Historia, 52, 2, November 2007, pp 186-213

Ten Reasons for Not Marrying: Sex and Illegitimacy in Mid-Nineteenth Century Cape Town

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The year 1840 was a watershed for Cape Town – the western and would-be undisputed capital of Britain's colony at the Cape of Good Hope. Its population was assuming a shape clearly antecedent to the modern city: the former slaves, who had been freed in 1838, were categorised with descendants of Khoesan indigenes, free blacks and slave-European concubinage under the newly minted term, "coloured";[1] recently arrived Xhosa, who had migrated from the Eastern Cape, were putting down roots;[2] the early European settlers who, regardless of origin, were referred to as "Dutch" were assimilating by and large to the rule and way of life of the British who had seized their country in 1806.[3] The new demography

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1. Of Cape Town's population numbering 20 016 in 1840, 10 560 were said to be "whites", see: J.R. Shorten, *Cape Town* (Shorten and Smith Publications, Cape Town, 1963), p 119. For a summary of "racial ascriptions over the course of South Africa's colonial history", and of opinion regarding "coloured" identity, see: P. Scully, *Liberating the Family? Gender and British Slave Emancipation in the Rural Western Cape, South Africa, 1823-1853* (David Philip, Cape Town, 1997), pp 13-14, 156-157. For the early phases and failures of the eastern Cape separatist movement, see: B.A. le Cordeur, *The Politics of Eastern Cape Separatism, 1820-1854* (New York Oxford University Press, Cape Town, 1981), pp 281-287. "Khoesan" is an invented term, jointly denoting the indigenous hunter-gatherers (San) and herders (Khoekhoen). Freed slaves were known as free blacks (*vryswartin*).
2. S. Judges and C.C. Saunders, "The Beginnings of an African Community in Cape Town", *South African Outlook*, August 1976, pp 122-123. The town's Somerset Hospital had as patients "a number of African negroes" in 1840 – C. Searle, *The History of the Development of Nursing in South Africa 1652-1960* (Struik, Cape Town, 1965), p 73.
3. Events in Europe resulted in Britain's occupation of the Cape from 1795 until 1803, when the Dutch returned; Britain's renewed occupation in 1806 was formalised in 1814. While Dutch-English assimilation was broadly true of the Western Cape, the Eastern Cape was experiencing an exodus of dissatisfied Dutch-speaking farmers (*boers*) – the so-called Great Trek.

and the fact that longstanding controls were relinquished with the end of slavery spurred support for an effective police. When epidemics swept the town – measles in 1839 and, soon after, another round of smallpox which had been so deadly in the past – the public health ethos, then taking shape in Europe, gained ground amongst the city's modernizers.[4] In 1840 Cape Town acted on a recent ordinance to elect a municipal board, empowered to take charge of "certain matters and things of a local nature".[5]

The ex-slaves, who had been emancipated in 1834, celebrated their freedom in 1838, at the end of four years of compulsory apprenticeship to their former owners. Among the measures which Britain put in place to effect that event, the Marriage Order-in-Council which came into force on 1 February 1839 is important to this investigation. This order, which applied to several of Britain's colonies, sought to legalise "certain marriages" contracted under slavery and to legitimise the children born of the *de facto* marriages of former slaves. The advantages of validating their relationships appear to have been widely recognised by eligible couples in the Cape's country districts and at the Christian mission stations, but the measure's impact on concubinage and out-of-wedlock births in Cape Town is less clear.[6] More conspicuous was the remapping of the townscape: Bo-Kaap ("upper-Cape Town") on the slopes of Signal Hill, was an example of the communities which were formed by persons free to leave the quarters provided by their former owners and to establish independent households. The growth of Islam, at the expense of Christianity, amongst the former slaves – now members of the free

4. In the wake of the smallpox epidemic, wardmasters carried out an inspection to assess the state of sanitation and living conditions in the town. Cape Town Archives Repository (hereafter CAR): Colonial Office (hereafter CO) 490, 159, 1840.

5. Ordinance for the creation of Municipal Boards in the Towns and Villages of this Colony …, Number 9 of 1836, *in* H. Tennant and E.M. Jackson (eds), *Statutes of the Cape of Good Hope, 1652-1895* I (J.C. Juta & Co., Cape Town, 1895), pp 201-213; N. Worden, E. van Heyningen and V. Bickford-Smith, *Cape Town, The Making of a City, An Illustrated Social History* (David Philip Publishers, Cape Town, 1998), pp 171-177. For the complementary roles envisaged for the municipal government and the police in 1840, see: S. Feast, "The Policeman as Thief-taker, Street-cleaner and Domestic Missionary: Police and Policing in Cape Town in the 1860s and 1870s." BA Honours, University of Cape Town, 1988, p 51.

6. Marriage Order in Council, in Force in this Colony from the 1st of February 1839 (signed into law by the Court at Windsor on 7 September 1838), *in* Tennant & Jackson (eds), *Statutes of the Cape of Good Hope* I, p 235. For the freed slaves' interest in marriage in the immediate wake of emancipation, see: Scully, *Liberating the Family?,* pp 110-111.

working class – became evident in the Bo-Kaap and other urban enclaves.[7] This development too was of relevance for the incidence of out-of-wedlock births.

The evidence of illegitimacy in Cape Town sets it apart in some respects from the colony as a whole,[8] but to what extent is this phenomenon susceptible to measurement? The chief sources for out-of-wedlock births, prior to official record-keeping where such matters might have been noted, are the church baptismal registers. For nearly a century and a half, during which the *Nederduitsch Hervormde Kerk* (NHK) monopolized public worship, records exist for this church only. Registers which were systematically maintained by the Lutherans are available from around 1800, and by the Anglicans from 1806. By 1840, other Christian congregations had been established, Jews were becoming organised as a community and, as has been said, Islam was highly visible in Cape Town.[9] Although bastards for whom the sacrament was sought, appear among the regular baptisms in the church registers, it may be assumed that some died unbaptised. With these factors in mind, it is not simple to calculate the rates of illegitimacy over time.[10]

By the middle of the century, certain trends in the attitudes and policies respecting marriage and out-of-wedlock births may be identified. In her analysis of the concerns of Cape Town's increasingly self-

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7. For example, see: CAR: CO485, Consistories, Clergymen & Missionaries, 94, 19 March 1836, Barnabas Shaw – Governor Sir Benjamin D'Urban, regarding the stiff competition his ministry among the apprentices at Rondebosch experienced from "the followers of Mohamed"; J. Whiteside, *History of the Wesleyan Methodist Church of South Africa* (Juta & Co., Cape Town, 1906), pp 73-74. Clergy in the rural areas were anxious lest freed persons migrate to Cape Town where Islam was a potent rival – see: Scully, *Liberating the Family?*, pp 77-78.
8. V.C. Malherbe, "*In Onegt Verwekt*: Law, Custom and Illegitimacy in Cape Town, 1800-1840", *Journal of Southern African Studies*, 31, 1, March 2005, pp 143-165; V.C. Malherbe, "Illegitimacy and Family Formation in Colonial Cape Town, to circa 1850," *Journal of Social History*, 39, 4, June 2006, pp 1153-1176; V.C. Malherbe, "Paternity and Illegitimacy: A problem for church and state at Cape Town, to the mid-1800s", *South African Historical Journal*, 55, June 2006, pp 66-87.
9. Malherbe, "*In Onegt Verwekt,*", p 165. See also Whiteside, *History of the Wesleyan Methodist Church*; C. Lewis and G.E. Edwards, *Historical Records of the Church of the Province of South Africa* (Society for Promoting Christian Knowledge, London, 1934). *The Cape of Good Hope Almanac and Register for 1844* reported 6 435 Muslims and just 17 Jews in Cape Town.
10. For calculations by year and by decade in eighteenth-century Cape Town, see: Malherbe, "Illegitimacy and Family Formation", pp 1160-1163.

conscious middle class, Kirsten McKenzie observed that respectability, based on the British model, had become "the bedrock upon which claims for civil rights and political representation were made", but that this aspiration was "threatened by the vibrancy of underclass culture … as well as by the web of poverty, crime and disease which dominated the city."[11] Elsewhere one notes the evidence of greater discretion in their sexual conduct on the part of men from Cape Town's elite and middle class.[12] The empire-wide abolition of slavery was one element of this altered sense of appropriate behaviour: emancipation coincided with and, in some respects, precipitated new attitudes respecting morality and the institution of marriage.

Slavery, and nine more reasons for not marrying

For most of the period after 1658, when slave importation began at the Cape of Good Hope, the slaves were barred from contracting legal marriages and their children were, perforce, illegitimate.[13] In Robert Shell's words, the "oceanic slave trade destroyed families at the point of enslavement, and also limited all subsequent family formation." He found "no husband-and-wife couples" among the newly-enslaved whose composition was, in any case, "highly skewed" in favour of men.[14] Referring obliquely to their sexual lives, the law acknowledged that slaves were not "entirely deprived of the rights of nature"; though unable to marry, they could "cohabit together as man and wife". The Dutch found, in fact, that allocating partners to their slaves was a means of keeping them more

11. K. McKenzie, "Dogs and the Public Sphere: The Ordering of Social Space in Early Nineteenth-Century Cape Town", *South African Historical Journal*, 48, May 2003, pp 241, 243, 247. The Cape received representative government in 1853, and responsible government in 1872. Its nominative Advisory Council (1825-1854) issued ordinances; from 1854 the new legislature issued acts.
12. Malherbe, "Illegitimacy and family formation", p 1169; L. Guelke, "The Anatomy of a Colonial Settler Population: Cape Colony 1657-1750", *The International Journal of African Historical Studies,* 21, 3, 1988, p 470.
13. G.M. Theal (ed), *Records of the Cape Colony* IX (William Clowes, London, 1897-1905), Statement of the Laws … regarding Slavery, pp 150-151. This applied equally to children "begotten by a master with any of his slaves", with the proviso that they might not be sold and were emancipated on the father's death.
14. R.C.H. Shell, *Children of Bondage, A Social History of the Slave Society at the Cape of Good Hope, 1652-1838* (Witwatersrand University Press, Johannesburg, 2001), p 125. With little chance of finding a partner among the female slaves, many slave men formed relationships with indigenous women who might be employed as "free" servants in the same or a nearby household.

peaceably attached.[15] In the decade prior to the Abolition Act of 1833, amelioration measures sanctioning slave marriage were introduced – but on terms which limited their impact.[16] Nevertheless, from 1807 (when Britain abolished the slave trade throughout its empire) it has been possible to trace the emergence of more stable sexual relationships between the slaves, and slaves with free persons in Cape Town. Stability was however largely independent of marriage and "the Cape slave family was characteristically female-headed".[17] In this brief account of the legal and demographic status of the slaves one can see the first and most important reason for not marrying.

If "own kind" gender imbalance was very much a secondary factor determining the inability of the slaves to found and foster families, it loomed large with respect to the spousal history of the European colonists. After eighty years of settlement, three-fifths of the "white" single men resident in Cape Town (in 1731) would never marry – a percentage higher than for men located in the rural and frontier districts of the colony where the male-to-female sex ratios were, in fact, less favourable to finding racially compatible wives.[18] Leonard Guelke, who made these comparisons, suggested that the "paradox" may be explained by the greater success of frontier men "in establishing independent livelihoods than single males in the older rural areas and Cape Town".[19] The vast majority of those who transacted a legal marriage chose white

15. Theal (ed), *Records of the Cape Colony* IX, p 150; N. Worden and G. Groenewald (eds), *Trials of Slavery, Selected Documents Concerning Slaves from the Criminal Records of the Council of Justice at the Cape of Good Hope, 1705-1794* (Van Riebeeck Society, Cape Town, 2005), p 166 and note 3. The Dutch practice of "marrying-out" [*uittrouwen*] their slaves did not entail legal marriage.
16. Shell, *Children of Bondage*, pp 320-321. According to this source, by 1831 just "three legal – that is, Christian – marriages had been solemnized among 35 000 slaves" in the colony as a whole, p 321. The measures in question were the Proclamation of 18 April 1823 (extended and altered by that of 1 August 1823) and Ordinance 19 of 1826.
17. A. Bank, "The decline of urban slavery at the Cape, 1806 to 1843", Centre for African Studies Communications, 22, (University of Cape Town, Cape Town, 1991), pp 101-110. The "percentage of females in the urban slave population (which was consistently higher than the percentages in rural areas) rose from 36,5 to 46,4 between 1806 and 1827", see: Bank, "The decline of urban slavery at the Cape", p 102.
18. "White" referred to persons who were accepted as being of European ancestry, whether strictly true or not.
19. Guelke, "Anatomy of a Colonial Settler Population", p 469. Guelke excluded free blacks and persons of slave descent from his definition of "white" colonists, p 453 and note 2.

wives: of the 2,3 percent colony-wide who in 1731 had married free black women, two-thirds (six men, of nine) were based in Cape Town where attitudes are supposed to have been freer of "strong racial ideas".[20] In his study of marriage and population growth of the "white" community in the 1700s, Robert Ross deduced that, later in the century, "ten per cent of adult Cape-born men failed to find … wives". If the patterns traced by Guelke still prevailed, then a high proportion of these men resided in Cape Town.[21] It must, in the circumstances, be assumed that most single men were sexually active in casual or stable non-marital relationships with local women, many of whom were of slave descent,[22] but the preference of the white colonists for endogamous marriage, where men outnumbered women of all descriptions for the better part of 200 years, had for long provided a second reason for not marrying.[23] This imbalance tapered off, ending in the mid-1800s when Cape Town's population of nearly 24 000 reflected a normal gender ratio.[24]

By then, the formulas devised by Christian churches for dealing with requests to baptise bastards, and with the immorality which produced them, had a long history. The unwed mothers were required to acknowledge their unchaste lifestyle and give proof of repentance. They might have been barred from the sacrament of Holy Communion for a period of time. The reputed fathers, if they were members, were pressed to marry; if not, they were urged to undergo instruction leading to the confession of faith and eligibility for marriage by the church. Those who

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20. Guelke, "Anatomy of a Colonial Settler Population", p 470 and Table VI, p 464. For the difficulty of enumerating free blacks in Cape Town, see: H.F. Heese, "Slawegesinne in die Wes-Kaap, 1665-1795", *Kronos, Journal of Cape History*, 4, 1981, p 47.
21. R. Ross, "The 'White' Population of South Africa in the Eighteenth Century", *Familia*, 12, 4, 1975, p 100. Ross also cited an estimate that "ten per cent of marriages … were 'mixed'", p 82 – a figure disputed by another scholar who put the figure at 5 per cent, see "Postscript" by J.A. Heese, p 101.
22. For the evolution of meanings attached to stable non-marital relationships referred to as concubinage in Roman and Roman-Dutch law, see P. Gane (ed), *The Selective Voet being the Commentary on the Pandects … by Johannes Voet … and the Supplement … by Johannes van der Linden* IV (Butterworth & Co. Africa Ltd., Durban, 1956), pp 385-388.
23. For the "somatic norm" at the Cape, see: R. Elphick and H. Giliomee, "The origins and entrenchment of European dominance at the Cape, 1652-c.1840", *in* R. Elphick and H. Giliomee (eds), *The Shaping of South African Society, 1652-1840* (Maskew Miller Longman, Cape Town, 1989), pp 525-526.
24. *Cape Almanac* (Colony of the Cape of Good Hope), G682 A1, Cape Town (9½ sq miles), May 1849: see males – 11 517; females – 12 232. In that year, no distinction was made "between the white and coloured population of Cape Town," although it was made elsewhere in the colony.

were unwilling, or prevented from marrying by their other commitments, were admonished to maintain the child as required by the law. These formulae were adhered to, by and large, despite some amendments introduced with the freeing of the slaves.

The process of securing bastard baptisms elicited various explanations for the parents' transgression. Many women claimed that they were seduced, or had consented to importunities after a promise of marriage; the female partner, made pregnant, might have been left waiting in hope, while the once-ardent suitor vanished in the colony, or left it altogether. Cape Town was the landing stage and short-term perch of many transients – not only the soldiers billeted for months or years at a time, and sailors who passed through, but men taking stock of where their interests lay in making a career. Marriage promises by youths who were underage could not be enforced. Some defaulters had meanwhile married someone else, or died before the promise of marriage could be kept. A man who acknowledged paternity might claim that he was willing, but too poor to marry. A few, who insisted on their willingness, attributed the failure to family opposition – on grounds, perhaps, of race or class which might have been obliquely expressed. More explicit was the opprobrium which the churches attached to sexual relations between Christians and Muslims – exacerbated by Islam's attraction for the freed slaves at Christianity's expense. In terms of the law, their children were illegitimate even when the partners married by Islamic rites. Connections of consanguinity and affinity kept some would-be couples from legal unions, while the offspring of adulterous relationships suffered scandal in addition to the normal disabilities of out-of-wedlock birth. Adulterers, should they secure a divorce, were prohibited by Roman-Dutch law from marrying each other – and thereby from legitimating a child who was born of the adultery.[25]

Muriel Nazzari said of the Roman Catholic Church in colonial Brazil:

> … it is essential to consider the role of the church … Whereas secular society created class and racial differences between individuals that worked to prevent their marriage, the church established what was moral and what was immoral … I will show that the church did not promote marriage between the sexual partners it prosecuted for concubinage, but instead sought to

25. Joannes van der Linden (ed), *Institutes of the Laws of Holland* (Stevens, London, 1828), pp 353-355. The last case found where criminal charges followed the adultery was in 1828, C.G. Botha, "Early Cape Matrimonial Law", South African Bound Pamphlets, 10, p 9.

> separate them, thereby demonstrating that it adhered to the contemporary belief that class and racial endogamy were requisites for marriage.[26]

Nazzari has built a strong case for the importance which the Portuguese attached to "class and racial endogamy" as the "requisites for marriage" – a principle dependent, in execution, on collaboration by their church. Whatever the (much-disputed) role of Calvinism in the origins and implementation of South African racism, it has not been shown that the Cape church blocked marriages which breached the barriers of race or class.[27] It remains to be asked if, by means more discreet, it contributed to the reasons for not marrying.

At Batavia, Dutch East India Company officials had noted that "every couple had its own reasons" for not marrying – an observation no doubt also true of the Cape,[28] or, perhaps, their motives were mysterious even to themselves: in 1848 Willem Fredrik Muller admitted to the NHK's Commission of Censure that for no reason he had left the mother of his children *(zonder daartoe enige redenen te hebben haar verlaten*) to live with someone else.[29]

The Marriage Order-in-Council: a new era for the ex-slaves?

As the freed slaves approached the end of their apprenticeship in 1838, Britain's Secretary of State for the Colonies published a new marriage order. His "liberal and comprehensive Law" aimed to legalise "negro marriages" which had been entered into under slavery, and to facilitate the "increased desire for lawful matrimony" which was anticipated in the

26. M. Nazzari, "Concubinage in colonial Brazil: the inequalities of race, class, and gender", *Journal of Family History,* 21, 2, April 1996, pp 109-110.
27. I.D. MacCrone, *Race Attitudes in South Africa historical, experimental and psychological studies* (Oxford University Press, London, 1937), pp 40-46, 125-136; W.A. de Klerk, *The Puritans in Africa a story of Afrikanerdom* (Rex Collings, London, 1975); A. du Toit, "No Chosen People: The Myth of the Calvinist origins of Afrikaner Nationalism and Racial Ideology", *The American Historical Review*, 88, 4, October 1983, pp 920-952.
28. L. Blussé, *Strange Company, Chinese Settlers, Mestizo Women and the Dutch in VOC Batavia* (Foris Publications, Dordrecht-Holland, 1988), p 169.
29. Nederduits Gereformeerde Kerk Argief (hereafter NGKA), G1, 1/24, W.F. Muller, 6 November 1848 and Leentje Davids, 4 December 1848, pp 570-571, 584. In 1838 the NHK established a commission to investigate matters which might lead to censure of members, NGKA: G1, 1/20, 5 March 1838, p 366 and 2 July 1838, p 410.

former slave colonies.[30] Where there was doubt respecting the validity of slave marriages which had been solemnized by "ministers of the Christian religion other than clergymen of the United Church of England and Ireland," provision was made for them to be confirmed. Secondly, the order arranged to register certain *de facto* marriages, where application was made within one year from its coming into force, and treat as legitimate the offspring of those relationships. Between these provisions, a distinction was made: marriages of the first type were recognised when "between slaves and between parties one of whom was a slave, and also in some cases between free persons of colour"; a *de facto* marriage qualified for solemnization only if it had been contracted "between persons one or both of whom were in the condition of slavery".[31]

Those clauses which referred to the freed slaves formed just part of the Order-in-Council, which covered all marriages after 1 February 1839. An important provision was that legal marriages might be performed by specially appointed civil officers as well as by Christian ministers who were "ordained or otherwise set apart".[32] Some confusion ensued, thus we find:

> The Revd J.M. Kloek van Staveren, Minister of the Lutheran Church in Cape Town, having certified to me, that Michiel Frans Kube and Anna Ernstina Barks, were married by him on the 26th day of May last past, but that the ceremony of such marriage was not in strict conformity with the provisions of Her Majesty's Order in Council bearing date the 7th day of September 1838, in consequence of which informality it has become necessary that the said M.F. Kube and A.E. Barks should be re-married: – Licence is, therefore, hereby given to their being so re-married by the said Revd J.M. Kloek van Staveren accordingly.[33]

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30. CAR: Legislative Council Appendix (hereafter LCA) 8, 1837, 36, 13 March 1836, Circular: Glenelg – D'Urban.
31. Tennant & Jackson (eds), *Statutes of the Cape of Good Hope* I, Marriage Order in Council, see especially Articles 1, 2, 12, 30, 35 and 36. The order made other important stipulations, for example to terminate compulsory marriage due to breach-of-promise (Articles 19-20).
32. Civil marriage was legalised by the Batavians in 1804, but the British had repealed that provision when they returned to the Cape in 1806, Theal (ed), *Records of the Cape Colony* V, Proclamation by Sir David Baird, 26 April 1806, p 407. In correspondence with the NHK clergy in 1836, government referred to the fact that "the Marriage Law of England is in the Colony", CAR: CO454, 81, 15 November 1836, William Robertson to Colonial Secretary Bell: see comment addressed to the governor.
33. CAR: Accessions (hereafter A) 2362, 1/1/3/1, Huwelyks Licentien 1819 tot 1845, 23 September 1839; J.A. Heese and R.T.J. Lombard (eds), *Suid-Afrikaanse Geslagregisters* I (Human Sciences Research Council, Pretoria, 1986), p 129.

Two further examples appear in the records of the Lutheran Church: that of George Oppel's marriage to Lea Kannemeyer, and of Thomas Richerdt's to Maria van Eyk.[34] All six were of slave descent. It is not clear to which article of the Marriage Order the lack of "strict conformity" referred. More apparent is the weight of habit and tradition at the point where changes were to be given effect.

In 1834 the synod of the NHK had taken an unprecedented step to promote marriage as a social and moral value, authorizing its clergy to marry "persons who do not possess the Christian religion, on their producing a certificate from the Matrimonial Court".[35] In the era of NHK monopoly, possession of the Christian religion had been firmly linked with baptism, which was "the sine qua non for Christian marriage". Additionally, only Christian marriages were recognised by the law.[36] By combating sinful cohabitation at the expense of long-established tenets, the synod had adopted a radical stance – somewhat offset by consigning the ceremonies to the consistory, and replacing the usual vow with a specially drafted oath. Despite these provisions, some NHK clergy were not convinced that such marriages should be condoned – an attachment to doctrine which was not appeased by the Attorney-General's advice that legality no longer depended on the applicants' prior baptism.[37]

Questions respecting the synod's resolution resurfaced in April 1839, when the Marriage Order was in force. The NHK's *Actuarius Synodi* pointed out that the order required publication of a

34. CAR: A2362, 1/1/3/1, 1 November 1839.
35. The Matrimonial Court, which was established at the Cape in 1676, had to certify that the applicants were marrying by mutual consent and were free of impediments respecting consanguinity, pre-existing marriage, parental permission (if not of age), and so forth.
36. The Netherlands' Political Ordinance of 1580 and Echt Reglement of 1656 had provided for civil as well as church marriages but "owing to no machinery having been provided in this Colony for the celebration of marriage by civil officers, marriage before a minister of religion was the only form in use". See: D. Ward, *A Handbook to the Marriage Laws of the Cape Colony, the Bechuanaland Protectorate, and Rhodesia* (J.C. Juta and Co, Cape Town, 1897), p .1.
37. CAR: CO454, 81, 15 November 1836, William Robertson – Colonial Secretary Bell: re the Attorney-General's comment, dated 21 November 1836; J.P. Jooste, *Die Verhouding Tussen Kerk en Staat aan die Kaap Tot die Helfte van die 19e Eeu* (Suid-Afrikaanse Calvinistiese Uitgewersmaatskappy Beperk, Bloemfontein, 1946), p 261; Shell, *Children of Bondage*, p 348; Botha, *Early Cape Matrimonial Law*, pp 1–3. Prior to the synod resolution of 1834, some Cape missionaries had made marriage available to station residents under conditions similar to those sanctioned by that resolution, Scully, *Liberating the family?,* pp 112-113.

couple's "Christian and other" names: did that not presume that they had been baptised? Oddly, the English-Dutch translator had altered a crucial word: the Dutch version referred to baptismal *or* other names, a construction which smoothed the way for the NHK's post-1834 marriage policy. Respecting the merits of these two versions, the British officials had no doubt: "the Dutch *must* give way to the English translation". The error was to be advertised – without comment as to what "Christian" meant in this context.[38] Shortly thereafter, an NHK clergyman informed the government that supporters of the synod resolution were hampered by the lack of clarity respecting Christian names. Maintaining his distance from the issues at stake within the Dutch church, the Attorney-General replied that clergy so disposed "may legally marry persons still heathens, although they have no Christian name, and have never been baptized".[39]

The same clergyman had raised a second issue: the freeborn son of a slave father and Khoe mother wished to marry the free woman with whom he was cohabiting, but the phrasing of Article 35 of the Marriage Order – "one or both of whom were in the condition of slavery" – appeared to deny the privilege where neither partner had been enslaved. That, he argued, was unfair, since such persons "though free, laboured under equal disadvantages in obtaining regular marriage".[40]

The clause he invoked, enabled such persons "to confer upon their children the benefit of children born in lawful wedlock". In effect, it entailed a (short-term) amendment of English law which made bastards of children born out of wedlock, even if the parents married at some later date: where the Marriage Order authorized the legalising of slave "marriages *de facto*," which had been entered into on a named date, it conferred legitimacy upon the children born within that union – but no others ("and no more").[41] Under Roman-Dutch law,[42] children born as a

38. CAR: CO 485, 53, April 1839, A. Faure, Actuarius Synodi – Colonial Secretary Bell. This correspondence fell between the departure of Attorney-General Anthony Oliphant, in March, and William Porter's assumption of the office in September 1839.

39. William Robertson, 5 November 1839, and "Opinion of Her Majesty's Attorney-General", *in* W. Porter, *The Porter Speeches, Speeches Delivered by the Hon. William Porter during the Years 1839-1845 Inclusive* (Trustees Estate Saul Solomon & Co, Cape Town, 1886), pp iv-vi. Porter held office until March 1866.

40. CAR: CO 485, 116, 30 September 1839, Robertson – Colonial Secretary Bell. Robertson had previously argued that it was desirable from every angle for "the parties to be regularly married", CO 454, 81, 15 November 1836, Robertson – Colonial Secretary Bell.

41. The concession is elaborated by Article 37 of the Marriage Order. The small window, time-wise, for acting on this privilege has been noted.

result of fornication or concubinage could be legitimated by the parents' subsequent marriage (*per subsequens matrimonium*). The deficiency (if it were seen as such) of legitimating by subsequent marriage was that the circumstance of the original illegitimacy, although mitigated, was not erased. The inquiry did not refer to any offspring of the pair on whose behalf a "regular marriage," under the Marriage Order, was asked, but it is probable that children were involved.[43] In the event, Attorney-General William Porter was not persuaded by the view that certain free persons deserved inclusion on the ground of disadvantage, equal to slavery, which they had experienced in the past. They must not, Porter ruled, be confounded with the former slaves lest the authorities permit "what in all probability, was criminal negligence or worse" on their part.[44]

Porter is remembered for his liberal views – and for witty comment which did not exclude the church.[45] His dismissal of "the necessity of baptism" was an example of his delight in dissecting legal intricacies: in effect he cleared a path for NHK clergy to "marry persons still heathens", or decline to officiate if their "scruples" forbade it – leading to opposite

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42. By and large, Roman-Dutch law was still in force at the Cape, although some forms of English law had been introduced: "Despite the official retention of Roman-Dutch law as the law of South Africa … there was a general movement towards English law and institutions … Government, administration and the judicial machinery were reshaped along English lines. English civil and criminal procedure were substantially taken over, while the English law of evidence was adopted in its entirety"; but also: "There were areas where the influence of English law was minimal, such as the law of persons and family relations, succession, property and portions of the law of obligations …", see: H.R. Hahlo and E. Kahn, *The South African Legal System and its Background* (Juta & Co, Limited, Cape Town, 1968), pp 576, 578.
43. For the final exchange on this subject, see: Porter, *The Porter Speeches,* pp iv-vi. An Order-in-Council of 3 April 1840 granted the "forms and ritual of the Dutch Reformed Church" when solemnizing marriages equal status with those of the United Church of England and Ireland. Marriages performed according to other usages required a special declaration, see: Ward, *A Handbook to the Marriage Laws*, p 14.
44. Porter commented extensively on the question of Christian names, arguing that the stipulation "does not impose the necessity of baptism, but is merely intended as a matter of description …" Children fathered by slaves on free women had, under the slave codes, been regarded as freeborn while those fathered by free men on slave women were slaves.
45. In his speech before the Legislative Council respecting the Dutch Reformed Church Bill, on 31 July 1843, Porter said: "It is not intended, assuredly not, to withdraw from that great school for grown up children, the Dutch Reformed Church, the aid which it has hitherto received from Government", *in* Porter, *The Porter Speeches*, p 214. For his reputation, see: A. Sachs, *Justice in South Africa* (Sussex University Press, Brighton, 1973), pp 47-48.

results.[46] The severity of his remarks respecting the freeborn pair who had wished to marry under the Marriage Order appears, on first sight, to be out of character, but Irish (and non-establishment, respecting the church) as he was, Porter was schooled in British marriage and property law which, pre-eminently, was designed to protect blood lines and inheritance by legitimate heirs. In his study of the American family, Michael Grossberg observed that England's common law regarded legitimation by subsequent marriage as "of a very immoral tendency, and an encouragement to the increase of spurious issue".[47] Neither the Order's framers, nor the Cape's Attorney-General entertained the idea that retrospective legitimation should extend beyond the singular case of marriages *de facto* by the former slaves.

In *Liberating the Family?*, Pamela Scully analysed the ways in which the interests of governments, abolitionists and missionaries contested or reinforced the marriage and related policies which were devised during the four-year process of slave emancipation, and in the post-abolition period.[48] Of concern here is how the evolving attitudes and policies impacted on concubinage and illegitimacy in Cape Town. As said, there is evidence for an increased demand for legal marriage in country churches, and at mission stations under the auspices of the Moravians, Wesleyans, London Missionary Society and others. To the extent that this occurred, it did so within a strict interpretation of the new measures. In Cape Town where concubinage was commonplace, and incurred less stigma than it appears to have done in the rural communities of the colony, one may ask if a more accommodating approach was needed to effect the moral transformation and respect for legality which the framers of the Marriage Order purported to encourage.[49]

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46. Porter, *The Porter Speeches*, pp v-vi. In 1846 the NHK's requirement that baptism precede a marriage was illustrated by the case of Jan Hollander who wished to marry Catharina Izaakse, a church member and the mother of his child, but was barred from doing so until the successful completion of his confirmation classes. The child's baptism was also postponed, pending their marriage, NGKA: G1, 1/24, May 1846.
47. M. Grossberg, *Governing the Hearth, Law and the Family in Nineteenth-Century America* (The University of North Carolina Press, Chapel Hill & London, 1985), p 204. For speculation respecting Porter's sexual orientation, see: K. McKenzie, *Scandal in the colonies, Sydney & Cape Town, 1820-1850* (Melbourne University Press, Carlton, 2004), pp 94-95.
48. Scully, *Liberating the Family?*, pp 110-116.
49. Porter was of the opinion that "a law framed for the society of the West Indies, as the Order in Council was, scarcely meets the wants of the society at the Cape", but it is not clear that his reservations touched on its limitations on that specific respect. CAR: Attorney-General (hereafter AG) 2616, 20 May 1842, p 77.

Concubinage versus marriage: A matter of cost?

Marriage entailed two sorts of expense: that attached to the legal formalities and that of the celebration itself. Men who acknowledged fathering an out-of-wedlock child sometimes cited these costs as the reason for not marrying. The Marriage Order had fixed four shillings as the fee for "solemnizing and registering a marriage," and transmitting the papers to government.[50] NHK member Fredrik Petrus Maneveld claimed that he had no money with which to marry Clara Lipper and legitimate their child, for which reason he had left Cape Town to look for work. In such a case the church, if convinced of the miscreant's seriousness, might have helped to secure a waiver of the fees.[51] Father-of-ten Johan Baard explained that he wished to marry his children's mother, Alida Gertsen, but could not afford wedding clothes and other costs – a concern which suggests that the poor were not exempt from the Cape custom of lavish show and hospitality when marrying.[52] When Baard asked for a private ceremony the council could not at once grant his request. In 1842 the Attorney-General had ruled that church weddings had more to do with "seemliness than legality"; a marriage was valid if conducted quietly at home. Did the NHK's uncertainty reflect policy at variance with that? In the event, Baard and Gertsen were married almost at once.[53]

The well-to-do had a different view of the financial penalties incurred by marrying. Charles Davidson Bell, a prominent member of Cape society whose first marriage ended with his wife's adultery,

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50. Article 23 of the Marriage Order-in-Council named additional fees for searches which might be required to verify the couple's eligibility to marry. A second order, of 20 February 1839, clarified the point that ministers were not to be deprived of any additional "fee, perquisite, or emolument" to which they were previously entitled. For licence fees as an impediment, see: P. Scully, "Private & Public Worlds of Emancipation in the Rural Western Cape, c.1830-1842", *in* N. Worden and C. Crais (eds), *Breaking the chains, slavery and its legacy in the nineteenth century Cape Colony* (Witwatersrand University Press, Johannesburg, 1994), p 216.
51. NGKA: G1, 1/24, November, 1848; 1/25, January and March, 1849. When Johannes Kleynsmit claimed he was too poor to marry the mother of his two children, the costs were waived and the marriage took place, NGKA: G1, 1/23, June 1846.
52. NGKA: G1, 1/24, November 1848. Cape weddings a century earlier were described in detail by O.F. Mentzel in *A Geographical and Topographical Description of the Cape of Good Hope* II (The Van Riebeeck Society, Cape Town, 1925), pp 115-121; Botha, *Early Cape Matrimonial Law*, p 3.
53. CAR: AG 2616, Report Book, 13 March 1841 to 17 November 1843, Attorney-General Porter, 5 August 1842 and 2 February 1843; Heese & Lombard, *Suid-Afrikaanse Geslagregisters* II, p 105.

complained of other deterrents to matrimony.[54] His argument began with the point that, under Roman-Dutch law, bastards had no claim on the reputed father's estate beyond their maintenance until they came of age. On that account, concubinage made economic sense: "Who can produce an instance in this colony of a man mulcted of more than £25 against his will for an illegitimate child? Who will compare that with the tax imposed for life on the savings of the honest, God-fearing frugal father of a legitimate child?" Bell referred to the fact that a man who married a second time – in a colony where "few healthy men can live alone and be thought chaste" – suffered an "iniquitous tax" on his worldly wealth by the obligation to provide for adult children of a previous marriage at the very moment when he faced the prospect of supporting minor children by his second wife. Laws which "tax a parent for legitimately introducing children into the world … and leave the illegitimate-child-tax so light" must "promote immorality", he insisted.[55]

Bell gave this evidence before the Law of Inheritance Commission appointed in the mid-1860s. Witnesses were quizzed concerning immorality which might be attributed to the existing laws of marriage and inheritance. In their final report the commissioners maintained that the colonial law respecting these matters was "immeasurably superior to the law of England" where a man "may, by law, leave all his fortune to his kept mistress, and let his minor children and their mother go to the workhouse". They had heard the evidence of sixteen "gentlemen" representing "the most opposite opinions" – a formula designed to ensure that diverse attitudes respecting proper relations between the sexes, and within families, would be aired. Within this framework of opinion – derived solely, in fact, from the perspective of privileged males – one detects Attorney-General Porter's hand in guiding the commission to a "liberal" view of women's rights. For example, the final report acknowledged a wife's material contribution to "the husband's gains" – discounting the view of Cape Town merchant Thomas Ansdell that "a wife can only be a partner in so far as she will economize the funds which the husband gives her". In support of his views, Ansdell had averred that it was not "the wife alone who has the bringing-up of the children;

54. For Bell's marital problems, see: CAR: Cape Supreme Court (hereafter CSC) 2/1/1/64, 24-25; Worden, Van Heyningen & Bickford-Smith, *Cape Town, The Making of a City*, p 204.

55. *Report of the Law of Inheritance Commission for the Western Districts - G.15-'65* (Saul Solomon & Co, Cape Town, 1866), pp 187, 224-225, 235, 237. Bell's objection was to the *lex hac edictali* which affected the terms of the ante-nuptial contract respecting a second marriage where there were living children of the former marriage.

because the husband is paramount, and in nine cases out of ten he forms the character of the wife and of the children also".[56]

The commissioners explored the points which Bell had raised. A similar debate had taken place in Britain: Porter asked if he were aware of the "Controversy conducted in the *Times* a couple of years ago, as to whether … the mode in which married women expected to be maintained in England did not drive men of moderate means to form illicit connections". Bell tried to dodge condoning concubinage with an alternative – not, in fact, readily distinguishable – which he described as "natural marriage unblessed by a clergyman." It entailed a private pledge of fidelity ("real chastity") which, he claimed, would prove more binding than the pledges which were publicly made.[57] Although the Commission cited other reasons for abolishing "the *lex hac edictali* having reference to second marriages" – the law which was denounced by Bell – his assertions of how comparative costs impacted on sexual behaviour may have contributed to that outcome.[58]

For most ex-slaves the impediments to marriage which were alleged by Maneveld-Lipper and Baard-Gertsen had greater relevance than those of Bell. Under slavery, manumission had hinged on a guarantee that the free black (*vryswarte*) would not become a burden on the state (or its welfare arm, the church).[59] The four-year period of apprenticeship prescribed by the Abolition Act of 1833 aimed to prepare the slaves to be self-supporting, in or out of service, after 1838; it could not, however, prevent the appearance of most at the low end of the economic scale.[60] Ward masters were clearly shocked to the core by the findings of the town-wide inspection they conducted in 1840: "In many

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56. *Report of the Law of Inheritance Commission for the Western Districts*, pp vii-viii, x, xix, 86. British-born Ansdell had been more than 40 years in the colony. As one of Cape Town's "élite merchants" he was regularly consulted on matters of public policy. D. Warren, "Proposals for an 'Improved Legislature' for the Cape Colony (1850): A Case Study of the Ideology of a Colonial Elite", *Cabo*, 6, 1, 1994, p 14.
57. *Report of the Law of Inheritance Commission for the Western Districts,* pp 186-187. Bell claimed that his "suggestion as to natural marriage had no connexion with concubinage", p 224.
58. *Report of the Law of Inheritance Commission for the Western Districts,* p xxv; *Report of the Law of Inheritance Commission* (Grahamstown, 1866), p 71.
59. J.L. Hattingh, "Slawevrystellings aan die Kaap Tussen 1700 en 1720", *Kronos*, 4, 1981, pp 27-29, 36.
60. In Cape Town, aged and infirm "government apprentices" – ex-slaves who had been employed on public works – were provided for at the Pauper Institution/Establishment attached to Somerset Hospital.

instances a proportion of 8 Individuals to a space of 12 x 14 feet was found" – a space which "excludes air and almost light entirely" and "tends to foster Idleness, and to promote Licentiousness".[61]

It is not possible at this stage of our understanding of Cape Town's dynamics to say if a fair proportion of the persons met in the church baptismal registers and court records emerged from the "Houses, Cellars – or we may almost say Dens – of the Col'd [coloured] population" of mid-century Cape Town.[62] The extent to which the denizens of such appalling back-street squalour were among those who sought church membership and risked its censure is conjectural. Whatever the case, their own poverty appears not to have been articulated by the women who faced punishment by requesting baptism for their bastards: a mother's responsibility was care-giving, a father's was financial support. Anna Catharina Roodt declared that John Ross, the father of her child, wanted to marry her, but had been too ill and then, having survived, lacked the means to do so. The Commission of Censure took the view that she might be prevaricating and, were she serious about marrying, the trifling cost would not prevent it (*deze geringe kosten hem daarvan niet zoude terug houden*). They married, and the child was baptised.[63] In 1864 Isaac Johannes *van de Kaap* – thus identified by the scribe as a freed slave, though he called himself Dominiques van Blerck – was found to have spent a long life in concubinage with Louisa Harmsen. Whether cost had been a motive – amidst the proofs of unwed constancy – the church urged them to marry, which they did.[64]

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61. CAR: CO 490, Item 159, Reports of Cape Town Wardmasters and Medical Officers, 1840, see Wards 2 and 4 for quotations. The inspection followed a severe smallpox epidemic. The "filth and corruption" discovered were clearly a revelation to the civil officers. Church officers – who were also of the middle class – were aware, through their house visits, of those conditions but the reports of their investigations of individual need do not reflect the same generalised horror, for example, see the reports of house visits carried out in 1859, NGKA: G1, 1/27, 7 March 1859, pp 353-354. For London at the time, see: P. Ackroyd, *London, the Biography* (Vintage, London, 2001), pp 376-377.
62. CAR: CO 490, Item 159, Wardmasters' Reports, Ward 6. For the late nineteenth century, see: E. van Heyningen, "Poverty, Self-Help and Community: The Survival of the Poor in Cape Town, 1880-1910", *South African Historical Journal*, 24, 1991, pp 128-143.
63. NGKA: G1, 1/24, 2 March 1846, p 3. My thanks to Gerald Groenewald for suggesting that as Roodt, but not Ross, was an NHK member, the Commission had to exert its influence on her to effect a marriage – hence the allegation that she might merely pretend (*voorgeeft*) seriousness re marrying.
64. NGKA: G1, 1/29, November 1864 and G1, 13/7, Marriage Register, 31 October 1864. Harmsen also had another name, the alias Van der Burgh.

Incidents of courtship: Promises and out-of-wedlock births[65]

"Prenuptial" sexual activity connotes an intention to marry that distinguishes it from the "carnal connection" which defied policing in Cape Town's streets and canteens. Many women who presented out-of-wedlock children for baptism alleged that they had engaged in intercourse and fallen pregnant only after a promise of marriage.[66] Younger men were, perhaps, especially prone to fulsome declarations of intent: Aletta Richter produced a letter wherein Johannes Theodorus Eckardt declared his undying love but, when their child was born, he had cooled and his parents blocked the marriage.[67] Some putative fathers stalled but afterwards gave in; others left the colony, married someone else, disappeared on commando or simply refused. A few counter-attacked: when Christina Verwey accused Arie de Melker of deceiving her, he retorted that she, in fact, seduced him and was not a respectable girl.[68] There were, as well, cases where marriage waited while a willing partner underwent instruction for baptism – a NHK, although no longer an official requirement.[69]

By the mid-nineteenth century, the legal nature of a promise to marry had come almost full circle from the Roman concept of a "somewhat toothless agreement", through centuries when the church defined it as a binding contract, to an understanding that "courtship should be considered experimental, not legally binding" in the sense of compelling due performance.[70] Article 19 of the Marriage Order-in-Council decreed that "in no case whatsoever shall any suit or proceeding be had … to compel the celebration of any marriage by reason of any promise or marriage-contract entered into or by reason of seduction or of any cause whatsoever." The remedy, prescribed in Article 20, lay in a

65. In the words of Peter Laslett: "Prenuptial pregnancy is by definition an incident of courtship and much of illegitimacy is regarded as having arisen in the same way", "Introduction: comparing illegitimacy over time and between cultures", *in* P. Laslett, K. Oosterveen and R.M. Smith (eds), *Bastardy and its Comparative History* (Edward Arnold, London, 1980), p 54.
66. See P. Laslett, *Family life and illicit love in earlier generations, Essays in historical sociology* (Cambridge University Press, 1978), p 128; J.R. Gillis, *For Better, For Worse, British Marriages, 1600 to the Present* (Oxford University Press, New York, 1985), pp 50, 110, 180-182.
67. NGKA: G1, 1/30, February 1868.
68. NGKA: G1, 1/29, December 1864.
69. See above for references to William Porter's opinion on this matter.
70. Grossberg, *Governing the Hearth,* p 58; D.S.P. Cronjé, *The South African Law of Persons and Family Law* (Butterworths, Durban, 1995), pp 129-132.

suit for damages in default of marriage.[71] It has been shown that this development was not welcomed by Cape Town's residents of "Dutch" descent: whereas ten women (eight of whom were pregnant) had demanded due performance of a promise of marriage in Cape Town's Supreme Court in the decade preceding the Marriage Order, none filed suit for damages after the new marriage edict until a single case in 1851.[72] Reparation via the court was, in any case, an option for the well-to-do. In 1840, Britain's parliament rejected a Seduction Bill which had aimed to bring legal proceedings for breach of promise within the reach of the "working class".[73] At the Cape, poor women (insofar as their strategies were documented) tended to approach a church to baptise an out-of-wedlock child – the first step in a process whereby the reputed fathers were called to account respecting marriage and/or their obligations with respect to the mother's lying-in expenses and support for the child.

Christina Helena Elizabeth Izaakse's dilemma illustrated the fact that poor women whose lovers reneged on a promise of marriage were unlikely to seek reparation through a court of law. In December 1848 she requested baptism for her child by Christoffel Fredrik Croeser, who was an NHK member. Called before the church council, he denied any

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71. Tennant & Jackson (eds), *Statutes of the Cape of Good Hope* I, Marriage Order in Council. By these provisions the former slave colonies were brought into line with British policy in terms of the Hardwicke Marriage Act of 1753. Judicial rulings respecting specific performance of a promise of marriage were terminated in the Netherlands in the same year, D. Haks, *Huwelijk en gezin in Holland in de 17de en 18de eeuw, Processtukken en moralisten over aspecten van het laat 17de- en 18de-eeuwse gezinsleven* (Hes Uitgevers, Utrecht, 1985), p 125.

72. K. McKenzie, "Wollstonecraft's Models?: Female Honour and Sexuality in Middle-Class Settler Cape Town, 1800-1854", *Kronos*, 23, November 1996, pp 57-74. In 1851 the minor, Christina Beck (aided by her father), was awarded £250, of the £2 000 initially demanded, CAR: CSC 2/1/1/67, 19. This breach of promise case appears not to have entailed seduction – which was difficult to prove in a court of law where a woman's oath, when paternity was denied under oath by the man, had no validity in the absence of outside corroboration. An additional case, prior to the Marriage Order, involved a suit by a man against his intended bride, McKenzie, pp 67-70 and note 83. "Dutch" connoted pre-British, regardless of actual origin in Europe.

73. L. Rose, *The Massacre of the Innocents, Infanticide in Britain 1800-1939* (Routledge & Kegan Paul, London, 1986), p 28. Some success was achieved with the Poor Law Amendment Act of 1844. The Act also provided that "a Poor Law officer who procured a forced marriage of a mother of a bastard child was guilty of a misdemeanour" – indicating that this solution had yet to be abandoned, I. Pinchbeck and M. Hewitt, *Children in English Society* II, *From the Eighteenth Century to the Children Act 1948* (Routledge & Kegan Paul, London, 1973), pp 592-593.

knowledge of his accuser until, hearing her described, he recalled that she was formerly a slave belonging to his uncle, Jan Lombaard. The council's efforts to bring them together succeeded in July 1849 when Izaakse gave her account of what had occurred. She had feared that Croeser would refuse her marriage because she was coloured, but he had pointed to his brother who had married a coloured woman (*zyn Broeder Doris die met een bruine meisje getrouwd is*) and to a friend whose wife was even darker (*eene vrouw die veel bruiner*). On the strength of those assurances and his open affection she had consented, and prepared for marriage by attending catechism and being baptised, but in due course she discovered she was pregnant, and Croeser ceased to call.[74]

Croeser had told Izaakse that he would readily get his mother's permission to marry, which suggests that he was not yet 21 – from 1829, the legal age of majority. The incapacity of minors respecting a promise to marry had been established by the decision in the case of Greeff versus Verreaux, where the undertakings of the defendant, a minor, were not enforceable even though they had been proven beyond doubt.[75] Whether a court of law might have awarded damages to Izaakse, whose evidence for seduction appears to have been irrefutable, that course was not adopted.[76] The church council treated Croeser's denials with scepticism, observing how he avoided meeting Izaakse and the witnesses to his behaviour who testified on her behalf. He was censured but, in the event,

74. NGKA: G1, 1/24-25, December 1848-August 1849. For C.F. Croeser (no issue recorded), see: Heese & Lombard, *Suid-Afrikaanse Geslagregisters* I, p 680: Croeser, d8. Croeser was in the employ of a Malmesbury butcher named Greeff at the time of his liaison with Izaakse – see: NGKA: G1 1/25, July 1849; he had returned home to Cape Town afterwards. His brother "Doris" was Theodorus Croeser who married Rosetta Erntzen in 1839, legitimating two sons born out-of-wedlock – see: CAR: Verbatim Copies (hereafter VC) 618, 11 August 1839.

75. CAR: CSC 2/1/1/6, 13, Elizabeth Helena Henrietta Greeff versus Pierre Jules Verreaux, 6 July 1829; J. Buchanan (ed), *Cases Decided in the Supreme Court of the Cape of Good Hope as reported by the Hon. William Menzies Esq.* I (J.C. Juta, Cape Town, 1870-1903), Greef [*sic*] versus Verreaux, 20 March 1829, pp 151-155. At the time of the alleged offence, Verreaux had been under the then-legal age of majority, namely 25. For the reduction of the age of majority to 21, see: Tennant & Jackson (eds), *Statutes of the Cape of Good Hope* I, Ordinance Number 62 of 1829. In 1834 Elizabeth Greeff married John Brumfield by special licence, which circumvented banns.

76. It appears that Izaakse desired "due performance" – an outcome no longer available through the law.

the child's baptism as Wilhelmina Fredrika Elizabeth was recorded in the special register for out-of-wedlock births.[77]

At the Cape, as in other slave societies, promises as a precursor to sex had a history other than that involving the prospect of a future marriage. Slave owners prevailed upon their female slaves to grant sexual favours with promises of manumission – unenforceable, when they were dishonoured, before (and sometimes after) the slave protections introduced in the 1820s.[78] The women's extraction of a promise – or their acceptance at face value of a promise offered – was not necessarily premised on a naive faith respecting its fulfilment. More subtle strategies were available to the powerless. With respect to a promise of manumission, John Mason found:

> In only a few cases do slave women allege that they had fought their masters off or had run away to escape sexual abuse. They instead came to the [slave] protectors after the fact, often with a child in hand, when they had a claim against their masters which they felt that they could enforce.[79]

As an extenuating factor respecting sexual misconduct, breach of promise was a flexible instrument in the hands of unwed mothers. Most promises were verbal and unwitnessed (ardent minors, *pace* Eckardt, might commit themselves in pen and ink).[80] The mothers' avowals before church commissions and the courts reflected not just their understandings of a partner's intent, but their own feelings towards relationships which fell short of their earlier hopes.

In 1858 Saliema Danielse requested baptism for her five-month-old child, citing a promise of marriage (*onder het doen van trouwbelofte aan*

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77. NGKA: G1, 11/9, Doop Acten van Onechte Kinderen, 1 June 1849. The child's names referred to her mother's faithful sister Wilhelmina, her putative father and her mother.
78. Studies of slave family life and slave agency have yielded valuable insights respecting issues such as this, for example see: Shell, *Children of Bondage*, Chapter 10 and especially pp 287, 297-298; Bank, *Decline of Urban Slavery*, pp 101-110; F.H.S. Vernal, "Steyntje van de Kaap: Concubinage, Racial Descent and Manumission in the Cape Colony, 1777-1822." BA thesis, Princeton University, 1995.
79. J.E. Mason Jr, "'Fit for Freedom': The slaves, slavery, and emancipation in the Cape Colony, South Africa, 1806 to 1842" I. PhD thesis, Yale University, 1992, pp 220-221. See also: J.E. Mason, *Social Death and Resurrection, Slavery and Emancipation in South Africa* (University of Virginia Press, Charlottesville & London, 2003), pp 96-97.
80. The passionate correspondence between the minor, Verreaux, and Greeff (see above) may be read in CAR: CSC 2/1/1/6, 13, 6 July 1829.

haar) by Jacobus Isaakze. The church's investigator reported that Danielse's mother kept a brothel (*een slecht huis*): Isaakze denied paternity on the grounds that, as a client, he had paid for sex (*dat hy in dat huis hoeren loon betaald heeft*). In the usual way, the NHK placed Danielse under censure for twelve months. This rare example, where baptism was sought for a child who was plausibly the result of prostitution, suggests unknown numbers of out-of-wedlock births where courtship was an irrelevance and marriage not discussed.[81]

Race and class

In January 1842 Margaretha Maria van Geems requested baptism for her child by Jacobus Theodorus Bruyns who, she said, had left her after a promise of marriage. Jacobus Theodorus van de Valle, as the child was christened, was the eighth fathered by Bruyns, the first seven being with Agatha Catharina Tims whom, it appears, he had not married. Bruyns himself – the tenth child and namesake of Jacobus Theodorus and his wife, Johanna Elizabeth Adamse *van de Kaap* – had a younger half-sister born to Martha *van de Kaap* while Adamse was still alive.[82] His grandparents – the first Jacobus Theodorus and Christina Elizabeth Roelofse *van de Kaap* – had a complex history of reproduction in- and out-of-wedlock.[83] From extant records of this family's sexual relationships, and the regularity with which the offspring were granted baptism, it may be seen that administering the sacrament weighed more heavily with the NHK (and other churches) than did elusive morality or the legitimation of a child, greatly though those outcomes were desired. Van Geems was placed under censure for a year. In the meantime her son was baptised under the usual conditions, namely the enlistment of two sponsors who were members in good standing of the NHK.[84]

The evidence suggests that there was homogeneity of race and class in the lineages of van Geems and Bruyns. Where there was not, the gap might be regarded as unbridgeable. When NHK member Clara Elizabeth Boltman was called to account for immoral behaviour, she advised that the father of her two children was in society's upper

81. NGKA: G1, 1/27, Notulen, 12 April 1858, pp 198-200. "*Slecht huis*" might be construed as simply a rowdy place but its meaning as a brothel seems confirmed by the reference to "*hoeren loon*".
82. Heese & Lombard (eds), *Suid-Afrikaanse Geslagregisters* I, pp 486-487.
83. CAR: VC608, Doop Register soo van Compagnies Slaven als van Compagnies-Dienaren en de Vrij Burgers beginnende met primo Januari Ao 1757, Catharina Elisabeth Roelofse *van de Kaap*, 1777. For the Roelofse family, see Malherbe, "Illegitimacy and Family Formation", pp 1163-1165.
84. NGKA: G1, 1/22, Notulen, January 1842.

ranks, thus they could not marry – a circumstance which she appeared to accept as natural. Boltman was the granddaughter of a Swedish immigrant and a free black, Clara Elizabeth *van de Kaap*.[85] She reported that, at the father's request, their two children were baptised in the English church where his name was entered in the register; still she was not at liberty to reveal it to the NHK.[86] Her sense that because she was intimate only with him and regarded him as her husband – in short, that they were common-law husband and wife – did not persuade the church to withhold its censure. In 1865 she married her long-term partner, Daniel Brink – legitimating their children and entitling them to inherit from their father's estate.[87] In 1847, a certain Charlotta Fredrika (surname illegible in the source) also saw fit to protect her partner's identity on the grounds that he was of the town's elite.[88]

Now and then the father of an out-of-wedlock child wished to marry, but found himself blocked. The Marriage Ordinance addressed that contingency by permitting applications to the chief justice for a ruling. In 1850 Jurgen Jacobus van Winkel petitioned to marry Rachel Williams who was pregnant with his child. Both Van Winkel, who was three months short of his majority, and the Scottish Church to which Williams belonged, had appealed to his parents for permission, but they were adamantly opposed. For parents to be overruled it was essential to show that the minor was self-supporting. Van Winkel, a carpenter earning 18 shillings per week, was able to satisfy the court. In his application he had said that he "knows of no ground of objection which his Parents or either of them can or do allege against … [Williams] except that she is to a certain extent,- a person of color".[89] Chief Justice

85. For usage of the term "free black", see: Scully, *Liberating the Family?*, p 14. The freed slaves formed at all times a small minority of the population of the colony, but were a significant social category in Cape Town where most were settled.

86. The Church of England baptismal register records Daniel Brink's acknowledgment of paternity respecting Boltman's sons Johannes (2¼ years) and Daniel (3 months),see: CAR: A1939, 1/1/3, 26 September 1842.

87. NGKA: G1, 1/24, Notulen, January 1848; Heese & Lombard, *Geslagregisters* I, p 322. For an earlier example, see the Van Reenen-Le Roux case, Malherbe, "Paternity and Illegitimacy", p 75.

88. NGKA: G1, 1/24, 6 December 1847, pp 393-394. The unnamed partner had fathered four children.

89. CAR: CSC8/1/1, 6, 20 July 1850, Orders under Section 17 of the Marriage Ordinance, February 1839, Volume 1, 1-122. Article 17 applied where "the parents or parent … of one or both of the parties to be married may be … induced unreasonably and improperly to withhold his, her, or their consent to a proper marriage ..." For attitudes in a rural area, see the otherwise satisfactory William Allchin who had "unfortunately married a woman of color" – Scully, *Liberating the Family?,* p 125.

Wylde found the marriage "proper and unobjectionable". Notable here is the reference to "color" – made more intriguing by the expression, "to a certain extent". Was Van Winkel's point of reference somatic or, rather, the intricacies of lineage? The case of Croeser and Izaakse – also mid-century – illustrated the way in which colour consciousness featured in considerations of matrimony: not the fact of colour alone, but the degree (*veel bruiner*) had figured as an element.

Amongst historians there is consensus that "racial stratification in Cape society seemed to get worse as time went by. The convergence between economic status and racial status also became more apparent …"[90] This trend accelerated in the mid-nineteenth century. The terms "coloured" and "persons of colour," employed in the British West Indies, are thought to have been relayed to the Cape via Britain's Colonial Office. A melding of hitherto disparate groups, the free blacks and "Bastaard Hottentots" (of indigenous Khoekhoen and slave descent), was effected by the Cape's Ordinance 50 of 1828 which combined them as "persons of colour". Emancipation hastened the process: "In practice, speech, and, indirectly, in law, the colonists were inventing a racially defined, subordinate working class."[91]

At the outset I noted Nazzari's contention that Brazil's Catholic Church was complicit in the "belief that class and racial endogamy were requisites for marriage". This seems the right place to make the point that, unknowable as are the minds and hearts of the church officers involved, there are scant grounds in extant records to deduce that concerns of that description outweighed their wish to save souls (baptise and confirm), combat immorality (overcome the reasons for not marrying), and confer legitimacy on children born out-of-wedlock. A small but telling indicator that "class" did not enjoy the special protection of the NHK – the Cape's largest church – came in 1837. Shortly before the freeing of the slave apprentices a question arose, in the nearby town of Stellenbosch, whether the clergy could refuse to baptise when parents appropriated well-known (settler) family names for the child – more especially if it were illegitimate. The synod could find no reason to overrule the parents' choice.[92]

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90. N. Penn, "The northern Cape frontier zone in South African frontier historiography", *in* L. Russell (ed), *Colonial frontiers, indigenous-European encounters in settler societies* (Manchester University Press, Manchester and New York, 2001), p 34.
91. Mason, *Social Death and Resurrection*, p 276.
92. NGKA: Acta Synodi, 1824-1915, Point 14, eighth sitting, 26 October 1837, pp 134, 186. The Lutherans appear to have adhered closely to NHK practice.

Conclusion

In 1840 the NHK baptised 41 children, of 25 unwed mothers – 4 of whom were deceased.[93] In 1841, 39 children (of 29 mothers) and the following year, 50 children (of 38 mothers) were baptised by the Dutch church. This pattern persisted through the 1840s, but, from the 1850s, the number of mothers reported as seeking baptism for their out-of-wedlock children dropped. The reasons for this are as yet unclear.[94]

Scully has traced the links between family formation and labour legislation in the aftermath of slavery: the "promotion of those social practices and habits which were believed to reproduce particular kinds of economic relationships become paramount in the post-emancipation context at the Cape".[95] For numbers of the freed slaves, marriage not only affirmed a couple's mutual affection, but was, as well, the means to a desired respectability; additionally, for men, it legalised the exercise of paternal power within the family. Ultimately, the framers of new labour law recognised that many lived as man and wife, and procreated families, without contracting legal marriages – a fact acknowledged by the ordinance respecting "Masters, Servants, and Apprentices" of 1842, but the exercise by which that outcome was reached, resulted in a clearer understanding of race and class, and the behaviour which underpinned one's place in Cape society.[96]

In time the toponyms which identified many mothers of out-of-wedlock children as freed slaves, or of slave descent, fell into disuse: the last noticed in the NHK's baptismal registers was in 1848.[97] However, from the ongoing genealogical research which has relied mainly on the records of the several Protestant denominations, we know that illegitimacy was (and is) a legacy of the Cape's 180-year-long history of

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Neither for them, nor for the Anglicans – next in size in Cape Town at the time – are there detailed records of their deliberations.

93. NGKA: G1, 11/7, Doop Acten van Onechte Kinderen, 1840.
94. It is not feasible at this stage to link this with Pamela Scully's assertion that "it was only in the late nineteenth century that formal Christian marriage became widespread among people of color in the Western Cape", see: "Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa", *The American Historical Review*, 100, 2, April 1995, p 344.
95. Scully, *Liberating the Family?*, p 109.
96. Scully, *Liberating the Family?*, pp 82-88, 110-116.
97. NGKA: G1, 11/8, Sitty Diana *van de Kaap*, 13 October 1848. The case of Dominiques van Blerck, identified as Isaac Johannes *van de Kaap* in 1864, was noted above.

slavery. Though the focus has tended to be on mothers and their bastards, that legacy pertains also to men: the census of 1875 showed a significantly higher proportion of white males in legal marriages, compared with males who were not white.[98] The out-of-wedlock children born to, and presented for baptism by women of colour, were the result of common-law marriages and shorter-term unions – some, no doubt, with men who also procreated families with "white" women and swelled the ranks of those numbered in legal marriages.

Although the Cape's almost two centuries of slavery produced what Peter Laslett has famously termed "something like a sub-society of the illegitimacy-prone",[99] a range of factors conducive to illegitimacy, such as are found in most societies, was also present – for example, the persistence of poverty, and of large numbers of transient men. In mid-nineteenth century Cape Town, illegitimacy with its attendant ills of moral offence and legal disability for the out-of-wedlock child was the domain of the churches and, if they had such, their welfare arms. As the century progressed, Britain's private philanthropies and the state fixated on the moral regeneration of "fallen" women and the "best interest" (as they perceived it) of the out-of-wedlock child. By fits and starts, those trends were replicated by Cape Town's middle class, the colonial legislature and the free press.[100] In more recent times, inquiries into illegitimacy – its causes, statistical frequency and social consequences down the centuries – have engaged historians and social scientists. The new millennium seems set to produce a host of out-of-wedlock births, and fresh reasons for not marrying.

Abstract

"Ten Reasons for Not Marrying" contributes to an investigation into illegitimacy in Cape Town in the nineteenth century – itself part of a larger exploration of out-of-wedlock births in South Africa's "Mother City" from its foundation to the present. Previous published works have examined issues such as family formation, unacknowledged paternity and the varied fortunes of the out-of-wedlock child. Studies of illegitimacy in

98. Feast, "The Policeman as Thief-taker", p 64.
99. Laslett, *Family life and illicit love*, p 107.
100. For Britain, for example see: E.J. Bristow, *Vice and Vigilance, Purity Movements in Britain since 1700* (Gill and Macmillan, Dublin, 1977). For Cape Town and its links with developments in Britain, see: E.B. van Heyningen, "The Social Evil in the Cape Colony 1868-1902: Prostitution and the Contagious Diseases Acts", *Journal of Southern African Studies*, 10, 2, April 1984, pp 170-197.

nineteenth century Cape Town hinge inexorably on the institution of slavery, and on the aftermath of slave emancipation in 1838. Additionally they require attention to the proclaimed policies and more subtle influences originating in Britain and given force by the colonial government and the influx of British settlers, who represented every social class. In 1840 Cape Town gained municipal status, a milestone which enabled those newly empowered as commissioners and ward masters to regulate and, as far as possible, to mould the motley townsfolk along lines "modern" and "respectable". Despite their efforts, the incidence of out-of-wedlock births, with their implications for morality and social welfare, remained high. This article investigates some obstacles to marrying. Work is in hand respecting the demographics of illegitimacy in Cape Town prior to the institution of official census-taking and statistics collection.

Opsomming

Tien Redes om Nie te Trou Nie: Seks en Buite-egtelikheid in Kaapstad in die Middel-Negentiende Eeu

"Tien Redes om Nie te Trou nie" is deel van 'n ondersoek na buite-egtelikheid in Kaapstad in die negentiende eeu – wat weer deel vorm van 'n breër ondersoek na buite-egtelike geboortes in die "moederstad" van Suid-Afrika van die totstandkoming daarvan tot die hede. Publikasies wat reeds hieroor verskyn het, ondersoek onderwerpe soos gesinsvorming, nie-erkende vaderskap en die uiteenlopende lotgevalle van buite-egtelike kinders. Studies oor buite-egtelikheid in Kaapstad in die negentiende eeu wentel noodwendig om slawerny en die nagevolge van die vrystelling van slawe in 1838. Verder vereis dit dat aandag gegee word aan die geïmplementeerde beleid van die tyd, asook die meer subtiele invloede wat hulle ontstaan in Brittanje gehad het, en deur die koloniale regering en die instroming van Britse setlaars vanuit alle sosiale stande, bekragtig is. In 1840 het Kaapstad munisipale status verkry, 'n mylpaal wat diegene wat pas as kommissarisse en wyksmeesters bemagtig is, in staat gestel het om die diverse dorpenaars sover as moontlik volgens moderne eietydse en respektabele lyne te reguleer en te slyp. Ten spyte van hulle pogings om die teendeel te bewerkstellig, het die voorkoms van buite-egtelike geboortes, met die verwante gevolge wat moraliteit en sosiale welsyn betref, hoog gebly. Hierdie artikel ondersoek enkele struikelblokke wat huwelike verhinder het. Aandag word gegee aan die demografie van buite-egtelikheid in Kaapstad voordat amptelike sensusopnames en die insameling van statistieke ingestel is.

Key words

Adultery; apprenticeship; baptism; breach of promise; Christianity; class; concubinage; emancipation; free blacks; gender imbalance; illegitimacy; immorality; Islam; marriage; *Nederduitsch Hervormde Kerk* (NHK); race; respectability; seduction; sex; slavery.

Sleutelwoorde

Buite-egtelikheid; bywywery; Christendom; doop; egbreek; emansipasie; fatsoenlikheid; gender (geslags-) wanbalans; huwelik; immoraliteit; inboekstelsel; Islam; klas; Nederduitsch Hervormde Kerk (NHK); ras; seks; slawerny; verbreking van troubelofte; verleiding; vryswartes.