

# People as Property: Systems of Servitude in Traditional Africa and Ancient Rome

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## 1. *Introduction*

This is a discussion of two systems of servitude or bondage which are totally unrelated and which occurred in two very divergent cultures. These systems are distinguished not only in space but also in time. The understanding of time, and history, is different in African and Western/European cultures. In mainstream Western history the history of pre-literate societies is considered to be pre-history<sup>1</sup>. But, because of its pre-literate tradition, African history cannot be restricted to text-based information<sup>2</sup>.

In this paper the focus will be on pre-contact African slave law. The term “pre-contact” here denotes the time before African communities came into contact with either Atlantic/European or Saharan/Arab slave traders. That was long before the so-called colonial scramble for Africa in the nineteenth century. The Arab slave trade took place from approximately AD700 to the first decade of the 20<sup>th</sup> century<sup>3</sup>, and from the seventeenth century, the Atlantic slave

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<sup>1</sup> BENGTON, *Introduction to Ancient History*, Berkeley 1970, 3-4; CARY, *A History of Rome*, London 1970, 40-45. The beginning of the early Middle Ages is generally regarded as the upper boundary of ancient history.

<sup>2</sup> The pre-literate tradition of the Bantu-speakers resulted from their geographical isolation at a critical stage in the development of writing. The collective name "Bantu" is derived from their ancient language, Ur-Bantu or proto-Bantu. See generally VAN NIEKERK, "Stereotyping Women in Ancient Roman and African Societies", *RIDA XLVII* (2000) 366 at 367-368.

<sup>3</sup> An estimated 14 million people were traded as slaves: approximately 9.6 million women and 4.4 men. Muslim traders exported slaves via the Red Sea, trans-Sahara, and East Africa/Indian Ocean to other parts of the world. But there are indications

trade commenced in all earnest and began dominating European-African relations<sup>4</sup>.

The goal with the comparison of rules regulating systems of bondage in two such diverse ancient societies is to gain insight into the regulation of an institution of which the origin can hardly be determined with precision<sup>5</sup>. But, more importantly, an understanding of the regulation of slavery in Roman society could assist in unravelling the complex institutions of bondage in pre-contact African societies<sup>6</sup>.

### *2. The tertium comparationis: rights in persons*

There are many different definitions of slavery. In this paper, “slavery” will comprise the ownership by one individual human being of another, of the economic value of the individual’s labour, and of his or her person. These seem to be the features which form the common core of most definitions of slavery<sup>7</sup>. The point of intersection, or *tertium comparationis*, which both the Roman and African systems of bondage possess, is “rights in persons”. This concept will be investigated in broad with reference to selected examples.

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that Arabic trade in Negro slaves had existed as early as AD 200.: See LAW, “The Garamantes and Trans-Saharan Enterprise in Classical Times”, *The Journal of African History* VII (1967), 181 at 196. It should be borne in mind, however, that the Arabic slave trade preceded Arabic scholarship across the Sahara. See FAGE, “Slavery and the Slave Trade in the Context of West African History”, *The Journal of African History* X (1969), 395.

<sup>4</sup> In West Africa, trading in slaves was for the first time documented in European narratives of the fifteenth century. These were references to slaves being offered by African communities to the European travellers and traders. FAGE, “Slaves and Society in Western African c1445-c1700”, *The Journal of African History* 20 (1980), 289 at 297-298.

<sup>5</sup> It can be traced with some certainty as far back as human recorded history can be determined CAMPBELL, “Aristotle and Black Slavery: A Study in Race Prejudice”, *Race* 3 (1974), 283. A comparison of this nature also uncovers interesting data relating to the relationship between law, legal institutions and the social reality in which they operate. SANDERS, “The Role of Comparative Law in the Internal Conflict of Laws”, in *The Internal Conflict of Laws*, SANDERS (ed), Durban 1990, 57 at 61ff; ZWEIGERT & KÖTZ, *Introduction to Comparative Law*<sup>3</sup>, Oxford 1998, 10ff.

<sup>6</sup> These institutions have not yet been explained comprehensively within an African framework.

<sup>7</sup> See FAGE (“Slavery and the Slave Trade in the Context of West African History”), *op.cit.*, 393 at 394 regarding the definition of slavery.

To do a functional analysis of the legal regulation of systems of bondage or, more specifically, of the status, or the lack of status of slaves in African and Roman societies, the first question one would ask is whether the concept of law or legal systems existed in ancient Africa. The primary rule of comparative law is, after all, comparing the comparable<sup>8</sup>. The answer to this is simply that the denial of African law as law is mostly premised on a narrow, ethnocentric, Western view of law and procedure and on a concomitant misunderstanding of the non-specialised character of group-orientated indigenous cultures. It is the fact that African law does not readily fit into Western positivistic definitions of law and the close link between law, custom, religion and other social norms in African cultures, which compel the perception that African societies are lawless and governed by the power of custom alone. This view is buttressed by the purported absence of physical coercion and authorised institutions to enforce norms, as well as the alleged absence of the concept of state and formal legislators, or the so-called “paraphernalia which we associate with law”. Today, African law is generally recognised as law and not as merely recurrent customary behaviour.

### *3. Rome: the concept of rights in persons*

In Roman law, slaves were the only human form of property. As late as the time of Justinian, they had no legal personality<sup>9</sup>. Not even the rise of Christianity had any significant impact on the position of slaves. However, the demands of the commercial world, as well as convenience and self-interest, forced slave owners to recognize the cognitive ability of slaves<sup>10</sup>. This made their legal position complex because, on the one hand, they were regarded as property, while on the other hand, they seemingly had legal personality. In private law, their position was akin to that of a son in parental power. Both could act as the agent of the master or father; the contracts of both benefited and bound the *paterfamilias* or master in the same way; neither could own property; and both could receive a *peculium*<sup>11</sup>. Their public-law

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<sup>8</sup> ZWEIGERT & KÖTZ, *op. cit.*, 34ff.

<sup>9</sup> WATSON, *Slave Law in the Americas*, London 1989, 30ff.

<sup>10</sup> BARROW, *Slavery in the Roman Empire*, New York 1928, 151.

<sup>11</sup> The father or master was liable for their wrongdoing in the same way, and both the son and the slave could be surrendered to avoid further liability. A noxal action could be instituted against the person in control of the slave, since the slave was not a legal

position was quite different. As a matter of fact, they were *pro nullis habentur* in civil and praetorian law<sup>12</sup>.

It is important to bear in mind that the fact that in Roman law slaves were regarded as property, did not mean that their humanity was disregarded. Thus, although Roman slaves did not have legal personality, and had no standing in a court of law as plaintiff or defendant, they were still regarded as animate, thinking property. In fact, it is their humanity that distinguished them from other forms of property and which compelled the development of special rules applicable to slaves as the only human *res*<sup>13</sup>.

As will become apparent in what follows, these special rules, together with the fact that in some instances slaves could seemingly perform legal acts, gave rise to an ambivalence which permeates the law regulating the position of the slave<sup>14</sup>. In the analysis of some examples, it will also become apparent that there was a discrepancy between the legal position of the slave and the reality of Roman life<sup>15</sup>.

Slaves are treated in the sources of Roman law as typical chattels. A slave could be the object of all transactions and of legacies. Like other chattels, they could be recovered with the *rei vindicatio* and the *actio Publiciana*<sup>16</sup>. Injury to a slave was treated as damage to property<sup>17</sup>.

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person and could not be sued. Sons and slaves were prominent in committing wrongs. WATSON *Roman Slave Law*, London 1987, 46-47, 67ff.

<sup>12</sup> Cf. D.50.17.32. *Idem libro quadragesimo tertio ad Sabinum. Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.* Slaves had no share in political life, could not hold office, could not sit in public assembly, could not enrol in the legions (although this rule was relaxed in time of necessity). Yet they could be employed in public service for clerical and manual work.

<sup>13</sup> WATSON, "Thinking Property at Rome", in *Slavery and the Law*, FINKELMAN (ed), Madison 1997, 419; See also BUCKLAND, *The Roman Law of Slavery*, New Jersey 2000, 3ff; WATSON (*Slave Law in the Americas*), *op.cit.*, 32.

<sup>14</sup> However, it should be borne in mind that there is a distinction between, on the one hand, granting legal personality and, on the other hand, recognising the legal significance of a slave's so-called "purposeful activity." See CORRÉ, "Thinking Property at Memphis: An Application of Watson," in FINKELMAN (ed) *Slavery and the Law*, Madison 1997, 438 on 447-448; See also FINLEY, *Ancient Slavery and Modern Ideology*, London 1980, 100ff.

<sup>15</sup> WESTERMANN, *The Slave Systems of Greek and Roman Antiquity*, Philadelphia 1955, 77ff.; WATSON (*Slave Law in the Americas*), *op.cit.*, xii; CROOK, *Law and Life of Rome*, South Hampton 1967, 55ff.

<sup>16</sup> Before Justinian they were classified as *res mancipi*, together with other more important things such as draught animals and land on Italian soil. They were further

This legal position of the slave contrasted starkly with the social reality of a slave's life. Slaves could fill most occupations open to free men and could manage businesses of all conceivable kinds. There was no limitation on the education of slaves or on the possibility of their gainful employment<sup>18</sup>. In fact, they could earn high incomes and could, themselves, "own" slaves. This was accomplished through the *peculium*. While the *peculium* technically belonged to the master, the slave had control over its disposal<sup>19</sup>. There was legally no limit on how the *peculium* could be acquired and increased<sup>20</sup>. Watson<sup>21</sup> comments that whereas Roman law dehumanised the slave, the *peculium* was "central to the slave's self-respect". Also in religious life there was no great discrepancy between the life of the slave and that of a free or freed person<sup>22</sup>. Slaves were entitled to a proper burial and the place where a slave was buried was regarded as *religiosum*<sup>23</sup>. They were not banned from religion and religious festivals. Where they were excluded from religious activities, it was not because religious protection was denied, but because certain divinities were reserved for special groups of which slaves did not form part<sup>24</sup>. They had their own special cult of Diana and, where appropriate, they

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classified as corporeal moveable property. They had no rights and duties and had virtually no access to the courts. BUCKLAND, *op. cit.*, 11ff.

<sup>17</sup> ARISTOTLE (*Politics* 1.4 - 6) characterised a slave as a "living instrument" who can "apprehend reason". See JOWETT, *The Politics of Aristotle*, Oxford 1885, xvi-xvii.

<sup>18</sup> See generally CROOK, *op. cit.*, 17, 188ff. This was not the position in the greater part of the Republic. In that period slaves were "relatively few and unimportant". In the latter part (decline) of the Dominate, responsible classes of employment were reserved for freemen BUCKLAND, *op. cit.*, 7.

<sup>19</sup> See D.41.2.49.1. *Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis, sed et iuris est.*

<sup>20</sup> They could also appoint business agents to look after their affairs relating to the *peculium* (D.3.3.33pr.) This is in itself an indication that the *peculium* could be of a considerable amount.

<sup>21</sup> WATSON (*Roman Slave Law*), *op. cit.*, 95.

<sup>22</sup> See generally BUCKLAND, *op. cit.*, 73-75; TACITUS, *Annales* 14.44; BARROW, *op. cit.*, 160-170; CROOK, *op. cit.*, 58.

<sup>23</sup> The *actio funeraria* was an action available to a person who had reasonably spent money to bury the deceased slave. This action was available against the heirs or the person upon whom the duty rested to bury the slave. See BUCKLAND, *op. cit.*, 74; FINLEY, *op. cit.*, 96.

<sup>24</sup> OGILVIE, *The Romans and their Gods in the Age of August*, London 1974, 93-94. See also FINLEY, *op. cit.*, 98.

shared in certain religious observances of the household<sup>25</sup>. There are no legal indications that they were not entitled to the protection of, and that they were not equal before, the gods. This did not change when Christianity became the state religion.

The complexity of the slave's position in law and the incongruence between law and the reality of every-day life in Rome and even between different legal rules were especially apparent with regard to marriage and familial relations. Slaves did not have the capacity to conclude a lawful marriage<sup>26</sup>. Yet it was common for them to live together as husband and wife. The cohabitation of slaves (as of animals and soldiers) was referred to as *contubernium*. It was not a marriage but a factual situation – at the pleasure of the master – and it created no legal consequences<sup>27</sup>. There could be no dowry; and if a free, married man was enslaved, the marriage ended<sup>28</sup>. However, the *contubernium* was protected in many ways and in practice recognition was given to the consequences of such a union. In the legal texts concerning the slave's family life, reference was made to *maritus, uxor, filius, parentes* and *pater*<sup>29</sup>. When slaves married after being manumitted, their blood relationships were taken into account in determining the forbidden degrees of relationship. If corporeal things were given to a slave, as if it were dowry, that property would be regarded as dowry, if it still existed, when the slave was freed. The *contubernium* of two slaves would become a marriage after manumission, if they continued to live together.

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<sup>25</sup> See CROOK, *op. cit.*, 98; WESTERMANN, *op. cit.*, 78-84. See e.g. OGILVIE, *op. cit.*, 98-96 on the *Saturnalia*, a religious festival that slaves celebrated with their households.

<sup>26</sup> Epit. Ulp 5.5.

<sup>27</sup> Therefore there existed no actions for adultery with a slave's partner.

<sup>28</sup> D.23.2.45.6. *Si ab hostibus patronus captus esse proponatur, vereor ne possit ista conubium habere nubendo, quemadmodum haberet, si mortuus esset. et qui Iuliani sententiam probant, dicerent non habituram conubium: putat enim Iulianus durare eius libertae matrimonium etiam in captivitate propter patroni reverentiam. certe si in aliam servitatem patronus sit deductus, procul dubio dissolutum esset matrimonium.* WESTERMANN, *op. cit.*, 81ff.

<sup>29</sup> D.38.10.10.5. *Non parcimus his nominibus, id est cognatorum, etiam in servis: itaque parentes et filios fratresque etiam servorum dicimus: sed ad leges serviles cognationes non pertinent.* See also D.33.7.12.7. quoted below in fn 31; BARROW, *op. cit.*, 152ff.; BUCKLAND, *op. cit.*, 76-79; WATSON (*Roman Slave Law*), *op. cit.*, 77ff.

Moreover, from early on, there was evidence of the recognition of the familial relations of slaves<sup>30</sup>. Ulpian wrote that families of slaves should not be broken up where the equipment of a farm, which included slaves, was bequeathed, since a testator cannot be presumed to have had an intention so cruel<sup>31</sup>. In AD334, Constantine forbade the division of families where the *actio familiae eriscundiae* was instituted to divide the estate of a Roman between two or more joint heirs<sup>32</sup>. Also in the law of purchase and sale adoptions were made to accommodate the familial relations of slaves. Generally, if a defective thing was sold and the physical defect was not declared, the purchaser was entitled to return the defective thing and recover the selling price. Likewise, the purchaser could return a sick slave within a certain time. Under such circumstances, healthy slaves who had a special family relationship with the sick slave would also be returned<sup>33</sup>.

When a slave was injured, the master had the ordinary delictual actions available for injury to chattels generally. However, as indicated, certain special rules were developed to accommodate the slave's humanity<sup>34</sup>. The Twelve Tables treated slaves as human beings, but as inferior. Thus for the breaking of a slave's bone the penalty was approximately fifty percent of the penalty for the breaking of a free person's bone<sup>35</sup>. Until the latter part of the Republic, the killing of a slave did not amount to murder but was merely regarded as an *iniuria* against the master of the slave<sup>36</sup>.

<sup>30</sup> In the first century BC, Varro indicated that the family life of the slave should be respected so that the slaves could become more attached to the master's estate. See VARRO, *Rerum Rusticarum* I.17.5.

<sup>31</sup> See D.33.7.12.7. *Uxores quoque et infantes eorum, qui supra enumerati sunt, credendum est in eadem villa agentes voluisse testatorem legato contineri; neque enim duram separationem iniunxisse credendus est.*

<sup>32</sup> C.3.38.11. Where families had already been divided they had to be returned.

<sup>33</sup> D.21.1.35. *Ulpianus libro primo ad edictum aedilium curulium. Plerumque propter morbosa mancipia etiam non morbosa redhibentur, si separari non possint sine magno incommodo vel ad pietatis rationem offensam. quid enim, si filio retento parentes redhibere maluerint vel contra? quod et in fratribus et in personas contubernio sibi coniunctas observari oportet.* Defects of the slave in the law of sale is comprehensively discussed by BUCKLAND, *op.cit.*, 38-72. See also WATSON (*Roman Slave Law*), *op.cit.*, 77ff.

<sup>34</sup> BUCKLAND, *op.cit.*, 29ff; WATSON (*Roman Slave Law*), *op.cit.*, 58ff.

<sup>35</sup> Such an injury was also regarded as a crime and the money (penalty) had to be paid into the treasury. BUCKLAND, *op.cit.*, 31.

<sup>36</sup> WATSON (*Roman Slave Law*), *op.cit.*, 69.

Accordingly, in the early *Lex Aquilia*<sup>37</sup> slaves were classed with herd animals, and the killing of one of a team of slaves was treated the same way as the killing of one of a team of mules<sup>38</sup>. By the end of the Republic, recognition was given to the slave's humanity when the *Lex Cornelia* of Sulla's time, which made it a capital crime to kill a man, included slaves in the definition of *homo*<sup>39</sup>.

Finally, the tension between the slave as *res* without legal personality, and the slave as thinking property who could act legally, also come to the fore in the law of contract. While slaves, like sons in power, could contract for their master<sup>40</sup>, they could not incur liability and could not sue or be sued on the contract since they were not regarded as legal persons. The right of action belonged to the master. But the master could not be sued because Roman law did not recognise direct representation. This meant that the master could avoid liability on a slave's contract. From the first century BC, this encumbrance on commercial transactions was remedied through various praetorian edicts.

Against the background of the Roman law of slavery, and given the disparity between the Roman slave's strict legal position and the social reality of Roman life, servitude in African culture will now be investigated to establish whether there existed an equivalent to the Roman model.

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<sup>37</sup> 287BC.

<sup>38</sup> D.9.2.22pr.; D.9.2.22.1. *Paulus libro vicensimo secundo ad edictum. Proinde si servum occidisti, quem sub poena tradendum promisi, utilitas venit in hoc iudicium. Item causae corpori cohaerentes aestimantur, si quis ex comoedis aut symphoniacis aut gemellis aut quadriga aut ex pari mularum unum vel unam occiderit: non solum enim perempti corporis aestimatio facienda est, sed et eius ratio haberi debet, quo cetera corpora depretiata sunt.* See WATSON (*Roman Slave Law*), *op.cit.*, 55ff. for a discussion of the application of the *Lex Aquilia* in this regard.

<sup>39</sup> D.48.8.1.2. *Et qui hominem occiderit, punitur non habita differentia, cuius condicionis hominem interemit.* See also G 3.213; Inst 4.3.11 *Liberum est autem ei cuius servus fuerit occisus, et privato iudicio legis Aquiliae damnum persequi, et capitalis criminis eum reum facere.* BUCKLAND, *op.cit.*, 31; WATSON (*Roman Slave Law*), *op.cit.*, 58; THOMAS *The Institutes of Justinian*, Cape Town 1975, 273.

<sup>40</sup> D.44.7.14. *Idem libro septimo disputationum. Servi ex delictis quidem obligantur et, si manumittantur, obligati remanent: ex contractibus autem civiliter quidem non obligantur, sed naturaliter et obligantur et obligant. denique si servo, qui mihi mutuam pecuniam dederat, manumisso solvam, liberor.*



#### 4. Africa: Understanding of property/patrimonial rights

In ancient African law, the concept of property or a patrimonial asset differed from the known Western conception. Importantly, in traditional African legal cultures one finds the concept of “rights in persons”. Within a Western framework of rights, one would be tempted to explain these rights as real rights, given their patrimonial nature, and to infer that the persons who were the objects of such rights, were also slaves. In fact, it has often been said by the earliest observers of ancient African societies, that all men were slaves to the King<sup>41</sup>.

However, African hierarchical social organization was complex, and the concept of rights quite different to the Western concept. The African notion of rights can be understood only in the context of the pervading importance of the group. In traditional African societies all members of the group were to some extent dependant upon one another. That is why not even kings were regarded as totally free<sup>42</sup>. The most important feature of these societies which may shed light on the African system of interdependency<sup>43</sup>, is the prominence of the group. Preservation of the group was a fundamental underlying principle which directed social, political and legal ordering.

Pre-contact African societies were subsistence societies and the individual's only means of survival was through the continued support of the group. The indigenous African approach to law is permeated by the idea that equilibrium in the community should be maintained and that failure in social relations results in misfortune. The concept of a family, or a group, encompassed a wide variety of both living and deceased people, not necessarily related by blood or marriage<sup>44</sup>.

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<sup>41</sup> FAGE (“Slaves and Society in Western African c1445-c1700”), *op. cit.*, 297-309.

<sup>42</sup> FAGE (“Slaves and Society in Western African c1445-c1700”), *op. cit.*, 296.

<sup>43</sup> The fact that all members were to some extent dependent upon each other makes it apt to refer to a system of interdependency, rather than dependency.

<sup>44</sup> This nuclear family formed a religious, economic and jural unit. DARBOE, *The Interaction of Western and African Traditional Systems of Justice: The Problems of Integration (A Case Study of the Gambia)*, Michigan 1982 105-107 110. Practically, the concept of harmony of the group went beyond the concept of harmonious co-existence of living individuals. Deceased ancestors, children yet to be born, as well as nature and the superhuman too formed part of the network of persons who had to live in a state of harmony: MBITI, *African Religions and Philosophy*, New York 1975, 107.

Rights and duties vested in the group and not in individuals. Members of a group shared in these rights in accordance with their status, which was determined by gender, maturity, marriage and a complicated system of ranking<sup>45</sup>. Rights in ancient African law are usually explained in terms of the Western theory of rights. There are two kinds of rights in African law which are relevant to bondage, namely rights of ownership and rights of guardianship. Both these concern the group's estate and may thus be compared with patrimonial rights.

Traditionally, rights of guardianship or authority were rights over persons. The object of such a right was an individual's freedom<sup>46</sup>. Thus, guardianship entitled the group to an individual's earnings and services. In the case of a woman, services encompassed her labour, reproductive capacity and sexual privileges. When she married, these were transferred from her group to her husband's group for the purpose of establishing and maintaining a family. In exchange, her husband's group transferred goods for value (called *lobolo*, or bridewealth) to her group<sup>47</sup>.

Where the right of guardianship was infringed, damages were awarded to the group. For example, in the case of the seduction and rape of an unmarried woman, damages were awarded for the reduction in value of the bridewealth (analogous to the Roman dowry) which could have been acquired by her group had she been given in marriage. In the case of adultery, rape or abduction of a married woman, damages were awarded to her group for the diminution of the value of their right of authority over the woman or for their deprivation of her services as worker and child bearer<sup>48</sup>. Also for homicide damages were awarded for the infringement of the right of

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<sup>45</sup> MYBURGH, *Papers on Indigenous Law in Southern Africa*, Pretoria 1985, 82-110; SCHAPER A *Handbook of Tswana Law and Custom*, London 1938, 30-34.

<sup>46</sup> See MYBURGH, *op.cit.*, 23-28 82, 110, 111, 112; HOLLEMAN, "Shona Customary Law" in *Readings in African Law* Vol II, COTRAN & RUBIN (eds), London 1970, 262-263.

<sup>47</sup> CHURCH, *Marriage and the Woman in Bophuthatswana: An Historical and Comparative Study* (Unpublished LLD Thesis, University of South Africa, Pretoria 1989, 36-37). Marriage goods should not be seen as a *quid pro quo* for the transfer of authority over the daughter, or for the daughter herself, but rather as performance in terms of a contract. This contract is comparable with a real contract in Western law.

<sup>48</sup> Pregnancy and child birth following the perpetration of these delicts increased the amount of damages, because of the additional costs incurred.

authority. It becomes clear that all people belonging to the agnatic group were potentially the objects of rights<sup>49</sup>.

From this exposition it is only natural to ask whether, if not all members of the group, at least women were not slaves in indigenous societies. After all, the group had a patrimonial right over a woman, and seemingly, both her person and her services had an economic value<sup>50</sup>. It should be borne in mind, though, that the rights in persons were not rights of ownership as in the Western sense of the word. These were unique rights shared by all members of the group. In fact, each member had a share in the right of authority over himself or herself. The members of the African group could not be regarded as property which was freely transferable. The importance of preserving the group and the harmony within it, as explained above, would have prevented trade in anybody belonging to the group. Members of the group therefore did not fit into the Roman paradigm of slaves.

However, as will become apparent in the limited discussion that follows, there was bondage in pre-contact African societies which is analogous to the more temperate Roman institution of slavery in the time of the Republic. It has to be borne in mind though that the slave trade instigated a fundamental change in the nature of slavery and in a proliferation in slavery amongst Africans to satisfy the demands of the slave traders. References to slavery in academic writings often refer to the institution as it prevailed after contact with the European or Arab slave traders. The most revealing indicator that slavery is discussed in a post-contact paradigm, is the reference to the selling of people in slavery. In pre-contact Africa, a barter economy, and, consequently barter, not sale was prevalent.

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<sup>49</sup> The group could also obtain satisfaction for the sorrow caused by the death of one of the members, the dismay being regarded as bodily injury. MYBURGH, *op.cit.*, 34-39.

<sup>50</sup> The transfer of goods for value (bridewealth), was not only performance in terms of a real contract. The transfer of marriage goods by the husband's group was, amongst others, regarded as the necessary means to restore the equilibrium in the community which had been disturbed by the transfer of the limited authority over the women to her husband's group. The *lobolo* or *bogadi* institution played an important role in maintaining equilibrium in relationships within the woman's group, the relationship between the two groups of the prospective husband and wife and the relationship between the living members of the social group and the deceased ancestors.

#### 4.1. *The West African Slave Coast*

Anti-abolitionists, traders and historians alike commonly justified the African slave trade by arguing that slavery was an institution well-known in traditional Africa, and that the European-driven Atlantic slave trade was merely a continuation of an existing and entrenched African cultural institution. The example generally referred to is that of Dahomey in West-Africa<sup>51</sup>, a country renowned for its harsh and exploitative chattel slavery. As against this, the standard counter-argument is that slavery was not a relic of primitive African antiquity<sup>52</sup> and that where it did exist, it never developed beyond its initial stages. It is further argued that the extreme violence experienced in some societies was due to “European corruption<sup>53</sup>”, and that where Atlantic traders found a flourishing slave system, it was due to the trans-Saharan slave trade<sup>54</sup>.

An investigation into the historical existence of slavery in forty ancient West African societies, which was conducted in the 1960's, revealed that the institution existed in only thirteen of them<sup>55</sup>. Consistent with African social organisation, the slaves were most commonly integrated in the production process of the subsistence family unit or used as warriors or servants in the royal courts<sup>56</sup>. As in Roman law, slaves were in a subordinate dependant position from which they could not escape unilaterally. The fact that in some instances the slaves were inhumanely treated, subject to humiliation and insult, performed the least respected functions and rigorous work,

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<sup>51</sup> LAW, “Dahomey and the Slave Trade: Reflections on the Historiography of the Rise of Dahomey”, *J. of African History* (1986) (27), 237, 248ff.; KOPYTOFF, “The Cultural Context of African Abolition”, in *The End of Slavery*, MIERS & ROBERTS (eds), London 1988, 485 at 493; FAGE (“Slavery and the Slave Trade in the Context of West African History”), *op.cit.*, 393 401ff; FAGE (“Slaves and Society in Western African c1445-c1700”), *op.cit.*, 289.

<sup>52</sup> LAW, (“Dahomey and the Slave Trade: Reflections on the Historiography of the Rise of Dahomey”), *op. cit.*, 254 ff, 257; BAKS, BREMAN & NOOIJ, “Slavery as a System of Production in Tribal Society”, *Bijdragen tot de Taal-, Land- en Volkekund* 122 (1966) 103.

<sup>53</sup> LAW, (“Dahomey and the Slave Trade: Reflections on the Historiography of the Rise of Dahomey”), *op. cit.*, 258.

<sup>54</sup> FAGE (“Slaves and Society in Western African c1445-c1700”), *op. cit.*, 289 293.

<sup>55</sup> BAKS, BREMAN & NOOIJ, *op.cit.*, 90 at 109.

<sup>56</sup> BAKS, BREMAN & NOOIJ, *op cit.*, 91.

and had a very low social status<sup>57</sup>, may have been a later development under the influence of the trans Atlantic slave trade.

Slavery prevailed widely also in the Western Congo, in Central Africa, and seems to have been an important institution in pre-colonial times. There are also indications that slavery may have existed even prior to European contact. Thus, it is said that in the Congo enslavement was a common penalty for crimes such as murder, poisoning, witchcraft and other anti-social acts which threatened the cohesion of the group<sup>58</sup>. This is in line with the fact that in ancient Africa, ostracism, whether in the form of banishment or enslavement, which alienated the individual from the group, was regarded as a very serious punishment. Also compatible with the prevailing importance of preserving and continuing the group is the evidence that a childless husband could take slave children and make them part of his clan and that he could use slave wives to bear him children<sup>59</sup>. In contrast, other references to slavery may rest on a misconception of the matrilineal kinship organisation of these societies. Thus reference to the extensive powers of the mother's brother over his sister's children, which included the power of life and death, is not conclusive of the existence of slavery<sup>60</sup>.

#### 4.2. Southern Africa

The best example of slavery in pre-contact Africa, comparable to the Roman institution, was found amongst the Tswana of modern-day Botswana. In that society, a distinction was drawn between hereditary servants and slaves<sup>61</sup>.

Hereditary servants were family groups that descended, for example, from fugitives from other tribes, foreigners found destitute

<sup>57</sup> BAKS, BREMAN & NOOIJ, *op cit.*, 92-93.

<sup>58</sup> FAGE ("Slaves and Society in Western African c1445-c1700"), *op. cit.*, 305ff.

<sup>59</sup> See generally RICHARDS, "Some Types of Family Structure amongst the Central Bantu" in RADCLIFFE-BROWN & FORDE (eds), *African Systems of Kinship and Marriage*, London 1975, 217-218, 220, 224, 226, 234, 239, 248, 249.

<sup>60</sup> At 249, RICHARDS, indicates that the *Khazi*, the mother's brother had considerable powers over his sister's children who lived with him. He had the power of life and death and could sell them in slavery. The father of the children could buy back his children, but they could not become part of his clan and were scorned as slaves.

<sup>61</sup> See generally SCHAPERLA, *The Tswana*, London 1976, 28-29; SCHAPERLA (*A Handbook of Tswana Law and Custom*), *op.cit.*, 31ff; 66ff.

in times of drought, and prisoners of war<sup>62</sup>. These servants were attached only to chiefs and other men of standing, but were not their property. They lived in their own homes and had the same rights and privileges as other members of the tribe<sup>63</sup>. They were free to leave the tribe should they so wish. However, their masters looked after their relatives as well and they rarely left the employment of their master.

But, chiefs and prominent men of ranking also had slaves. They were mostly Bushmen<sup>64</sup>. The Bushmen, who were the original inhabitants of the land, were hunter-gatherers who were forced to attach themselves to the cattle posts of western Tswana tribes<sup>65</sup> when their own hunting economy became unviable<sup>66</sup>. They were allocated, with the grazing and hunting areas, to headmen under whose control they came as property. This subjugation of the Bushmen occurred independently from the influences of the slave trade<sup>67</sup>.

Unlike the hereditary servants, the Bushmen were not free to leave, could not engage in any occupation without the permission of the master, and could not work for someone else. If they ran away, they were brought back by force. They could be lent to someone or given away. All their property was at the disposal of the master. They were oppressed and often treated badly. They had no recourse to courts, lacked most civic rights, and were barred from political assemblies in contradistinction to other conquered non-Tswana groups, who had been incorporated into the tribe. Because of their lowly origin, they

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<sup>62</sup> This reminds of ancient Roman society where slavery began when enemies were spared rather than slain. From there, reasons and methods of enslavement were extended, for example, to enslavement as punishment (also for citizens) and enslavement of the destitute. Of course, children of slave parents were also slaves. See BARROW, *op.cit.*, 1-2.

<sup>63</sup> They had specific obligations towards the chief: Like the other servants they cultivated fields, built huts, worked in homes or cattle posts. They were fed and clothed by their master; they used his cattle and ploughs and he helped them with bridewealth.

<sup>64</sup> Sarwa and Kgalagadi.

<sup>65</sup> The Ngwato was one of the Tswana tribes. See SCHAPERLA, (*The Tswana*), *op.cit.*, 14-15.

<sup>66</sup> See generally MIERS & CROWDER, "The Politics of Slavery in Bechuanaland: Power Struggles and the Plight of the Sarwa Inn the Bamangwato Reserve", in *The End of Slavery*, MIERS & ROBERTS (eds), London 1988, 172-174-177.

<sup>67</sup> The Bushmen were the lowest ranked in the Tswana community and did not have the same rights as other members of the tribe. Initially their masters claimed tribute from them in kind: whatever they produced or acquired was at the master's disposal. Later, they were employed in menial jobs at cattle posts, in fields and at home.

could even be deprived of their children. They formed part of the group's estate. The chief could allot them to different households. They then became part of the estate of the household to whom they were allotted. They were often given to the master's children. It was regarded as degrading for ordinary tribesman to marry them<sup>68</sup>.

### 5. Conclusion

The examples discussed above seem to indicate that slavery, analogous to the Roman institution, existed in pre-contact Africa. This form of bondage resembles the slavery of the earlier part of the Roman republic, when domestic slavery, which had little impact on the economy, prevailed in the small scale patriarchal community and when the relationship between the master and the slave was of a personal nature<sup>69</sup>. But it should not be equated with the Roman institution. Slaves in ancient African societies did not occupy the same important position in the society's labour force. While it is true that in Africa the transition to commercial trading in slaves for economic gain occurred in response to extraneous stimuli, it cannot be said that the institution of slavery in Africa developed exclusively in consequence of a European or Arabic input. Pre-contact African slavery, albeit of an incipient nature, was the result of a natural process and forms an inherent part of the history of Africa.

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<sup>68</sup> Slavery was abolished in Botswana by Proclamations 14 and 15 of 1936.

<sup>69</sup> See WESTERMANN, *op. cit.*, 59ff, 77, 79.