Navorsingsartikels / Research articles

The law of slavery: The predicament of the slave community at the Cape

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Abstract

Although slavery was not permitted in the Netherlands and in Britain, it was permitted in their colonies. The practice of slavery was introduced at the Cape shortly after the establishment of the refreshment post, and ceased in 1834, long after Britain's permanent occupation of the Cape.

In this article the legal position of the slave community at the Cape is analysed by means of the new insights gained from the study of various sources in the Cape Archives.

The traditional viewpoint has been that the legal position of the slave community at the Cape should be evaluated in terms of Roman Law. There is some doubt, however, about whether Roman Law, albeit in an adapted form, was applied at the Cape during this period. The viewpoint taken in this article is that the legal position of the slaves should be evaluated against the background of the frame of reference for law enforcement contained in the ***Statuten van Batavia*** *(1642) and later in the* ***Nieuwe Statuten van Batavia*** *(1766). From the analysis made of the legal practice at the Cape it appears that this frame of reference was not applied in respect of law enforcement. It emerges, however, that the traditional viewpoint, which holds that Roman Law was applied, should be clearly qualified.*

1. Introduction

William Wilberforce (1759), a member of the British Parliament, described slavery as "... the greatest and most complicated evil by which the human race has ever been afflicted" (Edwards, 1942:34).

In ancient times slavery was a well-known and accepted phenomenon. In this regard the Romans were no exception (cf. Van Zyl, 1977:75-78). An inevitable

result of the conquests leading to the establishment of the Roman Empire was the presence of slaves in great numbers (Dannenbring, 1984:84-85). Simon (1930: 227) describes the fate of prisoners of war as follows:

> (Slavery) was the ordinary destiny of prisoners of war if they were not massacred, so that their enslavement might be regarded as a milder fate than would otherwise be their lot (cf. Hattingh, 1990:6).

The Latin term for a slave, namely *servus*, indicates approval of this *modus operandi*:

> Servi autem ex eo appellati sunt, quod imperatores captivos vendere iubent ac per hoc servare nec occidere solent ..... (*Inst.* 1.3.3)[1]

Shortly after Van Riebeeck had arrived at the Cape, the slave system was introduced in accordance with the policies of the *Vereenigde Geoctroyeerde Oost-Indische Compagnie* (the V.O.C.) (Worden, 1985:6-18; Hattingh, 1990:6-8). The attitude of the slave owners at the Cape towards slavery as an institution was strongly influenced by the fact that the V.O.C. permitted and afterwards regulated the slave system. They did not only accept the slave system as an officially endorsed institution, but also regarded their rights in terms thereof as sacred and inalienable. Worden's (1985:16) report is worth repeating:

> (Slavery) was perceived as an institution ordained by the ruling authority and accepted as such ... The first settlers accepted slaves in much the same way as they did land and seed. Even after slavery became well established, owners saw it as a system of labour maintained and supported by the government.

It is therefore not surprising that later efforts by the British Government to improve the fate of the slaves at the Cape were vehemently resisted by the slave owners. It is also reported that the drive to end the slave system at the Cape was not supported by an Anti-Slavery Movement comparable to the movements in Britain (Watson, 1991:67-92). According to Watson (1991:6), this sentiment still has an effect on modern thinking in South Africa. Watson remarks that:

> (His study) does maintain that one principal source was the failure of early South African liberalism to develop over a century and a half either a systematic and comprehensive ideology of human rights or a coherent movement to oppose the steady reduction of the rights of South Africans ... This failure, I believe, began with the Cape's antislavery movement itself.

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1 See also *D* 1.5.4.2, *D* 1.5.5.1.

The only organised effort by whites to curb the effect of slavery at the Cape was the inception of the Cape of Good Hope Philanthropic Society for Aiding Deserving Slaves to Purchase their Freedom on 27 June 1828. The activities of the Society were sanctioned by *Proclamation* 70 of 3 February 1830 (Watson, 1991: 67-92). The Society's contribution towards the ending of slavery at the Cape was a limited one. Not only did the Society allow its members to own slaves, but it also refrained from attacking the validity of slave property and from exposing the contradiction between Christian principles and slavery. It is also remarkable that the public debate on slavery at the Cape was a practical, and largely strategic, discussion. This discussion accepted the philosophical underpinning that property in humans was legitimate and that the right to liberty was subordinate to the right to property and the concomitant need to a secure labour supply. The difficulties experienced by clergymen to transform the debate to one regarding moral principles is aptly described by Watson (1991:193-194) as follows:

> Their views were complicated by the ideologies of their denomination or mission society, by the tensions between their secular and spiritual roles, and by their personal relations with their parishioners, both black and white.

Apart from the attitude of the colonists at the Cape towards slavery, it is also important to emphasise that there was a considerable difference between the *de facto* and *de jure* position of the slaves.

Ross's (1980:5) comments on the early legal system at the Cape caught my attention. He remarks:

> South Africa was clearly ruled by a code of law ... and moreover by one which was based on a system to which more concentrated legal thought had been given, at a higher theoretical level, than any other in the seventeenth and eighteenth centuries.

Slaves were not without any rights. Their limited rights were, however, suppressed by the realities to which they were subjected. Worden (1985:113) refers to one aspect of their subjugation in the following terms:

> (T)here were numerous means of evading the laws which were supposed to protect slave interests. As Le Vaillant commented after his visit in the early 1780's, these wise laws do honour to the Dutch government, but how many ways are there to elude them.

Slaves themselves were under real pressure when it came to the enforcement of their limited rights. For instance the *Statutes of Batavia* (1766), which were applied at the Cape, allowed slaves to report maltreatment and abuse, but also stipulated that when a complaint was unfounded, the slave would be whipped and

returned to its master.[2] The realities slaves faced at the courts, combined with the effect that a complaint would have on the master-slave relationship at home, forces one to conclude that only the most severe cases of maltreatment were reported (Ross, 1980:7; Dooling, 1991:80). I support the view expressed by Ross (1983:1)

> (T)here has never been ... a (slave) society that was not brutal in the extreme. A mild slave regime is a contradiction in terms. Slavery is a form of social oppression that is based on the use of force, which is always available to, and frequently employed by the slave-owning class to impress its will on the slaves. If, somewhere in the world, there exists a social institution that is called slavery in which brutality and denigration are absent, then the concept has been stretched so far as to be empty and meaningless ...

2. Proposed legal framework

Van Riebeeck came to the Cape as an employee of the V.O.C. The V.O.C. was a company that received its Charter from the State-General in 1602. The Cape remained under the authority of the V.O.C. until 1795 when it was occupied by the British for the first time. The V.O.C. was dissolved during this time and when the British returned the Cape in 1803, it came under the authority of the Batavian Republic. In 1806 the British reoccupied the Cape, this time on a more permanent basis (Visagie, 1969:1-13, 40-41, 98-99).

It is important to note that slavery was not permitted in the Netherlands (De Groot, 1952 1.4.2; Van Leeuwen, 1708 1.5.4; Van der Linden *Inst.* 1.2.3) and Britain.[3] Slavery was, however, tolerated in their respective colonies, and history testifies that both countries and their citizens were deeply involved in the Atlantic slave trade (Postma, 1990:10 ff., Anstey, 1975:3 ff.). This fact would cause great difficulties for the British Government in its drive to end the slave trade and slavery (Hurwitz, 1973:48-76; Clarkson, 1968 I:1 ff.).

Comments on the legal position of the slaves at the Cape must account for the various sources of the early Cape law.

It is well-known that the Charter of the V.O.C. did not specify which law the company should apply in the territories under its control (Visagie, 1969:24-39; Van Zyl, 1907: 132, 135-138). Neither did the Charter grant the V.O.C. any legislative power (De Vos, 1992:227. Contra: Swanepoel, 1958:7, 14). The

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2 Vgl. Van der Chijs, 1891:9. 576. 14.

3 *Sommersett v Stuart* 20 How Street Tr 1 (1771-1772).

uncertainty resulting from this situation has received attention from many legal historians. Authoritative sources now accept that in the early judicial processes reference was made to the law as it was applied in East-India (Visagie, 1969:69). Due to this development, Roman Dutch law became the basis of the legal system in South Africa (Van Zyl, 1983:420 ff.).

Although no legislative powers were vested in the V.O.C., it produced the *Statutes of Batavia* (1642) and the *New Statutes of Batavia* (1766). These statutes as well as later Resolutions of the Council of India were destined to be applied in V.O.C. territories. Since these statutes and resolutions were not ratified by the State-General, it is often argued that they were *ultra vires* (Visagie, 1969:29-36; Roos, 1897:4-9; Van Zyl, 1907:132-147, 241-258, 366-383). Be that as it may, both the *Statutes of Batavia* (1642) and the *New Statutes of Batavia* (1766) were enforced at the Cape.[4] The *New Statutes of Batavia* were actually applied in the so-called 'Alphabetical' version thereof which were compiled at the Cape.[5] There is also substantial evidence that the *Resolutions of the Council of India*, of a later date than the *New Statutes of Batavia* (1766), were enforced[6] at the Cape.

It is generally accepted that the legal position of the slaves at the Cape was governed by the principles of Roman law, albeit in a very modified form (Visagie, 1969:89; Stock, 1915:330-331). The view is also expressed that the principles of Roman law did not apply when they were not reconcilable with local placaats and circumstances (Dooling, 1991:129).

The application of the principles of Roman Law to the slaves at the Cape appears to be sound, because Roman Dutch law was imported into South Africa as the basis of the legal system (Van Zyl, 1983:402 ff.). A closer analysis of the *Statutes of Batavia* and the *New Statutes of Batavia*, however indicates that, as far as the slaves were concerned, a broader legal framework dictated the application of the principles of Roman law.

According to the preamble to these *Statutes* its provisions should receive precedence over local placaats. It is also regulated that the position of slaves should be determined by the provisions of the *Statutes* under the heading of *lijfeigenen*. It is only when the *Statutes* remain silent on any point that the position of slaves

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4 *Eksteen v Denyssen qq Eva van de Kaap C J* 1556 (457-740) *C J* 932 (273-274), 494; *City v Klerk G H* 48.2.24 (558-747), *G H* 48.1.1 (261-262) 576-577.

5 *City v Klerk G H* 48.2.24 (558-747), *G H* 48.1.1 (261-262) 576-577; Stock, 1915:328, 336.

6 For example the *Resolution of the Council of India* dated 10 April 1770 which was repealed at the Cape by the *Proclamation* of 19 October 1812.

should be determined by the "beschreevene Keyserlyke wetten en regten" (Roman law).[7]

It is therefore submitted that it is incorrect to refer only to the application of the principles of Roman law to the slaves at the Cape. This simplistic view does not take into account the legal framework dictating the application of the principles of Roman law as specified in the *Statutes*. It also tends to lose sight of the fact that substantial aspects of Roman slave law were incorporated in the *Statutes*, albeit in a modified form (De Beer, 1992:124-131).

In practice, however, the legal framework as prescribed by the Statutes was not adhered to at the Cape. The Fiscal/Attorney-General prescribed his own framework which was incompatible with that of the *Statutes* (Theal, 1899:IX 146). He advocated the following precedence:

* The laws directed at the slave community which had been made and promulgated by the Colonial Government.

* The collection of laws under the title of *lijfeigenen* of the *Statutes of Dutch India*, in so far as they were not contrary to the existing laws of the Colonial Government; and finally

* Roman law in so far as it was not contrary to the Colonial Law, *the Statutes of India*, or the spirit of modern jurisprudence.

The Fiscal/Attorney-General was a very important and sometimes controversial official. Theal (1899 XXXIII:62-70) describes the powers of the Fiscal/Attorney-General as follows:

> (H)e was enjoined to maintain and protect before the Court of Justice the greatness and power of the Batavian Government and of all High and Low Legal Authorities appointed for the direction of public affairs in the Colony of the Cape, and further defend the Property, Means and Revenue, rights and privilege of the Government against all fraud, contravention, and spoliation whatever by whomsoever attempted and this either as Prosecutor or Defendant.

The key and important role played by the Fiscal/Attorney-General in the administration of justice urges one to conclude that in practice the legal framework he proposed did have some authority.

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7 Par. 89 *New Statutes of Batavia* (1766); Par. 86 *New Statutes of Batavia* (Alphabetical Version).

Apart from the Fiscal/Attorney-General's view, cognisance must be taken of a decision taken by the Political Council at the Cape on 12 February 1715. This decision empowered the Court to enforce the *Statutes of Batavia*, but only in so far as the *Statutes* are not incompatible with the local placaats, ordinances and resolutions of the local Government. According to Stock (1915:328), considerable stress was laid in later years upon the *Resolution* of 1715 and its importance seems to have been greatly exaggerated. This *Resolution* was in fact merely a reply to a letter from the Court of Justice requesting an indication on the applicability of the *Statutes*.

Before any final conclusion is drawn, it is essential that the legal practice at the courts of law be examined. Prudence is the mother of wisdom – this truism is also applicable when it comes to conclusions drawn from the records of these early court cases.

Up to approximately 1827 the Court of Justice and the Court of Appeal did not record the reasons for their judgments (Botha, 1915:319, 323; Visagie, 1969:70). It is therefore almost impossible to comment on the legality of the submissions of counsel which, incidently, was documented *in extenso*, and in many cases substantiated with full details of relevant authorities. Until recently the accessibility of the records of the Court of Justice and the Court of Appeal also proved to be a major stumbling-block. Legal historians had to cope with the time-consuming and almost impossible task of working at random through the available and unsystematised documents and series.

A very useful and, in my opinion, indispensable tool was developed by the research team from UWC-PU for CHE for this purpose. This team recently produced an index of the civil cases of the Court of Justice and the Court of Appeal from 1806 to 1827. This computer based index allows legal historians direct access to the documents containing the relevant data on any predetermined subject.

From the submissions of counsel before the respective courts it is apparent that they accepted the applicability of the *Statutes of Batavia* to the slaves.[8] From the detail references of counsel it is clear that the *Alphabetical Version* of the *New Statutes of Batavia* was used.[9] The *Resolutions of the Council of India* which appeared later than the *New Statutes of Batavia* were also used by counsel to

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8 *Munnik v Truter qq Hendrik C J* 1643 (139-311), *C J* 2232 (359-361), 266-267; *Denyssen v Beck C J* 1620 (1-980), *C J* 2227 (570-571), 698-700.

9 *City v Klerk G H* 48.2.24 (558-747), *G H* 48.1.1 (261-262), 576-577.

support their arguments.[10] There is evidence that counsel was aware of the legal framework dictating the application of Roman law as prescribed by the *Statutes*.[11] References to the *Resolution of the Political Council* of 1715 also received some prominence.[12]

It therefore appears that the legal framework as prescribed by the *Statutes* did not receive the required attention. It is also fair to conclude that with the support of the Attorney-General the *Resolution of the Political Council* of 1715 had an impact on legal thinking.

Apart from the uncertainty surrounding the legal framework there was no doubt about the relevant legal principles to which the slaves were subjected. Before moving to the changes brought about by the British since 1806, it would serve the purposes of this paper to summarise the situation that confronted them:

* The basic principles of Roman law were still relevant, either in their 'codified' form as part of the *Statutes*, or in their subsidiary role as part of the "beschreevene Keyserlyke Wetten en Regten". There are indications, however, that Roman law was not upheld in all respects at the Cape.

* In addition, both the *Statutes of Batavia* and the local placaats contain a large number of provisions aimed at the local needs and day to day life of the slave community.

* Although definite slave rights were enshrined in legislation, the precarious position of the slaves in general, and before the courts in particular, was evident.

3. Developments: 1806 to 1834

When the British reoccupied the Cape in 1806 they pursued their well-known policy in respect of conquered or ceded colonies (Visagie, 1969:95-97; Van Zyl, 1907:132-135). For the Cape this policy meant that justice was to be administered in the same manner as had been customary until then, and according to the laws, statutes and ordinances which had been in force.

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10 *Spacie v Stout C J* 1743 (1-129), *C J* 939 (659-660), 117-123.

11 *Eksteen v Denyssen qq Eva van de Kaap C J* 1556 (457-740) *C J* 932 (273-274) 494, 550-551.

12 *Denyssen v Beck C J* 1620 (1-980), *C J* 2227 (570-571) 698-700.

At this stage the British Government was under great pressure from the Anti-Slavery Movement to end slave trade in its territories. This was legislated in 1807, while the Anti-Slavery Movement continued their campaign now focusing on the abolition of all slavery (Hurwitz, 1973:21-76; Edwards, 1942:33-63, 81-90, 111-150).

As indicated above, the British authorities had to take cognisance of various sources of the slave law at the Cape in their efforts to accommodate the interests of the slave community. There is definite proof that they took up this challenge. Not only were the Fiscal and Attorney-General requested to provide details of the legal position of the slaves[13], but at least two sets of documents in the *Cape Archives*[14] also prove that the authorities had the desire to acquaint themselves with the details of the relevant provisions. In the Archives there is a handwritten copy of the *Alphabetical Version* of the *New Statutes of Batavia* in English as well as a list of the local placaats relevant to the slave community.

The British efforts to limit the number of slaves at the Cape date back to 1795. During the British occupation of 1795 to 1803 special permission, which was granted only under special circumstances, was required for the importation of slaves (Latsky, 1943:5-8; Stockenström, 1934:23-29; Edwards, 1942:34-36, 47-54). After slave trade had been prohibited in British territories in 1807 (Clarkson, 1968:Vol II 506-508, 576-587), the Government at the Cape had to attend to the real danger of the enslavement of the indigenous people. This threat urged the authorities to promulgate a number of ordinances[15] which legislated the movement, employment, land ownership and residence of the Khoisan. As pressure mounted from the Anti-Slavery Movement in Britain and its affiliates at the Cape, these laws became controversial, and were often described as justifying the slavery of indigenous people (Edwards, 1942:51-63; Van der Merwe, 1984: 149-151). There can be little doubt that these early laws introduced into our history the concept of group areas and pass laws.

On the other hand, efforts were made by of the British Government to improve the fate of the slave community. To the dismay of local slave owners a number of

13 See the reports of Attorney-General Denyssen of 16 March 1813 and 26 April 1813 in *Theal Records* IX 146-161, 170-174. As early as 29 November 1797 the Fiscal was requested to supply answers to the questions of Earl Macartney regarding the legal position of slaves at the Cape.

14 Cape Archives S O 7/35, 17/1.

15 For instance the *Proclamation* of 1 November 1809 (repealed by *Ordinance* 50 of 1828); *Ordinance* 49 of 14 July 1828.

Proclamations were promulgated in pursuance of this goal.[16] One of the most important changes that were introduced, was the introduction of the system of Slave Protectors and Guardians.[17] Mason (1991:108) describes the effect of this system on the master-slave relationship as follows:

> Since these men were independent of, and superior to the masters, the law struck at the heart of the master-slave relationship. It undercut the slave-holders pretensions of being the sole source of protection, discipline and indulgence for their slaves.

The Guardian of Slaves had to assist slaves in legal proceedings:

> ... wherein any Slave may be charged with any offence punishable by Death, Banishment, or Transportation; or wherein any question may arise as to the right of any alleged Slave to Freedom; or wherein any Person may be charged with the Murder of any Slave, or with any offence against the person of any Slave; or wherein any question may arise respecting the right of any Slave to any such Property as he or she is ... declared competent to acquire.[18]

The effectiveness of this system was restricted by the fact that the Protector or Guardian only reacted to the complaints lodged by slaves, who in turn were subjected to the serious consequences of unfounded accusations and various other retaliatory measures of slave owners (Mason, 1991:109-115).

The compulsory registration of slaves was also legislated.[19] This legislation proved to be impractical and caused resentment among the slave-owning community (Latsky, 1943:27-29).[20] Their opposition was aggravated because the Court of Justice was instructed to take into account the fact whether or not a slave was registered when his or her freedom was at stake. This legislation did not contribute substantially towards the improvement of the position of the slave

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16 See for instance the *Proclamation* of 26 April 1816; the *Proclamation* of 18 March 1823; *Ordinance* 19 of 1826 and the *Consolidated Order* of 1830.

17 Par. 2-7 *Ordinance* 19 of 19 June 1826; Par. 2-8 *Consolidated Order* of 1830.

18 Par. 7 *Ordinance* 19 of 19 June 1826.

19 Par. 1-12 *Proclamation* 26 April 1816.

20 The *ratio* for this *Proclamation*, as given in the preamble thereof, was to protect indigenous people from being subjected to slavery.

community. Slave registers proved to be outdated and unreliable while the unenviable position of slaves before the courts remained essentially unchanged.

The efforts of the British authorities were, however, not without success. The moves towards the recognition of slave marriages and their families were a major step in the process of humanizing the position of slaves.[21] Slave marriages were eventually even allowed against the will and without the permission of the slave owner. In addition, slaves obtained the restricted right to acquire and own property and to dispose thereof.[22]

The right of the slave owner to his property (slaves) and to their labour was regarded as inalienable and sacred. The right acquired by a slave to buy his freedom, even against the wish of his owner, was therefore experienced as a serious inroad into the inalienable right of ownership which even primitive societies uphold.[23]

The master-slave relationship was dealt a severe blow by the restriction placed on owners regarding the working hours of slaves[24] and the corporal punishment of their slaves.[25]

To support these measures, serious efforts were made to ensure that the rights of the slave community would be upheld. The admissibility of the testimony of slaves in judicial proceedings was reformed,[26] the Guardian of Slaves was compelled to pursue all complaints lodged by or on behalf of slaves.[27]

Clearly the aim of the British authorities was to undermine the philosophical and practical foundations on which slavery was based and to protect slaves from the

21 Par. 5-9 *Proclamation* of 18 March 1823; par. 21 *Ordinance* 19 of 19 June 1826.

22 Par. 13 *Proclamation* of 18 March 1823; par. 28-32 *Ordinance* 19 of 19 June 1826.

23 Par. 33-38 *Ordinance* 19 of 19 June 1826; par. 56-62 *Consolidated Order* of 1830.

24 Par. 1, 11 and 16 *Proclamation* of 18 March 1823.

25 Par. 17-22 *Proclamation* of 18 March 1823; par. 13, 16-17 *Ordinance* 19 of 19 June 1826; par. 4-6, 21-28 *Consolidated Order* 1830.

26 Par. 39 *Ordinance* 19 of 19 June 1826; par. 80 *Consolidated Order* 1830.

27 Par. 17 *Ordinance* 19 of 19 June 1826; par. 11 *Consolidated Order* 1830.

heartless behaviour of their owners. The heart of the slave system was, however, left untouched. The legislature was reluctant to make any substantial inroad into the property rights of slave owners.[28] The authorities' reluctance to remove the provisions condemning slaves when a complaint against their masters was ruled to be unfounded[29] proved to be a major stumbling-block in the execution of slave rights at the Cape. It became evident that the predicament of the slave community would only be resolved by the total abolition of slavery.

On 1 December 1834 slavery became illegal in British territories.[30] It was, however, replaced by a system of apprenticeships[31] which, on the pretext of ensuring training and jobs for slaves and labour for the colonists, boiled down to a continuation of the slave system albeit in a more respectable form (Edwards, 1942:117-214; Simon, 1930:216-217; Lovejoy, 1983:233-234). This prolonged harassment of the former slave community ended in 1838 when the system of apprenticeships was finally abolished.

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28 See par. 24 *Proclamation* of 18 March 1823.

29 Par. 12 *Proclamation* of 18 March 1823; par. 44 *Ordinance* 19 of 19 June 1826; par. 82 *Consolidated Order* 1830.

30 See the act of the British Parliament dated 28 August 1833 which was published in the *Government Gazette* in Cape Town on 10 January 1834.

31 *Government Gazette*, 10 January 1834. See Hengherr, 1953:34-50 for full details.

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