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

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The Emergence of *Nação* Legal Consciousness

"The problem is not changing people's consciousnesses—or what's in their heads—but the political, economic, institutional régime of the production of truth."

(Foucault 171-2)

8.1 Introduction

I have attempted in the largest part of this book to explore the legal consciousness of the seventeenth-century *Nação* [Hebrews of the Portuguese Nation] in Amsterdam, vis-à-vis the slavery and slave trade debate. In the introduction, I put forward that the Portuguese Jewish community contributed to the Dutch Republic slavery and slave trade legal debate. The intra-communal discussions within the *Talmud Torah Eẓ Ḥaim* Seminary and the extra-communal interactions with the Amsterdam and the Hague city authorities sufficed to substantiate my claim. However, this contribution was not recorded in the history of international law until this time.

Inspired by Yirmiyahu Yovel, I chose to focus on the *Nação* from the perspective of the "other within" the Euro-Christian hegemony. In utilizing the lens of the "other within," I argued that while European Christians were at the forefront of legal debates and colonial expansion, the Portuguese Hebrew Nation also contributed to that end, via their trade networks and their literature from the *Talmud Torah Eẓ Ḥaim* Seminary. The highlighting of these marginalized contributions was directed by two questions: How did *Eẓ Ḥaim's* Jews contribute to the legal-political discussions of *ius naturae et gentium* as the "other within" the Amsterdam-Dutch Republic debate on slavery and slave trade? Furthermore, how can an emphasis of these narratives make the *Nação* more visible in the history of international law than it is today?

Iberian Jews which were forcibly converted to Christianity between the fourteenth and fifteenth centuries, thereby becoming the "other within." As New Christians [within] they gained access to political and economic positions which were refused to them a Jews, prior to their conversion. However, as *conversos* [*The Other*] they were often time stigmatized by Old

Christians as having tainted blood, and branded as disloyal subjects of the Spanish Catholic Empire. This liminal identity [“other within”] afforded them to forge a global trade network with their Sephardic brethren throughout the Ottoman Empire, Western Europe, and the New World. *Conversos* controlled the *asientos* [contracts permitting the sale of slaves within the Spanish colonies] in the sixteenth century, therefore dominating the slave trade in Seville, Lisbon, and the Atlantic islands.

Given this circumstance, their material contribution to the slavery and slave trade political-legal debate forced several legal, ideological, and linguistic notions to change in order to accommodate the political-economic pursuits of the Habsburg Empire. After the devastation of Iberian Jewry at the end of the fifteenth century, the *Nação* sought ways to not only rebuild itself, but also to establish the messianic kingdom in the Holy Land. Accordingly, they instituted a global financial network, with Jerusalem as its capital. Bearing this in mind, *Nação* communities in Amsterdam, Brazil, and Suriname sent monetary assistance to their brethren in Jerusalem. In due time, the presence of Sephardim in Jerusalem grew to a majority, thereby revitalizing the community as a center of Jewish scholarship.

Simultaneously, *conversos* in *las tierras de idolatria*, i.e. the Iberian mainland, reached high levels within the clergy and became faculty members at universities in Salamanca, Alcalá de Henares, Coimbra, and Évora. As such, they participated in legal and theological debates concerning the law of nations and nature. In the seventeenth century some *conversos* reverted to the public practice of their ancestral heritage in the Dutch Republic.

After establishing the *Talmud Torah Eẓ Ḥaim* Seminary in Amsterdam, they translated Jewish jurisprudence [*halakhah*] into Roman jurisprudence by synthesizing the two legal

traditions. The alchemy of Christian theology, Greco-Roman law and philosophy, and Jewish law and philosophy is what characterized the scholarship which emerged from the *Talmud Torah Eẓ Ḥaim* Seminary. Rabbis and students were not only well-versed in Hebrew literature, but also the Classics and Catholic canonic literature. The product thereof is what I coined as *Nação legal consciousness*.

8.2 *Nação* Merchants and Rabbis Challenge the "Free Soil" Tradition

Throughout the course of the seventeenth century *Nação* merchants and rabbis challenged the pre-established notions in the Netherlands. It is precisely in highlighting the contradictions and conflicts that the agency of the *Nação* becomes visible. The municipality of Amsterdam had established (1) that slavery was not allowed on Dutch soil, and (2) that slavery as an institution was only allowed within the context of *ius gentium*, but not *ius naturale.* Dutch jurists*,* Hugo Grotius, Willem de Groot, Ulrich Huber, and Cornelius van Bynkershoek agreed the *slavery* was possible under the tenants of *ius naturale.* However, Bynkershoek agreed that the institution of *slavery* opposed the *ius naturale* and was only permissible in accordance to the law of nations. Bynkershoek was the only jurist to explicitly acknowledge that the Dutch engaged in slave trading in the East and West Indies. At the time when Portuguese Jews began to settle in the Netherlands, Dutch policy regarding slavery held that any enslaved person entering the Netherlands was *free*. The understood legal notion was called the "free soil" tradition.

The Great Council of Mechelen decided in the sixteenth century that enslaved peoples entering the Low Countries were to be freed, regardless of religion. This idea was developed by Dutch jurists throughout the course of the sixteenth and seventeenth centuries. Within the

theological circles of the United Provinces, the slavery and slave trade activities of the East India Company [VOC] and the West India Company [WIC] provoked a split between the followers of Johannes Cocceius and Gisbertus Voetius.

The Cocceians justified the institution of slavery based on Biblical, Rabbinic, and Roman law. On the other hand, the Voetians argued that slavery was equivalent to stealing. The political-economic connections of the Cocceians allowed for their interpretations of the Bible to take the leading role in the debate. At the same time, Grotius had introduced a crucial legal innovation, wherein he ascribed natural rights to private entities. In turn, the VOC and WIC acted as public authorities, in the name of the Dutch Republic. Even though Grotius was against the practice of slavery, trading companies constructed arguments with his legal ideas to engage in war with the Portuguese and confiscate their property, including slaves and slave trading posts (in accordance with *ius gentium*). Ergo, the economic endeavors of the guilds in the port cities of Friesland, Holland, and Zeeland overruled any argumentation against the practice of slavery and slave trade in the Dutch colonies.

At the turn of the sixteenth century the city leaders of Middelburg recalled the "natural liberty" of African slaves captured from a Portuguese vessel by Dutch skipper, Melchior van den Kerckhoven. Decades later, this precedent held no weight in other similar incidents in Amsterdam. Indeed, the notion of *res dominica* [ownership of goods] fashioned the concept of *libertas* [freedom]. Fundamentally, plantation owners in the Dutch colonies, who enjoyed tax-exemption for a stipulated time, were considered to be *free*, while their slaves—African *blacks*—were owned by them.

Even though some *Nação* merchants manumitted their African slaves, the reality in the Netherlands and the West Indies was that *black* or *mulatto* persons had been enslaved or descended from enslaved mothers. According to *halakhah*, manumitted slaves became Jews and formed part of the *Nação*. Crucial to the legal debate concerning slavery and slave trade in seventeenth-century Amsterdam was the rabbinic understanding of slavery *halakhah* within the *Eẓ Ḥaim* Seminary.

I argued that the moral lens by which the *Nação* operated in the slave trade was shaped by *halakhah*, as reflected in the writings of Abraham Pharar, Menasseh b. Israel, Isaac Aboab da Fonseca, and Isaac Athias. These scholars utilized their command of language in order to innovate *halakhic* notions that did not exist before: s*ervo de Israel* [servant of Israel]*, escravo não-banhado* [non-immersed slave]*, siervo pagano* [pagan slave]*, pagano idólatra* [idolatrous pagan]*,* and *esclavo* [slave]. Whereas the Ferrara Bible [official Spanish translation used by Sephardic Jews at the time] translates the Hebrew עֶבֶד, as *siervo* [servant]*,* in the literature of *Eẓ Ḥaim*'s jurists, one finds an array of translations, depending on the status of the slave.

Those slaves that had been circumcised and ritually-immersed held a quasi-Jewish status [*servo de Israel, servo bahado*], until they were emancipated as full-fledged Jews. On the other hand, slaves that had not been ritually-immersed [*siervo pagano, escravo não-banhado, esclavo*] had the status of non-Jews. I posited that the Atlantic slave trade influenced the understanding and implementation of *halakhah*, since prior to that time, Jewish slave owners accustomed to have domestic servants and freed them after 12 months of service.

However, the lucrative sugar cane industry in the West Indies required not only domestic servitude in facilitating a comfortable lifestyle, but manpower on the plantations. As one

contextualizes slavery *halakhah* from the Iberian medieval time period until the early modern period in the Dutch Republic, it is evident that Jewish plantation slave owners operated with new understandings of *halakhah.* No longer did they have to emancipate their slaves, nor try to convince them to become a part of the Jewish Nation.

Cases involving *Nação* merchants entering the Netherlands [sections 1.1, 7.2 and 7.4 discuss the cases in detail] with their servant/slaves highlight how *Nação* jurists and thinkers mobilized linguistic and legal conventions stemming from the "Salamanca School," Évora and Coimbra. Once they established themselves in Amsterdam, they synthesized Iberian legal notions with notions of Jewish slavery law. Prior to the odious trade, West African peoples were punished by local monarchs for their crimes in a number of ways. However, slave trade with Europeans became the primary punishment for all types of crimes, and even included innocent persons.

Before the sixteenth century, the *the law of the land* in Spain and Portugal was that enslavement was the result of a *just war*. While natural law theories were ubiquitous in the early modern period, humanists reshaped Aristotle's theory of *natural slavery* to fit the socio-economic context [discussed in Chapter 5]. The involvement of the *Nação* in the Trans Atlantic slave trade challenged the legal conventions put forward by Luis de Molina, Fernando de Oliveira, and Francisco Suárez. These jurists rendered the African slave trade illegal and immoral.

Eẓ Ḥaim's jurists and philosophers contributed to the understanding of *ius naturae et gentium* through their participation in the slavery and slave trade debate *Nação* scholars: Immanuel Aboab, Saul Levi Mortera, Isaac Cardoso, and Abraham Pereyra reworked the Roman

legal terms—*dominium, servitus, libertas*, and *ius bellum,* as they related to the slavery and slave trade debate. What is clear in their writings is how they conceived of natural law by combining Iberian rabbinic reasoning with scholastic legal reasoning from the "School of Salamanca."

Indeed, they created their own outlook of divine voluntarist law, which was based on the Talmudic notion of the seven Noahide universal principles. In doing so, they called it *La Ley Natural*, while at a foundational level, containing elements of positive law stemming from human volition. Thus, I argued that *La Ley Natural,* as conceived by *Nação* rabbis and philosophers resembled Fernando Perez's doctrine of the intermediate condition of law of nations [partially natural and partially positive] very closely. Moreover, I posited that when the aforementioned *Nação* scholars utilized the term *Ley Natural,* they conformed to the convention at the time of calling the primary law of nations by secondary natural law [*naturalized* law of nations].

Aboab and Cardoso held that *dominium* was the mastery over oneself [sovereignty] or mastery over others [ownership of property/lordship]. Within this legal framework, slaves were considered to be property of their masters, due to human transgression. Ergo, even though slavery formed part of *La Ley Natural,* it was not due to a natural condition of the individual. Furthermore, even though all human beings are born *free*, the Atlantic slave trade affected the legal understanding of the *Eẓ Ḥaim* scholars, such that the natural-born *freedom* of *black* Africans was restricted. In this context *libertas* was defined by being *free* from slavery, in virtue of either being born [*ingenus*] a *white* Dutch Reformed Christian or Jew, or having been emancipated [*liberti*] from it.

Nação jurists conceived of *just war* theory within their legal consciousness. Menasseh b. Israel made a great contribution to that effect in his monumental work, *Conciliator,* which proved to be controversial due to his political connections with the directors of the West India Company and the Magistrates of Holland and Friesland [Chapter 7]. In fact, the communal leaders of *Eẓ Ḥaim* did not approve of this work. To their dismay, he published a Latin version in Frankfurt and disseminated among the elite class throughout the Dutch Republic.

I postulated that Menasseh's *just war* theory provided Dutch theologians with material that connected natural-law thinking [*La Ley Natural*] with the Protestant theological notion of supersessionism [Replacement theology held by Christians in which the covenants between the Jewish People and God are superseded by a new covenant through Jesus Christ]. In this scenario, the aforementioned Dutch leaders understood that as the *New Israel,* they could confiscate the Portuguese slave ports and systems of slavery in West Africa for having violated the Law of Nature.

Ultimately, the scholars from the "School of *Eẓ Ḥaim*" synthesized Roman legal notions with *halakhic* notions. It can be concluded that their conception of *La Ley Natural* was divine, yet partly natural (human reason) and positive (human volition). Ergo, in the legal consciousness of the *Nação*, war and slavery are governed by *La Ley Natural.*

8.3 How Does This Study Contribute To The History of International Legal Thought?

At the beginning of this dissertation I stated the claim that the contribution of the Sephardim in the slavery and slave trade legal debate was overlooked, due to their ethnoreligious

identity. In saying this I am careful not to succumb to the misuse of anachronism, and labeling legal historians as anti-Semites. Indeed, Norman Roth argues that many writers [Jewish and non-Jewish] use the label of "anti-Semitism" for any "real or imagined manifestation of anti-Jewish sentiment in any period of history" (229). He is adamant that this is anachronistic on two accounts: (1) because the term and the concept did not come to emerge until the nineteenth century, and (2) in a descriptive sense because it refers to the hatred of the Jewish people because of imagined "racial" characteristics which are deemed to be inferior or subversive.

Nonetheless, there has been a lacuna in the field of intellectual history, vis-à-vis the Sephardim's role in early modern European legal discourse. Nineteenth-century Protestant legal historians viewed themselves as progressing from freedom from the Catholic Church. Thus, the narratives of ethnic and religious minorities were not included in the history and development of international law.

Martti Koskenniemi puts forward that "All significant history is inspired by contemporary concerns and carried out through the lenses provided by the present… a history from which we learn nothing is a waste of time" ("Imagining the Rule of Law" 20). He further puts forward, "the point is not to write 'global history' in which everything is visible-and impossible undertaking--but to diminish the power of blindness, and thus to act in a more acceptable way in the future" ("Histories of International Law" 21). Whereas some scholars have argued that international law began as a European Christian *civilizing mission*, herein, I have put forward that the *Nação* contributed to that end as the "other within" this hegemony.

In 1958, Shabtai Rosenne argued that the historical evolution of public international law was essentially the product of European Christian civilization, and part of Western civilization. He claimed that the Jews were not recorded as active participants in its development and emphasized that there was no attempt to reconcile or include *halakhah* with international law. Rosenne maintained that Jewish legal thought had a lot to contribute to the solution of problems which public international law dealt with. He substantiated his claim by demonstrating how medieval Jewish works were crucial to Christian Hebraists, such as Grotius and Selden. Finally, he concluded that the modern system of international law cannot ignore other aspects of international law which appear in Jewish sources (119-49).

Similary, Betina Kuzmarov argues that Jews were constructed as the "Other" through the appropriation of Jewish law by international legal scholars. Accordingly, she claims that the image of Jewish law can be "recaptured by critical scholars today" (48). Her fundamental premise is that Jewish law cannot be viewed as natural law because it is not meant to be universal, but personal ethic bound by an adherence to a covenant with God. In other words, Jewish law is divine voluntary law which is given by God's will through Moses. As such, Kuzmarov maintains that the Jewish tradition is unique, as an internally rule-bound legal system (56). In other words, Jewish law is a "nomocratic" system of law, applicable to the Jewish people alone (*ibid*).

Nação legal consciousness emerged as a response to the challenge of "recapturing the Other," through a synthesis of the theoretical frameworks utilized by Arnulf Becker-Lorca and Liliana Obregón. Becker-Lorca and Obregón approach international law by contributing to the history of its development through the production of subaltern narratives. Becker-Lorca argues

that semi-peripheral, non-Western lawyers, adopted international law and, while simultaneously internalizing European legal thought, and contributing to the development of nineteenth-century international law. In turn, they added to it a non-Western legacy.

In a similar fashion, I have sought to highlight the narratives and legal ideas of *Nação* jurists and philosophers in Amsterdam, and how they mobilized legal principles within and without their institutions. In doing so, my purpose has been twofold: (1) to challenge preconceived notions about the early modern European consciousness in regards to slavery and slave trade; and (2) to acknowledge agency of the *Nação*. While global histories of legal thought typically begin with philosophical traditions stemming from the Stoics, Cicero, and Grotius, herein I assumed the lens of Moses and the Prophets, Talmudic jurists, and Maimonides, peaking with *Nação* lawyers and philosophers. In this sense, *Nação legal consciousness* is my attempt to grant Jews agency in the development of the history and theory of *international* law. It is my hope that *Nação legal consciousness* will serve as a model in affording other minorities agency and emancipation in international legal history and theory.

Placing the archival data and relevant texts within their political, ideological, economic, legal, and religious contexts has proven to be useful in understanding not only the meaning of what was said or done, but also what the actors in question were doing in the legal debates with their linguistic utterances. That is where the innovation and the change of conventions were visible, permitting me to see the manifestation of agency. Ultimately, the Cambridge School method allowed me to reconstruct the fundamental concepts and abiding questions of morality, politics, religion, and social life in the seventeenth-century Dutch Republic and its colonies.

On this basis, I was able to examine the linguistic dynamics and interactions. The descriptive-evaluative notions [*servitus*, *dominium*, *potestas*, *libertas*, *siervo*, *escravo*, and the biblical narrative between Noah and *Ḥam*] were reworked to justify the systematic enslavement of human beings. This task was posed with the challenge of focusing on the arguments and examining what the texts and actions have to tell us about the perennial issues at stake.

Nação legal consciousness highlights the changes and contributions of Amsterdam's Portuguese Jewish community to the seventeenth-century Dutch Republic debate on slavery and slave trade in three major ways. First, *Nação* rabbis introduce Sephardic literature and thought to Dutch theologians. They intervene in the theological debate on slavery by providing a justification for the enslavement of *black* Africans via the myth of the "Curse of *Ḥam.*" Moderate Dutch Calvinist theologians then utilize this idea to construct *whiteness* and *blackness* within Dutch culture. In doing so, they deprive *black* Africans of their *dominium* [self-governance], *libertas* [freedom], and *Imago Dei* [divine image].

Next, *Nação* merchants continuously bring enslaved *black* Africans to Amsterdam, taking issue with public policy which understood that there was no slavery in the Netherlands. The so-called "free soil" tradition was put to the test various times. It was not until the mid-seventeenth century that the city of Amsterdam issued an official ruling on the prohibition of slavery. At that time, the *Eẓ Ḥaim* communal leaders establish a ruling that no *negro* or *mulatto* will be circumcised nor immersed in ritual baths for the purpose of entering the Congregation of Israel. Consequently, this ruling was implemented among the daughter communities throughout the Dutch colonies, thereby contributing to the construction of racial difference. In turn, *black*

Africans on the plantations were destined to become perpetual slaves. Plantation slavery economy contributed to a moral consciousness which was at ease with slavery abroad, and discomfort in the Netherlands.

Finally, *Nação* jurists and thinkers influence the legal debate on *ius naturae et gentium*. Legal discourse previously held that prisoners of war could be held captive and enslaved in accordance with the law of nations. However, chattel slavery appeared new to the scene and forced jurists to reconsider preconceived notions of *Imago Dei*, natural law, and *dominium*. *Nação* jurists make it possible to reconcile slavery with natural-law thinking. The seven Noahide laws, as put forward in the Talmud, provided the legal parameters to establish a universal code, similar to de Vitoria's and Grotius' conceptions.

In the case of de Vitoria, natural law as a universal code permitted the Spaniards to declare war on the New World Indians. Grotius' universal natural law permitted the VOC to declare war on the Spanish in the East Indies. The *Nação* intervenes in this debate by reinforcing the natural law theories of de Vitoria and Grotius. The ambiguities and questions raised by Grotius' notion of *servitus in ius naturale* [perpetual servitude] are answered within the legal understanding and *modus operandi* of the *Nação.* In creating the *servo de Israel* and *escravo não-banhado*/ *siervo pagano,* the legal consciousness of the *Nação* allows slaves in accordance to *La Ley Natural* to be sold as property and to be enslaved perpetually. Although *servitus* derives from human legislation and custom, it acquires natural and universal character. *Nação legal consciousness* bridges the gap between *ius naturale, ius gentium*, and divine law, where *servitus* is in agreement with the natural law of nations.

One can no longer claim that slave trade in the West Indies during the early modern period was the sole production of a European consciousness. It involved a very complex network of actors and events: African-Arab merchants, African monarchs, judges and arbitrators in the Caribbean, Spanish and Portuguese monarchs, *asientistas* in Spain, insurance lawyers in Flanders and the Netherlands, European guilds and investors, *lançados* in West Africa, government officials across European cities, Christian preachers and jurists, and rabbis and Jewish philosophers. This was a collective collaboration which shaped an entire era. What I have presented in *Nação legal consciousness* entails a micro-history of selected actors who maneuver themselves in and out of Europe through the odious trade.

Nação legal consciousness brings to light the dynamics between politics, law, economics, and religion. Koskenniemi asserts, "International law is a process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made" ("The Politics of International law" 221). The focus on religion is crucial, being that the world-vision of the people at the time was based on it. When looking at slavery and slave trade in the early modern era through the lenses implemented in this study, one can see that there are key factors: the Fall of Constantinople in 1453, the Protestant Reformation, the Spanish and Portuguese Inquisitions, the Shabbethai Ẓebi messianic movement, and Christian millenarianism. Each one of these factors played a role in the trafficking of people across the globe. Law has been implemented as a tool to promote a wide assortment of "religious, culturalist, and ethical, or economic ideas and arguments" (Banerjee and Lingen 1-4). Often time, the tension between politics and religion was mended by law, whether a dissenting minority agreed or not. Undeniably, in the early modern period, large parts of Europe were

defined by state formation, via the constitution of state power by the agency of law. As a Jewish polity in exile, the *Nação* developed its legal consciousness in search of political autonomy and emancipation.

In writing this intellectual history, I hope to open up a critical space which will lead to dialogue between past and present international legal thought. Consequently, we should question our contemporary conceptions and political sensitivities, and how they shape our morals and ethics. My goal has been to tackle Eurocentrism and the construction of racial difference. Moreover, this study supports the much argued claim that international law developed to a very large extent, out of the colonization of non-European territories. Without this context, *Nação legal consciousness* would have missed the political, *halakhic,* and linguistic innovations that emerged out of Amsterdam and the Dutch colonies. Furthermore, the production of historical knowledge is never neutral and is always political. Without a doubt, even this work represents a political exercise—to bring out the voices of *Nação* lawyers and thinkers. Finally, *Nação legal consciousness* reminds us not to forget the dark past of European trade wars and slave trade and their justifications. Unquestionably, the "School of *Eẓ Ḥaim*" merits its place alongside the "School of Salamanca."