

Jan Christiaan¹ Smuts (1870–1950): Middle Templar extraordinary

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Prologue

By the time that I was called to the Bar by Middle Temple in July 1952 I had paid little or no attention to the constitutional and legal problems of South Africa. But in 1958 I was asked by the newly-created International Commission of Jurists to attend as an observer, together with Fred Lawton QC (then a leading practitioner in England, later to become a Lord Justice of Appeal) the forthcoming opening of the trial in Pretoria of 156 people charged with treason. I duly attended those preliminary proceedings which began on 1 August 1958 (and ultimately were aborted), and over the following years I came here as an observer of other political trials, that is, until 1965.²

British subjects did not require a visa to visit South Africa, but the Minister of the Interior, unsurprisingly, possessed the power to take away that privilege and render the undesirable visitor a prohibited immigrant. Accordingly, I duly received a letter from the Secretary to the Minister of the Interior depriving me of the visa privilege. It was a long letter – two full pages of A4 paper. It chronicled (very accurately) all my misdeeds over the years, writing and lecturing against apartheid and constantly consorting with defence counsel in the political trials. The letter ended as follows: ‘I am instructed by my Minister to tell you that you have seen enough of South Africa, and South Africa of you – I remain your obedient servant!’ (That official sentiment might rank with the remark that Smuts is reported to have made when Mahatma Gandhi (whose spiritual qualities Smuts admired) left South Africa before World War I in similar circumstances, to the effect that South Africa was glad to see the back of the Saint!) I have treasured that excellent piece of poetry. I thought that one day it might be my passport to revisit South Africa. Alas, I did not come back until two years ago, when Middle Templars conferred delightfully with judges and lawyers here. On that occasion I was astonished to find that there was no formal celebration of the centenary of the Union of South Africa and its court system which remains the same today, except since 1994 with the overarching power of the Constitutional Court.

If you stand in Parliament Square, you will instantly observe that of the ten statues three of them are not of Englishmen. Abraham Lincoln is one. The other two are both South African – Nelson Mandela and Jan Smuts. The former’s fame is rooted in contemporary literature following the demise of apartheid in the last decade of the 20th century. But who in England today remembers Jan Smuts? Shortly before his 80th birthday on 24 May 1950 (only weeks before he died) Smuts remarked: ‘I belong to antiquity.’ As Professor Antony Lentin, in his recent study of Smuts, said, that remark felt true in more senses than one. Smuts was a universal man (‘such as might have stepped out of the pages of *Plutarch’s Lives*’); he had touched life at many points. He was a fine soldier who fought against the British in the two

Boer wars at the end of the 19th century, and for the British in the First World War; as an adroit politician in his homeland, twice becoming Prime Minister of South Africa; as one of the British delegates at the Paris Peace Conference in 1919; as a prominent member of Lloyd George’s Imperial War cabinet; and as an international statesman directly involved in the formation of both the League of Nations and the United Nations. But nowadays, who appreciates that Jan Smuts was a scholar, jurist, scientist, philosopher (he even read Spinoza during lulls in the Paris Peace Conference of 1919) and the author of the classic work on holism? ‘Even the great’, the South African writer Alan Paton wrote, ‘thought he was great’.

The overriding problem that faced South Africa in the first half of the twentieth century was race. The failure to devise an enduring solution ensured that it endured through the second half of that century. Any proper understanding of Jan Smuts’ approach to the political and human rights of the non-white population has to be contrasted with the position which faced Nelson Mandela in the latter years of the century. Smuts side-stepped the problem of the native population while Mandela, in different circumstances, confronted it and was not distracted by other political issues. RW Johnson concludes in his *South Africa’s Brave New World*, Smuts ‘failed to concentrate sufficiently on the home front...’ (That may be an exaggeration but if related to the post-Second World War era, Smuts’ primary interests were decidedly international. Prior to that his focus was on an independent South Africa, loyal to the Crown, a member of the British Commonwealth.) By way of comparison, Nelson Mandela in his inspiring leadership of the African National Congress focused starkly on the home front. Jan Smuts began his task, after the Boer War, of forging a nation out of the four colonial territories (two Boer Republics annexed as Crown colonies and two British colonies) in promoting the constitutional framework for the Union of South Africa in 1910 and the welding of the disparate groups which ended with his political defeat in 1948.

Smuts undoubtedly began his political life as a white supremacist. This was to be a white man’s country. But would it remain so, a half-century later? Might the establishment of an independent judiciary buttress the political status quo, or could it fashion a legal development that modified the inherent inequality between the races – a question rarely posed by commentators? Would the supremacy of whiteness ultimately yield to the ethical imperatives of human rights for all races? But I anticipate my theme. First, some biographical details of Jan Smuts, the lawyer.

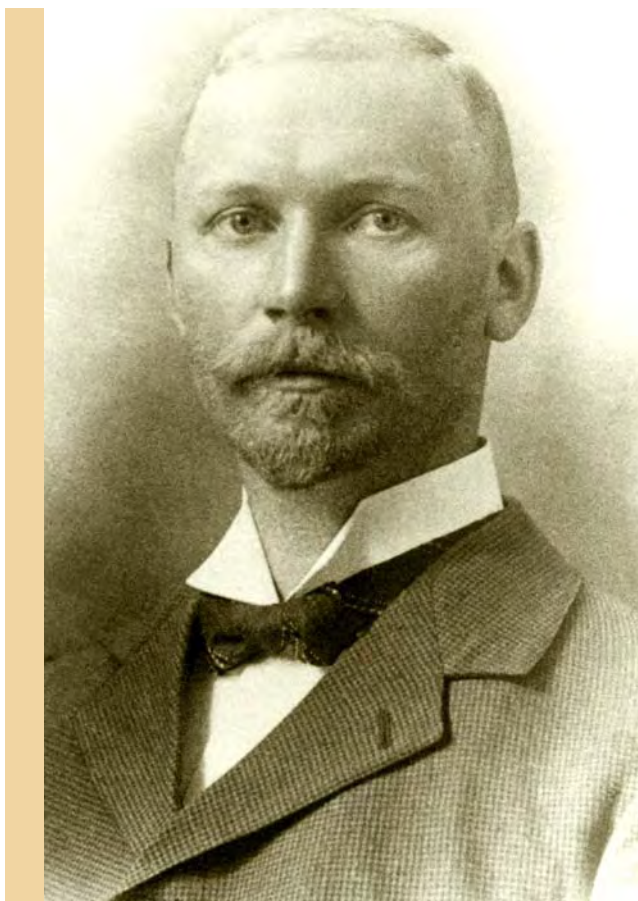
To start with, he was a Middle Templar, admitted in 1892.³ He had been an undergraduate at Stellenbosch, gaining a double first in the mixed literature and science degree. He was a student at Christ’s College, Cambridge, where he took both

parts of the Law Tripos simultaneously (an achievement then without precedent) and headed the list of candidates with a double first, winning prizes in jurisprudence and Roman law. The legal historian FW Maitland described Jan Smuts as the most brilliant law student whom he had taught and supervised: little wonder that Smuts was offered a fellowship by his college, which he turned down in favour of a return to South Africa. He was never called to the English Bar, although before returning to practise in Johannesburg and later in Pretoria he was a pupil at 1 Paper Buildings in the chambers of John Roskill, the father of Master Eustace Roskill. In the recent publication, *The History of Middle Temple*, Master Stockdale retells a delightful tale. In December 1903 the Finance Committee of the Inn received a letter from the surety of a South African student member of the Inn who had been on active service in the Boer War, actually on the enemy side. The surety paid the arrears of duty amounting to £6, adding in his covering letter that he had reason to believe the member had no intention of being called to the Bar, or indeed of recognising the Inn. The surety had misjudged the student, for in June 1904 the student sent £6 to the Inn. He was duly informed that the arrears had already been paid and that his name would be restored to the list of members on payment of the current year's duty of £1, which was immediately paid. In 1906 the student came to London to speak to the Junior Minister for the Colonies to plead for the incoming Liberal Government to grant autonomy to the two Boer republics within the British Empire; that Minister was Winston Churchill, who was sympathetic but sceptical. The student was Jan Smuts. In 1917, by then a general in the British Army (who had conquered the German colonies in what are now Namibia and Tanzania), Smuts was made an honorary Bencher on the nomination of Master Treasurer.⁴ He was made Chancellor of Cambridge University in June 1948, and his portrait hangs beside Milton's at Christ's College.

Unification of South Africa

Jan Smuts made a major and influential contribution to the drafting of the constitution. In 1908 he took the first steps towards realising his ambition to combine the English-speaking provinces of Cape Colony and Natal with the Afrikaans-speaking Transvaal and Orange Free State in a Dominion of South Africa aspiring to free itself from Imperial tutelage. He called a national convention of the four colonies. At Pretoria Smuts moved a resolution which was unanimously adopted. Smuts' legal expertise and political skill were instantly put into play. Smuts himself made the most active contribution to the formation of the union, producing a variety of draft proposals for consideration by 33 delegates to the Constitution. The proposals were duly processed through the four parliaments and were approved by the Liberal Government of Campbell-Bannerman whom Smuts had met in 1906 and ultimately by Parliament at Westminster. It was Campbell-Bannerman who acceded readily to Smuts' pleas. Might it not have been better for the indigenous population had Britain insisted on retaining Imperial rule, or even insisting on a US-style constitution protecting human rights?

What was to be the form of the constitution and the structure of the court system? Smuts' inclination was strongly conditioned by his legal training in the British tradition of Cambridge University where he had imbibed the historical, evolutionary interpretation of the British constitution, with the creation of an



A young General Smuts after the Anglo-Boer War.

untrammelled legislature (call it parliamentary sovereignty, if you will) rather than a legislature subject to constitutional limitations in the mould of the US Constitution, with its power of judicial review by its Supreme Court. Smuts was not initially averse to a federal structure but by 1907 had become convinced that a unitary constitution was preferable. On 23 June 1908 he told the Transvaal Legislative Assembly in clear form his reasons:

'The federal system is not only undesirable because it involves even more expense and means more machinery superimposed on the people of South Africa, which is already groaning under all this administration, but to my mind the great difficulty with federation is this, that it assumes that a number of independent parties come together into a compact, into an agreement, which is binding for the future ... Is that the sort of Constitution we want for South Africa, a country in its infancy? Do we want a Constitution which will lead to civil wars as the American Constitution led to? No, we prefer to follow a different type – that of the British Constitution.'

There is no recorded indication that between the two world wars Smuts had changed his stance over the South African constitution. The international distractions from domestic politics were ever-present. In 1917 Smuts was in London as a member of Lloyd George's Imperial War Cabinet and in 1919 as a member of the British delegation at the Peace Conference at Versailles. Twenty years later Smuts was actively engaged in the Allies' conduct of the war in Europe and North Africa.



Field Marshall JC Smuts during the Second World War.

The native problem

As the 19th century turned into the 20th, Jan Smuts had considered that South Africa faced two fundamental problems: first, consolidation of the white race, and secondly, white policy towards the other races (native, Asian and Cape Coloureds). The instant need was to fuse or consolidate the 'two Teutonic' peoples of South Africa which seemed to him to be self-evident and of pressing priority. As an Afrikaner by birth and English by legal disposition, he felt he was uniquely qualified and in an ideal position to be the welder together of the two white communities. Of the second problem, he was in advance of most Afrikaners both in apprehending the problem and in acknowledging that it would have to wait and be grappled with in the future, but all in good time when the development of the black population reached the standards of European civilisation. An early (1906) expression of his political stance disclosed his attitude as a supremacist:

'I sympathise profoundly with the native races of South Africa whose land it was long before we came here to force a policy of dispossession upon them. And it ought to be the policy of all parties to do justice to the natives and to take all wise and prudent measures for their civilisation and improvement. But I don't believe in politics for them. Perhaps at bottom I do not believe in politics at all as a means for the attainment of the highest ends; but certainly so far as the natives are concerned politics will to my mind only have an unsettling influence. I would therefore not give them the franchise, which in any case would not affect more than a negligible [sic] number of them at present. When I consider the political future of the natives in SA I must say that I look into shadows and darkness; and then I feel inclined to shift the intolerable burden of solving that sphinx problem to the ampler shoulders and stronger brains of the future. Sufficient unto the day etc. My feeling is that strong forces are at work which will transform the Africander (sic) attitude to the natives.'⁵

An example of Smuts' approach to the politics of South Africa throughout the first three decades of the Union is best shown in his discourses with private persons of a liberal disposition, the most notable being the author Olive Schreiner, who had a large reading public throughout the English-speaking world, and with whom he had a close relationship over many years at the beginning of the 20th century. She was a passionate advocate for a range of socio-political issues, often exhibiting contradictory intuitions – she was anti-capitalist, pro-Boer, pro-Native, anti-Whitehall, all things at one and the same time. Some of Olive Schreiner's letters to Smuts made swingeing comments about white trade union leaders who produced white-only unions and 'protected' skilled jobs for whites only. A letter of 16 April 1911 referred to the 'little handful of oligarchic white men, who call themselves "working men" to keep down the millions of their fellow citizens.' She had written, prophetically, that 'the continual association with creatures who are not free will ultimately take from us our strength and our own freedom, and men will see in our faces the reflection of that on which we are always treading and looking down. If we raise the dark man we shall rise with him; if we kick him under our feet he will hold us fast by them.' Smuts shared that passionate feeling, but his warm-hearted approach was controlled by a cool head. He knew instinctively that the issue of the franchise was not for today, but should be left to the morrow. His political struggles with such liberal causes did not detract from the strength of his friendships, which were reciprocated.

Toni Morrison, addressing the American literati in her essays entitled *Playing in the Dark*, has forcefully reminded 'all of us [that we] are bereft when criticism remains too polite or too fearful to notice a disrupting darkness before its eyes.' But those of us who have conducted public inquiries – rather akin to the task of the historian – are acutely aware of the hazard of judging human conduct from afar. Time, so far as we know, flows only in one direction, and despite our recognition of the seductive appeal of hindsight, we are prone to give it prominence. The significance of events under scrutiny, especially when viewed through that most accurate of diagnostic instruments, the 'retrospectivescope', are far removed from the hectic, demanding and fleeting days as they were lived. As the Third Priest comments in TS Eliot's *Murder in the Cathedral*:

'... one moment
Weighs like another. Only in retrospection, selection.
We say, that was the day. The critical moment.'

Yet Smuts can speak for himself, as in this letter to a friend from 1942:

'What will it profit the country if justice is done to the underdog and the whole caboodle then, including the underdog, is handed over to the wreckers?'

There speaks the experienced voice of pragmatism. If Smuts retained an aspiration for native representation in Parliament, he left unresolved his personal contradiction of denying the franchise to fellow citizens with fundamental human rights – as Professor Hancock, in his magisterial biography of Smuts (vol II at page 485), neatly observed: 'that expressed in a nutshell the mechanics of the struggle for power within an electorate established prominently upon the principle of racial discrimination.'

During the early part of the 20th century Smuts had provided no answers to the second problem – indeed his constitution-making of 1910 worked positively against such an immediate solution – and deliberately left it for others in the future to solve. He was generally unreceptive to theories about universal franchise and regarded himself as a pragmatist. He thought that development about voting rights would emerge in the course of political power, whereby the whole population would exhibit its responsibility and power, and not abuse that power as regards the native population. For the time being he was unsure how this approach could be reconciled with the enfranchisement of the majority. But, quintessentially, Jan Smuts believed in the rule of law and the evolving international human rights law. As the author of *Holism and Evolution* he would have expected that human rights for all persons would evolve along ‘holistic’ lines. As the reputed draftsman in 1945 of the preamble to the Charter of the United Nations, he became a primary subscriber ‘to re-establish faith in fundamental human rights [seven words specifically inserted in an amendment proposed by South Africa], in the sanctity and ultimate value of human personality, in the equal rights of men and women ... and to promote social progress and better standards of life in larger freedom.’

In 1941 Smuts, having only recently (in 1939) become Prime Minister of South Africa for the second time, was directly engaged in Britain’s grim resistance to Nazi Germany; it was his parliamentary stance that declared South Africa at war with Germany. In the following years he became instrumentally engaged in the establishment of the United Nations. It was at the very least a time for rethinking, if not an instant reshaping of the ever-present problem of the development of the non-white population in his own country. As one looked to the world after the ending of hostilities, Smuts did start to look beyond the political horizon, but time was short.

At the insistent invitation from Churchill, Smuts made his second wartime visit to England at the end of 1943. On 25 November 1943, at a private meeting of the United Kingdom Branch of the Empire Parliamentary Association (which was subsequently fully reported on the editorial page of *The Times*⁶). Smuts addressed the members in the Houses of Parliament on the topic of ‘Thoughts on the New World.’ In short, the race and colour problem was prospectively visualised by Smuts, although predictably with persistent prevarication. He said:

‘You can have no simple, straightforward approach to a problem such as the vast diversity of race and colour, culture, and levels of civilization existing in our Empire. That is the sort of problem with which we have dealt in the past, and which will face us even more in the future ... I know it is one of the questions on which people are thinking deeply and with which they are very much concerned nowadays. Many well-meaning people think you can by short cuts arrive at a solution. But you will not. Simplification will not help you. Simplification will mean falsification of the real difficulty. It is only by a long process of experience and patient experiment that you can deal with situations such as these.’

Internationalism

Significantly, the Covenant of the League of Nations in 1919, for which Smuts took some responsibility for framing, contained no provision for human rights, apart from references in Article 23 to ‘fair and humane conditions of labour’ for everyone and

to ‘just treatment’ of the native inhabitants of dependent territories. While human rights were discussed during the drafting of the Covenant, no obligations regarding human rights were incorporated into the Covenant of the League of Nations. Smuts would have been alive to the contrast between 1919 and 1945. If during the inter-war years he continued to do nothing (*niksdoen* – the Afrikaans for doing nothing – as his liberal friends were wont to say) and to watch, the policy of separate development of the races gradually disintegrated. A small token of such disintegration was exhibited by Smuts being prepared to arm the non-white population, were the Germans during World War I to invade South Africa. That at least infuriated the Afrikaners. By the 1940s, he had become, perhaps belatedly, convinced that the country had to tackle the Native problem. Even before his commitment in 1945 to the charter of the United Nations he had acknowledged the need for change. Addressing the Institute of Race Relations in Cape Town in February 1942 he at least dispelled the oft-repeated criticism that he had cared chiefly for primitive Africans, to the neglect of the urgent and nascent problems of African urbanisation:

‘Isolation has gone and segregation has fallen on evil days too. But there are other phenomena springing out of these conditions ... A revolutionary change is taking place among the Native peoples of Africa through the movement from the country to the towns – the movement from the old Reserves in the Native areas to the big European centres of population. Segregation tried to stop it. It has, however, not stopped it in the least. The process has been accelerated. You might as well try to sweep the ocean back with a broom.

When people ask me what the population of South Africa is I never say it is two millions. I think it is an outrage to say it is two millions. This country has a population of over ten millions, and that outlook which treats the African and Native as not counting, is making the ghastliest mistake possible. If he is not much more, he is the beast of burden; he is the worker and you need him. He is carrying this country on his back.’

But by the 1940s such high-sounding expressions about racial issues came too little and too late. His plan for the forthcoming general election of 1948 included recognition of African rights in the urban areas but specifically did not envisage any immediate extension of African parliamentary representation. Therein lay the complexity of Smuts’ problem. On the one hand there was his deep love of public duty as Prime Minister and on the other his countervailing liberalism. The inherent contradiction between the humanitarian in him and his South African (particularly, Afrikaner heritage) created the politician’s dilemma.

If there existed in terms of *realpolitik* insufficient leeway for radical change, such as to fend off the Nationalists and to avoid the loss of power at the General Election, Smuts’ years of drifting on policy towards racism had already – in all likelihood, unintentionally – paved the way for the advent of apartheid. But at the brink of the electorate’s decision in 1948 there occurred an event of political significance.

The event was precipitated, not by the black community under the growing strength of the African National Congress, but from the Asian population. In 1943 the Government under Smuts introduced the Trading and Occupation of Land Bill (the Pegging Bill) whose purpose was to extend severe restrictions on the freedom of the Asian population living in the Transvaal and Natal. The

Indian population was, not unreasonably, outraged by the loss of rights that had existed since the 1860s. After many political vicissitudes, the Bill became law in 1946 as the Asiatic Land Tenure and Indian Representation Act. It imposed restrictions on the purchase and tenure of land, and controversially created a separate electoral register for Indians, allowing them the right to elect three white representatives. Smuts declared that the Government intended 'fair play and justice for our Indian fellow-citizens, but we do not want to change the structure of our society ... we want to preserve the European orientation of our society.'

The Indian Government withdrew its High Commissioner, and took the issue to the first meeting of the General Assembly of the United Nations. Smuts travelled to the United States to hear Mrs Ranjit Pandit unleash an attack on Smuts and South Africa. The charter was essentially non-discriminatory. By that standard, South Africa's racial policies were indefensible. Smuts' only plausible defence was to claim, legalistically, that the Act was exclusively the concern of South Africa's domestic jurisdiction, and not for international intervention. India won the day. As Bill Schwarz in *The White Man's World* describes the event: 'the author of the Preamble to the UN Charter found himself the first to be arraigned for violating its principles.' Just so. Smuts' correspondence at the time displayed not anger, but bewilderment. (India was at the forefront of the UN non-recognition of South Africa's sovereignty over Namibia: Smuts had gone to the UN to face the music.) It is conceivable that, for Smuts, that one defining moment would have propelled him towards a realisation that the Indian victory at the UN had produced an early example of the outcrop of international human rights law which, at his life's end, was beginning to envelop the post-war world.


It was not until Smuts had been two and a half years in his grave that the Indian Government mounted an attack on the whole front against South Africa's policies on colour. Two conspicuous landmarks were the Universal Declaration of Human Rights in 1948 and the South African Group Areas Act of 1950 – the first instalment of the unalloyed apartheid regime.

The first of the two problems identified at the outset by Smuts – the welding of the two European races – by 1950 was still unfinished business. The second problem of African integration as citizens of the Union of South Africa that Smuts had designed could only have been aspirational and required personally an unresolved contradiction. All that might lead one to conclude that he died a failure, two years after losing power. Not so, for one is entitled not only to judge him in the context of the burgeoning South Africa, but also to speculate how he would have responded to the early years of apartheid.

There has been a long-standing difference among social historians in their interpretations of the effectiveness of separate development of the races between 1910 and 1948. By different assessments of the cohesion and homogeneity of the apartheid state from 1948 onwards, one argument is that there was, generally speaking, an unbroken lineage from the first decade of the 20th century through to the Smuts era, culminating in the advent of apartheid. An alternative view is one of a more fractured development in which segregation did not become a coherent policy until the 1920s and even then was distinguishable from apartheid in its rigorous political form. Bill Schwarz concludes his impressive discussion of the two views and their varieties, that Smuts never had to confront the politics which was necessary

to ensure that segregation continued into the 1950s, 'and we shall never know how he would have responded politically to such a situation'. My supposition is that the non-white population, increasingly urbanised and politically active, were, in Smuts' eyes at least, on the cusp of civilised behaviour in the Western European style. Forty years earlier (in 1906) Smuts had observed that 'the burden of solving' the problem of political change for the non-white population would have to be solved in the future. He added that for the time being 'strange forces' would be at work to transform Afrikaner attitudes to the non-white population. For those forty years Smuts was that future. But, given the times in which he lived politically, he procrastinated and prevaricated on the issue of his country's policy of segregation of the races. But time and circumstances of the new world of internationalism must have forced him, ineluctably, to rethink his personal, internal contradiction. Even the most ardent apologist could not deny that Smuts was innately a supremacist and segregationist: his ancestry and cultural heritage ensured that instinctive posture. He struggled unsuccessfully to reconcile the supremacy of the white population with his commitment to liberty and democracy. The events in New York in 1946 stung Smuts too late for action or for meaningful words. Within two years he was out of office and, two years after that, he died.

The international dimension of the immediate post-war years crucially influenced the opponents of apartheid. By that time, the politics of colour had become a distinct feature of internationalised controversy. The consequences of South Africa's domestic policies inevitably became issues of that country's foreign policy. The rest is a lamentable tale of the second half of the 20th century, until the miracle of 1994 and the end of apartheid.

At Smuts' death, the British Prime Minister, Clement Attlee, aptly remarked: 'A light has gone out from the world of free men.' So I conclude as I began, standing before the statues of Smuts and Mandela in Parliament Square. Viewed from the perspective of the entire 20th century, the juxtaposition of the two men's statues might reasonably seem to the fiercer critics of the system of apartheid to be paradoxical. Viewed, however, from the standpoint of the two halves of the century, the statuary proximity of Jan Smuts and Nelson Mandela – the two giants of the South African nation, each in his own half of the 20th century – is entirely apposite and congruent. 

Endnotes

- 1 On the spelling of his second name – Christiaan, with two 'a's – I have followed the entry in the South African Baptismal Register, as did his biographer, Professor WK Hancock, and as does the Middle Temple Bench Book.
- 2 I subsequently wrote an article in the *International and Comparative Law Quarterly* on the beginnings of the trial, which appeared in the issue of January 1959, pp 59–72.
- 3 He was admitted to the Middle Temple at the age of 21 on 7 May 1892 and was described as the second son of Jacobus Abraham Smuts, of Riebeeck West, district of Malmesbury, Cape Colony, corn farmer.
- 4 Upon being invited up to the Bench, Smuts wrote to Lord Parmoor, the Treasurer of the Inn: 'May I thank you and the Benchers of my old Inn for the great honour they have done me? Of the many marks of distinction and regard which I have received there is none that I value more highly than that of being elected an honorary Benchers of the Middle Temple.' Smuts was called to the Bench at a dinner on 14 June 1917. Announcement of the intention to call Smuts to the Bench was made on 26 April 1917 by Master Treasurer, 'and the Lord Chancellor will second'. [In fact, in the absence of the Lord Chancellor at a Parliament on 3 May 1917, the Lord Chief Justice seconded the proposal.]
- 5 A letter from Jan Smuts to John Xavier Merriman, Prime Minister of Cape Colony 1908–10, 13 March 1906.
- 6 The speech and the editorial were printed in the paper on December 3 at pages 5 and 8, with a further, explanatory, editorial on December 7, when the newspaper also printed a lengthy letter to the editor from Dr Margery Perham (a life-long liberal friend and critic of Smuts).