77.

24. See C.G. van der Merwe et al., *supra* note 23.

were created, they too adopted Roman–Dutch law. Van der Linden’s *Koopmans Handboek* was even recognised as the official law of the Zuid-Afrikaansche Republiek—a rare distinction for a jurist.²⁵

B. EARLY GENERAL WORKS ON THE SOUTH AFRICAN PRIVATE LAW

In 1910, the Union of South Africa, the precursor to the current Republic of South Africa, was created through joining the Cape, Natal, Orange Free State, and Transvaal into a single state. Its “common law” (in the sense of residual, non-statutory law) was Roman–Dutch law, as influenced by English law, or more precisely by British law because Scots law was also consulted. These influences also extended to the law of contract. The accommodation of two major legal traditions in one system created a serious need for scholarship setting out this mixture in a structured manner.²⁶ After a relatively slow start, a few pioneers started to address this need, and significant progress was made by the time the first edition of De Wet’s *Kontraktereg* appeared in 1947.

By then, the basic principles of private law, including the law of contract, had been set out in works by Sir A.F.S. Maasdorp,²⁷ Manfred Nathan,²⁸ and George Wille,²⁹ and the first book exclusively addressing South African law of contract, Sir John Wessels’s *The Law of Contract in South Africa*, had

25. See H.R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 560 (1968).

26. South African law also recognises customary law, but it only applies to members of specific indigenous African communities, and it has had limited influence on the civil/common law mixture thus far. See Reinhard Zimmermann & Daniel Visser, *Introduction* to *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA* 1, 12–15 (Reinhard Zimmermann & Daniel Visser eds., 1996) [hereinafter *SOUTHERN CROSS*].

27. See generally ANDRIES FERDINAND STOCKENSTRÖM MAASDORP, 3 *THE INSTITUTES OF CAPE LAW: THE LAW OF OBLIGATIONS* (1903). The work was later renamed as 3 MAASDORP’S *INSTITUTES OF SOUTH AFRICAN LAW: THE LAW OF CONTRACTS* (1978).

28. See generally MANFRED NATHAN, *THE COMMON LAW OF SOUTH AFRICA: A TREATISE BASED ON VOET’S COMMENTARIES ON THE PANDECTS, WITH REFERENCES TO THE LEADING ROMAN–DUTCH AUTHORITIES, SOUTH AFRICAN DECISIONS, AND STATUTORY ENACTMENTS IN SOUTH AFRICA* (1904).

29. See generally GEORGE WILLE & J.T.R. GIBSON, *WILLE’S PRINCIPLES OF SOUTH AFRICAN LAW* (1937); GEORGE WILLE & PHILIP MILLIN, *MERCANTILE LAW OF SOUTH AFRICA* (1918).

appeared in 1937.³⁰ Works devoted to specific contracts, such as sale, lease, suretyship, and pledge also appeared. The key question now arises: to what extent did the works of these jurists contain novel structural expositions of the general principles of the law of contract, and especially to what extent did those expositions reflect the influence of English law? Admittedly, English influence cannot be doubted, and it may have been stronger than traditionally recognized. For example, consider Table 2 below, which links key components of the tables of contents of Sir William Anson's *Principles of the English Law of Contract and of Agency and its Relation to Contract (Principles)*,³¹ and Wessels's *The Law of Contract in South Africa*.

Table 2

Anson <i>Principles</i> 16 ed (1923)	Wessels <i>Contract</i> 1 ed (1937)
Part II Formation of Contract	→ Part I Nature and Formation
II Elements of Valid Contract	→ I Meaning and Elements
III Offer and Acceptance	→ II Offer and Acceptance
IV Form and Consideration	→ III Form of Contract
V Capacity of Parties	→ IV Object of Contract
VI Reality of Consent	→ V Effect of Illegality
VII Legality of Object	→ VI Capacity to Contract
	→ VII Reality of Consent
Part III The Operation of Contract	→ Part II Operation
Part IV The Interpretation of Contract	→ IX Proof and Interpretation

30. Wessels's stated purpose was to write the first student textbook on the South African law of contract, which he explained as follows:

I realised that it was very difficult for students to ascertain the principles of our law of contract. The ordinary text-books on the law of contract are English text-books, such as those of Sir William Anson and Frederick Pollock. The only comprehensive book on the law of contract, according to the systems derived from the Civil Law available to students in this country, is Pothier's TRAITÉ DES OBLIGATIONS in the English translation of Evans and in the Dutch translation of Van der Linden.

SIR J.W. WESSELS, *Introduction* to 1 THE LAW OF CONTRACT IN SOUTH AFRICA, at xvii (A.A. Roberts ed., 1937).

31. SIR WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY AND ITS RELATION TO CONTRACT, at ix-xiv (J.L. Brierly ed., 19th ed. 1947) (Oxford 1879).

It is not possible to consider the details of the respective internal arrangements of the general principles of the law of contract in all the early South African and contemporary English works, but we may at least focus on the following significant developments.

First, greater structural prominence was given to offer and acceptance. For example, as Table 2 indicates, Wessels and Anson both devote an entire section to this topic. At the time, the practice of introducing specific sections on offer and acceptance was more typical of English legal works. These works reflected the recognition in the nineteenth-century common law of the notion that the consent, or common intention, required to create a contract is established when an offer is made to another, who then accepts it.³²

This development can be traced to the influence of earlier civilian authors, especially Pothier. In his *Traité des Obligations*, Pothier indicated that a contract exists through the meeting of minds of two persons where the one promises (i.e., offers) something to the other, and the other accepts the promise.³³ This definition of a contract enabled a clear distinction to be drawn between a contract and a mere non-binding, unilateral promise or *pollicitatio*. Nineteenth-century common lawyers, especially Anson, found the “offer and acceptance” formula attractive to solve problems in the common law on when a contract is established.³⁴ However, “offer and acceptance” did not enjoy any particular prominence in the writings of civil lawyers; they may have sown the seeds of its recognition as a structural category, but the plant that grew from it was cultivated by English jurists. Thus, it appears that it was through the works of English jurists that “offer and acceptance”

32. See WESSELS, *supra* note 30, at 18–58. For a general discussion, see A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 258 (1975); ZIMMERMANN, *supra* note 4, at 571.

33. ROBERT JOSEPH POTHIER, 1 A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW 5 (Newburn, N.C., Martin & Ogden 1802).

34. Simpson, *supra* note 32 (“[I]n nineteenth-century law [the] doctrine of offer and acceptance was superimposed upon the sixteenth-century requirement of consideration and made to perform some of the same functions and some new ones generated principally by the problem of written contracts by correspondence.”). This analysis proved useful for addressing practical problems arising from the more widespread use of the post for communication. See *Adams v. Lindsell* (1818) 106 Eng. Rep. 250, 251 (Eng.).

structurally came to the fore in South African law.

The second development reflected in the works of early South African contract lawyers is the structural treatment of certain considerations that influence the free formation of the will, and hence determine whether true consent exists. Van der Linden (presumably, again, under the influence of Pothier)³⁵ listed certain cases where a contract is “defective.” These cases included mistake, duress, fraud, and *laesio enormis* or gross disparity. A comparable list appears in Wessels’s work, under the heading of “reality of consent,” which as Table 2 reflects, again corresponds verbatim with a heading used by Anson.

A related, intriguing development has been the novel use in South African law of the category “voidable contracts,” as opposed to “void contracts.” This was done quite early in Maasdorp’s *Institutes*, when he linked the concept of a “voidable contract” to various grounds for obtaining *restitutio in integrum*. These grounds relate to the defects defined by Wessels under the aforementioned heading of “reality of consent.”³⁶

So, where did the notion of a “voidable” contract come from? It was not derived from earlier civil law sources: the Romans did not know it and it was undeveloped in Roman–Dutch law.³⁷ Conversely, in English law, the distinction between voidable and void contracts was already well-established when Maasdorp started referencing it.³⁸ In that system, a contract remained valid until terminated by one of the parties, as in cases of mistake, fraud, and duress. However, it is not apparent in the South African context why the *consequence* that certain defects of consent gave rise to voidability—rather than voidness—justified using “voidable contracts” as a general category. The distinction between these consequences was of greater practical importance

35. Compare KOOPMANS HANDBOEK, *supra* note 16, at bk. 1: pt. XIV, § 2, with ROBERT JOSEPH POTHIER, *supra* note 33, at 14–34 (discussing the various ways a contract can be defective).

36. The grouping “voidable contract” was also later used by Wille, but only from the second edition onwards because such contracts had not yet been placed under their own heading. See GEORGE WILLE & J.T.R. GIBSON, WILLE’S PRINCIPLES OF SOUTH AFRICAN LAW 739 (François du Bois ed., 9th ed. 2007).

37. See KOOPMANS HANDBOEK, *supra* note 16, at bk. I: pt. XVIII, § 10; VOET, *supra* note 14, at 2, 4, 21.

38. See, e.g., SIR WILLIAM HOLDSWORTH, 8 A HISTORY OF ENGLISH LAW 65–66 (2d ed. 1937); FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 358–59 (P.H. Winfield ed., 12th ed. 1946). The distinction probably also influenced Scots law. See WILLIAM W. MCBRYDE, THE LAW OF CONTRACT IN SCOTLAND 355–56 (3d ed. 2007).

in the common law, because, as Sir William Holdsworth has noted, a void contract was insufficient consideration for a later promise under English law, whereas a voidable contract could fulfill this role.³⁹ Furthermore, according to English property law, third parties could own property obtained under a voidable contract prior to rescission, but not property delivered under a void contract.⁴⁰

However, these considerations did not, and still do not, apply to South African law. It does not recognise the doctrine of consideration, although there was a brief and unsuccessful attempt to introduce it. South African law further applies the abstraction principle, whereby ownership passes even though an underlying contract is void. Mistake could further render a contract voidable (if induced by misrepresentation), or void (if it is reasonable and material, in accordance with the *iustus error* doctrine). Therefore, the heading of “voidable contracts” could not properly describe the consequences of the traditional cases of defective consent that it was supposed to accommodate.

The third main development in the structural representation of the early South African law of contract is the arrangement of the material relating to the consequences and termination of contractual obligations. Civil law texts traditionally dealt with these matters in the broader context of the law of obligations, rather than in sections devoted to contract.⁴¹ This position changed in early South African works on private law. Maasdorp introduced a section dealing specifically with the consequences of contracts, without mentioning obligations in general, and Wille later devoted sections to both the consequences and termination of contracts, as opposed to dealing with these matters in the context of obligations in general. Wessels’s work dealt solely with the law of contract, which meant that there was no section on obligations in general where these matters could be considered. As Table 2 reflects, he adopted a tripartite structure, dividing the law of contract into formation, operation, and termination.

39. HOLDSWORTH, *supra* note 38, at 36–37.

40. *See* Sale of Goods Act 1979, c. 54, § 23 (Eng.); *Cundy v. Lindsay* [1878] HL 93 at 100 (Eng.) (discussing the “bona fide purchaser” doctrine).

41. *See, e.g.*, POTHIER, *supra* note 33, at 83, 291 (discussing the “Effect of Obligations” and the “different Manners in which Obligations are extinguished” respectively); KOOPMANS HANDBOEK, *supra* note 16, at bk. 1: pt. XIV, § 7 (discussing consequences of obligations); *id.* at pt. XVIII (discussing the ways in which obligations terminate).

When South African jurists recognised the consequences, or operation and termination, of contracts as categories, they had to arrange the internal subject matter of these categories in a meaningful manner. Here we find unmistakable influences of English jurists, who had started writing specialised works on contract in the nineteenth century. Thus, local works started to refer to the English notion that there are various grounds for the “discharge” of a contract.⁴² Some of these grounds are familiar: they are essentially the same grounds on which obligations traditionally terminated in the civil law, such as performance, set-off, and prescription. Wessels at times used headings for these grounds which are virtually identical to Anson’s, namely “discharge by agreement,” “discharge by performance,” and “discharge by operation of law.”⁴³

However, English textbooks also recognised that a contract could be discharged by breach. This notion was unknown to South African law and also contrary to its general principles, inasmuch as it suggested that acting contrary to the contract somehow transformed the obligations. Local authors apparently realised that this was not going to work and simply made use of the heading “breach of contract,” rather than “discharge by breach.”⁴⁴ Sometimes a separate heading was created for the remedies arising from breach.⁴⁵ Under these headings they brought home a variety of material on non-performance and its consequences that earlier writers, such as Maasdorp and the Roman–Dutch authorities before him, had spread throughout various headings and sub-headings.

Nevertheless, it remained a considerable challenge to determine what exactly constitutes breach, what types of remedies might arise from breach, and what the best way would be to represent these concepts structurally. These problems are especially apparent in Wessels’s work. He lists several cases of breach that resemble Anson’s forms of discharge, including cases

42. See HOLDSWORTH, *supra* note 38, at 77–88.

43. Compare ANSON, *supra* note 31, at xii (designating the heading of Part IV as “Discharge of Contract”), with WESSELS, *supra* note 30 (designating the heading of Part III as “Termination or discharge of the contract”).

44. NATHAN, *supra* note 28, at pt. X; WESSELS, *supra* note 30, at pt. XVI.

45. WESSELS, *supra* note 30, at pt. XVII; WILLE & GIBSON, *supra* note 36, at 872–87. This corresponded with a concurrent development in English law. Whereas earlier editions of Anson’s work still discussed the remedies arising from breach under the heading of “discharge of contract,” a further heading entitled “remedies for breach of contract” was added to the sixteenth edition. ANSON, *supra* note 31, at xvii.

of making performance impossible, “renunciation,” and “failure of performance.” However, Wessels does not include *mora* (i.e., a failure to perform on time) in this list. He places it in a separate chapter, as if *mora* is not a form of breach.⁴⁶ Similar problems of coherence plague the exposition of remedies arising from breach. These remedies are all located in Part III, on termination or discharge, whereas the remedies of damages and specific performance could be claimed without termination or discharge.⁴⁷ All in all, it appears that early South African jurists were not quite able to cope with the challenges of providing a comprehensive and coherent treatment of the consequences and termination of contractual liability. These challenges were left to the next generation.

II. THE STRUCTURE OF DE WET’S *KONTRAKTEREG*

A. OVERVIEW

The foregoing discussion reveals a constant process of adaptation and refinement of the way South African jurists organized the general principles of the law of contract prior to the publication of the first edition of De Wet’s *Kontraktereg* in 1947. Significantly the field of contract had gained greater independence within the law of obligations, and it also became more open to structural influences from English common law, which faced challenges comparable to those the local jurists had to meet.

It is against the backdrop of these developments that JC de Wet, at the time a thirty-five-year-old law professor at Stellenbosch University, had to make some important choices about setting out these principles in his proposed new work on contract. By then, De Wet had already completed his undergraduate legal studies, as well as a doctorate on estoppel by representation in South African law, at Stellenbosch University. He had also been awarded a second doctorate on the development of the agreement for the benefit of a third party (or *stipulatio alteri*), by Leiden University in the Netherlands.⁴⁸ Ultimately, De

46. WESSELS, *supra* note 30, at pt. XV–XVI.

47. *Id.* at pt. III.

48. For a biographical sketch, see Reinhard Zimmermann & Charl Hugo, *South African Legal Scholarship in the 20th Century: The Contribution of JC de Wet (1912–1990)*, in *A MAN OF PRINCIPLE*, *supra* note 20, at 3. De Wet began teaching at Stellenbosch in 1936 and, after his retirement, was appointed to the W.P. Schreiner Chair for Roman and Comparative Law at the University of Cape Town in 1976. He

Wet adopted the following division for his *Kontraktereg*, which remained largely unchanged until the publication of the fifth and most recent edition in 1992.⁴⁹

Table 3

<p>De Wet Kontraktereg 1 ed (1947)</p> <p>Section A The Law of Contract</p> <p>I. Introduction</p> <p>II. Requirements for the existence of a valid contract: consensus</p> <p>§ 1 Introduction</p> <p>§ 2 The intention of parties to bind themselves legally</p> <p>§ 3 The declarations of will: offer and acceptance</p> <p>§ 4 Mistake</p> <p>§ 5 Misrepresentation</p> <p>§ 6 Duress</p> <p>§ 7 Undue influence</p> <p>§ 8 <i>Laesio enormis</i></p> <p>III. Requirements for the existence of a valid contract: the parties' capacity to act</p> <p>§ 1 Introduction</p> <p>§ 2 Mentally insane persons</p> <p>§ 3 Intoxication</p> <p>§ 4 Prodigals</p> <p>§ 5 Minors</p> <p>§ 6 Women</p> <p>IV. Requirements for the existence of a valid contract: other requirements</p> <p>§ 1 Formalities</p> <p>§ 2 The performance must be possible</p> <p>§ 3 The performance must be lawful</p> <p>§ 4 The performance must be certain or ascertainable</p> <p>V. Representation and authority</p>

briefly practiced as an advocate, and had an active opinion practice, but was essentially a legal academic for his professional life.

49. See Gerhard Lubbe, *Die Laaste Pandektis?—JC de Wet in Metodologiese Perspektief*, in *A MAN OF PRINCIPLE*, *supra* note 20, at 105, 115. While the focus here is mainly on the structure revealed by the headings used in setting out the law of contract, as Lubbe points out, there is a broader, and at times more latent, structural relationship between specific concepts and institutions. *Id.* at 116–17.

VI. The consequences of the agreement

§ 1 Introduction

§ 2 Parties to the obligation: co-debtors, co-creditors and third parties

§ 3 Alternative, facultative and generic obligations

§ 4 Obligations with divisible and indivisible performances

§ 5 Obligations with time clauses and conditional obligations

§ 6 Supposition, *modus* and guarantee

VII. The consequences of the agreement: breach or malperformance

§ 1 Introduction

§ 2 *Mora debitoris*: failure of the debtor to perform on time

§ 3 Repudiation

§ 4 Making performance impossible

§ 5 Positive malperformance

§ 6 Failure by the creditor

VIII. The consequences of the agreement: the remedies arising from breach

§ 1 Introduction: fulfilment and cancellation

§ 2 The so-called *exceptio non adimpleti contractus*

§ 3 Fulfilment *in forma specifica* and damages as surrogate for performance

§ 4 Cancellation

§ 5 Damages

§ 6 Penalty clause, earnest money, *roukoop*, etc.

IX. The transfer and termination of rights to performance

§ 1 Transfer or cession

§ 2 Fulfilment

§ 3 Termination of obligations by agreement

§ 4 Set-off and merger of debts

§ 5 Prescription and the passing of time

§ 6 Other ways in which obligations could terminate

X. The agreement of sale**XI. Hire of things****XII. The agreement to provide a service and agreement of mandate****XIII. Providing security**

Before considering this division in detail, a few general observations are called for. First, De Wet supported the trend of focusing less on specific contracts, and more on a systematic exposition of principles common to all contracts. As we have seen, this trend was reflected in the works of later Roman–Dutch jurists like Van der Linden, and was continued in earlier South African law by Wille and Wessels.⁵⁰

Second, many of the chapters actually fit under two main groupings, namely “requirements for a valid contract” or formation (Chapters II, III, and IV), and “the consequences of the agreement” (Chapters VI, VII, and VIII). This approach is also reminiscent of the practices of Wille and Wessels (and Anson) to arrange much of the subject matter of the law of contract in such broad categories. Of course, the relationship between the parts is not identical in these jurists’ works, a point that will be dealt with when the content of the chapters is considered in more detail.

At this very basic level, De Wet’s presentation is largely in line with established South African practice. It further stands in clear contrast to the civil law structures that developed in the course of the nineteenth and twentieth centuries.⁵¹ These civil law structures are characterised by the tendency to place many of the general principles that could relate to contracts in sections relating to obligations in general. At times they do so at remarkably high levels of abstraction, especially in the work of the German Pandectists.⁵² The commentaries on civil codes that

50. About three-quarters of *Kontraktereg* is devoted to general principles, and only the remaining one quarter to specific contracts. See generally KONTRAKTEREG, *supra* note 2. In the work of Wessels, the ratio is about two-third general principles, to one-third specific contracts. See generally WESSELS, *supra* note 30, at pt. XVII.

51. De Wet was obviously aware of these structures: not only did he study on the continent after completing his undergraduate studies, but he expressly referred to several Dutch and German sources in his works. He was not concerned with French law, and there appears to be only one reference to French law in the entire *Kontraktereg*. See KONTRAKTEREG, *supra*, note 2, at 116.

52. See FRIEDRICH C. VON SAVIGNY, DAS OBLIGATIONENRECHT ALS TEIL DES HEUTIGEN RÖMISCHEN RECHTS (Berlin, Veit & Co. 1851); BERNARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS, at bk. IV (Theodor Kipp ed., 8th ed. 1900) (Düsseldorf, Julius Buddeus 1862). De Wet frequently referred to these two authors. In his *System des Heutigen Römischen Rechts*, von Savigny focuses on the abstract concept of the “legal relationship” or *Rechtsverhältnis*. For more information on this topic, see WALTER BOENTE, NEBENEINANDER UND EINHEIT IM BÜRGERLICHEN RECHT: ZUR GLIEDERUNG DES RECHTSSTOFFS IM BÜRGERLICHEN GESETZBUCH § IV (2013) (containing a general discussion of the “legal relationship,” with emphasis on different types of contract).

De Wet consulted⁵³ typically first set out principles of private law in general, and then principles of the law of obligations, including the creation and features of obligations, types of obligations, and their enforcement. They do not contain any detailed exposition of the requirements that specifically relate to contracts, and the consequences of contracts are often dealt with in the context of the consequences of obligations in general, irrespective of their origins. Consequently, the general structure of nineteenth-century and later civil law sources was simply too far removed from the uncodified and less abstract modern South African law of contract.⁵⁴ Ronald Dworkin may have described De Wet as “the last pandectist,”⁵⁵ but there is little sign of their influences in the structures that he developed.

B. SPECIFIC CHAPTERS

Given the breadth of the subject matter covered thus far, it was necessary to paint with fairly broad strokes, providing only general impressions of structural representations of the law of contract. But a more detailed exposition of the structure of De Wet’s *Kontraktereg* is warranted, given that we are especially interested in his contribution as a jurist.

1. INTRODUCTION (CHAPTER I)

The first chapter does not contain major structural innovations. De Wet introduced his work with an exposition of the key concepts of an “obligation,” and treated the “contract” as a source of obligations.⁵⁶ This is in line with established practice. However, at the end of Chapter I, De Wet does include discussions of the concepts of a “legal fact” (*regsfeit*) and “legal act” (*regshandeling*). These concepts are typically found in the general, introductory part of expositions of the private law in modern civil law systems.⁵⁷ By applying them specifically to contract,⁵⁸ and especially by indicating that a contract is a type of “legal act,” De Wet therefore located the law of contract in a

53. See Lubbe, *supra* note 49, at 105.

54. For an exception to this general proposition, see R.W. Lee, *THE SOUTH AFRICAN LAW OF OBLIGATIONS*, at vii (A.M. Honoré et al. eds., 1950).

55. See Lubbe, *supra* note 49, at 105.

56. For comparison, see WESSELS, *supra* note 30, at § 40.

57. For the origins of such concepts in Pandectist thinking, and their influence on legal analysis and the exposition of De Wet, see Lubbe, *supra* note 49, at 109–10, 117–18, 121–23.

58. KONTRAKTEREG, *supra* note 2, at 6–7.

conceptual framework devised for private law as whole.

2. THE REQUIREMENTS FOR THE EXISTENCE OF A VALID CONTRACT (CHAPTERS II–IV)

In Chapters II, III, and IV De Wet set out the various requirements for a valid contract. These are essentially consensus, capacity, compliance with formalities (i.e., writing), and possibility, legality, and certainty of performance. While some aspects of the treatment of these requirements are quite conventional, others are novel; for example, he restructures the representation of some requirements, and elevates others to greater prominence. The key features of these representations are discussed in detail below.

First, in Chapter II De Wet deviates noticeably from earlier authors in terms of his treatment of the requirement of consensus. The innovations, which especially relate to mistake and other problems with consensus, must have caused him some structural difficulties. This chapter is one of the few that De Wet revised structurally in subsequent editions. The first edition contained the sub-heading § 2 on “the intention of parties to bind themselves legally.” There, De Wet essentially dealt with the distinction between agreements aimed at concluding contracts (as opposed to mere social agreements or words said in jest), simulations, estoppel, and *reservatio mentalis*. However, in later editions De Wet discarded this sub-heading, and expanded the content over other chapters and headings. Thus, the discussion of social agreements and jest was located in the introductory Chapter I, in the discussion of the contract as a source of obligations. Simulation, estoppel,⁵⁹ and *reservatio mentalis* were in turn incorporated into the material on mistake in Chapter II, in a new sub-heading § 2 on “consensus-mistake.”

De Wet presumably made these structural changes in order to accommodate various theoretical approaches to contractual liability found in Continental legal science.⁶⁰ In the first edition of *Kontraktereg* he still considered the “will theory,” the “declaration theory,” and the “reliance theory” under the rather

59. See Zimmermann & Hugo, *supra* note 48, at 15. On doctrinal considerations that may have inspired this pragmatism, see Lubbe, *supra* note 49, at 130–31.

60. He first introduced these theories to a South African audience in his monograph on fraud and mistake in concluding a contract. JOHANNES C. DE WET, *DWALING EN BEDROG BY DIE KONTRAKSLUITING* (1943).

opaque heading of “mistake.”⁶¹ The aforementioned structural change enabled De Wet to consider *reservatio mentalis* as a problem in the context of will theory, and to show that the problem of the simulated contract is not addressed by the declaration theory.⁶²

A second, more conventional feature of De Wet’s treatment of consensus in Chapter III is the structural significance he accords to offer and acceptance by treating it as a distinct topic, under its own heading. As we have seen, this practice was adopted from English law, and was not new at the time.⁶³ Despite its origins, De Wet pragmatically retained it, perhaps because it did not give rise to any doctrinal difficulties, and enabled him to deal with a number of complex issues under one heading (e.g., options and other agreements relevant to the negotiation process, and determining when and where agreement is reached).

Third, in Chapter II De Wet did not only discuss cases where consensus is absent (e.g., due to mistake or non-acceptance of an offer), but also dealt with cases where consensus is present. However, a problem exists with what he calls the “motivations”⁶⁴ behind the conclusion of the contract due to another party’s conduct. Such conduct could consist of making a misrepresentation, duress, or undue influence. De Wet, therefore, followed the established practice of only discussing these cases in the context of the requirements for formation of a contract and not (like earlier civil law sources) in the context of the grounds for termination of obligations in general.

However, De Wet took the further step of bringing these cases home under the broader heading of “consensus.” He thereby clearly indicated how they relate to the process of formation of a contract, and he avoided the common-law-inspired heading “voidable contracts,” which, as indicated earlier,⁶⁵ is less descriptive, especially with regard to the issue of mistake.

We now encounter the conceptually difficult issue of the relationship between mistake and misrepresentation. Because a successful misrepresentation induces a mistake, the boundary between these categories at first appears unclear. De Wet’s

61. See KONTRAKTEREG, *supra* note 2, at pt. II, § 4.

62. See *id.* at 11–12.

63. See Section I(B), *supra*, at tbl.2.

64. See KONTRAKTEREG, *supra* note 2, at 9.

65. See discussion, *supra* notes 36–39.

approach was to deal with “mistake” and “misrepresentation” in separate sections, but still under “agreement” as a general requirement for validity. Under “mistake,” De Wet only considered those mistakes that could preclude agreement. These he defined as mistakes as to the existence of consensus, which stood in contrast to mistakes that merely relate to the motive behind the agreement.⁶⁶ Mistakes in motive would only be actionable if induced by misrepresentation, hence the treatment in a separate section.⁶⁷ In drawing this distinction, De Wet drew on more recent thinking in the civilian tradition, and especially on the works of the German Pandectist, Friedrich Carl von Savigny,⁶⁸ who incidentally also left his mark on English jurists like Anson and Pollock.⁶⁹

Finally, De Wet was the first author to elevate possibility and certainty of performance to prominence as separate requirements for a valid contract.⁷⁰ But it was a hesitant start. Initially, De Wet stated that “sometimes” it is regarded as a requirement for an agreement that performance had to be certain or capable of being rendered certain, without expressly saying where this requirement came from. It may be that he had in mind the Roman–Dutch rule that certainty of price is a requirement for a valid sale. De Wet then added that he felt that

66. See KONTRAKTEREG, *supra* note 2, at 9; Dale Hutchison, *JC de Wet’s Contribution to the Development of the Law of Mistake in Contract*, in *A MAN OF PRINCIPLE*, *supra* note 20, at 193–94, 196.

67. See KONTRAKTEREG, *supra* note 2, at ch. 2, § 4.

68. See Hutchison, *supra* note 66, at 193–94 (citations omitted) (“Undoubtedly the greatest contribution to the development of the law relating to mistake came the following century . . . from the renowned German jurist von Savigny. It was he who first identified the distinction implicit in the Roman classifications of mistake: that between mistakes which affect the existence of consensus, and mistakes which relate only to a party’s motive or reasons for wishing to enter into the contract It was against this backdrop, then, that De Wet approached the problem of mistake in his 1943 monograph *Dwaling en Bedrog*.”); Lubbe, *supra* note 49, at 123–24, 128.

69. CATHARINE MACMILLAN, *MISTAKES IN CONTRACT LAW* 150, 171–72 (2010) (“[Pollock] agreed with Savigny that mistake did not itself affect the validity of the contracts but that it may be such as to prevent any real agreement from being formed. Pollock also followed Savigny’s lead in finding that where the mistake prevented any real agreement from being formed, the contract was void In both his definition of agreement, as the outcome of two or more consenting minds, and his definition of obligation, as a power of control exercisable by one party over another with reference to future and specified acts or forbearances, Anson was expressly indebted to Savigny.”). Pollock even referred to von Savigny as “the greatest expounder of legal principles in modern Europe.” FREDRICK POLLOCK, *FOR MY GRANDSON: REMEMBRANCES OF AN ANCIENT VICTORIAN* 169 (1933).

70. Wessels locates certainty and possibility under the heading “objects of contract.” WESSELS, *supra* note 30, at ch. IV.

it was unnecessary to regard certainty as a general requirement for a valid contract, because a valid offer in any event had to be certain.

However, in later editions De Wet simply deleted these comments and replaced them with general statements that certainty is an independent requirement for validity, and that the “negotiations” should reveal the content of the obligations. Perhaps he realised that the issue of certainty cannot be dealt with exhaustively in the context of offer and acceptance, as it is not necessary under South African law for an agreement to be separated into a distinct offer and acceptance in order to constitute a contract.

3. REPRESENTATION AND AUTHORITY (CHAPTER V)

After considering the requirements for a valid contract, De Wet devoted Chapter V to situations where one person concludes a contract on behalf of another. He clearly felt that this subject matter did not belong to the requirements for the formation of a contract, and was also unwilling to consider it in later chapters on the consequences of contracts. He was further convinced that representation and authority do not belong to the law of specific contracts, especially not to the contract of mandate (*mandatum*).⁷¹ By separately making provision for agency,⁷² De Wet, unlike his predecessors, therefore emphasized the importance of these distinctions.

4. THE CONSEQUENCES OF AN AGREEMENT (CHAPTERS VI–VIII)

The structural exposition of the consequences of agreements or contracts clearly caused De Wet problems. As Table 3 indicates, in the first edition of *Kontraktereg*, De Wet prefaced Chapters VI, VII, and VIII with “the consequences of an agreement.” However, from the third edition onwards, he discarded any references to “the consequences of an agreement” in the chapter headings, and simply replaced them with “VI Obligations arising from agreement,” “VII Breach of contract or malperformance,” and “VIII The remedies arising from breach.”

71. In the common law, authors like Anson followed a similar approach in their treatment of agency. See ANSON, *supra* note 31, at 387–91.

72. See KONTRAKTEREG, *supra* note 2, at 66; see also Zimmermann & Hugo, *supra* note 48, at 13 (“[I]t is not . . . surprising that De Wet imported into the South African discourse the separation of authority and mandate.”).

The choice of these new headings was not unproblematic. “Obligations arising from agreement,” is a rather vague description of the contents of Chapter VI, which essentially dealt with who must perform to whom, and how and when performance is to take place. The heading does not indicate what aspects of the “obligations arising from agreement” are at play: we are not concerned with the creation of these obligations because they had been dealt with earlier. In addition, De Wet’s own description of Chapter VI’s contents as “the phenomena that in general can arise with obligations arising from various types of agreements” is hardly elucidating.⁷³ Such a description could easily cover breach of contract, or even the termination of obligations, which is only dealt with in later chapters. Nonetheless, De Wet consistently adhered to this heading until the last edition.

Chapters VII and VIII respectively consider when a party does not act in accordance with these duties, i.e., when a party commits breach of contract, and the remedies that arise from breach. Instances of termination of contracts not arising from breach are in turn considered separately in Chapter IX. In his treatment of breach in Chapter VII, De Wet introduces a major innovation. He identifies five specific cases of breach, namely: (i) *mora debitoris* (i.e., failure of a debtor to perform timeously); (ii) repudiation; (iii) making performance impossible; (iv) positive malperformance; and (v) *mora creditoris* (i.e., failure of a creditor to cooperate with performance). Unlike Wessels, De Wet does not draw a distinction between *mora* and breach of contract, as if *mora* is not a form of breach.⁷⁴

In devising this typology of forms of breach, De Wet undoubtedly was influenced by civilian sources, especially when resorting to the concepts of positive malperformance and *mora creditoris*.⁷⁵ However, he also accepted that repudiation could amount to breach, a notion that can be traced directly to common law influences. Ultimately, we therefore find that his treatment of breach structurally accommodated different traditions, and was designed to reflect and give coherence to the processes of mixing that took place in South African law.

73. See KONTRAKTEREG, *supra* note 2, at 90.

74. See discussion, *supra* notes 43–45.

75. See Tjatie Naudé, *The Typology of Breach of Contract: JC de Wet’s Contribution in Comparative Perspective*, in *A MAN OF PRINCIPLE*, *supra* note 20, at 270, 270–88.

5. THE TRANSFER AND TERMINATION OF RIGHTS OF PERFORMANCE (CHAPTER IX)

As indicated above, De Wet drew a clear distinction between the “termination” of obligations in cases of cancellation due to breach of contract, and the termination of obligations in other situations. Chapter IX focuses on the latter category of cases,⁷⁶ and avoids overlapping discussions of the grounds for rescission when consent has not been obtained in a proper manner.

De Wet’s list of grounds for the termination of contractual obligations largely corresponds to the long-established lists in the civilian tradition of the grounds for termination of all obligations. However, there is one notable deviation. Some of these grounds, namely release, novation, and compromise, are placed under the general heading, “termination of obligations by agreement.”⁷⁷ This is reminiscent of the heading “discharge by agreement,” used by Wessels, under the possible influence of Anson.⁷⁸ No such heading exists in the works of earlier civil law authorities such as Van der Linden and Pothier, or Pandectists like Bernard Windscheid. Therefore, it may be that De Wet, perhaps unwittingly, followed English practice under the influence of Wessels.

III. THE INFLUENCE OF THE STRUCTURE OF DE WET’S KONTRAKTEREG

A. INTRODUCTION

We now turn to the impact of De Wet’s structure on the modern South African law of contract. As we have seen, the uncertainties about the division between the “unitary” contract and specific contracts, and about the respective domains of the law of contract and the law of obligations, by and large belonged to the past. The emphasis here will consequently be more on his influence on the internal arrangement of the general principles of contract. We will first examine his impact on the requirements for a valid contract, and then on its consequences, which include operation, breach, and termination.

76. See KONTRAKTEREG, *supra* note 2, at 192–93. At the end of Chapter IX, De Wet refers to termination (cancellation) due to breach, but then mentions that he dealt with it earlier.

77. See *id.* at 168–73.

78. See ANSON, *supra* note 31, at 305–10 (discussing “discharge of contract by agreement”).

B. THE REQUIREMENTS FOR A VALID CONTRACT

A number of modern works follow approaches similar to that of De Wet when setting out the requirements for concluding a valid contract. This influence is apparent from the modern treatment of the requirement of consensus, and more specifically, on how it is affected by mistake. We have seen that De Wet distinguished between mistakes that could exclude agreement, and mistakes that merely relate to the motive behind the agreement, and hence would only be actionable if induced by misrepresentation.⁷⁹ This distinction now enjoys strong support.⁸⁰ However, there are also some notable exceptions. Some works still deal with various types of mistake in a highly fragmented manner, without indicating how they relate to each other.⁸¹ And some authors, such as Richard Christie and Graham Bradfield, still prefer to set out the law of mistake predominantly in terms of a threefold distinction which is almost absent from De Wet's work—namely the distinction between unilateral, mutual, and common mistakes. The usefulness of this division, which Christie and Bradfield⁸² adopted from a work on English law,⁸³ is

79. See KONTRAKTEREG, *supra* note 2, at ch. 2, § 4(41).

80. See DALE HUTCHISON ET AL., *THE LAW OF CONTRACT IN SOUTH AFRICA* 120–21 (2d ed. 2012) (discussing the differences between misrepresentation and mistake); LOUIS F. VAN HUYSTEEN ET AL., *CONTRACT: GENERAL PRINCIPLES* 98 (5th ed. 2016) (“The decision of a prospective contractant to conclude a contract is often brought by a false representation by or on behalf of the other party to the negotiations. The party so misled labours under a mistake. If the mistake is material no consensus and, in principle, not contract arises—it is void ab initio. However, a representation frequently causes an error in motive. Although not material, and therefore not excluding consensus, such an error does affect the quality of the consensus, rendering the contract voidable.”).

81. See P.M.A. Hunt, *The Principles of the Law of Contract*, 84 S. AFR. L.J. 368, 372 (1967) (reviewing A.J. KERR, *THE PRINCIPLES OF THE LAW OF CONTRACT* (1967)) (“[W]hile there is room for many schemes for a book on contract, I do feel that some aspects of the scheme adopted by Mr. Kerr add nothing to clarity. Mistake is dealt with in bits and pieces. Misrepresentation, which should be treated in close proximity to mistake (of which it is after all just a special form), follows illegality.”).

82. R.H. CHRISTIE & G.B. BRADFIELD, *CHRISTIE'S THE LAW OF CONTRACT IN SOUTH AFRICA* 327 (6th ed. 2011) (“Cheshire Fifoot and Furmston have tried to bring some order into the English law of mistake by pointing out, correctly, that the factual situations involving mistake can be classified as cases of unilateral, mutual, or common mistake . . . [T]here is unilateral mistake when one party to the contract is mistaken but the other is not; if the mistake relates to something other than the other party's state of mind the existence of the mistake may or may not be known to the other party, but if it relates to his state of mind it cannot be described as unilateral unless it is known or at least ought to be known by him. There is mutual mistake when each party is mistaken about the other's state of mind—they are at cross purposes. There is a common mistake when both parties are of one mind and

increasingly questioned because it does not indicate why some mistakes matter and others do not.⁸⁴ As Dale Hutchison has suggested recently, the waning of this threefold division might be due to the influence of De Wet, and added that, whether this is true or not, the development is to be welcomed.⁸⁵

Second, it will be recalled that De Wet grouped together misrepresentation, duress, and undue influence in his chapter on agreement or consensus, since they all dealt with a problem influencing the motivation behind entering into a contract. However, in line with the English practice, some modern works continue to unify these cases under the heading “voidable contracts,”⁸⁶ even though the benefits of continuing this practice are unclear. It is somewhat out of place in classifications that group together problems with consent, rather than the consequences of these problems. Furthermore, as indicated earlier, the reasons for recognizing the void/voidable distinction in English law do not equally apply to South African law.⁸⁷

A further recent development, which extends De Wet’s grouping of situations where there is a problem with the motivation behind the contract, is to join them under the banner of “consensus obtained by improper means.”⁸⁸ This indicates that they are all concerned with cases where there is consensus, but that problems exist with the way in which consensus has been obtained, and that these problems relate to the conduct of another party. This appears to be a clearer basis for structural

share the same mistake about anything other than the state of each other’s mind.”).

83. GEOFFREY C. CHESHIRE, CECIL H. S. FIFOOT & MICHAEL P. FURMSTON, CHESHIRE FIFOOT AND FURMSTON’S LAW OF CONTRACT 284–85 (15th ed. 2007).

84. Christie and Bradfield recognise that a misrepresentation could induce a mistake “so fundamental” that assent is impossible, and “the contract is void *ab initio*.” CHRISTIE & BRADFIELD, *supra* note 82, at 296–97. However, they do not seem to accept that the converse of a fundamental mistake is a mistake in motive, which is only actionable if caused by misrepresentation. Mistakes in motive are discussed, but the distinction between a fundamental mistake and a mistake in motive is not made clear. *Id.* at 333.

85. Hutchison, *supra* note 66, at 211–12 (“The use of these descriptive labels is somewhat less marked in the more recent cases, a tendency that might perhaps be attributed to the influence of De Wet, but which in any event is to be welcomed; as others have pointed out, the tripartite distinction is suspect, and serves little analytical or elucidatory purpose.”).

86. *See, e.g.*, I.G. FARLAM ET AL., CONTRACT: CASES, MATERIALS AND COMMENTARY, at ch. 8 (3d ed. 1988).

87. *See* discussion, *supra* notes 36–39.

88. *See, e.g.*, HUTCHISON ET AL., *supra* note 80, at 114–44; VAN HUYSSTEEN ET AL., *supra* note 80, at 93–143.

presentation than a heading like “voidable contracts.”

Third, moving on from consensus, while De Wet’s recognition of initial possibility and certainty of performance as requirements for concluding a valid contract has been followed in many modern works, his views have not been universally accepted. In accord with some modern works on English contract law,⁸⁹ Christie and Bradfield discuss these two topics in the chapter on agreement, as cases where the courts refuse to enforce a contract, even though there is agreement.⁹⁰ But they are not consistent. Although courts also refuse to enforce the contract in cases of non-compliance with formal requirements—or with the requirement that a contract has to be lawful, even though there is agreement—Christie and Bradfield nonetheless consider these cases in separate chapters.⁹¹ Alistair Kerr in turn deals with vagueness or uncertainty in the context of interpretation.⁹² However, a determination of validity, which includes a finding of certainty, must logically precede interpretation.

C. THE CONTENTS AND OPERATION OF VALID CONTRACTS

It will be recalled that De Wet initially used the phrase “the consequences of the contract” as a common denominator for a host of topics, such as the implications of multiple parties, various terms, breach, and remedies arising from breach. It will also be recalled that he subsequently discarded this phrase, and dealt with these topics separately. This practice is followed in a number of modern works that deal with the three topics of “contents and operation” of contract, “breach,” and “remedies” in

89. See J. BEATSON, ANSON’S LAW OF CONTRACT 60–61 (28th rev. ed. 2002) (“Although the parties may have reached agreement in the sense that the requirements of offer and acceptance have been complied with, there may be no contract because the terms of the agreement are uncertain or because the agreement is qualified by reference to the need for a future agreement between them The law requires the parties to make their own contract; it will not construct a contract for them out of terms which are indefinite or uncertain. A vague or uncertain promise does not accordingly give rise to an enforceable contract.”).

90. See CHRISTIE & BRADFIELD, *supra* note 82, at 104–05; see also Gerhard F. Lubbe, *The Law of Contract in South Africa by RH Christie*, 1981 ACTA JURIDICA 177, 179 (“It requires a careful reading . . . to discover the discussion of initial possibility of performance and contracts void for vagueness in a section entitled ‘Offer and acceptance without contract,’ which in turn forms part of the chapter on ‘Agreement.’”).

91. CHRISTIE & BRADFIELD, *supra* note 82, at viii, xi (denoting Chapter Three as “Formalities” and Chapter Ten as “Illegality and unenforceability”).

92. ALISTAIR KERR, THE PRINCIPLES OF THE LAW OF CONTRACT 421 (6th ed. 2002).

separate chapters. In the chapter on “contents and operation,” they typically consider contracts involving multiple parties (e.g., suretyship, joint and several liability), types of terms, and interpretation, and they further clearly distinguish this chapter from earlier chapters dealing with validity.⁹³ The logic is that it has already been established that the parties concluded a contract, and that it must now be determined how the contract operates or works.

However, a countervailing notion in modern textbooks is more in line with the common law approach of drawing less distinct boundaries between validity and operation. For example, Christie and Bradfield place chapters on conditional contracts, the terms of the contract, and parties to the contract in between chapters that deal with the requirements for a valid contract (they follow the chapter on formal requirements, but precede chapters on misrepresentation and fraud, duress, undue influence, mistake, and illegality). This resembles the approach of some common law works. For example, after his chapter on “form of contract,” Pollock sets out chapters on “persons affected by contract,” “duties under contract,” “conditions, and herein frustration,” followed by “unlawful agreements,” “mistake,” “misrepresentation and fraud,” “the right of rescission,” and “duress and undue influence.”⁹⁴ In addition, Anson deals with various terms in the broader context of formation, and not under a separate heading of operation. It is not readily apparent why all these authors, under the heading of “formation,” discuss issues that do not relate to formation, but rather to the effect of terms that have already been “formed.”⁹⁵

93. For example, Lubbe & Murray first deal with questions of formation and validity in Chapters Two through Eight, and only in Chapter Nine on “operation” do they consider various rules on how, and to whom, performance must be made. *See generally* FARLAM ET AL., *supra* note 86; VAN HUYSSTEEN ET AL., *supra* note 80, at 51–238 (dealing with formation of contracts); *see also id.* at 239–318 (dealing with operation of contracts); HUTCHISON ET AL., *supra* note 80, at 45–271 (considering first the “formation of contract,” then the “requirements of a valid contract,” and finally the “contents and operation of contract”). However, the discussion of the “requirements of a valid contract” are misplaced because “formation” presupposes certain requirements.

94. POLLOCK, *supra* note 28, at vii–viii.

95. *See* BEATSON, *supra* note 89, at 132 (discussing interpretation of contracts through extrinsic evidence in a section entitled “Formation of Contract”). The link is admittedly closer when dealing with “assurances”: at times it is difficult to distinguish between an assurance which merely amounts to a representation that influences the decision to contract (a formation issue), and an assurance which amounts to a term (an operation issue). *See id.* at 125.

D. BREACH OF CONTRACT AND REMEDIES ARISING THEREFROM

As we have seen, De Wet revolutionised the treatment of breach of contract in South African law by devising a new typology of five types or forms of breach. As Tjakie Naudé has pointed out, this division, which was devised under the influence of modern civilian thinking, but which also accommodated the common law notion of anticipatory breach, may be regarded as one of his most influential contributions.⁹⁶ Similar divisions are followed in a number of modern works, such as *Wille's Principles of South African Law*,⁹⁷ Farlam et al.'s *Contract: Cases, Materials and Commentary*,⁹⁸ and Van der Merwe et al.'s *Contract: General Principles*.⁹⁹

A further notable example of De Wet's influence is the much stronger structural division between breach, on the one hand, and the remedies arising from breach, on the other. It will be recalled that earlier works on the law of contract did not pay much attention to breach of contract as a topic in its own right: the rules on situations where parties acted contrary to the contract were spread over sections on performance or fulfilment of obligations in general, or on the termination of obligations. In accordance with the development which De Wet proposed, some recent works accept that it may be of value first to deal with breach in its own right, and determine when it is present, before considering the remedies it gives rise to.¹⁰⁰ Cancellation then assumes the status of being only one of the remedies arising from breach.

Christie and Bradfield, who (like Wessels) make use of the heading "*mora* and breach," deviated from the De Wet approach. This at first suggests that *mora* (i.e., delay in performing) is something distinct from breach, because, if breach included *mora*, they could simply have used the heading "breach."¹⁰¹ However, from the context it is apparent that Christie and Bradfield do regard *mora*, together with positive malperformance, as specific

96. See Naudé, *supra* note 75, at 270.

97. For the most recent edition, see WILLE & GIBSON, *supra* note 36, 858–72.

98. FARLAM ET AL., *supra* note 86, at 470–529.

99. VAN HUYSTEEN ET AL., *supra* note 80, at 319–65.

100. *Id.* at 319–418 (listing Chapter Ten "Breach of contract" before Chapter Eleven "Remedies for breach of contract"); HUTCHISON ET AL., *supra* note 80, at xv–xvi (listing Chapter Twelve "Forms of Breach" before Chapter Thirteen "Remedies for Breach").

101. CHRISTIE & BRADFIELD, *supra* note 82, at 515.

forms or types of breach.¹⁰² But this still leaves unclear what circumstances, other than *mora*, would amount to breach. Under the heading of breach, they deal with a variety of themes like “Forfeiture clauses,” “Material breach of an essential term,” “Anticipatory breach and repudiation,” and “Instalment contracts”;¹⁰³ however, the relationship between these themes is not readily apparent.¹⁰⁴

E. TERMINATION OF CONTRACTUAL LIABILITY

Earlier civil law works, as we have seen, recognised certain grounds for the termination of all obligations, irrespective of their origins (i.e., whether they derive from contract, delict, or other sources). Modern works on contract generally contain sections that specifically list grounds for the termination of contractual obligations. These lists have a fairly uniform content: they usually include performance, set-off, novation, and prescription, whereas termination due to improperly obtained consent (rescission and *restitutio in integrum*) and termination due to breach (generally called cancellation) are dealt with elsewhere.

This practice cannot clearly be related to De Wet’s influence. Perhaps it is only worth noticing that the works which strongly follow his general structure also avoid the English practice of referring to grounds for “discharge,” rather than to grounds for “termination.”¹⁰⁵ For example, Ellison Kahn distinguishes between “discharge by performance,” “discharge by agreement,” and “discharge by law.” This terminology was used by Wessels¹⁰⁶ and Anson, whose works Kahn knew well and used in his lectures.¹⁰⁷ But it appears to be a matter of labelling, rather than of substantive importance, whether “discharge” or “termination” is used. It is at least generally accepted that South African law

102. CHRISTIE & BRADFIELD, *supra* note 82, at 515 (“The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in *mora*, and, in the last case, to be guilty of positive malperformance.”).

103. *Id.* at 534–42.

104. See Naudé, *supra* note 75, at 274.

105. See CHRISTIE & BRADFIELD, *supra* note 82, at xii (denoting the title of Chapter Twelve as “Variation and discharge”).

106. WESSELS, *supra* note 30, at ch. IV; see VAN HUYSSTEEN ET AL., *supra* note 80, at 487–547.

107. See ELLISON KAHN ET AL., 1 CONTRACT AND MERCANTILE LAW: A SOURCE BOOK 286–355 (Ellison Kahn ed., 2d ed. 1988).

does not work with the notion that breach “discharges” the contract, and therefore results in some form of automatic transformation or novation of the obligations.¹⁰⁸

CONCLUSION

Assessing the impact of a jurist on legal development can be a challenging exercise: the causes of legal change are often complex, varied, and not expressly acknowledged. Nonetheless, when comparing jurists’ structural expositions of a field of law, the influences are often manifest, especially when the potential sources of inspiration are fairly limited.

The concern here was with the structures devised for setting out the South African law of contract, and especially with the role of a famous jurist working in this field: JC de Wet. It was shown that important structural features of the South African law of contract were already established at the time when his *Kontraktereg* first appeared in 1947. For example, it had been accepted for some time that the law of contract was a branch of the law of obligations, and there had long been a shift away from predominantly dealing with specific contracts towards expositions that pay considerably more attention to general principles. Jurists who played a crucial role in this regard included Maasdoorp, Nathan, Wille, and Wessels; their works represent a continuation of late Roman–Dutch law, particularly the writings of Van der Linden, who in turn drew strongly on Pothier in seeking to set out general principles in a structured manner. However, there are also clear indications that some structural features introduced by these jurists were inspired by English jurists, most notably Pollock and Anson, who in turn at times were also inspired by earlier civil law sources.

De Wet’s *Kontraktereg* continues this tradition, but also contains a number of innovations. Thus, his exposition of the requirements for concluding a valid contract more extensively and directly links various aspects of consensus, and affords greater prominence to certainty and possibility as requirements. Breach of contract, the remedies arising from breach, and residual cases where contractual obligations terminate are also distinguished more rigorously than in the past. And the distinction he drew between five forms of breach, which included

108. CHRISTIE & BRADFIELD, *supra* note 82, at 515 (“Our law never seems to have worked on the basis that breach discharges the contract.”); *see supra*, Sections I(B) and II(B)(5).

the common law inspired construct of repudiation, was highly influential.

In conclusion, it is tempting to speculate, even if only briefly, on what the inspiration behind all these structural developments could be. Here, the first conclusion is that a comparison of various jurists' expositions of the field of contract reveals that there are seldom truly radical innovations. Jurists are generally strongly influenced by the structures used by their predecessors. They do not start with a clean slate. Some even indulge in creative plagiarism. Changes are generally modest in scope and introduced incrementally.

The second conclusion relates to the underlying ideological or doctrinal motivations underlying the jurists' structural choices, especially when facing vying approaches from different traditions. Here, it has become something of a cliché in the South African context to differentiate among "purists," who favour civil law and strongly resist common law influence, "pragmatists," who are not concerned about the pedigree of a rule as long as it works, and "pollutionists," who actively embrace transplanting common law.¹⁰⁹

However, if we consider the experiences with structuring our law of contract, the position is more complex. Although De Wet had at times the reputation of being a purist, his structural choices cannot be ascribed to an ideological, purist preference for structures followed in the civilian tradition. The nineteenth and twentieth-century works on the continental private law (especially German and Dutch law), which influenced so much of his ideas on specific aspects of the law of contract,¹¹⁰ were in any event not of much use as models for the exposition of the South African law of contract as a whole. In these works, the relevant principles relating to contracts were too widely spread over a host of headings that were generally applicable to private law, or to the law of obligations.

De Wet was therefore not, as Dworkin would have it, "the last of the Pandectists" when it comes to the substance of his

109. See Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in SOUTHERN CROSS, *supra* note 26, at 33, 60–64; Zimmermann & Visser, *supra* note 26, at 22–24.

110. See, e.g., Jacques du Plessis, *Die Regsaard van Prestasie*, 65 J. CONTEMP. ROMAN-DUTCH L. 59 (2002) (discussing the influence of German law on the problematic idea, propagated by De Wet, that performance requires a bilateral juristic act in the form of a debt-extinguishing agreement).

structural choices. He generally was content to follow broad outlines adopted by his predecessors. As stated often, especially by Reinhard Zimmermann and Charl Hugo,¹¹¹ De Wet's approach is at times characterised by a pragmatism which is difficult to reconcile with the reputation he enjoyed as a purist, fixed on keeping South African law in line with the civilian tradition, and concerned with rooting out all common law influences. If anything, the effect of the Pandectist tradition was rather on De Wet's method,¹¹² which is characterised by a rigorous, systematic, and conceptual approach to setting out the law of contract, and which at times is quite pragmatic in its structural choices.

But enough about the motivations behind De Wet's structural choices. What about the jurists that came after him? In essence, they can be divided into two main groups, both with influential members. These two groups consist of those who strongly adhered to De Wet's structures, and those who essentially ignored them. To the former group belong works that generally display a greater concern with matters of principle, and with providing systematic expositions that may be used in legal practice as well as in legal education. Important examples include *The Law of South Africa*, which is the South African equivalent of *Halsbury's Laws of England*,¹¹³ and standard textbooks, such as Gerhard Lubbe and Christina Murray's third edition of *Farlam & Hathaway's Contract: Cases, Materials and Commentary*, Schalk van der Merwe et al.'s *Contract: General Principles*, and *The Law of Contract in South Africa* edited by Dale Hutchison and Chris Pretorius. The latter group in turn includes works that are characterised by a special emphasis on the analysis of specific cases and their importance in practice, and less by a concern for structural coherence. Prominent works in this group are *Christie's The Law of Contract in South Africa*, and *The Principles of the Law of Contract* by Kerr.

What are we to make of the notable divergence in approaches of the jurists that came after De Wet? The debates between purists, pragmatists, and pollutionists quieted down long ago. There is no clear evidence in the modern works of strong ideological commitments to the civil law or common law; the focus is more on recent South African case law and legislation.

111. Zimmermann & Hugo, *supra* note 48, at 12–13.

112. See Lubbe, *supra* note 49, at 105.

113. A.D.J. van Rensburg et al., *Contract*, in 5 THE LAW OF SOUTH AFRICA (Robert D. Sharrock ed., 2d ed. 2010).

However, there may be a more subtle factor at play, which could at least provide a partial explanation for the divergence. These distinct groupings also share distinct personal backgrounds: the group that more closely follows De Wet's structure contains a number of jurists who either studied under him, or studied at institutions that adopted his structure and method in their teachings. Members of the group that essentially ignore him in turn studied at institutions that taught English law, or local law at a time when De Wet's structure was still unknown, and the works on contract more strongly reflected English influences.¹¹⁴ This conclusion is not without significance. It confirms the observation made at the outset about how vital and lasting structures can be in introducing new generations of jurists to a particular field of law.

114. Christie, who was the sole author of all but the latest edition of *Christie's Law of Contract in South Africa*, was born and raised in England, and studied law at Trinity Hall, Cambridge from 1946–1949, where he did, however, enjoy some exposure to Roman–Dutch law. See A.J.G. Lang, *Professor Richard Hunter Christie: A Personal Tribute*, 127 S. AFR. L.J. 414, 414–15 (2010). Kahn studied law at Witwatersrand, where he obtained his LL.B. in 1943. See Coenraad Visser, *Ellison Kahn*, in *ESSAYS IN HONOUR OF ELLISON KAHN 1* (Coenraad Visser ed., 1989). Kerr was born in Scotland, and studied law at Witwatersrand University from 1946–1948, where he taught contract law. See Graham Glover, *In Service to the Law: Alastair James Kerr SC*, 128 S. AFR. L.J. 51, 51–53 (2011). On the influence of Anson on Kahn, see, *supra*, Section III(E).