
**THE FIRST ATTEMPTS TO USE LEGISLATION
FOR SOCIAL ENGINEERING IN SOUTH AFRICA:
AN ANALYSIS OF THE 17th CENTURY
CAPE MISCEGENATION *PLAKATEN***

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The attempt to utilise legislation for separating artificially-designated population groups was of course a fundamental and ultimately notorious feature of apartheid governance in South Africa in the mid-to-late 20th century. The idea that statutes could be used to delineate workable boundaries between favoured and less favoured population classes dates back to the establishment of Dutch East India Company rule at the Cape in the second half of the 17th century. This article provides an analysis of the purposes underlying the earliest Cape miscegenation directives and statutes (*plakaten*) during this period. In understanding these *plakaten* in their juridical context, it is important to bear in mind that by the time of the arrival of Jan van Riebeeck as its first Commander at the Cape in 1652, the Dutch East India Company had already had considerable experience in producing colonial legislation. Since 1602, it had been issuing *plakaten* on a wide range of topics in order to assist in the rule of its possessions in the East Indies. In 1642, the Company produced a code which it entitled the "Statutes of India". This was an important and authoritative source of law within the Company territorial possessions during the first decades of the Dutch presence at the Cape. It will be suggested in this article that the Indies legislation and population policies provide valuable contextual evidence which may enable us to achieve a better understanding of the earliest use of colonial law as a manipulative tool for the purpose of promoting racial policies at the Cape.

It was concluded by Böeseken that Van Riebeeck was concerned about extramarital transracial sexual relationships at the Cape and therefore used the law in an attempt to discourage them.¹ This would support a view that Van Riebeeck was, in a sense, a founder of apartheid jurisprudence and that attempts to proscribe trans-group sexual activity date from the first presence of whites at the Cape. In this article, an alternative interpretation of the earliest legal and related materials is put forward. It will be argued, in part 1 below, that

the available evidence indicates that Van Riebeeck did not in fact implement a general policy of discouraging extramarital transracial sexual relationships. It will be suggested that, on the contrary, he promoted miscegenation as necessary for the initial phase of a carefully-planned Dutch East India Company population policy that had been developed in the Indies. In the second part of the article, it will be contended that a view promoted by some scholars to the effect that Van Riebeeck's successors in office intensified the use of criminal law during the 1660's in order to clamp down on persons who engaged in transracial sexual activity is not supported by the available historical evidence, and that the original population policy was probably merely maintained. In the third part of the article, I will identify and discuss briefly what were in fact the earliest efforts that were made (long after the departure of Van Riebeeck) to formulate and implement legislation designed to counter extramarital miscegenation at the Cape. It is significant that these early "apartheid"-style immorality laws and instructions which appeared only late in the 17th century were directly or indirectly the results of the efforts of visiting Dutch Commissioners, rather than the local Dutch East India Company legislature. It will be suggested that tensions and contradictions in the motives of visiting and local Company authorities helped to subvert an ambitious plan to use legal measures to create a strictly segregated, light-skinned upper-class at the Cape by the end of the 17th century.

1 Miscegenation and the law during the period of Van Riebeeck

During the period of office of Van Riebeeck there was such a shortage of white women at the Cape that, in order to allow for at least some local increase in the numbers of the settler population, he had to allow at least a few "mixed marriages" between European males and carefully selected and Christianised women of colour.² This was a limited process that could be carefully controlled by matrimonial entrance procedures so that the white group would not become integrated to a degree which the racially-prejudiced Dutch East India Company

2 vroegste dokumente" 1970 *South African Historical Journal* 14.
MacCrone *Race Attitudes in South Africa: Historical Experimental and Psychological Studies* (1937) 42; Bozarth *Burgher, Boer and Bondsman: A Survey of Slavery at the Cape of Good Hope Under the Dutch East India Company, 1652-1795* (PhD thesis University of Maryland College Park, 1987) 458. See also the report of Van Riebeeck to the Company Directors dated 5 March 1657 as reproduced in Leibbrandt (ed) *Letters Despatched from the Cape 1652-1662* (1900) vol 2 294-295.

leadership regarded as unacceptable.³

If mixed marriages could be easily controlled, the same could not be said about extramarital miscegenation resulting from informal relationships between Europeans and local Khoi or slave women. As regards the policies of Van Riebeeck, it is interesting that it is only during the last two years of his period of office at the Cape that pertinent court and other records begin to appear. In the first of these, dated 22 March 1660, a soldier attempts to excuse his desertion to a passing ship by claiming that he feared the consequences of his having made "a certain black maid" pregnant.⁴ It is perhaps noteworthy that this exculpation suggests that the soldier feared sanctions attendant, not upon fornication *per se*, but resulting from the pregnancy. The Dutch East India Company was at this time attempting to reduce the mortality rates of light-skinned children at many of its stations and colonies in the Indies by compelling its employees to pay the maintenance costs of their children by local or slave women.⁵ The Cape soldier's excuse, whilst obviously far from conclusive as

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- 3 This was in accordance with a policy that had been established well before the arrival of Van Riebeeck at the Cape. Article 60 of the August 1617 ("Instructions for the Governor and the Council of India"), as sent out by the directors of the DEIC, ordered "that no persons enjoying free trade, nor children of the same, shall be permitted in particular to give themselves in marriage to any Indies women, without the consent of the Governor General, the Vice Governor or another supreme official who happens to be in command the particular area concerned. And such consent will only be given to those persons who have previously been baptised and who have embraced the Christian religion. In that religion they will also be required both to raise their children and to instruct their slaves ...". See "Van den Vrijen Handel toe te Laten, Instructie voor den Gouverneur en de Raden van Indie" of 22 August 1617, in Van der Chijs (ed) *Verzameling van Instructien, Ordonnancien en Reglementen voor de Regeering van Nederlandsch-Indie, Vastgesteld in die Jaren 1609-1836* (1848) 41. That the same requirements and screening procedures were applied at the Cape during the period of Van Riebeeck can be seen from minutes of meetings kept by his officials and reproduced in De Wet & Böeseke (eds) *Suid-Afrikaanse Argiefstukke. Resolusies van die Politieke Raad 1651-1669* (1957-1990) vol 1 57 and 160-161.
- 4 "Attestations" Leibbrandt (n 2) vol 3 435. See also item C. 326 (Cape Archives) 154 and Hoge "Miscegenation in South Africa in the seventeenth and eighteenth centuries" in Valkhoff *New Light on Afrikaans and Malayo-Portuguese* (1972) 100 (n 6).
- 5 In the Indies, special efforts were made by the DEIC both to maintain and culturally-indoctrinate partly-white, illegitimate children. See eg Van Troostenburg de Bruyn *De Herformde Kerk in Nederlandsch Oost Indie onder de Oost-Indische Compagnie 1602-1795* (1884) 549; and the "Instructie voor de diakenen (en verszorgers van arme wezen) te Colombo" of 2 January 1666 as reproduced in Hovy (ed) *Ceylonees Plakkaatboek: Plakkaten en andere wetten uitgevaardigd door het Nederlandse bestuur op Ceylon 1638-1796* (1991) vol 1 125. Gerretson *Coen's Eerherstel* (1944) 59 has pointed out that the policy of nurturing and indoctrinating partly-white children was initiated by means of a proclamation issued by Governor Jan Pieterzoon Coen in 1628. For the relevant part of the text of the proclamation, see Coolhaas *Het Huis "De Dubbele Arend"* (1973) 42. In 1663, Ryckloff Van Goens sr explained the rationale underlying the policy by expressing the view that if half-white children were properly cared for so that their mortality rates were low, the population of lighter-skinned persons would "in fifteen or twenty years become so considerable that our Nederlanders should not be reduced to the necessity of marrying purely native women". See "Memoir of Ryckloff Van Goens" as reproduced in Reimers (ed) *Selections from the Dutch Records of the Ceylon Government* (1932) vol 3 33. In 1703, De Graaff *Oost-Indise Spiegel* (orig 1703; 1930 reprint) 12 referred to a refinement of the policy when he recorded that a committee of poor-relief officials met regularly at Batavia "to ensure that no one is allowed to depart from his children unless he has given evidence of sufficient assets that will remain behind".

evidence, may indicate that this policy was also beginning to be applied at the Cape.

The next Cape record, dating from less than four months later, is also a declaration related to a possible court matter. It takes the form of an accusation by two persons that one Elbertsz "had for a long time previously had intercourse" with their slave Adouke, often turning out her male slave cohabitee in the process.⁶ It is this quasi-adulterous aspect of the intercourse which is emphasised in a document which resulted not from any official miscegenation inquiry, but rather, was privately submitted as a rejoinder to Elbertsz' own previous accusation of theft against one of the deponents.⁷ The allegation that the relationship had continued for a long period of time and the suggestion that it had not been entirely clandestine may possibly indicate that the authorities under Van Riebeeck had not been particularly vigilant in restraining sexual relationships involving white males and slave women.

A third case for which court-related documentation has survived involved a married military constable of the Cape fort named Willem Cornelis who was discovered in bed with one of Van Riebeeck's own female slaves on the night of 22 August 1660, Cornelis was subsequently subjected to a criminal trial on alternative charges of fornication, concubinage or adultery, and fined an amount of 50 *realen*.⁸ On the face of it, this case might be taken as clear evidence supporting Böeseken's view that during the period of Van Riebeeck the criminal law was used to discourage persons from engaging in extramarital miscegenation. However, closer analysis suggests that there were special aggravating factors present that make the case quite unreliable as an indicator of the racial or morality policy of Van Riebeeck. Firstly, there is the fact that the slave involved belonged to Van Riebeeck himself. There was therefore an element of personal insult to the highest official through the debauching of a female directly under his control.⁹

6 Attestation of 7 July 1660, as reproduced by Hoge (n 4) 101 n 8. See also Leibbrandt (n 2) 443.

7 See the remarks of Elbertsz reported in the extract from the Attestation of Otto Jansz as reproduced by Leibbrandt *ibid*.

8 See the "Confession by Willem Cornelis" in CJ 2952 (Cape Archives) 138-139; and the arguments of the fiscal and sentence of the Cape *Raad van Justitie* in CJ 1 (Cape Archives) Part 1 1652-1668 168-171.

9 The accused himself, in a comment he made several months after the trial, stated that it was because he had been intimate with "the Commander's female slave" that he had been punished. See Declaration of Roeloff Michaelsz and others of 20 May 1661 as

In considering whether the Cornelis case provides convincing evidence of contemporary Cape miscegenation policies, it also needs to be borne in mind that there were some serious elements of neglect of military duties. In one of the pre-trial affidavits, three of the witnesses mentioned that his assignation with the slave had been discovered "long after the sentries were posted".¹⁰ The fact that this information was extracted from three witnesses suggests that Cornelis may have been on duty at the time of his offense. This supposition is strengthened by an averment made by the fiscal (and preserved in the trial record) that the fornication proved Cornelis' "great light mindedness ... in the execution of his duty".¹¹ It was testified that Cornelis had alternated between his sexual misconduct and interludes of tobacco-smoking dangerously close to the gunpowder storage room of the fort.

It must be concluded that there were unusual aggravating factors that probably affected the decision of the authorities to resort to a criminal prosecution as a response to the behaviour of Cornelis. The case therefore cannot be relied upon as showing that transracial fornication *per se* was being prosecuted at the time of Van Riebeeck. The post-trial comment of Cornelis himself that has been referred to above contained an additional remark that the court had simply used his offense as a means of taking money from him "in a thievish way".¹² This remark and his behaviour as recorded in the expostulation show that he was highly indignant, rather than contrite. His reaction appears to have been that of a man who had been singled out for unusual punishment not ordinarily attendant upon acts of fornication with slave women.

The Cornelis case is historically important because its trial record proves conclusively that copies of the "Whoredom and Adultery" section of the Statutes of India were available at the Cape during Van Riebeeck's period of office. In his argumentation in the case the fiscal referred to the section three times and cited no other legal precedent. In framing alternative charges of adultery, concubinage, and mere fornication, he showed a thorough knowledge of the nuances of the different paragraphs of the section.¹³ The sentence of a

reproduced in Leibbrandt (n 2) 451.

10 See Leibbrandt (n 2) 448: Attestation of Pieter Potter, Jan Danckaert and Fr: de Coninck (*sic*) of 23 August 1660.

11 CJ 1 Part 1 (n 8) 169.

12 Leibbrandt (n 2) 451.

13 The concubinage charge, eg, was quite correctly based upon the crime of an ongoing sexual relationship as forbidden by par 3 of the "Whoredom and Adultery" section. The adultery charge was based upon a claim (which Cornelis attempted unsuccessfully to disprove by producing some letters) that he had a wife and children in the Netherlands. See CJ 1 Part 1 (n 8) 168-170.

fine of 50 *realen* and loss of rank which the court imposed upon Cornelis was precisely that laid down for illicit intercourse by a married man with an unmarried woman in paragraph 2 of the section.¹⁴

The fact that no local Cape morality *plakaten* were cited as additional authority by the fiscal in the Cornelis case suggests strongly that Van Riebeeck had not promulgated any. That he did not have a policy of discouraging transracial sexual relationships with slave women in situations where there were no aggravating circumstances appears from a surviving document which refers to a paternity inquiry informally made by him at the Company farm at Bosheuwel. This document contains a joint sworn statement made by a sailor and a marine at the request of one Waendersz. The statement purports to record a conversation between Van Riebeeck and Waendersz. In the course of encouraging Waendersz to admit that he had made one of the slave women at Bosheuwel pregnant, Van Riebeeck is represented as having said: "[T]ell it freely, no harm is done, it is for the benefit of the Company ... go to the fiscal and settle the matter, it is not of any importance."¹⁵ That this is a faithful reproduction of at least the gist of Van Riebeeck's remarks seems fairly certain since the low-ranking deponents would hardly have dared to misquote their commander when on oath.

In referring Waendersz to the fiscal because of his having conceived an illegitimate child at Bosheuwel, Van Riebeeck was certainly not setting in motion a prosecution for fornication. If he had contemplated a criminal trial, there would never have been any question of the matter being simply "settled" between Waendersz and the fiscal as a matter of "little importance". The settlement required by Van Riebeeck could only have been in regard to Waendersz' maintenance obligation as father of the expected child. In view of Van Riebeeck's mild response to the fornication issue in the case of Waendersz, it is not surprising to find that there are further records from late in his period of office which show that at least some of the Dutchmen living in the vicinity of Bosheuwel came to consider that they had an absolute right to sleep with the slave women there whenever they wished.¹⁶ There is also evidence which suggests that private owners began to emulate the approach of the Cape

14 See *Nederlandsch-Indisch Plakaatboek* (n 3) vol 1 586-587.

15 Leibbrandt (n 2) 446-447: "Sworn Declaration of Arent Gerritsz and Adrian Bastiaansz, 19 December 1660."

16 See Leibbrandt (n 2) 452: "Declaration of H Pietersz and Martin de Bruyn dated 15 January 1662." See also the reference to the altercation between Remajenne and Pietersen in Franken "Die taal van die slawekinders en fornikasie met slavinne" 1927

authorities by joining in the financially lucrative practice of compelling Dutchmen who could be persuaded to confess their paternity to maintain offspring born to slave women.¹⁷

It may be concluded that although the evidence for Van Riebeeck's period of office is sparse, it is nevertheless sufficient to provide a fairly clear impression of his policy stance on extramarital miscegenation. As his guide, he used the "Whoredom and Adultery" section of the Statutes of India. He was obviously well aware that the creators of that section had not intended it to be rigorously applied to the inevitably common cases of fornication between Dutchmen and slave women unless significant aggravating factors were present.¹⁸ Van Riebeeck's main concern was to ensure that, wherever possible, the fathers of half-white children born to Dutch East India Company slave women were saddled with their maintenance costs so that the Company could be spared this expense. By imposing maintenance requirements as an alternative to criminal prosecutions for fornication, Van Riebeeck maximised his chances of increasing the numbers of slaves in a manner quite in accordance with the strict and persistent instructions from his superiors to the effect that he was to render the Cape as small a drain on Company financial resources as possible.¹⁹ In strengthening the maintenance resources available to partly-white children, he was also acting in accordance with the population policy of the Dutch East India Company as contemporaneously practised in the Indies.²⁰ Far from opposing miscegenation with slave women, therefore, Van Riebeeck actually encouraged it.

2 Local policies in the 1660's

Van Riebeeck left the Cape on the 6th May 1662. Some historians have characterised the rest of the decade (which saw three different Commanders in

Tydskrif vir Wetenskap en Kuns 33.

17 For an example of such a confession of paternity see the declaration of Claas Lambertsz dated 25 March 1661 in Leibbrandt (n 2) 450.

18 Even at the head office of the Company in Batavia the section was generally not enforced in ordinary cases. In February 1652 the Church Council there published a list of 110 Christian males who were living in "concubinage" without any hindrance whatsoever from the secular authorities: see the minutes of the Batavia Church Council dated 26 February 1652 as reproduced in Mooij (ed) *Bouwstoffen voor de Geschiedenis der Protestante Kerk in Nederlandshe-Indie* (1927) vol 2 226. Continued inaction by the authorities meant that by the end of the year the list had been increased to include 205 persons: see Van Troostenburg De Bruyn (n 5) 621.

19 For a discussion of these instructions, see Bozarth (n 2) 43.

20 See n 5 above. For further discussion of the Indies population policy, see Zaal "The ambivalence of authority and secret lives of tears: Transracial child placements and the historical development of South African law" 1992 *Journal of Southern African Studies*

office at the Cape) as a period when strong efforts were made to discourage transracial fornication.²¹ Since Van Riebeeck's approach of covertly facilitating miscegenation had accorded so well with contemporary policy in the Indies and was so appropriate to breeding more slaves when their numbers were still low, a stricter approach is not what one would expect. The Commanders of the 1660's do not emerge from history as figures of particularly exceptional independence in policy-making. Furthermore, there is no evidence that their superiors abroad directed them to clamp down on extramarital miscegenation during this period.

A re-examination of the primary sources for the period of Van Riebeeck's immediate successors indicates that, contrary to what has been suggested by some South African scholars, his pro-miscegenation policy was probably simply maintained. In the three known cases where Dutchmen were accused of illicit intercourse with women of colour during this period there were, just as previously, always important further factors present which had clearly influenced the focusing of official attention upon them. The first case is that of the soldier, Willem Schaleg, whose impregnation of a female slave in 1664 led to his insubordination and neglect of his duties, and thus to an adverse report by his superior.²² The second case concerned one Hendrik Courts van Deventer who was reported on 24 August 1666 for breaking curfew. He had trespassed twice by climbing through the roof of a house and had directed verbal insults and physical force against the female owner of a slave with whom he wished to have intercourse.²³ The third case concerned the soldier Hans C Snijman who had assaulted his corporal and neglected his duties in order to spend time "at the house of a certain well-known black maid". On 30th July 1667 he was sentenced to be scourged, to forfeit two-month's pay, and to be banished to Robben Island for two years.²⁴ It can be seen that none of these cases provides reliable support for a conclusion that transracial fornication *simpliciter* was being prosecuted.

376-379.

21 Böeseken (n 1) 14-15 described the first two of these Commanders, Wagenaer and Van Onaelberg, as applying "the law against concubinage even more strictly than Van Riebeeck". Heydenrych *Die Maatskaplike Implikasies by die Toepassing van Artikel 16 van Wet 23 van 1957* (unpublished dissertation Masters in Sociology University of Stellenbosch 1968) 36 concluded that local Cape *plakaten* promulgated by Wagenaer on 16 January 1665 and by the third Commander, Borghorst, on 12 December 1669, were at least partly motivated by a desire to discourage sexual contact between white males and female slaves. Heese *Groep Sonder Grense (Die Rol en Status van die Gemengde Bevolking aan die Kaap, 1652-1795)* (1984) 9 supports this interpretation of the 1669 Law.

22 See Leibbrandt (n 2) 478; Bozarth (n 2) 460.

23 See CJ 1 (1652-1668) (n 8) 326.

24 *Ibid* (Part 1 *Criminele Proses Stukken 1667*) 366-368.

One of Van Riebeeck's successors, Commander Wagenaer, for a brief period in 1665 gave the most blatant possible encouragement to fornication by paying slave women a lump-sum whenever they became pregnant.²⁵ And both Wagenaer in 1665 and Commander Borghorst in 1669 refrained from including extramarital sexual intercourse when they issued *plakaten* in which they listed other prohibited forms of "shameful" socialising between whites and persons of colour.²⁶ It would thus appear that Van Riebeeck's policy of trying to facilitate an increase both in the numbers of slaves and light-skinned persons by not applying morality laws strictly against European males who engaged in transracial sexual relationships was simply maintained by his immediate successors.

3 The first attempts to use criminal law to initiate sexual segregation at the Cape: the role of the Commissioners from 1669 to 1685

Attempts to impose at least some restraints upon transracial fornication involving white males and women of colour came only late in the 17th century. These occurred as part of a broader morality campaign which was externally initiated and sustained by visiting Dutch East India Company Commissioners. Such Commissioners were annually appointed by the Company directors in the Netherlands (the so-called *Heeren xvii*) and they were often given authority to make changes in the laws and practices in force at the Cape as they passed to or from the Indies.²⁷ On 25th June 1669 Commissioner Joan Thijsen reported to the *Heeren xvii* that little agricultural progress could be expected at the Cape whilst the colonists there remained so "debauched" and fond of frequenting secluded drinking dens.²⁸ The next Commissioner, Matthias van der Brouck, heard from the Commander that these dens were linked with "other foul methods of earning money". As a result of this report, he reduced the number

25 VOC 4000 "*Extraordinaire Oncosten*" 1665 502 as cited by Armstrong & Worden "The slaves, 1652-1834" in Elphich & Gillomee (eds) *The Shaping of South African Society, 1652-1840* (2nd ed 1989) 124 n 75.

26 Prohibited interracial behaviour included gambling, all-night visits, holding drinking parties in secluded areas, and selling liquor. See the "Prohibition against breaking the Sabbath and gambling" of 17 January 1665 in Jeffreys & Nade (eds) *Kaapse Argiefstukke: Kaapse Plakkaatboek 1652-1806* (1944-1951) vol 1 84; and the "Prohibition against the sale of strong drink to slaves or Hottentots" of 12 December 1669 reproduced *ibid* vol 1 107.

27 On the powers and influence of the Commissioners at the Cape during the 17th century see generally Böeseke *Nederlandsche Commissarissen aan de Kaap 1650-1700* (1938).

28 Böeseke (n 27) 33 161.

of ale houses near the Cape fort from about twenty to seven.²⁹

Extramarital relationships between Dutchmen and slave women were expressly condemned by Commissioner Isbrand Goske. In his instructions to the Cape Commander of 23 February 1671 he stated bluntly that "filthy and indecent" sexual activities involving female slaves and rank-and-file colonists (*'t ' gemyn volck'*) had become an everyday occurrence and should not be tolerated by the Cape authorities.³⁰ Goske's proposed solution to the problem of extramarital miscegenation flew in the face of all pre-existing legal precedent. In order to render them less accessible to colonists, female slaves should be united with male slaves "as man and wife" and punished if they were sexually unfaithful to their slave partners.³¹ Goske's approach was contrary to that in the Indies because the "Whoredom and Adultery" section of the Statutes of India was not directed at female slaves who were taken advantage of by colonists. Nor did the old Roman law of slavery make it possible for there to be either a marriage or a duty of sexual faithfulness between slaves. Although his remedy was jurisprudentially unorthodox, Goske's views about the undesirability of fornication at the Cape may have found favour with the *Heeren xvii* since he was made governor there from 1672-1676.

Two years after Goske's term of office as governor, a more conventional attack upon extramarital miscegenation at the Cape was produced in the form a lengthy and strictly-worded local *Plakaat*. This was published on 9 December 1678 "at 11 o'clock with the usual solemnities and affixed for everyone's information".³² It referred, with a tone of morally righteous horror, to the "scandalous crimes of fornication, or whoredom". According to the *Plakaat*, participation in these crimes by Company employees and freeburghers with heathen or slave women had become so common that acts of physical intimacy between members of the two groups were often to be seen even in public places.³³ At long last, local legislation had been produced as a counter to transracial fornication at the Cape.

29 Bøeseken (n 27) 39-40. As a result of the advice of Van der Brouck, the Cape *Raad van Politie* decided on 5 March 1672 to issue liquor selling licences to only a few trusted colonists.

30 Hoge (n 4) 102 n 13.

31 See Moodie (ed) *The Record or a Series of Official Papers Relative to the Condition and Treatment of the Native Tribes of South Africa* (1860) 309. It would be another 25 years before the Company marriage Commissioners at Batavia decided that certain privately-owned slaves might marry: see *Nederlandsch-Indisch Plakaatboek* (n 3) vol 9 401.

32 Item LM 9 at the Cape Archives ("*Precis of the Cape Archives: Journal 1677-1695*" – hand-written translations from the *Dagregister* by Leibbrandt (n 2)) 146.

33 "*Verbod teen die hou van bysitte; en teen omgang met nie-kristelike of slawe-vrouens*" of 9 December 1678: see *Kaapse Plakaatboek* (n 26) vol 1 151-152.

Aside from its importance as the first locally-produced anti-miscegenation legislation in South Africa, the 1678 *Plakaat* is historically-significant because it provides clear evidence of a continued influence of the Statutes of India as a source of law on questions of morality at the Cape. Criminal punishment under the *Plakaat* was to be expressly "according to the Statutes of India". And the description of the crime aimed at sexual intimacy with "mistresses or concubines" shows that some of the wording had been taken from that contained in paragraph 4 of the "Whoredom and Adultery" chapter of those Statutes.³⁴

Hattingh has correctly pointed out that, although many Afrikaner historians have depicted the 1678 *Plakaat* as being aimed against miscegenation generally, its wording suggests that it was designed simply to raise standards of morality and public decency.³⁵ Hattingh's view is supported by the moralistic tone of the *Plakaat* and by the considerable space devoted in it to descriptions of an allegedly rampant and increasingly public promiscuity. However, the minutes of the Cape legislature (*Raad van Politie*) reveal another underlying motive. When the necessity for publishing the *Plakaat* was discussed by this body, it was complained that when slave women bore the illegitimate "mixtice" children of white fathers "these must be released from their servitude after the passage of a certain span of years, whereas, in contrast, those brought forth by their own nation remain duty-bound for always".³⁶ This racial distinction in periods of slavery arose from an instruction of the then Commissioner Goske in 1671 to the effect that the offspring of female slaves and European fathers must "in time enjoy the freedom to which, in the right of the father, they were born".³⁷ By this instruction Goske had sought to discourage owners who facilitated miscegenation with slave women by making mixed-race slaves less useful than full-blooded ones. And the fact that the *Raad* was influenced to produce a reactionary *Plakaat* seven years after he had left the Cape shows that his instruction had become as binding there as any law.

The Cape *Raad's* fears about offspring surfaced in the wording of the 1678 *Plakaat* itself with a reference to "increasing discoveries daily" of "Company and private slave quarters filling up with the numbers of illegitimate children [as] quite sufficient evidence" of the high incidence of transracial fornication "to the

34 Cf *Nederlandsch-Indisch Plakaatboek* (n 3) vol 1 586.

35 Hattingh "Beleid en praktyk: Die doop van slawekinders en die sluit van gemengde verhoudings aan die Kaap voor 1720" (1982) *Kronos* 35-36.

36 *Resolusies van die Politieke Raad* (n 3) 270 (Discussion of 30 November 1678).

shame of the Dutch and other Christian nations". In the preamble to the *Plakaat* indignant references were made to the now widespread practice by Europeans at the Cape of acknowledging and accompanying their slave or other non-Christian concubines in public "as if they were married persons". Europeans were further accused of openly living with and maintaining such women and their children. These remarks about the unconcealed social interactions of mixed couples and *de facto* families in public provide support for the contention advanced earlier in this article that very little attempt had been made to use legal measures to curb extramarital miscegenation during the first two decades of the Dutch East India Company presence at the Cape.

It would appear from its wording that a major purpose of the 1678 *Plakaat* was to prohibit the informal life-partnerships and other less regular transracial relationships that were by now threatening to replace lawful marriages as the predominant norm. The Company had become anxious to establish better control over the processes of mate selection so that what were regarded as the most culturally and somatically suitable of the available women could be matched with European males using the screening process provided by Dutch East India Company marriage-entrance procedures.³⁸ If this could be achieved, a relatively light-skinned upper class might now gradually be separated out from the under-groups at the Cape. By 1678, with the first generation of the offspring of miscegenation having reached adulthood, there may have been sufficient partly-white females at the Cape for the authorities to contemplate a stricter use of the criminal law in order to achieve this. The law could now be used in order to counter unselective fornication and encourage as many white males as possible to procreate monogamously with women considered suitable by the Company. The 1678 *Plakaat* may have represented both an attempt to control miscegenation and to minimise losses of young Company slaves through "right of the father" emancipation claims when they reached adulthood.

A likely effect of the *Plakaat* would have been a reduction in support for such claims from European fathers who might now be deterred from admitting paternity because of a fear of attracting fornication prosecutions.

Unsurprisingly, the fundamental shift from allowing to discouraging miscegenation with slave women was found to need the support of a second

37 Moodie (n 31) 309.

38 See ns 2-3 and the accompanying text above. For a later initiative, see the text accompanying n 50 below.

Cape *Plakaat* soon after 1678. There are records from 1681 which indicate that prostitution operations which involved slave women and catered for Europeans were still flourishing, and possibly on a larger, more organised scale than in previous decades.³⁹ A *Plakaat* entitled "Prohibition against Assignations of Company Servants and Female Slaves" was promulgated late in that year.⁴⁰ The prime mover behind this Statute was Van Goens jr.⁴¹ He spent the period 13 February-28 March of 1681 as a visiting Commissioner at the Cape.⁴² He had recently been implementing the second phase of the Company's population policy in Ceylon by attempting to discourage sexual relationships between colonists and full-blooded women of colour as a way of gradually "whitening" the dominant population group there.⁴³ Since prostitution had remained endemic at the Cape, it is not surprising that he decided there was a need for additional measures there in 1681. As part of a morality campaign based upon an implementation of the 1681 Statute, the fiscal was instructed to enforce it by arranging for raids upon suspected houses of ill fame.⁴⁴

A comparison between the wording of the preambles of the 1678 *Plakaat* and the 1681 one shows that whilst the former was aimed both at longer-term extramarital relationships and prostitution, only the latter was targeted in the 1681 Law. Another difference in emphasis was that (as has been noted above) participants in illicit transracial relationships were described in the 1678 Statute as frequently consorting in public "as if they were married persons" and as openly nurturing their illegitimate offspring. In the 1681 Statute, it is clandestine behaviour which is now aimed at. Fraternising of Europeans with slave women is characterised as generally more carefully concealed than previously, especially by the women, who are described as "knowing how to transport themselves surreptitiously at previously-arranged times to the Company's slave lodge and many other places that we suspect". It would appear that the effect

39 It was recorded in November of that year that prostitution networks in which slave women "gave over their bodies to all kinds of disgusting lusts of the flesh and allowed themselves to be used by the Europeans" were being run, *inter alia*, by an Asian couple from Timor, a freedwoman named Chatarina, and at the Company's own main slave lodge: see *Resolusies van die Politieke Raad* (n 3) vol 3 28 (entry dated 26 November 1681). See also LM 9 (n 52) 256-257 (from *Dagregister*, entry for 27 November 1681).

40 It was promulgated on 26 November 1681 by Governor Simon van der Stel under the name and authority of Van Goens: see *Kaapse Plakaatboek* (n 26) vol 1 179.

41 On 20 March 1681 he provided detailed instructions for the Cape Governor, and in the *Kaapse Plakaatboek* (vol 1 179) he is listed as the author of the 1681 *Plakaat*.

42 See Böesekeken (n 27) 162-163.

43 This emerges clearly from a report which he wrote in 1679 for his successor as Governor of Ceylon. He stated in the report that "[m]arriage with native women is forbidden in Ceylon because there is a sufficient number of women descended from European fathers. This prohibition must be maintained". See Pieters (ed) *Memoir Left by Ryclof van Goens, Jun* (1910) 12.

44 *Kaapse Plakaatboek* (n 26) vol 1 179; and *Resolusies van die Politieke Raad* (n 3) vol 3 28 (entry dated 26 November 1681).

of the 1678 *Plakaat* had been to drive extramarital miscegenation underground. The fear of a wholesale slide into a brown-skinned society in which *de facto* marriages would replace legal ones that the Company could control had receded in the minds of the legislators.

The fact that by 1681 miscegenation was viewed primarily as a problem of fleeting acts of dalliance or prostitution may explain the simple sanctions provided for in the 1681 *Plakaat*. Whereas the nuances of the "Whoredom and Adultery" section of the Statutes of India had been incorporated in the punishment clauses of the 1678 *Plakaat*, in 1681 whipping was specified as the punishment to be applied. Europeans found guilty were to be "right soundly lashed" (*wel dapper gelaarst*) whilst their slave sexual partners were to be further degraded by being bound to a pole and then whipped. With the departure of Van Goens from the Cape, the 1681 *Plakaat* seems soon to have fallen into abeyance. When Commissioner-General Van Reede spent time at the Cape in 1685, he discovered that there were no fewer than 58 light-skinned illegitimate children "of Dutch fathers" at the main Company slave lodge.⁴⁵ He made inquiries amongst the colonists and discovered that the authorities had been so lax about enforcing the 1681 Law that it was now widely believed that "concubinage" was not a punishable offence.⁴⁶

After reprimanding the Governor, Van Reede furnished him with a list of measures to be adopted to promote racial segregation and combat the widespread prostitution involving female slaves and European clients. In order to provide them with more privacy and physical autonomy, females in the main slave lodge were to be allocated segregated sleeping quarters. They were also to be given adequate clothing so that they would no longer be compelled to barter their bodies for the garments of Europeans.⁴⁷ To further hinder the latter, adult slave women were to be "married" to male slaves "according to their own customs", placed in married quarters, and whipped if sexually unfaithful to their "spouses".⁴⁸

45 Hushof (ed) "HA van Reede tot Drakenstein, Journal van zijn verblijf aan de Kaap" 62 *Bijdragen en Medelingen van het Historisch Genootschap* (1941) 1 184. See also VC 38 (Cape Archives 317; and Böeseke (ed) *Suid-Afrikaanse Argiefstukke. Memorien en Instructien 1657-1699* (1966) 206.

46 Hushof (n 45) 184-185 quotes Van Reede as stating "ondervond de concubinage onder deselve met onse natie soo openbaar ende bekent was, men daarvan als van getolereerde dingen sprak". See also VC 38 (n 39) 320.

47 Böeseke (n 45) 207. See also VC 38 (n 39) 320.

48 Böeseke (n 45) 207. It will be remembered that slave marriages had already been proposed by Goske in 1671: see the text accompanying n 31.

Van Reede further instructed that a new morality *Plakaat* should be promulgated with a clause providing for a penalty of hard labour for six months on slave rations for any freeburgher who had sexual relations with a female slave. For the same offence, a Company employee should lose his pay for one year.⁴⁹ Van Reede's proposed measures clearly represented a serious attempt to reduce extramarital miscegenation. Realistically, he recognised that slave women were frequently motivated by poverty. Colonists denied pay or placed on hard labour would be unable to hire them as prostitutes or utilise them as dependant sexual partners. He also instructed the Cape Governor and legislature that "[t]he marriages of our Netherlanders with freed female slaves must be forbidden, yet [permitted] with daughters of Germanic fathers born in slavery on condition that ... the man lives a decent life, has the capability to maintain his wife and children ... which the Commander and Raad must make certain of as duly professing our religion".⁵⁰

The distinction here between daughters with a greater proportion of European blood and their mothers is significant. This was clearly an attempt to promote an implementation of the second phase of the Company population policy which, now that there were sufficient partly-white females available, Van Reede wished to see more vigorously applied at the Cape. Because of their darker skin colour, the previous generation of ex-slave women were no longer to be married to European husbands. Elsewhere in his instructions, Van Reede attempted to provide further support for what might be called the Company's whitening policy by fixing the amount that Europeans who fathered children upon slave women would have to pay towards the upkeep of such children at 100 *rixdollars* per annum. Unless they could leave sufficient money behind, they should forfeit their right to leave the Cape until the children reached adulthood.⁵¹

Although Van Reede's plan for a light-skinned upper-class was clearly more comprehensive than anything previously proposed at the Cape, an important practical question is whether it had much impact there after his departure. Governor Van der Stel does appear to have maintained resistance against *de facto* marriages. In annual collections of statutes which he published for the years 1687 and 1690, he included a provision which stated that "no free man or

49 Böeseken (n 45) 206.

50 Böeseken (n 45) 217 – "*Instructie voor den Commendeur Simon van der Stel en den Raad*" by Van Reede, 16 July 1685.

51 Böeseken (n 45) 206.

Company employee shall keep a concubine on pain of being dealt with in accordance with the statutes of India".⁵² There are also records for the late 1680's and 1690's which show that white males were prosecuted for fornication with women of colour in at least four cases.⁵³ Unlike in the earlier cases discussed in parts 1 and 2 above, in these cases there do not appear to have been significant aggravating factors. In two of the cases, hard labour on public works was included as a sentence. This suggests that Van Reede's instruction of 1685 had influenced the application of criminal law to at least some extent.⁵⁴

It is noteworthy that the four late 17th-century cases for which records have survived involved (with the possible exception of one where this is not clear) private female slaves whose owners had instigated criminal processes by complaining to the local authorities. But these same authorities appear to have disregarded the instructions of Van Reede by making little effort to protect Company slaves from sexual exploitation by European males. An investigation of the main slave lodge in 1692 revealed that more partly-white children than other children were being born to slave women there.⁵⁵ Local officials also at least sometimes continued to turn a blind eye to the activities of free persons who profited from prostitution.⁵⁶ An ongoing concern about what they regarded as a dire shortage of Company slaves at the Cape and the sheer impossibility of stamping out prostitution at a port town may have discouraged these officials from vigorously resisting extramarital miscegenation.⁵⁷ Van Reede's was the last attempt during the 17th-century to compel white males at the Cape to procreate within a privileged population group. By the end of that century, the view of the local authorities that criminal law could not be successfully used as

52 Jeffreys & Nade (n 26) vol 1 226 n 1 and 229 (*Generael Plakaat* of 2 January 1687, and renewal of this on 6 January 1690).

53 The cases were that of Diedloff Bibault in 1687, that involving Maria Everts in 1689, and those of the co-accused Willem Teerling and Elizabeth of the Cape (1689), and Jan Rutten and Catrijn of the Cape (1690). For some discussion of the former two cases see, respectively, Jordaan "The origins of the Afrikaners and their language 1652-1720: A study in miscegenation and Creole" 1974 *Race* 490; and Hattingh (n 35) 38. The latter two cases are referred to in CJ 3 *Oorspronklike Regsrolle 1689-1696* (Cape Archives) 8 21.

54 The European Teerling was sentenced to hard labour for only two months. In the case of Rutten and Catrijn, the female slave was treated as the main culprit. She was sentenced to be bound to a pole and soundly lashed and then to labour on public works for six months: see CJ 3 as cited in the previous footnote. It will be remembered that, whilst Van Reede had recommended six-month periods of hard labour, he had expressly reserved these for European parties to transracial fornication. The approach of treating co-accused female slaves more harshly was not in accordance with his instructions. See the text accompanying notes 47-49 above.

55 Böeseke *Slaves and Free Blacks at the Cape 1658-1700* (1977) 53.

56 See the references to the "*quads en oneerlijke huijshouding*" of Evert from Guinea and his wife and daughter in CJ 3 (n 53) 7 (entry of 10 February 1687).

57 In 1692 Governor Van der Stel wrote a letter to the *Heeren xvii* expressing his concern about the low number of slaves at the Cape: see Böeseke (n 55) 53.

a social engineering tool for this purpose seems to have prevailed.⁵⁸

4 Conclusion

As has been shown, the view that the Dutch East India Company used legal measures to discourage interracial sexual relationships from the time of the first presence of whites at the Cape is not borne out by the historical evidence. Although Roman-Dutch common law crimes such as adultery and fornication, and also the "Whoredom and Adultery" section of the Statutes of India could have been utilised to support sexual segregation, Van Riebeeck and his three successors in office chose instead to allow and even to some extent encourage the procreation by white males of partly-white extramarital children. Criminal trials were resorted to only occasionally where examples needed to be made of persons whose sexual misconduct was connected with other misbehaviour which the authorities wished to discourage. In other cases, the notional possibility of a criminal prosecution was very useful as a means of coercing the fathers of partly-white children into maintaining them. This spared the Company the expense of doing so when the mothers (as was often the case) were Dutch East India Company slaves, and generally increased the chances of lighter-skinned offspring growing to adulthood. Limited and selective application of criminal law was thus resorted to in support of the first phase of a population engineering plan. This stage required a build-up of maximum numbers of both slaves and lighter-skinned females who could be imbued with Christian tenets and eventually married to white colonists.

In line with what has been referred to in this article as the second phase of Company population policy, once a sufficient number of light-skinned and suitably indoctrinated females became available, a means needed to be found for encouraging male settlers to marry and procreate with them. It was at this point, in an attempt to reverse behaviour that had previously been permitted to colonists, that sanctions would need to be applied. A complicating factor was that local Cape authorities continued to appreciate the usefulness of

58 A relaxation in morality campaigning by the senior Company leadership may have had an impact in other colonies also. In 1700, Indies Church authorities complained bitterly in a report sent to the Netherlands that an unwillingness by the DEIC to implement appropriate measures was resulting in an upsurge of the numbers of illegitimate half-European babies being procreated by rank-and-file colonists: see Van Troostenburg de Bruyn (n 18) 622. At the beginning of the 18th century, the traveller Francois Valentijn claimed that concubinage was rife amongst Dutch colonists in Java: see Van Marle "De groep, der Europeanen in Nederlands-Indie, iets over ontstaan en groei" (1951-1952) 5 *Indonesie* 482.

extramarital miscegenation as a way of building up numbers of slaves. Visiting Commissioner Goske's "right of the father" rule of 1671 represented an attempt to overcome this obstacle by making mixed-race slaves less valuable because they would have to be emancipated at adulthood.

The first direct attempts to use legal measures to control miscegenation involving male colonists began with the *Plakaten* of 1678 and 1681. Despite the moralistic rhetoric in the preambles of these Statutes, the ambitious underlying aim was to halt what was perceived to be a dangerous slide into an integrated brown society. The policy of turning a blind eye to transracial sexual relationships during the first two decades of white rule at the Cape had produced a situation in which many rank-and-file colonists simply bypassed Company marriage-entrance restrictions by engaging informally in short or long-term relationships with women of colour. The 1678 and 1681 Statutes were formulated in an attempt to curb this social tendency. The wording of the second Statute and its promulgation a mere three years after the first suggests that miscegenation which took the form of prostitution proved more difficult to deter than longer-term familial relationships which could not so easily be concealed.

Despite the efforts of several visiting Commissioners and, in particular, the comprehensive proposals of Van Reede, the aim of achieving a lighter-skinned upper-class which was to a large extent sexually segregated, failed. Aside from less than wholehearted support for the second stage of the population plan from the local authorities, the sheer impossibility of preventing transient sexual relationships initiated by financially-advantaged male colonists meant that light-skinned children continued to be born to mothers from all groups. The failure of the attempt to use anti-miscegenation laws and policies to establish a pale complexion as a badge of privileged separateness in the late 17th-century foreshadowed that which would occur again in South Africa in the late 20th century.