Nação legal consciousness and its contribution to the seventeenth-century Dutch Republic debate on slavery and the slave trade

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Publication date
2021

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The Iberian Legal & Political Ideas on Slavery and Slave Trading: Fifteenth and Sixteenth Centuries

"Liberty was born with servitude…there was no one free, when no one was a slave: as among Christians no one is called free, since none of them is a slave."

François Connan, *Commentariorum Iuris Civilis Libri X*, 1557, 72-73.

Francisco de Vitoria on Imago Dei of the New World Indians—Imago Dei in the Valladolid Debate—Free-will, Dominium et Libertas—Servitus and Imago Dei in the Portuguese Context—Slavery in the Spanish and Portuguese Ordinances—"Curse of Ḥam" and Iberian legal consciousness

4.1 Introduction

The aim of this chapter is to reconstruct the theological, legal, and political context concerning the practice of slavery and slave trade in early modern Iberia. This is the context in which the *Nação* developed its *modus operandi* in African and Asian slave trade. Spanish language scholar Daniel Nemser posits that a return to the rise of Iberian slave trade "can shed new light on the entangled histories of freedom, race, and capital" (Nemser 119). He argues further that "the colonization of the individual by the market is critical for understanding how the concept of *freedom* begins to be mobilized as a justification for the slave trade" (126). Legal conventions, around *servitus*, *dominium*, and *libertas*, were ever-developing in Spain and Portugal in the sixteenth century. In the sixteenth century, after almost two centuries of stagnation, the debate on law of nations and nature had been revived by Francisco de Vitoria (ca. 1492–1546) and other Spanish Scholastics (Haggenmacher, "Grotius et la Doctrine de la Guerre Juste" 58). At that time, *converso* merchants dominated the Atlantic slave trade, commanding a network that connected Iberia, Africa, and the West Indies.

This chapter examines the theological concepts: *Imago Dei* [Created in the image of God] and free-will, and how they relate to the legal notions: *dominium* and *libertas* [Section 4.2]. Whereas Francisco de Vitoria and Bartolomé de las Casas (ca.1484 – 1566) upheld the divine

image of the New World *Indians*, Iberian lawyers with interests in New World plantation economy deprived *black* Africans of *dominium* and *libertas*.

The Atlantic slave trade challenges previously held notions concerning *servitus,* and natural-born *freedom* for all [Section 4.3]. Thus, even though Christians do not enslave each other, baptized Africans are still enslaved and sold as chattel. An analysis of Iberian and New World ordinances dealing with the practice of slavery can lend insight on how legal consciousness changes in the sixteenth century [Section 4.4]. Accordingly, this chapter scrutinizes the attitudes and the language surrounding Moors and *negros* [black Africans], and finally on how the "Curse of *Ḥam*" myth influences public international law [*ius naturae et gentium*].

In applying the Cambridge School method on the history of ideas, in section 4.2 I include a discussion on the meaning and change of the legal concepts: *dominium,* and *libertas* [Greek.: *eleutheria*]. In the sixteenth-century Spanish and Portuguese contexts, I have chosen to focus on the moral philosophies of theologians Francisco de Vitoria, Francisco Suárez (1548 – 1617), António de Santo Domingo (1531 – ca.1598), Fernando Perez (1530 – 1595), and Luis de Molina (1535 – 1600). The legal-political and moral discussions surrounding the sovereignty of Native Americans and the enslavement of *black* Africans bring to the foreground their conceptions of *ius naturae et gentium* in general, and in particular, their conceptions of *liberty* and *ownership*.

In sections 4.3 and 4.4 I reconstruct the fifteenth and sixteenth-century Iberian New World expansion context through an analysis of the linguistic conventions and argumentations utilized in the political texts that dealt with slavery. I have chosen to highlight the Roman legal

terms: *servus* and *servitus* in the medieval Spanish code *Las Siete Partidas,* and the Portuguese codes: *Ordenações Afonsinas, Manuelinas & Filipinas,*[1] which I utilize to reconstruct the Iberian moral theological and legal consciousness in which the *Nação* was birthed. Therein, I argue that the way in which *servus* and *servitus* were translated to Spanish and Portuguese, demonstrates how their meanings and understandings transitioned from the context of war captivity in the mainland to the colonial plantation economy context. In addition, I posit that the "Curse of *Ḥam*" myth contributed to the construction of negative attitudes toward *negros* [*blacks*] and *mulattos* [the offspring of an Iberian father and dark-skinned African mother], which were once directed toward the medieval Moors [*moros*]. This change took place within the Spanish New World context, as reflected in the language in *Las Leyes de Indias* and *Actas del Concilio Provincial de Santo Domingo.*

4.2 *Imago Dei*, Free-Will, *Dominium et Libertas* in Sixteenth-Century Spain

Imago Dei is a metaphysical expression which signifies the symbolical connection between the divine creator and humanity. It originates in the Creation story in Genesis 1:27 where it states that God created humans in his image and likeness. Roman law did not afford slaves the dignity of legal personality (Howard 26). However, prior to the sixteenth century Iberian scholastic thought associated *imago Dei* with the Roman legal notions, *dominium* and *libertas*. In Ancient Rome the concept of *libertas* meant to have protection from abuse by officials and having equality before the law. This also implied that the elite class had equal opportunities to compete

[1] Ordenações Afonsinas online edition. http://www.ci.uc.pt/ihti/proj/afonsinas/ .Accessed on 19 June 2020; Ordenações Manuelinas online edition. http://www1.ci.uc.pt/ihti/proj/manuelinas/. Accessed on 19 June 2020; Ordenações Filipinas online edition. http://www1.ci.uc.pt/ihti/proj/filipinas/ordenacoes.htm. Accessed on 19, 2020.

for high office, ruling out the idea of dictatorship (Plessis, Ando, and Tuori 350; Evrigenis 249). *Libertas* also expressed the idea of being free from servitude (Plessis, Ando, and Tuori 350; Evrigenis 250). Cicero conceived of *libertas* as enjoying freedom from coercion or the threat of it. In other words, the possibility of being threatened did not exist (Kennedy 492). This refers to political *slavery*, which had two facets: one internal [tyranny threatens the individual] and one external [one state threatens to subjugate another] (Nyquist 10).

In Ancient Greece the concept of *eleutheria* [liberty] was linked to the idea of non-enslavement, and the idea of being a citizen (Gazolla 25-33; Moreira 104-11). In the writings of Pericles (d. 429 B.C.E.) one can find definitions of *liberty* concerning the *freedom* to move in and out of the country at will, and the *freedom* to voice one's opinion (Guerra Ribeiro de Oliveira 70). Socrates defined *freedom* as the ability of having self-control, dominating one's desires. Thus, when humans rid themselves of everything irrational, they are truly *free* (72). Plato considered tyrants as *slaves* of their desires, therefore, not possessing *freedom* (72; Plato, "The Republic" Book IX). Aristotle's concept of *liberty* includes two forms: One is according to the law, since it consists of ruling and being ruled in turn; the distinction between free men, who can live as they will, and the enslaved who cannot (Evrigenis 250; Aristotle, "Politics" 1317a40-b17). According to Aristotle, slaves are naturally mere instruments whose purpose is to produce things for others, and are the property of others. Since they are not citizens, they cannot exercise *freedom* (Reale and Antiseri 218-22). Overall, the Greek Classics theorized three concepts of *liberty*: the ability to exercise self-control; free will and to use reason; participation in politics (Cláudio de Lima 107).

The North African Christian scholar, Lucius Caecilius Firmianus Lactantius (ca. 250 C.E..–ca. 325 C.E..) revamped *libertas* by relating it to religious toleration. Instead of tyranny, he applied it to religious compulsion. Hence, the Roman emperors: Diocletian (244–311), Maxentius (276 – 312), and Licinius (263 – 325) were branded enemies of Christian *libertas* (Leithart 109). Essentially, full legal personality in Ancient Rome required *civitas* [citizenship] and *libertas* [freedom from slavery] (Guerra Ribeiro de Oliveira 78). It can be concluded that the Greek *eleutheria* and the Roman *libertas* shared some common meanings: possessing political agency and being free from enslavement.

In the early modern period *eleutheria* and *libertas* reappeared in European political and legal discourse (Bell 742; Skinner, "Visions of Politics" Vol. II). Republican writers such as Machiavelli sought to recover the Roman tradition of *libertas* and "free states." Inspired by Cicero, they argued that *freedom* was not freedom from other states but also the independence from the desires of others (Kennedy 488). Franciscan John Pecham (d. 1292) equated *dominium* of one's will with *liberty* (Brett, "Liberty, Right, and Nature" 13). The Italian Franciscan Giovanni di Fidanza or St. Bonaventure (1221 – 1274), posited that brute beasts, which are excluded from spirituality, do not have internal liberty nor *dominium* (Brett 612-13).

In the thirteenth century, Thomas Aquinas (1225 – 1274) links *libertas* with the anthropological idea of *imago Dei,* arguing that man can participate in the rational eternal law of God, being made in His image and sharing divine reason, i.e. natural law:

> Man is said to be after the image of God, not as regards his body, but as regards that whereby he excels other animals. Hence, when it is said, "Let us make man to our image

> and likeness," it is added, "And let him have dominion over the fishes of the sea" (Gn. 1:26). Now man excels all animals by his reason and intelligence; hence it is according to his intelligence and reason, which are incorporeal, that man is said to be according to the image of God ("Summa Theologica" I, Q. 3, Art. I).

According to Aquinas, humans possess the divine image being created with intellect and rational capacity. This sets humans apart from animals. As such, humans have free-will, being able to make rational decisions. Aquinas argues "Man has free-will and reason: otherwise counsels, exhortations, commands, prohibitions, rewards, and punishments would be in vain" ("Summa Theologica" I, Q. 83, Art. I). Commenting on Aquina's conception of humans in the prelapsarian state, political historian Joseph Canning, states that humans shared common liberty [*libertas*] and possession of all things (130). It goes to show that according to Aquinas, humans, possessing the *imago Dei*, have reason, *libertas* [free-will] and *dominium* [lordship] of the natural world (Genesis 1:26-27).

Furthermore, Aquinas argues that the *right* to possess property [*possessio*] derives from man's creation in God's image [*Imago Dei*] and rational use of things for his development (Davis, "The Problem of Slavery in Western Culture" 96). This was a novel idea at the time, since theologians, canon lawyers, and civil lawyers argued about the notion of property [*dominium*], whether persons could be owned as property or not. The Franciscans argued that there were no legitimate claims of property over persons nor things, whereas Pope John XXII (1244 – 1334) declared that the notion of private property already existed since the prelapsarian time period.

Medieval theologians debated on the notion of free-will, thereby establishing two positions. Legal historian Anna Taitslin asserts "The notion of a free will grew out of a synthesis of the *intellectualist* notion of man's capacity for rational decision and the *voluntarist* notion of his responsibility to adhere to God's Commandments" (Taitslin 80). Similarly, some medieval theologians reasoned that since humans were created in the *imagine Dei,* they must have a free will similar to God's will (Pink 569).

The debate among canonists and scholastic philosophers pivoted around the question whether postlapsarian humans have true free will and reason (Nijman, "Grotius' Imago Dei Anthropology"). Assuming the *voluntarist* position, John Duns Scotus (1266 – 1308) maintained that true free will was lost after the Fall.[2] Franciscan friar William of Ockham (ca. 1287 – 1347) held that human free will was corrupted after the Fall, but that due to the divine image in humans, an aspect of the original *dominium* [property and sovereignty] prevailed. He argued further that the rational faculties in humans permits them to decide whether their actions are in accordance with right reason or not. In short, Ockham did not view human free will as a liberation from divine will, rather that humans have the capacity to perform God's will through right reason (Anfray 161; A. Lee 23-44).

Upon the Spanish conquest in the New World and contact thereof with the native peoples, new questions emerged: Is it always lawful to wage war? Do the Spaniards have the *right* to travel to the lands of the New World *Indians*? Can the Spaniards subdue the aborigines under their power if it is absolutely clear that they are defective of intelligence? This led to numerous

[2] See Anfray, " Molina and John Duns Scotus."

discussions on the *dominium* [sovereignty] and rule of the *Indians* (Brett, "People in Portrait"; Belli, Part II, Ch. XII).

In the Roman civil context, *dominium* implied primarily ownership of *res* [Anything which is the object of a legal act, i.e. property] and the rights and limitations related with the civil idea of ownership. *Dominium* was simply "man's total control over his physical world—his land, his slaves or his money" (D. Lee 378). Also, *dominium* signified the Romans concept of mastery, and power over persons or things (Tierney 16-7). The conquest and colonization of the New World motivated Spanish imperial jurists to reformulate *dominium* as private rights, by which they legalized and legitimized the Spanish hegemony over native peoples, in order to confiscate resources and generate wealth for the monarchy (Obregón 598).

In his *De Iustitia et Iure* (1553), Domingo de Soto (1494 – 1560) proposes the universalization of private property, thereby increasing human power over the environment (Jiménez Fonseca 129). De Soto cites the Biblical Creation narrative to substantiate humanity's claim to the original regime of common property. According to this theory, all things remain common prior to original sin [*ius naturale*]. It is only in the postlapsarian state of humans that things were privately distributed through human law and by consensus [*ius gentium*] (Jiménez Fonseca 130).

The Spanish encounter with New World Indians also led some theologians to define *dominium* as self-governance, whereas its abandonment signified true obedience to God. Possessing *dominium* of externals came to be identified with "external liberty, property and power" (Brett, "Liberty, Right, and Nature" 16, 18). In point of fact, some Spanish theologians utilized Aristotle's theory on natural slavery to justify the subjugation and rule of Native

Americans, on the basis of *imperium* [absolute power] and *dominium* [sovereignty] (Salazar 285-293).

Political theorist and historian, Richard Tuck asserts "the notion of natural slavery was being considered with favor from the early fifteenth century onwards" ("The Rights of War and Peace" 67). Furthermore, Anthony Anghie maintains that the extension of Empire and the idea of civilizing, educating, and rescuing the barbarian had many versions (Tuck 96). Essentially, actors who participated in imperial expansion utilized this idea. John Mair (1467 – 1550) was the first to apply Aristotle's natural slavery doctrine to the Native Americans:

> As the the Philosopher [Aristotle] says in the third and fourth chapters of the first book of the *Politics*, it is clear that some men are by nature slaves, other by nature free...And this has now been demonstrated by experience, wherefore the first person to conquer [the *Indians*], justly rules over them because they are by nature slaves (Pagden, "The Fall of Natural Man" 38).

Political science scholar, Anthony Pagden asserts that Mair's stance presented a solution to a political dilemma, i.e. by what "right the crown of Castile occupied and enslaved the inhabitants of territories to which it could make no prior claims based on history?" (Pagden, "The Fall of Natural Man" 27). The claim is that they are savages, cannibals, animalistic, and cannot govern themselves, thereby incapable of *dominium*. In the *Requerimiento*[3] of 1513, Palacios Rubios (1450 – 1524) agreed with Aristotle and Mair that the New World natives were incapable of self-

[3] The Spanish Requirement of 1513 was a declaration by the Spanish crown that legitimized the seizure of territories of the New World by divine ordination.

governance (Neff 118). In the same vein, Agostino Nifo (1531) remarks in his essay *On Wealth* "The wealth which can be acquired by war consists of barbarians and their goods, for (as Aristotle says) war is only just for Greeks and Latins if it is against barbarians. Barbarians are natural slaves, and Greeks and Latins are natural masters. So barbarians and their goods are the common use of all Greeks and Latins" (Tuck 42). Nifo defines *barbarians* as the "Ethiopians and their neighbors" and the Arabs (*ibid*).

Contrary to sixteenth-century Spanish humanists, Francisco de Vitoria put forward that the New World *Indians* were not subject to *natural slavery*. De Vitoria argued that *dominium* was inalienable, and could not be relinquished voluntarily ("De Indis" q.1, art. 2; q.1, art. 3). He held that the *Imago Dei* establishes the legal parameters of *dominium*, but that transgressors are deprived of *dominium* because they lack this image (Vitoria, "De Indies" 1, para. 318). In utilizing Aristotle's arguments in defense of the *Indians,* he posited that they used their reason, since the way they lived testified to their capacity to reason [they had cities, governments, marriages, and laws].

De Vitoria also argued that the pope was not the the emperor of the world (Bunge 46). As such, natural law must be globalized so Christian and non-christian peoples can have a common law to abide by (Jiménez Fonsenca 125). Even though de Vitoria removed the *Indians* from the class of slaves, nevertheless, he justified their subjection to the Spanish crown (Capizzi 48). After proving that their subjugation could not be argued on the grounds of *natural slavery*, de Vitoria claimed that unless they ceded *dominium* voluntarily, the primary cause of their rule would be as a result of a *just war* (Brett, "People in Portrait"; Gutiérrez 321). In his *First Relectio of the Indians Lately Discovered* (1532)*,* de Vitoria puts forward that the Spaniards

could declare a *just war* against them on the basis of violating the natural *right* to hospitality, free travel, and free trade ("De Indis" q.4, art. 4; Anghie 91).

The theological notion of the *Imago Dei* was also invoked within the Valladolid debate (1550). In early July 1550, the Dominican Scholastic, Domingo de Soto was called to Valladolid to discuss *Democrates Alter de Iustis Belli Causis Apud Indos* (Rome 1550), the recent work of Juan Ginés de Sepúlveda (1494 – 1573). Bartolomé de las Casas (ca.1484 – 1566) also attended the debate, in defense of the New World *Indians*. Like de Vitoria before him, de las Casas held that natural slaves (Aristotle) may indeed exist, but that the Native Americans were not so (Neff 122). De Vitoria's conclusions, as expounded by de las Casas, provoked the anger of the Humanist Ginés de Sepúlveda.

De Sepúlveda referred to Aristotle, synthesizing his doctrine with Cicero: "Nature has endowed every species of living creature with the instinct of self-preservation, of avoiding what seems likely to cause injury to life or limb and of procuring and providing everything needful for life" (Neff 122). Ginés de Sepúlveda maintained, "the defect of the *Indians* lies not simply in individual infractions of the law of nature, but in the fact that they constitute a city so barbarous and inhumane that it does not include among moral evils the crimes I have enumerated and does not condemn them in its laws or morals" ("Demócrates Secundus" 30A).

De las Casas countered "Every human being is a reflection of the image of God, therefore, natural distinctions between free and slaves cannot exist, but all humans possess a common image (Hanke "All Makind is One"). In saying thus, de las Casas upheld the *imago Dei*, *dominium* and *libertas* of the Native Americans. As a consequence of this debate, the majority of the *junta* of theologians and canonists favored de las Casas (Almeida de Souza 25-59).

4.3 *Servitus* and *Imago Dei* in the Portuguese Context

Although natural law reasonings were constructed to protect the rights of the New World *Indians*, the same was not done on behalf of African *blacks*. After his visit to the island of Hispaniola, de las Casas suggested in his *Memorial de Remedios* (1516) to the Regents of Castile that a license be issued to import *negros* [African blacks] from Spain or directly from Africa to Hispaniola. He put suggested that it would go better with the *Indians* "if we could each get licenses to bring a few dozen Negro slaves from Spain or Africa" (De las Casas, "*Historia de las Indias*," 2190-91)[4]. Las Casas made this proposal to alleviate the harsh labor endured by the natives and to assist the declining indigenous labor force. His motivation was flamed by the advancement of the sugarcane industry which benefited Spain.

It was not until 1547 when de las Casas visited the Lisbon royal and commercial documents in the archives, and received the testimony of Portuguese chroniclers, that he began to condemn the African slave trade (Pérez Fernández, "Fray Bartomolé de las Casas"). Upon analyzing the debates and the sources thereof, I question why did de las Casas suggest the importation of black African slaves? Indeed, it was not until after he had heard about the horrors of Atlantic slavery that he changed his mind. This leads me to think that he had initially subscribed to the "Curse of *Ḥam*" myth. After all, he did believe that barbarians, as natural slaves did exist, albeit not among the Native Americans. If so, then he did not think that *black* Africans possessed the *imagine Dei*.

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[4] See the eleventh remedy of Las Casas's "Memorial de remedios para las Indias (1516)" in *O.E.,* 5:9b.

The Portuguese had been engaging in West African slave trade (1445) many years before the Spanish got involved. While there were ecclesiastical and legal-political debates about the *dominium* [property and sovereignty] and rule of New World *Indians* by the Spanish empire, such never took place on behalf of the enslaved Africans within the Portuguese context, notwithstanding of a few voices of protest. Luis de Molina argued that the trade of sub-Saharan Africans was never debated systematically, primarily because it was introduced little-by-little, and because there were no learned men among the Portuguese who could approach the king to dissuade him from engaging in the trade of humans (Hespanha 953; "Tractatus de Iustitia et de Iure" col. 178, B/C).

The legal understandings of Aquinas, de Vitoria, de Molina, and de Soto gained entrée into the universities at Coimbra and Évora. Therein, the legal debate on *dominium* [property/ sovereignty] and *servitus* developed. António de Santo Domingo and Fernando Perez were among the most prominent jurists in these debates. Agreeing with Justinian law and Aquinas' legal conceptions, these theologians accepted the enslavement of peoples as a result of a *just war*. If so, who were the West Africans at war with so that the Portuguese could legally enslave and trade them? Papal bulls legitimized Portuguese attacks in Africa and Asia, and the enslavement of their peoples (Obregón 599). Since there were no conditions for a *just war*, I argue that the involvement of the Portuguese in the Atlantic slave trade depended on universalized natural law theories, the pursuit to strengthen Christendom in Europe from an Islamic threat in Constantinople, and the construction of racial difference.

The Roman legal term *servitus* acquired new meanings and understandings within the Portuguese slave trade of *black* Africans. Before 1445, *servitus* was discussed within the context

of war captivity, but transitioned to the colonial plantation economy context thereafter. Sometime between the eleventh and the thirteenth centuries, Latinists indicate a linguistic transition between the Roman terms *ancilla, serva, servus,* and *familius* to *sclavus* (Karkov, Klosowska, and van Gerven Oei 161). Before the eleventh century, *servus* was used to describe a chattel slave. After that time it became synonymous with a serf (162).

Siervo derives from the Latin *servus*. According to Justinian's Institutes and Digest, s*ervi* [plural or *servus*] are so called because commanders order their captives to be sold, and thereby they are accustomed to save [*servare*] rather than kill them [Justinian, "Institutes" 1.3.3; Justinian "Digest" 1.5.4.2]. *Servitus* is also derived from the same Latin cognate *servare*, as Isidore of Seville (560–636) states in seventh-century Iberia: *Servitus* is derived from saving (*servare*), for among the ancients, those who were saved from death in battle were called *servi* (Isidore of Seville V.xxvii.32; Phillips 1). Furthermore, Thomas Aquinas (1225 – 1274) used the term *servitus* as servitude, and referred to "slavery" only when he meant chattel slavery, which was not common in the Middle Ages (Capizzi 31-52). Whereas before the medieval time period, *servus* meant a war captive whose life was spared, subsequently, its meaning became associated with different forms of *slavery*.

In spite of the odious trade and its defendants, there were a few opponents who raised their voices against it. After having witnessed the sale of slaves in his native Seville, in his *Tratado y Contrato de Mercaderes* (1569), Tomás de Mercado criticizes the way in which the Portuguese dealt with the African slave trade (Russell-Wood 35). He exhorted Spanish merchants not to engage in the trade of African peoples, due to various forms of abuse which were justified through law (Pérez Memén 106).

Similarly, in his *De Iustitia et Iure* (1593), Luís de Molina denounces and chastises the bishop and clergy of Cape Verdes for their indifference and their negligence to stir moral indignation against the trade (Russell-Wood 35), considering it illegitimate on moral and theological grounds. Thus, he declared the traders liable of mortal transgression (*ibid*). These sharp criticisms of the Portugueses' slave trading activities raises the question: What legal notions did Portuguese jurists and theologians put forward in order to exploit *black* Africans? Removing the need of a *just war* was crucial for Portuguese theologians and lawyers in justifying their pro-slavery position.

Jurists and theologians in Coimbra and Évora concurred that *servitus* was the result of a *just war*. What legal understandings did they maintain in regards to the nature of *servitus*? Born in Coimbra in 1531, António de Santo Domingo entered the Dominican Order in 1547, and was appointed Chair of Prima at the University of Coimbra in 1573. While at Lisbon, he began commenting on Aquinas' *Summa Theologie* (1578 – 1586) (Stegmüller 10). As a Thomist, de S. Domingo adopted Aquinas' division of law, instead of the division proposed by de Soto. In contradistinction to de Soto, he argued that *ius gentium* must be a natural law, since all humans recognize the same value in it [*Habet eadem vim apud omnes*.]. What was clear for de S. Domingo is that the law of nations is derived from natural reason. However, he distinguished between norms which are necessary for human existence and norms which can be abolished, since they are not necessary for human existence. According to this conception, de S. Domingo concluded that *servitus* could be abolished if there was no human consensus agreeing to it (Cod. 5512, f.7r).

In contrast to de S. Domingo, Fernando Perez adopted de Soto's conception of natural right—a type of natural-rational instinct. Perez was born circa 1530 in Córdoba. He came to Évora in 1559. He taught theology in the Chair of Vespers (1559 – 1567) then at Prima (1567 – 1572). Upon leaving Évora for Coimbra, Luis de Molina succeeded him. While in Coimbra, Perez prepared *De Iustita et Iure* (1588) (Stegmüller 10). He argues that *ius gentium* is necessary to promote a peaceful coexistence among peoples because of the fallen state of humans after the original sin. Thus, the *imago Dei* was corrupted after the Fall. Wherefore, Perez posited that *ius gentium* is a positive and instituted *right*. Hence, *servitus* within the context of war, is ruled by the law of nations, as a result of the postlapsarian state of humans.

Similar to Perez, Francisco Suárez considered war and *servitus* as belonging to the law of nations, and not of the natural law. Suárez was born in Granada, Andalusia and began studying law at Salamanca since 1561. While there, he entered the Jesuit Society in 1564, where he continued his studies of theology and philosophy. In 1572 he was ordained priest, after which he taught theology at Ávila, Segovia, Valladolid, Rome, Alcalá, Salamanca, and Coimbra. He remained in Coimbra teaching theology until his death in 1617. Robin Blackburm asserts that Luis de Molina's teachings on slavery and the slave trade had a significant impression on Francisco Suárez (Blackburn 179). De Molina maintained that the primary rationale for the institution of *servitus* by the law of nations was to castigate crimes which were unworthy of death ("De virtute et statu religionis*"* tr. VII, I.6, c. 2, n. 20, Vol. 15, 394; tr. VII, I.2, c. 12, n.17, Vol. 15, 173). He argued furthermore, that even though *servitus* is a universal custom according to the law of nations, a prince has the power to censure it. Essentially, the apathy of the colonial powers to dissolve the African slave trade is precisely what Suárez criticized in his day.

By the same token, in *A Arte da Guerra do Mar* (1555), Fernando de Oliveira criticizes Portugal's ideals of territorial extension, commercial exploitation, and religious expansion "giving themselves to war have gained our Portuguese riches and prosperity, and lordship of lands and realms … and, above all, given a chance for the faith of God to be multiplied" (Silva 31). Fernando de Oliveira was born in Gestosa and had obtained a broad Christian humanist education under the Dominican theologian André de Resende. At the age of 25 he moved to Spain, where he became interested in linguistics. In 1536, he produced the first Portuguese grammar book, and returned to Portugal in 1543 (F. de Oliveira Part I, chap. 1-5).

De Oliveira argued that wars must be waged according to the principles of *just war,* and that any enslavement of peoples acquired by unjust wars must be stopped. These issues are discussed in the first five chapters of *A Arte da Guerra do Mar.* De Oliveira confronts Portugal's wars at sea and those of some African states. He points out that African kings wage unjust wars with other African kingdoms to acquire slaves to sell to the Europeans, or by stealing fellow Africans for the slave trade. Even though slave markets existed among Africans before the introduction of the Portuguese, he accuses the latter of stimulating the request for slaves and thereby expanding the slave trade across the Atlantic (Duffy and Metcalf 149).

In addition, he accuses the Portuguese with leading slave raids and unjust warfare in order to take slaves on the West African coast (Newitt, "How Portugal Built its Empire"). Therefore, he reasons, "If there were no buyers, there would be no sellers," and denounces the Portuguese as … "the inventors of such a vile trade, never before used or heard of among brothers' as the "buying and selling of peaceable freemen as one buys and sells animals," with the spirit of a "slaughterhouse butcher" (Figueiredo 814). Essentially, de Oliveira rejected the

Portuguese monarchy's two-fold justification of the capture and trade of slaves along the West African coast, i.e. a *just war* theory-rationale, and the natural slavery of West Africans as inferior peoples (Smith, Mieroop, and Glahn 17-8).

During the latter part of the sixteenth century (1593), Luis de Molina advocated for the illegality of the African slave trade. De Molina raises a number of issues against the implementation of the institution of slavery and the practice of slave trade at the time. First, he expounds on his understanding of what constitutes a *just war* (col.415,C; col.415, A; tr. 2, d.104; col. 431, D and following). António Manuel Hespanha posits that de Molina's conditions for *just war* evidence that war is unjust when motivated for expansion of territories, glory, or personal gain (942). In that case, some cases for war and slavery were more controversial.

Furthermore, de Molina argued that Christians were not permitted to castigate anyone with war for violating natural law principles (col. 435, E). Only God can punish peoples for violating natural laws (col. 436, B/E). In doing so, he contradicted the contemporary Franciscan opinion, which desired to revive the spirit of the Crusades. Thus, he considered it unjust that "barbarous" or "rude" peoples became subjected through evangelization, so that they could keep natural law principles.

De Molina also expounded on *servitus* as a result of a crime: this state of *slavery* can only apply to the culprit, not to his descendants. However, once the culprit was lowered to the status of a *servus*, then his descendants also became perpetual *servi* (col. 158. C; 160; C). Upon analyzing the African slave trade, de Molina maintained that Portugal was not at war neither with Upper nor Lower Guinea. There was no legitimate legal basis for a *just war* (col. 166, D). The only possibility was that the slaves were bought from local African traders.

Without a doubt, these people had become enslaved due to local wars and condemnation for crimes. De Molina doubted the legitimacy of the wars among the Africans. He argued that if the internal wars are not just, then neither are the slaves bought by the Portuguese, truly war slaves. He further argued that even if the wars were just, the buyers did not certify that the slaves were true slaves (col. 189, E). Hence, the manner in which the slave market functioned did not allow for verifications of legal enslavement.

De facto, often time the Portuguese would arrive at a river or a port and Africans would offer to sell themselves. The Portuguese would buy the persons at the best price, without examining the legitimacy of the *tangomãos'*[5] titles (Silva Horta and Mark, "The Forgotten Diaspora"). Consequently, many innocent people—children and women—were condemned during internal wars. It was common in Africa that children and wives were sold as slaves together with their fathers and husbands. De Molina rendered this unjust and illegal (Hespanha 955). These were then sold to the Portuguese buyers, then sent to Brazil or elsewhere (951).

Finally, he held that even if some Africans were guilty of practicing cannibalism, this was not a reason to globalize it as a crime against all sub-Saharan Africans, thereby selling them (Hespanha 955). In point of fact, in his *First Relectio of the Indians Lately Discovered*, de Vitoria puts forward that cannibalism is a crime against the law of nature ("The First Relectio on the Indians" para. 375). Concerning the application of Aristotle's theory of natural slavery, de Molina explained that it referred to people that could govern themselves, and should be reduced to civil servitude, but not systematic chattel slavery (Hespanha 958). On these grounds, de Molina considered the entire trade illegitimate.

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[5] Eurafrican traders. Many of them were the product of Portuguese Jewish merchants and African mothers, who were integrated into to the Jewish people.

If truth be told, the Atlantic slave trade depended primarily on politico-economic factors. Whereas Portuguese jurists and theologians agreed that *servitus* as an institution was part of the law of nations, the ethnographical sketches of Fernando de Oliveira and the legal analysis of de Molina's suffice to substantiate their claims that there was no legal basis for just wars against the West African nations. Private enterprise of the lucrative sugarcane industry and the *hidalgo* [nobility] lifestyle of Iberians; and a religious war on a grand scale were the three main motors behind the odious trade.

In 1488, King John II (r. 1481 – 1495) informed Innocent VIII (r. 1484 – 1492) that slave trade dividends lent financial assistance to wars against North African Moors. The Portuguese monarchy collected more than two million *reis* through slave trade taxes and duties in 1506. After 1531, low-interest loans were made to Portuguese owners of sugar plantations in the Indies to enable them to purchase slave laborers (Orique "A Compassion of the Voice"). Koskenniemi asserts "Behind every sovereignty there is some kind of an ideology that justifies it but is visible only once the (positive) legal routines are disturbed—and every natural law needs positivity to make itself applicable in the world…But much of Europe's expansion took place through private operators, colonial or trading companies, and by way of private contract and the exercise of the right of private property" ("International Law and Empire" 10). The Portuguese monarchy promoted the trade of enslaved Africans for nearly sixty years by the time Portuguese theologians and jurists began to discuss the legality of *servitus, dominium,* and *libertas*.

4.4 Slavery in the Spanish and Portuguese Ordinances

An examination of Spanish and Portuguese legal codes which deal with slavery highlight the racial difference which was constructed through language and law. After the *Reconquista* (722–1492), *moro* [Moor] as an idea was equated with slavery within the Spanish Christian context, and thereafter, against the background of the Atlantic slave trade, the negative attitudes toward the Moors were imputed on all dark-skinned Africans.

In the Spanish medieval period, Alfonso X the Wise compiled *Las Siete Partidas* [Seven-Part Code] in Castile, between 1251 and 1265. However, these laws were not set into effect until around 1348. This code relied on the legal and ethical traditions of the ancient Visigoths, Romans, and the Justinian Roman law Code (Saperstein and Marcus Chapter 22). These were then synthesized with Church law in the early modern period. Before *Las Siete Partidas*, the enslaved included: non-Christian prisoners of wars, condemned persons, voluntary slaves who needed to pay their debts, and the children of enslaved mothers ("Las Siete Partidas" Code 4:XXI:1). *Las Siete Partidas* added two more categories: children of priest as slaves in the service of their father's churches, and Christians who helped the Moors with war materials (Code 4:XXI:4).

The fourth code of *Las Siete Partidas* addresses the rights of masters and the enslaved within a system of slavery, that reflects various ethnicities in a domestic, urban, and temporary environment. The North African and sub-Saharan soldiers accompanying Muslim armies, who were captured, became the property of Spain. Other Africans arrived to Spain either as free persons or via the slave market. Among the slaves in medieval and early modern Spain were

Greeks, Sardinians, Canary Islanders, Russians, Turks, Egyptians, Spaniards, and Moors. Even though the laws of *Las Siete Partidas* favored Christians, the enslaved could include Muslims, Jews, or even Christians. The idea that servitude was born out of sparing the lives of war captives is reflected in *Las Siete Partidas*:

> *Servidumbre, es postura, o establecimiento que hicieron antiguamente las gentes, por la cual los hombres, que eran naturalmente libres, se hacían siervos y se sometían a señorío de otro contra razón de naturaleza. Y siervo tomó este nombre de una palabra que es llamada en latín servare, que quiere tanto decir en romance como guardar: Y esta guarda fue establecida por los emperadores, pues antiguamente a todos cuantos cautivaban, matábanlos, mas los emperadores tuvieron por bien y mandaron que no los matasen, mas que los guardasen y se sirvieren de ellos.*
>
> Servitude, is a position, or an establishment that people did in the ancient times, by which men, who were naturally free, became servants and submitted to the lordship of another against reason of nature. And [the] servant took this name from a word that is called in Latin *servare*, which means to say in romance [Spanish]—to preserve: And this preserving was established by the emperors, because formerly, they killed them all whom they captivated but the emperors had good [intentions] and ordered not to kill them, but to preserve them and serve themselves with them (Code 4:XXI:1).

In this context, Roman emperors demonstrate mercy by saving the lives of his captors, and reducing them to servitude. This law assumes that humans were born naturally free, and to submit oneself to the lordship of another goes against natural or right reason. Thus, it stands in contradistinction to sixteenth-century Spanish humanists' conceptions of Aristotle's premise of natural slavery, which puts forward that some peoples were born in a natural state to serve others (Aristotle, "Politics" 1.2, 1252a24-6; Tuck "The Rights of War and Peace" 42).

The laws of *Las Siete Partidas* assume the legal understanding that *servi* are acquired as a result of a *just war*. As such, masters have *dominica potestas* [complete ownership] over their *siervos*. Yet, this power restricts the master from killing or abusing a *siervo* through starvation or physical strikes, unless the master discovers the *siervo* sleeping with his wife or daughter, or similar things (Code 4:XXI:6). At the farthest extent of this law lies the assumption that a male servant is sexually promiscuous. In fact, this form of *servitus* is limited to males, since they are taken captive from enemy armies. One could then conclude that these laws do not apply to female servants.

Libertas as a notion within *Las Siete Partidas* is intimately related to the idea of *Imago Dei* and free will. Thus, humans created in the "image and likeness" of God have the capacity to reason and to make decisions are truly *free*. According to *Las Siete Partidas* a master could grant *liberty* to his *siervo* at the church or outside of it, in front of a judge or in a written will ("Las Siete Partidas" Code 4:XXII:1). The master must do this himself, and cannot assign someone else to manumit the *siervo*.

Sally Hadden argues that the omissions on: the proper religious instruction for *siervos*, their right to marry, or the rights to food, clothing, and shelter, demonstrate that bondsmen

comprised a small population, and that this type of *servitus* was intended for a temporary time period (258). She also posits that the presumptions of title XXII of the Fourth *Partida*, "all creatures in the world naturally love and desire liberty," formed part of Spanish colonial laws, yet their transmission were lost by sixteenth-century settlers in the New World (*ibid*). This implies that external factors to the legal codes had influenced public policy in the New World.

Certainly, the international arbitration system set up in the Spanish colonies to settle slave-property disputes had been corrupted. Essentially, the "neutrality" of the arbitration system normalized the slave trade, since judges-conservators "worked within the system," yet did not discuss the "legitimacy nor the legality of slavery" (Martineau 219-241). While the Spanish medieval *siervo* was not limited to a racial nor ethnic group, after the Portuguese commenced the trade of dark-skinned African slaves (1445), medieval Iberian slavery law began to acquire pejorative elements, based on phenotypes, and influenced the language thereof.

The *Ordenações Afonsinas* were instituted with the objective of systemizing Portuguese laws in the fifteenth century. They were approved sometime between 1446 and 1447. This code was organized in five books, divided by titles, and paragraphs; its structure is similar to *Las Siete Partidas.* The books are divided as follows: judicial administration; protective rules on behalf of some persons and institutions; procedural norms; civil law proceedings; criminal law. It also contains laws regulating the rights and legislations pertaining to the Jews and the Moors.

The printing press was introduced in Portugal during the monarchy of King Manuel. Already by 1512, the *Ordenações Afonsinas* were modified and named *Ordenações Manuelinas*, after Dom Manuel. However, there is a debate as to the exact date when they went into full force. The first publication was in 1514, and implemented in 1521, the year of King Manuel's passing

(Almeida Costa 282). This code maintained the same structure of the five books, but some laws were eliminated, while others were added (Dias Paes 525). After Spain and Portugal consolidated power in 1580, this code of law underwent another modification—the *Ordenações Filipinas.*

King Phillip of Spain modified the *Ordenações Manuelinas* to include legislation from *Las Siete Partidas* in the Portuguese ordinances. The redaction of this code was concluded in 1592, but it was not until 1603 when it went into effect. Whereas the *Ordenações Manuelinas* had 393 titles, the *Ordenações Filipinas* had 511 titles (525). By the time that the *Ordenações Filipinas* were redacted, Spain and Portugal had expanded their empires across the seas, and the Catholic Church's religiosity and authority had been centralized. Thus, the previous codes needed to be reworked in order to adjust to changes in social structure and the disuse of many laws. The *Ordenações Filipinas* demonstrated a respect for Portuguese legislation, despite the submission of Portugal to the Spanish monarchy (Lara, "Ordenações Filipinas Livro" V).

Collectively, the *Ordenações Manuelinas* and *Ordenações Filipinas* include 71 sections on slavery. The former contains just twenty-three sections on slavery, whereas the latter has forty-eight. They are found in Book Four and Book Five. While in the *Ordenações Afonsinas* the term *servo* applies to a captive Moor*,* in the *Ordenações Manuelinas, servo* applies not only to Muslims, but also to *black* Africans [*servo* is servant in Portuguese]. However, in the *Ordenações Filipinas* the term *escravo* is used exclusively for enslaved sub-Saharan Africans.

The myth of the "Curse of *Ḥam*" contributed to this racial difference. The *escravo* is mentioned in sixty-four sections, while *free* persons in ten, and the African *negro* in eleven. Indeed, the use of *escravo* in the *Ordenações Filipinas* brings out into the open the reality of plantation slavery in the colonies (Lara Ribeiro 375-398). Plantation slaves [*escravos*] were

"bequeathed in wills, sold in deeds, given as gifts, used to pay mortgages, used as security in loans, listed in plantation inventories along with other moveable property and livestock, and their value specified in currency or sugar" (Handler 240).

The *escravo* is equated with things, together with animals and objects "And if there were a quarrel regarding an *escravo*, a beast, or a ship, and depending on the appeal, whether the *escravo*, or the beast, or the ship perish, they shall not fail to go thereafter" [*E se for contenda sobre algum escravo, besta, ou navio, e pendendo a instância da apelação, morresse o escravo, ou besta, ou perecesse o navio, não deixarão por tanto de ir pelo feito em diante*] (Book III, Title LXXXII:1). Hence, the *escravo* is considered to be property. Furthermore, in Book Five, Title LXX, *escravos* and *negros* are prohibited from living alone and from dancing within the city limits of Lisbon. This law singles out dark-skinned Africans, regarding them as slaves. Also, in Book Five, Title XCIX, slaves from Guinea and the offspring of female slaves born in Brazil, are required to be baptized. Herein, it is evident that most African slaves were taken from Guinea and that it was common practice for Portuguese men to have children with their slaves. In legal terms, the *escravo* in the *Ordenações Manuelinas* and *Filipinas* has the status of private property, with the exception that they can enter into matrimony (Dias Paes 533).

After the late fifteenth-century Spanish conquest in the New World, it became necessary for the crown to establish laws to regulate economic, political, and social life in its overseas territories. Throughout the four-hundred years of Spanish imperialism on American soil, legal codes were compiled several times. Slavery was accepted in legal codes on the Iberian peninsula and exported overseas; they were compiled as *Las Leyes de Indias* [Laws of the Indies] (García Benítez 259-274). In volume one, Phillip II orders on May 26, 1596, that in "each town a time be

designated in which the *Indians* and *negros* shall listen to the Christian doctrine" (De la Guardia 31).

Law XII reads:

> We order that in each of our Christian towns in the Indies designate a time each day, where all of the *Indians, negros*, *mulattos*, whether slaves or free, within the towns, to listen to the Christian doctrine, and provide them persons to teach them, and that all the neighbors be obliged to send their *Indians*, *negros*, and *mulattos* to the doctrine, without impeding them at said time…and we declare that they whom should hear the doctrine every day, to be *Indians*, *negros*, and *mulattos*, which serve in homes, who normally do not toil in the fields (32).

Decades earlier, on October 18, 1549, Phillip had decreed, "We order and command all peoples that own slaves, *negros,* and *mulattos*, to send them to the Church or the Monastery at the time designated by the priest" ("Las Leyes de la Indias" Lax XIII).

In comparing Law XII and XIII, there is a slight difference between the tripartite formula: *Indians*, *negros*, and *mulattos*; slaves, *negros*, and *mulattos*. By 1596, the Native Americans were no longer considered to be enslaved subjects of the Spanish crown. However, *negros* and *mulattos* were placed on the same social echelon with slaves (García Benítez 262). These terms not only describe their phenotypes, but evaluates them as slaves in need of salvation through Christian instruction.

At the *Concilio Provincial Dominicano* in 1622, owners of *negros* brought from Ethiopia and other parts, were commanded to indoctrinate and baptize them. The Council also determined to catechize and baptize the Africans on the docked ships, awaiting to be sold, lest some of them die and lose their souls, without indoctrination and baptism (Armellada 21-4). By the end of the sixteenth century the sole source of New World plantation slaves were *black* Africans (Salzman, Smith, and West 274). Even though *black* Africans were Christians, they did not have the *Imago Dei.* As such, they could be enslaved by *white* Europeans.

4.5 Conclusion: The "Curse of *Ḥam*" and Iberian legal consciousness

The myth of the "Curse of *Ḥam*" contributed to the depreciation of dark-skinned Africans and to their association with enslavement. This destructive myth contributed to the construction of racial difference which influenced Iberian legal consciousness. In the Spanish colonial codes and councils, *negros* and *mulattos* are deemed heathens and slaves. Thus, the linguistic convention in the Spanish West Indies is that dark-skinned Africans are not only enslaved, but also need to be saved through Christian doctrine.

French Jurist François Connan (1508 – 1551) declared "Liberty was born with servitude…there was no one free, when no one was a slave: as among Christians no one is called free, since none of them is a slave" (*Commentariorum Iuris Civilis Libri X*, 1557, 72-73). Indeed, before the commencement of the Atlantic slave trade, the practice of slavery within the Christian kingdoms of Spain and Portugal was limited to the war captivity. Prior to the peculiar trade, *libertas* was defined as possessing free-will and right reason. The rational capacity to make decisions was based on the theological notion *imago Dei*. Accordingly, *dominium* was either

equated with *libertas* or understood as self-governance. As such, *servi* did not have *libertas* nor *dominium*.

The myth of the "Curse of *Ḥam*" provided a basis for the dehumanization of sub-Saharan Africans. Tuck asserts that the first readers of Aristotle's *Politics* in Latin understood that "hunting natural slaves is *ipso facto* just," [*ad hominum quicumque nati sunt subici et non volunt, velut naturum iustum hoc existens bellum premum*] since the victims of the raids are natural slaves (66; Aristotle, "Politics" c.1260). Essentially, in citing Aristotle, Renaissance jurists dehumanized individuals and treated them like animals, to justify slavery and slave trade (Shelton 230-31; Zack 115; Davis, "Inhuman Bondage" 33).

The amalgamation of Aristotelian *natural slavery* with the "Curse of *Ḥam*" myth was the vehicle by with lawyers justified the eradication of natural *rights* and the divine image from *black* Africans. Therefore, even if dark-skinned Africans were baptized into Christianity, they did not possess the natural *right* to *libertas* and *dominium*. Therein lies the contradiction of it all. Consequently, West Africans are enslaved without the legal basis for a *just war.* Even though the slave owners hold illegitimate titles over their slaves, the enslaved are sold as *res.*

The Atlantic slave trade had a great influence on how the law of nations and nature was conceived within the sixteenth-century Iberian context. The analysis hereof evidenced that *ius naturae et gentium* was fluid. *Dominium* [sovereignty or property] as an institution of the law of nations and nature was reworked by opportunistic theologians and lawyers in order to construct arguments in favor of the Atlantic slave trade. *Dominium* as private property was universalized as a natural *right*, such that Iberian Christians could own Christian and non-Christian African slaves alike.

On the same token, *dominium* as sovereignty was universalized such that the law of nature was applied to all humans, irrespective of religious affiliation. Thus public law and private law became intertwined (Koskenniemi, “Law and Empire” 12). The destructive myth of the biblical *Ḥam* and his descendants was understood by pro-slavery Iberian theologians as volitional divine law, i.e. lawful because it was willed by God. When the "Curse of *Ḥam*" myth is understood as volitional divine law, and is synthesized with the *naturalized law of nations* (refer to Section 1.3), the enslavement of Africans becomes a mandate sanctioned by both God and men. The conceptions of the law of nations and nature were not static; they changed according to the time and their use. To that end, Iberian jurisprudence sought to maintain balance with morality, law, and Christian ethics (Koskenniemi, “International Law and Empire” 11).

In the case of slavery and slave trade between Iberia, Africa, and the islands, legal thinking developed in service of colonization and the enslavement of innocent peoples. Whether a person was born into slavery, enslaved within the context of war, or due to a penalty, in Roman law he or she is considered *res* of the owner on the grounds of *dominica potestas* [The ownership of slaves]. It is on this basis that European colonists made their legal claims on *blacks* wherever they were to be found. This is the context in which *Nação* merchants participated in the early modern Iberian debate on slavery and slave trade. By the time the Dutch arrive to the scene, there is a ready-made system of colonial slavery, a network of slave trade, and legal arguments to draw from.