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Arguments related to slavery in seventeenth century Dutch legal theory

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Summary

The Dutch participated fully in the Transatlantic Slave Trade. The Dutch colonies, it was said, could not do without enslaved workers. But in the Dutch Provinces people were free; the Dutch were freedom loving Christian people. This articles sketches the legal arguments used by the seventeenth century Dutch jurists regarding slavery, and some slavery related topics as freedom and property. It appears that the pro-slavery arguments were so strong that a profound legal discussion among the jurists on the legitimacy of the institution was considered superfluous.

Keywords

slavery – unfree labor – Dutch jurists – seventeenth century – Grotius – Groenewegen – Huber – Noodt – Voet – Bijnkershoek

1 Introduction

Ideas of human rights and of democracy reject all forms of slavery[1], including political slavery, and scholars from all over the world pay much of their time and efforts on the subject that appears to be the institution contrasting the

1 Article 4 of the *Universal Declaration of Human Rights*: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'. See also Article 5 of the *Charter of Fundamental Rights of the European Union*.

spirit of our times[2]. Yet transatlantic slave-trade and American chattel slavery were largely initiated and carried on by the Western nations that pushed the ideas of human rights and democracy to today's peaks.

Also the Dutch contributed to the transatlantic slave-trade and early modern slavery. It started in the seventeenth century, the 'Golden Age' for the citizens of the Dutch Republic, and lasted for centuries[3]. With respect to the Dutch contribution to slavery we could say the century began with the establishment of the Dutch East India Company (VOC) in 1602. More important for the topic of slavery was the founding of the Dutch West India Company (WIC) in 1621, for the WIC participated widely in the transatlantic slave trade[4]. Themselves enjoying an increase of wealth and liberty in their home-country, the Dutch transported over half a million enslaved Africans to the Americas between 1600 and 1850[5]. Although the idea of individual freedom is said to have gained popularity in the seventeenth century, and notwithstanding the fact that the tension between this idea and slavery was both evident and considered to be

2 For an introduction on the subject and the current debates the following compilations cover a range of subjects: D. Eltis and S.L. Engerman (eds.), *The Cambridge world history of slavery*, Volume 3: *AD 1420-AD 1804*, Cambridge 2011 (published online 2011); M.M. Smith and R.L. Paquette (eds.), *The Oxford handbook of slavery in the Americas*, 2010 [Oxford Scholarship Online 2012]; Jean Allain (ed.), *The legal understanding of slavery, from the historical to the contemporary*, 2012 [Oxford Scholarship Online 2013]; Ph. Misevich and Kristin Mann (eds.), *The rise and demise of slavery and the slave trade in the Atlantic world*, [Rochester studies in African history and the diaspora], Rochester 2016; D.A. Pargas and Felicia Roşu (eds.), *Critical readings of global slavery*, Leiden – Boston 2018.

3 J.I. Israel, *The Dutch Republic, Its rise, greatness, and fall, 1477-1806*, [Oxford history of early modern Europe], Oxford 1995, in fact pays only limited attention to slavery and slave-trade, most of it in chapter 35. Fortunately, apart from the titles in this study, there is a lot of literature on Dutch slavery, such as from the historians Pieter Emmer, Karwan Jalal Fatah-Black and Gert Oostindie.

4 Introductory on the Dutch participation in American slavery: H. den Heijer, *Dutch Caribbean*, in: Smith and Paquette (eds.), *Oxford handbook of slavery* (*supra*, n. 2), p. 154-172. The focus on the Americas has been so strong, that it is often overseen that slavery was also omnipresent in the other colonies in different parts of the world, especially in South-East Asia. On slavery in Dutch East India, i.e. the VOC-territories: A. Reid (ed.), *Slavery, bondage and dependency in Southeast Asia*, St. Lucia – London – New York 1983; more recent, in Dutch: M. van Rossum, *Kleurrijke tragiek, De geschiedenis van slavernij in Azië onder de VOC*, [Zeven Provinciën reeks, 35], Hilversum 2015. For the year 1750 Van Rossum gives 64.000 slaves in the West-Indian Dutch colonies, and 75.500 in the East (p. 7).

5 Embarked 552,971; disembarked 474,080. For the numbers, see *Voyages, The Trans-Atlantic slave trade database*; last consulted July 2020. The database shows peaks in the Dutch transports of slaves from Africa to America in 1643/4, 1669, 1671 and the period 1756-1775 (except for the year 1760).

in need of an explication, 'not many Calvinist voices were heard denouncing slavery in principle in the seventeenth century'[6].

The Dutch 'Golden Age' also gave birth to a generation of outstanding jurists. From the viewpoint of legal theory we could say that the century started with Hugo Grotius (1583-1645). To name only a few of the other jurists: Simon van Groenewegen van der Made (1613-1652), Ulric Huber (1636-1694), Johannes Voet (1647-1713) and Cornelis van Bijnkershoek (or Bynkershoek, 1673-1743)[7]. Together they produced, for more than a century, impressive legal texts on a range of topics including international law (the law of war, and the law of the sea), constitutional law, and Roman law. Making use of the techniques of both the *mos italicus* and the *mos gallicus* they shifted the traditional legal focus on the *ius commune* (the amalgam of Roman and canon law) to a focus on natural, international and local laws. They are known as the Dutch school ('Hollandse school'); one of their lasting products is the Roman-Dutch law[8].

Another fruit of this Dutch school that would turn out to be extremely fruitful was the legal approach to natural law. Hugo Grotius of course is to be named first for his conceptions of an international legal order, of natural rights pertaining to every human being, and his ideas on human liberty. His ideas on natural law and an international legal order were taken over by other legal theorists, Bijnkershoek probably being the most famous Dutch example, and would soon after also find their way into theories, such as John Locke's, that would lay the fundaments for our modern human rights. Yet we should remember that these ideas were developed in the same age, by the same authors and even in the same books in which slavery and slave-trade were legitimised.

This being so brings to the fore questions on the contribution of the Dutch seventeenth century jurists to the legitimisation of slavery and on the legal arguments used in the discussions on the topic. This paper aims to answer such questions. The paper will also attend the question of how the Dutch jurists solved the apparent contradiction between natural rights and freedom on the one hand and the legitimisation of slavery around the world on the other.

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6 A.H. Huussen Jr., *The Dutch Constitution of 1798 and the problem of slavery*, Tijdschrift voor Rechtsgeschiedenis, 67 (1999), p. 99-114 on p. 102.

7 Due to the prominent position of Bijnkershoek, I make some exceptions for him and enter the eighteenth century; for the rest, this study is limited to seventeenth century legal tracts and texts.

8 R. Feenstra and R. Zimmermann, *Das römisch-holländische Recht, Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, [Schriften zur Europäischen Rechts- und Verfassungsgeschichte, 7], Berlin 1992; G. van den Bergh, *Die holländische Schule, Ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500-1800*, [Ius Commune, Sonderhefte, 148], Frankfurt am Main 2002.

Part of the answer to the last question turns out to be: by altogether largely disregarding the ongoing transatlantic slave trade and colonial slavery. We will see below that the Dutch jurists in fact only showed relatively little interest in the contradictions between what they claimed for themselves and their compatriots and the legal position of the enslaved. In vain we look for a profound and fundamental discussion on the subject of freedom versus slavery among the jurists. We find arguments in favor of both, but no theory[9].

An explanation for this lack of real and profound interest might be that slavery was as good as non-existent in the Dutch Republic itself. In his paper called *What happened in the colonies stayed in the colonies* Rik van Welie points out that in the Dutch Provinces the suffering of the black slaves 'was not on the public radar screen'[10]. Hugo Grotius in his *Introduction to the law of Holland* (*Inleidinge tot de Hollandsche rechts-geleerdheid*, written around 1618-1620, published 1631) indeed wrote that apart from some peculiar remnants (*zonderlinge gerechtigheden*) of unfreedom, all the people in the Dutch Provinces were considered to be free (1.4.2). Should a slave be brought to the Republic, he or she could plea for freedom as soon as he or she disembarked or crossed the border of one of the Provinces; the so called free-soil principle[11]. Caput XXXIX of the Amsterdam customs, to give just one authentic example, explicitly stated that within the city indeed all the people were free and no one slave[12]. In 1636 the VOC forbade slave owners to take their slaves into the Low Countries[13]. Johannes Voet in his 1698 commentary on the Digests indicates

9 Huussen, *Dutch Constitution of 1798* (*supra*, n. 6), p. 104: 'Looking into the textbooks published in the Republic, however, one seldom finds any trace of slavery at all'. Traces I found, but no profound discussion.

10 R. van Welie, '*What happened in the colonies stayed in the colonies', The Dutch and the slave-free paradox*, in: Misevich and Mann (eds.), *The rise and demise of slavery* (*supra*, n. 2), p. 100-127 on p. 107 and 112.

11 For a European overwiew of the principle see the excellent Master-thesis on this theme by Filip Batselé, '*Omnes homines aut liberi sunt aut servi', Liberty, slavery and the law in Early Modern Europe*, Master-thesis Ghent University, 2016-2017. The study is published by Springer 2020.

12 '1. Binnen der Stadt van Amstelredamme ende hare vryheydt, zijn alle menschen vrij, ende geene slaven; 2. Item, alle slaven, die binnen deser Stede ende hare vryheydt komen ofte ghebracht worden, zijn vry ende buyten macht ende autoriteyt van hare Meesters, ende Vrouwen (...)' – if reclaimed as slaves they could ask for a legal declaration of freedom; see G. Rooseboom, *Recueil van verscheyde Keuren, en Costumen, Midtsgaders Maniere van Procederen binnen de Stadt Amsterdam*, Amsterdam 1656, p. 193.

13 A.J. van der Chijs, *Nederlandsch-Indisch Plakaatboek 1602-1811*, Batavia – The Hague 1885, I: p. 409-410.

that in the Dutch provinces the slave would not become free automatically but had to take action himself, with or without approval of his master[14].

Despite their aversion to slavery based on the alleged 'Germanic' fondness of freedom, described already by Tacitus in his *Germania*, and witnessed by the absence of slaves in the Dutch provinces, a theoretical reconciliation of their freedom-ideals with the notorious existence of slavery in many parts of the world, the ongoing slave trade across the Atlantic, and the use of slaves by Dutch slave-owning compatriots, clearly was not the prime concern of the seventeenth century Dutch jurists. It may be ours, as we are familiar with the modern idea of universal human rights, of fundamental rights that should be universally respected. They talked of natural rights instead, and could reconcile this talk with the idea of slavery on legal grounds, and with the actual participation of the Dutch in slavery on economic grounds. Legal: the arguments favoring slavery were strong, the institution being sanctioned by the *ius gentium* to start with. Economical: the colonies simply could not do without the enslaved. The combination of the two resulted in a triumph of the right to property, including the right to own a person, over universal personal freedom.

The paper starts with a sketch of legal pro-slavery arguments: the idea of slavery as an institution of the *ius gentium* and natural law arguments in favor of slavery. It next turns to some contextual features that seem to favor slavery: the picture of slavery in a wider context of forms of unfree labor, and the availability to the Dutch of a complete set of slavery-law ready to be used in the colonies even before the rise of any slave-related issue in either the West or the East. Then the discussion will move to anti-slavery arguments, slavery being an institution that fits awkwardly within both Christian faith, the alleged Germanic ideal of liberty, and finally the tradition that regards the sale of oneself as an act in conflict to the law.

As the term slavery is often not well defined in the sources and is used to cover a wide range of labor forms of unfree nature[15], I also use slave(ry) in a wide and open sense, specifying the term only where necessary, and possible, to distinguish it from other forms of unfree labor(ers)[16].

14 *Commentarius ad Pandectas*, ad I.v, par. 3: '(…) si servus regionum nostrarum […] fines intraverit, etiam invito domino possit confestim ad libertatem proclamare'.

15 Exceptions are Hugo Grotius, Ulric Huber and Gerard Noodt; see the references *infra*.

16 Suzanne Miers, *Slavery, a question of definition*, in: Pargas and Roşu (eds.), Critical readings (*supra*, n. 2), p. 184-200 (previously published in: Slavery and abolition, 24(2) (2003)), opens her study with: 'Slavery is arguably the most misused word in the English language'.

2 Legal arguments legitimising slavery

There were several legal arguments in favor of slavery as an institution[17] that were not easy to disregard by seventeenth century jurists. The pro-slavery arguments were not in the local customs and laws of the Dutch Provinces, as slavery was not part of the local legal systems. One had to look for them in natural law and in the *ius gentium*. The *ius gentium*-argument was the most powerful of the two.

2.1 *Slavery sanctioned by the* ius gentium

In the seventeenth century a jurist of course could not ignore the fact that the institution of slavery was sanctioned by the law of the peoples, the *ius gentium*. And it had been so at least since the times of the Romans. This was expressed most clearly by the Roman jurist Florentinus in Digests 1,5,4: *servitus est constitutio iuris gentium*[18].

2.1.1 Roman law

Ius gentium originally was the amalgam of legal rules and institutions that the Romans in antiquity had found in the laws of all the peoples they had come in contact with. It was, indeed, the law of all peoples. Its content came very close to and was sometimes equated with natural law, and for obvious reasons: what appears to be familiar to all peoples, i.e. all beings of the same human nature, can well be taken for a 'natural' disposition of these beings (or conversely: what seems 'natural' for a given species, such as humans, can be expected to be found in the laws of all such beings of the same nature). In fact, slavery was the most important, if not the only legal institution that for the Romans distinguished the *ius gentium* and the *ius naturale*[19]. By nature all men are born free, the Romans said (expressed in Roman law in Institutes 1,3 and Digests

17 See also J.R. Young, *Proslavery ideology*, in: Smith and Paquette (eds.), Oxford handbook of slavery (*supra*, n. 2), p. 399-418 on the pro-slavery arguments in the Americas. According to Young 'a proslavery mentality was the starting and ending point of the entire colonial project' (p. 402); the discussion centered around what Young calls the 'profit vs. paternalism dialectic'.

18 There is a valuable Dutch monograph on this text of the Digest by E.J.H. Schrage, *Libertas est facultas naturalis, Menselijke vrijheid in een tekst van de Romeinse jurist Florentinus*, [Leidse juridische reeks, XIV], Leiden 1975.

19 M. Kaser, *Das Römische Privatrecht*, I, München 1971, II.2.50.ii (p. 204); W.W. Burckland, *The Roman law of slavery, The condition of the slave in private law from Augustus to Justinian*, Cambridge (1908) 1970, p. 1.

1,1,4, 1,5,4,1, 50,17,32)[20]; yet slavery was omnipresent in their own civilisation and, in one form or another, also in the civilisations and among the peoples they had got in contact with. In Institutes 1,3,3 and 4 we find an outline of the origins of slavery as rooted in the *ius gentium*: gradually supplementing the older custom of killing the vanquished in war, people all over the world had got accustomed to saving the lives of the conquered in order to use or sell them as slaves instead. *Servus* ('slave') was said to be derived from the word *servare* ('to save')[21].

As Roman law had been taught at the law faculties all over Europe from 1100 onwards and had eventually been incorporated, often partially, in local legal systems on the Continent (the so called 'reception of Roman law'), someone living in the seventeenth century Europe with a university training in law would consider the institution of slavery entirely lawful as it was indeed sanctioned by the *ius gentium*[22]. Most jurists would probably also be aware that slavery in one form or another was found in all times and almost all over the world, also among the Germanic peoples. The seventeenth century German jurist David Mevius indicated that history points out that it had been the Frankish king Clovis I (466-511) who had introduced the Roman custom of enslaving prisoners of war among the freedom loving Germanic peoples[23]. From then on, the fate of the unfree persons among the Germanic peoples had fluctuated over time[24].

2.1.2 Enslavement in war

Concerning the question of who exactly would qualify for enslavement in war the medieval jurists had already generally accepted that it was not allowed for Christians to enslave their captives if the war was waged against

20 Digest 50,17,32 (a text by Ulpian): 'quia, quod ad ius natural attinet, omnes homines aequales sunt' (according to natural law, all men are equal).

21 This is what Aristotle in *Politics* 1.6 called a 'legal' slave (as opposed to 'natural' slaves).

22 S. Drescher, *From consensus to consensus, Slavery in international law*, in: Allain (ed.), Legal understanding (*supra*, n. 2), p. 102 points out that it would take two centuries for slavery to be transformed from an internationally sanctioned institution into an internationally delegitimised crime against humanity'. Also explicitly R.H. Helmholz, *The law of slavery and the European ius commune*, in: Allain (ed.), Legal understanding (*supra*, n. 2), p. 17-18.

23 David Mevius, *Ein kurtzes Bedenken über die Fragen so von dem Zustand, Abforderung und verwiederter Abfolge der Bawrsleute …* (1656), Die erste Haupt-Frage no. 22 (ed. by Marion Wiese, *Leibeigene Bauern und Römisches Recht im 17. Jahrhundert, Ein Gutachten des David Mevius*, [Schriften zur Europäischen Rechts- und Verfassungsgeschichte, 52], Berlin 2006). See also Wiese's extensive introduction to the text, ibidem, p. 33 and 127.

24 Wiese (*supra*, n. 23), p. 83 ff.

other Christians. The Italian jurist Giovanni da Legnano (c. 1320-1383) in his *Tractatus de bello, de represaliis et de duello* said that the customs of his days had made the *ius gentium* rule on the enslavement of captives in war obsolete between Christians[25]. This view was followed by the next generations of international law jurists[26]. Hugo Grotius had it as a '*Christianis in universum placuit*' (generally agreed rule among Christians) in *De jure belli ac pacis* III.7.9 (first published in 1625). Grotius also indicated that between Muslims an identical practice had developed (III.7.9.1-2).

However, Legnano and the other medieval writers on the law of war had not quite explained what a Christian prisoner of war would actually be if he was not enslaved[27]. Gradually the idea got accepted to ask for a ransom before relieving the captive, a custom still adhered to in the days of Bijnkershoek, who in his *Quaestionum juris publici libri duo* I.3 (published in 1737) discussed the precise legal background of this custom. But the custom itself was clear enough: between Christians enslavement had been succeeded by either exchange of prisoners or else detention until payment (*servituti igitur successit vel captivorum* (...) *permutatio, vel detentio, donec redimantur*).

It had been Hugo Grotius who had set the stage for the *ius gentium*-argument for slavery among the seventeenth century Dutch jurists. He did so in chapter 7 of the third book of his *De iure belli ac pacis* (1625), which would soon after publication become one of the pillars of Dutch legal theorising. Although by nature no human being is a slave, so also Grotius, the *ius gentium* regarded as slaves 'not only those who surrender themselves, or promise to become slaves (...), but all without exception who have been captured in a formal public war become slaves'[28]. The rationale behind the idea of sparing the lives of captives of war and to use them as slaves instead, so Grotius explained, was indeed to encourage captors to avoid the greater evil of killing them (III.7.5.1 and III.7.6.3-4). But the effects of the law were unlimited: 'there is nothing which a master is not permitted to do to his slaves', he wrote in III.7.3, a statement that was in close harmony with the VOC Instruction of 1617[29]. The slave was

25 M. Keen, *The laws of war in the late Middle Ages*, London – Toronto 1965, p. 156-157. Giovanni da Legnano, *Tractatus de bello*, ch. LX [edition and translation by J.L. Brierly in the series Classics of International Law, edited by Th. Erskin Holland], Washington – Oxford 1917.

26 For an overview see Batselé, *Omnes homines* (*supra*, n. 11), par. 2.2.1.4 and 2.3.1.

27 Keen, *Laws of war* (*supra*, n. 25), p. 157.

28 *De iure belli ac pacis*, III.7.1; translation by F.W. Kelsey, *On the law of war and peace three books*, 1913 (1925).

29 Cf. article 64 of *Instructie voor den Gouverneur en de Raden van Indië* 1617, in: Van der Chijs, *Nederlandsch-Indisch Plakaatboek 1602-1811* (*supra*, n. 13), I p. 45: '... and they shall be treated as rigorously as shall be found fit' (translation by J. Fox, *For good and sufficient*

not allowed to resist his master, according to Grotius, and the law included the right to sell and transfer ownership of the slave (III.7.5.2 and III.7.7). As long as war continued, captives still had the right flee to their own people and retain their freedom (that is: no 'bond of conscience' was laid upon the captives); but had they fled to another people or after peace had been made, they were to be given up to the master who would claim them (III.6.1).

One might be prompted to ask how the ban on slavery in Dutch law, and even more so the custom of Christians not to enslave Christian captives, could be reconciled with saying that slavery was permitted by the *ius gentium* – the law of peoples. Grotius, however, had defined *ius gentium* not as the law of *all* nations, but as the law of all *or of many* nations (I.1.14.1). The reason for this weakening of the *ius gentium*-criterion, he himself said, was the awareness that maybe not all nations would agree on some widespread laws that deviated from natural law. Such as – apparently – slavery.

2.1.3 Bijnkershoek

Bijnkershoek in his *Quaestionum juris publici libri duo* I.3 (1737) went a step further where he claimed that enslavement of prisoners of war had fallen in disuse among most peoples (*moribus plerarumque Gentium*). To illustrate his point he referred to a case of the Dutch military council. On 14th December 1602 the council had ordered twenty-four prisoners of war (captured in the siege of Den Bosch; *hostes, in obsidione Boscana captos*)[30] to be released before starving in the dungeons; he added that it would have been rather astonishing had the council ordered to kill them or to sell them as slaves instead. However, he also made clear that 'fallen in disuse' obviously was not the same as being abolished altogether. Although 'almost' (*fere*) out of use between Christians (*inter Christianos*), Bijnkershoek noted that the Dutch could still make use of their right according to the *ius gentium* against people who would in their turn use it against them. More precisely, they could still make use of the right to enslave prisoners of war if the war was waged against Barbarians (such as the Turks or the Indians, as Paulus Voet had it in his commentary (1668) on the Institutes 1,3,5, no. 4: *cum Barbaris, puta Turcis, Indis*; or such as the people from Algeria, Tunisia and Tripoli, as Bijnkershoek himself had it in *Quaestionum juris publici libri duo* I.3: *Algerienses, Tunitanes, Tripolenses*)[31]. The legitimation for enslavements of 'Barbarians' by Christians was found in the *jus talionis*:

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reasons, An examination of early Dutch East India Company ordinances on slaves and slavery, in: Reid (ed.), *Slavery, bondage* (*supra,* n. 4), p. 246-262 on p. 249).

30 Obviously not the 1629 Siege of Den Bosch.

31 Bijnkershoek, *Quaestionum juris publici libri duo* I.3.

as they would enslave their Christian captives, Christians could do the same to them[32].

What follows is in its succinctness emblematic for the general attitude towards the subject of the Dutch jurists. Bijnkershoek without critical note accepted the apparent habit to sell enslaved persons to the Spaniards (on the Iberian peninsula slavery was never abolished), 'for the Dutch themselves', he added explanatory, 'don't have slaves, unless in Asia, Africa and America' (*nam ipsi Belgae servos non habent, nisi in Asia, Africa et America*). We get a grasp of the two legal spheres in which the Dutch lived: one in Europe among Christians without slavery, and one outside Europe ('beyond the line')[33] in which slavery was far from uncommon. And virtually nowhere the spheres do meet.

Whatever the legal force of the legitimation rooted in the *ius gentium*, the preacher Georgius de Raad in his *Bedenckingen over den Guineeschen slaefhandel der gereformeerden met de papisten* ('Demurs on the Guinean Slave Trade of the Reformed with the Papists') already in 1665 noted that many slaves had in fact been captured illegally and shouldn't have been enslaved at all[34]. But his cry was hardly heard; or at least it found no echo in the legal treatises.

And so the prime concern of the jurists of the Dutch School seems not in the first place to reconcile slavery with their own fondness of freedom; instead, it seems they had the task of legitimising the legal ban on slavery within their own legal systems. After all, a seventeenth century inhabitant of the Dutch Republic could ask, why it should not be allowed for a Dutch citizen to hold slaves within his home-country, if slavery as such was a legal institution sanctioned by the *ius gentium*. What could legally support the restriction on generally accepted objects of ownership? However, this question was asked nor answered explicitly by the jurists; and it still bothered the States General as late as in 1776[35]. Regulating some topics related to slaves who had either been

32 Both Paulus Voet (*In quatuor libros Institutionum Imperalium commentarius*, on Institutes 1,3,5, no. 3) and Bijnkershoek (*Quaestionum juris publici libri duo*, 1.3) use the *jus talionis* argument.

33 Concisely drawn by S. Drescher, *Free labor vs. slave labor, The British and Caribbean cases*, in: S.L. Engerman (ed.), Terms of labor, slavery, serfdom, and free labor, [The making of modern freedom], Standford (California) [1999], p. 50-86 as 'west of the Azores and south of the Tropic' (p. 53).

34 On De Raad and his work (and similar works from the same period), see A.N. Paasman, *Reinhart, Nederlandse literatuur en slavernij ten tijde van de Verlichting*, [diss. Leiden], Leiden 1984, p. 98-103 (p. 101-102).

35 *Placaat van de Staaten Generaal, omtrent de Vryheid der Neger- en andere Slaaven, welke uit de Colonien van den Staat naar dese Landen overgebragt of overgesonden worden*, 23 May 1776, in: Groot Placaat Boek, negende deel, Amsterdam: Johannes Allart, 1796, p. 526-528. See also Huussen, *Dutch Constitution of 1798* (*supra*, n. 6), p. 106.

brought or fled to one of the Dutch Provinces, the States General weighted two sides of what they considered the inborn freedom of the Dutch ('de aangeboore en dadelyke Vryheid'): the property rights of owners and masters on the one side, and the just ideas on 'patriotic' freedom ('regte denkbeelden der Vaderlandschen Vryheid') to be applied to slaves on the other. Both property (including property over a person) and freedom originate in the same set of ideas. In the colonies they decided explicitly in favor of the first, while holding on to the second in the Republic.

2.2 *Slavery sanctioned by natural law*

Apart from the *ius gentium*-argument yet another interesting and promising line of thought was available to seventeenth century legal debates on slavery. This thought remained entirely within the contours of natural law, the law inborn in every human being. This argument too had forcefully been articulated by Hugo Grotius in his *De jure belli ac pacis* at the end of the first quarter of the seventeenth century[36].

By nature, so Grotius started the discussion on slavery as permitted by natural law, nobody is a slave[37], for every human being by nature holds as his own (*suum*) his life, body, limbs, reputation, honour and freedom to act (II.17.2.1, *vita, corpus, membra, fama, honor, actiones propriae*)[38]. From this interesting list of things that are naturally ours, the element of *actiones propriae*, the free

36 See more extensively G. van Nifterik, *Hugo Grotius on 'slavery'*, in: Grotiana, NS 22-23 (2001-2002), p. 233-243. My argument in the *Grotiana*-paper is that it is preferable not to translate *servus* for slave, since many forms of servitude existed, whereas 'slavery' might be too strongly associated with the slaves in the Americas and that the translation 'slavery' for *servitus* could obscure the fact that for Grotius *servitus* permitted by natural law was in theory neither harsh nor unfavorable for the *servus* – as was slavery based on the *ius gentium*. I therefor preferred the term 'perpetual services'. In the study at hand on 'arguments related to slavery' this refinement is less relevant, for Grotius's argument on natural slavery is surely related to the subject and indeed was invoked to legitimise slavery as such.

37 *De iure belli ac pacis* III.7.1: 'Servi natura quidem, id est citra factum humanum aut primaevo naturae statu hominum nulli sunt'. Also II.22.11: '(...) libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de iure naturae praecedente factum omne humanum (...)'.

38 Similar Hugo Donellus, *Commentatorium iuris civilis libri viginti octo*, II.8 (ed. Francofurti 1626, p. 45). On the influence of Donellus: R. Feenstra, *La systématique du droit dans l'oeuvre de Grotius*, in: Sistematica giuridica, Storia, teoria e problemi attuali (ed. B. Paradisi), [Biblioteca Internazionale di cultura, 22], Firenze 1991, p. 333-343, on p. 341, and *idem*, *Hugues Doneau et les juristes néerlandais du XVII^e siècle*, *L'influence de son 'système' sur l'évolution du droit privé avant le Pandectisme*, *Jacques Godefroy* (*1587-1652*) *et l'Humanisme juridique à Genève*, Actes du colloque Jacques Godefroy (ed. B. Schmidlin and A. Dufour), Bâle – Francfort-sur-le-Main 1991, p. 231-243, especially on p. 237-243.

disposal over one's own actions, can be translated as freedom or liberty, a translation that can be substantiated by pointing out Grotius's *Introduction to the jurisprudence of Holland* (III.1.12), where he himself labelled 'somebody's free disposal over his actions' ('des mensches vrije macht over sijne daden') as 'vrijheid', that is: 'freedom' or 'liberty'[39]. In I.1.5 of his *De iure belli ac pacis* Grotius described liberty as the power over oneself (*potestas in se*). *Potestas*, in turn, was one of the three manifestations of a right (*ius* as a faculty; the other two manifestations being dominion (*dominium*) and personal right (*creditum*)). It could either be a power over oneself (liberty), or a power over others (*potestas in alios*). Examples given by Grotius of a *potestas in alios* are the power of a father, and of a master over his slave (I.1.4 and I.1.5).

According to Grotius a person can forfeit his natural liberty by way of punishment (II.5.32) or by a voluntary act whereby he gave himself into slavery and submitted to a master who in turn has to consent to this submission (II.5.8.1 and II.5.27-30; see also II.24.6.2). The master than acquires a right over the person and can claim this person's services, in exchange for food, shelter, and other necessities of life. Should the slave afterwards have a child, the child too will have to work for his/her parent's master, until at least full compensation has been made for the master's costs to provide shelter and food for the child when it was still too young to make him any profit (II.5.29).

At that point, by way of a short appendix to the paragraph concerning children born of slaves, Grotius remarked that it was generally approved that the voluntary slave in case of excessive cruelty of the master was permitted to flee. This is well in harmony with his contention that this type of slavery (voluntary slavery, permitted by natural law) 'contains no element of undue severity' (II.5.27.2). This permission does according to Grotius not contradict to the prohibition of the Apostles that forbids slaves to leave their master (further discussed in III.7.6), since the last was meant as a general prohibition correcting the error of those who altogether oppose to slavery as inconsistent with 'Christian liberty'. It is not amazing that Grotius abstains from mentioning Institutes 1,8,2, for Grotius's solution for voluntary slaves (free to flee) of course

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Both articles are reprinted (with addenda) in: R. Feenstra, *Legal scholarship and doctrines of private law, 13th-18th centuries*, Aldershot 1996.

39 Compare also the aforementioned Roman jurist Florentinus in D. 1,5,4 (*supra*, n. 18): 'Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur', to which according to R. Feenstra, *Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen*', in: Festschrift für Franz Wieacker zum 70. Geburtstag (ed. O. Behrends et al.), Göttingen 1978, p. 209-234, p. 227 fn. 120, Grotius made an implicit reference in IBP I.1.5. On Florentinus's text see Schrage, *Libertas est facultas naturalis* (*supra*, n. 18).

goes much further than the Roman law provision whereby only the master could be forced to sell the slaves he maltreated severely.

In short, according to Grotius slavery might not itself be natural (nobody is a slave by nature), but could nevertheless be legitimised entirely within the contours of the *ius naturale*, since the voluntary transaction between the two parties to the contract, one submitting himself and the other acquiring the right over the other person's actions, takes place in conformity to the *ius naturale* (see also III.7.1.1). What belongs to someone, what is his (*suum*), can by natural law be sold by this person, and subsequently be purchased by somebody else. The result of the transaction of the free disposal over one's own actions is a master (*dominus*) and slave (*servus*) relation called 'slavery' (*servitus*). As I have argued elsewhere, it is however not entirely clear what rights the purchaser obtains from this transaction; in particular it is not clear whether or not the master can subsequently sell and transfer his *potestas* in the other to a third party[40]. The right of life and death over his slaves had by Grotius expressly been denied to the master, albeit, he added, that killing slaves by the laws of many peoples went unpunished (II.5.28).

2.3 *Natural law and* ius gentium *arguments mixed*

2.3.1 Huber

The Frisian jurist Ulric Huber too considered slavery to be in accordance with nature, but he arrived at this position from quite another angle[41]. To begin with he explicitly rejected Grotius's definition of contractual (voluntary) natural slavery as lifelong services in return for food (*perpetuae operae pro alimenta*). This definition, so ran Huber's argument, was unfit to explain the right of a master to sell his slave, which was after all licit according to the *ius gentium*. Obviously Huber did not make a distinction in rights and supposed conduct of the master towards his slaves between what Grotius would take for slavery according to the *ius gentium* on the one hand, and voluntary slavery as rooted in the natural law on the other; after all, Grotius had not clearly stated whether or not a voluntary slave could be sold and transferred by the master. It would be more accurate, Huber said instead, to say with Justinian and the classical jurists that a slave is anyone who is subjected to another's power (*dominio alieno*).

In harmony with the widely held *ius gentium* argument and referring to Cicero (*De officiis* III.32: 'and it is not opposed to Nature to rob, if one can, a

40 Van Nifterik, *Hugo Grotius on 'slavery'* (*supra*, n. 36), p. 239 ff.

41 Ulric Huber, *Disgressiones Justinianeae* (1670) II.2 and *De iure civitatis* (1676) II.1.6.1-6.

man whom it is morally right to kill')[42], Huber reached the conclusion that it cannot be contra nature to save the life of someone whom you may kill and to make him serve you instead. In addition Huber accepted the Aristotelian idea of slaves by nature, the idea that some men are more apt to serve than to enjoy liberty[43]. He concluded that the maxim of Justinian and the jurists that slavery is against our nature must therefore be interpreted as saying that it is 'against our initial natural status'; for initially all men are indeed born free. It should not be interpreted as to imply that slavery contradicted the *recta ratio*.

Along these lines Huber listed no less than five causes for slavery: convention, consumed nutriments, the law of war, generation and conviction for a criminal offense[44]. We will see below that according to Huber obviously the Frisians were not among the Aristotelean 'slaves by nature'.

2.3.2 Noodt

Gerard Noodt at the very end of the seventeenth century in an academic speech on account of his farewell as rector of the University of Leiden offered his audience another rather interesting account of slavery[45], somewhat blurring, as Huber had done before him, the distinction Grotius had made between the two types of slavery, one within the contours of the *ius naturale*, the other based on the *ius gentium*. The speech was actually on supreme power and the *lex Regia* and the question was primarily on political slavery, the situation in which an entire population is subjected to a ruler as slaves are subjected to a master. From political slavery Noodt took a small step towards individual slavery[46].

There are several ways by which someone can become the slave of another, he said. The vanquished in war are often forced into slavery by chains or weapons; however, it can also be the case that one is bound to slavery by a pact (*alium bello victum vinculis aut armis coërcet, alium pacto permittit*)[47]. This of course reminds us of Grotius's two types of slavery, but Noodt elaborated on the distinction differently. He accepted two forms of voluntary slavery, both within the reach of *ius gentium*. Voluntary slavery itself he described as slavery

42 Translation by Walter Miller in the Loeb-edition.

43 Aristotle, *Politics* I.6.

44 Huber, *De iure civitatis* II.1.6.7-12.

45 Gerard Noodt, *De jure summi imperii et lege regia* (1699). A facsimile of the text with a Dutch translation is available in: *Over de soevereiniteit van het volk, Een revolutionaire rede uit 1699 over de opperste macht* (translation by H. van Cuijlenborg), Amsterdam 2017.

46 On p. 19-20 of the facsimile mentioned *supra*, n. 45.

47 Similar to Thomas Hobbes, *De Cive* 8.4, discussed also by Samuel Pufendorf, *De iure naturae et gentium* VI.3.6 and Huber, *De iure civitatis* II.1.6.14.

not based on violence but on the given word (*non vi … sed fide*); one form of voluntary slavery resulted from the choice of a vanquished in war for slavery over being killed by the victor, the other from a choice for slavery over starvation.

He next pointed out that it is proper in any contract, including the contract to sell oneself for the reason of inability to sustain yourself or even for the only reason to avoid a violent death, that there must be profit on both sides. This was in fact a legal call for moderation in the treatment of slaves: should the situation for the 'voluntary' slave start to get worse than the situation he wanted to avoid by selling himself into slavery, the slave would be freed from the obligation to serve; for a person would never voluntarily bind himself for the worse, but only for the good (*quia obligavit se non ad malum, sed ad bonum*). A voluntary slave would return to a natural status should the master treat him or her badly; consequently the slave would no longer be chained by the obligations that arise from the *ius gentium* and could either run away, or even kill the master if needed to save himself.

Noodt next turned to involuntary enslavement forced by violence, by chains or weapons. In this situation the master and slave in their mutual relationship would continue to live in a state of war. Such a state of war being ruled by the law of war, the master and the slave would continue to face each other in their natural status (*in naturae statu*). This implicated that both master and slave were and would remain in their 'own right' (*sui juris*). Consequently, both would be licensed to make use of all of the natural rights attached to a situation of war. More specifically: the master would be licensed to be cruel in order to enforce his will, and the slave would be licensed to use violence against his master and to run away if he could.

2.3.3 Overview

Based on the work of the historian David Brion Davis, Jeffrey Young concluded that 'the weight of the Western intellectual tradition was decidedly conducive to arguments in favor of slavery'[48]. This overview shows that seventeenth century Dutch jurists indeed not only found legal arguments in favour of slavery as a legal institution in the *ius gentium*, but also in natural law theory. Both sources of law were of course not to be disregarded by any seventeenth century jurist. The Dutch jurists disagreed on several matters, even on matters of importance, either of theoretical importance such as the question whether or not slavery was an institution also sanctioned by natural law, or of practical importance such as the questions of how to treat your slaves. But generally speaking, slavery as such was not put into question, and accepted as either part

48 Young, *Proslavery ideology* (*supra*, n. 17), on p. 404.

of the *ius gentium* or of natural law, or more often: as legitimised in different modes by both[49].

3 Contextual legal arguments in favor of slavery

Before we turn to arguments against slavery, attention must be paid to some features that shaped the background against which the seventeenth century discussion on slavery took place. I presume the two contextual arguments below could well have contributed to the acceptability of the institution, even if they are nowhere explicitly mentioned in this vein by the Dutch jurists.

3.1 *Between slavery and free labor*

It is a fact that unfree laborers were rather common in the seventeenth century and that there were many unfree labor relationships in between free labor and slavery. Concerning the different forms of unfree laborers we turn to the *Gutachten* of David Mevius once more. According to Mevius the Roman law categories *agricolis, colonis scriptiis* and *rusticanis* were actually not entirely appropriate to describe the position of several free, less free and unfree workers on the land in seventeenth century Germany. He called them 'Bawrsleute', and listed with an increasing lack of freedom 'freye Bawren, 'Freybawren', 'Pachtleute' and 'Bawren'. The last category, 'Bawren' (peasants), were taken for 'leibeigene Knechten' (serfs) by some, for 'freye Leute' (free people) by others, for 'Halbeigene' (semi serfs) by Mevius and still several others[50]. They were not entirely free, for they were obliged to perform unfree services and duties. But apart from these services and duties the 'Bawren' were considered free. In other words, persons who worked on the land were often neither entirely free nor entirely unfree, but somewhere in between. Although opinions on their legal position differed strongly among the (German) jurists, ranging from a position ruled by the Roman laws on slavery (as defended by Johannes Oldendorp) to a

49 F. Dorn, *Der Unfreiheitsdiskurs in deutschen Rechtsbüchern des Hoch- und Spätmittelters*, in: Elisabeth Herrmann-Otto (Hrsg.), Unfreie Arbeits- und Lebensverhältnisse von der Antike bis in die Gegenwart, Hildesheim – Zürich – New York 2005, p. 167-205, provides an interesting overview of medieval German legal codes on the legitimacy of unfreedom, questioned by Eike von Repgow in the *Sachsenspiegel* (1220-1235), but restored by the gloss on the text by Johann von Buch (1325). 'Eikes Argumentation muβte demgegenüber (…) aus der Sicht des gelehrten Juristen als mit dem geltenden Recht unvereinbar erscheinen' (p. 202); Buch's gloss would influence future generations of jurists more than Eikes viewpoint.

50 For the Middle Ages see Helmholtz, *Law of slavery* (*supra*, n. 22), p. 22.

position characterised as bounded to the ground but otherwise free (Mevius)[51], it is altogether clear that the reception of the Roman laws on slavery had been far from favorable for the position of such unfree workers[52].

Generally speaking, unfree labor as it still existed in the seventeenth century in Germany (and further east) was said to be non-existent in the Low Countries. However, Hugo Grotius who in his *Introduction to the jurisprudence of Holland* 1.4.2 pointed out that the distinction between free and unfree persons had formerly also been known in Holland, subsequently said that even in his days some odd remnants of unfreedom could still be found in Holland and surrounding territories. Apart from these remnants, he continued, all persons within the Province of Holland were considered free. In his *De iure belli ac pacis* Grotius made a distinction between perfect (i.e. complete) and imperfect kinds of *servitus* (servitude or slavery), 'such as which is temporary, or under a condition, or for certain purposes' (II.5.30); one of the varieties of imperfect servitude are indeed the serfs bound to the land (*statu asscriptorum glebae*). Paulus Voet, father of the famous Johannes Voet, in his commentary on Institutes 1,3,5 under 4 remarked that remnants of servitude (*vestigiae* (…) *pristinae servitutis*) actually still existed in two quarters of the Duchy of Gelders, the Quarter of Zutphen and the Veluwe Quarter (*etiam in tetrarchia Zutphaniensi et Velavica*). Obviously the forms of relative unfreedom were still too important to ignore.

3.1.1 Sociological point of view

Apart from such remnants of unfree status, it seems crucial for a proper understanding of the seventeenth century's ideas on slavery to consider unfree labor also in a wider social context. In many parts of Europe genuine slavery may have disappeared (almost) completely after the Roman era[53]. But according to Robert Steinfeld in his study on employment law in England and America free contractual labor was only invented as late as the nineteenth century. Prior to that era, all workers were placed in 'a truncated legal hierarchy of ranks and orders'. One of the ranks was 'servants', which encompassed slaves, apprentices, menial servants, day laborers and other agents over whom a master

51 Wiese, *Leibeigene Bauern* (*supra,* n. 23), p. 129; for Mevius's text see *ibidem*, p. 274-280.

52 Wiese, *Leibeigene Bauern* (*supra*, n. 23), p. 83 ff. and Dorn, *Unfreiheitsdiskurs* (*supra*, n. 49), p. 202.

53 Apart from the remnants just mentioned, slavery as such survived in Italy and the Iberian Peninsula, see W.D. Phillips, *Slavery in late medieval Europe*, in: Pargas and Roşu (eds.), *Critical readings* (*supra*, n. 2), p. 665-698 (previously published in W.D. Phillips Jr., *Slavery from Roman times to the early transatlantic trade*, Minneapolis 1985).

had personal authority[54]. Also Bas van Bavel in his study *Manors and markets*, though time and again pointing out that important regional differences existed even within the Low Countries, concludes that '(a)lthough at the end of the Middle Ages forced labour was largely a thing of the past, the wage labour market was not open and free, but often coupled with unequal power relationships, artificially fixed low wages, or all kinds of restrictions'[55].

According to Steinfeld, to grasp the master-servant relationship in its pre-nineteenth century vein we should perceive the early modern society and human existence as 'both rigidly hierarchical and completely integrated'[56]. Dominant in many relationships was the head of the household. He was husband, father and master in one person and governed both his wife, his children, and his (resident) servants. As a master he exercised a kind of jurisdiction over his servants, which had a dual basis. One was his domestic authority as the head of the household, his *patria potestas*, which made him a kind of ruler over his family as over his own small polity (at the same time it also made the political rulers look like fathers of their people)[57]. The other basis, at least as important for our subject, was rooted in the idea 'that the labor of common people was a resource over which the community had jurisdiction'. This idea implied, inter alia, that the community had a right to decide where the laborers should work and live. The community in turn had so to say subsequently 'extended to masters (…) a certain jurisdiction over the persons of their laborers'[58].

54 R.J. Steinfeld, *The invention of free labor, The employment relation in English and American law and culture, 1350-1870*, [Studies in Legal History], Chapel Hill – London 1991, p. 15 and 16. For a scope to '[a]ll European and early American societies', see D. Eltis, *Slavery and freedom in the early modern world*, in: Eltis and Engerman (ed.), *Cambridge world history of slavery* (*supra*, n. 2), p. 25-49, p. 36 ff.; on p. 45: 'Slavery in the colonies and wage labor at home appear as two different methods of coercing workers and (…) the difference between the two was small'. See also Drescher, *Free labor vs. slave labor* (*supra*, n. 33), p. 52: 'For most of human history the expression free labor was an oxymoron'.

55 B. van Bavel, *Manors and markets, Economy and society in the Low Countries, 500-1600*, Oxford 2010, p. 205. Apparently, the labor market in the Low Countries was more open than elsewhere; see for instance *ibidem*, p. 209.

56 Steinfeld, *Invention of free labor* (*supra*, n. 54), p. 55 ff. divides the early modern world of labor into 'servants and apprentices' (also indicated as 'men who are ruled', p. 64) on the one hand, and 'laborers and artificers' on the other. See Young, *Proslavery ideology* (*supra*, n. 17), p. 401 on 'the religious values inculcated by Catholicism – values that took for granted an uneven social hierarchy and the need for subordinate members of society to be carefully overseen by the proper authorities', favoring the enslavement of the native American people by Columbus; on p. 402: 'The story of European colonisation of the Americas was (…) built on a proslavery plot'.

57 Steinfeld, *Invention of free labor* (*supra*, n. 54), p. 55 ff.

58 Steinfeld, *Invention of free labor*, p. 62 and 64. See also Eltis, *Slavery and freedom* (*supra*, n. 54), esp. p. 36.

In addition there was still another basis for a master's power over his servants, rooted in the idea of labor as something that could be held in property[59]. In Roman law labor relationships with non-slaves were guided by the contract of hire (*locatio conductio operarum*), a contract that gave rise to a personal claim of the *conductor* (employer) to the labor of the *locator* (employee)[60]. However, the reception of Roman law had not contributed to a mitigation of the fate of common contracted servants on this topic. For precisely on this topic local customary (Germanic) law had widely withstood its supplementation by the Roman law of contracts for a long period. Hugo Grotius in his *Introduction to the jurisprudence of Holland* indeed considered the contract of hire fit to conclude the accomplishment of a work for a payment (*Introduction* III.19.11)[61]; and in his remarks on the articles 29-31 of his legal advice to regulate the position of (Portuguese) Jews in Holland of 1615, Grotius implicitly hinted that for domestic services the contract of hire had indeed replaced the older practice of using slaves[62]. But unlike in Roman law, a contract of hire in the law of Holland resulted in some right of property, more specifically: a use-right for a limited time. Grotius used the legal figure of 'bruick' to indicate the employer's use-right in the labor of the employee (*Introduction* II.44.9). In legal theory 'bruick' was one of the real rights, i.e. rights that can be invoked against anyone. It gave the employer a strong claim on the labor of the servant, rather than a personal right to the fulfillment of a contractual obligation by the servant. In fact, the employer could indeed be said to have a kind of property in the employee's labor.

Labor being traditionally and persistently taken for something over which one would have a property right, well fitted in the gradual but in the end radical replacement of the social hierarchical order from the seventeenth century onwards by new ideas, coined by C.B. Macpherson in 1962 as 'possessive

59 Steinfeld, *Invention of free labor* (*supra*, n. 54), p. 66 ff.; Drescher (*supra*, n. 33), p. 52: '(…) labor itself remained understood as service – an alienation or limitation of one's property in one's own working capacity for the duration of a contract'.

60 For a short introduction to the contract of hire as a contract of employment, see B. Nicholas, *An introduction to Roman law*, [Clarendon Law Series], Oxford 1975, IV.1.2.(b).(2).

61 See also Simon van Leeuwen, *Het Rooms Hollandsch Recht* (1646), IV.22.

62 Hugo de Groot, *Remonstrantie nopende de ordre op de Joden*, recently published by D. Kromhout and A. Offenberg (eds.) as *Hugo Grotius's* Remonstrantie *of 1615, Facsimile, transliteration, modern translations and analysis*, Leiden – Boston 2019, p. 169: 'Daer nae als het gebruijck van Slaven begonst aff te gaen, ende een ijder hem meest lijet dijenen door huijrlingen …'; '[lijet dijenen door] huijrlingen' ('huijrlingen' from huijr, i.e. 'hire') is translated on p. 213 as '[employ] domestic servants', somewhat obscuring the dichotomy slaves – hired employees.

individualism'[63]. Being free and equal according to this individualistic idea implied that each and every individual by nature had property rights in his or her own person, actions and capacities, which could subsequently be sold and transferred if one wished to do so. This in turn implied that any individual could exploit the labor of another, in a way that previously the community had done[64]. Macpherson traces the idea of possessive individualism back to Thomas Hobbes, and refers to Hugo Grotius only once, in a footnote. Whatever the merits of Macpherson's analyses of his seventeenth century sources and of the impact these sources have had on capitalist thinking[65], we saw already that the main contours of what Macpherson took for a new approach had been laid down earlier. By nature, Grotius had said in line with Spanish late-scholastic thinkers as Juan de Molina and Francisco Suarez, every man has property in what is his own (*suum*), among which his own actions (*actiones propriae*)[66]. Being his property, a man can by natural law market the free disposal over his own actions. The result Grotius called *servitus*, since the seller would lose *potestas* over his own actions, whereas the purchaser, the master, acquired a *potestas in alio*, a subjective right over another person. Even if, as we pointed out above, it is unclear in Grotius's text whether or not the purchaser acquired genuine property in the person of the seller[67], it is clear that he did acquire a kind of property right in his or her services[68].

63 C.B. Macpherson, *The political theory of possessive individualism, Hobbes to Locke*, Oxford 2011 (1962); Steinfeld, *Invention of free labor* (*supra*, n. 54), p. 78 ff.

64 Especially Eltis stresses the close interdependence of the 'new freedom' and slavery, and concludes (p. 49): 'freedom as it developed in Europe meant in part the freedom to exploit others'. See also *supra*, n. 35 on the *Placaat* of the States General of 1776, favoring the right of ownership over the right to freedom.

65 Frank Cunningham provides a very short summary of the critique on Macpherson's analyses in his *Introduction to the Wynford edition*, in: C.B. Macpherson, *The life and times of liberal democracy*, [Oxford 1977], p. vii. John Dunn, in his *Democracy unretrieved, or the political theory of Professor Macpherson*, British Journal of Political Science, 4 (1974), p. 489-499 on p. 491, observes 'that Macpherson was not greatly interested in studying political thinking historically, that his interest in the seventeenth century roots was always (and very properly) subordinated to his interest in the diseased twentieth-century tree'.

66 Annabel Brett, *Changes of state, Nature and the limits of the city in early modern natural law*, Princeton – Oxford 2011, ch. 4. Idem: *The development of the idea of citizens' rights*, in: Q. Skinner and B. Strath (eds.), States and citizens, History, theory, prospects, Cambridge 2003, p. 97-112, on Grotius (p. 104-105): 'Individual right was conceived in an almost commercial vein as natural man's original capital, to be spent on advantage'.

67 Steinfeld, *Invention of free labor* (*supra*, n. 54), p. 100 (not in correlation to Grotius): 'In service only the property in a servant's labor was conveyed (…). In slavery, by contrast, a master could claim nearly absolute property in his slave's person'.

68 See above, and also more extensively my contribution on the topic in Grotiana (Van Nifterik, *Hugo Grotius on 'slavery'* (*supra*, n. 36). I concluded that the exact character of

3.1.2 *Potestas – dominium*

The discussion above shows that from a sociological point of view slavery can be seen as the most extreme among other forms of unfree labor. From a historical point of view Suzanne Miers asks what makes someone a slave: being sold or acquired against his or her will, the way he or she is treated, or maybe one's legal status? She thereafter gives an interesting account of several kinds of slavery and serfdom (a term equally poorly defined)[69]. Legally speaking, the demarcation line between slavery and other forms of (more or less unfree) labor seems more clear, as a slave is the master's property to be treated according to the master's whims, whereas other unfree workers as serfs bound to the ground and (house-hold) servants are not. Huber, as we have seen above, without much ado along these lines replaced Grotius's relatively mild natural law slavery definition *qui perpetuae operae pro alimenta debet* (who owes perpetual services in exchange for food) for *qui dominio alieno contra naturam subjicitur* (who contrary to nature is subjected to the dominion of someone else), thereby disregarding the variances between Grotius's slavery on the ground of natural law and of *ius gentium*-slavery.

But despite Huber, obviously in the seventeenth century legal theory was not unanimous on the exact nature of slavery, as indeed Grotius in his influential work had accepted a mild form of slavery, close to contracted services and somewhere between 'genuine slavery' (that is: slavery on a *ius gentium* basis)[70] and free labor. The master acquired *potestas*, not *dominium*, and the *potestas* over his voluntary *servus* did not include the right of life and death (*De iure belli ac pacis*, II.5.28); it is not entirely clear whether the master can sell the person over whom he has *potestas*. In an earlier study I concluded that the master's right over his slave, *potestas*, in fact seems closer to a contractual right (*creditum*) than to ownership (*dominium*)[71]. Huber in the 1670's wanted to draw a clear line between slavery and non-slavery that Grotius himself had in 1625 not been willing to accept. Noodt, theorising in 1699 on forced and voluntary forms of slavery, again went in different directions, not to be categorised easily.

Whatever the merits of Grotius's and Noodt's ideas on slavery on a voluntary (natural law) basis for legal practice, it seems reasonable to expect that the (actual) labor-relations as discussed in this paragraph and the (legal) arguments with which such relations are classified by among others Grotius, Huber

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the right to the services that the master acquires is in the end not entirely clear. Whether this right is transferrable or not, for instance, seems to depend on the sort of subjection concluded between the master and the servant.

69 Miers, *Slavery, a question of definition* (*supra*, n. 16).

70 For the term 'genuine slavery' see Grotius, *De iure belli ac pacis* III.7.

71 Van Nifterik, *Hugo Grotius on 'slavery'* (*supra*, n. 36), p. 239 ff.

and Noodt affect the way people think about slavery as a legal institution. If it is accepted that some slaves are the master's property and at the mercy of his whims while other slaves are not, the conclusion should be that also in legal theory a continuum can sometimes be perceived between unfree and free laborers, between slaves and non-slaves.

3.2 *Roman slavery law*

Another contextual circumstance that deserves our attention is the fact that a complete set of legal regulations related to slaves and slavery was at hand even before the people in the Low Countries were confronted with any of the possible legal questions that had to do with slavery. It was enshrined in the Roman law books the jurists had been studying for generations. Having accepted slavery as an institution of the *ius gentium* and in accordance with natural law, the legal rules needed to regulate the institution were ready at hand. Or, approached from the opposite perspective, as William Phillips says: the reception of Roman law was '[o]ne of the most important preconditions for the emergence of New World slavery'[72]. Questions related to slave-marriages, to runaway slaves, tort law involving slaves, chastisement of slaves, manumission of slaves, all the topics had already been discussed and settled by the most prudent jurists of Antiquity. And thanks to the intellectual work of generations of medieval jurists all over Europe the rules were in the seventeenth century ready to be applied in their own time even if, as was in fact the case, the conditions differed substantially from those in ancient Rome.

As such, of course, Roman slave law had not been received in the United Provinces. Slavery being non-existent in the Low Countries, at home nobody felt the need for a law on slavery and slaves. Concerning the West Indies, however, two articles in two different charters by the States General regulating the legal position of (black) slaves pointed to Roman law. The articles proscribed that the law to be applied in matters concerning slaves were 'the gemeene beschreven Rechten' (the common written laws)[73]. Alan Watson went to some

72 Phillips, *Slavery in late medieval Europe* (*supra*, n. 53), p. 695. See also, for instance, Sue Peabody, *Slavery, freedom, and the law in the Atlantic World, 1420-1807*, in: Eltis and Engerman (eds.) *Cambridge world history of slavery* (*supra*, n. 2), ch. 23, p. 594-630, on p. 600: 'Justinian's new organised Corpus Juris Civilis influenced most continental European legal systems, allowing many threads of continuity with both the past and among the Atlantic colonial slave regimes'. See also *supra*, n. 53.

73 The charters are the *Ordre van Regieringe soo in Policie als Iustitie, in de Plaetsen verovert* (13 October 1629, art. 61) and the *Instructie, vande Ho: Mo: Heeren Staten Generael deser Vereenighde Nederlanden, voor de hooge en lage Regieringe der Geoctroyeerde West-Indische Compagnie* (23 August 1636, art. 86); both can be found in the Groot Placaetboeck 1664, Tweede Deel, p. 1235 ff. and p. 1247 ff.

length to prove that indeed Roman law was meant by the words 'the gemeene beschreven Rechten', for which he inter alia refers to Bijnkershoek[74]. Johannes Voet, paraphrasing the article of the 1636 charter in Latin in his *Commentarius ad Pandectas*, has *leges civiles* (i.e. Roman law) for 'de gemeyne Rechten'[75]. We can therefor conclude with Watson that unless a specific regulation was promulgated, Roman slavery law was to be applied to 'Dutch' lawsuits in which slaves were involved. This might explain, as Watson observes, that the Dutch had no specific set of rules, as for instance the French Code Noir, on slave-matters[76]. The Dutch solved the problem the easy way by falling back on the law that had already been available even before the Dutch could bring any case involving a slave to any Court[77].

Roman law also to some extent solved the problem raised by De Raad in 1665, that in fact many slaves had been captured illegally and shouldn't have been enslaved at all (see above). After all, Roman law to a large extend liberated slave traders and slave owners to question the legal status of their slaves, since it implied that the status of a captive was defined by the *ius civile* of the state the slave was imported from[78].

4 Arguments questioning slavery

In their contribution on the seventeenth century Dutch slave trade to the compilation *The uncommon market*, Ernst van den Boogaart and Pieter Emmer note that '[d]oubts as to the morality of the trade existed from the start and lingered on later in the century'[79]. They thereby refer to the aforementioned preacher

74 A. Watson, *Slave law in the Americas*, Athens – London 1989, p. 102-114. Cornelis van Bijnkershoek, *Observationes Tumultuariae*, no. 2966: '... paucis exceptis, vigere jus Romanum...'.

75 Johannes Voet, *Commentarius ad Pandectas*, ad D. 1,5,3: '... etiam vigere debere latas de servis leges civiles ...'.

76 Watson, *Slave law* (*supra*, n. 74), p. 103: 'The Dutch had no slave law'.

77 See J.A. Bush, *Free to enslave, The foundations of colonial American slave law*, Yale Journal of Law and the Humanities, 5 (2) 1993, p. 417-470 for a comparison with the English common law situation. Bush points out that in the seventeenth century also English law was 'largely indifferent to slavery' (p. 432).

78 Y. Rotman, *Byzantine slavery and the Mediterranean World*, Cambridge MA 2009, p. 26, and Drescher, *From consensus to consensus* (*supra*, n. 22), p. 86.

79 E. van den Boogaart and P.C. Emmer, *The Dutch participation in the Atlantic slave trade, 1596-1650*, in: H.A. Gemery and J.S. Hogendorn (eds.), The uncommon market, Essays in the economic history of the Atlantic slave trade, [Studies in Social Discontinuity], New York – San Francisco – London 1979, p. 353-375, p. 356.

Georgius de Raad (*supra*, n. 34) who objected to the trade of slaves with the Spaniards. De Raad's main argument was that trading slaves with 'papists' was like handing the traded persons over to the devil, the Pope according to him being the Anti-Christ. This might in his days have been a valid religious argument; and it may have been even more so as he could support it by indicating the many sins committed in the actual practice of the trade. However, it was not a fundamental objection to the trade in human beings as such.

We do find a more fundamental objection to this trade in the *Swart register van duysent sonden* ('Black Register of a Thousand Sins', 1679) by the preacher Jacobus Hondius[80]. One of the thousand sins (the 810th) he mentioned was the trade in human beings. This trade treated other humans as merchandise or animals, while in fact they are of the same nature as the merchant himself. God's blessing, Hondius roared, will not rest on the money earned by this trade, and a member of the Reformed Church should not engage in this merciless commerce[81].

The remarks of both preachers may suffice to show that religious and moral arguments against slavery and slave-trade were raised and actually expressed in the seventeenth century. Religious arguments sometimes also slipped into the works of the Dutch jurists, transformed into legal statements or transposed to a more legal sphere. Their force was however weak. The so-called Germanic love of freedom on the other hand was strong; but it only extended to the Germanic people, such as the Dutch themselves. Finally, Grotius's account of voluntary natural law slavery was not uncontested.

4.1 *Christian faith*

No doubt the 'humanitarian influence of the Church' had contributed to the disappearance of slavery from Western Europe by 1500, though it is also true that the Church 'never condemned slavery outright and was often itself the owner of slaves'[82]. We get an illustration of the ambiguous position of Christian religion towards slavery in a wider sense from the famous catholic missionary Bartolomé de las Casas. Las Casas loudly spoke out against the many abuses inflicted by the Spaniards on the indigenous people of the Americas. However, as Jeffrey Young rightly points out, he 'advocated African slavery as an alternative to the oppression of the Native American workers'[83]. Apart from this direct

80 *Ibidem*, p. 103.

81 Remarkable is also the 811th sin mentioned by Hondius: keeping the money collected to release slaves in Turkey for yourself is theft, a violation of the eighth Commandment. Hondius is obviously talking about Christian prisoners of war.

82 J.K. Kelly, *A short history of Western legal theory*, Oxford 1997, p. 193.

83 Young, *Proslavery ideology* (*supra*, n. 17), p. 402.

but ambiguous influence of the Church on slavery as an institution, Christian faith was sometimes used as an argument in legal discussions, for example on the question of whom it was permitted to enslave and whom not, and on how to treat your slaves.

We have already discussed the custom that Christians would not enslave Christians in war. Yet Paulus Voet in his commentary on Institutes 1,3,5 note 4 explicitly stated that the reason for this and for the subsequent absence of slavery in the Dutch Provinces (with the exception of the Quarters of Zutphen and the Veluwe) cannot be found in Christian ideals of equality and charity. After all, he said, we do find slaves in the *respublica Judeorum* ordained by God[84]. Moreover, there was the curse of Ham-myth (Genesis 9); biblical references in the works of some Dutch jurists can be aligned to that myth[85]. Instead, according to Paulus Voet the reason was that already among the Romans it had been customary not to enslave captives in a civil war (as the wars *inter Syllam & Marium, Cesarem et Pompejum, Augustum & Antonium*), a custom accompanying the *ius gentium* rule to enslave instead of to kill the vanquished. Wars among Christians, Voet continued, must be taken for civil wars (*quasi bellum Civile*), since in a sense all Christians belong to the same, Christian community.

4.1.1 Vinnius

Arnoldus Vinnius in his commentary on Institutes 1,3,3 (1642) remarked, as Grotius had done before him (*De iure belli ac pacis*, III.7.9.2), that like the Christians the Muslims do not enslave Muslim captives of war. But Christians could enslave Muslims, and once enslaved, Vinnius continued, Muslim slaves would remain slaves even after they might have given up their religion and had turned into Christians. After all, he said just as Paulus Voet had done, slavery was not contrary to the *lex Divina*.

84 I Corinthians 7.21, Deuteronomy c.15, Exodus c.21 and Leviticus c.25, see also Arnoldus Vinnius in his *In quatuor libros Institutionum Imperalium commentarius* I.3.3.

85 See for instance Huber, *De iure civitatis* II.1.6.7-12, also discussed *supra*, n. 44. Concerning slavery by convention Huber points out in II.1.6.7 that it is permitted by both Roman and Mosaic law, referring to Exodus c.31:6 (read, presumably, 21.6). My colleague Yehonatan Elazar-de Mota, who is currently working at the T.M.C. Asser-Institute on a dissertation in which he will dwell more extensively on this subject, argues that rabbinic understanding of the passages that deal with 'Canaanite' slavery (such as Gen. 9; Exo. 21; Lev. 25) influenced Dutch legal thought, such that Huber and others cited the same biblical passages as the rabbis. These passages are all part of the 'Curse of Ham'-myth. Paulus Voet in his comments on Institutes 1,3 and 1,8 under the headings *Jure Mosaico* in fact often refers to these passages.

4.1.2 Grotius

Johannes Voet referred to articles 85 and 86 of the *Instruction of the States General* dated 23 August 1636 (see also above) and urged slave owners not to be too cruel to their slaves and to give them a day off on Sundays and Christian holidays. In fact, this call for generosity seems to be the closest the Dutch jurists were prepared to get to the actual involvement of their countrymen in contemporary global slavery and slave trade. And for the time being, it was about the most Christian faith would do for the non-Christian slaves in the colonies.

Christian faith also came to the fore concerning the relationship between a master and slaves on another level, as for instance in Grotius's texts on legal relationships more generally between Christians and non-Christians, his *De societate publica cum infidelibus* (first decennium of the seventeenth century) and his *Remonstrantie* of 1615 (concerning the position of Jews within the Province of Holland, 1615)[86]. As the mores of Grotius's days assumed that a subordinate should follow the religion of his superior, Grotius advised that it should be out ruled that a Christian should become a slave or even a domestic servant of a non-Christian[87]. To allow a Christian to become the slave or servant of a non-Christian owner would be like handing over a Christian to damnation.

4.1.3 VOC regulations

Grotius's advice would soon find echo's in some VOC-regulations that instructed Christian slave holders to teach their slaves the Christian religion, and indeed forbade them to sell their slaves to non-Christians[88]. Such regulations are said to have a twofold intention, 'to maintain religious separatism and, at the same time, to promote Christianity among slaves'[89]. As we have seen above, the preacher De Raad in 1665 went one step further and also fulminated against the sale of slaves to Spanish papists, being anti-Christs altogether. Grotius on the other hand, in his days, relatively shortly after the Dutch had cast off the Spanish 'papist' yoke, had argued in the *Remonstrantie* on the basis of papist Decretals.

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86 I am much obliged to my colleague prof.dr. Marc de Wilde for both references. On the *De societate* see P. Borschberg, 'De societate publica cum infidelibus', *Ein Frühwerk von Hugo Grotius*, Savigny Zeitschrift für Rechtsgeschichte, Romanistische Abteilung, 115 (1998), p. 355-392; on the *Remonstrantie* see *supra*, n. 62.

87 Cf. the sixth proposition and the sixth and eighth conclusion in the *De societate*, and article 29 of the *Remonstrantie*.

88 Cf. article 60 of *Instructie voor den Gouverneur en de Raden van Indië* 1617, in: Van der Chijs, *Nederlandsch-Indisch Plakaatboek 1602-1811* (*supra*, n. 13), I, p. 47; see also the *Voorschriften nopens het verhandelen, regeren ende opvoeden van slaven* dated 4 May 1622, *ibidem*, p. 96-99 and the 1642 *Statutes of Batavia*, *ibidem*, p. 572-573.

89 Fox, *For good and sufficient reasons* (*supra*, n. 29), p. 253.

All in one the conclusion should be that in the seventeenth century legal tracts Christian faith does not appear as a serious ideological challenge to the institution of slavery. The main contribution on the subject was on the question of who may and may not be enslaved by Christians and to whom slaves may be sold. It did also have some mitigating potential, urging for a mild regime and a day off on Sundays.

4.2 *The Germanic ideal of freedom*

4.2.1 Groenewegen

The ambiguous position of Christian faith towards slavery, was also taken up by Simon van Groenewegen in his *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* ('Tract on the laws abrogated and fallen in disuse in Holland and surrounding regions', 1649). Commenting briefly on Institutes 1,8 and after summarising that 'it may not be unlawful for Christians to have slaves, provided the masters (…) treat them with Christian kindness and gentleness'[90] Groenewegen supported the Christian ideas by pointing out the Germanic fondness for liberty. This celebrated Germanic idea (their 'name and fame for Liberty', said Groenewegen) made the Germans detest slavery and had according to Groenewegen since long caused slavery to fall in disuse in Holland to the extent that even the name of it had vanished from seventeenth century discourse. The liberty idea was so strong, he said, that it could even override property law: as soon as slaves brought to the Republic from other countries touched the shores of one of the Provinces they could demand their liberty in spite of the property rights of their owners[91]. Ignoring the *Placaa*t issued by the VOC ('Heeren XVII') of September 1636 that issued a ban on bringing slaves into the Netherlands (punishment: forfeiture of the slave)[92], Groenewegen referred to some authors to show that this free-soil principle was also followed by other Christian nations.

In the Dutch Provinces the free-soil principle would however in the course of time be seriously weakened; eventually it only protected slaves who had entered the territory with the master's approval. The famous Claas-case (1736), described by Bijnkershoek[93], clearly showed that in the eighteenth century runaway slaves did no longer find protection in the principle. Claas (or Claes,

90 Translation by V. Sampson, *Treatise on Roman laws abrogated and not in force in Holland and neighbouring countries by Simon à Groenewegen van der Made*, Cape Town [etc.] 1908. 'Christian kindness and gentleness' afterwards providing a religious motive for the constitution of emperor Antoninus Pius cited in Digest 1,6,2 and Institutes 1,8,2.

91 I follow the translation by Sampson, *Treatise on Roman laws* (*supra*, n. 90), 1, p. 15.

92 Van der Chijs, *Nederlandsch-Indisch Plakaatboek 1602-1811* (*supra*, n. 13), 1, p. 409.

93 Cornelis van Bijnkershoek, *Observationes Tumultuariae*, no. 2966 (cf. *supra*, n. 74).

but named Pamphilus by Bijnkershoek) had been a slave from Curaçao who had embarked on a ship without permission of the master and fled to the Dutch provinces. Based on the free-soil principle he asked the judges for his freedom after he had been claimed in name of his master. The case made it to the highest court (Hoge Raad) and finally Claas lost both the case and his freedom. The new interpretation was hereafter sanctioned by the States General in 1776[94].

4.2.2 Huber

The Germanic love of freedom can also be found in Huber's exposition of the contemporary law of Frisia (and elsewhere, *Heedendaegse Rechtsgeleerdheyt, Soo elders, als in Frieslandt*, 1686). Huber, whom we met earlier writing in an aristotelean vein on the natural aptness of certain peoples to serve rather than to enjoy liberty, needed only four short paragraphs to discuss the distinction between free and unfree persons among his countrymen (I.4.39-42). Although before the year 1200, so Huber, unfree persons had existed also in Frisia, in Huber's own days only 'Vrije Friesen' (Free Frisians) populated the Province. The characteristic love of freedom had made unfree farmers and (house)servants obsolete. Huber returns to the topic in chapter I.13 on the power a father had over his domestic servants. The Frisians only know of free persons, Huber said again; in his days domestic servants were hired for their tasks and received wages for their services, and both parties were bound to the conditions of the contract of hire ('de voorwaerden of huir'). Should the servant not perform satisfactorily, the master could try to encourage him or her by words; should this be insufficient the master could maybe punish mildly, for which Huber refers to a *Placaat* by the 'Heeren Staten' (of Frisia) of 24 March 1671, the content of which he gave in the remaining paragraphs of the chapter[95]. Apart from the *Placaat*, he simply believed that beating didn't fit the Frisian character (I.13.4). Neither did, obviously, slavery.

4.2.3 The Germanic idea and Roman *favor libertatis*

Even if Mevius had said that the Northern European forms of unfree labor had once been introduced by a Germanic king[96], notwithstanding the freedom

94 Batselé, *Omnes homines* (*supra*, n. 11), ch. 6. The *Placaat* of the States General of 23 May 1776, see fn. 35.

95 Punishment of slaves outside the Provinces was not entirely left to the owner either; see the 1625 amplification on the subject to the 1622 VOC-regulation, and the 1642 *Statutes of Batavia*, in: Van der Chijs, *Nederlandsch-Indisch Plakaatboek 1602-1811* (*supra*, n. 13), I, p. 171-173 and 573; also Fox, *For good and sufficient reasons* (*supra*, n. 29), p. 256-258.

96 Wiese, *Leibeigene Bauern* (*supra*, n. 23), p. 127 and 277 (Mevius, *Gutachten*, I.19-22).

among 'die Alte Teutsche' praised also by Tacitus, the Germanic idea of freedom was much stronger than the Roman *favor libertatis*. The Germanic idea had been strong enough to abolish slavery, albeit that in the seventeenth century this would only mean the abolishment of slavery of Germanic people, whereas Antony Honoré summarises the Roman *favor libertatis* as the principle that '[w]hen the law could be interpreted in a way that favoured freedom, freedom should be preferred'[97]. Said otherwise, the Roman *favor libertatis* was not used to abolish slavery, as was the Germanic idea, but only to limit its application. This is not to say that the Roman idea has not influenced and mitigated European ideas on slavery. As Roman law had been taught at the European law faculties since 1200 and was used in many European courts, no wonder this law, as Helmholz says, 'shaped what lawyers thought about slavery'; this included the idea of *favor liberatis*[98].

Christian and Germanic ideas together and supplemented by the Roman *favor libertatis* in the legal tracts of the Dutch School added up to a ban on slavery within the Dutch European territories, to an embargo on enslavement of Christians by Christians, to a call for mild treatment of slaves and a day off on Sundays and holydays, and to interpretation of the law in favor of freedom. Apparently, transatlantic slave-traders and slave-owners in far remote countries could live with that.

4.3 *No sale into (perpetual) slavery*

We have seen that according to Grotius a man can within the boundaries of natural law sell his services and labor (*actiones propriae*) to someone else – a contractual origin of slavery, not to be confused with the *ius gentium* slavery rooted in war Grotius also acknowledged. The text of Grotius on the topic can be found almost literarily in Vinnius's comments on Institutes 1,3,4 (keywords *Venandari passus sit*). Vinnius, however, added that the *doctores* are of the opinion that freedom is regained as soon as the debt for which one had been necessitated to sell his services and labor was solved. Without this addition the sale would come close to slavery, Vinnius said, and after all, slavery was banned from the Dutch provinces. This was of course a serious restriction on the consequences of a sale of one's own muscle power, a restriction on Grotius's natural law slavery he himself had not explicitly made. In Vinnius's vein, the sale of services came close to the seventeenth century contract of hire

97 A. Honoré, *The nature of slavery*, in: Allain (ed.), *Legal understanding* (*supra*, n. 2), p. 9-16 on p. 10; see also on *Favor libertatis* H. Ankum, *Der Ausdruck* favor libertatis *und das klassische römische Freilassungsrecht*, in: Herrmann-Otto (*supra*, n. 49), p. 82-100.

98 Helmholz, *Law of slavery* (*supra*, n. 22), p. 17-39 on p. 17.

of which we have seen above that an employer received a use-right ('bruick') in the employee's labor. However, more likely we should categorise Vinnius's account of temporary sell of services as debt bondage or debt slavery.

The idea of selling oneself into slavery itself – transposed by Grotius as the sale of one's *actiones propriae* within the contours of natural law and without the restriction to the payment of the debt – had over the centuries not been unanimously accepted by the jurists; and obviously it still wasn't in Grotius's own days. Strongly opposed to the possibility of contractual self-enslavement had been the medieval commentator Baldus de Ubaldis (1327-1400). In his commentary to Codex 2,4,43 he rejected the validity of such a contract which he considered to be contrary to good manners, referring to Digests 40,12,37: *conventio privata neque servum quemquam neque libertum alicuius facere potest* ('A private agreement cannot make anyone either a slave or a freedman of another'). Many legal scholars had followed the great commentator on this point, and more would do so in the future[99].

Besides, there was an even older alternative tradition against the sale into slavery. The Byzantine Emperor Leo VI the Wise (866-912) had constituted (*Constitutio* 59) that it was a sign of insanity to sell yourself into slavery, that such a contract should not be tolerated and not be valid, that both parties to the contract should be scourged with rods, and, finally, that the status of him who had sold himself should remain the same as before. Presumably the medieval jurist Baldus had not been familiar with this old tradition, since it was only from the sixteenth century onwards that jurists began to show an interest in Byzantine law, including this *Constitutio*. The legal humanists edited the Novels of emperor Leo the Wise, which came to be known as *Leonis novellae*; the first edition seems to have been Scrimger's in 1558[100]. The opinion that it was illicit for any mortal to sell himself or in any other way to give himself into slavery was followed by Johannes Voet, for which he referred to the French jurist Philibert Bugnyon (*Legum abrogatarum et inusitatarum in omnibus Curiis, Terris, Jurisdictionibus, et Dominiis regni Franciae tractatus*, a work from

99 Wiese, *Leibeigene Bauern* (*supra*, n. 23), p. 208 ff. Mevius (*Ein kurtzes Bedenken …*, Die andere Haupt-Frage no. 46 ff.) in: *ibidem*, p. 286-287 mentions some proponents and opponents of the idea.

100 H.E. Troje, *Graeca leguntur, Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhundert*, [Forschungen zur neueren Privatrechtsgeschichte, 18], Köln – Wien 1971, esp. p. 99. On the reception of Byzantine law B.H. Stolte, *The law of New Rome, Byzantine law*, in: D. Johnston (ed.), The Cambridge companion to Roman law, Cambridge 2015, p. 355-373, esp. p. 369-70; on Scrimger's edition see F.A. Biener, *Geschichte der Novellen Justinians*, Berlin 1824, p. 367 ff. I thank prof. Hylkje de Jong for showing me the way into Byzantine law.

1666 similar to the well-known tract of Simon van Groenewegen)[101]. Bugnyon in turn indeed explicitly referred to the *Constitutio* 59 by Emperor Leo.

An argument very similar to the one in *Constititio* 59 can be found in Rousseau's *Du contract social* (1762; chapter I.4), fulminating explicitly against Hugo Grotius. With Rousseau our discussion enters a new era and the sphere of human rights, or rather, of one human right: freedom.

5 Concluding remarks

In most legal tracks of the seventeenth century Dutch jurists we look in vain for a coherent view on the institution of slavery as it existed in their century in the West and the East. Although some jurists, such as Hugo Grotius, reflected more systematically on the institution, each seems to present his fragmented ideas on slavery in an isolated way and according to his own preferences. A thoughtful discussion on the subject between the jurists did not arise.

Almost at the very end of the century (1698), Johannes Voet, sometimes called the Dutch Ulpian after the famous Roman jurist who is most prominent in Justinian's Digest[102], composed his comments on Digests 1,5, which could well be taken for a summary of Dutch legal thoughts on slavery. We find many of the elements discussed above: the distinction between a free man and a slave being introduced by the *ius gentium*, distinctions between different types of slavery (with a reference to Jacobus Raevardus (1535-1568), *Variorum, sive de iuris ambiguitatibus libri quinque*, v.xx), slavery being almost abolished among Christian peoples (reason for Voet to pass over many questions, such as questions concerning the way by which a person becomes slave, subjection of the slaves on the whims and desires of the masters, chastisement of slaves, the gains made by slaves for their master, slaves being bound to the soil, and methods to regain freedom: 'these matters serve little purpose with us owing to the almost complete abolition of slavery among Christians'[103]; the interested

101 Bugnyon, *Legum abrogatarum et inusitatarum ... tractatus* I.V: *De servis et servitute abrogata*: 'La grande rigueur de Servitude, d'avoir sa vie et mort en la main de son Seigneur, tout ainsi que pauvres bétes, est abolie à bonne et juste raison'.

102 Feenstra and Zimmermann, *Das römisch-holländische Recht* (*supra*, n. 8), on p. 41 quote Van Warmelo (South African Law Journal, 27 (1910), p. 196 f.): 'In many ways Grotius may be described as the Julian and Van Bynkershoek as the Papinian among the Dutch jurists, but Voet may well be considered to be the Ulpian among them'.

103 Translation by P. Gane, *The Selective Voet, being the Commentary on the Pandects*, Vol. I, Durban 1955. The translation by J. Buchanan, *Johannes Voet* (...), *his Commentary on the Pandects*, Capetown 1880, even completely leaves out this section on Digest 1,5: 'This

reader is advised to consult commentaries on Institutes 1,3 and 1,8), the free soil principle (referring to Groenewegen and his own father Paulus Voet), the idea that it is not permitted for any mortal to sell or consign himself to another as slave (referring to Bugnyon and emperor Leo the Wise), the right of retaliation by which Christians could enslave 'barbarians' (with the addition of the States General that these slaves must be treated not too harshly and not work on Sundays and holidays), and the remnants of bonded men resembling slavery in Gelre and Zutphen, called '*laten, lassen, keurmoedige, schotbare, hofhorige mannen, Wastinische luyden*'[104]; the reader who wants to find out more on the various forms of unfree laborers in the various parts of the Republic and the conditions they live in, 'to be sought in the old and obscure customs of our own and neighboring countries', is directed to a list of authors and their works[105].

When we follow Voet's advice and turn to his *Elementa juris secundum ordinem Institutionum Justiniani in usum domesticae exercitationis digesta* (1712), title 1,3 and 1,8 of the Institutes, we again look in vain for any references to contemporary Dutch slavery in the colonies. The same is true of commentaries on the Institutes of Johannes's father, Paulus Voet, who does mention and reflect on contemporary types of servitude 'at home' (often under the headings *Moribus* (*Germanorum*)), but pays no attention on slavery in the West or East.

Whereas the practically absence of slaves in the Dutch provinces (and hence the absence of slavery in Dutch law) counts as the main reason for the limited interest in the institution among the jurists, it needs to be pointed out that there was a strong positive incentive not to do away with the institution entirely. Bijnkershoek explicitly said in the Claas-case mentioned above that the colonies simply couldn't do without slaves: *quia haec et aliae coloniae*

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section referring only to the abolished distinction of free man and slaves, is unnecessary to be translated'.

104 *Laten* and *lassen* are not translated by Gane (*supra*, n. 103) see above); the other forms are translated as 'men subject to a right of pick in their estates' (*keurmoedige*), 'tributary men' (*schotbare*), 'men bound to an estate' (*hofhorige mannen*) and 'fellows of the soil or turf' (*Wastinische luyden*).

105 Fredericus à Sande, Lambertus Goris, Antonius Matthaeus, Simon van Leeuwen, David Maevius (Mevius), Nicolas Burgundus, Georg Adam Struvius, Justus Meyer, Paulus Voet and a *Placaat* of the States of Zeeland, 15 November 1678. Such laborers were bound to the ground they worked on; it is often remarked (see for instance F. à Sande, *Tractatus Praeliminaris de vario Rerum ac Personarum Iure* 1.32 and A. Matthaeus in his *Paroemiae*, 44) that their position was (much) better than that of Roman slaves. The eighteenth century jurist Jacobus Voorda in unpublished notes of the lectures given by him in 1744-1760 (published with transcription and English translation (by M. Hewett) in 2005 (Royal Netherlands Academy of Arts and Sciences) as *Dictata ad ius hodiernum*, ad D. 1,5, p. 32 ff.) gives a valuable summary of the topic, mainly on the basis of Lambertus Goris.

necessario indigent servis, sine quibus res coloniarum expediri non possunt [106]. The institution of slavery might not be natural, but it was generally considered legitimate, rooted in the *ius gentium*, and according to some under certain circumstances even permitted by natural law. When subsequently the right of property was weighted against ideas of personal freedom, legal (and political)[107] thinking favored the first over the latter: limiting the right to property was considered harder to legitimise than limiting a person's freedom. Better even, freedom and subsequently the lack of freedom, could be legally translated into property rights, rights that were open to sale and trade. Lastly, property rights themselves were an expression of the inborn freedom, explicitly mentioned thus in the 1776 Instruction of the States General.

The conclusion that property rights trumped over freedom is not new[108]. To this conclusion related to the topic of slavery, one could add that a higher esteem of property over freedom was not restricted to the legal question of slaves and slavery 'beyond the line'. Rijpperda Wierdsma in his 1937 dissertation on the constitution of the Dutch Republic came to a similar conclusion, albeit in the context of an entirely different discussion[109]. For his discussion was not on slavery; it was not even on the position of foreigners within the Republic. Far more generally Rijpperda Wierdsma reached the conclusion that in the seventeenth century Dutch Republic personal freedom was less well protected than freedom of property. He came to this conclusion after discussing the political expulsions of citizens from their towns by the administration. He pointed out that against expulsions practically no remedy existed. Citizenship in the seventeenth century Dutch Republic in fact depended on an almost absolute power of the administrative officers. Property, on the other hand, was legally well protected.

This brings us back to the fundamental human rights the paper started with. It is not that the Dutch people of the seventeenth century were unaware of rights and liberties we today call fundamental, human and inalienable. Hugo Grotius himself had pointed them out and had labelled them a man's own, *suum*. In addition, Reformed preachers launched ideas that delegitimised slave-trade and slavery outright: it shows a lack of mercy to our fellow-men, they claimed. In addition there was the Germanic ideal of freedom, and the

106 Cornelis van Bijnkershoek, *Observationes Tumultuariae* (*supra*, n. 74), no. 2966.

107 The 1776 *Placaat* of the States General (*supra*, n. 35).

108 The same point is also made by Huussen, *Dutch Constitution of 1798* (*supra*, n. 6), p. 106 and Van Welie, '*What happened in the colonies stayed in the colonies*' (*supra*, n. 10), p. 115 among others.

109 J.V. Rijpperda Wierdsma, *Politie en justitie, Een studie over Hollandschen staatsbouw tijdens de Republiek*, (diss. Leiden), Zwolle [1937], p. 154.

Christian faith that ruled out that Christians would enslave Christians. But in the Dutch legal textbooks such ideas in favor of freedom were only applied to the Dutch themselves, to fellow Christians and persons of Germanic origin. Application of the ideas was not universal; the ideas were generally believed to have nothing to do with the indigenous people in the colonies or with the Africans. Ideas on freedom did have to do with slavery, though, for they had to do with the protection and promotion of property rights of Dutch slave-traders and slave-owners.

Let us finish our overview over seventeenth century legal arguments on slavery still one year closer to the very end of the century than Voet's commentary, by turning to Gerard Noodt's 1699 lecture once more. Noodt's main issue was political slavery, the idea of a nation enslaved by an absolute ruler. Having discussed the several ways by which an individual might become someone's slave, the proper and rational behavior towards slaves, and the rights of slaves towards their master, Noodt got to his main issue: should not a nation that is enslaved politically be treated by their ruler in the same manner as individual slaves ought to be treated by their master; should we not indeed approach the master-slave and the ruler-nation relationships in the same way[110]? His answer was affirmative. Said very concisely: also a nation should either be treated to the better of the enslaved people (if the subjection to slavery had been consented to); or as a people in a continuing state of war with its oppressor, their relationship being ruled by the law of war (if the subjection had been forced by power or arms). In case of a continuation of the war between the people and the ruler, the people could fight their overlord and use the natural law means to free themselves. This finally shows that the discussions on the rights and position of slaves in the end did also have some direct relevance for the Dutch citizens themselves, who had not long before successfully revolted against their Spanish 'master'.

110 Noodt, *De jure summi imperii et lege regia* (*supra*, n. 45), p. 22.