

Family Law and ‘The Great Moral Public Interests’ in Victorian Cape Town, c.1850-1902

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In the wake of the mineral revolution, and the Cape Colony’s attainment of responsible government, Cape Town’s population doubled in the nineteenth century’s latter years. Its largely British ruling class, seeing opportunities for wealth and a greater significance in empire and world, sought to construct a social order conducive to those goals. Faced with increasing ethnic heterogeneity, gender imbalance due to the numbers of male immigrants, and frustration in combating the endemic poverty and slums, city fathers and their closest colleagues – doctors, clergy – perceived the way forward in terms not of extending rights but of moral reform. This article carries the ongoing investigation of family life and law in Cape Town through the Victorian period. It examines legal enactments and social developments where they impacted on marriage, divorce, concubinage and related matters, with particular reference to the welfare of children and those born out of wedlock.

This article contributes to a larger historical investigation of out-of-wedlock births in Cape Town from its beginning as an outpost of the Dutch East India Company. The near-two centuries when the fact of slavery was central to the history of illegitimacy have been the subject of earlier research.¹ Here the focus is on the mid- to late nineteenth century when patterns of sexual behaviour and family formation, shaped by that history, came under the scrutiny of policy-makers steeped in British traditions and jurisprudence.² The essay asks to what extent the Cape’s family law was reshaped by the altered circumstances, and how the welfare of out-of-wedlock children and their parents (or caretakers) was affected.

Under Roman-Dutch law, ‘crimes of incontinence’ were defined as ‘adultery, polygamy or bigamy, rape, fornication, concubinage, sodomy, and incest’.³ The Company soon learned to treat its servants’ resort to concubinage as inevitable given the shortage of marriage partners, that is, of women from Europe. Numbers of

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- 1 G. Groenewald, “A Mother Makes No Bastard”: Family Law, Sexual Relations and Illegitimacy in Dutch Colonial Cape Town, c. 1652-1795’, *African Historical Review* 39(2), Nov. 2007, 58-90; V.C. Malherbe, ‘In Ongeet Verwekt: Law, Custom and Illegitimacy in Cape Town, 1800-1840’, *Journal of Southern African Studies* 31(1), 2005, 163-85; V.C. Malherbe, ‘Born into Bastardy: The Out-of-Wedlock Child in Early Victorian Cape Town’, *Journal of Family History* 32(1), 2007, 21-44.
- 2 N. Worden, E. van Heyningen and V. Bickford-Smith, *Cape Town: The Making of a City. An Illustrated Social History* (Cape Town, 1998), 216-27.
- 3 J. van der Linden, *Institutes of the Laws of Holland* (London, 1828), 353. Italic in original.

European men formed relationships with slaves and freed slaves (*vryswartens*) or, more rarely, with Cape indigenes. From the founding of the Cape settlement, the churches – exclusively, to begin, the Dutch Reformed Church (DRC) – partnered government as guardians of the colony’s morals. The DRC encouraged cohabiting couples to marry (possible only when both parties were baptised) and present their offspring for a Christian baptism.⁴ With the passage of time, and with gender parity amongst the settler population, the crime of adultery joined that of concubinage as a threat to stable families – perceived as the bedrock of well-ordered polities.

The short-lived Dutch ('Batavian') government, which followed Britain's first occupation of the Cape (1795–1803), enacted a measure facilitating secular marriage.⁵ On their return in 1806 the British reinstated marriage as a religious (specifically Christian) event. In 1818 the option of marriage by special licence was introduced; in 1829 the age of majority was lowered, from 25 to 21 – a change which freed a cohort of youths from parental control at the point of marriage.⁶ Potentially of great significance were ordinances of 1823 and 1826 which permitted slaves to enter into legal marriage – if they were Christians. Few applicants presented themselves. The early decades of British rule were more remarkable for the rate at which slaves embraced Islam and sought marriage by Muslim rites despite the fact that such marriages lacked legality.⁷ By mid-century, crucial measures prompted by emancipation were in place. Britain's Marriage Order-in-Council of 1838 (in effect from 1 February 1839) had formalised certain slave unions as marriage. It also eased access to that rite by authorising civil marriage officers.

The expanding hegemony of Britain touched the lives of Cape Town's diverse peoples at many points. The DRC's dominance in social and religious life gave way in face of the Anglicans, Methodists and others amongst the new officialdom and flow of immigrants.⁸ With the Charter of Justice (1828) English jurisprudence grew in influence.⁹ Until late in the century, judges schooled in English common law dominated the Cape Supreme Court, which replaced the old Court of Justice.¹⁰ Chief Justice Wylde, who filled that office until 1855, defined the judiciary as protectors of 'the great moral public interests of the local society'.¹¹ The judges' reflections on the merits of two merging legal systems provide insights into mind-sets respecting morality, the status of women and children, and other aspects of family law.

4 That campaign was compromised by irreconcilables respecting the law, as it pertained to slavery, and Christian precepts as they had been interpreted, see R. C.-H. Shell, *Children of Bondage: A Social History of the Slave Society at the Cape of Good Hope, 1652-1838* (Johannesburg, 1994), 330-50.

5 Huweliksordonnantie vir buitedistrikte, 31 Oct./9 Nov. 1804, S.D. Naudé, ed, *Kaapse Plakkaatboek* vol. 6 (Cape Times Ltd., 1951), 215-28. The ordinance was later extended to Cape Town.

6 V.C. Malherbe, 'Illegitimacy and Family Formation in Colonial Cape Town, to c. 1850', *Journal of Social History*, 39(4) (Summer 2006), 1156. A special licence dispensed with banns prior to marriage.

7 Malherbe, 'In Onegt Verwekt', 175; V.C. Malherbe, 'Christian-Muslim Marriage and Cohabitation: An Aspect of Identity and Family Formation in Nineteenth-Century Cape Town', *The Journal of Imperial and Commonwealth History*, 36(1), March 2008, 6-7.

8 The DRC relaxed its exclusive right to public worship c. 1780, when it granted the right to Lutherans.

9 'English law became more important simply because English ideas and institutions came to dominate life in the colony.' (J. Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge University Press, 2008), 93-4).

10 E. Fagan, 'Roman-Dutch Law in its South African Historical Context' in R. Zimmerman and D. Visser, eds, *Southern Cross, Civil Law and Common Law in South Africa* (Cape Town, 1996), 33-64; M. Chanock, 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30, 1989, 269-70, 278.

11 M.W. Searle, ed, *Cases Decided in the Supreme Court of the Cape of Good Hope*, 5 vols (Cape Town, 1884), 1, 229.

At the same time, popular participation in government was increasing – reflecting trends in Britain and elsewhere. In 1840, Cape Town attained municipal status: townsmen (but not women) were eligible to vote if they met the property qualifications fixed for the council's two chambers. Early on, the councillors petitioned Queen Victoria to grant representative government. In 1854 the first parliament met in Cape Town, making it 'at once an imperial and a national capital'.¹² Just eighteen years later, when mineral discoveries in the interior were transforming the economy and demography of southern Africa, the colony received responsible government. From 1872, the developments to be explored occurred in the context of self-rule.

Marriage and Divorce

In the parlance of the time, men and women married as consenting individuals but were bound jointly by a 'contract with society': dissolving a marriage was seen as destroying a pillar 'on which civilised society rests'.¹³ Governments and religions sought to channel sexual behaviour in directions both socially useful and conducive to standards defined as 'moral'. The institution of marriage has been central to matters such as property and succession, and to a rational ordering of reproduction to meet social needs: 'a vehicle for the production of soldiers, sailors, workers and housewives'.¹⁴

In England 'divorce meant adultery'.¹⁵ Cape judges recruited in Britain were uncomfortable with the Roman-Dutch law's admission of malicious desertion as ground for divorce although it, like adultery, claimed biblical authority.¹⁶ In 1853 Johannes le Roes sued Anna Wiehahn for restitution of conjugal rights – the mandatory first step in divorce proceedings – after she 'unlawfully and maliciously deserted' him, alleging his violence and threats to her life.¹⁷ Justice Musgrave (who supported the finding for Wiehahn) lamented: 'I have often expressed myself very strongly against the facility which is given to married persons in this country to obtain a divorce for malicious desertion.' Whether the court ruled for plaintiff or defendant, either one could (by withholding restitution) gain the object of freeing themselves for 'another connexion'.

Musgrave wished the new Cape parliament might place the law of divorce 'on a more satisfactory footing' – apparently one which permitted judicial separa-

12 Worden et al, *Cape Town*, 171-75, 177.

13 J. Buchanan, ed, *Cases Decided in the Supreme Court of the Cape of Good Hope as reported by the Hon. William Menzies Esq.* [hereafter Menzies Reports], 3 vols (Cape Town, 1870-1903), 1, 143; Searle, ed, *Cases Decided in the Supreme Court*, 3, 393.

14 H.R. Hahlo, 'The Law of Concubinage', *South African Law Journal*, 89, 1972, 330.

15 U. Vogel, 'Whose Property? The Double Standard of Adultery in Nineteenth-century Law' in C. Smart, ed, *Regulating Womanhood, Historical Essays on Marriage, Motherhood and Sexuality* (London & New York, 1992), 160; M.L. Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (London, 1989), 9, 174-6, 182-3; B. Clark, 'History of the Roman-Dutch Law of Marriage from a Socio-Economic Perspective' in D.P. Visser, ed, *Essays on the History of Law* (Cape Town, 1989), n 162, 179 & n 184, 181; H.R. Hahlo, *The South African Law of Husband and Wife*, 5th ed (Cape Town, 1985), 12, n 75.

16 Buchanan, ed, *Menzies Reports*, 1, 146; A.F.S. Maasdorp, C.A. Beck and O.H. Hoexter, eds, *The Institutes of South African Law, being a Compendium of the Common Law, Decided Cases, and Statute Law of the Union of South Africa*, 4 vols (Cape Town & Johannesburg, 1929), 1, 88-103.

17 'A.J.F', 'Malicious Desertion' in R.B. Howes and T.G. Duncan, eds, *South African Law Journal together with Index and Table of Cases* (Cape Town, 1924), 41, 38-44; Clark, 'Roman-Dutch Law of Marriage', 180-1.

tion but preserved an unhappy couple's marriage.¹⁸ Here too, the Roman-Dutch tradition afforded relief more generously than the law of Britain where, at the time in question, divorce *a mensa et thoro* which revoked the duty to share bed and board (but did not end the marriage) was the province of ecclesiastical courts.¹⁹ At the Cape a legal separation was available through notaries or courts of law.²⁰

In practice, resort to the legal remedies in cases of breakdown in relationships was erratic. In 1843, after two years of marriage, Henry Farmer of Cape Town left Elizabeth van Wielligh and went to England. Shortly after, she – being 'ill provided for' – formed 'a criminal connexion' with Frederick Watson whom she married, 'representing herself as a widow'. When Farmer returned (1852) he secured a divorce, citing her adultery.²¹ A judge asked if, in granting such divorces, the court had been faithful to the 'principles of morality and public policy by which it guides itself'.²²

At more or less the same time Peter Seaward, whose wife had left him for 'one Africa' after a period 'in a common brothel', secured a divorce. Considering Farmer and Seaward, the Chief Justice lamented that 'parties in the lower classes' too often and too easily secured divorces. Justice Bell – another ready critic of Cape law – echoed concerns respecting 'persons of that rank of life'.²³ Such judgments reflected the court's deep consciousness of social hierarchy – above and beyond the assessment of 'rank, social position, and education' deemed appropriate when awarding damages.²⁴

Judges regretted the 'monstrous' local provision allowing plaintiffs as much as a third of a century in which to seek a remedy.²⁵ The court's concern was not, however, for persons thus consigned to a marital limbo. Contemplating Mrs Farmer, Bell observed:

... it is good English as well as Dutch law that a woman compelled by her husband to live apart from him, must return to those moral restraints which she was obliged before marriage to impose upon herself, and is not entitled to justify by his conduct, the prostitution of her person and mind ...²⁶

Of Mrs Seaward (seemingly the erring partner) counsel argued: 'Total ne-

18 Searle, ed, *Cases Decided in the Supreme Court*, 2, 14.

19 J.M. Masson, R. Bailey-Harris & R.J. Probert, eds, *Cretney Principles of Family Law*, 8th edition (London: Sweet & Maxwell, 2008), 282; M. Freeman, *Understanding Family Law* (London, 2007), 113, 324.

20 'A.J.F.', 'Malicious Desertion', 41, 41. According to Hahlo, 'the effect of a separation agreement, formal or informal, depended largely upon whether or not it had been entered into *justa causa*, that is to say, in circumstances which would have justified a judicial decree of separation', *Law of Husband and Wife*, 5th ed, 321. Britain's Divorce Act of 1857 aligned that system more closely with Roman-Dutch practice, but persons – women, generally – in failed marriages secured a decree with difficulty. Shanley, *Feminism, Marriage, and the Law*, 44, 169–74. For consequences respecting legitimacy, see L. Stone, *Road to Divorce, England 1530–1987* (Oxford University Press, 1990), 180. See also the Matrimonial Causes Act of 1878.

21 Searle, ed, *Cases Decided in the Supreme Court*, 1, 227–8; Cape Town Archives Repository [hereafter CAR], Cape Supreme Court [hereafter CSC] 1/10/1/3, Entries of Judgments, 1848–1868, Records in Civil Cases, 1852.

22 Searle, ed, *Cases Decided in the Supreme Court*, 1, 232.

23 *Ibid.*, 1, 228–9, 248.

24 C.H. van Zyl, 'The Theory of the Judicial Practice: Divorce', in W.H.S. Bell, ed, *The Cape Law Journal* (Grahamstown, 1893), 7, 216.

25 Farmer v F., Searle, ed, *Cases Decided in the Supreme Court*, 1, 232–4.

26 *Ibid.*, 1, 231.

glect by the husband of the wife would be no bar [to his right to divorce] ...' Mrs Farmer's predicament – abandoned, indigent, and required to revert to maiden-like chastity – seems not to have figured in Justice Bell's dictum that Cape law resulted in 'sin and confusion to society'.²⁷

The law required that plaintiffs seeking a divorce were 'pure' not only when the suit 'is commenced, but during the whole course of the proceedings': if they were themselves adulterers, or committed adultery while suing a spouse for that offence, the case was dismissed.²⁸ Did the court investigate Farmer and Seaward's behaviour while apart from their wives? Nothing to that effect was recorded. A century later the law was unchanged, resulting in 'the absurd situation where two adults both of whom have committed adultery ... remain bound to each other as punishment for their misconduct'.²⁹

And what of children? A man named as father of a bastard might, for example, admit paternity and blame poverty for his failure to marry, or deny paternity on grounds that the woman was promiscuous.³⁰ Appearing before the DRC council, Arie de Melker denied that he misled Christina Verwey with a promise of marriage: she had 'known other men' – were she respectable he would marry her. Verwey insisted, without success, that he was the only man whom she had known sexually.³¹ Women less hopeful that their word would prevail may have shrunk from that sort of exposure. Fathers were responsible for child support, to age 16, and the churches urged men towards that duty; *sogesegde* fathers like De Melker could evade those pressures. A woman could sue for damages and/or maintenance but such initiatives appear unusual. Occasionally the shoe was on the other foot: a man claiming breach who sued for £500 was awarded a shilling – a sign, it seems, that his suit was deemed frivolous.³²

The Marriage Order-in-Council had also enabled 'any person desirous of marriage' to lodge an appeal when parties (usually parents) attempted to block it. Where legitimation of a child was at stake, the court ruled generally for the appellant. An exception occurred when Michael Whelan, a Catholic, petitioned to set aside his parents' objections and marry a Protestant – apparently a woman of colour – who was pregnant with his child. On unspecified grounds, the court ruled against him and the child was presumably born out of wedlock.³³ It appears that issues of faith and/or race were decisive.

Though so much hung on strict procedures – the legality of marriages and legitimacy of the offspring, succession and the right to property – there were loopholes. In 1886 just 53 Christian ministers, of the 'mainline' churches, appeared on the Civil Service List; yet 364 were styled as such in Cape Town's *General Direct*-

27 Seaward v S., *ibid.*, 1, 248.

28 Heathershaw v H., *ibid.*, 5, 36; C.G. Hall, ed, 4 vols, *Maasdorp's Institutes of South African Law*, 9th edition, 1. The Law of Persons, 73.

29 J.D. Petersen, 'Divorce Law Reform' in E. Kahn, ed, *South African Law Journal* (Cape Town, 1971), 88, 480.

30 The Order-in-Council of 1838 had terminated forced marriage for breach of promise – already abandoned at the Cape in practice. H.R. Hahlo, *The South African Law of Husband and Wife*, 2nd ed (Cape Town: Juta & Co. Limited, 1963), 46-7, 562; K. McKenzie, 'Wollstonecraft's Models?: Female Honour and Sexuality in Middle-Class Settler Cape Town, 1800-1854', *Kronos: Journal of Cape History*, 23, 1996, 57-74.

31 Nederduits Gereformeerde Kerk Argief [hereafter NGKA], G1 1/29, Notulen, Dec. 1864. In court, the man's denial would prevail over uncorroborated evidence respecting paternity.

32 Mocke v Fouché, in Bell, ed, *The Cape Law Journal*, 10, 315.

33 CAR, CSC 8/1/1, n. 40, 14 March 1874.

tory. Apparently another 311 ‘exercise the function of marriage officers – who are wholly unknown to government’. What, then, of enforcement of the legal requirements such as banns, parental rights over minors, or proofs respecting degrees of consanguinity? Here again, race and class were factors: respecting ‘natives and half castes in town’, surely it was ‘undesirable to allow their union by a catechist, evangelist, or local preacher’. Parliament, it was argued, should legislate so that the clergy – like doctors, land surveyors, attorneys – be required to register in order to serve as marriage officers.³⁴ It had, in fact, attempted to do so a decade earlier but complications cited by churchmen had persuaded it to drop the measure.³⁵

Anomalies arose from the fact that legal marriage was construed as a Christian event, with civil marriage an option for Jews and Muslims who desired legality. Respecting its competence ‘to take a Malay wife’s evidence … against her husband’ – were the marriage legal, her evidence was inadmissible – the court found that, being unable to determine ‘whether the parties were legally married’, it could do no other than impose a token sentence.³⁶ Soetje Magmoet tried to register a deed without her husband: pointing out that their marriage was not legal, Magmoet rejected his coverture (in law, his authority or ‘protection’). The court ruled that she had described herself as married: it was not the registrar’s job to establish legality.³⁷ Such decisions, where the court seemed to improvise, were significant for a large (if not commensurately powerful) segment of Cape Town’s population.³⁸

The Victorians’ view of marriage – its purpose and practice – reflected contemporary interpretations of its ancient sources in Judeo-Christian scripture and Greco-Roman law and philosophy. Morality and respectability, protection of property and inheritance, gender hierarchy and parental power – all bulwarks of a stable society – were seen by a growing middle-class to reside in monogamous unions which were both religious in character and of unimpeachable legality.

The Crimes of Concubinage and Fornication

‘No doubt because South Africans are a moral people, there are not many cases on concubinage in our law.’ That assertion (made as late as 1972) must surprise at first glance. The author identified two types of concubinage: unmarried cohabitation, when reasonably stable, and marriages shown to be invalid. The key words are ‘in our law’: neither the Roman-Dutch nor the English tradition had a ‘law of concubinage’; indeed, ‘family law all but ignored cohabitation’, which began without banns or licence and ended without divorce.³⁹ Under the circumstances, the claims

³⁴ Bell, ed, *Cape Law Journal*, 3, 121-3. The List named seventeen Anglicans, twenty-nine DRC clergy, five Roman Catholics, and one each of the Lutheran and Scottish Churches. Other professionals registered under the Stamp Act 20 of 1884.

³⁵ Votes and Proceedings of Parliament, Session 1875, *Report of the Select Committee … Marriage Law Amendment Bill, Appendix II* (Cape Town, 1875), 1, iii-vii, 1-5; Index to Bills, *Index to the Annexures and Printed Papers of the House of Assembly … 1854 to 1897* (Cape Town, 1899), xxi.

³⁶ Queen v Lodewyk, 24 June 1884, J. Buchanan and E.J. Buchanan, eds, *Cases Decided in the Court of Appeal of the Cape of Good Hope … 1880 to 1884* (Johannesburg, 1973), 365-7. The Cape’s Court of Appeal had a brief existence (1879-86), H. Corder, ‘The Judicial Branch of Government: An Historical Overview’, in Visser, ed, *Essays on the History of Law*, 62.

³⁷ Soetje Magmoet v Registrar of Deeds, 19 July 1887, H. Juta, ed, *Reports of Cases Decided in the Supreme Court of the Cape of Good Hope* (Johannesburg, 1973), 5, 179-80.

³⁸ Malherbe, ‘Christian-Muslim Marriage and Cohabitation’, 5-24. Act 60 of 1860 To Amend the Law concerning Marriages, whereby Jewish and Muslim clergy were appointed as marriage officers, appears not to have served to clarify these cases.

³⁹ Freeman, *Understanding Family Law*, 47; Hahlo, ‘Law of Concubinage’, *South African Law Journal*, 89, 321.

of cohabiters seldom reached the courts. In 1878 the Cape Supreme Court awarded damages for seduction and maintenance from the estate of a man who, while living, had supported his concubine and their child.⁴⁰ The outcome appears to have rested on a rare absence of rival claimants and on unassailable proofs of the plaintiff's and child's relationship with the deceased.

Though we lack statistics, it may be said that unwed cohabitation flourished in Cape Town, owing not only to the presence there of slave descendants whose forebears were excluded from legal marriage, but to the fact that the city was a busy seaport and home to successive military garrisons. Casual and longer-term sexual liaisons produced many out-of-wedlock births. Such offspring might be reared by single mothers or in families, albeit in an environment of poverty, instability or strife. In cases of abandonment the church placed foundlings with foster parents when no offers of adoption were received; the nineteenth century's faith-based homes for orphans and others in need of care often excluded bastards.⁴¹ Side by side with those phenomena were the rituals whereby the youth (daughters, specifically) of the more privileged classes were steered towards proper and timely marriage to avoid a sexual lapse. Such precautions were never foolproof and it was claimed that not a few men of substance chose to flee the colony 'when their children have disgraced them'.⁴²

Testifying before the Law of Inheritance Commission (1866), Charles Bell claimed that immoral behaviour by persons known to the commissioners (the 'respectable' class) was covered up: 'I will not drag skeletons from the dark corners of households where they have long been carefully concealed,' he declared before denouncing the measures which, he believed, provoked decent men to weigh the costs of marriage versus support of 'a faithful concubine of the better class'.⁴³ Bell may have had in mind his (former) brother-in-law, John Ebden, who did not marry and left his worldly goods to his mistress – earlier the mistress of another well-connected Capetonian – and their three out-of-wedlock children.⁴⁴ As the father (divorced) of several children, Bell declared that he risked 'the foul tongues of Cape scandalmongers' should he bring a governess into his house; equally injurious was the fact that his children, being legitimate, compromised his resources should he remarry – not the case were they born out of wedlock.⁴⁵ Without conceding that the law gave an excuse for concubinage, the Commission proposed the repeal of provisions which prejudiced remarriage.⁴⁶

Sexual transactions in Cape Town's canteens and public spaces went largely unhindered unless the constables surprised fornicators, or the drinking dens too brazenly incorporated brothels. Prostitution was not a criminal offence but '[k]

40 Kramer v Findlay's Executors, E.J. Buchanan, ed, *Cases Decided in the Supreme Court of the Cape of Good Hope during the Year 1878* (Johannesburg, 1973), 51-2.

41 Legal adoption came with the Act of 1923. Prior to that, 'adoption' was a form of fostering. For an exception regarding the exclusion of bastards, see E. Bradlow, "'The Oldest Charitable Society in South Africa': One Hundred Years and More of the Ladies' Benevolent Society at the Cape of Good Hope", *South African Historical Journal* 25, 1991, 86.

42 *Report of the Law of Inheritance Commission into Inheritance for the Western Districts – G.15 - '65* (Cape Town, 1866), 228-9.

43 *Ibid.*, 186, 187.

44 G. Richings, 'Charles Bell's Divorce: The Legal Aftermath', *Quarterly Bulletin of the National Library of South Africa*, 54(3), 2000, 110; P. Simons, *Old Mutual, 1845-1995* (Cape Town, 1995), 29.

45 *Report of the Law of Inheritance Commission*, 235.

46 *Ibid.*, xi-xii, xxv.

eeping a disorderly house or brothel to the ... common nuisance of the neighbourhood' was actionable and, periodically, Parliament and the municipality upped their efforts to control soliciting, pimping and procuration.⁴⁷ Of the poor's survival strategies, prostitution was most deplored but eluded control by the law.

In 1868, a Contagious Diseases Act based on British legislation set out to identify prostitutes as the source of infection, of men in general and the military in particular.⁴⁸ Opposition mounted against a measure perceived as forced upon the Colony by the imperial power for the sake of its garrison. A leading opponent pointed out that Cape Town with a small population (30,000) plus 800 to 1000 soldiers had 409 registered prostitutes compared with Britain's garrison cities, for example Aldershot with 9790 soldiers and 248 prostitutes. Was Cape Town more immoral? Might the fact that the Medical Inspector received 5s. for each name added to the register create a 'government establishment for the manufacture of "common prostitutes"'?⁴⁹ The Contagious Diseases Act was repealed but its array of powers lingered in the official mind. By comparison the alternative tool, the Public Health Act, lacked teeth; it did not, for example, allow the compulsory examination of women suspected of syphilis.⁵⁰ Again, Cape Town was said to teem with prostitutes – a label which lawmakers failed to define.⁵¹ Just as England moved to abolish its Contagious Diseases Act, the Cape Parliament saw fit to pass a new Act.⁵² Opponents in Britain were disgusted and their journal, *The Shield*, warned women against emigrating to the Cape where the measure was in force.⁵³

One consequence of Britain's Contagious Diseases Act was the attention focused there on the 'double standard' which oppressed women. Where a woman could be divorced for one act of adultery, a married man, without risk to his marriage, could access 'clean' prostitutes – the gift of an all-male Parliament. If careless, he brought disease to a wife unaware of his extra-marital activities, and on whom he was free to force himself. A Cape Town wife secured a divorce when she was infected and her husband was found with 'venereal [sic] disease long after marriage' – construed by the court as '*prima facie* evidence of adultery' when he failed to prove that his condition was a relapse from ante-nuptial infection.⁵⁴ Did her suit require a particular measure of courage? A question for historians has been the general passivity of Cape Town's women respecting affronts to their status and wellbeing at a time when their British sisters were campaigning for equality in response to the Contagious Diseases Act and other crass discrimination.⁵⁵

47 Queen v Ana Paulse, 1 Sept. 1892, Bell, ed, *Cape Law Journal*, 9, 243; Act 44 of 1898 Police Offences Amendment Act.

48 For the Act's terms, 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), 1984, 171 and *passim*.

49 S. Solomon, *The Contagious Diseases Act: its operation at the Cape of Good Hope: four letters to the editors of the Cape Argus* (Cape Town, 1870), 18, 19, 39.

50 Van Heyningen, 'The Social Evil', 178-9; Queen v Cornelia and Sanna, *Cape Law Journal*, 1, 43.

51 H.J. Self, *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve* (London & Portland, Or., 2003), 25, 41, 53.

52 Act 39 of 1885, Van Heyningen, 'The Social Evil', 178.

53 V. Bickford-Smith, E. van Heyningen and N. Worden, *Cape Town in the Twentieth Century: An Illustrated Social History* (Cape Town, 1999), 25; Van Heyningen, 'The Social Evil', 194. The Contagious Diseases Act of 1885 was repealed only in 1919.

54 Lee v L., 1880, *Cape Law Journal*, 7, 208-9.

55 E. Bradlow, 'Women at the Cape in the Mid-19th Century', *South African Historical Journal*, 19, 1987, 51-75; Van Heyningen, 'The Social Evil', 175-6; Worden, van Heyningen and Bickford-Smith, *Cape Town*, 202-4, 237.

Though regarded as heinous, other ‘crimes of incontinence’ – rape, sodomy, incest – came less often to notice and were commensurately less threatening to the social order than were concubinage and casual sex. A male could not be prosecuted for rape if he was under fifteen years of age nor if, when married, he forced ‘conjugal rights’ on an unwilling wife (marital rape was not deemed an offence until 1991).⁵⁶ The youth of a girl (her age not given) was the sole factor inclining Attorney-General William Porter to consider charging a man for ‘indecently uncovering the person of the [sleeping] girl, and laying himself upon her body, and seeking to have carnal connection with her’: supposing she were ‘precocious in vice’, there was nothing ‘safe to treat as Rape’ and the man though a ‘scoundrel’ had committed no crime.⁵⁷ The Attorney-General appeared most concerned to protect the man against a false charge. At the century’s end, juries not satisfied that the sexual assault of a girl aged 14 to 16 equalled rape, or intention to rape, were permitted to frame a lesser charge before delivering sentence.⁵⁸

The Crime of Adultery

Now and then the Cape’s records mirror travesties such as those that pepper A.P. Herbert’s *Holy Deadlock*. When Mrs Robinson hired a private detective for proofs of her husband’s infidelity, the sleuth ‘saw a man resembling the defendant commit adultery with the woman as charged’. In the view of the court:

It is no connivance in the adultery on the part of plaintiff if the private detective on seeing the woman in the street tells her to go up the street and she might find someone to consort with her, but had nothing to do with actually bringing the parties together. Any procuration ... to induce the defendant to commit adultery would be sufficient ground to refuse a divorce.⁵⁹

Robinson had confessed but a defendant’s admission was insufficient to secure a decree – hence the resort to this charade.

High-profile divorces for adultery occurred in Cape Town.⁶⁰ Martha Bell (born Ebden), wife of the Surveyor-General Charles Bell, and army doctor Lestock Wilson Stewart were found guilty despite her strenuous denials. In the words of a Cape legal scholar:

Direct evidence of ... adultery is, of course, very rare, and is never required ... there must be such positive proof ... to make the presump-

⁵⁶ Clark, ‘Roman-Dutch Law of Marriage’, 179-80; Bell, ed, *Cape Law Journal*, 11, 231-32; Shanley, *Feminism, Marriage*, 9, 80, 84-5.

⁵⁷ CAR, Attorney General [hereafter AG] 2158, Letter Book, 15 July 1847-1851, Porter-W. Vowe, 10 Jan. 1850, 295-6.

⁵⁸ Articles 1 and 5, Criminal Law Amendment Act 25 of 1893.

⁵⁹ Robinson v R., 10 Aug. 1894, *The Cape Law Journal*, 11, 279.

⁶⁰ In 1836 Chief Justice Wylde divorced the wife he had left behind in New South Wales a decade earlier, a spectacle preceded by a *cause célèbre* respecting rumours of incest with his daughter, see K. McKenzie, *Scandal in the Colonies, Sydney & Cape Town, 1820-1850* (Carlton, Vic., 2004), 41-5; K. McKenzie, ‘Women’s Talk and the Colonial State: The Wylde Scandal, 1831-1833’, *Gender & History*, 11(1), 1999, 30-53; Buchanan, ed, *Menzies Reports*, 1: 272; CAR, CSC 2/1/1/33, No. 17 (16B), 1836, Sir John Wylde v Jane Elizabeth Wylde.

tion probable ... the parties having been found very near each other, and apparently surprised, rising hastily, dress discomposed, one running one way and the other another, confusion, hesitancy, embarrassment, are strong evidence of guilt, especially if the circumstances cannot be satisfactorily explained by them.⁶¹

Bell was awarded damages, dissolution, and custody of three children including their infant daughter, Catherine, with whom Ebden pleaded 'she will not part'.⁶²

Of Cape Town's women, Edna Bradlow asserted: 'The most serious challenge to the male-dominated order was ... adultery' – a blow to the locus of respectability, the family. Charles Bell's loss in terms of injury to family honour and to property was valued at £500 in damages.⁶³ Half a century had elapsed since Lady Anne Barnard's rollicking account of a Mrs Baumgardt's adulteries with high-ranking Britons at the Cape, which seemed to bear no serious consequences.⁶⁴ If social mores grew more rigid from mid-century, some middle-class wives yet dared to defy them. Johanna Tiesman, wife of the DRC clergyman Emmanuel de Roubaix, bore the child of a man not named and embarked on a second adultery with Charles Schutte.⁶⁵ Was Tiesman's search for a new partner a self-validating challenge to the social order – the possibility at which Bradlow hinted? De Roubaix secured a divorce and remarried. Of speedy remarriage, Bell would remark: 'in this colony few healthy men can live alone and be thought chaste'.⁶⁶

A plaintiff's success in securing a divorce might hinge on whether he 'conived at his wife's misconduct or exposed her unavoidably to pollution' – a stratagem resorted to by some in pursuit of dissolution of a marriage.⁶⁷ Once satisfied that the parties were legally married, and the defendant an adulterer,⁶⁸ the judges determined if the plaintiff colluded by his 'mental assent' (and not 'mere inaction') in the behaviour complained of.⁶⁹ Friends, landlords, relatives and servants – including, prior to 1838, slaves – might be called upon to testify where connivance was suspected.⁷⁰ For so long as divorce depended narrowly on fault, the court and determined escapees from wedlock played at cat and mouse.⁷¹

As numerous as were marriage partners whose behaviour hinted at collusion, there were also numbers who clung to marriage against the wishes of an unfaithful spouse: 'Over and over again an innocent husband or wife is known to purposely abstain from availing himself or herself of the legal remedy ... because

61 Van Zyl, 'Divorce', *Cape Law Journal*, 7, 206.

62 CAR, CSC 2/1/64, May-June Term, 1850, Nos. 24 and 25. In 1860, Governor Sir George Grey separated from his wife on grounds of her overtures to a fellow passenger (apparently unconsummated) while sailing to the Cape. They remained estranged but did not divorce.

63 Bradlow, 'Women at the Cape', 58.

64 M. Lenta and B. le Cordeur, eds, *The Cape Diaries of Lady Anne Barnard, 1799-1800*, 2 vols (Cape Town, 1999), 1, 35-6.

65 CAR, CSC 2/1/65, Records ... Supreme Court, 1850, No. 47.

66 *Report of the Law of Inheritance Commission*, 235.

67 *Ibid.*, 1, 230, 232, 248.

68 Buchanan, ed, *Menzies Reports*, 1, 262-5, 267-8, 281.

69 C.G. Hall, ed, 4 vols, *Maasdorp's Institutes of South African Law*, 9th edition, 1. The Law of Persons, 75; Van Zyl, 'Divorce', *Cape Law Journal*, 7, 209 and 8, 13.

70 De Wet v De W. (1833) where *concubitus* might have been proved 'by servants or slaves in the house', Buchanan, ed, *Menzies Reports*, 1, 269.

71 Petersen, 'Divorce Law Reform', 88, 479.

the divorce ... would be an event desired by the guilty parties.' While the motive imputed was revenge or malice, considerations such as financial support and the welfare of children, or hope of reconciliation, may have played a part.⁷²

Adulteries not aired in a court of law often came to the notice of the churches. At age fourteen Geertruida Destroo – still just a child (*om zoo te spreken nog een kind*) – had married Christiaan Adriaansen. He abandoned her, and Johannes Greijbe came to her rescue. Destroo's self-perception as a child-bride was the verdict of her middle age: girls of 12 (and boys of 14) had attained the legal age of marriage.⁷³ Six of Destroo and Greijbe's children were baptised by the English Church; her wish to have the seventh christened where she herself had been baptised had brought her to the DRC. Destroo wished to marry Greijbe but could not afford to pursue a divorce. Both men appeared before the council – Adriaansen to justify himself, Greijbe to affirm his wish to marry.⁷⁴

It is not clear if the churches advised those too poor to employ legal counsel that the court, if satisfied respecting need, might hear their cases. James Lissenbury won his suit for divorce 'as a pauper', declaring he had not £10 'in this World save and except wearing apparel'.⁷⁵ Sarah Cooper, also granted pauper status, named her husband's partner in adultery but failed to prove her case.⁷⁶ Reformers argued that those not approved to sue *in forma pauperis* were doomed to 'misery or immorality'. The number of actions increased when costs were cut (in 1885) by streamlining the legal process. Soon the court complained that pauper suits were becoming 'an abuse at the expense of the country'.⁷⁷ The choice – to consult the law, or to air a problem before one's church officers – depended by and large on economics.

Although no instance has been found, the churches must have advised adulterers that, were they divorced and free to remarry, the law proscribed their marrying each other. In 1840, Attorney-General Porter had noted:

I am of opinion that the Dutch law, differing from the English ... forbids any marriage between parties who have been guilty of adultery. Whether the injured party have been divorced for unfaithfulness of the consort, or have died in ignorance, or divorced for other cause, no legal marriage can be solemnized between guilty parties.⁷⁸

When Petrus Lerm appealed to marry Maria Smith, after his divorce for their adultery, Porter advised:

A marriage dissolved for Adultery leaves behind it an incapacity upon the part of the guilty spouse to contract a legal marriage with the par-

72 'Crim. Con.', *Cape Law Journal*, 5, 190-91.

73 Hahlo, *Law of Husband and Wife*, 5th ed, 17. The ages were raised only in 1935.

74 NGKA, G1 1/28, Notulen, 4 Nov. 1861, 190, 2 Dec. 1861, 198-200, and Jan. 1862.

75 CAR, CSC 2/1/165, Records, Judicial Cases in the Supreme Court, 1850, No. 42; CSC 2/10/1/3, Entries of Judgments 1848-1868, see 1850-March 1852.

76 CAR, CSC 2/10/1/3, *ibid.*

77 Ex parte Patrick Murphy, 12 July 1894 in Bell, ed, *Cape Law Journal*, 12, 206; C. Leonard, 'Law Reform – Divorce', *Cape Law Journal*, 1, 80-3; Rule 371, New Rules of Court, 22 July 1885, *ibid.*, 2, 210, and *ibid.*, 4, 74.

78 CAR, AG 2616, Report Book, 4 Feb. 1840, note in front of volume. English law permitted adulterers who were free to do so to marry. See also the Deserted Wives and Children's Protection Act 7 of 1895.

amour. The ground of the law ... seems to be, to remove from the criminal parties one temptation to compass the death of the injured spouse.⁷⁹

On the face of it, the law which denied Lerm's appeal might equally have encouraged thwarted lovers to act upon any murderous instincts. It remained in force until 1919 when the Appellate Division of the Union of South Africa ruled that, 'as adultery has ceased to be a crime', that provision had lapsed.⁸⁰

Rigid as the law appeared, relief was not wholly out of the question. The courts had 'the power to condone the plaintiff's adultery by weighing up the respective blameworthiness of the parties'.⁸¹ The church, too, had means of regularising adulterous relationships. Johanna Prins, wife of Robert Barns, asked the DRC to baptise her child by a certain George Rose. Barns had gone to Australia where, she believed, he had taken a wife – confirmed in due course by a sworn statement. Bigamists could evade the law by flitting between metropoles and colonies.⁸² If not discovered where he resided, Barns need not be inconvenienced, but Prins could neither free herself by an order presuming his death nor afford a divorce.⁸³ In the circumstances, the DRC requested a ruling by its mentors in the Netherlands (*den Hollandschen Conseil*).⁸⁴ The *Conseil*'s reply has not been found but the inquiry suggests that dispensations were available where 'morality' was the prize.

Adulterers contrived to marry despite assertions that it was 'absolutely impossible'. An authority stated:

I am aware of many instances in this Colony where the parties who have committed adultery have, on the dissolution of the former marriage, married each other, and that this is connived at, and in many cases even encouraged by others as well as by clergymen, on the ground that it would be better they should be married rather than openly live in a state of adultery. But whoever does so marry is liable to the penalties of the Placaaten [18 July 1674] which are still in force with us.⁸⁵

Remembering Cape Town's many 'fringe' clergy who conducted marriages, this assertion seems plausible. A judge regretted the harm done to children of adulterers, who succeeded against the odds in marrying, were the parents to be forced to part. Parliament, he submitted, should revoke a misguided measure.⁸⁶ If illegitimacy was, in particular, a product of 180 years of slavery, it also owed something to legalities which prejudiced marriage. Provisions that penalised the

79 CAR, AG 2616, 26 Aug. 1843, 226; see also AG 2619, 9 Jan. 1851, 76.

80 Estate Heinemann and others v H., Maasdorp, Beck and Hoexter, eds, *The Institutes of South African Law*, 19.

81 Clark, 'Roman-Dutch Law of Marriage', 179 and *ibid.*, n. 162.

82 Such evasions were less likely to succeed with improvements in long-distance communications. (W. Stoney, 'Can a Deserted Spouse, without having obtained a divorce, apply to the court for leave to re-marry?', *Cape Law Journal*, 12, 176.

83 NGKA, G1 1/28, Notulen, 5 Nov. 1860, 38-9 & 3 Dec. 1860, 53.

84 NGKA, G1 1/28, Notulen, 14 Jan. 1861, 70.

85 Van Zyl, 'Divorce', *Cape Law Journal*, 7, 213; Daniel v D., 19 Dec. 1884, H. Juta, ed, *Cases Decided in the Supreme Court of the Cape of Good Hope during the years 1884-5* (Johannesburg, 1973), 3, 234.

86 Juta, ed, *Cases Decided in the Supreme Court*, 3, 232.

children of adulterers rested on the anxiety that relaxation equalled an invitation to immorality.⁸⁷

Women and the ‘Public Interests’ of Society

Victorian women remained subject to coverture: the ‘first dent in the monolithic marital power of the husband’ came with South Africa’s Matrimonial Affairs Act of 1953.⁸⁸ An important argument against divorce was that it deprived a husband ‘of all legal control over his wife’; where there was adultery, that control ‘if once abolished ... is often transferred to the adulterer, however illegal such a course may be’.⁸⁹ An abandoned wife who remarried in good faith – when, say, five years had passed without news of the absent spouse or his whereabouts – could be forced to return to him should he appear and claim her as his ‘right’. The safer if more expensive option was to pave the way to remarriage by first securing a divorce for malicious desertion.⁹⁰ At the end of the century it was regretted that divorce actions were increasing steadily. Had it not, it was asked, become ‘a little too easy’, when one considered that divorce went ‘to the root of the social life of any community’?⁹¹

The language of patriarchy found full expression at the Cape: ‘The tendency of advancing civilization is to elevate the *status* of women’ towards ‘greater independence and responsibility’. Transparently, male tutelage was central to that project.⁹² Jurists were mindful that women’s ‘honour, purity and chastity are too delicate flowers to trifle with’ and must be ‘sacredly regarded’.⁹³ Middle-class women acknowledged the status, relative to the men in their lives, which law and tradition conferred on them. When the colony resisted Britain’s plan to land convicts (ticket-of-leave men) at the Cape, the ‘Females of Hottentots Holland’ addressed Queen Victoria on behalf of their ‘Husbands, Fathers, Brothers, Sons ... by whose toil we are supported, by whose love we are cheered, and by whose opinions we are guided’.⁹⁴ While patriarchy amongst the ‘respectable’ was graced by lofty sentiment, women of ‘the poorer classes’ were liable to be held responsible for the shocking indigence, child mortality and neglect which put the society’s future at risk.⁹⁵

Dependants suffered an egregious setback in the wake of the Inheritance Commission’s report, referred to earlier. The Commission started by extolling the Roman-Dutch law’s respect (‘to a reasonable extent’) for the ‘equality of the sexes’: in England, a man was entitled to ‘leave all his fortune to his kept mistress and

⁸⁷ Petersen, ‘Divorce Law Reform’, 481. Statistics respecting the rate of illegitimacy were only available after the Act to Provide for the Registration of Births and Deaths No. 7 of 1894.

⁸⁸ Hahlo, *South African Law of Husband and Wife*, 5th ed, 12-19; H.R. Hahlo, ‘The Sad Demise of the Family Maintenance Bill 1969’ in Kahn, ed, *South African Law Journal*, 88, 201-4.

⁸⁹ ‘Crim. Con.’, *Cape Law Journal*, 5, 191.

⁹⁰ Van Zyl, ‘Divorce’, *Cape Law Journal*, 8, 6-7; Stoney, ‘Can a Deserted Spouse ... re-marry?’, 12, 165-77. Children born in the second marriage were, however, deemed legitimate.

⁹¹ *Cape Law Journal*, 10, 285-6.

⁹² W. Stoney, ‘The Marital Power’ in H.T. Tamplin, ed, *Cape Law Journal*, 13, 111; T. Ansdell, *Report of the Law of Inheritance Commission*, 86.

⁹³ Van Zyl, ‘Divorce’, *Cape Law Journal*, 8, 11-12.

⁹⁴ Tuesday, 18 September 1849, *The Cape of Good Hope Observer*, 1, 38.

⁹⁵ A.B. Vanes, *Report of the Select Committee on the Destitute Children Relief Bill*, 62.

let his minor children and their mother go to the workhouse'; at the Cape a surviving spouse married in community of property was assured of a share of the estate regardless of his wishes.⁹⁶ Though both systems treated a wife as a minor,⁹⁷ Cape widows and orphans could not be left destitute at a man's pleasure.

Despite its appearance of pride in the colony's liberality, the Commission recommended repeal of the *lex hac edictali* which 'prevented a spouse giving to a second or later wife, either by gift or bequest, more than the least share given to a child by the former marriage'.⁹⁸ In 1873 the Cape's new responsible parliament passed the Law of Inheritance Amendment Act which asserted a husband's right to disinherit without giving reasons (followed, in 1874, by the Succession Act). Regretting these measures, a full century later, the jurist H.R. Hahlo commented: 'Unrestricted freedom of testation was in conformity with the ethos of the English upper middle class of the late nineteenth century.'⁹⁹

Britain's law respecting bastardy had for long been linked with the so-called Poor Law. In 1834, an unwed mother's access to poor relief was deliberately made more shaming and more difficult. The new measure conformed to the *laissez-faire* philosophy which underpinned other social policy (including the advocacy of free labour over slavery).¹⁰⁰ For reasons practical and philosophical, the Cape did not enact a poor law.¹⁰¹ Discouragement of out-of-wedlock births, and the activity which produced them, needed other incentives. Chief among those was the mantle of respectability which rewarded a timeous marriage.

Traditionally, churches were concerned with the sin and not, overtly, the sinner's niche in society. But as the dispensers of charity, they had an interest in their members' self-support: when adulterer Jan Cruywagen left for Durban, his abandoned wife brought her neediness to the DRC.¹⁰² Female applicants for *alimentatie* who are named in church records, and can be traced in *South African Genealogies*, appear often to have been of slave descent – an indicator, if not a proof, of status in terms of 'race' and class.

The coincidence of material need and non-conformance with middle-class morality amongst Cape Town's large 'mixed-race' community was a factor in the establishment of separate 'mission' churches. Racial references had not characterised the reports of the DRC's Commission of Censure established in 1838 but they are rife in the records of the *Nederduitse Gereformeerde Sendingkerk* (Dutch Reformed Mission Church) which was founded in 1881 for *kleurlinge*

96 *Law of Inheritance Commission*, viii, xiv-xv, xix; R. Probert, *Cretney's Family Law*, 5th edition (London: Sweet & Maxwell, 2003), 297. Those who entered into an ante-nuptial contract (a minority of Cape marriages) were also protected, M.J. de Waal, 'Law, Society and the Individual: The Limits of Testation', in Visser, ed, *Essays on the History of Law*, 314.

97 Buchanan, ed, *Menzies Reports*, 1, 144.

98 Lucas v Hoole, in E.J. Buchanan, ed, *Cases Decided in the Supreme Court of the Cape of Good Hope During the Year 1879*, 136.

99 Hahlo, 'The Sad Demise', *South African Law Journal*, 88, 201-4; Hahlo, 'Law of Concubinage', *South African Law Journal*, 89, 327-8; F. du Toit, 'Succession Law in South Africa – A Historical Perspective' in K.G.C. Reid, M.J. de Waal & R. Zimmerman, eds, *Exploring the Law of Succession: Studies National, Historical and Comparative*, Edinburgh Studies in Law Vol. 5 (Edinburgh University Press, 2007), 71-3. The 1969 failure was remedied by the Maintenance of Surviving Spouses Act 27 of 1990.

100 I. Pinchbeck and M. Hewitt, *Children in English Society, Volume II, From the Eighteenth Century to the Children Act 1948* (London, 1973), 588 and *passim*.

101 E. van Heyningen, 'Poverty, Self-Help and Community: The Survival of the Poor in Cape Town, 1880-1910', *South African Historical Journal* 24, 1991, 131-2.

102 NGKA, G1 1/28, 4 Nov. 1861, 188-9, and 2 Dec. 1861, 199-200.

(‘Coloureds’).¹⁰³ When Johanna Kleinschmidt, a married member of that body, went alone to the diamond fields at Kimberley she brought back a ‘white’ baby which she claimed as her own but not her husband’s.¹⁰⁴ Mission Church officer Salomon Hendriks – accused of drunkenness and consorting with Muslims – was the product of an adulterous ‘white’ mother.¹⁰⁵ Those markers ran deeper than mere gossip, betraying a sense of boundaries crossed by wayward women and the predictable social consequences.

Children of Cohabitation and Failed Marriages

For most of human history ‘parental rights were strikingly similar to property rights’. Parents controlled their children’s labour and earnings, or choice of a marriage partner.¹⁰⁶ The nineteenth century’s closing decades saw the burgeoning of orphanages and schools, and curbs on cruelty to children. Those advances were hard fought: ‘reformers had to confront the view of parental rights which identified patriarchal decision-making with family stability, and this with societal cohesion’. Reforms were not intended to alter the stigma attached to cohabitation or illegitimacy. To a degree, the institution of marriage retained its status at the expense of families formed by the unmarried.¹⁰⁷

The Christian churches and other faith communities admonished cohabiting couples to marry and rear their children within the fold of religion. Their campaigns accelerated in the post-emancipation milieu: as said, the DRC established a Commission of Censure to monitor its members’ behaviour.¹⁰⁸ For Christians, inducements to marry were the churches’ power to withhold the sacraments of baptism and communion, and their disbursements of charity. For Muslims and Jews, morality was satisfied by each faith’s religious ceremony, even if legality depended on a civil marriage in addition.

Difficult to measure is the influence on marriage choices of a family-friendly legal principle: whereas, by English law, a bastard had no reprieve from its status as *filius nullius* (nobody’s child), the Roman-Dutch law legitimated a child if its parents wed at some later date (*per matrimonium subsequens*).¹⁰⁹ Upon the marriage, guardianship passed from mother to father.¹¹⁰ Children rescued from illegitimacy lived in families which yet were vulnerable to legal complications: a woman who married her children’s father, but resided apart as he was abusive, was warned

¹⁰³ J. Kinghorn, ‘Modernization and Apartheid: The Afrikaner Churches’ in R. Elphick and R. Davenport, eds, *Christianity in South Africa: A Political, Social & Cultural History* (Cape Town, 1997), 136, 151. The DRC had approved ‘separate churches for the races’ in 1857. (R. Davenport, ‘Settlement, Conquest, and Theological Controversy: The Churches of Nineteenth-century European Immigrants’, *ibid.*, 66).

¹⁰⁴ NGKA, SA Gestig, S[ending]K[erk] G1 1/1, Notule van de Kerkraad, 1857-1904, see 15 Dec. 1898.

¹⁰⁵ *Ibid.*, 17 Apr. and 16 Oct. 1890.

¹⁰⁶ Freeman, *Understanding Family Law*, 178 and n. 23.

¹⁰⁷ *Ibid.*, 2, 251, 353-4.

¹⁰⁸ NGKA, G1 1/20, Notulen, 5 Mar. 1838, 366, and 7 May 1838, 396.

¹⁰⁹ Legitimation by subsequent marriage became British law with the Legitimacy Act of 1926. (R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford & Portland, Oregon: Hart Publishing, 2008), 181). It has been ‘controversial whether children who were legitimated by the subsequent marriage of their parents acquired their status ... from the date of marriage or retrospectively from the date of their birth’. (D.S.P. Cronjé and J. Heaton, *The South African Law of Persons* (Durban: Lexisnexis Butterworths, 2003), 76).

¹¹⁰ In line with the principle that a mother makes no bastard (*‘n moeder geen bastaart maakt*), extra-marital children inherited equally with any legitimate children of the mother.

that their ‘agreement … was *contra bonos mores*, and therefore invalid’; the law required she restore conjugal rights to her abuser.¹¹¹

Legitimation qualified the child to inherit equally with any siblings born in wedlock, should the father die intestate. Where a father provided for bastards in his will, careless wording could negate his intention: a man with surviving offspring born both in and out of wedlock left property to ‘my children’ in his testament; the latter’s hopes were quashed when his instruction was construed to refer exclusively to those of ‘legitimate’ birth.¹¹² The Cape court was probably familiar with the English case, *Dorin v Dorin* (1875), where a ‘bequest to “our children” was held to refer only to legitimate children, even though none existed’.¹¹³

Roman-Dutch and English common law shared a strong reluctance to bastardise children born within a marriage: neither husband nor wife could charge ‘non-access’ when success would have that result.¹¹⁴ Where infidelity was alleged, the law decreed *pater est quem nuptiae demonstrant* (the father is whom the marriage shows) – a ‘legal fiction’ which presumed paternity and preserved legitimacy.¹¹⁵ That presumption reflected a strong reluctance to burden the child with the stigma and loss of rights intrinsic to illegitimacy.¹¹⁶ Charles Bell, who had exercised his paternal right in wresting the infant Catherine from her mother, defied the law respecting the last-born child, Charlotte, conceived during the marriage but delivered after the divorce for adultery. By so doing he deprived Ebden of a valid claim for maintenance.

Whereas Charlotte was bastardised by *force majeure*, the infant Horak was ruled out of wedlock by the law: six months after her marriage, Mrs Horak gave birth to a ‘mature and full grown child’. When she was found to have concealed her pre-marital pregnancy by another man, the court decided for Horak and granted annulment: ‘The basis of the remedy, it would seem is fraud – the attempt to foist off another man’s child on an unsuspecting husband.’¹¹⁷ With the marriage recast as concubinage, the child was made illegitimate.

Failed marriages gave rise to bitter contests over custody. A husband’s rights were paramount: ‘so long as the marriage was not dissolved by a divorce *a vinculo matrimonii* on account of adultery or malicious desertion, the right to the custody of the children by the father is absolute.’¹¹⁸ A mother might be allowed to rear daughters, but sons only while young and with the prospect of relinquishing them. Dirk Stegman sued for restoration of three children: the court ordered their mother to return the two boys and keep their daughter ‘*pro tempore*, and until further order’.¹¹⁹ When the Simeys judicially separated, Mrs Simey was given their son, aged seven, on the ground of ‘best interests’ – a concept gaining traction in

111 Van Osten v Van O., 1923, Howes and Duncan, eds, *South African Law Journal*, 41, 95.

112 Hahlo, *Law of Husband and Wife*, 5th ed, 37, see *In re Russo* (1896) 13 SC 185. The ‘illegitimate’ children would have been eligible to inherit if legitimised by subsequent marriage, see above.

113 Collier and Sheldon, *Fragmenting Fatherhood*, 180.

114 British Law was amended by the Law Reform … Act of 1949, *ibid.*, n. 27, 181.

115 *Ibid.*, 104.

116 Probert, *Cretney’s Family Law*, 194.

117 Hahlo, *Law of Husband and Wife*, 5th ed, 122; Horak v. Horak, Searle, ed, *Cases Decided in the Supreme Court*, 3, 389-90.

118 Buchanan, ed, *Menzies Reports*, 1, 240-41.

119 CAR, CSC 2/10/1/3, Entries of Judgments 1848-1868 (emphasis in original); Clark, ‘Roman-Dutch Law of Marriage’, 183.

such cases. Sometime after, a ‘school-mistress who had taught coloured children’ testified on behalf of the father who sued for custody. Her evidence trumped the mother’s plea that the boy was ‘the only child left of thirteen’, and backward because he was ‘delicate’. The court ruled for Simey: ‘Victorian courts thought, and said, that they were acting in the best interests of the child when holding that a father had the right to decide on his child’s upbringing’.¹²⁰

Child murder or abandonment – the desperate measures of women faced with unwanted pregnancy – engaged the courts from time to time. Abortion and infanticide were treated as murder by Roman-Dutch law (or as homicide if intent to kill could not be proven).¹²¹ But without registration of births and deaths, babies could be disposed of and, if discovered, a mother could claim that the child had been stillborn.¹²² In 1845, the Cape government tried to close the gap by punishing concealment of birth:

... if any woman shall be delivered of a child and shall by secret burying or otherwise ... endeavour to conceal the birth thereof, every such woman so offending ... and being convicted thereof shall be liable to be imprisoned with or without hard labour for any term not exceeding five years.¹²³

The act of concealment was the crux, without needing proof if death occurred ‘before, at, or after’ that event. The ordinance’s efficacy respecting child murder may be doubted: during the next quarter-century, trials for infanticide averaged one or two per annum.¹²⁴

Where it could find extenuation, the court showed mercy to women who were young, poor, and often in domestic service. A certain Hendrichs denied that she had given birth, but an infant’s body was found in the garden. She was acquitted of concealment when a midwife and other witnesses swore that the death had been natural and, further, it was acknowledged that no law prescribed that the dead be buried ‘in a public place’.¹²⁵ Hannah Solomon’s sentence to hang for infanticide was commuted to ten years’ hard labour in the light of her youth and inexperience – as was Elizabeth Barrett’s, she being ‘rather simple’ and ‘the Victim of a Vile Father’.¹²⁶ Emmie Morris, an ‘off-coloured young woman’ whose employer testified on her behalf, was tried for the lesser crime of concealment.¹²⁷ Child murder – a murky factor in the infant mortality rate – fuelled demands for harsh punishment where a child died on account of its mother’s ‘neglect’.¹²⁸ Statistics compiled from

120 Probert, *Cretney’s Family Law*, 297; Juta, ed, *Cases Decided in the Supreme Court ... 1884-5*, 3, 1-3. See Britain’s Guardianship of Infants Act 1886.

121 Van der Linden, *Institutes of the Laws of Holland*, 335-7.

122 In the nineteenth century, the authorities attempted to determine if an infant was alive at birth by placing the lungs in water, a crude version of the current hydrostatic test. See Cronjé and Heaton, *The South African Law of Persons*, 7, n. 5.

123 Ordinance No. 10 of 1845 for Punishing the Concealment of the Birth of Children, H. Tennant & E.M. Jackson, eds, *Statutes of the Cape of Good Hope, 1652-1895*, 3 vols (Cape Town: J.C. Juta, 1895), 1, 372-3.

124 P. Scully, ‘Narratives of Infanticide in the Aftermath of Slave Emancipation in the Nineteenth-Century Cape Colony, South Africa’, *Canadian Journal of African Studies*, 30(1), 1996, 102, n. 3.

125 Queen v Hendrichs, 12 Apr. 1888, *Cape Law Journal*, 5, 139.

126 CAR, CSC 1/1/1/21, No. 8, Jan. 1868; CSC 1/1/1/45, No. 20, July, 1898.

127 CAR, CSC 1/1/1/47, No. 33, Apr., 1900.

128 *Cape Times*, 3 Nov. 1884.

information gathered in terms of Act 7 of 1894, which introduced compulsory registration of births and deaths, confirmed the presumption that out-of-wedlock births contributed disproportionately to infant mortality, and that the mothers most often were persons of colour.¹²⁹

By the end of the century, children's homes were an option for preserving infant life – though not panaceas for women faced with loss of employment or social disgrace. Cape Town's first orphanage, launched jointly (1815) by the DRC and Lutherans, had penalised illegitimacy. The founders proposed

... there to receive, to feed, to clothe, and to educate in a Christian and honest manner such needy orphans of both sexes that were or will be born from legitimate marriages of Protestant parents, and such without distinction of creed, Dutch Reformed as well as Lutheran ...¹³⁰

From 1850, when the Catholic Church established Cape Town's second orphanage, church-initiated institutions for childcare and the reform of prostitutes and unwed mothers grew in number.¹³¹ Though some admitted out-of-wedlock children, they and their mothers were still subject to discrimination: Dr Jane Waterston – Cape Town's first woman doctor – sponsored maternity services which, at century's end, excluded unmarried mothers (a ban which some contrived to outmanoeuvre).¹³²

It was reprobated that Christian women admitted to 'Malay' homes to give birth often left their infants to be reared as Muslims.¹³³ The adoption of Christian children by Muslim families – more common in Cape Town than elsewhere in the Colony – grew as a focus of alarm. When Mrs Mathews gave a child born of her adultery 'to a Malay woman', her husband sued for divorce and the court commented: 'There is far too little power of serving the interests of children, the innocent victims ... by refusing the decree of divorce'.¹³⁴ It is unclear how preserving the marriage might have enhanced the child's life chances, beyond its 'rescue' as a Christian.

The options for an unwanted child not aborted or done away with at birth were likely to be fraught with trauma.

'Race' and the New 'Public Interests' of Society

Increasingly, Cape society was limned by race as well as by class. Cape Town's orphans and abandoned children had long figured among the destitute. Intractable cases were housed with the adult chronic sick and paupers – to begin, in what had been the Slave Lodge and, afterwards, on Robben Island, historic place of banish-

129 S. Burman and M. Naude, "'Bearing a Bastard': The Social Consequences of Illegitimacy in Cape Town, 1896-1939', *Journal of Southern African Studies*, 17(3), Sept. 1991, 376-8. The Act to Provide for the Registration of Births and Deaths No. 7 of 1894 provided that a man could not be named as father without his consent, pre-empting false claims of paternity; when identified, a father was required to support his child to age 15.

130 NGKA, V5 3/1, Notarieëlle Acte, Suid-Afrikaanse Weeshuis, 1 Sept. 1808.

131 Malherbe, 'Born into Bastardy', 34-5.

132 Bickford-Smith, Van Heyningen and Worden, *Cape Town in the Twentieth Century*, 37-8.

133 Burman and Naude, 'Bearing a Bastard', 384.

134 Mathews v M., *Cape Law Journal*, 10, 285-6; Malherbe, 'Christian-Muslim Marriage and Cohabitation', 17.

ment in Table Bay.¹³⁵ The Victorians aligned those children's status more closely with that of 'juvenile offenders'.

Parliament was persuaded that parents no longer stand as obstacles to the interests of the (white) child and the state.¹³⁶ Apprenticeship, an established means of relieving guardians of dependent children in their care, was extended by the Cape Parliament to the inmates of the new reformatories.¹³⁷ Next, magistrates were empowered to commit poor children to a reformatory where no apprenticeship could be found.¹³⁸ A doctor addressing the Select Committee on the Destitute Children Relief Bill remarked:

We had it in evidence that the lowest class in Cape Town was the degraded whites. They were lower than the coloured people ... when whites and blacks mix together, the blacks push the whites down, and if we wish this country to be manipulated by white people it is necessary that those white people should be on a better basis than coloured people.¹³⁹

The resulting Act (1895) linked poverty, race and illicit sex: a destitute child was defined as 'of European parentage', under age 15, without carers or home, found begging or living in a 'reputed brothel' – the last elaborated where the child was female. Once committed to an institution, such a child could be apprenticed so long as he or she was segregated by sex, and 'from persons not of European parentage'.¹⁴⁰

The 1895 Act reflected thinking that privileged 'poor whites' amongst the underclass. But who was white? Based on the evidence of experts whom it examined, the Select Committee which framed the Act abandoned attempts to establish criteria respecting 'European parentage'. Asked to define a European child, the Superintendent-General of Education responded: 'We sometimes have two teachers in the same school who cannot agree as to whether a child is European ... suppose you have two children of the very same colour, the public make a distinction ...' Another witness put it: 'A line is socially drawn.'¹⁴¹ Shown a path through the difficulty, the Cape Parliament entrusted 'race' classification to on-the-spot (white) officials and the community they represented.

With attention to race on the increase,¹⁴² matrimonial law yet escaped amendment to reflect it. In 1898 Mrs Niemand sued for divorce because of her husband's adultery with a woman who had shared their house for twelve years. The court looked with sympathy on her delay in acting, citing her social isolation – her natal

¹³⁵ *Report on the General Infirmary, Robben Island, for the Year 1867* (Cape Town, 1868), 12; Malherbe, 'In Ongev Verwekt', 180-1.

¹³⁶ T. Scanlon, *Report on the General Infirmary*, 11.

¹³⁷ In this context apprenticeship was more often low-paid service than systematic training.

¹³⁸ Art. 11, Reformatory Institutions Act 7, 1879, respecting males and females to age 16; Art. 1, Juvenile Offenders Apprenticeship Act 8, 1889; Art. 4, Reformatories, Apprenticeship of Juvenile Offenders in Custody Act 4, 1892.

¹³⁹ Vanes, *Report... Destitute Children Relief Bill*, 51-2.

¹⁴⁰ Art. 1 and 3, Destitute Children's Relief Act, No. 24 of 1895.

¹⁴¹ *Report of the Select Committee on the Destitute Children Relief Bill* (Cape Town, 1895), 4, 34.

¹⁴² V. Bickford-Smith, *Ethnic Pride and Racial Prejudice in Victorian Cape Town: Group Identity and Social Practice, 1875-1902* (Cambridge, 1995).

family having severed relations since her marriage to ‘a coloured man’.¹⁴³ Gender disparity in the white community was again on the rise: by the 1890s, it appears that ‘as much as 15 per cent of marriages in Cape Town were mixed’.¹⁴⁴ Niemand’s predicament suggests that stigma, so far as it attached to ‘inter-racial’ marriage, was greater where the woman in the partnership was white. The Morality Act of 1902, which banned intercourse between black men and white prostitutes, was the Cape’s first racial legislation respecting sex between consenting adults.

Conclusion

‘Law inevitably fossilises the values of the era in which it was created.’¹⁴⁵ In the twentieth century, the moral code and features of matrimonial law which had encouraged hypocrisy were widely dismissed in popular parlance as ‘Victorian’. For Victorian women the ‘double standard’ – entrenched in the law, and the mindsets of legal practitioners – raised the risk, with respect to their material welfare and reputation, of challenging the system. Notwithstanding, they as well as men took their chances with the law where it circumscribed their sexual choices: the Cape Colony’s case law includes (as seen) examples of their ingenuity.

But where English feminists had much to celebrate as the century drew to a close – the more exuberantly since they had fought for and won key victories themselves¹⁴⁶ – there was no equivalent progression at the Cape. Members of the Women’s Christian Temperance Union were roused to campaign against ‘the indignity done to women’ by the Contagious Diseases Act of 1885 but they failed to sway the lawmakers: the offending Act was only repealed in 1919.¹⁴⁷ The Colony’s Roman-Dutch law was in some respects less draconian than English common law in defining the rights of women and children. In the course of integrating the two systems, Cape Victorians were satisfied at first with mainly technical amendments; then came the assault on the ‘legitimate portion’. By taking ‘the principle of [a man’s] freedom of testation further than any other Western legal system’, the new Parliament dealt a blow to dependants.¹⁴⁸

Though, at century’s end, the legal status of children born out of wedlock appeared static, the real-life situation of many was being transformed by the shifts in attitude which have been traced – notably, respecting race and the child’s ‘best interests’. Burman and Naude concluded that when, towards the end of the century, attention turned from punishing ‘sin’ to the welfare of the out-of-wedlock child (its frequent product), the turnabout owed most to the Medical Officers of Health (first appointed in 1894) who wanted Cape Town’s infant mortality statistics to conform with figures regarded as acceptable elsewhere. Medical Officers of Health lobbied for improvement in conditions of birth and post-natal care – matters on which their

143 Niemand v N., 3 Aug. 1898, H.T. Tamplin, ed, *The Cape Law Journal* (Grahamstown, 1898), 15, 269-70.

144 Bickford-Smith, Van Heyningen and Worden, *Cape Town*, 227. Single men attracted by the mineral revolution were arriving in greater numbers from Europe and elsewhere.

145 Collier and Sheldon, *Fragmenting Fatherhood*, 57.

146 Summarised by Shanley, *Feminism, Marriage*, 183.

147 Bickford-Smith, Van Heyningen and Worden, *Cape Town*, 237.

148 M.M. Corbett, H.R. Hahlo & G. Hofmeyr, *The Law of Succession in South Africa* (Cape Town: Juta & Co. Ltd., 1980), 33.

opinion was influential.¹⁴⁹ Slower to come were legal reforms where the punishment of immorality disadvantaged children deemed ‘illegitimate’, and sometimes bastardised the innocent. Amendment of the *status quo* would be piecemeal and cautiously incremental prior to the ‘sexual revolution’ and revisions of family law which characterised the late twentieth century.

Cape Town’s population mushroomed in the final decades of the nineteenth century. The implications for ‘morality’ of the predominantly male influx raised hopes of attracting marriage partners from Europe. That hope was unrealised: the reach of *The Shield* in diverting British women from the Cape, out of abhorrence of its Contagious Diseases Act, was probably minimal but the flow of female immigrants was disappointing overall and particularly so for southern Africa, with Canada, Australia and the United States more attractive to many.¹⁵⁰

A fair share of Britons who made the Cape their home were imbued with ambition to overcome the inherited shortfalls, boost the economy and present to the world a public face worthy of membership of a mighty empire. The middle class of merchants and professionals, clergy and philanthropists vied and collaborated to identify and reform activities inimical to that project. That quest, with its focus on bodily and moral health, demanded attention to family stability and sexual behaviour in public discourse. The quest continued in the new century, when the tendency of Cape legislators and their (mainly white) electors to construe the society in racial terms accelerated.

We are still far from understanding how notions of morality and respectability were shaped by factors such as religion, or a self-conscious middle class, in the late nineteenth century. This article has explored Victorian Cape Town’s social order through the prism of family law – remembering that ‘the law has played a part, perhaps a major part, not just in reproducing this social order, but in ... constituting and defining’ it.¹⁵¹

149 Burman and Naude, ‘Bearing a Bastard’, 411-2.

150 C. Swaisland, *Servants and Gentlewomen to the Golden Land* (University of Natal Press, 1993), 27; Bickford-Smith, Van Heyningen and Worden, *Cape Town*, 237.

151 Freeman, *Understanding Family Law*, 62.