

LAW AND COMMUNITY IN A SLAVE SOCIETY: STELLENBOSCH DISTRICT,

C.1760-1820

WAYNE DOOLING

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ABSTRACT

Law and Community in a Slave Society: Stellenbosch District,
c.1760-1820

Wayne Dooling

This dissertation is primarily concerned with the functioning of the law in the Cape Colony in the late eighteenth and early nineteenth centuries as it pertained to slaves and masters (and to a lesser extent Khoi servants). It examines the operation of the law in one particular rural district, namely, Stellenbosch in the years c.1760-1820. The chief primary sources include criminal -- and on a smaller scale civil -- records of the local and central courts of the colony. Travellers' accounts have also been utilised.

The study of one particular rural district reveals the extent to which the law was intricately woven into the fabric of the settler 'community'. Despite differentials of wealth, the settlers in Stellenbosch district were essentially part of a community of slaveholders. The contours of the settler community fundamentally influenced every step of the legal process. Members of the settler community were in a situation of face-to-face interaction. This meant that often, in conflicts between settlers, recourse to the law was seen as a last resort and more emphasis was placed on the maintenance of personal social relationships. However, this community, of which a landed elite

stood in the forefront, had discordant features and domination of the poor by the rich did not go without any struggle.

The features of the settler community also fundamentally influenced the position of slaves in the law. Access to the courts for the slaves for complaints against their masters was very significantly determined by conflicts which existed amongst slaveholders. In court the extent of solidarity amongst members of the community could ultimately determine the chances of success for slaves. Another way in which concerns of community influenced the legal process was by the importance which was attached to the reputations of individual slaveowners. Often such concerns overrode strictly legal ones. Even in determining the severity of sentences in criminal cases reputations of individuals were of primary importance.

The VOC not only served to bolster the authority of slaveowners but also to keep the wider society in control. Therefore, it could not allow slaveholder tyranny over their labourers to go unchecked. Moreover, the legal system had to be more than simply an instrument in the hands of the master class. At the local level, the VOC could be seen to be acting in the interests of the wider society by listening to the complaints of slaves and prosecuting individual masters.

Roman common law, as opposed to statutory law, was the law most commonly used in criminal cases involving slaves. This had two important implications. Firstly, Roman law did not deny the slave any personality and prosecutors constantly reminded slaveowners

that slaves were persons. Secondly, Roman law had an apparent universality in that its dictates were made applicable to all in society. These factors combined to make the law perform a hegemonic function.

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ABBREVIATIONS

- CJ Court of Justice (Cape Town)
- ICS Institute of Commonwealth Studies, University of London
- JAH Journal of African History
- JSAS Journal of Southern African Studies
- RCC Records of the Cape Colony edited by G. McCal Theal,
London, Clowes and Son, 1896-1905
- SSA Collected Seminar Papers of the Institute of
Commonwealth Studies, London, The Societies of Southern
Africa in the Nineteenth and Twentieth Centuries
- VOC Vereenigde Oost-Indische Compagnie (Dutch East India
Company)

Introduction

In recent years a number of studies have appeared which have fundamentally recast the historiography of the eighteenth and early nineteenth century Cape.¹ The society which emerged as a direct result of Dutch colonial expansion was characterised by the violent exploitation of slave and indigenous labour which facilitated increasing levels of agrarian production. Levels of profitability in the southwestern Cape equalled that of New World slave societies.² The chief divides in the Cape economy were between the port of Cape Town, wine and wheat production of the arable Southwestern Cape and the frontier regions further north and east which were dominated by pastoral activities.

The slave population responded to their day-to-day subordination with continued acts of resistance, however disorganized and individualistic. The law has been seen to be of fundamental importance in maintaining the status quo. The law itself, however, has never been the subject of detailed investigation. In a single article Robert Ross has argued that the Cape legal system in the

1. R. Elphick and H. Giliomee (eds), The Shaping of South African Society, 1652-1840, Cape Town, Maskew Miller Longman, 1989 is probably the best synthesis of this new work. Standard works on slavery are R. Ross, Cape of Torments: Slavery and Resistance in South Africa, London, Routledge and Kegan Paul, 1983; N. Worden, Slavery in Dutch South Africa, Cambridge, Cambridge University Press, 1985; R. Shell, "Slavery at the Cape of Good Hope, 1680-1731", Ph.D. thesis, Yale University, 1986; M. Rayner, "Wine and Slaves: The Failure of an Export Economy and the Ending of Slavery in the Cape Colony, South Africa, 1806-1834", Ph.D. thesis, Duke University, 1986.

2. Worden, Slavery, 78-9

eighteenth century has been characterised by what can be termed the 'rule of law'.³ This study is an attempt to fill this gap in the historiography of Cape slavery. In general the law has been seen unproblematically as being an alternative source of power to the master class in the day-to-day control of the slave population. In contrast, this study will attempt to show that the law was much more than a simple adjunct to the power of the slaveholders and ultimately served to resolve many of the contradictions in slave society. It will be argued that the law at the Cape functioned hegemonically: it was of crucial importance in keeping *all* members of society (settlers, slaves and Khoi) in their proper place in society. The law itself became as important an arena of struggle as any other in that "constant contest between the masters and the slaves" in the countryside.⁴ Moreover, the struggle in the courts was often carried to the countryside.

Law and Community

Studies of law and crime have proliferated (most notably in the U.K.) in the last two decades.⁵ These studies have shown that the

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3. R. Ross, "The Rule of law at the Cape in the Eighteenth Century", Journal of Imperial and Commonwealth History; IX, 1980
 4. Ross, Cape of Torments, 37
 5. For a historiographical overview see J. Innes and J. Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England", Journal of British Studies, 25, 4, 1986. A good synthesis is V.A.C. Gatrell, B. Lenman and G. Parker (eds), Crime and the Law: The Social History of Crime in Western Europe since 1500, London, Europa Publications, 1980

history of law and crime, "[by] its very nature, ... offers a focus for those concerned with conflict and for those concerned with control."⁶ The emphasis in this study will be on the processes involved in cases coming to court and on the happenings in court. When emphasis is placed on

an act for which a person or a group of people is presented, indicted or found guilty in a court of law [then] the significance of the criminal declines while that of those offended against, or those enforcing the law, increases because ... there is now a process from the act to the appearance in court and the verdict, and it is necessary to examine all the factors which influence that process.⁷

It is this process which intimately links the operation of the law in the rural district of Stellenbosch with the concept of community. Timothy Curtis, drawing on the work of Erikson, notes "that there is nothing inherent in any act that defines it as deviant or criminal; it is the attitude of the community that labels behaviour as good or bad, desirable or undesirable, honest or criminal."⁸ But Curtis also warns that the community should be seen "not as an amorphous whole, but as a melange of shifting interest groups; shifting not only in the sense of differing alignments, but also in the sense of differing compositions."⁹

This study proceeds along these lines -- it examines the processes whereby cases came to court in the slave society and

6. Gatrell et al (eds), Crime and the Law, 2

7. T. Curtis, "Explaining Crime in Early Modern England", Criminal Justice History, 1, 1980, 117-118

8. ibid, 123

9. ibid, 127

the way in which the community influenced every step of the legal process.

One of the central features of the early Cape legal system was the dominance of the local organs of law over the central ones. For this reason the process whereby cases arrived in Cape Town is in itself illuminating. And this would be best achieved via a regional study of the law. Hence, the point of departure of this study is the slaveholding community in the district of Stellenbosch in the years 1760-1820.¹⁰

Chapter one outlines the contours of the settler 'community' in the district of Stellenbosch. Despite the differentials of wealth and status within the settler society a 'community' existed in which a 'gentry' had come to occupy a hegemonic position -- not least through its control and manipulation of the law. Not only was the law an arena of struggle between slaves and masters but between settlers as well. It is in this 'community' in which the slaves and servants found themselves and this crucially affected the operation of the law in the district.

Chapter two argues that relations between settlers very significantly determined the access of the servile population to

10. The desire to examine the law in both the Dutch and British colonial periods motivated the decision to examine these years. This period offers a convenient bridge between the three (VOC, Batavian and British) forms of government which the Cape has seen. 1820 has been chosen as a cut-off date because it represents a point just prior to the reorganisation of the Cape legal system and the imposition of British 'amelioration' policy. Thus, I have not studied all the criminal records of the period under review, but have instead 'sampled' the records for the different periods.

the law courts. In the district of Stellenbosch the law displayed the essential characteristics of law in small-scale communities: "the more personal, oral, and small-scale the community in which it is administered, the more certain it is that the law will reflect the neighborhood will".¹¹ In the community individuals had certain reputation and this, it will be argued, was of fundamental importance in determining the access of slaves and servants to the law courts.

Chapter three examines the happenings in the courtroom. The concerns of the community not only determined whether a case would come to court or not but also influenced proceedings in court. The local court was in fact the community in miniature. The position of individuals in the settler community was of fundamental importance in determining whether or not individual slaveowners would be prosecuted.

Chapter four examines the happenings in the Court of Justice in Cape Town and considers the question of arbitrariness of the law. It also argues that it was Roman law which was most often turned to in criminal cases. However, the fact that Roman law was most often used did not militate against the considerations of community. In sentencing too the reputations of individuals were important.

11. B. Wyatt-Brown, Southern Honor: Ethics and Behaviour in the Old South, New York and Oxford, Oxford University Press, 1982, 364

Chapter five looks at the question of the 'hegemonic function of the law'. It is argued, firstly, that the VOC, as the colonial state, had on the one hand to ensure continued exploitation of slave and Khoi labour while, on the other hand, it had to appear to be acting in the interests of society as a whole. It therefore had to be more than simply an instrument in the hands of the slaveowning class. This chapter also examines the implications of the fact that it was Roman common law (as opposed to statutory law) which the courts most commonly turned to in the courts. It is argued that the 'rule of law' at the Cape in the period under review promoted the hegemonic function of the law.

The structure of the Cape legal system.¹²

The Raad van Justitie [Court of Justice], the highest civil and criminal court in the Colony in the eighteenth century, was established in 1685. Although this body was to be independent of the Council of Policy, the chief executive institution at the Cape, the two bodies consisted of the same members, with the governor acting as the head of both. In 1734 the Secunde (Deputy-governor) replaced the governor as head of the Court. The governor, however, retained a right of veto over decisions passed by the Court. In 1785 the size of the Court was increased to

12. This section has largely been summarised from D.H. van Zyl, Geskiedenis van die Romeins-Hollandse Reg, Durban, Butterworth, 1983; C.G. Visagie, Regspleging en Reg aan die Kaap, 1652-1806: Met 'n Bespreking van die Historiese Agtergrond, Cape Town, Juta, 1969; J.A. Wiid, "Die Stellenbosse Bestuur, 1682-1929" in Stellenbosch, Stellenbosch, 1679-1929, Stellenbosch, Dorpsraad, Hortors Bpk., 1929

thirteen members -- six VOC officials, six burghers and the Secunde as head.

In the Court of Justice the Independent Fiskaal [Fiscal] served as public prosecutor. Formally independent of the judiciary at the Cape, he was solely responsible to the Heeren XVII in The Netherlands. The Fiscal was subject to immense criticism from burghers at the Cape: in addition to his salary he also received a percentage of all fines imposed by the Court of Justice. Thus, in 1793 he lost his independence and was placed under the authority of the governor.

In 1682 the college of four Heemraden was established in Stellenbosch, the district having been established in 1679. The body was to consist of the most notable settlers in the district. Initially Drakenstein district was included under the jurisdiction of Stellenbosch and this district was represented by two Heemraden. The Heemraden were unsalaried officials and they were subject to a fine of five rixdollars for non-attendance of meetings which took place on the first Monday of every month. In 1685 a Landdrost was appointed to preside over the meetings of the Heemraden. He was an official of the VOC and was to be assisted by the Heemraden. The Landdrost served as public prosecutor in the Court of Justice for cases coming from the Stellenbosch district. The board of Landdrost and Heemraden could deal with petty civil disputes (for example, over water rights and land boundaries) which arose between settlers in the district. Criminal cases, however, had to be dealt with by the

Court of Justice and in such cases the Landdrost and Heemraden could collect evidence which was to be presented before the Court of Justice. Some criminal cases, however, were dealt with by the local board of Landdrost and Heemraden. In terms of instructions sent to the the various Landdrosts in 1805, each Landdrost had

to maintain the authority of Government, protect persons and property, attend to education, treat the aborigines as free people, promote their civilization and see that they received justice, and was to prevent aggression, yet be prepared for defence. He was to encourage agriculture in its various branches, and promote it by counsel and support, especially the conversion of the Cape into wool-growing sheep; to urge the planting of trees and improvement of agricultural implements; to examine grants of lands; to register all farms and erven; to receive land-rent; and to protect the sea-coast and the wrecks in his division. Further he acted as public prosecutor, and had charge and superintendence of the police, and 'as long as the use of slaves in the colony should not be abandoned, the Landdrost was to consider it amongst his most sacred duties to watch for the protection of those unfortunate beings; he was to judge between master and slave'".¹³

When the Landdrost and Heemraden failed to reach agreement over a certain issue, a notable settler of the district had to be called in to resolve the dispute. The local boards had the assistance of Veldcornets, settlers whose essential task it was to police the district. These functionaries were nominated by the Landdrosts. They sometimes collected evidence and examined bodies in criminal cases.

Membership of the the board of Landdrost and Heemraden was strictly controlled. Half of the number of Heemraden resigned each year and out of a list compiled by the college of Heemraden

13. cited in P. Borchers, An Autobiographical Memoir, Cape Town, African Connoisseurs Press, 1963, 185-186

themselves, the central government would appoint their successors. Twenty-three Landdrosts were appointed between 1685 and 1828.

There was little change in the administration of the local boards with the coming of the British to the Cape in the early nineteenth century. As one contemporary noted: "Soon [after the British takeover], however, some of the functionaries of the former government attached themselves to the British authorities, and they reciprocally to them ... but with regard to this village [Stellenbosch] no alteration was made in its administration."¹⁴ However, in 1817 a proclamation was passed which gave the local boards greater jurisdiction in criminal and civil cases and only the more serious cases were prosecuted before the Court of Justice. In terms of this proclamation the Landdrosts and Heemraden of all districts were

to take cognizance of the crimes of vagabondizing, cattle stealing, and other thefts not accompanied by any circumstances of murder, violence by breaking into houses, or other aggravations, and also of all lesser crimes and misdemeanours not liable by the existing laws to more severe punishment than that which is termed domestic, and to proceed to judgment and to pass sentence.¹⁵

In January 1828 the boards of Landdrost and Heemraden were replaced by civil commissioners and magistrates on the recommendations of a Commission of Inquiry.

14. cited in Borchers, Autobiographical Memoir, 163

15. Report of the Commissioners of Enquiry to Earl Bathurst upon Criminal Law and Jurisprudence, 18 Aug. 1827, RCC, XXXIII, 1-388, 47-8

The rest of this study will be concerned with the way in which the slaveholders and the servile population interacted with this legal system.

Chapter 1

The Contours of the Community

The Southwestern Cape was the orbit of agrarian production at the Cape. It is here, according to Robert Ross, where the origins of 'quasi-capitalist' agriculture were to be found.¹ Despite the criticism levelled at Ross², he has nevertheless successfully qualified the thesis (first challenged by Bill Freund) that "class distinctions in the European sense did not apply within the white community".³ In the course of the eighteenth century a rural landed elite -- the 'Cape gentry' -- had emerged in the southwestern Cape who had managed to gain substantial control over the local organs of power to such an extent that by the nineteenth century the "authorities in Cape Town simply could not

1. R. Ross, "The Origins of Capitalist Agriculture in the Cape Colony: A Survey" in W. Beinart et al (eds), Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa, 1850-1930, Ravan, Braamfontein, 1986
2. H. Bradford, "Highways, Byways and Culs-de-Sacs: the Transition to Agrarian Capitalism in Revisionist South African History", Radical History Review, 46/7, 1990, esp p 82, has seriously criticised Ross's characterisation of the Cape as 'capitalist' in this period.
3. M. F. Katzen, "White settlers and the origins of a New Society, 1652-1778", in M. Wilson and L. Thompson (eds), A History of South Africa to 1870, Cape Town and Johannesburg, David Philip, 1985, 232; R. Ross, "The Rise of the Cape Gentry", JSAS, 9, 2, 1983; W.M. Freund, "Society and Government in Dutch South Africa: The Cape and the Batavians, 1803-1806" Ph.D Thesis, Yale University, 1972; L. Guelke and R.C.-H. Shell, "An Early Colonial Landed Gentry: Land and Wealth in the Cape Colony (1652-1731)", Journal of Historical Geography, IX, 1983.

impose their will on the countryside against the wishes of the local gentry".⁴

Cape settler society, then, was marked by significant distinctions of wealth -- wealth which was largely concentrated amongst the slaveowners of the Southwestern Cape. In the pastoral regions, on the other hand, a rough "equality of poverty" existed.⁵ Here too, however, significant distinctions of wealth existed. Mentzel, who visited the Colony in the years 1732-40, noted that "Among these, "there are also rich and poor..."⁶ Where the historiography of the Cape colony is fundamentally lacking is in analyses of the social implications of these divisions of wealth, despite the recognition that it provides "[much] of the dynamic of early Cape history...".⁷ Of crucial importance, then, is the extent to which the social order had become self-legitimizing, that is, the extent to which the power of the gentry had become authority. Or to phrase the question in another way: would it be more accurate to define the Cape as a society in

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4. Ross, "Cape Gentry", 214; Rayner, "Wine and Slaves", 91ff
 5. Ross, "Origins of Capitalist Agriculture", in W. Beinart et al (eds), Putting a Plough, 66; L. Guelke, "The Early European Settlement of South Africa", Ph.D Thesis, University of Toronto, June 1974, 393
 6. O.F. Mentzel, 3 volumes, A Geographical and Topographical Description of the Cape of Good Hope, Van Riebeeck Society, Cape Town, 1944, III, 110
 7. Ross, "Origins of Capitalist Agriculture", 66; C. Bundy, "Vagabond Hollanders and Runaway Englishmen: White Poverty in the Cape Before Poor Whiteism", in W. Beinart et al (eds), Putting a Plough; C. Crais, "Gentry and Labour in Three Eastern Cape Districts: 1820-1865", South African Historical Journal, 18, 1986, are exceptions but they are confined to the Eastern Cape.

which the gentry had obtained hegemony or as one of broad slaveholder hegemony? How, in other words, are relations between gentry and smaller farmers to be characterised? This is especially important since both gentry and smaller farmers were slaveholders.

Travellers' accounts provide one starting point in an attempt to answer this question. Lichtenstein, when he travelled in the interior of the Cape colony in the early nineteenth century, found that the "colonists in general are too much disposed to quarreling among themselves, principally with respect to the boundaries of their several estates; and perhaps among ten neighbours nine will be at variance".⁸ He also noted regional differences in this regard. In the Hantam he observed "the amenity of disposition which appeared in them towards each other".⁹ It was the first place where their 'active chief' [Janssens] had not been called in to settle disputes amongst the colonists. In the Middle Roggeveld, he also observed numerous disputes amongst the colonists over land boundaries. In the Roggeveld he noted that "There are few colonists here who have not had a law-suit with their neighbours."¹⁰ Percival, on the other hand did not draw these regional distinctions. He commented that a "perpetual inclination to quarrel, and a thirst

8. H. Lichtenstein, Travels in Southern Africa in the years 1803, 1804, 1805 and 1806, Cape Town, Van Riebeeck Society, 1928, 117

9. ibid, 116

10. ibid, 133

of revenge equally distinguish the boor of Graaf Reynet and of the Cape, ...[and] the planters of the [southwestern] Cape bear ... deadly animosities toward each other, often on the most trivial grounds, a dispute about an acre of land, a well, or the course of a stream...".¹¹ The trekboers were thus a quarrelsome people and these disputes often progressed into litigation, according to the contemporary accounts. The civil records of the district of Stellenbosch attest to the partial truth of these assertions. Disputes over land, it would appear, occupied most of the time of the Landdrosts and Heemraden. But whether these animosities were "deadly" remains to be seen.

The views of the travellers have, to some extent, found an echo in the work of Leonard Guelke. Guelke notes that the arable farmers of the southwestern Cape formed a fairly stable community. Here the farms were not too far from one another for farmers to maintain regular contacts. These farmers also regularly attended one of the four churches at Paarl, Swartland, Stellenbosch or Roodezand. Also, the vendutie (auction) provided for regular social gatherings.¹² In the arable areas,

white society, although it was divided on the basis of wealth, was a close-knit community. The wealthy and the poor rubbed shoulders with each other and participated together in community activities such as church gatherings or auction sales. The small farmers were also often tied to the wealthier ones by debts.¹³

11. R. Percival, An Account of the Cape of Good Hope, London, Baldwin, 1804, 225

12. Guelke, "Early European Settlement", 362

13. Guelke, "The Making of Two Frontier Communities", Historical Reflections, 12, 2, 1985, 433

Guelke, however, finds much less evidence for community-solidarity on the frontier. Here he echoes the views of the travellers. He notes that "in an unsurveyed land there was much to quarrel about".¹⁴ But Guelke goes further and argues that "there was little economic incentive for trekboers to patch things up, neither side being likely to need the other's cooperation to maintain its economic position".¹⁵ For Guelke, this means the absence of a 'community' of trekboers. "Extreme individualism" was fostered by the absence of a non-farm rural population. Trekboer society "lacked the cement that a community-minded non-farm rural population could have provided and became, in consequence, even more atomised".¹⁶ Guelke does not, however, provide any explanation of his term 'community-minded'. For Guelke, then, the availability of Khoi and slave labour militated against the development of a community of trekboers, since they were largely economically independent and deemed superfluous the assistance of others in their daily farming activities. To be sure, Guelke is partly correct in emphasizing the individualistic nature of frontier farmers. Individual land tenure would be of primary importance here in promoting individualism. But Guelke seems to be placing too much importance on the absence of a non-farm rural population. His argument would undoubtedly be greatly strengthened if he had

14. L.Guelke, "Freehold farmers and frontier settlers, 1657-1780" in R. Elphick and H. Giliomee (eds), Shaping, 95

15. ibid

16. ibid

shown the effects of 'goodwill' which such a class had had in other colonial settings.

Guelke's work contains its own contradictions. Elsewhere, he writes that the "frontier community was essentially a series of loosely knit micro-communities. The white frontier people, notwithstanding their isolated existence, comprised a remarkably stable community".¹⁷ Again, Guelke refrains from defining 'community' or 'micro-community'. He himself notes that frontier farmers *did* set limits to their independent behaviour.¹⁸ On the frontier "[circumstances] were such that everyone on the frontier benefited from an informal system of reciprocity".¹⁹ Moreover, frontiersmen were forced to cooperate in the commando against the Khoisan.

The contradictions in Guelke's work stem from, firstly, a failure to provide a working definition of 'community' and, secondly, a failure to realise the extent to which the trekboers not only had contacts with each other but also with the farmers of the arable southwestern Cape. He denies the latter contact and claims that trekboers either manufactured whatever they needed or else obtained this from Cape Town.²⁰

17. L. Guelke, "The Making", 436

18. Guelke, "Freehold farmers", in R. Elphick and H. Giliomee (eds), Shaping, 95.

19. Guelke, "Early European Settlement", 394

20. Guelke, ibid, 393

The concept of community has been very fruitfully applied to the Southern United States (both antebellum and postbellum).²¹ Southern communities have been described as most striking in "the paradoxical combination of stark domination of some human beings over others with a pervasive sense of reciprocity and even communal solidarity, grounded in ... the 'familiar and familial' circumstances of ordinary life".²² The essence of community is to be found in the coexistence of conflict and cooperation. Or, as one historian of the U.S. has put it: "For most of the antebellum period, the reality of conflict was the driving force of southern politics, while the stability of collaboration was the foundation of slavery's security."²³

The parallels with the Cape are most striking in this regard. Again the travellers' accounts provide a starting point. Lichtenstein noted that "among so many rough, unpolished men the outward forms of decency were never violated" [in the process of dispute settlement].²⁴ This paradox is also noted by Percival when he writes that it "is curious to observe that, notwithstanding the animosity and feuds which subsist between

21. Wyatt-Brown, Southern Honor; O.V. Burton and R.C. McMath Jr. (eds), Toward a New South? Studies in Post-Civil War Southern Communities, Connecticut, Greenwood Press, 1982

22. McMath, "Community, Region and Hegemony in the Nineteenth-Century South" in O.V. Burton and R.C. McMath (eds), New South, 283-4

23. H.L. Watson, "Conflict and collaboration: yeomen, slaveholders and politics in the antebellum South", Social History, 10, 3, 1985, 275

24. Lichtenstein, Travels, 134

neighbours, yet they seldom pass by the houses of each other without visiting. A Dutch farmer hardly ever fails to stop at any dwelling he comes to on a journey, though perhaps he is at open war with the owner."²⁵ Percival also noted that at burials, "All the friends, relations, and neighbours of the deceased attend in the deepest mourning... half of them who escorted the body to the grave had been probably at variance during his whole life with the deceased".²⁶ These contradictions Percival attributes to "ostentation". It will become clear that the economic independence of the trekboers which Guelke describes could in fact only be sustained through regular cooperation. These contacts were fostered by two main forces, viz, the domestic consumer market and the credit market.

Community, Credit and Stratification

That there was a large market for credit in the Cape colony is known.²⁷ Credit largely financed the wine boom of the early years of the nineteenth century.²⁸ The main source of this credit came from the government-funded Lombard Bank. In this period farmers heavily mortgaged their slave and fixed property. But credit was not only important in financing agrarian production. It came to

25. Percival, Account, 226

26. ibid, 275

27. Ross, "Origins of Capitalist Agriculture", in W. Beinart et al (eds), Putting a Plough, 66-72; R. Ross, "The Cape of Good Hope and the world economy, 1652-1835", in R. Elphick and H. Giliomee (eds), Shaping, 258-263

28. Rayner, "Wine and Slaves", 34-5

play a very important social role in community-building.²⁹

Credit, in a word, was patronage. And patronage is of fundamental importance in understanding the absence of large-scale conflicts among colonists at the Cape. Patron-client ties in stratified agrarian communities, as many anthropologists have noted, generally act to limit or preclude class conflict. One anthropologist has defined patronage as "an informal contractual relationship between persons of unequal status and power, which imposes reciprocal obligations of a different kind on each of the parties. As a minimum, what is owed is protection and favor on the one side and loyalty on the other."³⁰

The archival records point to an extensive network of credit relationships. For example, the ex-Heemraad of Stellenbosch, Johannes Albertus Meyburgh, had no less than forty-eight debtors at the time of his death in 1790.³¹ Interestingly, women played as important a part in this network of credit relationships. For example, Sophia Margaretha Myburgh, widow of the Heemraad Pieter Gerhard van der Byl, had money owed to her by at least twelve different people.³² Elisabeth Theron had nine outstanding debts, three from one person, at the time of her death.³³ Only

29. This section is therefore primarily concerned with the social role of credit and does not purport to be an extensive study of credit in the district.

30. S. Silverman, "Patronage and Community-Nation Relationships in Central Italy", *Ethnology*, 4, 2, 1965, 176

31. 1/STB 18/34, Inventory of J.A. Meyburgh, 9 April 1790

32. *ibid*, Inventory of Sophia Margaretha Myburgh, 8-9 Nov. 1791

33. *ibid*, Inventory of Elisabeth Theron, 21 December 1791

occasionally did farmers have no debtors or creditors at the time of their death.³⁴

The sums of money which colonists borrowed varied markedly. The sums could be as little as fifty rixdollars³⁵ or as much as 10,000 guilders (3 guilders = 1 rixdollar).³⁶ Farms were sometimes purchased on credit and this could involve significant sums of money. In 1810, at the height of a wine boom the colony experienced in the early years of the nineteenth century, Stephanus Malan bought a farm from Jan Morel for the sum of 50,000 guilden.³⁷ For this he had to mortgage his eight slaves (seven adults and one child), in addition to two ox-wagons, forty-six oxen, ten horses, one hundred and forty sheep, as well as his person and "alle losse goederen".

On the surface, it would appear as if the lending of money was a fully-fledged form of class power. In many cases the persons who lent money were excessively wealthy, whereas those who borrowed were relatively poor. It would appear as if the gentry regularly acted as lenders of money. For example, in 1766 Anthonij Gherver borrowed the sum of 750 guilders from Jan Bernard Hoffman.³⁸ Hoffman in that year owned at least twenty one adult slaves

34. For example, 1/STB 18/34, Inventory of Pieter de Wet, 23 August 1784

35. 1/STB 18/68, obligatie of Johan George Breedeham, 19 October 1774, no 99

36. 1/STB 18/95, obligatie of Daniel Rossouw, 7 June 1810, no 18

37. ibid, obligatie of Stephanus Malan, 16 January 1810

38. 1/STB 18/68, Obligatie of Anthonij Gherver, 22 April 1766

(seventeen males and four females) and four slave children. In addition he had thirty thousand vines under cultivation.³⁹ Gherver, on the other hand, was absolutely propertyless and unmarried.⁴⁰ Some members of the gentry appeared to have been regular lenders of money. Hendrik Cloete (a Heemraad) lent one thousand guilders to Philip Wouter de Vos in 1761⁴¹ and a further two thousand guilders to De Vos in 1762.⁴² He also lent money to Hendrik Nieuwenhuysen in 1766⁴³, to Dirk Coetze in 1767⁴⁴, and the sum of five thousand guilders to Coenraad Hendrik Fyt in 1773 for purchasing the opstallen [buildings] of four loan farms.⁴⁵ Hendrik Cloete, it is known, was exceptionally wealthy and in 1773 owned no less than forty-four adult slaves (thirty-six males and eight females) and seven slave children.⁴⁶

There are a number of indicators which suggest that the credit contracts between parties were more than simply economic agreements and should rather be regarded as forms of patronage.⁴⁷

39. J 203, opgaaf of Jan Bernhard Hoffman, 1766-9

40. ibid, opgaaf of Anthonij Gherver, 1766-9

41. 1/STB 18/68, obligatie of Philip Wouter de Vos, 11 January 1761

42. ibid, obligatie of Philip Wouter de Vos, 9 January 1762

43. ibid, obligatie of Hendrik Nieuwenhuysen, 27 August 1766

44. ibid, obligatie of Dirk Coetze, 6 December 1767

45. ibid, obligatie of Coenraad Hendrik Fyt, 30 November 1773, no 92

46. J 207, opgaaf of Hendrik Cloete, 1773-4.

47. In some ways these agreements do not conform to the definition of patronage accepted by many anthropologists who

Perhaps the most important element is the fact that credit was largely in private hands in a society in which individuals knew each other personally. This was noted by one nineteenth century contemporary who wrote of the village of Stellenbosch that it was one in which the colonists "were generous in assisting one another either by becoming sureties or giving credit, especially to young beginners and married couples".⁴⁸ Individuals, therefore, did not borrow money from an impersonal credit market but from known individuals with whom they had face-to-face contact. The people from whom they borrowed -- the gentry in many cases -- were also the most visible members of rural society. They were the ones who filled the posts of Heemraden in the judiciary, and of ouderlinge and diakens in the church.

Another indication of the importance of credit as a form of patronage -- and perhaps related to the previous point -- is the exceptionally long-standing nature of some of the credit agreements. For example, when the ex-Heemraad Johannes Albertus Meyburg's estate was probated in 1790 a number of monetary debts were outstanding which were contracted ten years earlier.⁴⁹ There

regard the arrangement as informal, unwritten, highly personalistic and not subject to enforcement by any outside authority. "Enforcement, compliance, and performance are bound up in, and limited to the face-to-face relationship between the client and the broker, or the broker and the patron.", J. Duncan Powers, "Peasant Society and Clientelist Politics", American Political Science Review, 64, 2, 1970, 423-4

48. Borchers, Autobiographical Memoir, 195

49. 1/STB 18/34, Inventory of oud-Heemraad J.A. Meyburgh, 9 April 1790.

was also generally no date stipulating when the debt should be paid as long as the interest (varying from five to six per cent) was paid regularly. Debtors were therefore chronically indebted, but there does not seem to have been any pressure on them to honour their obligations. One Johannes Hendrik van den Bergh had an obligation of one hundred rixdollars standing since 1769, a time-span of twenty-one years.⁵⁰ Johannes Laubscher borrowed money from Meyburgh on two occasions. Hendrik Nieuwenhuysen only paid his debt of 1600 guilders to Hendrik Cloete thirteen years after he had made it.⁵¹

The fact that colonists did not appear to have difficulty in finding sureties for loans would also suggest that credit served to bind colonists together. Again, the persons most likely to stand surety were the gentry. In 1774 Maarten Melk stood surety for Johan Hendrik Ehlers when he borrowed money from Cornelia Heyning.⁵² This would be categorised as cooperation between equals since both Ehlers and Melk were fairly wealthy.⁵³ In 1771 the Heemraad Jan Bernhard Hoffman, as well as Michiel Otto stood

50. ibid

51. 1/STB 18/68, obligatie of Hendrik Nieuwenhuysen 27 August 1766

52. ibid, obligatie of Johan Hendrik Ehlers, 11 October 1774, no 98.

53. Ehlers had a total of fourteen slaves and had 30,000 vines under cultivation, while Melk was an exceptionally wealthy burgher who was the only one in the colony who admitted to owning more than one hundred slaves in the eighteenth century. J 207, opgaaf of Johan Hendrik Ehlers, 1773-4; Ross, Cape of Torments, 23

surety for the Heemraad Josias de Kock.⁵⁴ But the gentry were not averse to standing surety for poorer colonists as well. For example, in 1810, Willem-, Daniel- and Philip Morkel as well as Marthinus Theunissen, Dirk van Rheenen and Ary Jacob Joubert stood surety for Pieter Langenhoven.⁵⁵ Langenhoven owned only one slave and had one Khoi woman in his employ, whereas the Morkels were members of the gentry.⁵⁶ Standing surety for the poor must certainly be regarded as acts of patronage.

A further indication that credit functioned served to strengthen community ties is the fact that credit was not always vertical. It did not always appear in the form of gentry patronage. Very often credit operated horizontally, or between individuals who were more or less equals. Hendrik Cloete, for example, who had extended credit extensively, borrowed 1 800 guilders from Evest van Schoor in 1768 which he repaid in 1770.⁵⁷ In 1768 the Heemraad Adriaan Malan borrowed 4000 guilders from the ex-Heemraad Jacobus van der Spuy.⁵⁸ On 22 April 1766 Jan Bernhard Hoffman concluded an agreement in which he borrowed 1 500 guilders from Johannes Appeldoorn.⁵⁹ That same day he lent 750

54. 1/STB 18/68, obligatie of Josias de Kock, 3 November 1771.

55. 1/STB 18/95, borgtogten, 5 March 1810, no 1

56. J 242, opgaaf of Pieter Langenhoven and Willem Morkel de oude, 1810

57. 1/STB 18/68, obligatie of Hendrik Cloete, 6 June 1768, no 50.

58. ibid, obligatie of Adriaan Malan, 17 March 1768, no 48

59. ibid, obligatie of Jan Bernhard Hoffman, 22 April 1766

guilders to Anthonij Gherver.⁶⁰ Since Hoffman was borrowing at the rate of five per cent and lending at six per cent he was thus making a profit on the agreement. But it is unlikely that Hoffman would have borrowed money simply to lend it out in order to make a profit of one per cent. Credit was not a primary means of capital accumulation. It is more likely that Hoffman was extending credit to Gherver who may have had difficulty in obtaining it elsewhere. Moreover, Gherver left as security his property and person. But his opgaaf of that year shows him as being absolutely propertyless.⁶¹ There also seems to have been some degree of reciprocal borrowing amongst colonists. While Sara de Buys owed individuals the sums of 450; 100 and 56,40 rixdollars, she was owed the sums of 100, 15 and 3 rixdollars.⁶²

In this regard the distinction which Keith Wrightson draws between patronage and neighbourliness in early modern England is important:

At its simplest, it [neighbourliness] can be defined as a type of relationship between people established on the basis of their residential propinquity ... it involved a mutual recognition of reciprocal obligations of a practical kind and a degree of normative consensus as to the nature of proper behaviour between neighbours ... it was essentially a horizontal relationship, one which implied a degree of equality and mutuality between partners to the relationship, irrespective of distinctions of wealth or social standing.⁶³

60. *ibid*, obligatie of Anthonij Gherver, 22 April 1766

61. J 203, opgaaf of Anthonij Gherver, 1766-9

62. MOOC 8/12, Inventory of Sara De Buys, 22 October 1766, no 7

63. K. Wrightson, English Society, 1580-1680, London, Hutchinson, 1982, 51

Members had to conform to certain standards to be considered part of the community.⁶⁴ Paternalism and deference, on the other hand, were the hallmarks of relationships between unequals. The important point is that both forms of social interaction (neighbourliness and patronage) could exist within a particular local context at the expense of class as a way of ordering society. "Class, after all," James Scott notes, "does not exhaust the total explanatory space of social actions."⁶⁵ This is especially true where class may compete with kinship, neighbourhood, faction, and ritual links as foci of human identity and solidarity.⁶⁶

Again, the credit network serves to illustrate this point. In 1760, for example, Ignatius Maree borrowed two thousand guilders from his father-in-law Pieter Roux.⁶⁷ The sum only had to be repaid to the estate of Roux after his death in four equal installments -- the first had to be paid six months after his death and the remaining three in annual instalments. This contract clearly shows how ties of kinship and marriage served to mitigate distinctions in wealth. The extension of credit in such instances was clearly 'non-bourgeois' in orientation. In one instance, a number of persons extended credit to one person which

64. ibid

65. J.C. Scott, Weapons of the Weak: Everyday forms of Peasant Resistance, New Haven and London, Yale University Press, 1985, 43

66. ibid

67. 1/STB 18/68, Obligatie of Ignatius Maree, 19 April 1760

enabled him to purchase a farm. In 1810 Daniel Krynauw borrowed six thousand guilders from Elisabeth de Villiers, nine thousand guilders from Oloff Godlieb de Wet, eight thousand guilders from Jacobus Petrus Roux, four thousand from Maria Henrica Heyning and three thousand guilders from Johannes Christiaan Brasler.⁶⁸ These loans enabled Krynauw to purchase a farm in Paarl for thirty thousand guilden. Besides the seller of the farm ten other people (four sureties; the five lenders and the borrower) were involved in this transaction. This clearly points to very significant network of community support. In 1802 the widow Alida Buys borrowed the total sum of 3,000 guilders from four persons collectively, all of them sharing the same surname.⁶⁹ The widow was not under obligation to repay the capital for the first three years on condition that she paid the interest on time. Clearly, this case also qualifies as one which must be regarded as an instance of reciprocal support rather than class expropriation, especially since the persons from whom she borrowed were all related.

In general individuals who borrowed money only left as security their general property and their persons. Only rarely did they mortgage specific items of property.⁷⁰ The fact that the rate of interest at which people borrowed (five or six per cent per

68. 1/STB 18/95, sureties; 21 March 1810, no 9; 24 April 1810, no 10; no 11; 19 May no 12, no 15

69. 1/STB 18/72, obligaties of Alida Buys, 15 December 1802

70. In 1775, for example, Hermanus Combrink mortgaged his slave David van Mallebaar for the loan of 450 guilders. 1/STB 18/68, obligatie of Hermanus Combrink, 22 March 1775, no 108

annum) remained constant for most of the eighteenth century and well into the nineteenth century, despite the fluctuations of the Cape economy, is perhaps indicative of the social role which the credit network had come to play.

An important consideration, by using the credit network as an index, is the extent of community in the district of Stellenbosch (for the district in the eighteenth century was larger than present day Portugal). In addition, the district comprised markedly different forms of economic organization, viz, mixed wine-and-wheat-farming in the southwestern Cape and pastoral farming in the less arable frontier regions.

In 1838 the village of Stellenbosch was described in the following way:

In the days when formalities were unknown in the village (tradition says), it appeared as one family home; the villagers were known amongst themselves from childhood; virtues and vices were speedily exposed, and either praised or unceremoniously condemned. The voice and opinion of the seniors decided the differences in the village, by good and sound sense; and the judgment of these plain and honest men was all decisive, and friendly and indulgent feeling paved the way to mutual and good understanding. Reciprocal support in distress and want was the pleasing and useful fruit of such proceedings, and it has been stated that scarcely a person, failing in the honest pursuit of livelihood, was known to have held his hand out for assistance and succour without meeting compassion. Distress could not be seen without fellow-feeling.⁷¹

This piece, written as a form of poetry which originally appeared in Dutch, is undoubtedly flavoured with nostalgia and romanticisation, since its author was himself a member of elite

71. cited in Borchers, Autobiographical Memoir, 213-4

society in the early nineteenth century. Furthermore, the author himself claims that it is drawn "partly from fact and reality".⁷² However, it does convey a sense of the existence of community. Moreover, the essence of it has been verified by the archival records utilised above.

But this description is limited to the village of Stellenbosch and it remains to be seen how accurate this was for the rest of the district. Firstly, the frontier trekboers must certainly have come into contact with the farmers of the arable southwestern Cape since the latter had farms in the frontier regions as well.⁷³ In 1773, for example, Hendrik Cloete sold the opstallen on his loan farms in the mountains beyond the Olifantsriver and 'agter Picquetbergen'.⁷⁴ The money which the purchaser (Fyt) owed him would thus serve as a tie to the southwestern Cape. Again the credit network can provide an index of community interaction. The fact that some farmers in the frontier regions were indebted would question Guelke's assertion that they were largely atomised. At the time of his death Jan Myntjes van den Bergh of the Roggeveld owed the sum of Rxds 303,34 to "diverse Partyen".⁷⁵ Rachel Jourdaan, the wife of Johannes Erasmus Smit of the

72. ibid, 212

73. Ross, "Origins of Capitalist Agriculture", in W. Beinart et al (eds), Putting a Plough, 62-3.

74. 1/STB 18/68, Obligatie of Coenraad Hendrik Fyt, 30 November 1773, no 92

75. MOOC 8/10, Inventory of Jan Myntjies, 7 March 1764, no 74

Picquetbergen, owed Hendrik Kruger the sum of Rxds 200.⁷⁶ It is particularly difficult to determine how far the credit network stretched in the frontier districts, since the records do not give the places of residence of the parties involved. The point is, however, that the farmers in the frontier districts were not isolated from the credit network which has been shown to bind colonists together. At the time of his death in 1770, Jacobus Victor of the Roggeveld owed money to eight different parties.⁷⁷

There is further evidence that frontier farmers had contact with colonists in the arable southwestern Cape. The auctions which were held in the frontier regions appear to have been as well attended as those in the arable areas and there is therefore no reason to assume that they played any less important a role in community interaction (in addition to acquiring agricultural goods and slaves) as those in the arable regions. Auctions were noted for the opportunity to gossip. Moreover, the auctions which were held in the frontier regions were attended by those of the arable regions as well as those of the frontier regions. For example, the auction which was held on the farm of Hermanus Scholk in the Roggeveld was attended by⁷⁸, amongst others, Eduard

76. MOOC 8/11, Inventory of Rachel Jourdaan, 14 September 1764, no 14

77. MOOC 8/13, Inventory of Jacobus Victor, 16 March 1770

78. I am equating attendance with the purchase of goods.

Wium of the southwestern Cape and Floris Visser of the Roggeveld.⁷⁹

In the preceding discussion of the social role of credit, the comparison with antebellum Georgia Upcountry is most striking.

There, Steven Hahn has noted,

The structure of credit and debt, in short, was more an indication of community interdependencies, which unquestionably had discordant features, than an index of class power. Notions that social relations were not governed simply by the marketplace and laws that protected the property of petty producers set limits to the economic leverage that any social group, however wealthy, could hold over the mass of the white population.⁸⁰

And in this, Hahn draws attention to one of the crucial aspects of community, viz, that interdependence does not exclude the possibility of conflict.

The Domestic Consumer Market

The domestic consumer market could also have served to tie colonists into the bounds of community. For example, a number of colonists owed money to the widow Sophia Margaretha Meyburgh at the time of her death for the purchase of certain goods. The Heemraad Pieter Gerhard Wium had bought six mudden of barley; Jacobus Hamman 170 mudden of wheat; Casper Anthonij Cornelissen, seven mudden barley, Johannes van Nieuwkerken, three leaguers of wine, while Andries Daniel Grove had bought two leaguers of wine,

79. 1/STB 19/36, Auction held on farm of Hermanus Scholk, 23 March 1792

80. S. Hahn, The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia Upcountry, 1850-1890, New York and Oxford, Oxford University Press, 1983, 77

ten mudden of wheat and an ox-wagon from the widow.⁸¹ At the time of his death in 1810 Willem Esterhuysen of Picquetberg owed Christiaan Smidt Rxd's 377 for the purchase of goods.⁸² In some ways, slaves and Khoi servants formed as much a part of this domestic economy, albeit in a less formal manner. In 1815 the wife of J.A. Myburgh, of the farm Meerlust, bought a pair of shoes from a slave.⁸³ The knegt Casper Knippe had sold wine to slaves, Khoi and colonists while his employer was away from the farm.⁸⁴ This was despite the fact that colonists were forbidden, in terms of the 1754 slave code, to purchase goods, except foodstuffs, from slaves.⁸⁵ In certain instances, colonists and the servile population were integrally locked into one domestic economy. Martha Lubbe of the Cedarberg, for example, 'borrowed' two 'ellen linnen' from the Khoi woman Kaatjie Klein.⁸⁶

The necessity of economic cooperation also served to link colonists together. One very sensitive area in which such cooperation was required was in the field of water-rights. In 1765, for example, the burghers Josua Joubert, Hester Retief,

81. 1/STB 18/34, Inventory of Sophia Margaretha Myburgh, 8-9 Nov. 1791. These are only some of the persons who had purchased goods from the widow.

82. MOOC 8/28, Inventory of Willem Esterhuysen, 18 August 1810, no 26. Unfortunately, the goods are not stipulated.

83. 1/STB 3/24, Testimony of Styntjie van de Kaap, 25 March 1815.

84. 1/STB 3/12, Testimony of David van de Caab, 11 October 1791.

85. K.M. Jeffreys, Kaapse Plakkaatboek, III, Cape Town, Cape Times, 1949, 5

86. CJ 494, Eisch en Conclusie van Lanndrost van Stellenbosch contra Jacobus Adriaan Vorster, 25 October 1802, 171ff

Philip Minnaar, Francois Du Toit, and Daniel Retief all owners of farms in Wagenmakersvalleij concluded an 'onderlinge verdeeling' regarding the use of water from the river during summer for each farm.⁸⁷ They had agreed that during the summer months the water from the river would be dammed up and that each would take turns to lead the water off. The significance of this lies in the fact that the 'onderlinge' [community/customary] agreement appeared to have worked well enough until exactly the moment that one farmer (Josua Joubert) had gained access to more resources. For in 1774 Hester Retief and Philip Minnaar brought a complaint against Josua Joubert who had acquired a piece of land adjacent to his farm in erfpagt from the governor.⁸⁸ They had however always allowed their cattle to graze on the land and to drink from the two fountains on the land. It was only now that the colonists appealed to the Landdrost and Heemraden to authorise their 'onderlinge' agreement of 1765 (nine years earlier) in order to prevent further disputes.

The significance, here is not so much that burghers were at variance but that they had operated in terms of a customary agreement for a significant period of time. What this case clearly shows is that access to the law courts for some members of settler society was a means to settle internal disputes amicably where customary agreements had broken down. It is in

87. 1/STB 1/132, 12 Dec 1774

88. ibid, 12 Dec 1774

this that the explanation for "decency" in the process of dispute settlement is to be sought.⁸⁹

The fact of community is also suggested by indications that there was a tendency on the part of settlers to avoid litigation. This would be particularly relevant in instances of face-to-face interaction. In one case Dirk Uys and Jan Hyne were charged with "verregaande mishandeling" of the property and the person of one Lebengoed.⁹⁰ They, however, informed the Landdrost that they had reconciled their differences out of court. The Landdrost concurred in the light of the "onaangename gevolgen" which may result from litigation.

In 1802 the burgher Christiaan Bock wrote to the governor, Dundas, complaining about his neighbour, the Veldcornet Jacobus Gideon Louw, who "vexes and grieves him in every respect".⁹¹ Bock claimed that although he had legal title to the places Groene Rivier and Holwegfonteyn, situated in the Bokkeveld, Louw attempted to take Holwegfonteyn from him and even set fire to the buildings which he had erected there. According to Bock he had been plagued by Louw for three or four years. Yet he claimed that he was "one who always preferred admonishing his enemies to better themselves to proceeding to the law, to desist from said actions and to guard himself therefore against such just

89. Lichtenstein, Travels, 134

90. CJ 78, Landdrost of Stellenbosch contra Dirk Uys and Jan Hyne, 21 April 1796, 83ff; 89ff

91. 1/STB 10/11, Christiaan Bock to Dundas, 5 Feb. 1802.

punishment as would at last befall him". Only after this lengthy period of personal agitation did he finally complain to the Landdrost "about such horrid treatment". Approaching the Landdrost, and later even the Fiscal, proved fruitless. All consolation which Bock received from the Landdrost was that Louw "was a man of bad temper" and he was advised to approach the governor. Again, what should be stressed is not the fact that colonists were often engaged in violent confrontation with one another, but the fact that involvement of the law was seen as a last resort. This situation is comparable to seventeenth century English villages where the emphasis also rested on a tendency to avoid litigation and to promote reconciliation.⁹² "What really mattered [in village life]", Keith Wrightson writes, "was the maintenance of specific, local, personal relationships, not conformity to impersonal law."⁹³ These instances suggest that disputes between settlers did not immediately degenerate into litigation. Although litigation between settlers was frequent, as the travellers' accounts suggest, settlers tended to attempt to resolve differences in other ways. Only when such methods failed was litigation resorted to.

Thus far, it has been argued that it would not be inaccurate to speak of the existence of a community (as it has been defined

92. J.A. Sharpe, "Enforcing the law in the Seventeenth-Century English Village" in V.A.C. Gatrell et al (eds), Crime and the Law, 107

93. K. Wrightson, "Two Concepts of order" in J. Brewer and J. Styles, (eds) An Ungovernable People: the English and their Law in the seventeenth and eighteenth centuries, London, Hutchinson, 1980, 25

above) in the district of Stellenbosch. In the district interaction had a face-to-face dimension which would be of some importance in the relationships amongst individuals. It is probable that this would be more intense in the village of Stellenbosch and in the more settled districts of the Hottentots Holland, Tygerberg and Drakenstein. But it has also been argued that frontier farmers were not as atomised as Guelke had suggested. After all, they too were indebted and auctions were held in the frontier districts as well. It should be remembered that the community was above all else a community of unequals in which members were connected by vertical and horizontal ties. And the way in which the richer members of the community locked the poorer ones into their orbit was through patronage, either through direct loans of money or by standing surety for a loan. It has also been suggested that ties of kinship sometimes cut across lines of class. It is through these means that the absence of any large-scale class-conflict in settler society in the eighteenth and nineteenth centuries is to be explained.

Since there was a tendency for members of the community to avoid litigation (in addition to the fact that the role of law is a central focus of this study) it is important to consider the role which local authorities played in, and the extent to which they formed part of, this community. The Heemraden were almost inevitably large slaveholders and thus members of the Cape gentry. Indeed, it was through their wealth that they had come to dominate the offices in military, civil and ecclesiastical

administration.⁹⁴ This is quite obvious in the magistracy of Stellenbosch where the Heemraden came from the most notable of families -- the Van der Byls, Cloetes, Meyburgs, De Villiers, Hoffmans, Faures, Morkels, Wiems and the like.⁹⁵

The Heemraden, then, undoubtedly were a part of the community of colonists. The position of the Landdrost was less clear-cut, however. He was, after all, an official of the VOC. But there are indications that the Landdrosts had very distinct ties with the freeburgher population. They too were linked to the colonists through credit. In the period 1773 to 1775 the Landdrost Marthinus Adriaan Bergh had lent money to at least five individuals -- the sums varying from 150 to 450 guilders.⁹⁶ In 1803 the Landdrost Johannes van der Riet lent money to the surgeon Christiaan Wedemeyer.⁹⁷ Hendrik Lodewyk Bletterman, who resigned his post in 1795, had 4000 guilders due to him from Marthinus Wilhelmus Theunissen in 1805.⁹⁸ Furthermore, there are indications that the Landdrost socialised with the members of the freeburgher population. Borchers describes the Landdrost Bletterman as a "kind-hearted gentleman, and as well as his lady,

94. Ross, "Cape Gentry", 208

95. Borchers, Autobiographical Memoir, 190

96. 1/STB 18/68, obligaties of Christiaan Crynauw, 16 March 1773, no 112; Johannes Jurgen de Beer, 10 March 1774, no 94; Johan George Breedeham, 19 Oct 1774, no 99; Hermanus Combrink, 22 March 1775, no 108; Paulus Johannes Fick, 23 March 1775

97. 1/STB 18/72, obligatie of Christiaan Wedemeyer, 8 Oct 1803

98. ibid, obligatie of Marthinus W. Theunissen, 1 Feb. 1805

the essence of politeness and civility".⁹⁹ Whether this is true or not is irrelevant: the point is that personal contact was maintained. The 'essence of civility' was undoubtedly part of the culture which the upper echelons of Cape society had to maintain in order to set itself apart from other colonists. Borchers further notes that the Landdrost regularly socialised with members of the elite -- the pastor, Heemraden, village physician.¹⁰⁰

Still, it is particularly difficult to establish the degree of cooperation between Landdrost (as an official of the VOC) and the Heemraden. The criminal court records give no indication of the extent to which the Heemraden influenced verdicts. There is some indication that there was some hostility between them. The Commissioners of Inquiry of 1826 found that

the Landdrosts, either as prosecutors or as judges, received but feeble assistance from the Heemraden, whose views of impartiality or of justice in cases in which the coloured classes were engaged before them, were much perverted by the prejudices and habits that have become almost hereditary amongst them, as well as the lower class of white inhabitants.¹⁰¹

In this regard there are some indications that the identity of interests between Landdrost and Heemraden varied from one individual to the next. Freund notes that the "Landdrost administered from a weak position, and the most successful

99. Borchers, Autobiographical Memoir, 28

100. ibid, 205

101. "Report of the Commissioners of Inquiry to Earl Bathurst upon the Administration of the Government, 6 Sept. 1826", RCC, XXVII, 342-97, 377

Landdrosten such as Faure and Van der Riet, although sometimes able to maintain an independent point of view, had to know very well how to accommodate local interests".¹⁰² Perhaps the best way to explore the position of the Landdrost is to turn to the criminal records. It is worth exploring one case in detail.

In 1814 the Fiscal instituted charges of corruption and neglect of duty against the Landdrost of Tulbagh¹⁰³, H. van de Graaff.¹⁰⁴ This case had its origins in February 1810 when Jacobus Johannes Burger fatally wounded the slave Galant, belonging to G.B. Liebenberg. The proceedings at Tulbagh shed a bad light on Burger and Liebenberg instituted a civil case for the loss of his slave. But the case failed to reach the attention of the Court of Justice. The Fiscal concluded that the Landdrost intended to leave the case unprosecuted.

The Fiscal also found that it appeared as if the Landdrost wanted to smother a case against Gerrit Visser for killing the 'bastard hottentot', Marsitrie. The Landdrost received 125 sheep from Visser. In not prosecuting Jacobus Johan Burger and Gerrit Visser, it was found, he had deliberately made himself guilty of contravening the Crimineele Ordonnantie of 5 July 1570 (the Dutch

102. Freund, "Society and Government", 91

103. This district originally formed part of the district of Stellenbosch and was only declared a separate district in 1804. Its first Landdrost was the retired Landdrost of Stellenbosch, H.L. Bletterman.

104. CJ 560, Fiscal contra Landdrost van Tulbagh, 29 Dec. 1814, 2ff

Ordinance guiding criminal procedure) and of the oath that he had taken on the acceptance of his post.

Clearly, the Landdrost was guilty of corruption. Had the Secretary of the district not informed the Fiscal of these transgressions these details would never have become known.¹⁰⁵ Undoubtedly, many more like these exist. The case, however, clearly demonstrates the ties which existed between a Landdrost and the settler community. Gerrit Visser, the one against whom the landdrost failed to institute proceedings, came from an influential family. He was the son of the influential Veldcornet of the Middel Roggeveld, Floris Visser.¹⁰⁶ In other cases, however, it will become clear, the Landdrost vigilantly prosecuted those colonists who had ill-treated their slaves and Khoi servants.

The Patriot movement which had started around 1780 was essentially a movement of the local gentry in which the Heemraden played a most influential role.¹⁰⁷ The outbreak of the movement marked a point when the "VOC, as an institution, had lost

105. It is not clear from the case details why he had done this.

106. On one occasion Floris Visser returned unopened letters which the Landdrost of Stellenbosch had sent him. 1/STB 20/30, Landdrost of Stellenbosch to Floris Visser, 10 Jan. 1799, no 110

107. G. Schutte, "Company and colonists at the Cape, 1652-1795", in R. Elphick and H. Giliomee (eds), Shaping, 309-15; C. Beyers, Die Kaapse Patriotte gedurende die laaste kwart van die agtiende eeu en die voortlewing van hun denkbeelde, Pretoria, J.L. van Schaik, 1967

confidence; the gentry, as a class, had gained it...".¹⁰⁸ The movement was triggered by the banishment of Carel Hendrik Buijtendag from the colony in whom the Patriots found an example of the arbitrary justice which they felt they received at the hands of the VOC.¹⁰⁹ The 'defection' of Marthinus Bergh (Stellenbosch Landdrost, 1773-78) to the Patriot cause in 1778 is again clearly an indication of the identity of interests between Landdrost and Heemraden.

To suggest that a community existed in the district of Stellenbosch is not to say that it had little or no contact with the world outside. The community was not a closed corporate community as many peasant societies. Farmers regularly had contact with Cape Town where they had to dispose of their produce. Not until the nineteenth century could colonists marry in Stellenbosch; prior to this they had to make the journey to Cape Town. Some colonists had ties with kin in other districts. In 1816 Sara Johanna Gildenhuisen, then living in Swellendam, had an uncle living in the district of Stellenbosch.¹¹⁰ Furthermore, she made a journey from Swellendam to Stellenbosch for her husband to see a 'Javaanse docter' resident in the village of Stellenbosch.¹¹¹

108. Ross, "Cape gentry", 197

109. N.G. Penn, "Anarchy and authority in the Koue Bokkeveld, 1739-1779: The banishing of Carel Buijtendag", Kleio, XVII, 1985, 24

110. 1/STB 3/25, Testimony of Sara Johanna Gildenhuisen, 19 April 1816

111. ibid, Testimony of Hermanus Adriaan Combrink, 20 April 1816

Maintaining the Social Distance

The big problem with the maintenance of hierarchy through face-to-face interaction, one author has noted, is that there is always the risk of carrying identification too far -- the notion of 'familiarity breeds contempt'. This militates against the legitimation of hierarchy.¹¹² It is in this that the importance of ritual is to be sought. Ritual served to separate the rich from the poor in a way that could only breed awe and respect. The meeting of the board of Landdrosts and Heemraden, the most visible manifestation of the authority of the gentry, was a ritual. There were other ways in which the members of the gentry hoped to distinguish themselves from the broad mass of colonists. In church officials had pews of distinction, and their wives were seated according to the ranks of their husbands:

The least deviation by the sexton or any other inferior created a sensation and provoked a rebuke; so strictly were these regulations respected, that even at funerals after the members of the family had followed the deceased, each individual present was called by name to follow in procession according to his rank in the ranglyst.¹¹³

Further, Borchers writes, the village of Stellenbosh

was in those days very sociable. The Landdrost, secretary, pastor, village physician, and some of the most respectable inhabitants, about a dozen in number, met in turn at their respective houses in the evening, when, smoking in the social pipe with canister tobacco, and in winter discussing a glass of punch or good wine, the evening was pleasantly passed.¹¹⁴

112. H. Newby, "The Deferential Dialectic", Comparative Studies in Society and History, 17, 2, 1975, 159

113. Borchers, Autobiographical Memoir, 193-4

114. ibid, 205

This rather exclusive gathering described above should at least place limits on the extent to which the "wealthy and the poor rubbed shoulders".¹¹⁵ It had a specific social function: to prevent identification between rich and poor.

Closing the Distance

The deference which the rich expected from the poor was never complete. Patronage served to mitigate relations between rich and poor; in no way did it completely eliminate it. "Even within the context of patronage and hierarchy," Scott writes, "the social order is not self-legitimizing. A basis for conflict and tension arises from the very political myths which justify inequalities in the first place".¹¹⁶ For it would appear as if the colonists were not completely averse to challenging members of the gentry.

Sometimes the struggle between gentry and poorer colonists occurred on the legal terrain itself. It is perhaps worth taking a detailed journey into one case. In 1818, the burgher Daniel Cornelis Hoffman requested the Veldcornet, C L Neethling, to inspect the farm of his neighbour, Pieter Daniel Grundling, whom he (Hoffman) alleged was running some water on to his property.¹¹⁷ The Veldcornet went along to Grundling's farm, taking his brother Hendrik Neethling, as well as Jacob de

115. Guelke, "The Making", 433

116. J.C. Scott, "Protest and Profanation: Agrarian Revolt and the Little Tradition, Part I" Theory and Society, 4, 1, 1977, 14

117. 1/STB 2/1, The Secretary of Stellenbosch contra Daniel Cornelis Hoffman, 3 Feb. 1818, 43ff

Villiers along as witnesses. Together, they found that Hoffman had no grounds for complaint and that Grundling had allowed a "klyn straal" [small stream] of water to run, not on to Hoffman's property, but into his own garden. Clearly the local authorities were subject to extreme partialities. It is difficult to imagine Hoffman making a complaint if he had absolutely no grounds on which to rest his case.

But the exercise of judicial chicanery by members of the ruling class (Veldcornets were sometimes men of considerable power) did not go without any struggle (on the legal terrain itself) by persons over whom they had absolute authority. Daniel Hoffman was not prepared to let his case rest there. He accused the Veldcornet, Neethling, of making a false report, and argued that his witnesses have collaborated with him (Neethling) in this. It is significant, however, that it was the Veldcornet who took Hoffman to court and not vice-versa. In his defence Hoffman stated that he had pointed out the untruthfulness of the Veldcornet's report to him, requesting him to change the report, which, however, he refused to do.

So moved was Neethling by this contempt of his authority that he took Hoffman before the court of the Landdrost. And here in court a drama all of its own played itself out. The Landdrost came to regard Hoffman as 'vyandig' [hostile]. But Hoffman was not prepared to let the case rest here. Displaying a remarkable awareness of the law, Hoffman requested that the Landdrost be removed from the deliberations of the court because he had come

to take a personal interest in the case. Quoting the instructions given to the Landdrosts and Heemraden he requested that the Landdrost "mogen niet worden toegelaten zodanige lieden die direct of indirect belang hebben in de zaak waarmeer gehandeld word" [that he may not be allowed in court since he had come to take a personal interest in the case]. Further, he protested against the testimony of the Veldcornet's brother, arguing that this testimony could not be accepted by law. According to him he could not understand how the Veldcornet could be so ignorant of the law relating to criminal and civil procedure.¹¹⁸ Hoffman also noted that this practice was a "landsgewoonte". On these grounds he requested that the charges brought against him be dismissed.

The Landdrost found that Hoffman had insulted him in his public capacity by accusing him of partiality and requested the Heemraden to consider whether he should be allowed to attend the deliberations. The Heemraden decided to ignore the proclamation of 18 July 1817 and decided that the Landdrost would remain in the sessions.

Not surprisingly, the Landdrost and Heemraden decided to honour the report of the Neethling brothers and De Villiers. The secretary of Stellenbosch asked that Hoffman apologise to the Veldcornet for insulting him, and further suggested that a fine of Rxd's 250 would be payable in addition to the costs of the

118. "De Bekl had zich ook geen denkbeeld kunnen maaken dat de Veldcornet reeds voor eenige Jaaren, die post bekleed nog zoo onkundig in de wetten is, van niet te weeten dat zyn broeder, met hem kan getuygen".

case. Hoffman, refusing to accept this judgement, requested that the case be sent to the Court of Justice in Cape Town. This was, however, contrary to the laws of prosecution and the Landdrost and Heemraden decided to postpone the case.

This lengthy excursion had been taken in order to illuminate a number of points about the nature of social interaction in Stellenbosch district. Firstly, it is clear that, in addition to patronage, the law was a principle instrument through which the gentry attempted to assert hegemony over lesser colonists.¹¹⁹ Secondly, it is equally clear that the law was as important a means through which lesser colonists could challenge this hegemony. Moreover, the ritual of the court had thus certainly failed to awe this particular colonist into respect for its authority. Deference, then, did not come easily. Hegemony, E.P. Thompson noted in a slightly different context,

does not entail any acceptance by the poor of the gentry's paternalism upon the gentry's own terms or in their approved self-image. The poor might be willing to award their deference to the gentry, but only at a price. The

119. Hoffman certainly has to be classified as a lesser colonist at this time. His 1817 tax return showed that although he had 39,000 vines under cultivation he had only managed to extract two leaguers of wine due to the youthfulness of his vines. He owned only one adult male slave (i.e., above 16 years), two women slaves (above 14 years) and one female child slave. The Veldcoronet, Daniel Neethling, however, was no better off, owning only one male slave while employing the labour of two Khoi women. But Neethling's brother, Hendrik Ludolph, was a man of considerable wealth, owning a total of fourteen slaves (10 adults and 4 children). In addition he cultivated 40,000 vines from which he gained 16 leaguers of wine and one quarter leaguer of brandy. J 255, 1817

price was substantial. And the deference was often without the least illusion.¹²⁰

Since both Hoffman and Neethling were ultimately members of the slaveholding class, it would be a mistake to characterise their relationship as equivalent to the one which existed between landlord and tenant in early modern England. Nevertheless, the relationship remained one of conflict between individuals who occupied structurally different positions in the colony's political economy.

The case of Carel Hendrik Buijtendag provides a suitable example of struggle between gentry and lesser colonists.¹²¹ In 1776 Buijtendag was banished from the district of Stellenbosch for the atrocities committed against his Khoi servants. Nigel Penn has argued that the subsequent banishment of Buijtendag from the colony in January 1779 should be seen in the light of these atrocities.¹²² What is important in this context, however, is that the case of Buijtendag is representative of a struggle between poorer colonists and gentry. Penn has noted that "there is good reason to suppose that they [the crimes committed against the Khoi servants] would not have reached the authorities had not Buijtendag succeeded in antagonising his neighbours and, in particular, the powerful Van der Merwe family".¹²³

120. E.P. Thompson, "Eighteenth-century English society: class struggle without class?" Social History, 3, 2, 1978, 163.

121. Penn, "Anarchy and authority"

122. ibid, 25

123. ibid, 32

The Buijtendag case clearly suggests that Buijtendag's disregard of authority was integrally related to aspects of land and wealth. For this tangle with the gentry was not his first meeting with the law. It is quite possible that his disenchantment with authority can be traced back as early as 1765, while he was living on his farm Rietvalley in the Roode Zand. In this year Buijtendag sought the aid of the authorities in settling a land-dispute between himself and one of his neighbours, the widow Secilia Du Preez, widow of Jan Olivier Cornelitz. The dispute went over a piece of land which lay between the two loan farms. Buijtendag had in the meantime cultivated the piece of land and requested the court that the widow would assist him in this and that the proceeds would be shared equally until the authorities had decided which party had more right to the land in question. At harvest-time, however, Secilia Du Preez would hear nothing of this and hoped to have the harvest to herself.

It was only now that Buitendag sought the intervention of the court. The Heemraden who visited the site in question found that the widow naturally had more claim to the land because it was nearer to her farm. They argued that cultivation of the land in question would be to the disadvantage of the widow, since she would not be able to graze her cattle in the mountains beyond. Buitendag might not have felt so bad had the widow only been given exclusive right to the land in question, but she was also granted the wheat (50 mudden) which he had harvested. In this settlement the Landdrost acquiesced. It is clear that Buijtendag could not have been too happy with the settlement. It is perhaps

this which prompted him to "stay at home" when called on commando duty by Van der Merwe in 1774. Buijtendag's disregard of Van der Merwe must be seen as evidence of struggle between the gentry and the lesser colonists. And this must perhaps be evaluated in terms of his prior experience of authority.

Katzen has noted that the late eighteenth century Cape society

rested on two main assumptions: that whites should be allowed to deal with slaves and other non-white dependents more or less as they saw fit, without government interference, and that all whites were entitled to as much land as they wanted without paying for it.¹²⁴

What Katzen does not note, however, is that the desire for land also assumed the form of significantly large conflicts between settlers. And it was these conflicts which were at the centre of 'community' struggles, as the evidence in the above case suggests.

It should be remembered, however, that these conflicts between gentry and the broader mass of colonists, took place within the context of community. They were not instances of unambiguous class conflict. Again, the comparison with the American South is useful. These communities displayed "no neat pattern of cultural homogeneity, despite the appearance of communities, nor of unambiguous class conflict, despite the pervasiveness of domination and subordination".¹²⁵

124. M.F. Katzen, "White settlers and the origins of a New Society, 1652-1778", in M. Wilson and L. Thompson (eds), History of South Africa, 232

125. McMath, "Community, Region and Hegemony", in O.V. Burton and R.C. McMath Jr. (eds), New South, 290

From 'Community' to 'Moral Community'

The colonists in the district formed part of a 'moral community' in the sense that members had to conform to certain standards of behaviour in order to be considered part of the community. In this community reputation, or having a good name, was of considerable importance. This serves to explain why Johannes Stephanus Olivier sued Carel Hendrik Buijtendag in 1765 for having uttered "scheldwoorden en lastertaal" towards him.¹²⁶ He alleged that Buijtendag had called him a "schelm" and a "schoelje" in addition to accusing his mother that she "met slaven konkelde". In this case Buijtendag was forced to beg the pardon of Olivier. In 1771, also, Jacobus Hugo instituted proceedings against Gerhardus Petrus Pretorius for slander. He alleged that Pretorius had called him a "bloedsuiger van weeskinder". After deliberations Pretorius was forced recognize Hugo as an "eerlyk en deugzaam man".¹²⁷ And the Commissioners who investigated criminal law in the colony in 1827 noted that

[libels] which consist of written or verbal defamation are not of unfrequent occurrence, and more especially amongst the inhabitants of the Districts whose colloquial intercourse is marked with expressions of peculiar coarseness, which with a disposition to private slander give rise to frequent appeals at the Court of Justice and of Circuit."¹²⁸

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126. 1/STB 5/20, case of Stephanus Olivier and Carel Buijtendag, 22 April 1765, unpaginated
127. ibid, case of Jacobus Hugo and Gerhardus Pretorius, 8 April 1771
128. "Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 19

The importance which colonists attached to having a good name is integrally related to the concept of community. To speak of reputation without the existence of community would be non-sensical. Furthermore, reputation, is intimately connected with 'shame'. And "it is shame, that concern for the good opinion one's neighbours and friends, which circumscribes behavior within the moral boundaries created by shared values. A man without shame, is by definition, capable of anything."¹²⁹

An important question in this regard, then, would be to ask who defined where the boundaries of good behaviour lay. There are indications that this was largely the prerogative of the gentry. In December 1771 the Heemraad and burgher lieutenant Thomas Arnoldus Theron, was chosen to the post of elder in the Dutch Reformed Church of Drakenstein. This decision was ratified by the Council of Policy. But four burghers Tieleman Roos, Pieter le Riche, Pieter Sellier and Johannes Nieuwoudt objected to the appointment on the grounds that Theron lived in "onvrede en liefdeloosheid met sy bure".¹³⁰ They came to this conclusion on the grounds that he had refused to cooperate in the use of water in the district. On these grounds they found that he could not be appointed to the post of ouderling. This incident points to the way in which the burgher population viewed good neighbourliness. Economic non-cooperation was incompatible with being entrusted to such an important position in community life. Furthermore, the

129. Scott, Weapons of the Weak, 17

130. Beyers, Kaapse Patriotte, 119

movement against Theron was spearheaded by Tieleman Roos, a leading member of the Drakenstein gentry. On the other hand, however, Theron had no shortage of individuals to testify to his character. The significant point, however, is that there was an agreement that the position of elder had to be occupied by someone of good reputation.

Conclusion

It has been argued that the settlers in the district of Stellenbosch (in the arable southwestern areas as well as the more remote pastoral areas) formed part of a 'community' of slaveholders. The settler community, however, was not a monolithic entity and there were marked distinctions of wealth and status. The 'gentry', who dominated positions within the judiciary (and the church) were the leading voices in the community. Their domination, however, did not go without struggle on the part of lesser colonists. This definition of community, therefore, recognises the coexistence of conflict and cooperation. Community bonds were shaped by the existence of an extensive credit network which linked settlers both vertically and horizontally. A domestic consumer market, of which slaves and servants formed a part, also served to bring settlers into the sway of the community. The community was a 'moral community' in which each person had a particular reputation. The following chapter, then, will outline the extent to which the access of slaves and servants came to be determined by the position of slaveholders within the 'moral community'.

Chapter 2

The Community and Access to the Law for the Servile Population

The previous chapter has outlined the contours of the settler community in the district of Stellenbosch. This chapter examines the process whereby slaves (and servants) achieved access to the courts of law at the local level that is, to the offices of the Landdrost and Heemraden. It will argue that the access of the servile population to local law courts was determined by the position of their masters in the settler community.

Slaves at the Cape were not completely rightless in the eighteenth century. These rights were guided by the regulations in the Statutes of India, the Dutch colonial regulations. Slaves, when they had been ill-treated, could lodge a complaint against their master or mistress with the nearest authority. However, the slaves were also to be punished if their complaints were said to be unfounded.¹ Slaveowners under Dutch colonial rule were not completely above the law. A slaveowner who killed a slave, "zal daar over aan den lyve ofte andersints gestraft worden, na geleegentheid van zaaken".² Moreover, to prevent excesses, the bodies of deceased slaves were not to be buried without having been examined by two neighbours. These regulations had their

1. J.A. Van Der Chijs, Nederlandsch Indisch Plakaatboek, 1602-1811, 17 vols, 's-Gravenhage, M. Nijhoff, 1885-1900, IX, 576

2. ibid, 575

origins in Roman law. In the Roman imperial period a series of laws were enacted which brought slaves more and more under the control of the state.³ The lex Petronia stipulated that a master who killed a slave became subject to trial for homicide and the master was required to give up a slave proved to have suffered excessive cruelty. There was little change in the legal status of slaves at the Cape until the passage of Ordinance 19 in 1826 when the rights of slaves were significantly extended.⁴

The Khoi too were not completely rightless. The Khoikhoi, the Company had insisted since the founding of the refreshment station, were legally free and were not to be enslaved. In the course of eighteenth century, however, the Khoi were largely reduced to a landless and propertyless workforce -- to a position "which can best be described as that of bondsmen".⁵ There is every indication that the settlers went to great lengths to permanently immobilise the Khoi -- from withholding wages, livestock and children to fostering monogamous relationships.⁶ For example, in 1798 Jacobus Johannes Pienaar, Veldcornet in the

3. K.R. Bradley, Slaves and Masters in the Roman Empire: A Study in Social Control, New York and Oxford, Oxford University Press, 1987, 126

4. M. Rayner, "Slaves, Slave-owners and the British State, 1806-1834", SSA, ICS, University of London, 12, 28, 1981

5. R. Ross, "The changing legal position of the Khoisan in the Cape Colony, 1652-1795", African Perspectives, 1979/2, 67.

6. On the steady disintegration of Khoikhoi independence, see, R. Elphick and V.C. Malherbe, "The Khoisan to 1828", in R. Elphick and H. Giliomee (eds), Shaping, 3-65

Bokkeveld, wrote to the Landdrost of Stellenbosch claiming that
if

onder dat soort van menschen [bastard], word gepemiteerd van een byslaap to den ander te loopen vryen en overhindert uyt hun dienst te drossen, toevlugt te neemen by soort Christenen die de twist en oneenigheeden beminnen voorstaanders van drossers en hottentots die hun niet aangaan, zal men dezelve niet kunnen dienst meer gebruyken maar dagelyksche onheylen daarvan hebben te verwagten.⁷

The colonists also had the Khoi believe that they were bounded for life to colonists in whose employ they were. In 1799 the Landdrost wrote to Jochem Scholtz, burgher of the Middel Roggeveld, that he could not understand how "men by uw in het veld met een idee beheft is als of een Hottentot eers by ymand in dienst verhuurt is, verpligt is geduurende zyn leeftyd te blyven dienen".⁸ Scholtz had prohibited the Khoi Cupido Jantje from leaving his employ after having worked for him for thirteen years. He also refused to give off his wife, children and cattle.

The attempts of farmers to immobilise the Khoi highlight one option which the Khoi -- unlike the slaves -- had. In the competition for labour between farmers the Khoi had a certain bargaining edge. They could -- and did -- abscond from one farmer to the next. That they were able to do so perhaps took much steam out of potential Khoi rebellion and Khoi-slave collaboration.⁹

7. 1/STB 10/152, Pienaar to Landdrost, 15 Dec. 1798

8. 1/STB 20/30, Landdrost to Jochem Scholtz de jonge, 10 Jan 1799, no 110

9. On the origins of peasant rebellion, see M. Ades, " 'Moral Economy' or 'Contest State'? : Elite demands and the Origins of Peasant Protest in South East Asia.", Journal of Social History, 13, 1980

The British, especially, and with clear utilitarian motives, emphasised the free status, and legal equality, of the Khoi. In 1798 representatives were sent to the Khoi of little Namaqualand

to endeavour to appease the hottentots and to assure them that government, so far from having any intention of enslaving them will extend to them the same impartial justice as to all the other inhabitants living under the protection of its Laws...¹⁰

Those Khoi who were free [independent] were "entitled to and shall receive every protection of the government, but they must at the same time expect to be strictly amenable to justice in all cases of injury committed by them".¹¹

On the other hand, those Khoi, or 'bastards',

as have no means of subsistence must necessarily be compelled to hire themselves as servants to the farmers upon fair and reasonable terms, but at the same time ... the farmers [must] show every degree of kindness towards them since any improper harshness on their part would unquestionably disgust the Hottentots encouraging them to become rogues instead of successful servants to the Boors which it is the wish of government to induce them to be.¹²

The wishes of the central government were directed from the Landdrost to the Veldcornets. In 1799 the Landdrost expressed dismay at the fact that the Veldcornet, N.N., [?] could allow the Khoi to be held by farmers and in the process suffer severe ill-treatment when they were not in possession of a pass.¹³ This, he

10. 1/STB 10/9, Dundas to Landdrost and Heemraden, 22 Dec 1798, no 333

11. ibid, Craig to R.J. van der Riet, 27 June 1796

12. 1/STB 10/10, Dundas to Landdrost and Heemraden, 11 Dec 1801

13. 1/STB 20/30, Landdrost to Veldcornet N.N., 6 Dec 1799, no 194

claimed was unacceptable since the Khoi were a "vrij volk ... en met ons t' selve regt en aanspraak hebbe op de bescherming der wetten". Theoretically, then, the Khoi had as much access, as well as accountability, to the laws of the colony as any of the other inhabitants of the colony. Theoretically, their legal position was closer to that of colonist than that of slave.

But, of course, the opinion of the Landdrost was not necessarily that of the Heemraden and colonists. In 1797 the Heemraden of Stellenbosch objected to hearing a case in which a Khoi sued Maria Elisabeth Theron for payment of a debt.¹⁴ Van der Riet "stated clearly that a Hottentot should be recognised before the law in the same way as himself, and that this constituted true equality, since before the law all were of equal standing". This matter was of some importance since it questioned the position of the Khoi in civil society. The clarity which the Heemraden requested had already come in the 1796, however. Then Governor Craig had written to Van der Riet that "hottentots and other inhabitants have an equal claim to an equitable decision of their differences".¹⁵ The fact that the Heemraden forwarded a request of this nature suggests that not much heed had been paid before this to the repeated insistence on the equality of all before the law. It is also indicative of the extent to which the Heemraden

14. R.J. van der Riet and Heemraden of Stellenbosch to Governor Macartney, 6 Feb 1797, in A. Du Toit and H. Giliomee, Afrikaner Political Thought: Analysis and documents, volume one, 1780-1850, Cape Town and Johannesburg, David Philip, 1983, 94

15. 1/STB 10/9, J.H. Craig to Van der Riet, 23 Feb 1796, no 30

had been able to challenge the directives of the Landdrost. And, with the Heemraden denying the Khoikhoi legal equality, the colonists were unlikely to pay much heed to the orders of the central government.

There are clear indications that the authorities drew distinctions between slave and Khoi prior to the imposition of British rule at the Cape. In 1792 the Landdrost, H.L. Bletterman, investigating a case against Matthias Lotter for killing the Khoi Cupido, claimed that Lotter should be rigorously punished for ill-treating "eenen uit natuur vrygebooren mensch".¹⁶ In instances in which slaves had been killed at the hands of masters, the Landdrost had made similar requests, but the fact that he made reference to the legal status of the Khoi is of some significance. In another case the Landdrost refused to punish the Khoi woman Caatje on her master's accusation that she had assisted two slaves in stealing one of his sheep.¹⁷ The Landdrost claimed that he lacked the authority to punish her and that he would have to receive written permission from the Court of Justice. Here too an important distinction was drawn between slave and Khoi, for the Landdrost readily punished Caatje's two slave accomplices. In explaining his actions, the Landdrost argued that Caatje was a "vry geboore Hottentottinne" and that he

16. CJ 74, Landdrost of Stellenbosch to CJ in case of Matthias Lotter, 22 Nov 1792, 371ff

17. CJ 75, Landdrost to CJ in case of Rudolph Cloete, 23 May 1793, 113ff

had acted in accordance with the laws laid down in the colony regarding "vry geboore hottentotten".

In the course of the nineteenth century, too, the authorities placed limits on the issue of domestic correction. In 1815 the Landdrost of Stellenbosch ordered G.J. du Toit that he could not beat "geen Hottentot hoe gering ook ... dan wel hiertoe permissie van de Landdrost the hebben verkregen".¹⁸ This is in contrast to the position of slaves who could, at this time, still receive unauthorised 'domestic correction' provided it did not exceed certain limits.

Thus, with regard to the treatment of both slaves and servants, masters could be brought before the law courts. But the workings of the law or the maintenance of social harmony in any context depended on a number of variables. In the Cape it depended, inter alia, on the extent to which the colonial state could assert its will over an extended colony¹⁹; on the resources which the slaveowning class had at its disposal to avoid the arm of the colonial state²⁰; on the accessibility of the courts to the servile population and on the extent to which the colonial state

18. 1/STB 9/5, 17 Feb. 1815, no 2, 140

19. Nigel Penn, for example writes that "Governmental authority was only as real as the power of its local representative...". Penn, "Anarchy and authority", 41

20. The traveller, Le Vaillant, noted that "These wise law [regarding slaves] certainly do great honour to the Dutch government; but how many means are there to elude them." F. Le Vaillant, Travels into the Interior Parts of Africa by Way of the Cape of Good Hope in the Years 1780-1785, London, Robinson, 1790, 87

and the settler population were united in their views on the best way in which to maintain order in the colony;²¹ and, perhaps most importantly, on the perceptions which the servile population had of their rights in law.²² "Law", Clifford Geertz writes, "is local knowledge".²³

The ability of the Cape slaves to 'enforce' their legal rights, Robert Ross has argued, stemmed from the conflict which existed between the colonists and the VOC -- a conflict which was largely rooted in the existence of Company grain and wine monopolies. This conflict reached a head, first in 1707 with the fall from office of Willem Adriaan van der Stel, and again with the outbreak of the Patriot movement around 1780.²⁴ "This conflict became focussed on the law courts," Ross has written, "and thus on the legal status of the slaves, just because this was one arena in which the authority of the Company was imposed on the burghers."²⁵ For "as long as the Company maintained its hegemony

21. For a study of the effects of diverging definitions of crime between a planter class and the colonial state, see F. Cooper, "Contracts, crime, and agrarian conflict: from slave to wage labor on the East African coast" in F. Snyder and D. Hay (eds), Labour, Law and Crime: An Historical Perspective, London and New York, Tavistock Publications, 1987

22. For the consequences of acute slave awareness of having rights in law, see W. Dooling, "Slaves, slaveowners and Amelioration in Graaff-Reinet, 1823-1830", B.A. (Hons) thesis, UCT, 1989

23. C. Geertz, Local Knowledge: Further Essays in Interpretive Anthropology, New York, Basic Books, 1983, 215

24. Ross, "Rule of Law", 6-7; G. Schutte, "Company and colonists at the Cape, 1652-1795", in R. Elphick and H. Giliomee (eds), Shaping, 303-315.

25. Ross, "Rule of law", 6

over the Colony, the balance of power gave the slaves (and the Khoi) a certain bargaining power that they lost... with the collapse of the Company at the end of the eighteenth century".²⁶

Ross's argument is essentially a critique of Rodney Davenport who has asserted that "the rule of law did not exist at the Cape in the Company period".²⁷ By pointing to the existence of a rule of law at the Cape, Ross provides a useful way into analysing the role of the law in the Cape social structure. This begs immediate comparison with the functioning of the rule of law in other societies.²⁸

But there are problems with Ross's argument nevertheless. He fails to explain why the economic conflict between Company and colonists was translated into a conflict over the status of slaves. If this were the case, then the conflict between burghers and the Company would most certainly be more or less intense as farmers were to a greater or lesser extent involved in commercial agriculture. And Ross does not show this. His case studies are drawn rather randomly from various districts in the colony.

26. ibid, 7

27. T.R.H. Davenport, "The Consolidation of a New Society: The Cape Colony" in M. Wilson and L. Thompson (eds), History of South Africa, 297

28. The most innovative article is D. Hay, "Property, Authority and the Criminal Law" in D. Hay et al, Albion's Fatal Tree: Crime and Society in Eighteenth-century England, London, Penguin, 1975; E.P. Thompson, Whigs and Hunters: The Origins of the Black Act, Middlesex, Penguin, 1975, 258-69; T.J. Keegan, Transformations in Industrialising South Africa: The Southern Highveld to 1914, Braamfontein, Ravan Press, 1986, 121-166

Furthermore, Ross is exclusively concerned with cases which have come before the Court of Justice in Cape Town and does not consider the workings of the judicial process before a particular case came to Cape Town.

The role of the district courts of Landdrost and Heemraden, then, is neglected. In Cape Town the slaves may have been able to perceive the latent conflict between the colonists and the Company where the Fiscal, answerable only to the Heeren XVII, prosecuted all criminal cases. But in the rural areas, where the Landdrosts, who had distinct ties with the settler population, and Heemraden, who were chosen from the most notable settlers and, almost inevitably large slaveholders, were arguably the most visible manifestations of authority to the servile population. It was to these courts (or to the Veldcornet, the burgher official who was appointed by the Landdrost) where they had to proceed when they wanted to complain about their owners. The views of these courts would therefore be of fundamental importance in bringing the cases before the Court of Justice. Furthermore, Ross does not demonstrate in which way the slaves and Khoi had lost their bargaining power once the Company had lost its hegemony over the colony. He would have to demonstrate that either less slaveholders were being brought to trial for the ill-treatment of their slaves or that less harsh punishments were being laid upon them. And finally, there is very little indication in Ross's argument as to when slaves would be inclined to go and complain to the authorities about their masters.

One way of overcoming these gaps is to analyse the workings of the judicial system in the colony on a much more local level. This chapter will put forward an alternative model for explaining the slaves' assertion of their rights in law. The slaves, it will be argued, gained their position by way of the position that they occupied within the burgher community. For these were the conflicts to which the majority of the slaves were more readily exposed. The criminal cases which ultimately went to Cape Town, did so because the local Landdrost or Heemraden (or both) wanted them to go there. It was perhaps only then that the conflict between the Company and the colonists assumed any significance. Those slaveholders who were ultimately put on trial for ill-treating their slaves or servants, were the ones who had stepped out of the 'moral community' of the slaveowning class. For often the fate of individual slaveowners depended on the testimony of their neighbours. Neighbours were the ones who examined the bodies of deceased slaves, who could testify to the way in which slaves were treated, and closely linked to this, to the reputations of individual slaveholders. They could also be the same ones with whom colonists were involved in land-disputes. And the servile population, it will become clear, was very aware of the state of community which existed amongst the burgher population.

One of the most crucial elements in the 'moral economy' of the Cape slaveowners was a desire to treat their slaves and servants

in the way that they deemed fit.²⁹ They resented state interference in their day-to-day control of their slaves and servants. It is only in this context that the hostility which the slaveowners showed toward the imposition of 'amelioration' can be understood. Furthermore, the slaveowners stated their position explicitly. The Cape Patriots claimed the right to be allowed to punish their own slaves "without being allowed to tyrannise them".³⁰ One colonist told another that he could treat the schoolmaster "en alle die in zyne dienstwaren, naar zyn goed denke ... en denzelve ook slaan konden".³¹ The views of the slaveowners assume a stark form in the words of the slave Adam who told his master, after he had fatally stabbed him, that: "Jij hebt altoos gezegd dat jij Fiscaal en Landdrost was, wie is nu Fiscaal en Landdrost?"³² Clearly the slaveowners assigned final authority over their slaves and servants to themselves. The slaves on the other hand had views of their own. Adam clearly rejected his master's claim to being 'Fiscaal en Landdrost' when he fatally stabbed him.

29. This concept of 'moral economy' is more or less in line with that of Delius and Trapido who use the term to describe the "class confidence, sense of hierarchy, biblical authority and political strength" of a ruling class. See, P. Delius and S. Trapido, "Inboekselings and Oorlams: The Creation and Transformation of a Servile Class", JSAS, 8, 2, 1982, footnote 15, 219; E.P. Thompson, "The moral economy of the English crowd in the eighteenth century", Past and Present, 50, 1971

30. cited in Ross, "Cape Gentry", 211

31. 1/STB 3/11, Testimony of Engbert Dykslag, 19 June 1775

32. CJ 498, Sentence in case of Landdrost of Stellenbosch contra Adam van die Kaap, 21 Feb 1805, 327ff

The resentment of state interference in master-slave relations was not peculiar to Cape slaveowners. In the American South, too, the slaveowners had been noted for their hostility to the intervention of the state in master-slave relations. There a dual legal system (the law of the plantation in addition to the law of the state) had emerged to cope with the contradictions in the slaves' position as person and property. In the Southern states the state deemed it inappropriate to regulate the master-slave relationship. The result was that "for most slaves it was the law of the plantation, not of the state, that was relevant. Only a small proportion of the slaves ever had to deal with the law-enforcement mechanism of the state. Their daily lives were governed by plantation law."³³ In contrast, the VOC *did* deem it fit to intervene in the master-slave relationship. The crucial question, then, is to determine to what extent the Cape slaveowners had been able to stave off the pressures of the colonial state.

A dual legal system mean that the slave "came to assume that ultimate authority resided in his particular master".³⁴ At the Cape, however, the VOC was not representative of the settlers: "as a class, the main body of slave-owners was remarkably powerless".³⁵ The prime allegiance of the VOC at the Cape was to

33. R. Fogel and S. Engerman, cited in M. Wayne, The Reshaping of Plantation Society: The Natchez District, 1860-1880, Baton Rouge and London, Louisiana State University Press, 1983, 15

34. Wayne, Reshaping of Plantation Society, 16

35. Ross, "Rule of Law", 7

its directors in Holland. Consequently, at the central level, the settlers could not prevent the VOC, and later the British colonial state, from regularly intervening in the master-slave/servant relationship. But, as will become clear, one of the most striking features of the Cape legal system was the dominance of the local over the central organs of justice. To bring their masters to court, therefore, the servile population first had to convince the local authorities of the legitimacy of their complaints. And to the local authorities, local considerations were of primary importance. How, then, did slaves gain access to the law courts?

There are indications that slaves to some extent viewed the law courts as countervailing sources of authority to that of their masters. That some slaves and Khoi were at least aware of their right to complain at the offices of the Landdrosts and Heemraden there can be no doubt. In 1795, the slaves Eva van die Caab and Mourits van Mauritius collectively complained to the Landdrost and Heemraden about the ill-treatment that they suffered at the hands of their master, Jan Abraham Meyer of Roodezand.³⁶ Eva complained of her heavy work-load which included cleaning the kitchen in the morning, fetching wood, cooking and in addition to water the 'garden' during summer. Moreover, she had to cut wheat with the male slaves. All of this she found 'swaar en ondoenelijk'. It was not so much the heavy work burden which prompted her into complaining, however, but the fact that she was

36. 1/STB 3/13, Testimony of Eva van de Caab, 11 Feb 1795, no 83; ibid, Testimony of Mourits van Mauritius, 11 Feb 1795, no 84

beaten with a sjambok for not being able to comply with all of this. Mourits claimed that his master kicked him against the head when he failed to slaughter an ox quite to his master's satisfaction. He also complained about an incident which had taken place four years previously when his master beat him over the head and shoulders with a kirrij for not treating the oxen to his liking. Another slave, August, belonging to the burgher surgeon Carel Fredrik Paret, after severe treatment which spanned four years, also complained to the Landdrost about the treatment he had to endure, which included beating, branding and being suspended from a beam with his hands pulled over his knees and a stick placed beneath his knees.³⁷ In 1799 the slave Cedras van Mozambique took the sjambok with him to the Landdrost with which he claimed he was beaten sporadically for two weeks.³⁸ He claimed that he went to the Landdrost out of fear that he would suffer the same fate as five of his fellows who had been ill-treated by his master and had subsequently died. The Khoi were also not averse to seeking redress at the office of the Landdrost. The Khoi woman Leys claimed that she was often beaten 'onverdiend' without being given a reason.³⁹

These cases all suggest that the slaves and Khoi were, at least to some extent, aware of having the right to complain to the offices of the Landdrost and Heemraden. For many the courts

37. ibid, Testimony of August van Mauritius, 14 March 1795, no 95

38. 1/STB 3/14, Testimony of Cedras van Mozambique, 16 March 1799

39. 1/STB 3/13, Testimony of Hottentot woman Leys, 17 Nov 1795, no 104

represented alternative sources of authority to that of their masters. Occasionally, this took a very explicit form. When Coenraad Appel beat the slave woman Filida over the head with a piece of wood, she told him: "Daar zijn nog wel Heeren daar ik mijn beklag aan doen kan en zal de jongen daartoe opmaken."⁴⁰ When the slave Adam told the slave Joost that he had killed his master, Jacob Minnaar, Joost asked him: "Indien jij mishandelt wierd, waarom dan niet liever bij den Landdrost geklaagd. Wie weet of jij dan niet zou zyn verkogt geworden, en dit sou immers beeter geweest zyn als zo nu kwaad te doen".⁴¹ The point of significance here is not so much Adam's killing of his master. This was an act of passion and the prosecutor accepted this.⁴² More significant is Joost's comment. For him, complaining to the Landdrost provided a far more attractive and rational option which held out the possibility of concrete results (being sold to another master). In 1794 Cornelis Pontij claimed that the Khoi, Hermanus, after being asked to identify himself told him: "Wie ben jij... ik ben zoo goed als jij en jij ben onse Heer niet, en ik zal off kan mijn regt ook bij de Raad van Justitie [Court of Justice] zoeken".⁴³ It is not clear, however, whether Hermanus

40. 1/STB 3/11, Testimony of Elsie Anna Meijburg, 7 Feb 1775

41. CJ 498, Sentence in case of Landdrost of Stellenbosch contra Adam van die Kaap, 21 Feb 1805, 327ff

42. For this reason the Landdrost did not ask for the normal death sentence in such cases (impalement), but rather that Adam simply be hanged.

43. 1/STB 3/13, Testimony of Cornelis Ernestus Pontij, 21 June 1794, no 60

had actually said this. But, at the very least, it would reflect slaveholder awareness of the slaves' and Khoi's perceived right of complaint.

Some slaves did not give up on the legal battle when they failed to succeed at the local law courts. In 1820 the slave woman Candase, after having repeatedly complained about the treatment that she received at the hands of both her master and mistress and not being able to gain satisfaction at the office of the Landdrost, went to the Fiscal Denysen and complained about the way in which her complaints were treated in Stellenbosch.⁴⁴ In another case punishment was not enough to deter slaves from seeking redress in the courts. Samson, Philander and Goliath simply went back to the court after their master beat them when they had come from the court demanding to know what they had said there.⁴⁵ They claimed that they had thought it wise to bring their claim to the court anew.

It should be noted, however, that the complaints brought to the courts by slaves during the eighteenth and early nineteenth centuries differed markedly in nature from the ones which they were to bring in the 1820s and the 1830s when special slave amelioratory measures were introduced by the British state.

During the eighteenth century the complaints were limited in scope and were largely confined to instances of ill-treatment. In

44. 1/STB 2/2, Extract from Daybook of Landdrost, 4 May 1820

45. CJ 78, Landdrost of Stellenbosch to CJ in case of Jacobus Alleman, 6 Oct. 1796, 208ff

the nineteenth century slave complaints were often very specific and sometimes very closely tied to specific pieces of legislation. Then they complained about hours of work, the food and clothes that they received, the disruption of family-life, in addition to specific instances of ill-treatment.⁴⁶ However, the examples above illustrate that even in the eighteenth century the courts were not regarded by the servile population as mere extensions of the authority of their masters.

The slaveholders on the other hand, were also aware of the slaves' right of complaint and often attempted violently to prevent their slaves from going to the courts. Slaves sometimes went to the court notwithstanding their masters' orders to the contrary.⁴⁷ However, the behaviour of the Cape slaveowners was somewhat contradictory. While they sought to be "Fiscaal en Landdrost" on their farms on the one hand they actively solicited the aid of the state in buttressing their authority on the other hand. In 1815, for example, D.J. Rossouw wrote a letter to the Landdrost complaining about his slave Toemat "door wien onderscheidene ongeregeldheeden word gepleegd met betrekking to eenige hottentots meijden, waardoor twist is ontstaan en ongelukken te dugten zyn".⁴⁸ The court responded positively to the slaveowner's request. The Veldcornet was ordered to investigate the matter and to punish Toemat "naar bevinding van

46. Dooling, "Slaves, Slaveowners", 21-39

47. CJ 78, Landdrost of Stellenbosch to CJ in case of Jacobus Alleman, 6 Oct. 1796, 208ff

48. 1/STB 9/5, 16 Feb 1815, no 3, 139

zaaken" or to send him to the prison in Stellenbosch. In another incident Jacob van Reenen of Drogevalleij sent his Khoi servant, Dirk Witbooi, to the Veldcornet H. Brand for a beating for going to Tygerbergen without a pass.⁴⁹ Although Nigel Worden has seen the law as "an alternative to the disciplinary control of the master over his slave", he does not seem to recognise that slaveowners perhaps perceived that they *needed* the aid of the state in bolstering their authority.⁵⁰ What must be recognised is that the slaves and servants were brought to court for offences which could quite easily have been dealt with on the farm. The law was thus at once a check on the power of the masters as well as being a means whereby slaveholders could reinforce their power over their slaves and servants. Indeed, the slaveowners were turning their slaves away from themselves. This could have demonstrated to the slaves and Khoi that the slaveowners were not absolutely sovereign.

The slaves, then, sometimes utilised their right of complaint in attempts to stave off the worst forms of ill-treatment which they suffered at the hands of their masters. Yet, it has been argued in the previous chapter, the slaves were part of a 'community' of slaveholders. Consequently their access to the law courts was very significantly determined by the position of their masters in the 'moral community' of settler society.

49. 1/STB 9/5, 27 February 1815, no1, 161

50. Worden, Slavery, 114

It is therefore not surprising that slaves sometimes turned to the neighbours of their masters. For example, in 1764 the slave Tas, who had deserted his master's farm approached Jan Lodewyk Pretorius asking him to speak to his master, Jan Gysbert Olivier, on his behalf so that he would not receive any punishment for having deserted.⁵¹ In many cases the slaves' appeal to their masters' neighbours was not misplaced. Significantly, these requests were not refused by neighbours.⁵² It was the existence of a moral community -- the existence of definite boundaries which circumscribed the behaviour of individuals (not least in relations with their slaves) -- which allowed slaves to proceed to the neighbours of their masters.

Occasionally, the neighbours were also the representatives of authority. The slaves under the control of Johannes Kuhn, a particularly notorious burgher who had a (bad) reputation for the maltreatment of his slaves, sometimes appealed to the Heemraad Josias De Kock to act on their behalf.⁵³ Kuhn was said to have been responsible for tying one of his slaves to a ladder and drawing a curry-comb over his naked body from neck to buttocks. De Kock claimed that Kuhn's slaves, out of fear of punishment, requested him on more than one occasion to appeal to their master not to beat them. In 1765 the slave Fortuyn van Bengalen appealed to the veldcorporaal, Johannes van Aarden, to appeal to his

51. 1/STB 3/11, Testimony of Jan Lodewyk Pretorius, 25 Jan 1764

52. *ibid*, Testimony of Gerrit Beukes, 29 May 1770

53. *ibid*, Testimony of Josias De Kock, 15 May 1770

mistress not to punish him.⁵⁴ This Van Aarden did, and Fortuyn's mistress promised not to punish him on that occasion. The slave April told the Veldcornet Hendrik de Vos: "Sieurde Vos, helpt mij toch en verlost mij, als ik weder naar het huys van my Sieur moet gaan, gaat ik naar mijn dood."⁵⁵ April complained not so much of ill-treatment but of a lack of food. He claimed (which was confirmed by Vos) that he sometimes collected wood for Vos for which he received some bread. These instances all suggest that slaves were not averse to turning to their masters' neighbours in attempts to escape expected punishment. Neighbours presented an alternative avenue for the slaves. Of course, this did not always have favourable results. For example, Carel Fredrik Paret did not punish his slave August when he had come home on his own after he had deserted on a number of occasions over a period of four years. But when August was brought home by one of his neighbour's slaves, after he had appealed to one of Paret's neighbours to put in a good word for him on his return, Paret had him beaten on the back and buttocks with quince sticks.⁵⁶

In some instances, the recourse of slaves to other colonists was combined with recourse to the law. In 1790, after having been beaten on the orders of his mistress, the wife of Izaak de Villiers, the slave boy Lakey went to the burgher Izaak Minnaar

54. 1/STB 3/11, Testimony of Hendrik Gildenhuysen, 19 December 1765

55. 1/STB 2/2, The Secretary of Stellenbosch contra Pieter Roux, 29 June 1820

56. 1/STB 3/13, Testimony of Adonis van Mallebaar, 12 March 1795, no 92

to complain about the incident.⁵⁷ Lakey must have suspected that Minnaar would be prepared to listen to his story. His perception was not misplaced; Izaak Minnaar sent him to Stellenbosch to lodge his complaint. Clearly, the slaveowning class did not speak with one voice. It is in this niche that the slaves and servants found a bargaining edge.

In other instances, such as the one above, cases of ill-treatment of slaves and servants by masters only came to court in the first place because slaves were encouraged by the members of the settler community to do so. When Rudolph Cloete beat the Khoi, Windvogel, Windvogel reported the incident to his master, David de Villiers.⁵⁸ De Villiers, however told him that he could not help him "en dat zig naar den regt moeste begeven". Occasionally, slaves had kin of their masters on their side, or at least, acting on their behalf. When Damon was beaten by Hendrik Gildenhuijsen in 1815, Gildenhuijsen's brother, Pieter Johannes, sent him to the Landdrost to seek redress. In court, Pieter Gildenhuijsen further stated that his brother treated all the slaves of his mother "zeer streng" and that this instance of ill-treatment was not the first.⁵⁹ Possibly, Pieter was disgruntled at the fact that his brother was staying with his mother and obviously gained control over the farm and the servile

57. 1/STB 3/12, Testimony of Lakey, 11 Jan. 1790

58. 1/STB 3/13, Testimony of Hottentot Windvogel, 16 Feb 1794, no 22

59. 1/STB 3/24, Testimony of Pieter Johannes Gildenhuijsen, 8 July 1815, no 102

population, while he was 'living' at the farm of the widow of Samuel Anthony Walters.⁶⁰ This dispute between kin members in no way detracts from the fact of community -- indeed it further reveals the extent to which the community was at once an arena of cooperation and conflict. One anthropologist has noted that "if it is true that it is kin and neighbours who most often work together, it is also true that it is between these people that disputes most often develop."⁶¹ This case clearly shows the extent to which the servile population's access to the court came to be mediated by community norms.

The fact that slaves stood the chance of being punished if their complaints were said to be unfounded further served to turn slaves to the neighbours of their masters. There are indications that the risk of punishment for bringing in 'unfounded' complaints must have weighed heavily upon their decision as to whether to proceed to the courts or not. In some cases this clearly served as a deterrent. In 1820 the slave woman Francina claimed: "Ik was bang om alhier [to court] te koomen doch ik begon naderhand te twyfellen" Asked why she had not brought her complaint immediately she claimed: "Ik was bang geweeest

60. ibid

61. R. Layton, "Patterns of Informal Interaction in Pellaport", in F.G. Bailey (ed), Gifts and Poison: the Politics of Reputation, Oxford, Basil Blackwell, 1971 98

omdat de heere de laatste maal op my zo kwaad waaren want toen heb ik veel slaagen ontvangen."⁶²

It is in this context that the case of Damon from Madagascar should be assessed. In 1815 Damon claimed that Hendrik Gildenhuijsen (the son of his owner) beat him with a kirrij, as well as with his fists, over his entire body so that his nose bled.⁶³ Gildenhuijsen then threw him to the ground and beat him with a sjambok over his buttocks, back and shoulders. Damon went back to work but the following day, no longer being able to endure the pain, he went to hide in the bushes, with the intention, so he claimed, of going to complain. He stayed there for several days until he went to the Veldcornet of the Paardeberg, Le Roux. Le Roux sent him to his master's brother, Pieter Johannes Gildenhuijsen, who in turn took him to the Landdrost "ter verkryging van zyne recht".

What is clear from this case, is that Damon did not have sufficient courage to complain to the authorities directly. The other colonists were instrumental in bringing this case to the attention of the authorities. This case also demonstrates the way in which appeal to neighbours and appeal to the law courts were mutually reinforcing. Clearly, then, factors which militated

62. 1/STB 2/2, The Secretary of Stellenbosch contra Isaac Cornelis de Villiers and his wife, Neeltjie Bresler, 20 May 1820

63. 1/STB 3/24, Testimony of Damon van Madagascar, 8 July 1815, no 101

against slaves' access to court (like the fear of punishment) were in some ways offset by the nature of the settler community.

There are indications, however, that the community did not always look kindly upon those who were instrumental in bringing such cases to the attention of the courts. In 1798 the Khoi Dikkop claimed that he would not have brought any complaints to the court had he not been "op gemaakt" by Tomas de Selva. The Veldwagtmeester of the Roggeveld, Jacobus Nel, wrote to the Landdrost with the request: "Ik verzoek onderrigting hoe ik myn met sulke mense sal gedragen die so omgaat mit de hottentot om van de menschen op te maken om te gaan klaagen".⁶⁴ To some extent, then, people who encouraged the servile population to complain were not considered to be acting in the interests of the community. This must have served to put a partial brake on the servile population's access to the courts. The Veldcornet in this case was clearly hoping to have the support of the Landdrost. Nevertheless, slaves and servants were turned to the courts by the neighbours of their masters.

The slaves could proceed to the neighbours of their masters because their owners formed part of a community of slaveowners. In this community, it has been suggested in the previous chapter, each person had a reputation. And slaveowners who were known for excessive cruelty to their slaves could expect to attract ill reputations. In 1826 a number of Stellenbosch residents,

64. 1/STB 10/152, Jacobus Nel to Landdrost, Ryno van der Riet, 16 October 1798

objecting to the forthcoming Ordinance 1765 of that year, claimed that for a slaveowner to be condemned as an ill-treater of slaves would be to lose "his whole credit and reputation...".⁶⁶ The community shunned those who grossly ill-treated their slaves and servants. Ironically, these slaveowners who were guilty of excessive ill-treatment served a social function. In the early eighteenth century, for example, slaveowners could keep their slaves in check by threatening to sell them to Michiel Otto, a slaveowner notorious for his excessive cruelty.⁶⁷

At the very least, certain forms of treatment occasioned community talk. In 1770 Josias De Kock claimed that he heard "uit de gerugten" that one Johannes Kuuhn treated his slave "barbaars".⁶⁸ Christiaan Ernst testified how he had seen Kuuhn undress a slave who had deserted and brushed him down from neck to buttocks with a curry-comb. He also claimed to have heard "uit de gerugte" that Kuuhn "zeer straf met zyne slaven omgaat en denzelven nu en dan mishandelt".⁶⁹ Jan Roux told De Kock that he witnessed a slave being tied to a harrow by Kuuhn and beaten constantly for one and a half hours. The knegt on the farm, Gerrit Beukes, claimed that he had seen Kuuhn treat the slaves

65. This was a major piece of amelioratory legislation which gave slaves extended rights in law.

66. Memorial of Residents of Stellenbosch to Landdrost and Heemraden of Stellenbosch, 10 July 1826, RCC, XXVII, 109-116, 112

67. Mentzel, Description, III, 49

68. 1/STB 3/11, Testimony of Josias De Kock, 15 May 1770

69. ibid, Testimony of Christiaan Ernst, 29 May 1770

"zeer straf en barbaars" and that he had repeatedly spoken to Kuuhn about this.⁷⁰ Kuuhn had clearly stepped out of the 'moral community' of the slaveholding class. In another case, a colonist claimed how she was aware of another colonist's "onreedelijke behandelinge ... zo omtrent haar man als't volk ... gepleegd".⁷¹

The case of Carel Buijtendag (see pp 41; 47-50) provides another case in this point. Buijtendag was banished from the district of Stellenbosch in 1776 for the gross ill-treatment of his Khoi servants which resulted in the death of one of them. Nigel Penn notes that the first complaints to have reached the authorities about Buijtendag came from his neighbours relating to the ways in which he had treated his Khoi servants. He also adds that "there is good reason to suppose that they would never have reached the authorities had not Buijtendag succeeded in antagonising his neighbours and, in particular, the powerful Van der Merwe family."⁷² But in the end Penn underplays the significance of neighbourhood and concludes that "Governmental authority was only as real as the power of its local representative and unless the personal interests of that man were involved there was little chance of intervention".⁷³ The Veldwagtmeester Van der Merwe may have been in the vanguard of the struggle against Buijtendag, but it is clear that he acted not only on his own antipathy towards

70. 1/STB 3/11, Testimony of Gerrit Beukes, 29 May 1770.

71. *ibid*, Testimony of Aletta Booijesen, 15 April 1776

72. Penn, "Anarchy and authority", 32

73. *ibid*, 41

Buijtendag, but also that of the fellow burghers. In a letter to the Governor, the Landdrost and Heemraden of Stellenbosch noted that Van der Merwe complained about the unsocial behaviour of Buijtendag towards his "medeburgers en buuren".⁷⁴ The Landdrost not only provided an affidavit by Van der Merwe but also nine original letters and five testimonies attesting to the unsocial character of Buijtendag. Clearly, the community was instrumental in bringing offending masters to the courts. Having their fellow colonists brought before the courts for offences against slaves and servants was one way in which the community could discipline their neighbours.

At the Cape, then, in contrast to the American South, some slaves were, at least to some extent, aware of having rights in law. Occasionally they proceeded to the office of the Landdrost on their own accord to lodge complaints against their master. There are indications, however, that the threat of punishment for lodging 'unfounded' complaints weighed heavily on the slaves decisions to proceed to the local law courts. Some slaves, then, clearly did not have sufficient courage to lodge complaints of ill-treatment against their masters. In response some slaves at the Cape turned to the neighbours of their masters. Normally neighbours appealed to masters on the behalf of slaves. In other instances slaves proceeded to the courts under direct encouragement from the neighbours of their masters. It was the nature of relations amongst settlers which resulted in settlers

74. 1/STB 20/2, Landdrost and Heemraden to Joachim van Plettenberg, 6 May 1776

directing slaves to the law courts. Reputations of individual slaveowners were sometimes also of fundamental importance in cases coming to the attention of the law courts. In court the drama continued. The courts were the community in miniature. Although reputations of slaveholders and divisions within the settler community were vital in bringing cases to court, these factors could also severely limit the servile population's chances of success. In courts the servile population faced two major difficulties -- the willingness of settlers to testify against their fellows burghers and the reputations of their masters in the slaveholder community. The following chapter will explore the way in which these factors impinged on the slaves access to justice.

Chapter 3

The Courtroom: The Community in Miniature

The previous chapter has demonstrated how the slaves' and servants' access to court was determined by the contours of the community in which they found themselves. For slaves to gain some measure of justice two factors mattered above all else: the readiness of settlers to testify against their fellows and linked to this, the reputations of their masters in the settler community.

How, then, did colonists react to one another in court? If the complaints of the servile population often came to court as a direct result of conflicts between neighbours, it was often the solidarity or non-solidarity amongst neighbours which could ultimately determine the chances of success or failure of complaints of slaves and servants in court. According to Armstrong and Worden the position of slaves in court was severely compromised by the fact that "[c]orroborating evidence was often difficult to obtain in a community which supported the interests of slaveowners rather than the slaves, and since the heemraden and landdrosts were themselves slaveowners they were hardly impartial".¹ On the surface the criminal records attest to the truth of this view. Slaves were duely flogged when their

1. J. Armstrong and N. Worden, "The Slaves", in R. Elphick and H. Giliomee (eds), Shaping, 154

complaints were said to be groundless.² This trend continued right into the period of amelioration.³

In many cases, too, the slaveowners had no shortage of witnesses to support their claims that they generally treated their slaves well. In 1815, for example, Jan Nieuwhout could produce four declarations which supported his claim that he generally treated his slaves well.⁴ In 1820, when Albertus Laubscher was charged with ill-treating his slave Tubord, he claimed that he could prove that Tubord was a "brutaal voorwerp" by calling on the "Veldcornet en zyn geheele buurschap".⁵

In the broad outlines, then, the argument of Armstrong and Worden is correct. But they fail to provide an explanation of when and why slaveowners were vigilantly prosecuted for committing excesses against their slaves and servants. For such instances were not as infrequent as may be assumed. The Landdrost and Heemraden were not mere extensions of the authority of the slaveowners. The support or non-support of the slaveowners should be measured in 'community terms'. The slaveowners could

2. 1/STB 9/15, 2 March 1815, no 6, 175, ibid, 21 March 1815, no 1, 228; ibid, 22 March 1815, no 1, 234; 1/STB 3/25, Testimony of Camorie van de Kaap, 13 April 1810

3. In the six months prior to 1831 the Assistant Protector of Slaves at Stellenbosch dismissed nine out of ten out of a total of seventy-nine cases brought before him. J. Mason, "Slaveholder Resistance to the Amelioration of Slavery at the Cape.", Centre for African Studies, University of Cape Town, Conference Paper, July 1986, 27

4. 1/STB 9/5, 17 March 1815, no 2, 221

5. 1/STB 2/2, Secretary of Stellenbosch, P.C. Blommestein contra Albertus Laubscher, 30 March 1820

ultimately expect the support of the courts when their reputations met with the gentry's approval.

It is worth taking a detailed journey into one case. In 1803 one Jacobus Adriaan Vorster, of the Cederberg district, stood trial for the murder of the Khoi woman, Kaatjie Klein, wife of the 'gedoopten Bastard', Cornelis Coopman.⁶ Vorster found a number of witnesses to act on his behalf. A number of colonists spoke of the unsavoury character of the Coopmans (Kaatjie's family), while others spoke of the commendable characters of the Vorsters. Louis Coetzee claimed that the Coopmans were a "brutaal volk" while the Veldcornet, Barend Fredrik Lubbe, claimed that they were a family of "kwaadaartig en een slegt gedrag". The ex-Veldcornet Frans Lubbe, living at the Bidouw, claimed that the Coopmans were a "twistzoekende en ergerlyke menschen" and that he constantly received complaints from the inhabitants of the district about them in the time that he was Veldcornet. The Vorsters on the other hand, were "onbesprooken vroom en vreedzaame lieden". These testimonies were not all that Vorster had on his side. In addition, the Veldcornet, Barend Lubbe, as well as Henning Jacobus Van Wyk, and Louis Coetzee all testified that they had examined the body and found a wound only the size of "een erwfen korrel". The Veldcornet, Abraham Mouton, moreover, refused to come to examine the body when Cornelis Coopman summoned him on two different occasions, despite the fact that he was only three hours away by ox-wagon.

6. CJ 494, Eisch en Conclusie of Landdrost of Stellenbosch contra Jacobus Adriaan Vorster, Oct. 1802, 171ff

The freeburghers, then, in particular neighbourhoods were not so individualistic that they refused to support one another in times of crisis. Moreover, kinship came to play a role here too.

Vorster's wife, Martha, had been born a Lubbe and was related to the Veldcornet, Barend Lubbe.⁷ The support which these colonists gave to their fellows was not at all automatic. The very existence of community, also points to the existence of tensions and conflict. It should be stressed that the community should not be assumed to be monolithic. Not all the colonists in the district came to support Vorster. Isaac van Rooyen, David Willemsen and Abraham Willemsen, whom Coopman had summoned as three "onpartydige lieden" (thereby alluding to the partial nature of the other witnesses) after the Veldcornet refused to come when he had summoned him, all testified that they found a wound the size of "een halve vinger lengte". But this evidence only serves to further highlight the existence of a community, the contours of which were negotiated over time and place.

In this case the actions of the community seem to have been rooted in the productive activities of the inhabitants of the area. It would appear as if the hostility which these burghers displayed towards the Coopmans did not stem solely from any inherent racial solidarity (although this was undoubtedly present). It would seem that the hostility stemmed more from the fact that the Coopmans had access to cattle which they had

7. C.C. De Villiers and C. Pama, Geslagsregisters van die ou Kaapse Families, 2 volumes, Cape Town, A.A. Balkema, 1981, volume I, 511

allegedly indiscriminately grazed on the fields of the inhabitants of the district. And this must be seen in the light of Vorster's claim that he had few cattle and much debt and his wife's claim that Vorster was a man of 'armoede'.

The Vorsters, Lubbes (the influential Veldcornet family related by marriage to the Vorsters), the Coetzees and the Van Wyks would in this case seem to constitute (what Guelke calls) a 'micro-community'.⁸ It was rooted within a specific locality (the Cederberg) and linked by marriage as well as the contours of pastoral farming. The Coopmans, against whom the crime had been committed, had to an extent been a part of this local community, in the sense that they too had been engaged in pastoral activities which obviously brought them into competition with the local colonists. But the very competition which they provided, and furthermore, Christiaan Koopman's message to Frans Lubbe claiming that he was "geen kral hottentot dat u [Lubbe] mij kommandeerd soo jij wil", necessitated their exclusion from the community.

The Coopmans, then, were not only involved in direct economic competition with the settlers of the district but were determined also not to become the servants of the settlers. It is in this that the readiness of the colonists to testify against them must be sought. Interestingly, the fact that the settlers sought to defame the Coopmans points to the fact that they too were not without reputations. In this case much more emphasis was placed

8. Guelke, "The Making", 437

on the reputations of individuals that on the facts of the case, mainly, that Kaatjie Coopman had died at the hands of Vorster. The emphasis on reputation, then, was in fact carrying the community into the courtroom.

The Question of Slave Testimony

The reputations of individual slaveowners was of particular importance in a society where the validity of slave evidence was unclarified. In many cases the slaves on the farm were the only ones who could give decisive evidence and the admissibility of their testimony came to be of crucial importance. In 1771 the Landdrost of Stellenbosch stated that the law is 'constant' in this regard: "dat de depositie van een ongeloovige van waarde gehouden word, soo wanneer er geen andere middelen zyn om tot de waarheyd te koomen".⁹ Nevertheless, considerable confusion reigned about this in the eighteenth century Cape law courts. The fact that the prosecutors often found the need to consider the validity of slave evidence also testifies to the hostility towards the acceptance of slave testimony. This stands in direct contrast to the Southern United States where there was no question about the status of such testimony -- it was simply not accepted.¹⁰

9. CJ 400, Eisch en Conclusie in case of Landdrost of Stellenbosch contra Hester Pienaar, 4 April 1771, 170ff

10. E.D Genovese, Roll, Jordan, Roll: the World the Slaves Made, New York, Pantheon Books, 1974, 32

One typical case occurred in 1767 when Hendrik Greeff faced charges for killing his slave Jacob.¹¹ Greeff had not only beaten Jacob senseless, when he was brought home after he had deserted, but also dumped him in water and told him: "Jou rakker! Jy moet tog verrekken, ben jy nog bang om te sterven?" Jacob died the following day as a result of the punishment. What makes this case of particular interest is the fact that the evidence against Greeff had come exclusively from the slaves and the servants on the farm. Greeff denied the testimonies of Archilles and Silvia who claimed that Jacob had been beaten with a sjambok. Although the Landdrost was of the opinion that the testimonies of the slaves deserve "alle geloof" because there was no evidence that they had colluded in the giving of their testimonies, he still felt compelled to justify the acceptance of slave testimony against owner or of pagan against Christian. He cited one Roman law source which advised that in cases where there were no other means to arrive at the truth, "onbekwaam getuygen" -- and therefore also slave testimony -- could be accepted. On these grounds the Landdrost requested that Greeff be banished from the colony for life and that his slaves be sold on condition that none of them should come into the possession of any of his relatives.

In another case involving the death of a slave the Landdrost was unequivocal about the validity of slave evidence: he claimed that "slaaven die van geene misdaden overtuigd zyn niet kunnen

11. CJ 393, Eysch en Conclusie of Landdrost of Stellenbosch contra Hendrik Greeff, Nov. 1767, 10Bff

verondersteld worden anders dan met de waarheid in deze mond tot den regter kunnen toevlugt te zullen neemen".¹² The Landdrost arrived at this conclusion despite his opinion that the complaints of slaves could often not be seriously considered as a result of the "gebrak aan Christen getuigenissen" or a lack of medical evidence to prove allegations of gross ill-treatment. The Landdrost's reference to the fact that the slave should be believed because he had not been accused of any crime was not simply a question of semantics. Indeed, in another case the Landdrost quite explicitly stated that slaves who were brought to the prison at Stellenbosch as deserters were not believed when they brought in complaints against their masters.¹³

In February 1792 three slaves of the burgher Charles Naude of the district Drakenstein went to the 'pro-interim' Fiscal, J.P. Deneys and complained not only of 'verregaande mishandeling' by their master of two of their fellow slaves, but also that their mistress had beaten the slave woman Sara with an agterrossjambok while she had had her three-day old child on her back.¹⁴ The child subsequently died. Naude claimed that the slaves' claims were completely 'leugenagtig' and that the child had died of 'stuiptrekkingen'. He further claimed that this could be corroborated by persons who were on his farm before and after the

12. CJ 483, Landdrost of Stellenbosch contra Jacobus Mosterd and Francina Karsters, 2 April 1801, no 2, 5ff

13. CJ 399, Landdrost of Stellenbosch to CJ, in case of Johannes Kuhn, 19 June 1770, 750ff

14. CJ 74, Statement of Pro-Interim Fiscaal, J.P. Deneys in case of Charles Naude, 15 March 1792, 92ff

death of the child. He submitted these declarations and also transported Sara to Cape Town whose testimony corresponded with that of his own. Deneys found that although these declarations could not be regarded as foolproof evidence they had to be deemed to have 'buitengewoone kragt', because they 'strekken tot probatie van onschuld, en geproduceerd zyn tegen verklaringen van slaven, tegen hunne lyfheer getuigende, van hoedanige verklaringen die liberaale admissie tot kwaad exempel verstrekt, en ook diametraal aanloopt tegen de beschreeven wetten'. Thus, according to Deneys the acceptance of slave testimony against their masters served as a bad example and went against the grain of existing laws. He did not cite the legal source. It would seem, however, that he was referring to specific Roman-Dutch law texts.

In 1793 the acting Landdrost of Stellenbosch, J.H. Neethling outlined three laws which he claimed were applicable in the colony in this regard.¹⁵ One stated that "geen slaaf teegen zynen lyfheer in een onderzoek over lyfstraffelyke misdaden eenig geloof meriteeren kan". The Lex 6 Codicus de questionibus stated that a slave "nog voor nog teegen zynen lyfheer in een ondezoek over lyfstraffelyke misdaden of geldzaaken eenig geloof meriteeren kan", while the Lex 8 Codicus de testibus had it that "een slaaf even min ten voordeele van, alst teegen zyner lyfheer mag gehoord worden is buiten twyfel". In 1801 the Landdrost of Stellenbosch, Ryno Johannes van der Riet, although he argued that

15. CJ 75, Landdrost of Stellenbosch to CJ in case of D.G. Verwey, 18 July 1793, 150ff

especially the slaves who resided in the rural areas were subjected to the "tyrannische juk van ombarmhartige lyfheeren of vrouwen", claimed that the complaints of slaves could often not be taken seriously "door gebrak aan Christen getuigenissen of onmatige kenmerken van mishandeling".¹⁶

The inherent bias against slave testimony is clear from all of these laws. The bias seemed to be directed specifically at slaves and did not seem to stem so much from the Roman law stipulation that the testimony of one person was insufficient. In some ways too the colonists were aware of the bias against slave testimony. For example, when Elisabeth Grove sought to prove her husband's infidelity she told the slave woman Philida that if she saw her husband sleeping with any of the female slaves on the farm she should call the Europeans on the farm "omdat getuigenissen van slaven niet zouden goedgekeurd werden".¹⁷ It is thus clear that the question of the validity of slave evidence in the Cape law courts was not as unproblematic as has been assumed, that is, that "the Court of Justice treated the evidence of a slave as any more or less trustworthy than that of a white person, even including his master".¹⁸

These cases all testify to the undetermined nature of slave evidence in the law courts and the difficulties involved in

16. CJ 483, Landdrost of Stellenbosch contra Jacobus Mosterd and his wife Francina Karstens, 2 April 1801, no 2, 5ff

17. 1/STB 3/11, Testimony of Elisabeth Grove, 26 Sep 1776

18. Ross, "Rule of Law", 7

successfully prosecuting slaveowners. When the Commissioners of Inquiry submitted their report in 1827 the status of slave testimony was still unresolved and they found it necessary to advocate the

general admissibility of ... [slaves and other classes who are not instructed in the nature of religious obligation] as witnesses in all cases, leaving their credit to be estimated by the Court or Jury according to the principle which is applicable to all other secondary evidence, with the exception of Slaves testifying in criminal charges against their masters and mistresses.¹⁹

But they further recommended that "no verdict or sentence should be effectual in law for the infliction of any capital punishment which had proceeded upon the evidence of persons not understanding the nature of an oath, unless their testimony is confirmed by other or circumstantial evidence".²⁰

Up until then, they found, the evidence of "Slaves, Hottentots, and persons of similar condition was and has been received by way of information, and not of proof, except where it was confirmed by other circumstances ... such evidence has been at all times open to objections".²¹ But they also stated that slaves and Khoi have been allowed to give evidence, after having been "admonished to speak the truth".

19. "Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 128-9

20. ibid, 129

21. ibid, 79

Testimony and Reputation

It would seem, however, that the acceptance of slave testimony depended more on the reputations of individual slaveowners than on any systematic adherence to legal principles. In the same way that reputations of slaveowners were of crucial importance in bringing cases to court in the first place (see Buijtendag case, for example, pp 47-50), the adherence to the legal principles prohibiting the acceptance of slave testimony was flouted when reputations of slaveowners did not meet with the approval of the community.

In 1773, for example, the Landdrost showed extreme reluctance to prosecute one Dirk Gysbert Verwey for a case involving the death of his slave, Laberlot.²² Verwey claimed that Laberlot had deserted and when he came back he locked himself in the mill. When the door was opened he was found dead on the floor and, so Verwey claimed, it appeared that he had died from a fall from a ladder which he tried to use to escape through a window. The Landdrost thus gave Verwey permission to have Laberlot buried without having been examined by a surgeon but only by two of his neighbours on the sole grounds that Verwey was someone who was known to treat his slaves well. The actions of the Landdrost in this case, in the light of his statements and actions in other cases, have to be labelled as dubious at best. He had allowed the slave to be buried without being examined solely because the

22. CJ 75, Landdrost of Stellenbosch to CJ in case of D.G. Verwey, 4 July 1793, 132ff

slaveowner had a reputation of treating his slaves well. Here he was at pains to resort to the legal principles which rejected the acceptance of slave testimony.

When compared with another case it becomes abundantly clear that it was not so much the Landdrost's respect for the law which governed his actions but rather an emphasis on the reputations of individual slaveholders. In another case involving the death of a slave in which the slaves had been instrumental in bringing the case to the attention of the authorities, Pieter Roux claimed that he was known to the Court of Justice as well as to his neighbours as someone who was used to treating his slaves "over eenkomstig de pligten van een rechtsgeaard Christen..."²³ The Landdrost, however, did not agree with Roux's assessment of his own reputation. He claimed that this was not the first time that Roux had made himself guilty of a crime of this nature.²⁴ Here the Landdrost had no difficulty in accepting the testimonies of Roux's slaves.²⁵ In another case involving the ill-treatment of a slave, the Landdrost, although accepting that he could not rule out the possibility that one Daniel Rossouw may have been lying,

23. CJ 78, Pieter Roux to CJ, 22 Sep. 1796, 192ff

24. ibid, Landdrost of Stellenbosch to CJ in case of Pieter Roux, 6 Oct. 1796, 205ff

25. But he insisted, however, that the declarations would not be sufficient to lay 'corporeele straffe' on Roux unless they were accompanied by his confession, since the slave had been dead for ten or twelve days when the body had been examined and it was not possible to determine whether the slave had died from the actual ill-treatment or the failure to get help in time. The point remains, however: he accepted the truth of the slaves' testimony and requested that the slaves be sold.
ibid

argued that his declaration was assisted by his "goeden naam en faam".²⁶ In 1794 H.L. Bletterman insisted on prosecuting Jan Anthonij Caldeyer for ill-treating his slave girl Candase van de Caab on the grounds that the accused was known as a person "die reeds herhaaldelyk over mishandeling zyner slaven heeft moeten worden gecorrigeerd".²⁷ Clearly, reputations of individual slaveowners were vital in determining the willingness of the courts to prosecute them. *

It is therefore not surprising that slaveowners were generally forced to assert their 'commendable' reputations where the treatment of their slaves was concerned. As it has already been suggested, to be known as an ill-treater of slaves in the community was to have a bad reputation. The attorney B. De Waal claimed that the insistence of the Landdrost on prosecuting Rudolph Cloete would have the effect of making his "goede naam en faam by het publicq aan verdenking van zig waarlijk aan eenige mishandeling te hebben schuldig gemaakt, bloot steld, het geen voor den suppli.. en zyne familie ten hoogste fletrisant is".²⁸

26. CJ 74, Landdrost of Stellenbosch to CJ in case of Daniel Rossouw, 5 July 1792, 193ff

27. CJ 76, Landdrost of Stellenbosch contra Jan Anthonij Caldeyer, 2 Jan. 1794, 5ff

28. CJ 76, Procureur B. De Waal for Rudolph Cloete to CJ, 8/9 May 1794 227ff

The Gentry and Reputation

Given the importance that reputation came to play in court proceedings, it is important to ask who in the community determined what constituted a good reputation where the treatment of slaves and servants was concerned. Chapter one (see pp 51-2) has already suggested that this was the prerogative of the gentry. It was also the gentry who were in the forefront of prosecuting masters who had grossly ill-treated their slaves.

In the early nineteenth century, Rayner has argued, the British had brought with them very distinct paternalist notions of relations between master and servant. The colonial administration clearly desired that

impartial justice, without difference or exception, should be dispensed to all classes...The law is the same to all, the rich or poor man, the powerful or defenceless, the master or the slave, the European, the colonist or the Hottentot, are all alike within its protection or punishment, and it never for a moment will be in contemplation, what is the rank or situation of the offender.²⁹

In carrying out this task, she argues further, they had the active support of the local gentry. Echoing Genovese, she notes that the "colonial elite saw the value of using the judicial system as a means of disciplining their own class, as well as an instrument of broader class control".³⁰ Cooperating with the British colonial state brought increased opportunities of

29. Statement in the Court of Appeal for Criminal Cases by Governor Sir John Cradock, 5 Oct 1812, cited in Rayner, "Wine and Slaves", 124

30. Rayner, "Wine and Slaves", 127

personal aggrandizement and was fundamental in the making of the "British-Dutch alliance". The "British-Dutch alliance" was a result of the incapacity of the British state to rule the colony without collaboration from the colonial elite and was a reflection of the domination which the colonial elite had gained over the central and local administration of the colony.

To be sure, these notions of equality in law differed markedly from the ones which guided the Dutch judicial system. In 1796 the Court of Justice argued that "the distinction of persons is one of the essential points by which the degree of punishment is measured in most civilized Nations".³¹ But using the law as a means of disciplining the wider society (that is, settlers as well as the servile population) was not an entirely new concept to the local Dutch gentry at the time of the British takeover of the Cape in the early nineteenth century. Collaboration of the gentry with the British in the early nineteenth century was in fact building on a long history of using the judicial system in order to prevent excesses against members of the servile population.

It would seem as if the Landdrost and Heemraden, in the eighteenth century already, regarded themselves as guardians of the public peace. They accorded themselves the role of guarding against the excesses of the colonists against their slaves and servants (and in the process determining the reputations of

31. Letter from the Cape Court of Justice to Major General Craig, 14 Jan 1796, in A. du Toit and H. Giliomee, Afrikaner Political Thought, 91-94, 91

individual slaveowners). In the previous chapter it has been suggested that the gentry determined the boundaries of the 'moral community'. In the case of one exceptionally unsociable burgher and one who was known for the ill-treatment of his servants, the Landdrost and Heemraden appealed to the Governor lamenting his "ongehoorsaame levens en handelwyse". In addition, they saw their role as guardians of the public peace. The ill-treatment of servants by the burghers, they argued, could only lead to "groot onheil voor 't algemeen welzijn".³² They did not stipulate what the "onheil" would be but it could perhaps be speculated that they were fearing increased government intervention in the slaveowners relations with their slaves and servants if excessive punishment continued unchecked. In addition, there was always the threat of a servile uprising. It is significant to note that this was a combined letter of Landdrost and Heemraden. *Jointly* they requested that an example be made of Buijtendag and that he be banished to Europe or the East Indies. By making examples of a few individuals who far transgressed the boundaries of decency the gentry were in fact facilitating the continued exclusion of the state in the day-to-day lives of masters, slaves and servants. For by doing so only cases of excessive ill-treatment of slaves and servants (normally cases involving death) came to the attention of the courts.

There are further indications that it was the gentry who were instrumental in bringing cases of excessive ill-treatment of

32. 1/STB 20/2, Landdrost and Heemraden to Joachim van Plettenberg, 6 May 1776

slaves and servants to the attention of the courts. It is perhaps not insignificant that Christiaan Ernst and Jan le Roux informed Josias de Kock, a Heemraad, and therefore almost certainly a member of the gentry, that Johannes Kuuhn was guilty of ill-treating his slaves.³³ In 1767 the 'bastard hottentot' Meij died at the hands of Hans Jurgen Kettenaar of the Hottentots Holland, in collaboration with Chritoffel Janssen van Bielefeld and Cornelis van der Toek.³⁴ This case came to the attention of the authorities via two Khoi, Joris and Arnoldus, who went not to the landdrost at Stellenbosch, nor directly to Cape Town, but to the ex-Heemraad, Daniel Malan -- not officially a person in authority, but almost certainly a member of the gentry. He in turn took the case to court. Furthermore, it was the Veldcornet Nicolaas van der Merwe, who was in the vanguard of bringing Buijtendag to justice. When Jacobus Mosterd and his wife of the Swartland stood trial for the killing of the slave woman Dina, the Landdrost concluded that an "ontmenschelyke mishandeling" had taken place. On these grounds the Landdrost argued:

waardoor het reedelyk gevoel, het instinct en de reeden van welgeaarde menschen en vooral van wetgeevers en regters beschouwd wordende als iets dat alleen door die hoognoodzaakelyke onderschouwing der daaraangestelde inrigting der maatscappij in deeze gewesten kunnende verschoonde en gewettigd worden.³⁵

33. 1/STB 3/11 Testimony of Josias de Kock, 15 May 1770

34. CJ 791, Sentence in case of Hans Jurgen Kettenaar, Christoffel Janssen van Bielefeld and Cornelis Jansz van der Toek, 3 December 1767, 419ff

35. CJ 483, Landdrost of Stellenbosch contra Jacobus Mosterd and his wife Francina Karstens, 2 April 1801, no2, 5ff

The importance which the Landdrost accorded to the 'welgeaarde menschen' in the district is of utmost significance. The comparison with the American South is instructive in this regard. There, Genovese had noted

The judicial system may become, then, not merely an expression of the willingness of the rulers to mediate with the ruled; it may become an instrument by which the advanced section of the ruling class imposes its viewpoint upon the class as a whole and the wider society. The law must discipline the ruling class and guide and educate the masses.³⁶

Furthermore, "the authorities and public opinion more readily came down hard upon overseers or small slaveholders than upon gentlemen of standing."³⁷ Thus, even though the Cape gentry formally had little control over the central organ of the law they were able to significantly influence the legal process. The Cape gentry, too, in the period under review, used the law to discipline wider society.

Therefore, for the law to become a means whereby the wider society could be disciplined it had to be more than a simple instrument in the hands of the masters. In one case in which a slaveowner was accused of beating his slave so that his arm was "in stukke", the Landdrost, H.L. Bletterman, claimed that "dergelyke buitenspoorigheeden niet ongemerkt kunnen worden gepasseerd maar inteegendeel ... behoren beteugeld te worden".³⁸

36. Genovese, Roll, Jordan, Roll, 27

37. ibid, 38-9

38. CJ 74, Landdrost of Stellenbosch contra Jan Radyn, 27 Sep 1792, 305ff

He also claimed that the 'brutality' of any slave did not give a slaveowner the right to cripple him. In another case the Landdrost stipulated that a slave should not be allowed to become the victim of differences between slaveowners.³⁹ But perhaps, most importantly, the slaves' position was also determined by the recognition on the part of the Landdrost of the inherent tensions in the master-slave relationship. For example, when the burgher Johan George Rigter sent his slave, Paul van Batavia to the Landdrost with a letter stating that he had hit him with a spade across the back, the Landdrost found that, although all "valsheid of wraakzugt" is to be expected in the slave, he also considered the fact that Rigter "aan de gewoone menschelyke zwakheeden onderheevig zynde".⁴⁰ The Landdrost also claimed that Rigter's testimony was not beyond reasonable doubt and that it would always be a bad example

en diametraal teegen recht en reeden aanlopen zoude, wanneer men op een simpel zeggen van een lyfheer, hoe zeer ook met eede gesterkte, en zelfs als waar en waarachtig verondersteld, een slaaf die tog nimmer ophoud een mensch te zyn, ter dood veroordeelen.

This statement, of course, has enormous implications. It not only recognized the humanity of the slave but also shows that the Landdrost, at least, was not prepared to become a direct instrument of the slaveowners in disciplining their labourers.

39. CJ 74, J.A. Truter for Landdrost of Stellenbosch to CJ in case of Moses, slave of Petrus Retief, 30 Aug. 1792, 284ff

40. CJ 74, J.A. Truter for Landdrost of Stellenbosch to CJ in case of Paul van Batavia, 16 Aug. 1792, 252ff

But, it should be remembered, this took place within the context of community, and therefore the reputations of individuals.

Prosecutions of masters, as much as access to court for the servile population, was determined by local community considerations. There two factors were of prime importance: the willingness of settlers to testify for or against their fellows and the reputations which individuals had in the burgher community. The willingness of colonists to testify against their fellows was determined by community considerations. The willingness of Landdrosts to prosecute was determined by reputations of individuals. It would appear as if considerations of reputation overrode ones of validity of slave evidence. In the eighteenth century already the gentry were the main ones who assigned reputations to individuals and who regarded themselves as guardians of the public peace. They were the ones who disciplined the wider society. The following chapter will further consider the treatment of slaveowners in the Court of Justice.

Chapter 4

The Community and the Court of Justice

The previous chapter has examined the processes involved in the prosecution of individuals and has argued that community considerations came to play a very significant role. This chapter will consider some of the consequences of prosecutions and will argue that community considerations ultimately influenced decisions taken by the Court of Justice.

In the eighteenth century the role of Landdrost and Heemraden in criminal prosecutions was largely restricted to that of preparatory examination. They, or perhaps more specifically the Landdrost, then decided which cases were worthy of prosecution before the Court of Justice in Cape Town. Unfortunately the archival records do not provide details of this process and much has to be left to speculation. It was the Court of Justice which finally decided on the sentence to be imposed on individuals which appeared there, while the Landdrost acted as prosecutor. Unfortunately also, the Court of Justice did not give the reasoning behind the arguments in sentences and there is seldom any indication of the path by which sentencing had been arrived at. Perhaps one way of arriving at this is by examining the regularity with which the Court and the Landdrost (prosecutor) agreed upon the punishment to be inflicted and it can then be

deduced whether the Court of Justice followed the reasoning of the prosecutor.

Because of important differences between Roman common law and statutory law as it affected the Cape, the question of which legal sources were being adhered to in the Court of Justice, like that of criminal procedure, is a crucial one. The vagueness and uncertainties of legal sources allowed much room for confusion. In the eighteenth century Cape there were officially three sources of law which could be called upon: the Dutch colonial regulations, (Statutes of India), the local proclamations issued at the Cape (placaaten) and the Roman common law. Initially there was much uncertainty as to the sources which should be employed at the Cape with the result that the Court of Justice directed a petition to the Governor in 1715, requesting clarity in this regard. Then the Statutes of India, together with Roman and Dutch laws, were recognised as the "fundamental laws of the Colony".¹ But it was also decided that the Statutes of India should be observed in judicial proceedings "where they should not be repugnant to the proclamations and resolutions of the local government".² Local statutory law therefore had superiority over the Batavian laws. The 1715 decision, however, did not settle the issue. One author on this subject concluded that "the law at the Cape was the Roman-Dutch law, supplemented by the Statute law of Holland, and by the Statutes of India and legislation passed by

1. Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 1

2. ibid

the Council of Policy at the Cape, but the whole basis of the law was, in fact, custom with the statute law being *ultra vires*".³ Visagie's reference here to the prominence of Roman-Dutch law over the local statutes is a reference to the fact that the charter (octrooi) which entitled the Company to establish the refreshment station at the Cape, did not grant it any legal power. The 1827 Commissioners too found that "recourse has been more frequently had in the definition and punishment of crime to the enactments of the Roman code than to those of the Provinces of Holland or even to the local statutes".⁴

Thus, the prosecutors in criminal cases before the Court of Justice most frequently called upon Roman-Dutch sources, although others were sometimes too invoked. This comes to the fore most clearly in cases where slaveowners faced charges involving the death of their slaves. In such cases, a question of crucial importance in determining the severity of the sentence, (after the admissibility of slave testimony had been debated and resolved) was whether or not the killing was one of premeditated action. Fiscal Denyssen in 1813 attempted to give clarity to the question when he stated that "when death is the consequence of extravagance of the master in punishing his slave without a premeditated intention to kill him, the master so offending is according to the Roman law not considered as a wilful murderer,

3. C.G. Visagie, "Die Regsbedeling aan die Kaap onder die VOC", Acta Juridica, 1963, 168

4. "Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 5

nor is he subject to the punishment prescribed for a wilful murderer..."⁵ The Statutes of India stipulated that in such cases slaveowners were to be "corporally or otherwise punished, according to the circumstances of the case".⁶ Hence, in accordance with Roman law, the Cape courts had a great deal of latitude in carrying out sentences in such cases.

It was recourse to this principle (that is, that premeditated intention had to be proven before capital punishment could be inflicted) which theoretically saved slaveholders from capital punishment for the killing of their slaves and servants. Although the Landdrost argued that the punishment which Hendrik Greeff (see p 88) inflicted upon his slave Jacob, which resulted in the latter's death, had been far exceeded ["verre is te buiten gegaan"], he nevertheless argued that it could not be proven that Greeff "met kwaad opset is te werk gegaan".⁷ Even more fascinating, though, was the the Landdrost's reasoning that it would be highly unlikely that someone would wantonly damage his own property.⁸ These two principles -- that premeditated murder was a necessary requirement for the infliction of capital punishment, and that slaveowners would not wantonly damage their

5. "Statement of the Laws of the Colony of the Cape of Good Hope regarding Slavery", 16 March 1813, RCC, IX, 151

6. ibid

7. CJ 393, Eisch en Conclusie of Landdrost of Stellenbosch contra Hendrik Greeff, Nov. 1767, 108ff

8. "...niemand kan geoordeeld worden, zyne ijgen belangen soo wynig te behartigen, dat zig willens en wetens zyn ijgen goed op zoo eene wyze zoude willen kwytmaken."

own property -- were thus mutually reinforcing. On these grounds, no slaveowner could be capitally punished for killing his own slave, and the charge would of necessity have to be one of excessive ill-treatment, ["verregaande mishandeling"], as indeed was the charge in Greeff's case. In this case the Landdrost further claimed that the surgeon did not find the wounds to be "absolut lethaal" and that the death of Jacob should be attributed to the lack of medical care rather than the actual blows against the head which he received. The latter argument was certainly of limited validity since, another Landdrost, in another case, citing Roman-Dutch law sources, noted that only in instances where the victim survived six weeks after the infliction of the wounds could it be said that the wounds were not fatal.⁹ Jacob died the day after Greeff had beaten him.

It would appear as if at least some slaveowners were aware of the premium which the Court of Justice placed upon the principle of premeditation. For example, David Naude claimed that when he had beaten his slave Dam he only intended to 'correct' him since he had bought him for Rxds 750 and "immers niet moedwillig om't leeven zou brengen".¹⁰ It was the question of premeditation which also saved Naude from capital punishment. Although the Landdrost described the punishment of Dam as "ontmensche handelwijse" and noted that he had beaten his slave in a completely "overmatige en

9. CJ 494, Eisch en Conclusie of Landdrost of Stellenbosch contra Jacobus Adriaan Vorster, Oct. 1802, 171ff

10. CJ 426, Landdrost of Stellenbosch contra David Naude, 28 June 1787, unpaginated.

allersints ongepermitteerde wijze", he also recognised that Naude could not receive the 'ordinary' punishment since premeditation had not been proven. On these grounds also he requested that Naude be banished and that his slaves be sold to his advantage. Thus, although slaveowners were spared capital punishment by the dictates of Roman law, it is nevertheless clear that the premium which was placed on the necessity of premeditated thought was not simply a self-serving device of the slaveowning class. What was striking about the administration of justice at the Cape was the extensive nature of legal thought.¹¹ Legal sources were extensively proffered in support of arguments.

For in 1777 Daniel Pienar faced charges for killing fellow burgher Christiaan Horn on his farm in the Koue Bokkeveld.¹² Here too the Landdrost insisted that it had to be shown that the killing was one of premeditated action even though he recognised that the law was based on the premise that "doodslag met he leevens of bloed word gestraft". Because this could not be proven Pienar had to be found guilty of "gewelddadige en verregaande treffing".

In both these cases the Landdrost arrived at the same conclusion and via the same legal channels (Roman-Dutch law), despite the difference in legal status of the victims and offenders. It would suggest that the sentence requested by the Landdrost, as far as

11. Ross, "Rule of law", 5

12. CJ 411 (I), Eisch en Conclusie of Landdrost of Stellenbosch in case of Daniel Pienar, 27 Feb. 1777, 314ff

capital punishment was concerned, was less motivated by the legal status of the persons than by the dictates of Roman law. Roman law was applied to slave and colonist alike. In both cases the Landdrost requested that the offenders be banished from the colony for life (although he requested that Pienar be flogged as well).

The recourse to the dictates of Roman law should therefore not be seen as a simple mechanism whereby slaveowners could escape capital punishment for the killing of their slaves. This procedure was applied to slaves as well. It was Roman law also which saved some slaves from capital punishment. Even in cases where slaves were the offenders, the Landdrost, contrary to the local laws, considered the question of premeditation. An article in the local slave code of 1754 stipulated that: "Dog by aldien een slaaf ofte slavinne haar zo verre komt te vergrypen dat haare handen aan hunne lyfheeren en vrouwen komen te slaan, schoon ook zonder geweer, zullen de sodanig zonder genade met de dood werden gestraft".¹³ In prosecuting Adam van die Kaap for the murder of his master, Jacob Minnaar, the Landdrost argued that Adam could be spared the ordinary death sentence because there was sufficient evidence that he had not planned to kill his master.¹⁴ No matter how much the local laws applied to Adam, he argued, the court had to consider the rage ['drift'] which had grabbed him at the time that he fatally stabbed his master who was punishing him

13. Jeffreys, Kaapse Plakkaatboek, III, 2

14. CJ 498, Landdrost of Stellenbosch contra Adam van die Kaap, 21 Feb 1805, 335ff

for having deserted. On these grounds the Landdrost requested that the ordinary death sentence in such cases be laid aside and that the alternative of hanging be inflicted.

In this case, thus, Roman law was granted superiority over the local laws of slavery. The Landdrost noted, however, that in a case where the slave killed his master it was patently clear that the slave could not escape death. This was of course not the case in situations where masters were guilty of killing their slaves. The Court of Justice agreed with the Landdrost's assessment, since the sentence which he requested was imposed.¹⁵ In another case, too, of a slave who had lifted his hands at his master (but had not killed him), the Landdrost requested that the death sentence be cast aside due to the age of the slave (approximately 60). Instead he requested that a noose be placed around his neck, that he be flogged, branded and to work in chains on Robben Island for life.¹⁶

Also, in 1804 the slave Jacob stood trial for assaulting Gysbertus Johannes van Winterhoven, a knecht on a farm in the Hottentots Holland.¹⁷ A fight had ensued after Jacob refused to go back to work after lunch one day by telling Van Winterhoven: "Ik wil vandag niet werken." In the process Jacob had stabbed the

15. CJ 498, Sentence in case of Landdrost of Stellenbosch contra Adam van die Kaap, 21 Feb. 1805, 327ff

16. CJ 427, Landdrost of Stellenbosch contra Baatjoe van Sambawa, 15 Nov. 1787, 469ff

17. CJ 498, Eisch en Conclusie of Landdrost of Stellenbosch contra Jacob van Bougies, 24 Jan 1804, 173ff

knegt with a "cris". In prosecuting Jacob the Landdrost noted that the "algemeen gevoelen van grootste en notabelste gedeelte van deezen geheel is van die by de [Roomse] wetten gemaakte bepaling en dat die Rechtsdoctoren als iets ontwyffelbaars stellen dat 't opzit om iemand te dooden indient't zelve geen effect gehad heeft niet genoeg is om de daader met de dood te kunnen straffen ... " On these grounds he requested that Jacob be exempt from capital punishment.

These cases also show that the courts did not resort to capital punishment in all cases where the lives and property of the colonists were threatened -- even in cases where this came into conflict with the local laws. What tempered the infliction of the death sentence was the adoption of the Roman principles that capital punishment should be considered seriously and that it is better to give account of "te groote sagtmoedigheid, als te verregaande strengheijd".¹⁸

These cases, then, suggest that the prosecutors in legal cases were more inclined to follow the guiding principles of Roman-Dutch law ['custom'], even when it came into conflict with the local statutes. This saved some slaves from capital punishment (and in some cases less brutal forms of capital punishment), in the same way as many slaveowners were saved from capital punishment by the principles of Roman law.

18. CJ 410, Landdrost of Stellenbosch contra July van Bougis, 20 July 1776, no 49, 257ff.

Life-time banishment from the colony was perceived to be an extreme sentence for those colonists who were found guilty of killing their slaves. This sentence also represents "the limit beyond which the Court of Justice would not go in disciplining the more unruly members of the white population".¹⁹ But it would appear as if community considerations pervaded even the severity of sentences inflicted by the Court of Justice. The 1827 Commissioners found that banishment seemed to be

peculiarly applicable to those who may have contributed by the notoriety or the nature of their offenses to awaken the animosity or hatred of the members of a small community, and to whom the presence of an obnoxious individual even in a state of confinement or condemned to a pecuniary penalty serves only to furnish fresh causes of irritation and perhaps of vengeance.²⁰

The law was clearly not as simple an expression of community-will as the Commissioners would have had it. It was rather an expression of community-will as defined by the local gentry. Since Roman law ruled out capital punishment for slaveholders guilty of killing their own slaves (premeditation was vital for the imposition of capital punishment and it was argued that slaveowners would not wilfully harm their own property), banishment was the alternative for those who had particularly ill reputations.

In chapter two it has been shown that it was often the gentry who had determined access to the local courts for slaves and

19. Ross, "Rule of Law", 8

20. "Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 101

servants. In addition, the linkages between reputation and sentence were clear. Indeed, in requesting that Daniel Pienar be banished from the colony for killing Christiaan Horn, the Landdrost did not fail to note that Pienar, since his arrival in the Colony, lived a "slegte en onbandige levenswijse".²¹ Two other Stellenbosch burghers, Carel Buijtendag and Johannes Kuhn, (see pp 47-50; 79; 98; 72; 78; 99) were also banished under circumstances of notoriety. Hendrik Greeff's (see pp 88; 106-107) reputation was not called into question when the Landdrost requested that he be banished. It is perhaps not insignificant, then, that the Court of Justice handed him a lesser sentence, namely, a fine of Rxds 500.²² The Landdrost's requests of banishments for those of ill-fame, together with the sentences imposed by the Court of Justice is indicative of the control which the local legal organs had come to have over the central judicial system. The local gentry, then, in the course of the eighteenth century, had succeeded in acquiring not only firm control over the local, but over the central organs of justice as well. The judicial system had thus become not so much an organ of power of the VOC as of the local gentry in disciplining unruly individuals in their locality.

In 1822 the entire colony was rocked by the execution of William Gebhard for the murder of his father's slave, Joris, on the

21. CJ 411, Eisch en Conclusie of Landdrost of Stellenbosch contra Daniel Pienar, 27 Feb. 1777, 314ff

22. CJ 50, Landdrost of Stellenbosch contra Hendrik Greeff, 17 Dec 1767, no 14

estate Simon's Valley in the district of Stellenbosch.²³ In the light of the preceding cases, it is not surprising that the 1827 Commissioners found the execution "remarkable for the punishment of a person of such rank for such an offence as for the evidence by which the charge was sustained".²⁴ In fact, the sentence has to be described as arbitrary in the light of the principles which had guided the Court of Justice until then, not so much because the evidence against Gebhard was brought by slaves, although the prosecutor, Deputy Fiscal J.J. Lind noted that "it will be attempted to reject their depositions on that account"²⁵: rather, the prosecution had not proven that Gebhard had had premeditated intention. On the contrary, it did not even address the question. Indeed, the prosecutor stated that should the truth of the evidence brought against Gebhard be established he would be judged guilty of "cruel ill-treatment".

The prosecutor's request of the death sentence was thus completely contrary to the legal principles observed until then. For the Court of Justice had regularly observed the principle, as the preceding discussion has shown, that a slaveowner could not be found to be "wilful murderer" where there had been no premeditated intention to kill him. The defence advocate clearly reminded the court that it had to prove that the prisoner had

23. Landdrost of Stellenbosch and Drakenstein, D.J. van Ryneveld, versus Wm. Gebhard, RCC, XXXIII, 281-325

24. "Report of Commissioners of Enquiry upon Criminal Law", RCC, XXXIII, 8

25. ibid, 318

been guilty of homicidium dolorum [premeditated intention], "on which alone the punishment demanded by the Prosecutor, can be inflicted ... howsoever he [Gebhard] had acted".²⁶ Even by the English laws, he noted, "an excess in the punishment is neither considered or punished as murder".²⁷ Despite this very convincing argument of the defence attorney, and indeed supported by sufficient legal sources -- convincing since it was precisely the kind of argument which had saved other slaveholders in similar circumstances -- the Court ruled that Gebhard had been "the wilful author of the ill-treatment committed on the Slave Joris ... of which the death was the unavoidable consequence -- doth pronounce the Prisoner guilty of the Crime of Wilful Murder; ... and doth condemn him ... to be punished with a halter round his neck, at the gallows, until he is dead..."²⁸

Mary Rayner, in discussing the new form which authority took in the colony in the nineteenth century, has provided a very convincing explanation of the 'arbitrary' nature of this sentence. Gebhard's execution, she argues, "had come to serve a useful propaganda purpose, expressing a tacit understanding which had been reached between the elite of slaveowners and local officials at the Cape and the colonial government..."²⁹ This explanation is also consistent with the powers of patronage which

26. ibid, 320

27. ibid, 321

28. ibid, 325

29. Rayner, "Wine and Slaves", 79

the local gentry had assumed since the eighteenth and expanded in the nineteenth centuries (see esp pp 18ff). However, the local gentry was not assuming a wholly new role in the nineteenth century. In the eighteenth century already, it has been shown, they had come to exercise considerable influence over the administration of justice in the colony, and had come to play the role of disciplinarians.

The fact that reputations of individuals affected the sentences that they received shows how community considerations influenced the operation of the law at the central level. Although it was the Court of Justice which passed sentences on masters, it would appear as if the Landdrost, as a member of the settler community, ultimately determined the fate of individual slaveholders in his vigilance or non-vigilance in prosecuting. In 1793, for example, the Landdrost of Stellenbosch, H.L. Bletterman, failed to institute proceedings (on the basis of his assessment of reputation) against Dirk Gysbert Verwey (see p 93) who was suspected of killing his slave, Laberlot.³⁰ Verwey claimed that Laberlot had died as a result of a fall from a ladder while trying to escape through the window of the mill in which he had been confined for having deserted. This case would probably not have gone any further than this had three of Verwey's slaves not gone to Cape Town and told the Fiscal that Laberlot had suffered "slaan, stooten en schoppen" by Verwey and that he had died as a result of this punishment. The body was exhumed and the surgeon

30. CJ 75, Landdrost of Stellenbosch to CJ in case of D.G. Verwey, 4 July 1793, 132ff

found signs of severe ill-treatment. The Landdrost concluded, however, that there were no indications that the wounds had been inflicted by Verwey and that they must have been inflicted as a result of Laberlot's resistance when he had been taken captive. He concluded that the complaints brought in by Verwey's slaves necessarily had to be false and he therefore requested that the slaves be punished in the prison and returned to their master.

This case is instructive not only in showing the assistance which some slaveowners had from the Landdrost (where their reputations were not tainted) and their neighbours but also of the relative powerlessness of the Court of Justice. The Court agreed with the Landdrost's assessment that the testimonies of the slaves were not sufficient to institute proceedings against Verwey. It maintained, however, that it could not be concluded that the testimonies were completely untrue. Yet, the Court was not absolutely powerless -- it ordered that the slaves be returned to their master with a serious recommendation that they should not be ill-treated. It did not accede to the Landdrost's request that the case be closed and instead ordered him to conduct a more thorough investigation. Eventually the Court concluded that the slaves' testimonies had to be rejected. Verwey, however, was ordered not to punish his slaves in the least for bringing the complaint against him; on the contrary he was told to treat them "op eene betamelyke wyze" in future.

It would appear, then, as if the Court of Justice was genuinely at pains to establish the truth of the events in instances

involving deaths of slaves. In this case the court resisted attempts by the Landdrost to have the case dismissed. But what is equally clear in this case is the relative helplessness of the Court in such instances. It was completely at the mercy of the evidence brought forward by the Landdrost who acted as prosecutor, and had the slaves not gone to the Fiscal in Cape Town to report the incident, the case would never have gone that far. The fact that the Court explicitly ordered that Verwey's slaves should not be flogged would suggest that it suspected that some truth lay in their testimonies. In the end, however, the Court was dependent on evidence brought forward by the Landdrost. 'Justice' for the slaves (as much as access to the courts), then, ultimately came to depend on the position of their masters in the burgher community. And this case shows that the Landdrost was very much a part of that community. *He* was the one who assessed the reputation of Verwey. It would appear, then, that the Court of Justice simply ratified decisions which had been reached in the lower courts.

In some instances the Landdrost was desirous of prosecuting slaveowners despite the reluctance of the Court of Justice to do so. For example, when David Naude stood charged before the Court for killing his slave Dam the members of the Court of Justice requested that the charges against him be dropped.³¹ But the Landdrost insisted that the punishment that the slave had

31. CJ 426, Landdrost of Stellenbosch contra David Naude, 28 June 1787, unpaginated

received had been the sole cause of his death and that Naude deserved the "ordinaire straffe der doodslagers".

Slaveowners, then, in cases involving the death of slaves and servants could expect either to pay a fine or, when their reputations were called into question, to be banished from the colony. In the eighteenth century slaveowners who were found guilty of ill-treating their slaves in cases not involving death, could usually expect small fines, if any at all. For example, in 1792 Jan Radyn was fined Rds 25 for beating the slave Willem with a spade so that his arm was "in stukken".³² Jacobus Du Plessis was also fined Rds 25 with costs for ill-treating the 'Bastard Hottentot' Goliath.³³

The protection which Landdrosts gave to particular slaveowners was not a simple case of collaboration of settlers. For (as the first chapter has demonstrated) the burgher community was not a monolithic entity. The criminal justice system ultimately became a tool with which the upper echolons of the burgher community could bestow patronage upon others. This came clearly to the fore in the course of the nineteenth century when the offices of Landdrost and Heemraden had gained significantly greater autonomy from the Court of Justice. By a proclamation of July 1817 the powers of the Landdrost's court were significantly extended. In 1818, for example, Hermanus van Brakel was tried before the local

32. CJ 74, Landdrost of Stellenbosch contra Jan Radyn, 27 Sep. 1792, 305ff

33. *ibid*, Landdrost of Stellenbosch contra Jacobus Du Plessis, 8 Nov. 1792, 366ff

board of Landdrost and Heemraden in Stellenbosch for ill-treating his father's slave Klaas van die Kaap -- a case which would normally have fallen under the jurisdiction of the Court of Justice.³⁴ Klaas complained that Van Brakel had beaten him over the head with the back end of an axe. Although the court found that Klaas had not shown Van Brakel the necessary "ondergeschiktheid ... al men van een slaaf moet verwagten", and that he was generally well-treated by his master, it was of the opinion that he had been beaten with an "onbehoorlike instrument". The secretary asked for a fine of Rxds 25 and costs, upon which Van Brakel claimed: "Ik heb niets tegen den eisch, maar wij zijn arme menschen." The Landdrost and Heemraden reduced the fine to Rxds 12 and costs. Clearly, Van Brakel's claim to poverty was an appeal to the patronage of the gentry. In 1820 the prosecutor of Stellenbosch requested that a fine of Rxds 100 be laid upon Albertus Laubscher for the ill-treatment of his slave Tubord van Mozambique.³⁵ Tubord had suffered such a severe punishment at the hands of his master that his left arm had been broken. In this instance, too, the Landdrosts and Heemraden reduced the fine -- to Rxds 25 with costs to the benefit of the "armen casse van de Swartlandsche kerk". The gentry in this case were dispensing a double patronage: to Laubscher as well as to the poor of the Swartland.

34. 1/STB 2/1, The Secretary of Stellenbosch P.C. van Blommestein contra Hermanus van Brakel, 27 Aug 1818, no5, 25ff

35. 1/STB 2/2, The Secretary of Stellenbosch P.C. van Blommestein contra Albertus Laubscher, 30 March 1820, unpaginated

It was not only that slaveowners could expect smaller fines now that members of their community had greater control over the legal process -- rather, they were now increasingly drawn into the paternalistic web of the local gentry. In addition to credit (see pp 18ff) the legal system had become another weapon in the gentry's arsenal. In this respect the British were on a contradictory course. At the same time that they were instituting greater state intervention in the master-slave/servant relationship, they were in fact facilitating means by which slaveowners could stave off that intervention. It is perhaps this contradiction which ultimately saw the destruction of the local boards.

The treatment of settlers who had made themselves guilty of excessive brutality towards their Khoi servants illustrates the extent to which the legal system had become an instrument of broader class control. The Company had since the seventeenth century drawn a distinction between the slaves and the Khoi. The Khoi were never to be enslaved. The distinction is perhaps most clearly revealed when the 'justice' which the Khoi received in the Court of Justice is examined. In 1767 sixty-seven year old Hans Jurgen Kettenaar of the Hottentots Holland was sentenced to death for killing the 'bastard Hottentot' Meij.³⁶ Kettenaar's accomplices, Christoffel Janssen van Bieleveld and Cornelis Jansz

36. CJ 791, Sentence in case of Hans Jurgen Kettenaar, Christoffel Janssen van Bieleveld and Cornelis Jansz van der Toek, 3 Dec 1767, no 38, 419ff

van der Toek, were both sentenced to be whipped and banished.³⁷ The death sentence on Kettenaar too has to be regarded as arbitrary in the light of the principles which have guided the Court of Justice. Here the Landdrost explicitly argued that the question of premeditation was irrelevant.³⁸ Although it was not unlikely that Kettenaar had no intention of killing Meij, the Landdrost argued, the fact remained that Meij had died as a result of his actions and that he should answer for his "kwade handelswyze". In requesting that Kettenaar be capitally punished the Landdrost drew not so much on Roman law texts but on the Old Testament. He cited Exodus 21, 12: "Wie iemand slaat dat hy sterve, die zal zekerlyk gedood worden."

There was little difference in the atrocities committed against Meij and those of slaveowners who had been banished for killing their slaves. The sentence requested by the Landdrost was thus certainly out of character. It deviated from principles which had guided the Court in cases where slaves, as well as colonists, were the victims of extreme brutality. Thus, the fact that the violence was directed at someone who had been legally free, would

37. According to J. Hoge Kettenaar was banished from the colony along with his accomplices. It would appear, however, as if Hoge had misread the archival sources for the sources he himself cites indicate that Kettenaar was executed on 5 Dec. 1767. J. Hoge, "Personalia of the Germans at the Cape, 1652-1806" in C. Beyers et al (eds), Archives Year Book for South African History, Cape Town, Cape Times, 1946, vol 9, 199; CJ 791, Sentence in case of Hans Jurgen Kettenaar, Christoffel Janssen van Bieleveld and Cornelis Jansz van der Toek, 3 Dec. 1767, no 38, 419ff

38. CJ 392, Eisch en Conclusie of Landdrost of Stellenbosch in case of Hans Jurgen Kettenaar, Christoffel Janssen van Bieleveld and Cornelis Jansz van der Toek, 3 Dec 1767, 548ff

appear to be the sole cause for the heavy sentence requested by the Landdrost. Clearly, Kettenaar's sentence was an attempt to put into practice the Company's official policy regarding treatment of legally free people: that they were never to be reduced to the position of slaves. For in sentencing colonists who had been guilty of killing their slaves, the courts gave some consideration to the fact that slaves remained chattel. For this reason they could maintain that owners would not deliberately kill their slaves. Furthermore Kettenaar was an ideal candidate for the lesson to be taught: he was not a member of the local gentry. His 1767 tax-return shows him as being not only unmarried but also propertyless.³⁹

The fact that the Court of Justice in this case, as well as others, handed down the sentence requested by the Landdrost once again shows how the local authorities had a considerable degree of influence over the the central judicial system. Not only did they largely determine who would appear before the Court of Justice, but they also appeared to have considerable influence over the eventual outcome.

Another colonist, Jan Otto Diederiks of the Bokkeveld, was sentenced to twenty-five years on Robben Island for brutally ill-treating ["excessen in het mishandelen"] the Khoi servants living on his farm, withholding and slaughtering the cattle which they had earned, and "brutaliteyten in een vrye Craal dier natie

39. J 203, opgaaf of Hans Jurgen Kettenaar, 1767, folio 8

gepleegd".⁴⁰ Diederiks had not only laid claim to the livestock of the Khoi, but to their persons as well.⁴¹ One of his servants was chained, beaten, kicked and had his fingernails removed with pliers. The Khoi servant, Klynveld, died as a result of this punishment. Nigel Penn has correctly pointed out that this heavy sentence would suggest that the treatment which Diederiks handed out to his servants went beyond the realm of acceptable treatment of Khoi servants.⁴² But it is also likely that he received this sentence -- in line with Kettenaar's sentence -- because he had been guilty of killing a Khoi.

This process was not uniform, however. For example, in 1793 Matthias Lotter was given the trifling sentence of fourteen days confinement on bread and water and fined the sum of Rxds 25 for killing his Khoi servant Cupido.⁴³ He claimed that Cupido had broken into his wine cellar to steal some wine and that he had beaten him over the buttocks while two of his slaves had held Cupido down. Cupido died four days after having received the punishment. This sentence was despite the Landdrost's opinion that the illtreatment to which Cupido had been exposed had been

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40. CJ 47, Landdrost of Stellenbosch contra Jan Otto Diederiks, 11 April 1765, 36ff
41. N. Penn, "Labour, land and livestock in the Western Cape during the eighteenth century: The Khoisan and the colonists", in W.G. James and M. Simons (eds), The Angry Divide: Social and Economic history of the Western Cape, Cape Town and Johannesburg, David Philip, 1989, 13
42. ibid
43. CJ 74 Landdrost of Stellenbosch to CJ in case of Matthias Lotter, 22 Nov 1792, 371ff; CJ 75 Landdrost of Stellenbosch contra Mattias Lotter, 14 Feb. 1793, 53ff

the cause of his death and that "dezelve mishandeling gepleegd zynde tegens eenen uit natuur vrygebooren mensch, dezelve dan ook rigoureuse behoord te worden gestraft".

Thus, despite the similarity in the daily circumstances of slaves and Khoi servants, the Court of Justice undoubtedly acted more harshly against those guilty of excessive barbarity towards the Khoi. This was despite the limits placed on respect for property, that is, slaves. In another case the Landdrost noted that while it was true that a person could do with his money [and therefore his slaves] what he wanted to, punishment should be limited to domestic correction and should never go over to torture.⁴⁴

Clearly, the Landdrost was incorrect in claiming that slaveowners could do treat their slaves as they pleased since the courts did prosecute some slaveowners for ill-treating their slaves. The greater harshness for brutality towards Khoi was one way in which the authorities could attempt to compel the colonists into accepting its directives that the Khoi were not to be enslaved. Excessive ill-treatment of Khoi servants, more so than of slaves, was stepping out of the bounds of the moral community (as defined by the most notable settlers) of settler society. However, the sentences were to be lessons to colonists, and the exposure which the servile population would get to this was to be minimised.

Hence, in passing the death sentence on Kettenaar, the Court of Justice deviated significantly from sentences which were passed

44. CJ 399, Eisch en Conclusie of Landdrost of Stellenbosch contra Johannes Kuuhn, 21 April 1770, 661ff

on members of the servile population: Kettenaar's death was not to be accompanied by the mass spectacle. He was to be buried immediately. This was no small omission for the bodies of executed slaves and Khoi were routinely left exposed (and in some cases mutilated) after execution. The 'spectacle of suffering' was of particular significance: a visible display of the power of the state.⁴⁵

So significant was the 'spectacle of suffering' that, as late as 1821, the court of Landdrost and Heemraden in Stellenbosch offered a reward of Rxds 100 to the person who could assist in the apprehension of the person/s who had removed the exposed head of executed slave April from a pole placed along the Papegaaysberg.⁴⁶ It was important, in "belang voor de justitie" that the 'boosdoeners' be found, the court noted. Chief suspect was April's father who had allegedly said: "Dat he een zodanig hartzeer gevoelde over het staan van die kop van zyn kind op de Papegaaysberg...". This comment is not only suggestive of the effect which such displays must have had on the slaves, but also

45. P. Spierenburg, The Spectacle of Suffering: Executions and the evolution of repression: from a preindustrial metropolis to the European experience, Cambridge, Cambridge University Press, 1984. Spierenburg's study is essentially a critique of Foucault's characterisation of the evolution of punishment as a sudden transformation -- the 'birth of the prison' -- and he argues that the transformation of repression was a gradual change -- as a result of change in sensibilities -- from the middle of the eighteenth century to the close of the nineteenth. "Modes of repression", he argues, "belong to the history of mentalities.", *ibid*, 200; M. Foucault, Discipline and Punish: The Birth of the Prison, London, Penguin, 1977

46. 1/STB 2/7, Minutes of Meeting of Landdrost and Heemraden, 30 Nov. 1821

of the semblance of family-life attained by them. Thus, well into the time of the British takeover of the Cape, a very high premium was placed on the visible display of power. Whether this was a reflection of the independence of the local authorities is unclear, however. Nevertheless, it is clear that the 'spectacle of suffering' occupied an important place in the opinion of local authorities in attempts to discipline the servile population. It lends support to the view that the "representatives of the state saw the system of public executions as the pearl in the crown of repression".⁴⁷

On the whole, however, slaveholders came off extremely lightly for excessive brutality toward their slaves and servants. Some of this has to be attributed to the intervention of legal counsel; in other instances, however, it has to be attributed to the reluctance of Landdrosts to prosecute. Moreover, it has been suggested, the Court of Justice did little more than ratify decisions which were taken at the local level. For example, in 1794 Hendrik Beukes informed the Landdrost that his slave Sabina had died shortly after he had punished her for the theft of a sheep.⁴⁸ He claimed that he had beaten her with a 'klyne sweep' and that only six or eight stripes could be seen on her body and buttocks. The Landdrost, because he found the death of the slave so shortly after she had received a punishment as 'zeer suspect', collected testimonies from the persons who had examined the body.

47. Spierenburg, Spectacle, 77

48. CJ 76, Landdrost of Stellenbosch to CJ in case of Hendrik Beukes, 13 March 1794, 120ff

According to these witnesses only a few marks could be seen on the body, while Hanna, a Khoi servant in the employ of Beukes, declared that Sabina had always told her that she would take poison if punished, and that Sabina had done her normal work in the house until the time that she died. On these grounds the Landdrost found that no charges could be initiated against Beukes. The Court of Justice concurred. This case again highlights the significant role of witnesses in criminal procedure.

It would appear, then, as if the local authorities had considerable influence over the central organ of the law in determining the outcome of cases involving slaves and servants. This is evident from the consistency in sentences requested by the Landdrost and those eventually handed down by the Court of Justice (although these were not always identical). It is also evident from the fact that sentences in the Court of Justice -- as much as appearance in court in the first place -- seem to have been influenced by the reputations of individuals. The factors affecting the exercise of justice in the 'community', then, were translated to the central authorities in Cape Town.

In the course of the nineteenth century local control over justice went even further when these authorities were given even greater jurisdiction. In the nineteenth century, as local authorities gained more autonomy, influence of the gentry could be extended to patronage. The reductions of fines imposed on slaveowners by the local court served as acts of patronage dispensed by the gentry. The control which local authorities had

was clearly not just a matter of slaveowners protecting their own. In the eighteenth century, already, the discipline which the local gentry were attempting to exercise over settlers could be extended to the central government. This is clear when the sentences imposed for excessive brutality towards Khoi servants are examined. The discipline could be exercised more effectively in cases involving Khoi, for here the property rights of slaveowners were not called into question.

The slaveowners faced particularly severe punishment in cases where they had acquired particularly ill-reputations. In such cases, banishment would be the norm. Where there reputations were not in question they could expect small fines or complete acquittal. It is in this that the explanations for the banishment of characters such as Buijtendag and Kuuhn have to be sought. And this perhaps explains the eventual dismissal of the case against Vorster for the killing of Kaatjie Klein (see pp 84-7). Vorster had a number of influential witnesses who could attest to his character and the Landdrost regarded his time in detention during the trial as sufficient punishment.⁴⁹

In the Court of Justice it was Roman law which was most commonly turned to in cases involving slaves. The dictates of Roman law ensured that many slaveowners escaped capital punishment. Where the law became an instrument of broader class control, Roman law was evaded. The following chapter will explore more implications

49. CJ 494, Eisch en Conclusie of Landdrost of Stellenbosch contra Jacobus Adriaan Vorster, Oct. 1802, 171ff

of the fact that it was Roman law, as opposed to statutory law,
which was most commonly turned to in the Cape law courts.

Chapter 5

The Hegemonic Function of the Law¹

A recent guideline to the writing of South African legal history² has cautioned that "no comprehension of law can be achieved as long as it was conceived of as superstructural".³ In Chanock's terms, too much of the writing on law in South Africa has seen law functioning hegemonically, in a country where little attention had been paid to legitimising power and securing consent by legalism of the African population. The question of whether the law in an overtly repressive society (such as a slave society) could have been sufficiently 'just' to function hegemonically is analogous to exploring the nature of the law in the twentieth century apartheid state (equally obviously repressive). Even in twentieth century South Africa, however, with its political economy of 'racial capitalism', and where only certain sections of the population could be penalised for the violation of certain 'crimes' (such as pass-laws), it was possible for the apartheid state to accord the law some

1. The influence of the chapter by the same name by E.D. Genovese is clear; Genovese, Roll, Jordan, Roll, 25-49

2. I would prefer to call this work a social history of the law.

3. M. Chanock, "Writing South African legal history: A Prospectus", JAH, 30, 1989, 266

legitimacy.⁴ The law in twentieth century South Africa had some of the attributes of hegemony, Suttner has argued, because it abstracted 'crimes' from their social context. The question of whether or not the law functioned hegemonically, immediately draws attention to the interrelations between law and the state.

Historians of the eighteenth century have tended to see the law, because of its violently repressive nature, as maintaining the status quo through violence alone. Hence, Guelke writes that there

was no concept more remote from the thinking of the VOC than the idea that the exercise of power rested on the consent of the governed ... A first principle of VOC government was the maintenance of law and order, using whatever psychological or physical measures that might be needed ... Its rule rested on awe and terror. Where awe ceased to be effective, terror took over. The penalties for those who broke the law were extremely harsh, and punishments were administered in public to serve as an example to all.⁵

The failure to link the 'hegemonic' with the 'instrumental' (that is, the idea that the law was only a brutal instrument of the ruling class) elements of the law stems from, firstly, a failure to see the VOC as the embodiment of the colonial state, and secondly, a failure to appreciate the role of Roman law (that is, the fact that it was Roman law, as opposed to statutory law, which was most commonly used in cases where slaves, servants and settlers came to court) in the Cape social structure. Guelke's

4. R. Suttner, "The judiciary: its ideological role in South Africa", International Journal of the Sociology of Law, 14, 1, 1986.

5. L. Guelke, "The Making" 427

analysis is devoid of 'law-in-action' studies. The rest of this chapter will consider these issues.

The VOC, that "archetypal phenomenon of the mercantilist age",⁶ performed all the functions with which the modern state -- "the historically conditioned set of institutions in any class society which, more or less adequately secures the social conditions for the reproduction of the dominant mode of production"⁷ -- is associated. This definition of the state clearly directs attention to the relationship between production, the state and the law. The Company was empowered by the States General to "conclude treaties of peace alliance, to wage defensive war, and to build 'fortresses and strongholds'". Indeed, as Boxer notes, the Company "was virtually a state within a state".⁸

Foremost on the agenda of the VOC and settlers alike was the maintenance of high levels of agrarian production. In this the Company and colonists were united. There can be no doubt that the VOC, and later the British state, guaranteed the continued exploitation of slave and Khoi labour. The ferocity with which it responded to attempts by slaves and serfs to throw off the bonds of their domination, in addition to the latitude given to slaveowners in 'correcting' recalcitrant labourers, clearly

6. J.B. Peires, "The British and the Cape, 1814-1834", in R. Elphick and H. Giliomee (eds), Shaping, 490

7. J. Lonsdale and B. Berman, "Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895-1914", JAH, 20, 1979, 489

8. C.R. Boxer, The Dutch Seaborne Empire, 1600-1800, London, Hutchinson, 1965, 24

attests to this. Indeed, the role of the state in maintaining slavery was not only incidental but crucial. In societies where governmental support for slavery did not exist, slavery in fact disintegrated: "...without governmental support, slavery could not withstand the kind of day-to-day acts of disobedience that slaves routinely engaged in virtually everywhere".⁹

Unlike other slaveholding colonies the Cape slaveowners were denied political power and real divides existed between Company and colonists.¹⁰ For this reason, the VOC state, or legal, apparatus could not simply be an instrument in the hands of the slaveholders. However, it would be a mistake to see the rights which the servile population may have possessed in law and whatever 'justice' they may have obtained at the central level as a simple result of conflict between Company and colonists.¹¹ For the Company was probably as determined to ensure continued agrarian production as it was to maintain the monopoly of violence within its own hands. Rather, the rights which the slaves and Khoi did obtain in law was a result of the position which the state occupied in the colonial political economy.

A crucial function of the colonial state was to keep the levels of class conflict within manageable levels. "If coercion were to

9. P. Kolchin, "Some Recent Works on Slavery Outside the United States: An American Perspective. a Review Article.", Comparative Studies in Society and History, 28, 1986, 777

10. G. Schutte, "Company and Colonists at the Cape, 1652-1795" in R. Elphick and H. Giliomee (eds), Shaping

11. For this view see Ross, "Rule of law", 6

be seated overtly in the relations of production", Lonsdale and Berman have noted, "the intensity of class conflict would rise to intolerable levels."¹² For the state,

to maintain its own legitimacy through the morality of class domination, the state must be seen to act on behalf of the social order as a whole; indeed it may have to act ... against the perceived interests of particular segments of the dominant class in order to renovate the structures and ideology of domination and accumulation.¹³

In any slave-society coercion is, by definition, overtly seated in the relations of production. That is, the labourer is tied, by legal stipulation, to the person of his owner. In this sense the law was decidedly precapitalist. Capitalist relations of production presuppose that labourers are free in a double sense: that they are free from access to the means of production (this precondition was fulfilled under slavery since slaves were denied legal ownership of property) and, secondly, that they are free to sell their labour on the open market, that is, the labourers themselves should not form part of the means of production.¹⁴ This second precondition, of course, stood in direct violation of the laws governing slave society.

Under bourgeois law all are theoretically equal before the law. The absence of legal equality, however, does not imply that the law could not gain some measure of consent in the eighteenth and

12. Lonsdale and Berman, "Coping with the Contradictions", 489,

13. ibid, 489-90

14. K. Marx, Capital: Volume One, London, Lawrence and Wishart, 1983, 668; Cooper, "Contracts, Crime", in F. Snyder and D. Hay (eds), Labour, Law and Crime, 231

early nineteenth centuries. One anthropologist has warned that it "would be a mistake to be so affected by present day egalitarianism as to think that the tie between a leader and a follower cannot be accepted as a moral one: both history and one's everyday experience provide examples which are proof of the contrary."¹⁵ Moreover, even in a capitalising countryside, "violence by the powerful against the powerless" was not completely incompatible with the 'rule of law'.¹⁶

At the local level the VOC could have been seen to have acted in the interests of society as a whole. The right of slaves to complain about ill-treatment on the part of their masters was crucial in this regard. Chapter two (pp 66ff) has shown how slaves had come to make use of the law courts -- even though this was determined by the community in which they found themselves. The significant point is not so much that the results of such complaints were often very limited as far as the slaves were concerned but the fact that they continued to make use of the offices of the Landdrost and Heemraden. It should be stressed that

The commitment of subordinated groups to law and order should never be underestimated. Not only are the norms of the dominant classes often internalized, but 'indiscipline' can also be contrary to under-class codes of behaviour....

15. Bailey, Gifts and Poison, 16

16. M. Murray, " 'The Natives are Always Stealing': White Vigilantes and the Reign of Terror in the Orange Free State, 1918-1924", JAH, 30, 1989, 107

Moreover, legal tactics turned not only the court-house but also the countryside into a site of struggle.¹⁷

The fact that the slaves had the right of complaint in the eighteenth century, (and chapter two has shown that they were to some extent aware of this) must surely have gone some way toward providing the legal system with some legitimacy. Moreover, the actions of some burghers who actively encouraged the slaves to complain about their masters could not have failed to impress the servile population. What could the slaves have gleaned from the processes in court?

Firstly, it was clear to the slaves that often, under certain circumstances, the courts were quite happy to listen to the complaints which they had about their masters. Furthermore, in some cases, the courts not only listened, but actually believed their complaints. Upon this, the courts sometimes acted resulting in prosecutions of slaveholders and in some cases even convictions (see esp. pp 112ff). Although a monetary fine would not have been of much help to a slave who had died at the hands of his master, it surely must have some effect on the remainder of the servile population. And the slaves could see that particularly barbaric masters who were convicted were sometimes banished from the colony. Those slaves who were sold as a result of judicial stipulation could only have perceived that the courts had intervened on their behalf.

17. H. Bradford, A Taste of Freedom: the ICU in Rural South Africa, 1924-1930, Braamfontein, Ravan, 1988, 136-7

Yet the courts, by restricting prosecution to particularly harsh slaveowners and those who did not fit the community ideal of a good master, and by flogging those slaves who were found guilty of making an 'unfounded' complaint granted the slaveowners the necessary powers they needed to control the servile population in their day-to-day activities. It is in this way that the obviously repressive state structure of the eighteenth century could have been seen to be acting in the interests of society as a whole: it granted slaves some legal protection while at the same time reinforcing the authority of slaveholders.

Another part of the answer as to whether or not the law functioned hegemonically is to be sought in the particular status which Roman law occupied in the Cape law courts. It has already been argued that it was *Roman* law (as opposed to Batavian or Cape statutes) to which the Court of Justice most often turned in prosecutions (see esp. pp 105ff). The fact that laws on slavery came to the Cape fully developed is of crucial importance. Roman law placed at the disposal of the Dutch a substantial body of jurisprudence with which they could readily confront the problem of property in man. In addition, the Cape had inherited a complete body of 'slave law' from the East Indies in the form of the 'Statuten van India'. Never in the eighteenth century did a 'slave question' threaten to bring about a colonial crisis.

The overwhelming significance of Roman law in eighteenth century Cape society was its apparent universality, that is, it was made applicable to all. In this regard, slave law was integrally

linked with a much larger body of jurisprudence. Roman law never denied the slave any legal personality. The slave in Roman law was not only property or Res (object of rights), but also persona, by which the Roman lawyers meant human being.¹⁸ Slaves were not regarded as mere extensions of the will of their masters but as individuals capable of independent thought and action. In an overwhelming number of cases brought before the Court of Justice, slaves 'crimes', in general, were made out to be universal ones -- that is, they were judged independent of their status as slaves.

A case in this point is the one of the slave July, slave of Stellenbosch burgher, Johan Hendrik Ehlers, who was charged with attempted theft, "rusverstooring" and "gewapende agressie en resistentie" against his master's "voorzoon" Christoffel Dafel and the knegt Jan Wagenmakers.¹⁹ On the night of 31 March 1776 July had allegedly attempted to steal some keys from a cabinet in his master's bedroom. He failed to do this when he awakened his master. When his master's son, Christoffel Dafel, approached him he stabbed him with an assegaai but did not injure him due to the bluntness of the instrument. He also stabbed at the knegt Jan Wagenmakers (so the latter claimed) without injuring him, however. July fled to his former master in Cape Town where he told another slave that he (July) had played 'amok'. The

18. W.W. Buckland, The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian, Cambridge, Cambridge University Press, 1908, 4

19. CJ 410, Landdrost of Stellenbosch contra July van Bougis, 20 July 1776, 257ff

Landdrost noted that it was well known that 'amok' was "geen spel, maar wel een wraaksugtige moord in de orientaalste spraake te denoteeren."

The significance of this case rests in the punishment which the Landdrost requested. Even though July had not attacked his master he had attacked one of his children, and slaves, according to the Landdrost, were expected to show their owners' children "alle eer". Thus, the Landdrost argued aggression towards the master's children could be regarded as aggression against the master. Moreover July had also shown aggression toward the knegt -- "die niet alleen in opzigt als zijn meester plaatsvervullen, maar ook als Christ of Europees boven hem gesteld is". The Landdrost therefore concluded that, both in terms of the local laws and the Statuten van India, July deserved the death sentence. Yet the Landdrost requested that the death sentence be set aside and he invoked Roman law. It was better, he argued, to account for too much leniency than of excessive severity. He requested that a rope be tied around July's neck, that he be branded, whipped set to work on Robben Island for life in chains. Furthermore, the Court of Justice handed down the sentence requested by the Landdrost, once again testifying to the influence which local authorities had over the central organ of justice.²⁰ This case demonstrates how the 'slave law' available to the court was actually set aside in place of Roman law. The laws dealing with slaves specifically were available to the slaveholding class but

20. CJ 793, Sentence of July van Boegies, 1 Aug. 1776, no 44

were rarely used. In short, the widespread recourse to Roman law meant that in court slaves faced the same legal machinery as Khoi and colonists. Recourse to the letter of statute law would therefore not illuminate much in the social structure of the eighteenth century Cape.

Of course, in certain instances, the Landdrost had to resort to the invocation of specifically slave laws. For example, when January was accused of stabbing his master, Johannes Esterhuysen of the Roggeveld, with a 'boslemmer mes' the Landdrost drew on the laws pertaining to slaves in the Statutes of India. This made provision for the imposition of the death sentence, "met of zonder genade", on slaves who had been found guilty of lifting their hands at their master.²¹ But even in such instances exceptions were drawn. When the same law was invoked in the case of Baatjoe, slave of the widow of Jacob Mouton of the twenty-four rivers for threatening his mistress's son with a knife, the Landdrost noted that his "hooggaande jaaren" (about 60 years) came to his advantage. He therefore requested that Baatjoe be flogged, branded and placed in chains on Robben Island for life.²²

Here again the question of capital punishment is of some importance. It has been argued that, in cases where slaves as well as settlers faced charges of murder, the question of

21. CJ 402, Eisch en Conclusie of Landdrost of Stellenbosch contra January van Bengalen, 4 July 1772, 215ff

22. CJ 427, Landdrost of Stellenbosch contra Baatjoe van Sambawa, 15 Nov. 1787, 469ff

premeditation was actively engaged in (see pp 107ff). The severity of the slave codes was not immediately called upon.

A crucial part of making the law applicable to all was the creation of moral standards to which all could be subjected. "For a ruling class to obtain hegemony", Cooper has written, "the exercise of repressive power by the state must operate in conjunction with the redefinition of culture and social norms of the dominant class."²³ Hence, when the slave Frans, property of Marten Melk, was sentenced for killing fellow slave Willem, the mandoor on the farm, he was sentenced not as a slave, but as one who had broken the law of God. The Landdrost, citing both biblical and Roman law sources, noted that "zoo goddelijke als menschelyke wetten, dat zoo ijmand eens mensche bloed vergiet, des zelfs bloed ook moet werden vergoten".²⁴ Nor was Frans sentenced for the demise of his master's property.

Perhaps nowhere was the imposition of slaveholder morality more clear than in cases of sexuality. Here too, slaves were subject to the laws of the wider society and not to any body of slave law. Sodomy was regarded as a particularly heinous crime. In one case in which a slave was accused of sodomy the Landdrost noted that sodomy, according to all the sources, is regarded as the "allergrootste en afschuwelykste misdaad en moet dan ook na goddelyke en menschelyke wetten, met de swaarste straffen werden

23. Cooper, "Contracts, crime", in F. Snyder and D. Hay (eds), Labour, Law and Crime, 242

24. CJ 394, Eisch en Conclusie of Landdrost of Stellenbosch contra Frans van Madagascar, 30 June 1768, 510ff

tegengegaan".²⁵ Sodomy was regarded as a crime against God. The Landdrost cited Roman law sources in addition to Levitikus 20:13: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them." It is interesting to note here that sodomy was equated with homosexuality. Here, too, the slave was simply another individual being judged before God.

In imposing its morality upon the slaves, the slaveowning class enjoyed a certain measure of success. In cases of sodomy, for example, the cases typically came to court as a result of the actions of the offenders' fellow slaves. Chief witnesses against Pedro van Bengalen who stood charged with sodomy were his fellow slaves, Regina and Marie.²⁶ Discovering Pedro in the act Regina told him: "Pedro, foeij wat doet jij daar, Schaamd jij jou niet?" Regina and Marie told the slave Thomas about the "afschuwelijk gedoente", who reported the incident to their master.

Furthermore, upon seeing Pedro, Marie told him: "...jij bent waardig dat jij in de zee gegooij word." It is clear, then, that Pedro's fellows were as disgusted in his actions as the authorities and that they thought that he ought to be punished. Marie's statement would also suggest that she gave some approval to the standard punishment for such offences, namely, drowning. And indeed, this is the sentence which the Landdrost requested.

25. CJ 395, Landdrost of Stellenbosch contra Thomas van Conchin, 25 Aug. 1768, 664ff

26. CJ 392, Landdrost of Stellenbosch contra Pedro Van Bengalen, 5 Nov. 1767, 532ff

The significant point in this regard, however, is that Pedro's offence was not one which was slave-specific and the punishment was not one which was reserved for slaves only. Khoi as well as sailors sometimes appeared on similar charges and received similar sentences.

In some ways, too, slaves were drawn into pronouncing statements on the morality of their masters. Hence, the slaves of Coenraad Appel testified against their master of committing incest with his stepdaughter.²⁷ The court must have found Appel's actions particularly hideous (even though Elsie Anna was his stepdaughter) for he was sentenced to be flogged and banished from the colony. His stepdaughter was sentenced to be confined on bread and water for four weeks and she was thereafter to be confined to the slave lodge for life.²⁸

But the fact that slaves were exposed to the same procedural technicalities did not mean that they suffered the same punishments as other members of the colonial population. Bradley has noted how slaves in the Roman Empire were subject to criminal prosecution just as other segments of the population, and in this respect they were not exposed to a particular form of treatment which was not experienced by other social groups as well. "The inherent bias of the Roman legal system meant, however, that

27. 1/STB 3/11, Testimonies of October van Boegies, 25 January 1775; ibid, Louis van Madagascar, 25 Jan 1775; ibid, Caesar van Boegies, 25 January 1775; ibid, Filida van de Caab, 25 Jan. 1775

28. CJ 57, Landdrost of Stellenbosch contra Coenraad Appel and Elsjje Anna, 16 March 1775, 26; ibid, 20 April 1775, 37-8

lower social categories were discriminated against as far as the application of punishment was concerned, and slaves, as the lowest category of all, suffered the most severe types of criminal penalty..."²⁹ Hence, although slaves faced the same procedural technicalities as others their sentences were consistently more ferocious and, without exception, death sentences were accompanied by the mass spectacle. But here again it is necessary to consider the position of slaveholders and members of the servile population in the community. Slaveholders could receive less brutal forms of punishment because they had reputations within the settler community. In some ways the mere fact of appearance in court was a form of punishment. Nigel Worden cites the case of a Stellenbosch burgher guilty of keeping a slave in chains who begged the Landdrost "'with tearful eyes, that he not be brought before the Council of Justice and thereby bring shame upon himself and all his family and bearers of his name'."³⁰ Some forms of punishments of colonists were designed explicitly to defame colonists and this "presupposed that the accused had a reputation in the community".³¹ Slaves, by definition, had no reputation in society and could not suffer pecuniary fines.

Thus far it has been argued that the widespread use of Roman law had the effect of abstracting slave 'crimes' from the master-

29. Bradley, Slaves and Masters, 129

30. Worden, Slavery, 114

31. A. Sachs, Justice in South Africa, London, Sussex University Press, 1973, 25

slave relationship. Slaves were made subject to rules which were applicable to all in colonial society even in cases where laws were available which dealt specifically with slave relations with their masters. This process was carried through to 'offences' which did not directly threaten the authority of the masters (such as sodomy). But crucial to maintaining slaveholder authority was the imposition of what they saw as acceptable behaviour. The imposition of such absolute moral standards had the effect of tying slaves into a much wider body of law, the enforcement of which, as we have seen, some slaves gave active support to.

The incorporation of slaves into a universal body of law is in direct contrast to the southern United States. There, the dual legal system meant that, as Tushnet has argued, 'slave law' gave masters virtually complete control over their slaves and southern courts restricted itself to conditions which arose from the condition of the slave alone.³² In contrast to the Cape, Southern law declared in one case that "'Masters and slaves cannot be governed by the same common system of laws; so different are

32. M. Tushnet, The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest, Princeton, Princeton University Press, 1981, 37-42; M. Tushnet, "The American Law of Slavery, 1810-1860: A study in the persistence of legal autonomy", Law and Society Review, 10, 1, 1975, 137. For a critique of Tushnet, see E. Fox-Genovese and E.D. Genovese, Fruits of Merchant Capital: Slavery and Bourgeois Property in the Rise and Expansion of Capitalism, Oxford, Oxford University Press, 1983, 368-80. For an alternative view of American slave law see J. Oakes, "The Political Significance of Slave Resistance", History Workshop Journal, 22, Autumn 1986. These differences ultimately stem from their different views of the role of paternalism in American slave society.

their positions, rights and duties."³³ At the Cape, as it has been argued, both masters and slaves were made subject to Roman law. In contrast to the United States, when the state was needed to maintain the social order, the VOC did not enter the master-slave relationship per se, that is, the slave was rarely punished in law for committing *slave* crimes, but rather for apparently universal crimes. Specifically slave crimes, like desertion, were in most instances dealt with on the farm.

In a sense the political weakness of Cape slaveowners ultimately stretched to their advantage with regard to control over their slaves when compared to their Southern counterparts. Slave law at the Cape was part and parcel of Roman law. In contrast to the Cape, American courts had to battle over the question of whether the slave was property or person. Slave law at the Cape did not have to be created as the colony grew and expanded and the Cape slaveowners effectively had the assistance of the state from the very beginning. Essentially, the VOC was the 'relatively autonomous' state: there was no direct manipulation by the settlers of the political process, while at the same time "the appearance of autonomy conceals deep structural constraints upon the powers of the State apparatus which ensure that it faithfully pursues the interests of the ruling class".³⁴ As such, the state remained both the guarantor of continued exploitation of slave labour without appearing to be acting in the interests of the

33. cited in Tushnet, "American Law of Slavery", 133

34. H. Collins, Marxism and Law, Oxford and New York, Oxford University Press, 1982, 49

slaveholders. For the state created a 'moral hegemony' which individual slaveowners would have found difficult to create.³⁵

Majesty, Mercy and the Rule of Law

For eighteenth century England, Douglay Hay has identified three elements which were crucial in the maintenance of the hegemony through the law. He found that the law "was important as gross coercion; it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission..."³⁶ These three elements of the law (majesty, mercy, and the concept of the 'rule of law') were also present at the Cape. The majesty of the law was embodied in the rituals and symbols of the court. A commentator who served in the offices of the Landdrost in the early nineteenth century described the meeting of the board as follows:

On the first Monday of the month, the first official attendant who presented himself to sight at the drostdy was the messenger, dressed in black, with a silver shield, blazoned with a lion on a red field, suspended by a chain and hanging on the left side of his breast, preparing the court-room, and afterwards walking on the stoep in front of the drostdy-house. Next arrived the secretary with his portfolio and papers, attended by one of his clerks, a quarter of an hour before the board attended. The Heemraden followed successively, dressed generally in black, and when assembled, with the Landdrost presiding, the large village bell beside the Drostdy-house was tolled for some minutes, whilst the national flag was hoisted, and the public assembled in the hall in front of the court-room...The board being assembled, the doors were closed and prayers read by the secretary, and the minutes of the preceding meeting confirmed and signed by all present, -- the Landdrost rung

35. On the creation of a 'moral hegemony' see Bradford, Taste of Freedom, 206

36. Hay, "Property, Authority", in D. Hay et al, Albion's Fatal Tree, 49

the clear-sounding silver bell, and the large folding doors were thrown open, and litigants and others attracted by business or desirous to communicate with the board on various matters admitted. The president used to be seated in an armchair at the upper end of a table covered with a suitable green cloth, silver inkstands being used; opposite him sat the secretary, and on either side of the table sat the Heemraden. The business of the day began with civil suits.³⁷

Furthermore, public executions were the embodiment of the mass spectacle. Sparrman, an eighteenth century traveller, noted that the gallows at the Cape were the largest that he had ever seen, "but by no means too large for the purpose of a tyrannical government, that in so small a town as the Cape, could find seven victims to be hanged in chains."³⁸ Mercy was present as well in the eighteenth century. For example, the slave Baatjoe was spared the death sentence for lifting his hands at his mistress's son, on the grounds that he was very old -- about 60 years.³⁹ Furthermore, it has already been noted, Landdrosts argued, in accordance with Roman law, that it was better to show too much leniency than excessive severity.⁴⁰

37. Borchers, Autobiographical Memoir, 188-89

38. A. Sparrman, A Voyage to the Cape of Good Hope Towards the Antarctic Polar Circle Round the World and to the Country of the hottentots and the Caffres from the year 1772-1776, 2 volumes, Van Riebeeck Society, Cape Town, 1975, I, 86

39. CJ 427, Landdrost of Stellenbosch contra Baatjoe van Sambawa, 15 Nov. 1787, 469ff

40. CJ 410, Landdrost of Stellenbosch contra July van Bougis, 20 July 1776, 257ff

Rodney Davenport has argued that no 'rule of law' existed at the Cape during the Company period.⁴¹ To a certain extent Davenport is correct if equality of all before the law is seen as an essential element of the 'rule of law'. Roman law, almost by definition militated against this concept of a rule of law: "Roman precedent led to a legal definition of slavery at the Cape which denied any theoretical concept of legal equality..."⁴² Roman law also had an "inbuilt disposition ... to respect and favour the propertied classes".⁴³ But, as Robert Ross has noted, the Cape legal system in the eighteenth century already was guided by what could be called a 'rule of law'.⁴⁴ Ironically, in those cases in which it could be said that the law behaved arbitrarily, (Gebhard and Kettenaar -- see pp 113; 121) it acted against the perceived interests of the slaveowners. Where it acted arbitrarily in cases against slaves (such as in placing more emphasis on reputation than on law), it could to some extent rely on legal sources. A crucial element of the 'rule of law' in the Company period was the fact that Roman law, as it functioned at the Cape, never denied the slave a moral identity and was remarkable for its universality.

41. Davenport, "Consolidation of a New Society", in M. Wilson and L. Thompson (eds), History of South Africa, 297

42. Worden, Slavery, 115

43. G.E.M. de Ste. Croix, The Class Struggle in the Ancient Greek World: from the Archaic Age to the Arab Conquests, London, Duckworth, 1981, 330; P. Garnsey, "Legal Privilege in the Roman Empire", in M.I. Finley (ed), Studies in Ancient Society, London and Boston, Routledge and Kegan Paul, 1974, 141-165

44. Ross, "Rule of law".

Prosecutors before the Court of Justice (the Landdrosts) constantly reminded the slaveholders that slaves were persons too. Where slaveowners attempted to assert the fact that slaves were property, the courts consistently came down on the fact that their slaves were their fellow human beings. For example, one Hester Pienaar told her slaves who wanted to go to Cape Town to complain about the ill-treatment that she meted out to them: "Wat wil je gaan klagten, ik kan met myn slaven doen wat ik wil! en dewyl het myn geld is, kan ik je ook doodslaan sonder dat de overigheid my daarover iets kan doen."⁴⁵ Against this, the Landdrost stated that "in het goddelyke regt word er geen onderschyd gemaak tusschen een vrygebooren en een slaaf..." The reference to the law of God was of special force in a society where so much emphasis was placed on being a Christian. Therefore, ill-treatment of slaves was particularly undesirable where slaveholders were part of a community of Christians. The Landdrost noted that the slave Bella had been the "meede mensch" of Hester Pienaar. Moreover, it was the duty of slaveowners to treat their slaves with "meedelyden" because they were born into slavery. Very significant is the fact that the Landdrost did not draw a direct relationship between race and slavery. The Landdrost noted that they had to thank God that they were born as free persons and not as slaves.⁴⁶

45. CJ 400, Eisch en Conclusie of Landdrost of Stellenbosch contra Hester Pienaar, 4 April 1771

46. ibid, "daar we uty eenen bloeden geschaapen het de goddelyke voorsiening heyd alleenig te danken hebben dat we in vryheyd, en niet in een slaafse dienstbaarheyd gebooren zyn, had moeten tracteeren."

The apparent universality of Roman law, the fact that Roman law never denied the slave any personality, the suggestion that there was no explicit link between bondage and race, and the fact that slaveholders were not totally above the law were thus essential elements in the making of the 'rule of law' in the Cape slave society. Together with majesty and mercy the 'rule of law' at the Cape had, to a greater or lesser extent, managed to gain some measure of consent from the servile population and the slaveholders. In this it was intimately linked to the will of the community -- the readiness of some slaveholders to testify against their fellows should be seen in this context. Slaves, too, were in countless instances, ready to testify against their fellows.

As Hay notes, however, the hegemony of the law was never complete.⁴⁷ It was constantly challenged and redefined. The legal terrain itself became an arena of struggle. Genovese also writes that, "hegemony implies class struggles and has no meaning apart from them ... it has nothing in common with consensus history and represents its antithesis -- a way of defining the historical content of class struggle during times of apparent social quiescence."⁴⁸ The court records are replete with other forms of resistance, most notably desertion.

47. Hay, "Property, Authority", in D. Hay et al, Albion's Fatal Tree, 55

48. E.D. Genovese, "A reply to criticism", Radical History Review, 3, 1977, 98

An examination of the 'moral economy' of the slaves, reveals the extent to which the law had managed to obtain hegemony.⁴⁹ For in almost all complaints brought by slaves, they spoke about perceived injustices. Thus, they complained not only about punishment, but about the fact that they had been punished unjustly or unfairly. For example, in 1795 the slave woman Eva complained that the work that she was compelled to do was "swaar en ondoenelyk".⁵⁰ The slave August claimed that he repeatedly deserted because he was constantly beaten unfoundedly by his master.⁵¹ Some time later, August proceeded to the office of the Landdrost instead because his master threatened to cut his head off. This case perhaps suggests that, for the slaves, deserting and complaining to the Landdrost were simply alternative options from which they could choose. In 1795 the Khoi woman Leys claimed that she was often beaten "onverdiend" without being given a reason.⁵²

Another important part of the moral economy of the slaves was the right to maintain family ties. Hence, Daantje, slave of Jacobus Blignault of Achter Paarl, repeatedly visited his 'byzit', Silvia, slave of Heer Gebhard of the farm Simonsvaleij in Groot

49. Here the notion of 'moral economy' is used to denote the perceived traditional rights and customs which slaves expected and in terms of which their actions should be evaluated; Thompson, "Moral economy"

50. 1/STB 3/13, Testimony of Eva van die Caab, 11 Feb 1795, no 83

51. ibid, Testimony of August van Mauritius, 14 March 1795, no 95

52. ibid, Testimony of Hottentot Leys, 17 Nov. 1795, no 104

Drakenstein, without the permission of his master.⁵³ For this he was placed in shackles at night for three consecutive weeks and he went to the office of the Landdrost requesting to be sold. In 1794 the slave Diane, belonging to the widow of Pieter le Roux, claimed that she had had "vleeschlyk verkeerd" with Cobus, slave of Stephanus du Toit.⁵⁴ Now, she claimed, her mistress had repeatedly ordered her for the last three years to leave Cobus and to live with her fellow slaves, Damon, Pedro, or Geduld, which she "volstrekt niet had willen doen". Clearly, Diane had deep emotional attachments to her 'husband'. Due to the ill-treatment she suffered at the hands of one of her fellow slaves, who had tied a "remketting" around her neck at night and tied her to a pole in the kitchen, she miscarried when she was pregnant with her fourth child. Diane left the farm and went to the court in Stellenbosch, claiming that she could not live with her mistress any longer. Clearly, the ill-treatment which Diane suffered stemmed directly from her commitment to her sixteen year old relationship to which she obviously had deep emotional attachments. This is what eventually brought her to the office of the Landdrost, and although she did not explicitly state so, it can be assumed that she had hoped that the court would sanction her relationship with Cobus. This case shows how, for the slaves, the courts were more than just instruments in the hands of their masters. But it is also clear that slaves were addressing the

53. 1/STB 3/25, Testimony of Daantjie van die Kaap, 16 March 1816

54. 1/STB 3/13, Testimony of Diane van de Caab, 27 July 1794, no

perceived injustices within the colonial legal structures. This case also suggests, however, that the hegemony of the law was less complete over slaveholders than over slaves.

Thus, by the time that the British introduced the policy of slave 'amelioration' the slaves of the Cape colony had had a long history of using the courts of law to achieve certain limited ends. By that time, it can indeed be said, the law had become internalised -- the law was part of the 'culture' of the servile population and they had their own use of the law. For not only did slaves see the law courts as avenues through which they could address grievances which they had against their masters, but also as ones through which their fellows could be confronted. For example, in 1795 the Khoi woman Griet, complained to her master, Jan Marais about the way in which the Khoi Jan Danser, in the service of the burhger Pieter du Toit, had treated her.⁵⁵ She claimed that he had tied a 'paarderiem' around her neck and hands and tied her to a pole because she refused to sleep with him. She remained in this position while he smoked a pipe, after which he hit her with a knopkirie until she lost consciousness. Griet's master promised her that he would deal with Jan Danser. However, Griet remained unsatisfied after Danser had come to the farm on a number of occasions without her master doing anything to him. She therefore went to the Veldwagtmeester, Pieter du Toit, (who was also Danser's master) requesting that Danser be punished. In court Griet further stated that Jan Danser was a thief and that

55. 1/STB 3/13, Testimony of Griet, 30 Jan. 1795, no 80

he had on numerous occasions stolen sheep and other cattle, "zo van de hottentotten als Christenen". Clearly for Griet, the courts, whatever else it may have represented, also represented an arena in which personal grievances could be corrected. It is significant that Griet bypassed her master when she failed to get satisfaction. In 1815 Galant went to the court to complain about his fellow slaves who had accused him of being a 'Tovenaar, een rondloper, en maker van vergift'.⁵⁶

Paternalism and the Law

Reacting to the arguments of Ross and Worden who have perhaps overemphasised the violence of Cape slave society, Robert Shell has argued that it was paternalism which held Cape slave society together.⁵⁷ Slaves were intimately connected to their masters and mistresses via the patriarchal society, he argues. "Most slaves, however, did accept (albeit equivocally) the paternalism offered by the masters..."⁵⁸

For the American South, Eugene Genovese has noted, the slaves

understood that the law offered them little or no protection, and in self-defence they turned to two alternatives: to their master, if he was decent, or his neighbors, if he was not; and to their own resources. Their commitment to a paternalistic system deepened accordingly,

56. 1/STB 3/24, Testimony of Galant from Mozambique, 15 April 1815

57. R. Shell, "The family and slavery at the Cape, 1680-1808", in W. James and M. Simons (eds), Angry Divide, 20-30; Ross, Cape of Torments, esp. pp 29-37; Worden, Slavery, 106

58. Shell, "The family and slavery", in W. James and M. Simons (eds), Angry Divide, 22

but in such a way as to allow them to define rights for themselves.⁵⁹

At the Cape, in contrast, it has been argued extensively, the slaves turned both to their masters neighbours and to the law (see pp 72ff). Long journeys to Cape Town on the part of slaves to the Fiscal surely attest to the commitment of slaves to the law. The two were mutually reinforcing. These were not insignificant alternatives which were open to the slaves. In addition to other alternatives (such as the Hangklip maroon community), these factors would have militated against slaves responding positively to any paternalistic overtures which their masters may have had. Also by punishing those slaves who sought refuge in the law, the Cape slaveholders could only have deepened the conviction of the slaves that the courts had something to offer which the slaveowners wanted to deny them.

Perhaps, the biggest problem with Shell's argument is that he is searching for a *specifically* slave mode of control, that is, as opposed to Khoi and indentured servants. If he is correct in asserting that "not a scrap of evidence" suggests that slaves were beaten more than Khoi or indentured servants, then there is also no reason to assume why Khoi servants would not have been subjected to the same paternalistic overtures of their masters.⁶⁰ According to Shell, the Cape slaveowners were reinvoking the ancient Roman *familia*. The peculiar significance

59. Genovese, Roll, Jordan, Roll, 31

60. Shell, "The family and slavery", in W.G. James and M. Simons (eds), Angry Divide, 21

of the Cape, is not so much to determine the particular mode of control as far as slaves were concerned, but to recognise the very important fact that slaves and indigenous labour lived and laboured alongside one another, that is, to recognise the importance of different forms of 'unfree' labour in one social formation. Until this is recognized, any study of the early Cape would be "woefully incomplete".⁶¹

This is perhaps why the 'hegemonic function of the law' in the Cape social structure is of particular importance: everybody in society was drawn into its hegemony -- slaves, Khoi servants, poorer colonists, sailors, and knegts. This is not to deny the violence of slave society. The utility of hegemony as a concept is its recognition that societies are constantly marked by conflict; yet the conflict is contained to such a degree that it does not threaten the existence of that society.

The law, then, cannot simplistically be relegated to the level of 'superstructure'. Moreover, the law, E.P. Thompson noted,

did not keep politely to a 'level' but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) ... it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out. ⁶²

61. P. Lovejoy, "Review of Slavery in Dutch South Africa", by Nigel Worden", JAH, 27, 1986, 569

62. cited in H.J. Kaye, The British Marxist Historians: An Introductory Analysis, Cambridge, Polity Press, 1984, 204

And it was within the community, of which slaveholders, slaves and servants were members, in which these alternative notions of the law were fought out. It is clear that the British could not rule the colony without collaboration from the colonial elite. One of the most important characteristics of the law as it operated in the eighteenth century was, as the previous chapters have demonstrated, the dominance of the local organs over the central, or put in another way, the weakness of the Cape Court of Justice at the hands of the local boards of Landdrost and Heemraden. The British could not at a stroke do away with the dominance of the local over the central organs of justice. The coming of the British, as far as the administration of the law is concerned, should therefore be seen more in terms of continuity than of change. Moreover, it was only in 1827 that the Cape legal system was radically transformed by the British following the recommendations of a Commission of Enquiry.⁶³ In the eighteenth century already notable members of the community had used the law to keep the 'community' in the form they wished. Then already the law was at once "the repressive and negative aspect of the entire positive civilising activity undertaken by the State."⁶⁴ The law was at the same time the 'educator' by which "every state tends to create and maintain a certain type of civilization and of citizen (and hence of collective life and of individual

63. A. Sachs, Justice, 38

64. A. Gramsci, Selections from Prison Notebooks, London, Lawrence and Wishart, 1971, 247

relations), and to eliminate certain customs and attitudes and to disseminate others".⁶⁵

In order to resolve the contradictions in slave society the VOC, as the colonial state, had to prevent excesses of slaveowners against their slaves and servants. In order to contain levels of conflict, the state had to be seen to be acting in the interests of society as a whole. The law was of crucial importance in carrying out this task. The courts sometimes gave credibility to the complaints of slaves and vigilantly prosecuted particularly brutal masters. Roman law also promoted the hegemonic function of the law, despite the fact that it denied the principle of legal equality. Roman law had the appearance of universality. Everybody was subject to the same set of laws and procedural technicalities. A crucial element of the 'rule of law' in the period under review was the fact that slaves, in terms of Roman law, were persons too.

65. ibid, 246

Conclusion

This study has attempted to show that the operation of the law in the Cape Colony would be best understood through the study of local regions. This is because an entire process was involved before particular cases came to court. Slaves and masters did not stand isolated in relation to the law. Both slaves and masters were dependent on others in courtrooms. Thus, law and community in the colony were intimately linked.

Despite the differentials of wealth and status in settler society slaveholders still formed part of a community. The settler community was one which was at once marked by conflict and cooperation. The community was shaped by a number of forces -- kinship, marriage ties, the credit market, the domestic consumer market. Both neighbourliness and paternalism characterised social relationships within the settler community. The community was not without conflict between rich and poor and often this conflict occurred on the legal terrain itself. The slaveholder community was a 'moral community' in the sense that members had to conform to certain forms of behaviour. It is through their behaviour that individuals acquired certain reputations. Those who were known for the excessive cruelty towards their slaves and servants were considered to have ill reputations.

These factors gave slaves access to the courts. Although evidence suggests that the slaves were aware of having rights in law, the threat of punishment for lodging 'unfounded' complaints seemed to

have weighed heavily on them. Thus their access to court was more likely to come from encouragement of neighbours of their masters. In court the slaves faced two related obstacles: the willingness of slaveholders to testify against their fellows and the reputations of individual slaveholders. Thus slaveholders were more likely to be prosecuted when they were known in the community to be particularly harsh towards their slaves and vice versa. The fact that legal regulations (such as those determining the validity of slave evidence) were overlooked in favour of community considerations (most notably, reputation), suggests that courtroom struggles can in fact be characterised as community struggles. Once prosecution followed sentencing too was marred by community considerations.

Thus particularly harsh slaveowners, and therefore also ones who had ill reputations, were likely to be banished in cases involving the death of their slaves. Others who did not suffer from ill reputations were likely to suffer a small fine or to be acquitted altogether. Most masters who were prosecuted were those who were guilty of killing their slaves or servants, which suggests that lesser crimes often did not make it to the courts. The gentry ultimately assessed the reputations of individuals thereby making the law a form of class rule.

Those slaveowners who were prosecuted in the Court of Justice faced the Roman common law in criminal cases. It was Roman law which theoretically saved slaveowners from capital punishment in cases involving the death of their slaves. But the significance

of Roman law lies in the fact that it was applied to all in society. Thus in some instances even slaves were saved from capital punishment in cases where statutory laws stipulated the death sentence. The exceptions to these cases, where the law could be said to have been arbitrary, shows the extent to which the law had become a form of class rule.

The VOC had to be more than an instrument in the hands of slaveowners. It had also had the historic function of resolving the contradictions in slave society and had to appear to be acting in the interests of society as a whole. An integral part of this was the creation of a moral hegemony. This was the ultimate significance of the hegemonic function of the law. The hegemony, however, was never complete -- hegemony, by definition also implies struggle. And the struggle would assume a new form with the transformation in the political economy of the Western Cape in the late nineteenth century.¹

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