

SLAVERY and ITS CONSEQUENCE UNDER INTERNATIONAL LAW

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Book One

Chapter I: Evaluation and Analysis of the word “Slavery”

1. Introduction

The writings that follow here are not, of course a complete review of what is known or perhaps unknown and thought about the history of Africa and Africans in Diaspora. These People have gone through long subjection to foreign powers and have suffered persecution under the facts contained in the African history or in the name of history that have always been and remain an entirely convincing denial of the mythologies of modern racism. The history of racist persecution is an old phenomenon. In the times of the slave trade and above all of the Atlantic trade, the African captives taken into slavery in the Americas and Europe were subjected to brutality and dehumanising treatments. Blacks were regarded as savages living in primeval darkness and so long as they were baptised by the casual waving of a Christian priestly hand above their heads while they lay in chains, the profits of enslaving them were justified.

The colonial dismemberment of the African continent began in the early 16th century. In the same year and breadth, the doctrines of modern racism were born.¹ The natural and inherent superiority of “Europeans” over “Africans” started to take shape as an intellectual and scientific discourse. The work of the German philosopher George Hegel,² postulated geographical phenomenon as a yardstick of Race categorization. The advocates of this pseudo philosophy advanced that Africa had no history prior to direct contact with Europe and since they have no history, they are possibly no human beings therefore, they could not be left to themselves, but must be “led” towards civilization by other people.³

These were seemingly yardsticks for Western Europeans to invade and dispossess the people of Africa, whether of land or freedom and they spawn an abrasive progeny of myths. As was expected, these myths portrayed the picture of an Africa inhabited by grown-up children: by beings, who in the words of the famous nineteenth century explorer Richard Burton, might be normal as children, but tend to regress backwards once they reach adulthood.⁴ The consequence of this prejudice, based on ignorance, denied all

¹ Davidson, Basil, *The African Slave Trade*, Boston, Little Brown & Company, 1980, pp. 95-98; Friedman, Saul S., *Jews and the American Slave Trade*, New Brunswick/New Jersey, 1998, p. 89.

² Hegel, Georg Wilhelm Friedrich, *Enzyklopaedie der Philosophen Wissenschaften im Grundriss*, Frankfurt, 1830, § 393; Compare also Treviranus, Gottfried Reinhold, *Biologie oder Philosophie der lebenden Natur für Naturforscher und Ärzte*, 6 Bde., Göttingen, 1822, pp. 1802-1822.

³ Compare Meinecke, Friedrich, *Die Idee der Staatsräso in der Neuere Geschichte*, Band 1. München, 1924, pp. 427-429; *ibid.* n.1 Davidson, B., 1980, p. xxii; Rawick, George P., *From Sundown to Sunup: The making of the Black Community*, Connecticut, 1972, p. 3.

⁴ *ibid.* n.1 Davidson, B., 1980, pp. xxii-xxiii.

previous understanding of the Europeans of Africa and its people. Previous European scholarship knew that the foundation of European civilization was partly derived from classical Greek civilization. That scholarship further accepted what the Greeks had laid down as patently obvious: that classical Greek civilization derived its religion, its philosophy and its culture from the ancient civilization of Africa, above all from Egypt of the Pharaohs.⁵ The civilisation of Egypt developed between Mediterranean and African spheres of influence out of long traditions of incipient stratified social system, already boasting of well-organised agro-pastoral economies, ceremonial architecture and sailing craft. The Egyptian civilisation profoundly influenced socio-economic development in North-East Africa, South-West Asia and also a cultural outpost of Hellenistic Greece and the Roman World.⁶

To those “founding Fathers” in classical Greece, any notion that Africans were inferior morally or intellectually, would have seemed absurd.⁷ Transitionally, the historical evolution have sent some old myths into abyss and established thereby, some basic truths. The seductively and romantically agreeable belief so dear to the 19th-century Europe and beyond, that all in Africa were savage before the intrusion of the Europeans may linger here and there, but not among the unadulterated and intellectually inclined Europeans concerned with Africa. Though, the European intellectuals who thought that they were bringing civilization to Africans against whom the Gates of Eden had barely closed may still have its adherents, yet not among those who have looked at the evidence.⁸ The evidence is that Africa had gone through various forms of development and civilization in comparison to the European continent, which in most part of its history encumbered various stages of internecine wars - One hundred years old War, Thirty years old War, First and Second World Wars, inquisition, the killing and the beheading of the so-called witches and wizards, of women and men with red hairs, of other Christian confessions aside from Catholics and many more.⁹ Aside from the development of Africa and consequently the world, which began in Egypt, a further examination of Africa will debunk all the myths and ignorance of the invaders. In an attempt to explaining the origin of man, the same European scientist have found fossils and artefacts of great variety of types and labelled them after the site of their discovery. Unexpectedly, given Africa’s more or less complex historical eclipse in

⁵ Compare Williams, Chancellor, *The Destruction of Black Civilisation: Great Issues of a Race from 4500 B.C. to 2000 A.D.*, Chicago, Illinois, 1987, pp. 35-38.

⁶ MacDonald, Kevin in Appiah, Kwame Anthony & Gates, Henry Louis Jr. (eds.), *Africana: The Encyclopaedia of the African and African American Experience*, 1999, pp. 91-93.

⁷ Appiah, Kwame Anthony and Gates, Henry Louis Jr. (eds.), *Africana: The Encyclopaedia of the African and African American Experience*, 1999, pp. 93-94.

⁸ Rawick, George P., *From Sundown to Sunup: The making of the Black Community*, Connecticut, 1972, pp. xiv-xv, p. 3.

⁹ *Der Brockhaus von A-Z*, 2000, pp. 522f, p. 96, p. 117.

recent times, Africa appear to have played a part of crucial importance in early human development. It is said that man and the apes had developed from a common ancestor as late as the Pleistocene, and that one of the tasks of physical anthropology would be to find the essential “missing link” between the two.¹⁰ This writer is of the opinion that humanity collective conscience should be alive to the tragedy of slave trade and slavery, which symbolise the denial of the fundamental human rights. By virtue of its magnitude, its duration and the violence that characterised it, slavery and the slave trade are seen as the greatest tragedy in human history and have caused profound transformation, which account in part, for a large number of geo-political and socio-economic changes that have shaped today's world. It also raises some of the most burning contemporary issues, for example racism, cultural pluralism, construction of new identities and citizenship.¹¹

Between 1760 and 1920, the institution of slavery metamorphosed from being an accepted social institution to been prohibited. Slavery was not only outlawed, but with it, the trade in slaves, indentured servitude, trafficking in persons, and other ancillary practises. Though this development was a victory for the principles of human dignity over traditional paternalism and exploitative capitalism, the fact is that, various different ideas contributed tremendously to the demand of each of these institutions. The human right principles postulate that some norm circles can be understood as part of larger “meta-norm” circles. Evidently, these norms against chattel slavery was a primary product of a broader Enlightenment Struggle to guarantee fundamental right for all and current efforts to mitigate human trafficking drawn on other principles on the rights of women and children in particular and workers in general.¹²

Book one Chapter I will address the term “Slavery” and its concepts in all its ramifications. The instruments of semantics, philology and biology e.t.c. shall be used to arrive at an acceptable definition of slavery. Semantic will treat the various divergent meanings accorded to the term slavery.¹³ Philology shall address the written records and its authenticity, the linguistics, especially historical and comparative linguistics of “Slavery” and biology will delve into the phenomena of slavery and its characteristics. These instruments are of paramount importance, if the word slavery is to be logically defined. This chapter is allotted a respectable space in this thesis because of its importance.

¹⁰ Iliffe, John, *Geschichte Afrikas*, Cambridge University Press, Cambridge University Press, 1995, pp. 16-17.

¹¹ Quirk, Joel, *Unfinished Business: A comparative Survey of Historical and contemporary Slavery*, Quidah, Benin, 1994, p. 1.

¹² Sandholtz, Wayne & Stiles, Kendall, *International Norms and Cycles of Change*, Oxford University Press, 2008, pp.169-170.

¹³ *Random House Webster's Unabridged Dictionary*, October 1999, p. 1740.

Chapter II have as its priority the examination of slavery as an ancient institution of all cultures and the subsequent break of this culture by the Europeans. Enough evidence shall be advanced to prove that almost every continent and country practiced one form or another of slavery and slave trade, but this seemingly established culture and norms were put to question by the Europeans. The practice of the Atlantic triangular slave trade and the colonial Plantation economy with the attendant exploitation of the slave workers will be extensively discussed in this chapter. “*Capitalism and Slavery*” as a factum for the Atlantic slavery shall constitute a major analysis of this chapter. It would be appropriate also to discuss the genesis of slavery and slave trade and its sources, so as to ascertain its evolution and development till this day. The ancient sources of slavery do not form a watertight yardstick to examining slavery in its ramifications; however, they constitute an important instrument to examining the validity and authenticity of ancient slavery.

This is because slavery and slave trade were originally seen as an indispensable human utensil, particularly amongst the Bourgeoisie of the countries keeping slaves. However, with the passage of time, slavery became more and more commercialised, prompting and encouraging sophisticated modus operandi to acquiring slaves. In most cases, the methods were unimaginable. The impact that this human phenomenon has to our civilization vis-à-vis economy, legality and our sense of morality today shall also be discussed. The principalities and powers, the intellectuals and finally, religion have all played effective roles to advance the causes of slavery. The punishment and treatment of slaves differ from country to country. While some countries were high-handed toward their slaves, others were just outright brutal. Ironically slavery and slave trade are still being practiced today all over the world, however under various pseudonyms viz.: servants, nannies, prostitutes, indentured servants, low paid workers e.t.c. All these are called in our modern terminology “modern slavery”. An attempt here shall be made to highlight the cause and causes of contemporary slavery.

Chapter III shall have as its priority, racism, cultural differences, and above all economics as the motives for Atlantic slave trade vis-à-vis triangular slave trade. The roles and the works of intellectuals, movies, newspapers, and physical contacts with the Africans contributed to slavery and also to the Atlantic slave trade.

Book Two Chapter IV shall deal with the examination and analysis of the motives of Atlantic slavery and slave trade using the economic, social and political yardstick as the most compelling factors. Mathematical calculations and economic diagrams shall be used here to describe the demand and supply of slaves and its effect on African economies.

Thereafter, in Book Two, the implications of Atlantic slave trade to Africa and its people in strictly economic and demographical terms shall be examined.

Chapter V shall present various definitions of natural law and present its prominent progenitors and contributors. The role of natural law in the examination of the atrocities of the Atlantic slave trade cannot be underestimated, considering the fact that during this period, international law or positive law as we understand it today had hardly existed therefore, the only appropriate yardstick open for the examination of the treatment and trade of the Africans appears to be the instrument of natural law vis-à-vis moral law.

Chapter VI: The merits and demerits of the concept of “Pacta sunt servanda” as applied by the Europeans in trade with his African partners will be examined in detail. The unfolding implications that resulted because of the failure of adherence of “Pacta sunt servanda” to the contracting persons, nations, villages shall also feature here prominently. It is on record that the European expansion over other parts of the world was undertaken by the acts of states and governments and later also private business partners participated in the slave trade. Therefore, the implication of this under international law will be evaluated.

Chapter VII: The extent and influence of the Radbruch’s Formula of Ratio Juris, its logicity and the nature of legal theory and Robert Alexy’s conceptual analysis and theory about the nature of law shall be combined together to determine the degree of morality and justice embodied in the slave laws enacted in the United States during the Atlantic Slave Trade. For example, Radbruch postulated that the objective of legal philosophy is to appraise the law in terms of congruency with its ultimate goal, i.e. to realize the ideas of law.¹⁴

Chapter VIII: The abolition and emancipation of slavery were two actions viewed from civilized world as an act of God initiated by man to save the extinction of Africans and their continent. The role of Quakers, Anglicans and most importantly anti-slavery campaigners, Granville Sharp and Thomas Clarkson must be emphasized here. They initiated, campaigned and fought for the abolition and emancipation of African slavery, without which the history of Africa and its people would have being hitherto be rewritten today. Just as the instruments of publications, sermon, pamphlets, treatise, poems, narratives, newspaper articles, reports and petitions were used to promote and aggravate Atlantic slave trade and slavery, so also were these instruments used to fight for the emancipation of slavery.¹⁵

¹⁴ Radbruch, Gustav, *Statutory Non-Law and Suprastatutory Law*, Oxford Journal of Legal Studies, 2006, pp. 105-108.

¹⁵ http://abolition.e2bn.org/slavery_56.html

Chapter IX: Though, the cause of reparation for Africans and Africans in Diaspora cannot be seriously questioned, particularly under natural law and the laws of morality, the conceptual, legal, moral and historical issues will be discussed. The normative arguments for and against reparations and the identity of beneficiaries and those sued for reparations will be the object of analysis. Causation and attenuation arguments of reparations, particularly in tort liability for example, act attenuation, victim attenuation and wrongdoer attenuation will help to determine culpability.

Tort law analogy in slavery reparations and more so lawsuits for Jim Crow, constitutional requirements and unjust enrichment are all indispensable legal instruments used to ascertain the merits and demerits of reparations. The concepts of restitution and genealogical determinism are also essential parts of this chapter. And finally, the philosophy of Libertarianism shall also constitute the evaluation of the case for reparations.

Chapter X: Summary and Conclusion.

1.1 Definition of the term Slavery (Concepts and Semantics)

Slavery as a concept has eluded all attempts for a scientific definition. An attempt to defining slavery as a given community social systems will be a *reductio ad absurdum*.¹⁶ Though, the application of semantics and jurisprudence have contributed immensely to unearthing the phenomenon of slavery, however, an acceptable definition has not yet being achieved.

The terminus technicus of slavery could be translated into following category of persons, at least in the Middle Ages: all persons, now and again, who may be under worldly or religious subjugation in relation to an ancestor, ruler, protector or master. Conversely, it includes the enslaved, the dependent, subjects of a ruler and at times servants. Myriads of slave societies had in the past attempted to extend the vocabulary to include also various subjugated societies. This attempt has, however, no universal application and therefore, a pedantic obsession.¹⁷

The Concise Columbia Encyclopaedia defines slavery as an institution, whereby one person own another and can also extract from that person labour or other services from amongst primitive and advanced cultures.¹⁸ This definition denotes or rather connotes that a slave is a property that can be disposed off by the owner¹⁹ at his whims and caprices, and at any given time. The qualification of a human being as a material thing or animal from the point of view of its exploitation is contradictory and untenable. If one had to accept this qualification, it would then mean that human beings are not superior to animals.

¹⁶ *The Concise Oxford Dictionary of Current English*, Sixth edition, Oxford University Press, 1964, 1976.

¹⁷ Compare *Noah Webster and the First American Dictionary*, Luisanna Fodde Melis, Rosen Publishing Group, New York, 2005, available at Books.google.com..

¹⁸ *The Concise Columbia Encyclopaedia*, Third edition, Columbia Universe Press, New York (under Slavery), 1994, p. ; compare also Finkelman, Paul, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (2nd ed.) published by M.E. Sharp, Inc., Armonk, New York, 2001, p. 6.

¹⁹ Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, (under Introduction) in the *Old Roman Law: a slave is explicitly described as inanimate object and not a person*, p. 11; Compare Finley, Moses I., *Esclavage antique et idéologie moderne*, Paris, 1981, who concurred with this thesis and postulated that the demand for slaves quite outweighs the supply. In the same breath, Miers, S. & Kopytoff, I. (eds.) also argued in, *Slavery in Africa*, Madison, 1977, the same argument advanced by contemporary authors. For example, White, Leslie, *The Science of Culture*, New York, 1969, p.128; In systems where slavery played a role, the means of production has difficulties in being transferred from one sphere to another. Therefore, the exchange of goods was conducted on the worth of goods and not production price. Compare Marx, Karl, *Capital*, MEW, 1867,1972, pp. 40f, p. 187 in Part 3, Capital 5; Meillassoux (ed.) , *L`esclavage en Afrique precolonia*, Paris, Maspero, 1975 b; and Bald, M.S., *L`esclavage et la equerre Saint au Fuuta-Jalon*, in Meillassoux (ed.), 1975 b, pp. 183-220.

Predictably, the slaves are treated in practice as human beings but not as animals. That is the ideological fiction. But from all the functions of the slave, even those who may be beast of burden, the commonest strategy to motivating them to work is to appeal to their good sense. This strategy spurred them to increased productivity and a notable intelligence. The postulation, that a slave was a thing or a material can only be viewed in the relationship between master and slave. A purely individual relationship, which had a far-reaching legal implication and which paradoxically, defines the concept of slavery legally.²⁰ This definition as a fiction explains the legal relationship between the slave and the owner and the degree of authority that the owner can exercise over the slave.

The effective administration of slave could mean a greater or lesser recognition of the slave's capacities as Homo sapiens and therefore, a shift towards notions of obedience and duty, which renders the slave indistinguishable in strictly legal terms from other categories of dependants.²¹ Paradoxically, certain categories of slaves enjoy some privileges, like wealth, higher rank in office, which place them seemingly in a superior position; and of this, it is said that they are relations.²² For example, the soldier-slave, the henchman and the rich slave, who benefit indirectly from the labour of other slaves or even of freemen or who themselves own slaves, are not expected to work. In terms of the slave-object of fiction as in the situations described above, the only institutional relationship relevant to the slave who is recognized by law is his relationship with his master. The legal definition of a slave is therefore, confined to the master-slave relationship. Measured through the parameter of legal jargon, the law both approves and conceals social relations, - contain them in the form most suitable to preserve the interest of those for whom the law is intended and classified.²³

As a result of this ambiguity in definition, the objectivity is eroded because the social reality between slave and master is not done justice to. In postulating the slave relation as individual, the law fixes the limits within which the authority of the master over the slave can be exercised; thus, the individual relation is merely a personification and individualization of a conception of authority, based on patriarchal ideology.

²⁰ Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, pp. 9–11.

²¹ *ibid.* p. 10.

²² *ibid.* p. 20.

²³ *ibid.* p. 20.

In terms of the individual, the definition of slave depends to some extent on that of the free man, because of this implicit ideological reference.²⁴ This explains the apparently infinite variety of the conditions of individual slaves – a variety, which cannot be explained by strictly legal principles, which are in itself indeterminate: the all-embracing criterion in the disposability of the slave, irrespective of his or her condition, lacks precision. Some categories of individuals who are not slaves can be alienated and not all slaves are in fact alienable. The inherent weakness of the legal definition is that it considers disposability as a characteristic, peculiar only to slaves. Yet, disposability has relevance only in the context of institutions, which make disposability of slaves possible vis-à-vis: wars of capture or slave market.²⁵

The set of mechanisms and operations through which a set of individuals can be deprived of its social personality, transformed into livestock, sold as merchandise and explored or employed in such a way that the cost of capture or purchase can be recovered or covered, is incredible.²⁶ However, disposability merely represents the transcendental state of the slave. It takes place, in most cases only when the slave is not productive towards his master or society. Alienation is merely the effect and confirmation of a process of depersonalisation, which had already been inflicted on the slave through capture. The ultimate alienation takes place on the sacrificial alters as well as on the Market i.e. in religious rites as well as in commercial transactions.²⁷ The state of the slave is expressed in his relation to these institutional social frameworks, not in his individual relation to his master. In the African societies, slaves are predominantly linked wittingly or unwittingly to the market. Consequently, the fate of the slaves is therefore, defined with respect to the market. It is therefore through the market mechanism that the state of the slave, as a social class, is defined and it is in this respect to the market, that the different, changing and individual condition of each slave is defined, according to the mode of insertion of the slave in each society.²⁸

For a proper analysis of the divergent roles played by the state and the slave, this study is divided into three parts; namely the economic space of slavery, which defines the state of the slave; the other two are devoted to the political and economic forms in which slavery takes in the two main types of African societies, in which military aristocracies and

²⁴ Rodney, Walter, *Afrika, Die Geschichte einer Unterentwicklung*, 1972, pp. 30-31.

²⁵ Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 11.

²⁶ *ibid.* p. 11.

²⁷ *ibid.* p. 11.

²⁸ *ibid.* p. 11.

merchants played dominant roles.

To do justice to the definition of slavery or perhaps to approach the definition dialectically, an attempt is taken to examine the collaborative work of Miers and Kopytoff on African slavery.²⁹ They opted for a genetic approach to the definition of slavery, which interestingly took legalistic, functionalistic and economic garb. Miers and Kopytoff postulated that minors, i.e. children, young people and women, one hand, are all in a dependent position in the family and that, on the other hand, the kinship system allows for the transfer of dependency.³⁰ Slavery is therefore, an extension of this troublesome phenomenon - the disposability of kinship. Consequently, they argue whether the slavery-Kinship continuum is the theory of “the transfer of rights in persons”.³¹ Two implications can be deduced from this thesis:

Firstly, that ownership has a peculiar meaning in Africa, in that it entails not only “rights-in-things” but also a set of “rights–in-things-and-in-persons”.³² Secondly, the concept of rights-in-persons and transactions in slave constitute some of the basic elements on which kinship system is constructed.³³ Such transactions are a formal part of African concept of kinship. They argue that the transfer of such rights is normally made in exchange for goods and money and that the transfer may cover the total rights-in-a-person. “*Therefore, such phenomena as kinship, adoption, the acquisition of wives and children are all inextricably bound up with exchange that involves precise equivalence in goods and money.*”³⁴ Judging from this point of argument, it is right to postulate that what makes a person a slave is the fact that he/she is a property and at the same time, a person over whom certain rights are exercised. Miers and Kopytoff wittingly or unwittingly rest their explanation on the strict application of Western nations of law and economics.³⁵ In most Western societies, property is seen as a set of rights, *usus fructus* and *abusus*, which can indeed be attributed separately to different parties or persons.³⁶ This is in contrast to the

²⁹ Mier & Kopytoff (eds.), *Slavery in Africa: Historical and Anthropological Perspectives*, Madison, University of Wisconsin Press, 1977, p. 1.

³⁰ *ibid.* pp. 7-8.

³¹ *ibid.* pp. 8-9.

³² Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 12; Compare also *ibid.* 29, pp. 8-9.

³³ *ibid.* n.29, pp. 10-11.

³⁴ *ibid.* p. 11

³⁵ *ibid.* n. 32, p. 13; See also *ibid.* n.29, pp. 11 ff.

³⁶ Meillassoux, Claude *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 13; Compare Mier & Kopytoff, *Slavery in Africa: Historical and Anthropological Perspectives*, Madison, 1977, pp. 11-12.

African customs, where rights can be divided up and applied to individuals as well as to things. Consequently, it is therefore a piece of vulgar rhetoric to advance that bride wealth, which is derived from bride price is an acquisition of right over children or wives in exchange for a price equivalent in goods or in money – a purchase in other words.³⁷ Not only do Miers and Kopytoff forget that the matrimonial transaction can take place and did in fact take place in African societies without bride wealth, but also that the notion of equivalence of individuals with goods is not always relevant to domestic societies. What is correct in Miers and Kopytoff theory is that kinship relations are constantly manipulated.³⁸ What is not quite correct is to say that, they are manipulated against currency through purchase. In matrimonies, for example, the equivalent to a pubescent woman is another pubescent woman with the same measure of potential fertility.³⁹ When the terms of a transaction are identical, intermediate goods have no intrinsic value and cannot be exchanged for themselves. Only when these goods enter the commercial circuit of the community and are produced for exchange, can they acquire an intrinsic value and communicate their marketability to the matrimonial circuits resulting in the⁴⁰ transformation of individuals into commodities. This is the so-called commercialisation of African slavery, which has nothing to do with the Kinship system. In the Kinship system, there is no continuum between the two levels but rather a qualitative change.⁴¹

Miers and Kopytoff are driven to believe that rights-in-persons are communicated to the slave system, but the reverse is the case; the sale ability of slavery contaminates the kinship relations. The theory of rights-in-persons introduces the principle of conservative classical economics into historical situations for which they are even less suitable than in these days. Miers and Kopytoff are propelled to believe that the cause of servile institution was the need to own wives and children, to enlarge one's group, to have clients, servants, retainers e.t.c.⁴² This need grew with the insatiable taste to accumulate more goods. These needs and wishes are satisfied, as Adam Smith would have us believe, to the human propensity for trade and barter.⁴³ The interpretation of Miers and Kopytoff in reducing social phenomenon to primary economics motivations is far-fetched.

³⁷ *ibid.* Mier & Kopytoff, pp. 10-12.

³⁸ *ibid.* n.36 Meillassoux, Claude, p. 13; Compare *ibid.* n.36 Mier & Kopytoff, pp. 10ff.

³⁹ *ibid.* Meillassoux, Claude, p. 13.

⁴⁰ *ibid.*

⁴¹ *ibid.*; Compare *ibid.* n.36 Mier & Kopytoff, pp. 10 ff, pp. 22-24.

⁴² *ibid.* n.37, p. 8 ff.

⁴³ Smith, Adam, *The Wealth of Nations*, London Penquin Books, 1776, p. 13; *ibid.* n.36, Meillassoux, p. 67; Rawick, George P., *From Sundown to Sunup: The making of the Black Community*, Connecticut, 1972, p. 6.

Why would certain populations wish to sell their children? If the desire of people is to enlarge their group, why would the majority be prepared to ostracise their dependence and thus impoverish themselves in absolute terms for the benefit of small fraction?⁴⁴ Empirically, it is true that some parents, driven by hunger, are forced to sell their children but this takes in an atmosphere of slave marketability, which is already active as a direct or indirect result of trade.⁴⁵ From the above-mentioned thesis, nothing can replace a human being as a producer or reproducer except another identical human being. If the propensity to barter is the motor of exchange, it can allow only for the barter of one man for another man or of one woman for another and not vice versa. The inherent weakness of Mier and Kopytoff argument is seen in the assimilation of slavery to kinship, when in fact the two institutions are strictly an antonym. If, by the purely ideological extension of kinship, the slave is sometimes assimilated to a sort of code, with the obligations of a dependant in terms of customary notion of morality, he still cannot acquire the essential prerogatives of the attribute called paternity. His status of non-kin stems from the specifics of slave exploitation and its mode of reproduction.⁴⁶ An intellectual vacuum concerning this point beclouds ones objective analysis to the contours of slavery, for it is in fact slavery, which highlight its opposite, franchise.⁴⁷

The thesis that slavery is an extension of kinship connotes the approval of the old paternalistic ideology, which has always been used as moral argument for slavery.⁴⁸ In ascending to this thesis, one becomes a victim of an apologist ideology, in which the slave-owner tries to pass off those he exploits as his beloved children. Though, both protagonist – Miers and Kopytoff are encumbered with the theory of economics and naïve materialism in their interpretation of servitude and its metamorphosis, they declare “*we don't need to appeal to an economic raison d'être the existence of slavery!*”⁴⁹ Perhaps, they mean that slaves are not necessarily used as producers, which is true. However, the economic scope of slavery is not limited to the productive use of slaves or to the profit, which it can generate. Whatsoever their calling may be, slaves are acquired at a cost: that of war or that of export of goods.

⁴⁴ Mier & Kopytoff (eds.), *Slavery in Africa: Historical and Anthropological Perspectives*, Madison, University of Wisconsin Press, 1977, p. 13.

⁴⁵ *ibid.* pp. 12-13.

⁴⁶ *ibid.* pp. 10-13, 22-24.

⁴⁷ *ibid.* pp. 16-18.

⁴⁸ *ibid.* p. 18 ff.

⁴⁹ *ibid.*, pp. 69-72; Meillassoux, Claude Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 15.

In mercantile communities, the condition of slaves changes in relation to the market mechanism, through the articulation of their food production and profits and through their entry as a stolen means of reproduction into the general economy and lastly through the nature of the production, which enables them to be replaced. By dismissing the economic *raison d'être* of slavery they can also dismiss the (Marxist) interpretation, in the belief that historical materialism can be reduced to the same econometric causality which they themselves use, albeit unwittingly.⁵⁰ What then does historical materialism, particularly what do Marx and Engels contribute to a better understanding or articulation of the term slavery?

Their contribution varies. While Engels is concerned with the conditions leading to the emergence of slavery and classified slavery in three main divisions of labour, namely:

- a. The division between agriculture and pastoralism, which gives rise to regular exchange, the emergence of money and an increase both in production and in the productivity of labour. With an increase in works, there is an increasing demand for the producers that are now providers.⁵¹
- b. The separation of craftworks from agriculture. The value of labour-power increases and men introduce themselves into exchanges as objects of exchange. Slavery becomes an essential component of the social system and war becomes a permanent sector of the industry.
- c. The separation of town and country, which favours the development of a merchant class, differential accumulation of wealth and its concentration in the hands of a class, which takes over the producers by increasing the number of slaves; Slavery therefore, became the dominant form of production.⁵²

Karl Marx sees slavery only in comparison with other modes of production. Variably, he sees slavery as the development of property based on liberalism⁵³ and on the other hand, slavery as the consequences of the extension of the family, in which case slavery is latent.⁵⁴ He does not resolve the question of the endogenous development of slavery or of its historical emergence through contact between civilizations.

⁵⁰ Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 16.

⁵¹ Engels, Friedrich, *L'origine de famille, de la propriété privée de l'Etat*, Paris, ed. Sociales, 1954, p. 1884; Engels, Friedrich, *Anti-Duhring*, Paris, ed. Sociales, 1950, pp. 1877-1878; see also Mier & Kopytoff (eds.), *Slavery in Africa: Historical and Anthropological Perspectives*, Madison, 1977, p.16.

⁵² *ibid.* 50, p. 16.

⁵³ Marx, Karl, *Pre-capitalist Economic Formations* (with an introduction by Eric Hobsbawm), London, 1964; Compare *ibid.* 50, p.17.

⁵⁴ Marx, Karl, 1857-1858, *Fundaments de la Critique de l'économie Politique*, Paris, Atropos., 1969, pp. 93.

He does not make clear the organic link between slaves as a class and their masters on the historical nature of the individualization of class relations and does not distinguish between the system of subordination, which is set up between kin in relations to agricultural production and those, which result from capture. In the field of jurisprudence, his comments help on understanding the confusion between subjects, family dependents and slaves⁵⁵ but do not resolve the problem of the specificity of the slave relation.

Firstly Karl Marx sees the so-called patriarchal slavery, where ownership of individual may be an accident and in which labour of the slave is directed towards the direct production, and slavery of means of subsistence, in other words, use-value relationship. With the effects of trade, patriarchal slavery can develop into a system geared towards the production of surplus value, in which the slave is subject to absolute exploitation, as exchange develops.⁵⁶

Secondly, Marx allies slavery with serfdom and advances that the former requires an initial outlay of money, which he assimilates to a fixed capital. The benefit derived hereof is seen as interest on the capital advanced or as rent. The available Surplus value appropriated is the normal and prevailing form. Because of the fixed capital invested in the purchase of the slave, the owner is forced to invest further capital in exploitation of the slave.⁵⁷

The relationship between masters and slaves, which appears as the motor of production, would still exclude the reification of the relations of production. Comparatively speaking, the labour of the slave in America is mediated by investments domination over men and tends once again to be achieved through domination over things. The excess labour of the slave increases as soon as it is no longer a question of obtaining from him a certain quantity of useful products. Marx, in emphasizing the problem of reproduction, argues that in America natural growth was insufficient and the slave trade was necessary to meet with the needs of the market.⁵⁸ Engels also concurred and postulated that the slaves in Rome reproduced themselves to a very limited extent and that colossal supplies of slaves ensured by war were a precondition for the development of the great landed estates. The internecine wars that the Germans waged among themselves, like those between the Saxons and the Normans' were also designed to supply the slave market.

⁵⁵ Marx, Karl, 1857-1858, *Fundaments de la Creitique de l'economie Politique*, Paris, Atropos., 1969, p. 92. For more details, please compare Meillassoux, Claude, *The Anthropology of Slavery*, The University of Chicago Press, 1991, pp. 16-17.

⁵⁶ *ibid.* Meillassoux, Claude, p. 17.

⁵⁷ *ibid.* pp. 17-18.

⁵⁸ *ibid.*, pp.18-19.

As a matter of fact, Roman slavery disappeared with the decline of trade and of the towns and the development of colonies and of serfdom.⁵⁹

The seeming difficulties in arriving at a coherent definition of slavery, in spite of the dialectical and scientific approach, prove the ambiguity of the concept of slavery. However, certain points shall be corrected here. For example, “*patriarchal slavery should not be identified as a class relation and does not in itself lead to slave system of production*”.⁶⁰ This is strictly not slavery but rather an isolated phenomenon of subservience. The concept of subsistence slavery, which produces a rent in food, and slavery proper, which generates and creates profit can be retained, but the two are not always synonymous.⁶¹ While subsistence slavery dominates military and ancillary slavery in aristocratic and military societies, it continues to be an indispensable basis for the creation of profit in merchant slavery.⁶² From the above analogy, slavery appears to be the only mode of production, which allows the human surplus-products to be appropriated independently of increases in the productivity of labour over the level of simple reproduction. Serfdom, on the contrary, necessitates higher productivity, since the serf has to ensure, at the very least, both his own reproduction and that of his master.⁶³ The argument of Marx and Engels does not hold water because of their repeated confusion of slavery with serfdom, problem of value and of the relationship between slavery and kinship.⁶⁴ While it is possible that relations between wider ranging nomads and sedentary agriculturalists favoured slavery, cattle nomads are at one time or the other, economically dependent on sedentary agriculturalists who cultivate the subsistent goods they need and military logically dominate through their control over animal energy.⁶⁵ This energy, which enables the herds to feed themselves on the move also provides a means of transportation for long distant trade or can be offered as a service in exchange for agricultural goods. The contact between the pastoralists and sedentary people helps cement the ground for subservience while nomadism supplies its logistics.⁶⁶ However, this contact between the two does not explain the demand for slaves from the clients’ populations and therefore, the genesis and definition of slavery.

⁵⁹ Meillassoux, Claude *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 19.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.* p. 20.

⁶⁴ Marx, Karl, *La guerre ci vise aux Etats-Unis*, Paris, Union Gen.-Dipd., 1970, pp. 1861-1865.

⁶⁵ *ibid.* n.59, p. 20.

⁶⁶ *ibid.* n.59; Compare Iliffe, John, *Geschichte Afrikas*, 1995, p. 21.

Slavery is a historical antecedent, which has affected all continents, sometimes simultaneously, sometimes successively; its genesis is the sum of all that happened during an intermediate period of history. Africans, who were made slaves, first by the Maghreb, and then to Europe, which is the origin of slavery in black Africa, merely took over from the trade in slaves, which had lasted for ten centuries in Asia, among the Europeans and around the Mediterranean.⁶⁷ The Slavs supplied their continent with slaves, the Eselavons their enclaves, the French ancestors, the Gauls regularly sold their English captives to the Romans; the Vikings took captives and sold them, while carrying on their coastal trade.⁶⁸ Muslim and Christian pirates took each other captive. The process of enslavement is a universal human phenomenon that engulfed the entire world, vis-à-vis: Turkey, Europe including the entire former Soviet Union, Arab World, and Asia etc. It is therefore, a piece of vulgar rhetoric and an abysmal intellectual plunder to argue as has always been the case, that slavery is synonymous to Africa and therefore, black people. Paradoxically, it is in Africa that the last bastion of universal supply of slave trade was registered, so that on this basis, some attempt to seek an explanation for the origins of slavery in Africa constituted the basis of an endogenous development of societies, which are still suspected of unproven primitivism and isolation and, which are, therefore, laboratories for retarded fantasies.⁶⁹

In spite of the dialectical-scientist approach to the definition of slave and slavery, an acceptable definition appears not to have yet emerged. I shall therefore, in the next chapter attempt, through the instruments of semantics, the definition of slave vis-à-vis slavery. The concept “free” shall be defined based on semantic analysis. The membership of any given social strata of human being confers on them a privilege, which is unknown to the alien and the slave. Free men (free-born, the gentiles) are those who were born and have developed together.⁷⁰ The alien, on the contrary, is he who did not grow up in the intestine of the social and economic network, which situates a man with respect to others. The unabridged Random House Webster’s Dictionary defines semantic as: “*of pertaining to, or arising from the different meanings of words or other symbolic semantic change.*”⁷¹

From the followings above, it is only logical that one attempt at a definition of slave vis-à-vis slavery using the instrument of semantic.

⁶⁷ Meillassoux, Claude *The Anthropology of Slavery*, The University of Chicago Press, 1991, p. 20.

⁶⁸ *ibid.* pp. 21-22.

⁶⁹ *ibid.*

⁷⁰ Benveniste, Emile, *Le Vocabulaire des Institutions Indo-Européens*, ed. De Minuit, 2 Vols., 1969, p. 323.

⁷¹ Random House Webster’s *Unabridged Dictionary*, second edition, Random House, New York, 1999.

That is expedient because one does not know at least, until this point, whether the word slave was derived from the group called *Slav* - a group of people in eastern, south-eastern and central Europe i.e. the Bulgarians, Serbs, Russians, Croats, Slovenians, Slovenes etc. If the answer is in the affirmative, what does it mean? The importance of semantic in explaining words, which has connoted, as well as denotated meaning, cannot be overemphasized. While Karl Marx uses slave and serf interchangeably without clear distinction and definition, the various Dictionaries define slave and slavery at its intellectual prons and caprice without any grammatical category.⁷² Added to these grammatical disarrays are the various terms used by various countries and slavery progenitors to describe or define slavery. The definition of slavery vis-à-vis slave as postulated in the preceding paragraphs, does not give a dialectical or scientific meaning to the concept of slavery. An attempt here shall be made to list the various definition of slavery:

Wikipedia defines “*slavery as a condition of control over a person against their will, enforced by violence or other forms of coercion*”. Slavery almost always occurs for the purpose of securing the labour of the person concerned. A specific form, known as chattel slavery, implies the legal ownership of a person or persons. Wikipedia in his journey to discovering other forms of definition of slavery propounded a new concept for slavery that is the so-called “white slavery”. According to him, it’s a term used currently to describe forced prostitution and it was also used in the nineteenth century to denote the enslavement of workers to wage labour in America after the civil war.⁷³

The American Heritage Dictionaries define slavery as the state of one bound in servitude as the property of a slaveholder or household.⁷⁴

Nevertheless, two evident obstacles confront historical attempt to put forward a universal definition of slavery:

“1). *Developing a definition that encompasses key variations among a wide range of historical slave systems; and*

2). *Developing a definition that consistently distinguishes between slavery and related forms of human bondage, such as serfdom, pawnship, debt-bondage and forced labour for the state*”.⁷⁵

⁷² *Random House Webster's Unabridged Dictionary*, second edition, Random House, New York, 1999; *The Concise Oxford Dictionary*, Oxford University Press, 1964, 1978; *Merriam-Webster's Collegiate Dictionary*, Tenth edition, Phiippiner Copyright by Merriam Webster's Incorporated, 1995; *Collins Cobuild English Language Dictionary*, William Collins Sons & Co, First Published, 1987.

⁷³ en.wikipedia.org/wiki/Slavery.

⁷⁴ <http://www.answers.com/topic/slavery>.

⁷⁵ Quirk, Joel, *Unfinished Business*, 1994, p. 23.

Essential to this definition is the nexus between property and treatment, with various attempts at historical definition categorising slavery in terms of a clearly defined legal status that will be distinguished from other institutions by the fact that individuals were classified as species of property, or human chattel. This emphasis on property is conventionally seen in terms of a combination of largely unfettered authority and extreme treatment, with the exceptional degree of personalised control that masters exercise over their slaves going hand in hand with consistently high levels of institutionalised brutality, psychological abuse and economic exploitation.⁷⁶ This focus is evident in the definition of slavery embodied in the Slavery, Servitude, Forced Labour and similar Institutions and Practices. The Convention of 1926 formally defined slavery as “*The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*”.⁷⁷ This definition, which was taken over by the League of Nation in 1953, was ratified by 95 countries in 2002 with the signatories accepting an obligation to prevent and suppress the slave trade and to bring about, pragmatically as soon as possible, the complete abolition of slavery in all its ramifications.⁷⁸ The slave trade is therefore “*all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to a slave; all acts involved in the acquisition of a slave with the view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and in general, every act of trade or transport in slaves by whatever means of conveyance*”.⁷⁹ Three cardinal points are noted from these definitions and that is: forced or compulsory labour in all work or service, which is expected from any person under the menace or any penalty and for which the said person has not offered himself voluntarily; the second point is serfdom labour, on land belonging to another person and to render some determinant service to such person, whether for reward or not, and is not free to change his status; and slavery is a status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised. Perhaps to substantiate these various definitions of slavery vis-à-vis slave, an attempt will be made in the next sub-capitals to present a clearer acceptable definition.

⁷⁶ Quirk, Joel, *Unfinished Business*, 1994, p. 24.

⁷⁷ *ibid.* p. 24.

⁷⁸ *ibid.* p. 24; Compare <http://www.hrea.org/learn/guides/slavery.html>

⁷⁹ The Slavery Convention 1926, Art. 1.2 available at http://www.hrea.org/index.php?doc_id=430; compare Bales, Kevin, *Disposable People: New Slavery in the Global Economy*, University of California Press, 1999.

1.2 The Philological Interpretation of Slavery

Publilius Syrus, a pantomimic Performer, who came to Rome in the first century B.C.E. is reported to have said that ancient slaveholders regarded their slaves instrumentally, as breathing objects, equipment similar to utensils or things rather than as socially living beings and added that, *occidierst pullchrum, ignoniniose ubi servas* meaning “it is beautiful to die instead of being degraded as a slave”.⁸⁰

In continuation of the semantic journey, an examination of ancient slavery will be undertaken, so as to ascertain its methodology and its philosophy. The methodological problems are encumbered with the problem of lack of primary sources, coupled with the fact that what little services, which virtually originated from ancient slaveholders does not express the view of the slaves themselves. However, a careful analysis shall be undertaken to assess their objectivity and truth. The philosophical problem has to do with the terms “slave” and “slavery”. To answer these basic questions in historical context, one must critically engage in interpretative and speculative literature on the nature and purposes of historical inquiry.

Philosophers, intellectuals, and historians have been trying to answer these basic questions about slavery and its antithesis for centuries.⁸¹ Among Scholars, there is unanimity that one can legitimately study a particular slave for whom there is evidence such as Epistetus (ca. 55-135 C.E.) or Frederick Douglass (1817-1895).⁸² As at the moment, there is no basic theory that allows for a single definition of slavery for all cultures and times.

⁸⁰ Harril, J. Albert, *The Manumission of Slaves in early Christianity* in Mohr, J. C. B., *Social History and Exegesis*, Paul Siebeck: Tübingen, 1995, p. 1.

⁸¹ Hobbes, Thomas, *Leviathan*, Richard Truck (ed.), *Cambridge Text in the History of Social Thought*, Cambridge, University Press, 1991, p. 21; Lock, John, *The second Treatise of Govt. in two treaties of Govt.*, 2nd ed., rev. Lasteff, Peter, *Cambridge Text in the History of Political Thought*, Cambridge University Press, §4, 1988, pp. 22-24; Hegel, Georg, Wilhelm Friedrich, *Phänomenologie des Geistes*, 5th ed., Rev. Hoffmeister, J., *Philosophische Bibliothek* 114, Hamburg, Felix Meiner Verlag, 1952, pp.178-230; Anshen, Ruth Nanda (ed.), *Freedom: Its Meaning*, New York, Harcourt, Brace, 1941; Wirszubski, C.H., *Liberty as a political idea of Rome during the late Republic and early principate*, reprint 1960, Cambridge: Cambridge University Press, 1950; Berlin, Isaik, *Four Essays on Liberty*, Chicago: University of Chicago Press, 1960.

⁸² Compare Thomas, Hugh, *The story of the Atlantic Slave Trade 1440-1870*, New York 1997, pp. 29-30.

David Brian once said, “*The more we learn about slavery, the more difficulty we have defining it*”.⁸³ Earlier studies simply took the objectivity of slavery for granted as a categorical and transcultural concept.⁸⁴ The problem of defining slave and slavery has not been conclusively, neither in semantic discourse nor till now defined. The quagmire here is whether a slave is a thing or person. It was argued earlier, that a slave is therefore; a person but only on the handling and usage of slaves. That, in my opinion, does not represent an acceptable logical definition of slave or slavery. Classical definitions, for example by Aristotle and Roman private law, define slave as property and made no difference between slave, a farm implement or domesticated animal.⁸⁵ They look at the law codes as descriptive rather than prescriptive and overlook the course of juridical decisions in the practice of law. A critic of the law-oriented approach is the historical sociologist Orlando Patterson, who admonished “*many modern students of slavery, in failing to see that the definition of the slave as a person without a legal personality is a fiction, have found irresistible a popular form of argument that amounts to a red herring*”.⁸⁶

⁸³ Westerman, Williams L., *Slavery and the element of Freedom in ancient Greece*, in *Slavery in classical Antiquity: Views and Controversies*, Finley, M. I. (ed.), Cambridge: W. Heffers & Sons, 1960; Friedrich, Carl J. (ed.), *Liberty*, Nomos 4: New York, Atherton Press, 1962, reprint 1966; Nestle, Dieter, *Freiheit* RAC 8, 1972, pp. 269-306; Spicg, Ceslas, *La Liberté” selon le Nouveau Testament*. Sc. Eccl 12, 1960, pp. 229-240; Id. *Charité et Liberté selon le Nouveau Testament*, 2nd ed., Paris, Les Editions de Cert, 1964; Straatan, Modestus van, *Menschliche Freiheit in der Stoischen Philosophy*, Gymnasium 84, 1977, pp. 501-518; Betz, Hans Dieter, *Paul’s Concept of Freedom in the context of Hellenistic Discussion’s about the possibilities of Human Freedom in Paulinische Studien, Gesammelte Aufsätze III*, Tübingen: Mohr, J.C.B., Paul Siebeck, 1994 pp. 110-125; Id., *Galatians: A commentary on Paul’s Letter to the Churches of Galatia*, Hermeneia Philadelphia, Fortress Press, 1979, pp. 255-281; Crocker, Laurence, *Positive Liberty. An Essay in Normative Political Philosophy*, Melbourne; International Philosophy series 7, The Hague; Martinus Nishoff, 1980; Jones, F. Stanley, *Freiheit in den Briefen des Apostel Paulus. Eine historische, exegetische und Religionsgeschichtliche Studie*, GTA 34 Göttingen, Vandenhoeck S. Ruprecht, 1987; Patterson, Orlando, *Freedom in the making of Western culture*, New York: Basic Books, 1991; Vollenweider, Samuel, *Freiheit als neue Schöpfung. Eine Untersuchung zur Eleurgeria bei Paulus und in seiner Umwelt*, FRLANT 147 Göttingen: Vandenhoeck S. Ruprecht, 1989.

⁸⁴ Davis, David Brion, *Slavery and Human Progress*, New York, 1984, p. 95; See also Siegel, G. Bernard J., *Some Methodological Consideration for Comparative Study of Slavery: American Anthropologist*, N.S. 47, 1945, pp. 357-363, on how the anthropological treatment of non-western slavery in the early part of this century was a fundamentally continuation of the positivist tradition.

⁸⁵ Thomas, Hugh, *The story of the Atlantic Slave Trade 1440-1870*, New York 1997, p. 28.

⁸⁶ Patterson, Orlando, *The Sociology of Slavery*, 1967, pp. 72-73, 80.

The argument has a standard formula. The scholar, not conversant with comparative legal practice, declares as a legal fact that the slave is defined and treated “as a *person without legal or moral personality*”. He then advanced his “proofs” that the slave is indeed treated as a person in law – but is he not punished for his crimes?⁸⁷ And are there no laws restricting the power of his master? Thus, there is a fundamental problem posed by slavery: the so-called conflict between the treatment of the slave as a thing and as a human being. His formula ends with some ringing piece of liberal theories to the effect that human dignity is irrepressible, “*You may define a person as a thing*” goes the flourish, “*but you cannot treat him as one*”.⁸⁸ These two thesis are a piece of vulgar rhetoric. No legal code has ever attempted to treat slaves as anything other than persons in law. The question is, of course, how the slaves are actually treated in practice. The irreverence of this thesis springs from the confusion of jurisprudence, as they are ignorant of law.⁸⁹ Finley argues that for the understanding of slavery as one form of dependent labours, it is imperative to understand its legal definition.⁹⁰ This is because the language of slavery does not always refer to what we call slaves, but ranges in meaning from the metaphysical such as senators as political or moral slaves, to the general, such as labourers. Ancient Scholars regularly named helots “slaves” yet helots, unlike chattel slaves, were not imported from outside but were subjected within their own native territories and could not be bought or sold.⁹¹ In spite of the linguistic jargon, chattel slavery differed from other forms of dependent labour, such as dept bondage, indentured servitude, clientship, peonage, and

⁸⁷ Thomas, Hugh, *The story of the Atlantic Slave Trade 1440-1870*, New York 1997, p. 29.

⁸⁸ *ibid.* p. 29

⁸⁹ Patterson, Orlando, *Slavery and Social Death: A comparative Study*, Cambridge: Harvard University Press, 1982, pp. 22-23. Patterson understands his monograph to be responding, even supplanting the classic comprehensive study of Slavery as a global human phenomenon by Nieboer, H.J., *Slavery as an industrial system: Ethnological Researches*, The Hague: Hishoff, 1910. For the most part, Patterson was quite successful in his talk, see the reviews of Patterson by Richard Hellie, *AHR* 89, 1984, pp. 411-412; Wayatt-Brown, Bertram, *Society* 21.3, 1984, p. 92f; van den Berghe, Peter L., *Ethic and Racial Studies* 7, 1984, pp. 301-305; Heinen, Heinz, *European Sociological Review* 4, 1988, pp. 263-268.

⁹⁰ Finley, M.I., *Ancient Slavery and Modern Ideology*, London, 1980, p. 68.

⁹¹ Sereni, E., *Recherche sur le Vocabulaire des rapports de dependance dans le Monde antique*, in: *Actes do Colloque sur l'esclavage*, Annales Litteraires de l'universite de Besancon, 1973; MacDowell, Douglas M., *Spartan Laws*, *Scottish Classical Studies* 1, Edinburgh: Scottish Academy Press, 1986, pp. 37-42; Parker, Robert, *Spartan Religion*, in *classical Sparta: Techniques Behind her Success*, Anton Powel (ed.), Oklahoma series in classical culture, Norman: University of Oklahoma Press, 1988, p. 145; Cucat, J., *Les hilotes*, *Bulletin de Correspondance, Hellenique Suppel.* 20, Paris: Elole Francaised d'Athenes, 1990.

serfdom.⁹² The semantic domain of slave vocabulary, therefore, poses a problem for interpretation contrary to Finley.

Patterson considers internal relations of slavery as governed, not by the concept of absolute power. Patterson sees slavery to be an intrinsically violent relationship of control, in which the enslaved person is functionally denied access to autonomous relations out of the master's sphere of influence. Though, not biologically dead, slaves in effects are "socially" non-existent to the free population.⁹³ This definition carries with our earlier definition of the relationship between master and slave and not between slave and the society. For Patterson, slavery is neither simply the loss of freedom nor the same as coerced labour, nor equitable with loss of civil rights. As a confined outsider, deprived of the trees of birth in both ascending and descending generations, the slave exists as what social anthropologists and historians of religion call "the other".⁹⁴ The slave was physically and violently ostracised from his people, stripped of previous ethnical forms of human dignity, and typically forced to learn a foreign language and to obey alien customs on pain of death. As an enslaved stranger, he lived perpetually in fear, fundamentally robbed of all rights and human dignity.⁹⁵ Richard Hellie concurred with this definition, when he documented the exceptional case of Russian slavery, a system that enslaved and made socially dead its own people.⁹⁶

Patterson's definition of a slave as socially dead takes cognizance of the alienating dynamics of the enslavement process: Slavery is therefore, the permanent violent domination of natively alienated and generally dishonoured persons.⁹⁷ However, in addition to juridical classification; Finley does place equal stress on the slave's "otherness" or deracination.⁹⁸ Finley and Patterson made significant advances over previous definitions of a slave, especially in seeing the slave as the "other", particularly in European context.

⁹² Finley, M.I., *Ancient Slavery and Modern Ideology*, London, 1980, p. 68; Id., *Slavery in International Encyclopedia of the social Sciences*, David L. Sills (ed.), 14, 1968, pp. 307-313. See also Garnsey, Peter (ed.), *Non-Slave Labour in the Greco-Roman World*, *Cambridge Philosophical Society Suppl. 6*, Cambridge: The Society, 1980; Bradley, Keith R., *Discovering the Roman Family: Studies in Roman Social History*, New York: Oxford University Press, 1999, pp. 103-124, discusses child Labour in the Roman World.

⁹³ Patterson, O., *Slavery and Social Death*, 1982, pp.1-75. The concept of "death to the law" is also found in Galatians Chapter 2 verse 19 and Romans Chapter 6 verse 10 (Rom. 7:4), so Patterson agrees with Apostle Paul.

⁹⁴ *ibid.*; *ibid.* n.92 Finley, p. 308.

⁹⁵ Patterson and Finley agree on "otherness" as essential to Slavery. See Finley, *Ancient Slavery and Modern Ideology*, London, 1980, pp. 308-309.

⁹⁶ Hellie, Richard, *Slavery in Russia: 1450-1725*, Chicago: University of Chicago Press, 1982.

⁹⁷ *ibid.* p. 13.

⁹⁸ *ibid.*

However, unlike Patterson, Finley retains the legal category of slavery as one form of dependent labour. Finley's dependent labour or "chattel" could be reduced to chattel hermeneutic and Patterson's the "social death" hermeneutic. This monograph is derived from the findings of Finley, Patterson, Brunt, Bradley and Hopkins without limiting itself to one school or method.⁹⁹ However, the knowledge of these debates and disagreement over the philosophical problematic of slavery as a global phenomenon helps biblical exegetes develop an informed hermeneutic.¹⁰⁰

1.3 Biological Determinism

The ancient moralist, Seneca, conjured a heated dialogue in his epistle 47, in which he delineates the elements of the model master-slave relationship according to Stoicism.¹⁰¹ Seneca condemns "harsh" physical punishment of slaves as beneath the dignity of the self-controlled Stoic but sees no problem with more moderate and regular disciplining of one's slaves.¹⁰²

Another philosopher, Dio Chrysostom, also forms the most extensive treatment of slavery in all of extant classical Literature.¹⁰³ However, it is the philosophy of Aristotle that supplies the popular discussion of today.

⁹⁹ Acquiesce to the German "School of Mayence" (*Arbeitsgruppe Sklavensforschung der Kommission für Geschichte des Altertums der Mainzer Akademie*), which has taken on avowedly polemical stance against some of M.I. Finley's view of ancient Slavery: for example, Kudlien, Fridolf, *Sklaven-Mentalität im Spiegel Antike Wahrsagerei, Forschungen zur antiken Sklaverei* 23, Franz Steiner (ed.), Stuttgart, 1991, pp. 12, 150-151; Schiedel, Walter, *Slavery and the shackled Mind: on fortune-telling and Slave Mentality in the Graeco-Roman World*, *The Ancient Bulletin* 7, 1993, pp. 107-114.

¹⁰⁰ Compare Hellie, Richard, *Slavery in Russia, 1450-1725*, Chicago: University Press Chicago, 1982.

¹⁰¹ Buckland, William Warwick, *Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*, The Lawbook Exchange, Ltd., 1908; Crook, J. H., *Law and Life of Rome, 90 B.C., A.D. 212, Aspects of Greek and Roman* Ithaca, Cornell University Press, 1967, esp. pp. 55-57, 179-191; Nicholas, Barry, *An introduction to Roman Law*, 3d Ed., Clarendon Law series, Oxford, Clarendon Press, 1987, esp. pp. 69-60; Watson, Alan, *Mortality, Slavery and the Jurists in the later Roman Republic*, *Tulane Law Review* 42, 1967-1968, pp. 289-303; Id., *Roman Slave Law and Romanist Ideology*, *Phoenix* 37, 1983, pp. 53-65; Id., *Roman Slave Law*, Baltimore, Johns Hopkins University Press, 1987; Bradley, Keith R., *Roman Slavery and Roman Law*, *Historical Reflections/Reflexious historigue* 15, 1988, pp. 477-495; Wicker, Franz, *Roemische Rechtsgeschichte: Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*, pt. 1, *Rechtsgeschichte des Altertums, Handbuch der Altertumwissenschaft* 3.1. Munich, Beck, C. H., 1988, pp. 362-367. New English translations of the standard legal sources are Mommensen, Theodor, with Krueger, Paul (eds.), *"The Digest of Justinian"*, trans. Alan Watson Philadelphia: University of Pennsylvania Press, 1982; and the *Instate of Gaius*, trans. with an intro by W. M. Gordon. & O. F. Robinson, Latin text, Seckel and Kuebler (eds.), *Texts in Roman Law*, Ithaca, Cornell University Press, 1988; Watson, Alan, *Roman Slave Law*, 1983, p. 105.

¹⁰² Bradley, Keith R., *Slaves and Masters in the Roman Empire: A Study in Social Control*, Brussel, Oxford, 1984, 1987, p. 119, writes that Seneca's apparent distaste for that kind of cruelty was virtually exceptional. Yet Bradley overstates the case here, given that others, for example Lucian of Samosata and Epictetus also rejected the evil treatment of slaves by owners.

¹⁰³ Chrysostomus, Dio, *Orationes*, J. de Arnim (ed.), Weidmann. Berlin, 1893, pp.14-15; Brunt, P. A., *Aspect of Social Thought of Dio Chrysostrom and the Stoics*, Para 19, 1973, pp. 9-34.

He claims that the “slave” is a kind of animate possession and that has some human bodies, but by virtue of their very anatomy, were biologically built for servility-hunched over deference, with large body frames suited for menial labour.¹⁰⁴ This theory of natural slaves by Aristotle did not, however, convince the Roman jurists. They postulated that slavery was an institution of the law of nations (*ius gentium*), by which, contrary to nature (*contra naturam*), a person is subjected to the power (*dominum*) of another.¹⁰⁵ Slavery appears to be the only case in the extant corpus of Roman private law in which the *ius gentium* and the *ius naturale* are in conflict.¹⁰⁶

To many scholars of jurisprudence and writers, it was Kismet, not nature that made certain people slaves. This argument, I think, requires no intellectual clout to comprehend that neither the evolution theory nor the holy books describes slavery as something natural. Therefore, Aristotelian argument of biological determinism for natural slaves is not convincing and does not even convince people in antiquity;¹⁰⁷ Cicero sees the Jews and Syrians as naturally good slaves. However, the ancient critics of Aristotle, which were not critics of slavery per se but Aristotle's particular view about it being natural, believed that risk of personal enslavement was common to all human beings irrespective of race. It must be noted that such critics, i.e. mostly Stoic, were not for the abolition of slavery. The argument in antiquity that slavery was *contra naturam* should be understood under the premise that no particular ethnic groups were automatically born servile. For example, the Stoic philosophers, in particular Seneca, found piracy, kidnapping and other forms of abduction a compelling argument against Aristotelian notion and other European slaveholders' notion of biologically determined natural slaves.

¹⁰⁴ Aristoteles, *Politik* (1252a-56a), München, Felix Meiner Verlag, 1981, pp. 1-7; Schlaifer, Robert, *Greek Theories of Slavery from Homer to Aristotle*, Harvard Studies in Classical Philology, Department of Classics, Harvard University, 1936, pp. 127-129; Klees, Hans, *Herren und Sklaven*, Stuttgart, 1998; Steiner, Franz, *Die Sklaverei in Oekomenischen und Politischen Schriften der Griechen in Klassischer Zeit, Forschungen zur antiken Sklaverei* 6, Wiesbaden, 1975, pp. 181-227; Smith, Nicholas D., *Aristotle's Theory of natural Slavery*, Phoenix 37, 1983, pp.109-122; Canbiano, Guiseppe, *Aristotle and the Anonymous opponents of Slavery*, trans. Mario di Greorio, in Finley, M.I., *Classical Slavery*, London, 1987, pp. 22-42; Davis, David Brion, *The problem of Slavery in Western Culture* 1966, reprint, New York, Oxford University Press, 1988, p. 38, p. 75; Synodinou, Ekaterini, *On the concept of Slavery in Euripides*, (Ph.D. diss., University of Cincinnati, 1974), pp. 168-172, identifies Aristotle's unnamed opponents as Euripidas.

¹⁰⁵ Institutes 1.3.2, Digest 1.5.4.1. in *The Digest of Justinian*, ed. Florentius, A., Amsterdam Brussel, 1990 (Theodor Mommsen & Paul Krueger, Trans. Alan Watson, Philadelphia: University of Pennsylvania Press, 1985).

¹⁰⁶ Buckland, W.W., *Roman Law of Slavery*, 2001, p. 1; Watson, Alan, *Roman Slave Law*, Johns Hopkins University, 1987, pp. 7-8.

¹⁰⁷ Cicero's *Paradoxa Stoicorum*, (Paradox 5) in Harrill James A., *The Manumission of slaves in Early Christianity*, 1995, pp. 33-34; *ibid.* n.103 Chrysostomus, Dio, *Orationes*, p.15; Philo von Alexandrien, *Quod omnis probus liber sit* (stoische Diskussion über die Freiheit des Menschen) in *Der Werk Philos durch L Cohn und P. Wendland*, Bd. VI, Berlin, 1915, pp. 3 & 40; *Heraclit* EP. 9 (Trans. In Abraham J. Malherbe, *The Cynic Epistles: A Study Edition*, SBLSPS 12, Missoula, Mont Scholars Press, 1977), pp.210-215; See Job 31: 31-51 and Proverbs 17:2 in the Holy Bible for similar views that slaves were not biological inferiors in the Holy Bible.

To buttress this fact, one only needs to look at some noble figures such as Julius Caesar, Hecuba, Darius mother, Plato (who was captured and ransomed at Aegina), and even the cynic sage Diogenes, they were all reported to have been taken into captivity at some point in their lives. Accordingly, if these great men suffered a twist of fortune and were at some time enslaved, this proved the unpredictable character of human life. Not even the archetypal sage Diogenes could escape this possibility.¹⁰⁸

1.4 Manumission

Manumission means to release one from slavery or servitude.¹⁰⁹ A master sanctioned release from slavery. This was a peculiarity of Athenians vis-à-vis European slavery and in some extent Hebrew slavery.

In Athena, those manumitted were denied citizenship and excluded from political life, ineligible for magistracies, forbidden to own land and prohibited from acquiring mortgage loans, their male children were denied citizenship.¹¹⁰ The Roman form of manumission took many forms, both formal and informal. The formal ceremony had three varieties: 1. Manumissi vindicta by the magistrate's rod: This occurred before a Roman magistrate in a legal proceeding. 2. Manumission cencu: a republican form, which was later discarded, transpired when the censor placed the slave on the roll of Roman citizens and 3. Manumission testamentto, which is generally considered as the most common form, however, there is no evidence to collaborate this view. The informal forms were divided into two: Manumissio per epistulum, took place when the master wrote a letter to a friend stating that his slave was liberated.¹¹¹

Manumission intramicos was a ceremony conducted by the master "before friends" who served as witnesses that the slaves have been liberated. There were other forms of manumission, for example the full enfranchisement (Roman citizens) to partial (Julian Latin).¹¹² The Roman jurist, Gaius outlines the differences between a Roman citizen and a Julian Latin.¹¹³

¹⁰⁸ <http://darkside.hubpages.com/hub/diogene>; <http://www.osho.com/library/online-library-slave-diogenes-individuality-e4cf4f1b-198.aspx>.

¹⁰⁹ Random House, *Webster's Unabridged Dictionary*, Second Ed., Random House New York, October 1999.

¹¹⁰ Freewoman, like all women, were never citizen of Athena.

¹¹¹ Compare Friedman, S., *Jews and the American Slave Trade*, 1998, p. 30.

¹¹² *ibid.*

¹¹³ Finley, M.I., *Ancient Slavery and Modern Ideology*, London 1980, p. 18.

“For any person who fulfils three conditions and is above the age of thirty,¹¹⁴ a Roman citizen must be in Quiritary ownership of his master and that he is freed by means of a lawful and legally recognized manumission, i.e. by rod, by inclusion in the census, or by will - but if any other of these conditions is lacking he will be a (Julian Latin).”¹¹⁵ The granting of full or partial enfranchisement depended on the slave’s age, his or her legal relations to the master and the form of ceremony. The practice of Julian Latin’s became predominant under the principle because of efforts to bar slaves from full Roman citizenship. A Julian Latin had commercial right (to enter into Roman contracts) but neither conubium (right to a recognized marriage with a Roman citizen nor testament factio, right to make and take a Roman will).¹¹⁶ A Julian Latin could therefore, function as an agent of his patron with the right to live and work as an independent freedman, a restriction that appealed to slaveholders. Slaves were not allowed to form a family and were subjected to separation by sale to different owners.¹¹⁷ In the African context, slave owners were encouraged to liberate slaves as an act of piety, and in certain circumstances slaves were able to purchase their freedom.

Many enfranchised slaves continue to settle in the same location, though they apparently were free to engage in a wide range of occupations than hitherto, particularly those involving craft.¹¹⁸ Freed slaves were allowed to secure lands from their former masters in the same way as other freed men or relatives of the master in his household, in exchange for a portion of the crop or land.¹¹⁹ Slaves gained the price of their freedom in various ways: Through revenue gained on their own account with skills such as tanning and weaving, or through sale of extra grain.¹²⁰ Though, slaves encountered a lot of legal setbacks, but gradual integration into the society was evident, sometimes within the lifetime of the original captives. There were also other mechanisms through which the slaves can go from the ranks to greater prestige and wealth.

¹¹⁴ Buckland, W.W., *Roman Law of Slavery*, Cambridge, 1908, 2001, pp. 437-597; Bradley, K., *Slaves and Masters*, New York, 1987, pp. 81-112.

¹¹⁵ “Quirites” is an archaic name for Roman citizens. “Quiritary” ownership means bare possession as opposed to possession by title in an estate.

¹¹⁶ The Institutes of Gaius, trans. with an introduction by W.M. Gordon & O.F. Robinson, latin text ed. Seckel & Kuebler, *Txts in Roman Law*, Ithaca: Cornell University Press, New York, 1988, pp. 25-27; Weaver, A.R.C., *Where have all the Julian Latin’s gone? Nomenclature and Status in the early Empire*. *Chiron* 20, 1990, pp. 276-305.

¹¹⁷ Compare Miers and Kopytoff, pp.165-166;

¹¹⁸ Salifou, A., *Le Damagaram, ou le sultanat de Zinder au XIXe siecle*. *Etudes nigériennes*, No 27, Niamey, 1971, p. 172; Interview with Sarkin Dawaki Muhamman dan Ari on January 17, 19, March 5 and April 25, 1968, in Miers, S. and Kopytoff, I., (ets.) *Slavery in Africa: Historical and Anthropological Perspectives*, 1977.

¹¹⁹ Interview with Li. Mustafa in Miers, S. and Kopytoff, I., (ets.) *Slavery in Africa: Historical and Anthropological Perspectives*, 1977.

¹²⁰ Compare Interview with Sarkin *ibid.* 118.

The many controversies of ancient slavery notwithstanding, deserves more attention than those over manumission. The Roman evidence differs dramatically from the Athenian and American. The geographic distribution along Romanized and non Romanized lines must be recognized.

1.5 Conclusion

It should be obvious from the foregoing that the attempt to present an acceptable or scientific logical definition of slavery has not been easy – in spite of the various instruments, semantics, philology, biology e.t.c., used in defining the concept of slavery. However, there is a consensus from the diverse definitions professed, that a slave is a person only by usage. Others define a slave as a property that therefore, enjoys no right whatsoever.¹²¹ One is tempted to postulate that the relationship between a slave and his buyer determines in most cases the definition of slavery and consequently the treatment. While some slavers were high-handed towards their slaves, some others were human and exhibit some sense of justice. This status differs, however, from continent to continent as shown earlier.

Common characteristics distinguished slavery from other human rights violations. A slave is therefore:

- 1) forced to work – through mental or physical threat;
- 2) owned or controlled by an ‘employer’, usually through mental or physical abuse or threatened abuse;
- 3) dehumanised, treated as a commodity or bought and sold as ‘property’;
- 4) physically constrained or has restrictions placed on his/her freedom of movement.¹²²

¹²¹ Bales, Kevin, *Disposable People: New Slavery in the Global Economy*, 1999; Davis, David Brion. *The Problem of Slavery in the Age of Revolution, 1770-1823*, 1999; Finkelman, Paul, ed. *Encyclopedia of Slavery*, 1999 and many more

¹²² <http://www.antislavery.org/homepage/antislavery/modern.htm>.

Chapter II: Slavery as an Ancient Institution of all Cultures; the Historical Development of Slavery: Slavery in Ancient Egypt, Slavery in the Fertile Crescent, Slavery in Ancient Greece, Slavery in Ancient Rome, The Atlantic Triangular Slave Trade, Modus operandi and Philology, Islam and Christianity as Forerunners to Commercialized Slavery.

2. Introduction

Slavery and slave trade appeared to be an accepted ancient part of society. It was, as Fustel de Coulanges said “A primordial fact, contemporaneous with the origin of society; it has its root in an age of the human species, where all inequalities had their *raison d`etre*. In the north part of China, in the 3rd century, slaves constructed the 1500 mile-long Great Wall aimed at protecting the Chin Empire against the Mongol Raiders.¹²³

In Egypt, slaves may have constructed the renowned Pyramids. The wealth of Assyrian and Babylonian warlords was in most cases derived from slave labour. At this time of history, slavery was an established institution such that temples, palaces, and rich estates owned slaves and exported them for their own benefits.¹²⁴ In Africa, especially in the Sub-Saharan, along Amazon, ships were constructed for slaves’ transportation to Muslim aristocrats in Persia and Arabia. In the Yucatan Peninsula, among the American Indian tribes, slavery and slave trade were also recorded. “In the Republic” Plato postulated that the institution of slavery was an indispensable tool for the Greek aristocrats.¹²⁵ In the world of Aristotle, the nature dictated that certain creatures were superior and others inferior. Just as there were differences between men and women, so were there different abilities amongst men. (“*He who is by nature not his own, but another’s and yet a man, is by nature a slave*”).¹²⁶ Just as there were animate and inanimate “instruments” helpful in the navigation of seas (a rudder and a human lookout), so was the slave nothing but an animate “instrument”, a possession, useful to the management of a household.¹²⁷

Thomas More in his Utopia called for “fettters of gold” appropriate for the hard working, penniless drudges who would perform tasks unworthy of free men (i.e. hunting,

¹²³ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 17.

¹²⁴ Kramer, Samuel N., *The Sumerians: Their History, Culture and Character*, University of Chicago Press, 1963, p. 78.

¹²⁵ Cornford, Francis (trans.), *The Republic*, Oxford: Clarendon Press, 1941, chap. VII, pp. 58-61 and chap. XVII, p.170.

¹²⁶ *Aristotle’s Politics*, tr. Benjamin Jowett, Oxford: Clarendon Press, 1908, book 1, chap. 5, p. 204.

¹²⁷ *Id.* chaps. 3, 4, 5, 6, pp. 31-36.

cooking, oxcart driving, butchering).¹²⁸ John Locke argued that slavery was entirely outside the social contract and therefore, slaves who did not accept their condition or status might opt for suicide.¹²⁹ Though slavery and slave trade during this time demonstrated the monstrosity of man towards man, however, the brutality of the transatlantic triangle slave trade and slavery as practiced by the western world was insidious. Bernard Lewis in echoing this moment, wrote in 1971 that at no time did the Islamic world ever practiced the kind of racial exclusivism, which is found in the Republic of South Africa during Apartheid regime or which had existed in the Americas during the slave trade.¹³⁰

Claude Meillassoux sums it all when he added that chattel slavery left Africans in a state of desocialisation, (aliens uprooted from their homes), depersonalisation (stripped of their humanity), desexualisation (the destruction of love and family) and decivilisation (devoid of legal guarantees and freedom).¹³¹

Phillip Curtin said that the origin of slavery in the West to the Medieval world and practice in the ante-bellum South was unique and dehumanising because the agricultural enterprises were largely dependent on slave labor.¹³² M. I. Finley wrote that “*Slavery is a great evil*”: *indignation and condemnation of slavery by the European scholars notwithstanding slavery remains a great evil*.¹³³ Some Afrocentric Scholars like those who composed Secret Relationship argued that slavery is a recent invention of the Western society. The slave here was deracinated outsider, stripped of homeland culture, family and identity.¹³⁴

Conversely, the traditional African tribal societies were presented by these Afrocentrics as pristine and untainted by class culture and there were house servants; the master and the servants lived together, worked together, shared food together, celebrated together and had a common sense of purpose.¹³⁵

¹²⁸ More, Sir Thomas, *Utopia* tr. Robert Adams, New York: Norton, 1975, pp. 35, 51, 64-65.

¹²⁹ Dockes, Pierre, *Medieval Slavery and Liberation*, tr. Arthur Goldhammer, Chicago: University of Chicago Press, 1982, pp. 27-34, 191-97; See also Fogel, Robert, *Without Consent or Contract: The Rise and Fall of American Slavery*, New York: W.W. Norton, 1989, pp. 201-202.

¹³⁰ Lewis, Bernard, *Race and Colour in Islam*, New York: Harper Touch, 1971, p. 102; Hereth, Michael, on Montesquieu: *An Introduction*, 1994, pp. 24–29.

¹³¹ Meillassoux, Claude, *The Anthropology of Slavery: The Womb of Iron and Gold*, tr. Alide Dasnois, Chicago: University of Chicago Press, 1991, pp. 101-15.

¹³² Curtin, P., “*The Atlantic Slave Trade*”, in *History of West Africa*, K. F. A. Ajayi and Michael Crowder (eds.), New York: Columbia University Press, 1972, pp. 243-51. See also Brooks, Lester, *Great Civilizations of Ancient Africa*, New York: Four Winds Press, 1971, p. 165.

¹³³ Finley, *Ancient Slavery and Modern Ideology*, New York, Viking, 1960, p. 64.

¹³⁴ Friedman, S., *Jews and the American Slave Trade*, 1998, p.18.

¹³⁵ Id.; Compare also Miers & Kopytoff, *Slavery in Africa: Historical and Anthropological Perspectives*, Madison, University of Wisconsin Press, 1977, pp. 22-23.

Furthermore, slaves intermarried with their masters, adopted their masters' religion and even absconded without consequence or punishment. Though, Africans were involved in kidnapping of other Africans from their homes, however not in the brutality of the Europeans. Colour bar was never a factor until the Europeans combined racism with economic exploitation after the 15th century. All scholars agreed that wherever the institution of slavery was practiced, it corrupted the slave owner and degraded the slave, and to a certain extent race, and the tribe and national identity.¹³⁶

2.1 Ancient Sources of slavery

It is cogent and relevant to turn to primary sources of slavery. This subheading lists the headings as far as practicable and then comment on their usefulness and limits. In consideration of the omnipresence and importance of slaves in ancient daily life, there is surprising little discussion of them by ancient authors. The intellectual vacuum is unimaginable. However, both Aristotle and Athenaeus tried to imagine a world without slaves. They could only envision a Fantasy Land, where tools performed their work on command, utensils moved automatically, shuttles move cloth and girls played harps without heathen hands to guide them, bread baked itself and fish not only voluntarily seasoned and basted themselves but also flipped themselves over in frying pans at the appropriate times.¹³⁷

The visionary wit of Aristotle and Co. cannot be over-estimated. They intended to illustrate how preposterous such a world without slave would be. It is however, paradoxical that intellectual philosophical heavy weights like Aristotle and Co. could descend or rather reduce the Homo sapiens to such imponderable state of nothingness and inhumanness. The effect of such options can only be viewed through the lenses prescribed by Aristotelism and the influence it had over people and through his generations. He was an authority and still an authority at least in Europe, whose actions or inactions during his days were like biblical injunction. In short, he accorded legitimacy to slavery. What definitions can one make of the primary sources: in comparison or different from our sources or secondly sources today?

¹³⁶ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 18-19.

¹³⁷ Aristotle's, *Politics*. 14. (125 3b) (350 B.C.E.); Aristotle's, *Politik*, Erstes Buch (1973), pp. 46-48; *Athenaeus The Deipnosophist* 6, Harvard Studies in classical prologue with an English tran. By Charles Burton Gulick, in 7 Vol. Harvard University Press, 1936, p. 267.

The primary sources fall, however, into the following categories:¹³⁸

- 1) Archaeology
 - a) Architectural remains
 - b) Skeletal remains
 - c) Relia (Chains, whips, collars, e.t.c.)
- 2) Inscriptions
- 3) Papyrus and parchments fragments
- 4) Literature
- 5) Legal material
- 6) Histories and biographies
- 7) Personal and other letters
- 8) Moral literature
- 9) Advice literature on household management
 - Economics handbooks for large agricultural estates
 - Domestic codes for all households, large or small
- 10) Imaginative literature
 - Satires
 - Poetry
 - Drama
 - Parables and myths
 - Proto-novels

- I. Virtually all ancient authors were themselves owners of slaves, therefore, their information should be taken with a pinch of salt. Their literature, which does not mention slaves, reflects the views of the masters, not necessarily of slaves.
- II. Extant evidence is principally limited to urban slavery. The treatment of slaves in the rural areas must have gone into oblivion.
- III. No quantifiable data is available
 - a. The total number of slaves is unknown (census data only from Egypt)
 - b. The size of individual slave holding is only a matter of conjecture.
 - c. The number of slaves working in manufacturing or agricultural industry were not recorded.¹³⁹

¹³⁸ Compare Aristotle, *Politics*, 1255b pp. 11–15; Id. 1254b pp. 16–21; Thomas, Hugh, 1997, p. 68ff.

139 *ibid.* Thomas, p. 68ff.

- IV. The documentary of evidence is inadequate
 - a. No account ledgers survived except from Egypt
 - b. No estate archives survived
- V. No slave Literature (e.g. autobiographies, personal letters) survived and slaves oral literature is irretrievable.¹⁴⁰

Unlike those who study the modern period, ancient historians simply have no oral repository out of which to reconstruct slave life or folklore. Those studying American slavery, for example, can fall on at least four major sources both written and oral of slave Literature.

1. The extant black slave autobiographies, which numbered over one hundred.
2. The many biographies and autobiographies stories published in the 19th century abolition's newspaper and church organs.
3. The folk music of "Negro"
4. The forty-one volume slave narrative collection.

This last item, over 10.000 pages of typescript, contains over 2,000 personal interviews with ex-slaves transcribed in 1920s and 1930s by several groups of investigations. As an evidence of ancient slavery, their respective masters erected Epitaphs of slaves. One such neurological notice has importance for understanding ancient slaveholders "ideology". It reads, "*I am yours*", "*to you even now under the earth, yes master, I remain faithful as before*".¹⁴¹ Manifestly, the master-slave relationship was, though, in some instances extended beyond death, masters kept their slaves even in Hades and slaves like Cicero, Epictetus, Terence, Marcus Aurelius and Seneca (in Diogenes) etc. are still faithful to their masters. This only portrays the state of mind of certain human beings during this time; however, it will be foolhardy or a blatant lie to argue, that the state of mind of mankind today had changed for the better, as we shall see in the on-going work. Additional tombstone illustrates an antithesis.

¹⁴⁰ Aristotle, *Politics*, 1255b, pp. 11–15; 1254b, pp. 16–21; Thomas, Hugh, 1997, p. 68ff.

¹⁴¹ Rawick, George P., ed., *The American Slave: A Composite Autobiography*, vol. 1, *From Sundown to Sunup: The making of the Black community, Contributions in Afro-American and African Studies*, Westport, Conn: Greenwood publishing, 1972, XIII-XXI, pp. 163-178; Craton, Micheal, *A cresting Wave? Recent Trends in the Historiography of Slavery, with Special Reference to the British Caribbean Historical Reflections/Reflections* historigue 9, 1982, p. 413.

It reads, “*I am Zosime, who was formally a slave only with my body; but now I have found freedom for my body and as well as my soul*”.¹⁴² The Roman legal evidence¹⁴³ has a much wider base of source materials; the Justinian compilation called the *corpus iurus civilis* and extant secondary law school text-book, the institute Gaius.¹⁴⁴ The compendium of Gaius, for example, reveals the enormous importance of slave for commercial purposes and other acquisitions.¹⁴⁵

2.2 The Modus Operandi and Topology

Some of the sources of ancient slaves were warfare, piracy, brigandage, the international slave trade, kidnapping, intent exposure, some breeding and the punishment of criminals. While the universality of this method may not be questioned, the African slavery, which is accorded an important role here, embodied some unimaginable human greediness in the annals of history.¹⁴⁶

According to Dio Chrysostom, the original ways of obtaining slaves were by capture in war and by land or sea brigade.¹⁴⁷ In some of the campaigns in Gaul between 58 and 51 B.C.E., Julius Caesar is reported to have shipped back to Peninsular Italy nearly one million enslaved Gallic prisoners of war.¹⁴⁸ However, a distinction will be made between genuine slave societies and societies that simply contained slaves.¹⁴⁹

¹⁴² Horsley et al, *New Documents*, vol. 2, *A Review of the Greek Inscriptions and papyri* published in 1979; Marrickriele, Australia: *The Ancient History Documentary Research Centre*, Macquarie University, 1982, p. 53, dated to the third century B.C.E.

¹⁴³ Finley, M.I., *Ancient Slavery and Modern Ideology*, p. 18.

¹⁴⁴ *ibid.*

¹⁴⁵ Morrow, Glen R., *Plato's Law of Slavery in its Relation to Greek Law*, Illinois Studies in Language and Literature 25.3, Urbana: University of Illinois Press, 1939; *Id.* “*The Murder of Slaves in Attic Law*”, 1937-1938, pp. 210-227; Vlastos, Gregory, “*Slavery in Plato's Thought*”, in Finley's *Slavery in Classical Antiquity*, New York: Barnes and Noble, 1960, pp. 233-249; *Id.* *Does Slavery Exist in Plato's Republic?* 1968, pp. 291-295.

¹⁴⁶ See the excellent collection in Wiedeman, *Greek and Roman Slavery*, London, 1981, pp. 106-121.

¹⁴⁷ Chrysostomus, Dio. *Orationale*, pp. 15-25, where he lists the ways in which slave-owners acquired Slaves; a similar list was provided in Harris, *Toward a Study*, 1980, ed. Seaborn., pp. 121-122.

¹⁴⁸ Harrill, James Albert, *The Manumission of Slaves in Early Christianity* von Tübingen: Mohr, 1995, p. 32; Finley, M. I., *The Ancient Economy*, Sather Classical Lectures 43, 2nd ed., Berkley and Los Angeles, University of California Press, 1985, p. 72, calls one million, a not wildly incredible figure; Hopkins, Keith, *Conquerors and Slaves, Sociological Studies in Roman History 1*, New York: Cambridge University Press, 1978, pp. 1-15, 99-115; Caesar regularly gave Gallic prisoners of war to his troops as Slaves; Treggiari, S., *Roman Freedman during the Late Republic*, Oxford, 1969, pp. 9-10.

¹⁴⁹ Finley, M.I., *Ancient Slavery and Modern Ideology*, London, 1977, p. 79; Patterson, O., *Slavery and Social Death*, pp. 350, 364 (appendices B and C), listed 66 Slaveholding societies and 141 large-scale Slave Systems.

Some maintained that in the history of Western World, there have been only five genuine slave societies: Two in antiquity (classical Athens and classical Italy) and three in the Modern New World (the Caribbean, Brazil and the southern United States).¹⁵⁰ It should be noted that the actual number of slaves in any given society is difficult to ascertain. This specially holds truth in classical antiquity. Unlike those studying modern America, ancient historians lack the raw material of clinometric. A definitive number of slaves may never be known.¹⁵¹ However, by 1860, slaves made up 33 percent of the total population in the confederate slave states. Only the American South slavery reproduced itself.¹⁵² The estimated official figure here cannot in all sincerity represent the aggregate of slaves shipped to America, because a lot of shipment as shall be shown in chapter III were not recorded. This chapter on the Genesis of African slavery shall furnish an appropriate figure.

2.3 Slavery in Ancient Egypt

Afrocentrist have advanced the thesis that the genesis of civilization is traceable along the bank of river Nile more than five thousand years ago. According to this view, black African tribes and clans were united by Menas and from this society, the principle invention like art, philosophy, writings, methodology, science, mathematics and organized religion originated. The ancient construction projects (pyramids, granaries, irrigation canals) were supposedly constructed not by slaves but by a combination of volunteer free workers and alien guest workers. In this view, every Egyptian hero was represented and identified as black Africans.¹⁵³

Langston Hughes, who propounded this thesis claimed that Ikhnaton (the 14th-century pharaoh, who antedated Moses with ideas of monolatry), and even Cleopatra (a descendant of Alexander's Greek general Ptolemy) were all black Africans.¹⁵⁴

¹⁵⁰ Finley, M.I., *Ancient Slavery and Modern Ideology*, London 1980, p. 9; Friedman, S. *Jews and the American Slave Trade*, 1998, p. 17.

¹⁵¹ Curtin, Phillip D., *The Atlantic Slave Trade. A census*, Madison University of Wisconsin Press, 1969, London, 1977.

¹⁵² Finley, *Ancient Slavery*, 1980, p. 310; Haris, *Towards a Study*, 1980, pp.119, 121.

¹⁵³ Friedman, S., 1998, p. 19.

¹⁵⁴ *ibid.*

This thesis was debunked by Mary Lefkowitz, Andrew Mellon Professor of Humanities at Wellesley College and a host of others.¹⁵⁵ The synthesis of this thesis were represented by the Egyptians, who postulated that anthropological evidence suggests that different racial types existed side by side in the many norms of ancient Egypt.¹⁵⁶ Incontrovertibly, there were interactions between the African blacks, the Egyptians and others beyond the Upper Niles. The Sudanese human hunters called the Medjai were employed by pharaohs of the Middle Kingdom (2000 -1800 B.C.) and volunteered to assist the subjugated Egyptians in the time of insurrection known as the second interregnum (1750 – 1580). In 945 B.C., the African monarch, Sheshonk marched through the Delta on his way to conquests in ancient Judea and three hundred years later, Taharka, another Ethiopian established his own dynasty in Egypt.¹⁵⁷ The peace of Egypt was sometimes disturbed by invaders from Crete and Semites from Upper Retenu (the name for ancient Palestine) and at times the invaders were defeated (as in the reign of Ramses III, c. 1190 B.C. when the sea people were conquered). There were also occasions when an in flock of emigrant traders succeeded the armed host. This was the case with the Hyksos (shepherd kings), i.e. Semitic hordes who conquered Egypt in eighteenth-century. These historical facts of the invasions are recorded in wall inscriptions of nobles at Beni Hasan, where colourfully garbed foreign merchants known as Apiru or Habiru can be seen.¹⁵⁸

¹⁵⁵ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p.19; Williams, Chancellor, *The Destruction of Black Civilization; Great Issues of a Race: from 4500 B.C. to 2000 A.D.*, 1987, pp. 87, 106, 110 and 111; Lefkowitz, Mary, *Not Out of Africa: How Afrocentrism Became an Excuse to Teach Myth as History*, New York, Basic Books, 1996; Lefkowitz, Mary and Rogers, Guy (eds.) *Black Athena Revisited*, Chapel Hill: North Carolina University Press, 1996. Mary Lefkowitz has rejected the notion that Egyptians were “Khemetic” (a term for black land, misused by some Afrocentrists. Professor Lefkowitz allowed that Egyptians were “people of colour”, not Europeans, beyond that, no one could say. Frank Yurco of the University of Chicago and Frank Snowden, professor of classics at Howard, also dismiss such claims as faddish.

¹⁵⁶ Egyptian diplomats regarded this controversy as unfounded. Abdel Latif Aboul-Ela, cultural emissary to the U.S., told Dinesh D`Souza this in *Illiberal Education: The Politics of Race and Sex on Campus*, New York: Free Press, 1991, pp. 112 and 119.

¹⁵⁷ According to Gardiner, Alan, the earliest culture in the upper Nile valley was “essentially African”. *Egypt of the Pharaohs*, New York, Oxford, 1966, pp. 391-95. The German Adolf Erman cited the Leyden Papyrus where blacks offer to protect the Egyptians from “the people of the Bow”. Blackman, Aylward, *The Ancient Egyptians: A Sourcebook of Their Writings*, New York: Harper Torch reprint, 1923, 1966, p. 107.

¹⁵⁸ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 20.

Some historians like Flavius Josephus paradoxically equated the Hyksos with the pastoral Israelites.¹⁵⁹ There is a likelihood that some of the invaders settled in Egypt and were eventually enslaved.¹⁶⁰ Among the settlers were the Israelites who were the ancient forbearers of the Jews. This historical quagmire appears to contradict the philosophy of the Afrocentrists. The core of the argument of victimisation is the claim that black Africans were powerless and unable to enslave. However, if the Egyptians were all blacks, how can one justify the use of the concept of slavery? And if, as some of them have argued, the ancient Israelites were all blacks, how could one explain the additional paradox of the black Egyptians, who enslaved the black Israelites?¹⁶¹ The middle road here was taken by an historian called Jon Manchip White, who advanced that the Egyptians' society employed fewer slaves and that the image of taskmasters lashing out at slave gangs was untrue and the 100,000 men required to raise the pyramids were not helots but skilled men who rejoiced in their abilities and were motivated by love, respect and patriotism towards their monarch.¹⁶²

Henri Frankfort and Sir Leonard Woolley concord with Jon Manchip White.¹⁶³ Woolley added that the thick Delta population available for corvee made slavery and slave trade insignificant.¹⁶⁴ The dean of American Egyptologist, James Henry Breasted in his history of Egypt distinguished between free serfs and slaves, while serfs paid taxes, slaves were not and generally were aliens.¹⁶⁵ Breasted's distinction between the serfs and slaves did not succeed as he expected because both groups lived in low, mud-brick tarched-roof huts, whose words were contiguous with others, both were faced with a constant threat of starvation and were also property of the priest and temples of Memphis, Heliopolis, Medinet Habu and Karnak and by the time Julius Caesar and his roman legions arrived Egypt, slaves or serfs formed the bulk of the population.

¹⁵⁹ The Hyksos were powerful band of warriors, armed with more sophisticated weaponry (chariots, sickle swords, bucklers) and knowledge of fortification than the Bronze Aged Hebrews could have possessed. Moreover, they venerated a multitude of animistic deities, including the reviled Sutekh set, and tried to impose their own culture upon the Egyptians. These Semitic kings (probably from Syria) dominated Egypt for more than a century until native resistance leaders, Ahmose and Kamose, founders of the eighteenth dynasty, defeated them. Yadin, Y., *The Art of warfare in Biblical Lands in the Light of Archaeological Study*, New York: McGraw Hill, 1967, I, pp. 176-184.

¹⁶⁰ Orlinsky, Harry, *Understanding the Bible through History and Archaeology*, New York: Ktav, 1972, pp. 52-56.

¹⁶¹ Williams, Chancellor suggests that many of the Israelites in Egypt were black and states that the wife of Moses was 'jet-black'. *The Destruction of Black Civilization*, Chicago: Third World Press, 1974, pp. 143 and 358.

¹⁶² White, Jon Manchip, *Everyday Life in Ancient Egypt*, New York: Capricorn, 1963, pp. 60-61.

¹⁶³ Frankfort, Henri, *The Birth of Civilization in the Near East*, Garden City, NY: Doubleday Anchor 195, p.110.

¹⁶⁴ Woolley, C. Leonard, *Ur of the Chaldees*, New York: W.W. Norton, 1965, pp. 175-176.

¹⁶⁵ Breasted, James Henry, *A History of Egypt*, New York: Scribner's/ Bantam, 1901/1967, pp. 70-72, 256-257, 412-417.

This was estimated at 7 Million people.¹⁶⁶ Though Breasted sometimes uses the term serfs and slaves interchangeably; however, there was no ambiguity in his description of the dehumanising treatments meted out to the slaves by the Egyptians. While describing the booty won by Thutmose III as a result of his annual incursions into Syria in the fifteenth-century, Breasted says:

*“The Asiatics themselves, bound one to another in long lines, were led down the gangplanks to begin a life of slave-labour for the Pharaoh. They wore long matted beards, an abomination to the Egyptians; their hair hung in heavy black masses upon their shoulders, and they were clad in gaily coloured woollen stuffs, such as the Egyptian, spotless in his white linen robe, would never put on his body. Their arms were pinioned behind them at or crossed over their heads and lashed together; or, again, their hands were thrust through odd pointed ovals of wood, which served as handcuffs. The women carried their children slung in a fold of the mantle over their shoulders. With their strange speech and uncouth postures, the poor wretches were the subject of jibe and merriment on the part of the multitude; while the artists of the time could never forbear caricaturing them.”*¹⁶⁷

These pictures of people working at pharaoh’s monument or temple estates depict images of slaves or of captive people; epigraphic evidence and the written testimony of the Egyptians attest to these facts. In the book of Exodus it is reported that after the death of Joseph, pharaoh increased or multiplied the burdens of the Hebrews by setting over them taskmasters, who were charged with the responsibility of afflicting them.¹⁶⁸ The Hebrews vis-à-vis slaves were said to have constructed Pithom and Per-Rameses, arsenals and granaries, which were used as a guard against the invading forces of Semites. The lives of the Israelites were unbearable.¹⁶⁹ Josephus recounted in his Antiquities the details of these oppressions.

¹⁶⁶ Appian: The Roman History published in the Loeb classical Library with an English trans. by Horace White Book 1 (Leob, 1912), pp. 14, 116-120; Plutarch, *The Fall of the Roman Republic*, tr. R. Warner, P.C., 1958, pp. 8, 1-11; Boak, Arthur and Sinnigen, William, *A History of Rome to AD 565*, London: Macmillan, 1965, 1969, pp. 156-157, 211.

¹⁶⁷ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, pp. 21-22.

¹⁶⁸ Dake’s Annotated Reference Bible: *The Holy Bible containing the Old and New Testaments of the authorised or King James Version Text*, 1963, Exodus 1 vs. 8, Exodus 1 vs. 11.

¹⁶⁹ Id., Exodus 1 vs. 14 and Exodus 1 vs. 15-22.

According to Josephus, the Hebrews were forced by the Egyptians to cut number of channels to stop the overflow of Nile waters during the flood season and also built walls and ramparts and raised smaller pyramids for the pharaohs. For Josephus, the aim of the Egyptians was to destroy the Hebrews by these labours.

Paradoxically, the Hebrews were miraculously delivered from the hands of the Egyptians. The story of Moses in the book of Exodus attests to this fact. Consequently, the Hebrews have been celebrating this miraculous delivery that is called Passover feast. Their dinner plates have been laden with matzos (the bread of affliction baked in haste during the Exodus), bitter herbs (symbolic of the Egyptians bondage), haroseth (a mix of apple, almonds, raisins and wine representing the mortar used to make bricks). The Passover Haggadah intones: Ovdim hayinu l'faro b'mitzraim (we were pharaoh's slave in Egypt...had God not brought our forefathers out of Egypt, then we and our children might still been slave to Pharaoh).¹⁷⁰ Whether the ancient Egyptians' acts of oppression against the Hebrews can be seen as genocide is a matter of conjecture. However, the practice of the Egyptians was a practice of slavery. The justification for this belief is offered by Leyden Papyrus, a long chronicle of social violent change from the reign of Pepi II, offers a series of lamentation related to slavery. Another testimony of slavery in Egypt is the thumb of Djehutihotep, a noble of the 20th dynasty at ElBerseh, which shows 172 men dragging 60-ton alabaster statue on a sledge. Supervising these slave workers were several taskmasters armed with sticks.¹⁷¹

Another evidence was the inscription from the thumb of Rekhmire (vizier for Thutmose III) at Thebes, which shows a number of Syrians and Nubians and their hands and feet were clotted with wet clay and standing by, were Egyptians taskmasters wielding rods.¹⁷² It was said that by the end of 1200 B. C. about 20 percent of the Egyptians were slaves. This included not only Hyksos and Nubians but also Libyans, Bedouin, Syrians and Apiru.¹⁷³ Series of manuscripts in 19th dynasty explain the plight of runaway slaves who, once recaptured, were chained and beaten with a hippo-hide wipe and his children were fettered.¹⁷⁴

¹⁷⁰ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 22.

¹⁷¹ Edwards, I. E. S., *The Pyramids of Egypt*, Baltimore: MD: Penguin, 1974, 1967, p. 267.

¹⁷² British copyist, Norman de Garies Davis believes the slaves were being chastised. See Wilson, Ian, *Exodus: The true Story behind the Biblical Account*, San Francisco, CA: Harper and Row, 1985, p. 8.

¹⁷³ Wilson, John, *The Culture of Ancient Egypt*, Chicago: University of Chicago Press, 1951, 1956, pp. 257- 258.

¹⁷⁴ *ibid.* n.170, p. 23.

The most chilling evidence in support of slavery in Egypt comes from what Ian Wilson termed “the surprising number of graves” uncovered with bodies, whose left forearms were broken.¹⁷⁵ And finally, the typical Egyptian peasant/slave was a chattel, a beast of burden, a draught animal whose life was comparable to the lives of the animals who were beside him both night and day.¹⁷⁶

2.4 Slavery in Fertile Crescent

In the preceding discussion the oppression of slaves was adequately documented and reported by various scholars. The treatment of slaves in the Fertile Crescent was no exemption. The legal documents obtained from Mesopotamia contained references to the sale of slaves. According to Leonard Woolley, the institution of slavery was traditional, universal and essential to social life and progress, neither was any man’s conscience hurt by it (not even the slaves).¹⁷⁷

Slaves were also captured in battles, through debt forfeiture, the sale of infants, minors and wives and even self-sale in societies where farmers and craft men were charged as much as 80% interest per year on loans. The slave was Mr. X. He was, as George Contenau writes, merely an item of a real property, a slave unit.¹⁷⁸ Unlike a freeborn, whose parentage was recited in legal documents, the slave had no genealogy. Rather, he appeared as “A ardusha B” (A the son of nobody, a slave of B).¹⁷⁹ Slaves were sold in an open market for Twenty-five shekels of silver, the price of five jars of wine or an ass. Like in Egypt, the slaves, men, women and children, were driven like cattle to accompanying myriads of soldiers.¹⁸⁰ Evidence suggests however, that the Phoenicians may have introduced the sale of black African slaves to the Mediterranean world.¹⁸¹ Slave owners had the rights to the body of their female slave.¹⁸²

¹⁷⁵ Wilson, Ian, *Exodus*, 1985, p. 81.

¹⁷⁶ Wilson, John, *The Culture of Ancient Egypt*, Chicago: University of Chicago Press, 1951, 1956, p. 74.

¹⁷⁷ Woolley, Leonard, *The Beginning of Civilization*, New York: Mentor, 1965, p. 598.

¹⁷⁸ Contenau, Georges, *Everyday Life in Babylonia and Assyria*, New York: W.W. Norton, 1966, p. 20.

¹⁷⁹ Meldesonh, Isaac, *Legal Aspects of Slavery in Babylonia, Assyria and Palestine*, Williamsport, P. A: Bayard Press, 1932, p. 28.

¹⁸⁰ *ibid.* n. ¹⁷⁸, p. 19.

¹⁸¹ Harden, Donald, *The Phoenicians*, New York: Praeger, 1962, p. 165.

¹⁸² Meldesonh, Isaac, *Legal Aspects of Slavery*, 1932, pp. 43-50.

While some slaves wore a distinctive hair-do, others were branded with a red-hot iron or marked with a star on their hands and some others wore an identity disk about their necks and were also forced to wear fetters.¹⁸³ There was no legal protection whatsoever for the slaves. The Hittites slave owners were assumed to have unlimited rights over their slaves and the power of life and death to deal with their slaves as they thought fit.¹⁸⁴ A humiliation of the master in the public or any attempt of absconding the consequences will be the mutilation of eyes, ears or nose and even death, not only for the culprit but also to his entire family.¹⁸⁵ In Babylon, the consequences for such offences were also mutilation and in Sumeria, the punishment was the application of shackles.¹⁸⁶ Georges Roux said that in the early dynastic city-states, where populations were approximately 20-30,000 of men, most women and children, were slaves, serving as gardeners, cooks, servants and weavers.¹⁸⁷ This statement seems to correspond with Samuel Kramer's interpretation of ancient Sumeria where slavery was a recognized institution and temples, palaces, and rich estates owned slaves and exploited them for their own benefit.¹⁸⁸ The laws of Amoritic Babylon (2000-1500 B. C.), appeared to be the most comprehensive codes from ancient Mesopotamia and showed how slavery featured in the society. More than a dozen of 60 precedents in the law code from Eshnunna relate to claims on slave girls, the marking of slaves, return of fugitive slaves, and punishment for an ox goring slaves. There were also references to six outlining punishments, the ultimate of which is death for assisting a runaway, in the celebrated code of Hammurabi (c. 1600 B. C.).¹⁸⁹

The importance of this last code is the *lex talionis*, which is analogous to the "eye for an eye" principle. The Babylonians were a class-conscious society, who were divided into three specific groups—*awilum* (aristocracy), *mushkenum* (free masses), *wardum* (slaves)—and who applied the law differentially according to one's status.¹⁹⁰

183 Oppenheim, A. Leo, Ancient Mesopotamia: Portrait of a Dead Civilization, Chicago: Chicago University Press, 1964, p. 75; Moscati, Sabatino, Ancient Semitic Civilizations, New York: Capricorn, 1960, p. 81.

¹⁸⁴ Gurney, O. R., *The Hittites*, Baltimore: MD, Penguin, 1925, p. 71.

¹⁸⁵ *ibid.*, pp. 70, 99.

¹⁸⁶ Woolley, C. Leonard, *The Beginning of Civilization*, New York: W. W. Norton, 1965, pp. 178-79. Lest anyone think slaves were permitted to think independently in Sumeria, the excavations at Ur revealed the bodies of more than hundred slaves forced to accompany their royal masters to the grave; Compare also Woolley, C. Leonard, *Ur of Chaldees*, New York: W. W. Norton 1965, pp. 45 -67.

¹⁸⁷ Roux, Georges, *Ancient Iraq*, Harmondsworth, Eng.: Penguin, 1964, pp. 318, 128.

¹⁸⁸ Friedman, Saul S, *Jews and the American Slave Trade*, 1998, p. 24.

¹⁸⁹ *ibid.*, p. 25.

¹⁹⁰ *ibid.*

Correspondingly, “if a free man destroyed the eye of a member of the aristocracy, they shall destroy his eye also. However if he has destroyed the eye of a commoner or breaking the bone of a commoner, he shall pay one mina of silver”.¹⁹¹ And if he has destroyed the eye of a free man’s slave or breaking the bone of a freeman’s slave, he shall pay one half of this value.¹⁹² According to A. T. Olmstead, slave sales formed the largest single group of documents, which testified to an enormous increase in the slave population.¹⁹³

Steles and orthostats of Assyrian monarchs exposed a general policy of destruction and deportation of slaves. Tukulti-Ninurta I (1242-1206) deported ten thousand captives from Syria and dragged the king of Babylon to Ashur in chains. Ashurnacirpal II (884-89) celebrated his victory at the town of Kinabu by burning 3000 prisoners and taking the king back to his own capital to be burnt alive. Shameser III (858-824) killed more than 14,000 of the men of Karkar, filling up the streams with their bodies and allowing their blood to flow in the furrows.¹⁹⁴ The Hebrews had a taste of these ancient Babylonian kings. King Sargon II (721-705) initiated the destruction of Samaria/Israel and obliterated all traces of the people, their prized 800-year old culture, cities and religious institutions.¹⁹⁵

As a result of the systematic annihilation of the Hebrews and its culture, it was reported that the northern Hebrew population, known as the Ten Lost Tribes, disappeared from history. Nebuchadnezzar attempted to follow the footsteps of his preceding kings in series of attacks against Judea between 597 and 586, but failed. The book of Jeremiah and 2 Kings Chapter 24, all in the Holy Bible, stated how the Hebrews were deported from their homeland and languished in slavery. They were deracinated, they laboured and farmed the estates and tunnelled the minds of the slave owners. As a matter of fact, they functioned like chattels in the ante-bellum South until Persians under Cyrus brought them respite at the end of the fifth-century.¹⁹⁶

¹⁹¹ Dake’s Annotated Reference Bible 1963, Leviticus 24:19-20 and Exodus 21:16; *Hammurabi Law Code*: section 114, trans. by Robert Francis Harper (The Legal Classics Library, New York, 1987).

¹⁹² Pritchard, James, ed., *The Ancient Near East in Texts and Pictures*, Princeton, NJ: Princeton University Press, 1958, p.161.

¹⁹³ Olmstead, A. T., *History of a Persian Empire*, Chicago: University of Chicago press, 1948, 1959, p. 77.

¹⁹⁴ Luckinbull, D. D, *Ancient Records of Assyria and Babylonia*, Chicago: University of Chicago press, 1926, I, p. 146.

¹⁹⁵ Oppenheim, A. Leo, *In Ancient Near Eastern Texts*, J. B. Pritchard, Princeton ed., NJ: Princeton University Press, 1950, pp. 283-284. Dake’s Annotated Reference Bible: *The Holy Bible containing the Old and New Testaments of the authorised or King James Version Text*, 1963, 2 Kings chap. 17.

¹⁹⁶ The law code of Dairus I in Olmstead, *History of the Persian Empire*, pp. 119-30. See Dandamaer, Muhammad, *Slavery in Babylonia from Nabonassar to Alexander the Great*, Dekalb: Northern Illinois Press, 1984.

2.5 Slavery in Ancient Greece

The practice of slavery in Greece was based in most cases on the concept of labor that was not only ideal for agriculture but also for industry, and public buildings, in silver mines and oarsmen for seafaring vessels. The treatment of slaves also in Greece was not completely different from the above mentioned treatments in the sub-capital 2.3; the Greeks accepted the institution of slavery as a way of life.¹⁹⁷

The consolidation and effective use of the institution of slavery were sporadically punctured by constant threats of escape or rebellion by the subjugated; therefore, the Greeks did not enjoy the maximum advantage accruing from the service of the slaves. According to Thucydides about 20,000 artisans fled during the Peloponnesian War to Decelea in 413, erroneously believing that under the subjugation of Thebes' bondage they were much safer or better in comparison to Athenian rule.¹⁹⁸ The question of Race featured prominently in the treatment of slaves in Greece. It was said that when Dorian tribes invaded the peninsula after the tenth-century B. C., they reduced the native ethnic groups to slavery. Examples are the Messenians who became helots of the Spartans as a result of the two wars fought in the 8th-century. Though the helots were not dispossessed of their ancestral land, however, they were prevented from land ownership and confined to hovels in marshy swarms.

Another development by the Greeks in comparison to the Hebrews, which shall be discussed later in detail is that the slaves did not enjoy any form of manumission and they could only intermarry with superior castes with special permission. They were also compelled to wear distinctive dress, which distinguished them from the elite Spartiates. With the process of time, the helots outnumbered their masters in ratio 10:1, and because of the quantitative superiority of the helots, the Spartiates unleashed a band of secret police, the Krypteia, whose task it was to purge with blood potential rebel's from the serfs.¹⁹⁹ In the first-century, the Spartans possessed about 300,000 helots and the Athenaus of Naucratis (a second-century Egyptian Greek) had a census taken in 310 B. C. which lists 460,000 slaves in Corinth, and another 470,000 in Aegina. The Athenas, which numbered 31,000 citizens had in its census 400,000 slaves.²⁰⁰

¹⁹⁷ Fine, John, *The Ancient Greeks: A Critical History*, Cambridge, MA: Harvard University Press, 1983, p.440.

¹⁹⁸ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 26.

¹⁹⁹ Michell, H., *Sparta*, Cambridge: Cambridge University Press, 1964, pp. 75-84.

²⁰⁰ Athenaus, *The Banqueting Sophists*, tr. G. B. Gulick, Loeb Library, 1927-1941, in Wiedemann, Thomas, *Greek and Roman Slavery*, Baltimore, MD: Johns Hopkins University Press, 1981, pp. 78-88.

While some of the slaves were captured, many were purchased on the island of Chios, an island which became the first specialized Greek slave state and also specialized in the sales of eunuchs.²⁰¹ Some other slaves were descendants of hektemoroi, who had the privilege of owning less than one sixth of their produce in comparison to the Spartan helots who kept on half of what they produce and many others were giving military assignments. A. R. Burn concluding this chapter convincingly added that slaves like corn, were typical export from underdeveloped to a developed area.²⁰²

2.6 Slavery in Ancient Rome

Slavery in the Roman Empire began to spread after the Second Punic War. According to Keith Bradley of the University of Victoria, Rome was one of the five-slave societies in human history. Others were ancient Athens, Brazil in the nineteenth-century, the colonial Caribbean and America before the civil war. By the 1st century A.D., about 3 million people (30-40 % of Italy's population) were slaves, a percentage that was identical with Brazil in 1800 and the U.S. in 1820.²⁰³ About 400,000 slaves were in Trajan's Rome, a city of 1.2 million people. An annual supply of 100,000 slaves were also recorded in Italy between 65 and 30 B.C. Between 50 B.C. and 150 A.D., Italy required 500,000 slaves per year, a figure reminiscent of the average of 60,000 to 80,000 Africans taking to the Western Hemisphere at the height of the Atlantic slave trade.²⁰⁴

Carthaginians, Egyptians, Alpines, blacks from Somalia, Macedonian Greeks, Germans; these slaves were obtained as prisoners of war, through kidnapping or piracy, by will and gifts, via debt slavery or abandonment.²⁰⁵ The modus operandi of disposing these slaves were in the open market. And according to J. P. V. D. Balsdon: *"the bawling voice of the auctioneer (in a language, which most of them could not understand), the indignity of standing on a platform (catasta or lapis) with bare white-chalked feet, of being slapped, punched, pinched, even made to jump by a potential purchaser who wanted to make sure of the quality of the human flesh that he was buying was a dramatic experience"*.²⁰⁶

²⁰¹ Burn, A. R., *The Lyric Age of Greece*, New York: Minerva Press, 1960, 1967, p. 223.

²⁰² *ibid.* p. 294.

²⁰³ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 27; Bradley, Keith, *Slavery and Society at Rome*, Cambridge: Cambridge University Press, 1994, pp. 12, 32.

²⁰⁴ Boren, Henry, *Roman Society*, Lexington, MA: D. C. Heath, 1992, pp. 67-71, 222.

²⁰⁵ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 27.

²⁰⁶ Balsdon, J. P. V. D., *Romans and Allies*, Chapel Hill: North Carolina University Press, 1979, p. 79.

The slave auction took place near the Temple of Castor, in Septa at Tithorea in Phocis at the time of the Isis festival. Slaves, whose prices were between 1200 and 8000 sesterces were sought for the internal and external needs of city households, to assist in ships and industries as water carriers and night attendants, to work on landed estates, to convey their master in sedan chairs to the circus, as gladiatorial trainees, for hard labour in mines, quarries, ships and as objects of sex (particularly good looking boys and girls). Like in the ante-bellum south, a slave, in Roman world, has no right to testify in a court of law and has also no right of marriage or kinship. His name (an allusion to the place of purchase and often ending with the suffix -por Latin for boy) may be arbitrarily assigned to him by his master. Slaves were reduced to inferiors given to theft, lying, and gluttony and could be whipped, branded or chained with metal collars.²⁰⁷ In the words of Professor Bradley, “*the righteousness and degradation of the slaves were manifest in countless ways, but particularly through sexual exploitation and physical abuse*”.²⁰⁸

The skilled slaves were relatively treated well aside from the women who were treated and degraded to sexual exploitation.²⁰⁹ The most degrading treatment was meted out to slaves, who were engaged in the fields, forests and mines work; these slaves were reduced to the state of animals and were treated as such. The accepted norm here according to Cato the Elder in *De Agricultura* was that slaves should be bred like other stock, denied family life and chained in the underground prisons at night with little food and no clothing given to them. The separation of children from their parents was encouraged, these were sold to other prospective buyers and the elderly or sick slaves that were no longer productive were to be left to starve. Agitations from slaves were met with a rod or whip or by banishment to more miserable working conditions.²¹⁰ A recalcitrant slave was consigned to a living dead in the mills or mines and some of them had their ribs broken or covered with bloody welts.²¹¹

²⁷⁷ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 28.

²⁰⁸ Bradley, Keith, *Slavery and Society at Rome*, 1994, p. 28.

²⁰⁹ Jones, Richard Duncan, *The Governance of God*, Columbia University Press, 1930, p. 7, 4:17-20. Jones talks of slaves being *vernae*, produce bread on the farm; Id. *The Economy of the Roman Empire*, Cambridge: Cambridge University Press, 1974, p. 5; Boren, Henry, *Roman Society*, 1998, p. 224.

²¹⁰ Borchaut, Ernest (Trans.), *Cato the Censor on Farming*, New York: Octagon Books, 1966, II, pp. 3-7; Plutarch denounced the mean nature of this instruction; Perrin, B., *Life of Cato*, New York: Loeb, 1924, p. 317.

²¹¹ Pseudolus, cited in Thomas Africa, *The Romans and Their World*, New York: St. Martin's Press, 1970, p. 87. On the plight of slaves in the mines, see Barrow, R. H., *Slavery in the Roman Empire*, New York: Barnes and Noble, 1968, p. 114.

The philosophical Diodorus Siculus in an emotional outburst once wrote that the slaves were not allowed to rest during working hours, were tortured and some of them survived these dehumanizing treatments as a result of sheer physical or will power so that some of them preferred dying to living.²¹²

Between 132 and 138 B.C., approximately 70,000 slaves from Pergamum, Delos, Athens and Sicily attempted an aborted struggle for freedom. A second civilian slave war was recorded between 104-99 B.C. which resulted in the death of 100,000 people and 30 years later, Spartacus led the most celebrated uprising in Roman history. A band of 70,000 fugitives and slaves invaded the armies of Rome before the Thracian gladiator and 6000 of his followers were hanged by crucifixion.²¹³ These draconian treatments melted out did not deter them from further rebellion because in the end of the first-century AD, the ex-praetor, Larcus Macedo was assassinated by a group of his household slaves. Afraid of further retribution from the slaves, the laws of imperial Rome modified some of Cato's rules. Under the present dispensation called the lex Petronia, masters were no longer allowed to deliver slaves to beasts in the amphitheatre. Conversely, the edict of Claudius forbade the abandonment of sick slaves and Domitian outlawed the castration of slaves.

Another interesting development in this connection was that emperor Nero ordered inquiries into the mistreatment of slaves. About two centuries after Spartacus was crucified, he won a posthumous victory when Hadrian outlawed the training of slaves as lanistae (gladiators).²¹⁴ There is a documented evidence that 80% of people living in imperial Rome could trace their lineage to one time slaves. In the field of manumission, three laws were enacted seemingly to enforce manumission: The Lex Fufia Caninia (2 B.C.), Lex Aelia Sentia (4 A.D.) and Lex Junia Norbana (17 B.C.). These regulations were meant to limiting the number of slaves that might be freed by a single owner at any given time. For example, the Lex Fufia Caninia forbade anyone who owned 2-10 slaves from freeing more than half of his possessions. If the individual owned 10-30, he was limited to freeing one-third. If he owned 30-100, he could free one-fourth.

²¹² Siculus, Diodorus C. H., (Trans.), *Old father and others*, New York: Loeb, 12 vols., 1933-1967, 5:38. p.1; On the misery of chained slaves, see Jones, A. H. M., *The Roman Economy*, Totowa, NJ: Rowman and Littlefield 1974, pp. 123-28.

²¹³ For more information on the first two slave rebellions see Siculus, Diodorus, *Old father and others*, 12 vols., 1933-1967, 24 p.2, and 36, pp.1-9. On Spartacus, see Appian, *Bell. Civ.*, Loeb, 1912, pp. 1, 14. 116-120; Plutarch, *The Fall of the Roman Republic*, tr. R. Warner PC, Crassus, 1958, 8 pp. 1-11. See also Boak, Arthur and Sinnigen, William, *A History of Rome to AD 565*, London: Macmillan, 1965, 1969, pp. 156-157, 211.

²¹⁴ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 30.

And if the number of slaves was 100-500, the limit of freed men was one-fifth.²¹⁵ The purpose of such laws was to prevent mass emancipation of alien slaves who might swamp Roman citizens in numbers and in the words of Professors Fritz Heichelheim, Cedric Yeo and Alexander Ward, these slaves may defile or pollute the racial purity of Italian stock through marriage if unchecked.²¹⁶

2.7 Religion: Forerunner of Commercialised Slavery and Comparison of Slavery Movement and the Treatment of Slaves

2.7.1 Introduction

From the preceding examinations of slavery, whether in the ante-bellum era of 1820s or in Rome, Greece and Italy, the treatment and status of slaves were almost identical. A concept, which refers to men as boys and regarded them as things to be disposed off when they were used up, where their women could be sexually abused and exploited and children sold off into bondage, where whole families laboured at gruelling tasks under the constant threats of collective and corporal punishment, where foreign cultures were deemed insignificant and had to experience eradication, where a tenant farmer was reduced to serfdom at the hands of a great lord or as a serf, where the individual slave was reduced to the state of an animal and where men preferred to die than to allow themselves to be subjected to humiliation and indignity. The spiritual revolution presented by Islam and Christianity at this time could eradicate the institution of slavery and the inhuman treatments of the slave owners towards the enslaved, but it did not. This sub-chapter will examine the roles of the monolithic religions towards slavery and slave trade.

2.7.2 Biblical Facts

Beginnings with the Old Testament of the Holy Bible, evidence abound of slaves and slave trade in ancient times. In Genesis 9:25 of the Holy Bible, Noah pronounces a curse upon Canaan, the youngest son of Ham, saying that he would be eved avadim (a servant of servants) to his brothers.²¹⁷

²¹⁵ Gaius Institutes, tr. F. de Zulueta, Oxford: Oxford University Press, 1958, book 1, 1:43; Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 30.

²¹⁶ Heichelheim, Yeo and Ward, *A History of the Roman People*, Englewood Cliffs, NJ: Prentice-Hall, 1984, p. 288; Friedman, Saul S., 1998, p. 30.

²¹⁷ For a comprehensive discussion of the so-called curse of Ham, consult the symposium in the William and Mary Quarterly, 3rd series LIV, January 1997; See also Braude, Benjamin, "The Sons of Noah and the Construction of the Ethnic and Geographical identities in the Medieval and early Modern Periods", 1997, pp. 103-142.

Genesis chapter 14 verse 14 recorded that 318 men born in Abraham's house accompanied him in his mission to rescue Lot at the Battle of Slime Pits. All of the men, who were part of the household, were commended to be circumcised, an imperative only applicable to slaves (see Genesis chap. 17 v. 12). The slave/servant Eliezer of Damascus is promised inheritance if Abraham remains barren (see Genesis chap. 15 v. 2). When Eliezer accomplished the task of finding a bride for Isaac in the city of Nahor (see Genesis chap. 24 vers. 1-56), Isaac blessed his faithful servant. In Genesis chapter 26 verse 29, there has been a lot of controversy of whether the Decalogue implicitly approves of slavery. In Exodus chapter 20 verse 10 and Deuteronomy chapter 5 verse 14, we find the injunction that the Sabbath is sanctified and therefore, no freeman or his family, nor his man servant or maid servant, bondsman or (bond maid) were expected to work on Sabbath. Biblical scholars were however quick to point out that the system of slavery which prevailed in the Torah, was fundamentally different from the cruel systems of the ancient world and even of Western Countries.²¹⁸

Hebrews could only become slaves in one of two fashions: by being sold by a Bet Din (rabbinical court) in payment of a debt, (see Exodus chap. 21) or by selling oneself into slavery on basis of poverty (see Leviticus chap. 25 v. 39). According to this regulation, no person irrespective of religious background or race could be abducted away from his homeland and sold into slavery for "*he that stealth a man and select him-he shall surely be put to death*" (Exodus chap. 21 v. 16). There were slaves captured during the biblical days, like the crammed retainers of Abraham. They were not treated as sub-human beings, but as brethren and were entitled to all rights of the households, for example, residence, food, clothing, duties and inheritance. *Eve dim* was a noble word for hired servant or work.²¹⁹ They could neither be assigned a menial or degrading job, nor might they be abused (see Leviticus chap. 25 vers. 40, 43). The *mishpatim* (Legal codes) reminded one of how bitter the experience of bondage in Egypt was (see Exodus chap. 1 vers. 11-16) and warned that if a heathen slave suffered damage to any of the twenty-four organs or limbs, he is to be set free (see Exodus chap. 21 vers. 26-27). No concubine should be degraded, nor could any female slave be sold to any foreign person (see Exodus chap. 21 v. 7).

²¹⁸ The commentary of Dr. J. H. Hertz, Chief Rabbi of the British Empire, Pentateuch and Haftorahs, London: Soncino Press, 1987, p. 537.

²¹⁹ Davies, David Brion, *The Problem of Slavery in the Age of Revolution*, Ithaca, NY: Cornell University Press; 1975 p. 523.

Though, no clearly defined punishments were laid down for the violation of these rules, however, the judges agreed that the killing of a slave deserved a capital punishment.

The spiritual revolution conjured by the Christian faith during this time could not ameliorate Rome's brutality and domination over men. They even found solace for their human trade of slavery in the Holy Bible. In his Epistle to the Colossians, St. Paul instructs, "*Slaves, obey in all things your master according to the flesh*" (Colossians chap. 3 v. 22). In his first Epistle to Timothy, the same Paul advises, "*Let slaves who are under the yoke account their masters deserving of all honour*" (I Timothy chap. 6 v. 1). In his letter to St. Titus, Paul distinguishes among the classes of men and says, "*Exhort slaves to obey their masters, pleasing them in all things and not opposing them*" (Titus chap. 2 vers. 9-10). Masters were advised to be just and fair to their slaves. Very few church elders entertained an embryonic vision of a society without slaves.²²⁰ The notable Christian Heavy-weights of the Middle Ages and the progenitor of Catholicism, St. Augustine but also Ambrose, Thomas Aquinas and Martin Luther merely attributed the existence of the institution to the fall of man in the Garden of Eden.²²¹ This is a known pattern of argument by mankind, particularly, when justifying their greed for slaves.

Throughout the Middle Ages, the church became entangled in slaves in such a magnitude that she became a proprietor of slaves-import to Europe from Scandinavia, North Africa and Slavonic lands of the East. Slaves were so common among Christians that one Visigothic council decreed that parish churches had to own at least 100 slaves to merit assignment of a priest. Pope Gregory the Great suggested that slaves purchased in Marseilles be trained as missionaries. The abolitionist Henry Ward Beecher subscribed to the same insensitivity, admonishing church audiences during American labour violence in 1877-1878, that people were poor because they were sinners. Charlemagne even taxed his subjects for the maintenance of slaves. In Saxony, church councils delineated rights of slaves, ostensibly prohibiting the enslavement of fellow Christians, at the same time, offering the sacraments to Christian slaves and sanctuary to runaway slaves. However, Pius II (1462), Paul III (1537) Urban VIII (1639), Benedict XIV (1741), Pius VII (1814) and Leo XIII (1888) did issue formal denunciations of slavery.²²² James Fox noted, while writing in the catholic Encyclopaedia more than eighty years ago, that Christianity found slavery in possession through the Roman Empire and when Christianity was in power, it could not

²²⁰ Allard, Paul "Slavery", *Catholic Encyclopedia*, XIV, New York 1913, pp. 36-39. See also Id. "Slavery", *New Catholic Encyclopedia*, New York: Mcgraw-Hill, 1967-1979, XIII, pp. 281-283.

²²¹ See Kretzmann, Norman and Stump, Eleonore (eds.), *The Cambridge Companion to Aquinas*, Cambridge: Cambridge University press, 1993, pp. 222-229.

²²² Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p. 31.

and did not attempt to abolish the institution of slavery²²³ and neither did the Muslims who rivalled Christianity in world power and in the trade of Africa. Unlike other obnoxious practices and rules of European Christians, the biblical slave system provided that all Hebrew bondservant should be released and set free after seven years. (compare Exodus chap. 21 v. 2, Leviticus chap. 25 vers. 1-4 and 10, Deuteronomy chap. 15 vers. 12-18). However, this privilege did not include non-Hebrews. They shall be an inheritance to Hebrews forever (see Leviticus chap. 25 v. 46). Slaves who absconded and later were found were not expected to be returned or handed over to their master (see Deuteronomy chap. 23 vers. 15-16).²²⁴

The Jewish Canon contains a catalogue admonishment for any violation of these laws. Micah chapter 2 verses 1-7 denounces those who covet and seize fields and houses, oppressing and casting out their fellowmen. Amongst Israel transgressions were the selling of the righteous for silver and the needy for a pair of shoes (see Amos chap. 2 v. 6). Isaiah instructed all to seek justice and relieve the oppressed (see Isaiah chap. 1 v. 17) and asked, *“What mean ye that ye crush my people and grind the face of the poor?”* (Isaiah chap. 3 v. 17) and continued in chapter 58 v. 6, *“Is not this the fast that I have chosen? To loose the bonds of wickedness, to undo the heavy burdens and to let the oppressed free, and that ye break every yoke”*.²²⁵ Before the fall of Jerusalem to the Romans in 70 A.D, it was not allowed to expose oneself or children to bondage through indebtedness. In the Talmud, rabbis admonished, *“he who acquires a slave to himself acquires a master to himself”* (Kidd.Zoa) as well as *“he who multiples female slaves, increases licentiousness”*. Slaveholder had to manumit slaves who were converted following, either ablation or circumcision (Yebamoth 4b-48a). Such proselytes were also human beings (Yebamoth 37a).²²⁶ One would have expected that a tribe who suffered the deracinated homesickness of people uprooted from their lands when they toiled for Pharaoh in the fourteenth century and when Nebuchadnezzar forced the Babylonian captivity upon them 800 years later would turn vengeance against humanity and enslave the enslaveables. They witness the pillaging of their shrines by Philistines, Moabites and the Ethiopian Sheshonk. Unaccountable numbers were killed by the Assyrian Kings, Tigleth Pileser III and Sargon, who succeeded in exterminating the ten northern tribes of Israel in the eighth century.²²⁷

²²³ Olmstead, A. T., *History of the Persian Empire*, Chicago: University of Chicago, 1948, 1959, pp. 36-39.

²²⁴ Friedman, Saul S., *Jews and the American Slave Trade*, 1998, p.35.

²²⁵ *ibid.*

²²⁶ Baron, Salo, *A social and Religious History of the Jews*, New York Columbia University Press and Jewish Publication Society, 1937-1952, p. 267; Compare also Friedman, S., p. 35.

²²⁷ *ibid.* n.²²⁴ p. 36; Krefzmann, Norman & Stump, Elenore, eds., *The Cambridge Companion to Aquinas* (Cambridge Uni. Press, 1993), pp. 222-229.

Inspired by a similar racial hatred, the Syrian Greek Monarch Antiochus IV killed thousands of Hebrews between 168 and 164 BC. Over the course of two centuries; the Romans massacred an estimated two million Hebrews and enslaved tens of thousands more when they tried to obliterate the Hebrewish state and Religion. ²²⁸

2.7.3 The Essence of Islam and the Role of Muslims in Slavery and Slave Trade

I shall now turn the searchlight to the role of Islam in ancient slavery vis-à-vis commercialised slavery. Islam and Christianity competed for slaves during all periods of slavery. However, they differed only in brutality. About 10-15% of slaves shipped to America in the ante-bellum period were Muslims.²²⁹ Until 1804 and 1881 respectively, Islam was not yet known for example in Hausa land and Masima.²³⁰ An estimated 50% of the population of Gambia and Guinea, 20% of Bissau, Ivory Coast and Nigeria and 5% of Sierra Leone, Upper Volta, Ghana and Cameroon were Muslims.²³¹

Islam was introduced into Africa by Arab Missionaries in the seventh-century. It is also a known fact that the first Muezzin (caller to prayer), Bilal, was an African.²³² In contrast to the New Testament of the Bible, Quran prohibited the enslavement of fellow Muslims and supported manumission for anyone who converted to the faith and could pray in Arabic before two witnesses and a Kadi (Muslim judge). Islam has two conditions under which a slave could serve his master, namely the Mudabbar indentured through the life of a master and the mukatil, who could work to achieve his freedom. Provision of manumission for slaves was also allowed. Emancipated slaves stayed with their masters, but could adopt his name and also become his clients.

²²⁸ Thousands were massacred when Pompeii conquered Jerusalem in 63 BC, at least 30,000 when Crassus ransacked the temple in 54 BC. Josephus tells of more than one million killed in the siege of the Holy City in 66-70 AD, another 100,000 taken for the entertainment of Romans in amphitheatres and mines. About 250,000 Jews died in Alexandria, Cyprus and Cyrenaica in the little known war of Quietus between 115 and 117 AD. Dio Lassiuss claims that at least 580,000 Jews died during the messianic uprising of Bar Kochba between 132 and 135 AD.

²²⁹ Austin, Allan, *African Muslims in Antebellum America*, New York: Garland, 1974, pp. 29-36; Gardell, Mattias, *The sun of Islam will Rise in the West, in Muslim Communities in North America*, ed. Yvonne Haddad and Jane Smith, Albany: Sunny Press, 1994, p.31.

²³⁰ Sindima, Harvey, *Africa's Agenda: the Legacy of Liberalism and Colonialism in the Crisis of African Values*, Westport, CT: Greenwood Press, 1995, p. 10.

²³¹ Robinson, Francis, *Atlas of the Islamic World since 1500*, Facts on File, 1974, p. 175.

²³² Friedmann, Saul S., *Jews and the American Slave Trade*, 2000, p. 228.

Though Islam preaches love, the treatment of blacks in Islamic countries left much to be desired. Whether Ethiopians, Zanj, Mawla, Nubians or as Sudanese, blacks have always been treated with scorn in the Arab world. The supposedly curse of Canaan by Noah was embellished in medieval times with tales of miraculous transformations of virtue, so blacks who became white and whites being punished for evil deeds by becoming black.²³³ Slaves were regarded as greedy, avaricious, base, untrustworthy and impossible to amend.^{234, 235} Al-Jahiz, a Muslim scholar writing in the ninth-century, portrays a picture of “*cheerful, laughing*” creatures with an innate aptitude for “*measured and rhythmic dancing, for beating the drum to a regular rhythm*”. A derogatory qualification of African slave during his time.²³⁶ Another Muslim writer from Basra wrote that “*the like of the crow among mankind are the Zanj, for they are the worst of men and the most vicious of creatures in character and temperament*”.²³⁷

²³³ In the ninth century, Wahab Ibn Munabbih related how Ham, the son of Noah had been a handsome white man till God “*changed his colour and the colour of his descendants in response to his father’s curse*”. See Lewis, Bernard, *Islam from the Prophet to the Capture of Constantinople*, New York: Harper Torch 1974, II, p. 210. For other interpretations of the curse of Ham, see Muhammad, Akbar, *The Image of Africans in Arabic Literature, Slaves and Slavery in Muslim Africa*, John Willis, ed., London: F. Cass, 1985, I. pp. 47-75; Isaac, Ephraim, *Genesis, Judaism and the Sons of Ham*, 1985, pp. 75-91.

²³⁴ According to one Arabic saying, three things interrupted prayer- a donkey, a dog and a mawla. To be called the son of a black woman” was an insult. The prophet Muhammad himself was said to have commented to the Ethiopian-Zanji, “*When he is hungry, he steals, when he is sate, he fornicates*”. Although that Hadith may be spurious, the [prophet was also quoted as warning against “*bringing black into your pedigree*”, for the Zanj is “a distorted creature”. See Lewis, Bernard, *Race and Colour in Islam*, New York: Harper Torch, 1970, p. 19, pp. 91-92 and Sersen, William John, *Stereotypes and Attitudes toward Slaves in Arabic Proverbs: A Preliminary View*, *Slaves and Slavery in Muslim Africa*, 1985, pp. 92-105.

²³⁵ The geographer Ibn Al-Faqih contrasted the “murky, malodors, depraved” blacks with fairer people and attributed their colour to remaining too long in the womb. The tenth century historian Al-Masudi, quoting Galen, listed traits found in blacks: “*frizzy hair, thin eyebrows, broad nostrils, thick lips, pointed teeth, smelly skin, black eyes, furrowed hands and great merriment*.” Al-masudi’s contemporaries referred to the Zanj as “*people distant from the standard of humanity*” and possessing little understanding or intelligence. Said al-Andalusia, an eleventh-century Muslim, judge from Toledo, faulted blacks for lacking self–control and steadiness of mind. A century later, Muhammad Al-Idrisi, writing in his Kitab Rujar, took note of the Zanj’s furrowed feet, stinking sweat and lack of knowledge and defective minds. (in Willis, John, *Slaves and Slavery in Muslim Africa*;1985)

²³⁶ The thirteenth-century Persian Nasir al-Din Tusi commented that the Zanj differed from animals only in that “*their two hands are lifted above the ground*”, and “*many have observed that the ape is more teachable and more intelligent than the Zanj*”. The fourteenth-century Tunisian chronicler Ibn Khaldun wrote: “*the only people who accept slavery are the Negroes, owing to their low degree of humanity and their proximity to the animal state*”. And in a passage reminiscent of America’s bigoted past, the eleventh-century Baghdad physician Ibn Butlan declared, “*if a Zanj were all to fall from heaven to earth, he would beat time as he goes down*”; Lewis, B., *Race and Colour in Islam*, 1871, pp. 34-38, 99; Id. *Slavery in the Middle East*, New York: Oxford University Press, 1990, pp. 46-52.

²³⁷ Friedman, Saul S., *Jews and the American Slave Trade*, 2000, p. 229.

Perhaps, the slavers were amazed that the enslaved who were supposed to be moaning slavery, seemed delighted and cheerful. It takes a philosophical hindsight to evaluating this scene, where sorrow and pain were converted into melancholy and seemingly joy. While the Muslims maintained that Christians and Hebrews kidnapped the African from their ancestral homeland, it must be remembered or rather recalled that it was the Arab Muslims who expanded the African slave trade 700 hundred years before the Portuguese rounded the Bight of Benin.²³⁸ The constant demand for pepper, palm oil, ivory, gold and human slaves came from Moors and Turks at a time when feudalism had virtually eliminated the institution from Western Europe and the World. The causes for the enslavement of Africans, particularly by the Europeans, came from the Arabs who spread over Northern Africa in the eighth century.²³⁹ No Arab regarded the trade as any more evil than a horse-dealer regards as evil or abnormal the buying or selling of horses.²⁴⁰

The Arabs were the progenitors of commercialised slavery in Africa; they were the procurers and the suppliers. The Arabs had myriads of experience in slave trading before the European entrepreneurs began to make money out of the business and they knew every trick of the trade and how to ambush the Africans. They were also versed in the game of deceit and also to discovering their hiding places.²⁴¹ The so-called “Afro-Arab Unity”, proclaimed at times by the then OAU and now AU, is a most pernicious hoax played on African culture and history till date. It is a distortion of history and an insult to collective intelligence of Africans to assume that the Arabs played a lesser role in slavery than the European. However, in barbarity of slavery, the Europeans were *ceteris paribus* (first among equals).²⁴²

²³⁸ Lewis, Bernard, *Islam from Prophet Muhammad II*, Oxford, New York, October 1987, pp. 210-211.

²³⁹ On the enslavement of the Gambia, Yoruba, Yoroko, Kumu, Busa, Kutukuli and Bobo people, see Willis, John, *Jihad and the ideology of Enslavement*, 1985, pp. 16-26; Id. *Slaves and Slavery in Muslim Africa*; See also Hiskett, Mervyn, *The Image of Slaves in Hausa Literature*, 1985. p. 123; Johnston, James, *The Mohammedan's Slave Trade*, *Journal of Negro History*, XIII, October 1928, pp. 478-491.

²⁴⁰ Phillips, Ulrich Bonnell, *American Negro Slavery*, New York, 1966, p. 9; Laffin, John, *The Arabs as Master Slavers*, Englewood, NJ: SRS Publs., 1982, p. 9.

²⁴¹ Otobil, Kwesi, *The Agonistic Imperative: The Rational Burden of Africa-Centeredness*, Bristol: Wyndham Hall Press, 1994, p. 79; In his glossary, C. Tsehloane Keto distinguishes between the Christian slave trade of the West and the Muslim in the North and East, 1999; Springs, Laurel, *The Africa-Centred Perspective of History: An Introduction*, NJ: K .A. Publishers, 1990.

²⁴² Friedmann, Saul S., *Jews and the American Slave Trade*, 2000, pp. 230-236.

The Arabs hegemony in Africa was no less malign to the African World than any other external hegemony. Arab slave trading in Africa began as early as 641 when they arranged to import 360 Nubians per year into Egypt. Berber and Tuarag tribesmen travelled from North Africa to the Souk er rekik (Market) in Timbuktu to purchase slaves. The Borno people were chained and marched to Kuka near Lake Chad in central Africa. Slave markets were so many in Northern Somalia that the region across the Red Sea from Jiddah to Hodeida in Asir was nicknamed the Cape of Slaves. Between 1860 and 1873 more than four million Africans were peddled by traders in Sudan. In Sudan, the public standing or wealth of an individual was measured by the number of African slaves he possessed.²⁴³ Slaves, who were not used on plantations in Sudan, were ultimately shipped to Hegat, Muscat, Oman, Zanzibar, the French Seychelles, Madagascar and India. Others were taken to Tripoli, Tunisia and Zanzibar. In East Africa, female slaves were priced higher than the males, a black African cost less than a mulatto, dark Caucasian or blond in that ascending order.²⁴⁴

The common strategy of the Arabs and the Europeans were to come to African community, settle in a grass-rooted hut from which they flattered the chief with goods and knowledge of Swahili. In exchange for cloths, beads, wine and musket, the chief gave them ivory, then women and finally regular supply of slaves. Over the years, the Arabs and the Arab Muslims became aware of tribal rivalries and through his own-armed band, raided the communities and taking the able-bodied young men and girls. As rightly described by Beachey, “*His ruga ruga were his dogs of war, ripe for carnage, revelling in blood*”.²⁴⁵ The Arabs provided an ever-hungry market for slaves; they promoted and supported wars between chiefs and the power of their guns obliterated large communities.²⁴⁶ In 1949, a Hausa woman from Nigeria related that “*there was always fear of war and enslavement*”.²⁴⁷ Commenting in the 1860s, David Livingstone noted how “a dead like silence” hung over depopulated villages.

²⁴³ Nwulia, Moses, *Britain and Slavery in East Africa*, Washington, D. C: Three Continents Press, 1975, p. 64.

²⁴⁴ The economics of slavery are outlined in Manning, Patrick, *Slavery and African Life*, Cambridge: Cambridge University Press, 1990, pp. 86-109; and Fisher, Allan and Fisher, Humphrey, *Slavery and Muslim Society in Africa*, Garden City, NY: Doubleday, 1971, pp. 121-128; See also Klein, Martin and Robertson, Clair (eds.), *Women and Slavery in Western Sudan, in Women and Slavery in Africa*, Madison: University of Wisconsin Press, 1983, p. 67.

²⁴⁵ Beachey, R. W., *The Slave Trade of Eastern Africa*, London: Rex Collins, 1976, p. 184.

²⁴⁶ Farrant, Leda *Tippu Tip and the East African Slave Trade*, London: Hamish Hamilton, 1975.

²⁴⁷ Fisher, Allan and Fisher, Humphrey, *Slavery and Muslim Society in Africa*, London, 1970, p. 33.

Houses were abandoned, broken by rain or destroyed by free wild animals that roamed farmlands. Corpses could be seen everywhere, including streams where they floated as feast for crocodiles. Captives, who could be pacified with hippo-hide, butts and bayonets were chained or tied together for the march that took three days to three months.

A nineteenth century Bohemian traveller, Ignatius Palme, revealed how slaves (between 300-600 persons) were controlled in a convoy. To avoid flight, a Sheba is hung around the neck of the full-grown slaves: *“it consists of a young tree about six to eight feet in length and two inches in thickness, forming a fork in front: this is bound round the neck of the slave so that the stem of the tree presents anteriorly, the fork is closed at the back of the neck by a crossbar and tightened in situ by straps cut from a raw hide; thus the slave, in order to be able to walk, is forced to take the tree in his hands and carry it before him. No individual could however, bear this position for a long length of time and to relieve each other, therefore, the man in front takes the log of his successor on his shoulder and this measure is repeated in succession. It amounts to an impossibility to withdraw the head but the whole neck is always excoriated, an injury leading often to inflammatory action, which occasionally terminates in death”*.²⁴⁸

Africans thus, shackled, were unable to sleep at night. They were not allowed to eat and their bodies swelled with oedema. If the heat of the day (about 110 Fahrenheit) did not kill some, then the chill of the night does the job and those whose wounds festered were untreated. A distinction between whites and blacks were obvious, particularly in treatment.²⁴⁹ The Eunuchs priced higher than a normal male at the market and some of the slaves had to be castrated for this purpose. Blacks would have both testicles under pain of death removed; whites, however, would lose only one of his testicles.²⁵⁰ Aware that profit could still be made, even if one of three made it to the market, the traders threw overboard all considerations for human dignity. Mortality and the rape of women were a common feature and in the event of the outbreak of epidemics, like yellow fever, cholera, plaque or small pox, the chained slaves would be left uncared for.²⁵¹

²⁴⁸ Fairservis, Walter, *The Ancient Kingdoms of the Nile*, New York: Mentor, 1962, pp. 171-177.

²⁴⁹ Friedman, Saul S., *Jews and the American Slave Trade*, 2000, p. 231.

²⁵⁰ See Beachey, R. W., *The Slave Trade of Eastern Africa*, London: Rex Collins, 1976, pp. 169-174; Fisher, Allan, *Slavery and Muslim Society in Africa*, pp.171-177; Friedmann, Saul S., *Jews and the American Slave Trade*, 2000, p. 231.

²⁵¹ *ibid.* Friedman, p. 231.

One British observer from India described in 1873: that “one gang of lads and women, chained together with iron neck rings was in a horrible state, their lower extremities coated with dry mud and their own excrement and torn with thorns, their own bodies were framework and their skeleton limbs tightly stretched over with wrinkled, parchment-like skin”.²⁵² Those who survived the death matches were piled into vessels bound for the island of Zanzibar, twenty–four miles of the coast of East Africa. Those who died or were unlikely to survive were thrown aboard the ship so as to spare the trader of extra tariff on his property. The dead were eaten up by dogs or thrown overboard to drift down with the tide. And if in their course, they strike the beach and ground, the natives came with a pole and pushed them from the beach and their bodies continue to drift on until another stoppage when they were served in a similar manner.²⁵³ Rebels were chained by the neck to the ground out the Caliph Palace, to die exposed to the sun, their only food was a broken gourd filled with gruel, flies and other insects. About twelve years’ old girls were shipped off to harems.²⁵⁴

After the abolition of slavery and the attempt by the British Royal Navy to stop the trade, 40,000 slaves were imported into the Caliph Port each year, well into the twentieth century. During the reign of Hammed bin Mohammad, about 5,000 Arabs on Zanzibar owned as many as 2,000 slaves each, “the slaves were” stowed in the literal sense of the word in Bulk, the first along the floor of the vessel, two adults side by side, with a boy or girl resting in between or on them until the tier was complete. Over them, the first platform was laid, supported by an inch or two clear of their bodies, thus, the second tier was stowed and so on until they reach above the gunwale of the vessel.²⁵⁵ Those of the lower portion of the cargo that died cannot be removed. They remain until the upper parts were dead and thrown overboard.²⁵⁶ One-tenth of those carried away usually survives until the final destination was reached. Occasionally, some loose their lives, like the 300,000 Zanjis, who lost their lives in Iraq in the 9th century, on account of their rebellion against the inhuman treatments.

²⁵² Fisher and Fisher, *Slavery and Muslim Society in Africa*, 1970, pp. 91-98.

²⁵³ Beachey, *Slave Trade of Eastern Africa*, London, 1976, pp. 60-61.

²⁵⁴ *ibid.* pp. 8-11, 17-23, 38-40, 89-92, 121-126; Dowd, Jerome in his *Slavery and the Slave Trade in Africa, Journal of Negro History II*, January 1917 made the comparison between buying a slave and a horse and concluded, “the sight was sickening”, p. 18.

²⁵⁵ Friedman, Saul S., *Jews and the American Slave Trade*, 2000, p. 231.

²⁵⁶ Cooper, Frederick, *Plantation Slavery on the East Coast of Africa*, New Haven, CT: Yale University Press, 1977, pp. 33-38.

An estimated figure of 12 million Blacks were taken away by the Arabs between 1510 and 1865.²⁵⁷

Many Sheik Kingdoms in the Middle East and in Africa continued to practice slavery even after 1926. An estimate of UNESCO in 1960 stated that about one-sixth of Kounta tribe of Mauritanian was enslaved. And the study of 1965 said that about three-fourth of the Tuaregs of West Africa-some 465,000 people — were under bondage.²⁵⁸ Chattel slavery was legal in Guinea till 1953, in Cameroon and also in Nigeria until the 1960s, Saudi Arabia until 1962, Mauritania until 1980. Arabs of Sudan continue to haunt slaves until today.²⁵⁹ There was slavery in Djibouti, Dubai, Oman and also in modern times. In the year 1972, about 25000 slaves still existed in Saudi Arabia!²⁶⁰

Anti-Slavery International reported that more than 55 million children (Including shepherds in Sudan, girl domestic in West Africa, under aged textile workers in Turkey, Pakistan and Bangladesh) were slaves.²⁶¹ In 1992, Africa Watch, a Washington-based research group, reported that about 100,000 slaves were still in Mauritania, a figure confirmed by Newsweek in May of the same year.²⁶² Ironically, slavery persists in some part of the Arab World, however, with a more sophisticated modus operandi. One would have expected that after the manifestation of the horrors of slavery and the intensive relationship between Arabs and Africans as a result of geographical proximity, slavery would have stopped. It appears that the greed to acquiring slaves obviously persists longer than the will to abolish slavery and slave trade. Though, the enslaved enjoyed little or no rights, they were however, accorded privilege of manumission. The primary aim of all slave societies as discussed above was economic motivation. This motive appeared to overwhelm every other consideration. The strategy for buying or kidnapping slaves differs from country to country. However, some countries preferred the combination of buying and kidnapping, while others preferred the subversive-kidnapping-buying methodology.

²⁵⁷ Laffin, John, *Arabs as Master Slavers*, 1982, p. 34; Beachey estimates that as many as 2 million blacks were taken in the nineteenth century alone. *Slave Trade of Eastern Africa*, 1982, p. 262; Compare: Friedman, Saul S., *Jews and the American Slave Trade* 2000, p. 300.

²⁵⁸ Derrick, Jonathan, *Africa's Slaves today*, New York: Schocken Press, 1975, p. 32-63.

²⁵⁹ Id. p. 56.

²⁶⁰ Rosenberg, Andrea, *The Middle East Slave Trade*, Middle East Review Winter 1976/77, IX, pp. 58-62.

²⁶¹ Friedman, Saul S., *Jews and the American Slave Trade*, 2000, p. 234.

²⁶² *Newsweek* (May 4, 1992), CXIX, pp. 32ff.

2.8 The Historical dimension of the Atlantic Slave Trade and the Middle Passage (1440-1850)

Slavery developed in Africa, perhaps as did everywhere else, as a result of contact between different civilizations. The history of the people concerned and of the encounters between them is determinant.²⁶³ This study, which is limited to the Atlantic slave trade and the triangular voyages between Europe, Africa and the Americas, shows that from its beginnings slavery developed in an inter-continental context, and that the institutions of war and trade were the necessary conditions for its existence.²⁶⁴

A “triangular trade” is a historical term referring to the 18th-century trade between South America, New England and the west coast of Africa. The commodities involved were several, but principally they were sugar, rum and slaves. The trade brought much wealth to North America and the profits ultimately became the foundation of American capitalism. As pivot to likely reparation claims, or redress and restitution, this chapter will be accorded priority. However, the following observations must necessarily restrict themselves to the essential ingredients that may present a watertight evidence for legal claims. The aim of this rather summary and arbitrary procedure is merely to suggest a few social historical and political frame works within which an examination of the differing evolution of slavery in other parts of Africa can be undertaken.²⁶⁵ The obvious reason therefore is because of the extension and complexities of the Atlantic slave trade.

The African socio-economic links to other states of the world were largely responsible for the massive slavery and slave trade amongst the nations of the world. The peculiarity and distinctiveness of African society and African slavery results in large part from local responses to global connections.²⁶⁶ For a clear picture to emerge from this labyrinth of complexities, three historical facts shall be advanced: 1). That slavery existed and sometimes flourished in Africa before the transatlantic slave trade, but neither the continent nor persons of African origin were distinguished in commercialised slave trading. 2). That the kidnapping and sale of slaves across the Atlantic between 1450 and 1850 encouraged expansion of commercialised and transformation of slavery within the continent, so that the system of slavery became prominent in societies all across Africa.²⁶⁷

²⁶³ Meillassoux, Claude, *The Anthropology of Slavery*, Chicago, 1991, p. 43.

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*, p. 44.

²⁶⁷ Compare Hochschild, Adam, *King Leopold's Ghost*, 1999, p.10; Iliffe, John, *Geschichte Afrikas*, 2. Auflage 2000, pp. 172-173.

3). That also after the abolition of the transatlantic slave trade and the European conquest of Africa, millions of persons remained in slavery.²⁶⁸

A trans-Saharan slave trade developed from the 10th to 14th century that featured the buying and selling of African captives in Arabic countries, such as the area around present day Sudan. Most of the enslaved were females who were purchased to work as servant, agricultural labourers or concubines. Some other slaves were shipped north across the desert of North West Africa to the Mediterranean coast. There, in slave markets such as Ceuta (Morocco), African slaves were purchased to work as servants or labourers in Spain, Portugal and in other countries.²⁶⁹ By the mid-1400, Portuguese ship captains had mastered the ability to navigate the waters along the West coast of Africa and had begun to trade directly with slave suppliers who built small trading coast, or factory on the coast. With this new opening to the slave trade, the Europeans were therefore able to circumvent the trans-Saharan caravan slave trade.²⁷⁰ However, the slave trade to Europe began to decline in the late 1400s because of the development of sugar plantations in the Atlantic Islands of Madeira and Sao Tome. These two islands, located in West Africa and in the gulf of Guinea, became leading centres of world sugar production and plantation slavery from the mid-1400s to the mid-1500s.²⁷¹ The early trade of the Europeans with West Africa was however not in people but was in gold because at this time of history, the Europeans did not have the wherewithal to overpower the African states before the late nineteenth century, and therefore the gold production was concentrated in the Akan gold fields and the backcountry of present day Ghana remained in African hands.

²⁶⁸ Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds.), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p. 1720; Hisketts, Qu Meruyn, *The Development of Islam in Africa*, London, 1984, pp. 6-7; National Geographic Deutschland, *Das Sklavenschiff*, August 2002, pp. 125-132; Iliffe, John, *Geschichte Afrikas*, 2. Auflage 2000, p. 173; Hugh, Thomas, *The Story of the Atlantic Slave Trade, 1440-1870*, Author of Conquest: New York, 1997, book I, chap. 1, pp. 21-24.

²⁶⁹ Meillassoux, Claude, *The Anthropology of Slavery*, Chicago, 1991, pp. 54-60; Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds.), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p. 1865.

²⁷⁰ Thomas, Hugh, *The Story of the Atlantic Slave Trade*, 1997, pp. 21-24.

²⁷¹ Compare Meillassoux, Claude, *The Anthropology of Slavery*, Chicago, 1991, pp. 69-72; Thomas, Hugh, *The Story of the Atlantic Slave Trade*, 1997, pp. 48ff; Bovill, E. W., *The Golden Trade of the Moors*, Second Edition, London Oxford New York, 1970, p. 116; Phillips, William D., *Slavery from Roman Times to the early Transatlantic Trade*, Minneapolis, 1985, Chapter 8; de Saunders, A.C., C.M., *A social History of Black Slaves and Freedmen in Portugal*, Cambridge, 1982, pp. 1441-1555.

As a result of agreements between Africans and the Europeans and rivalries for the African gold trade, there were constructions of dozens of trading forts, of stone castles, along a 161 kilometre coastal stretch of Ghana. However, in the late seventeenth century the value of Europeans goods traded for African people surpassed the value of goods exchange for gold. Subsequently, these gold forts became slave forts, where myriad of African slaves were confined in prisons awaiting sale and shipment.²⁷²

2.9 The Slave Trade, Development of Colonial Plantation Economy and Exploitation

In the colonial period, before the rise of large-scale industry, slavery existed in two different economic forms in the Western world, one representing its past, the other its future. The first was the patriarchal form in which it had always flourished from the beginning and the patriarchal plantations were largely self-sustained, retaining many features of natural economy. Production was then divided into two parts, one devoted to the cultivation of such cash crops as tobacco, corn, hemp, etc. and the rest were assigned to domestic consumption.²⁷³ The plantation system developed along these lines in the Virginia and Maryland colony. Blacks and whites who worked in the fields encumbered a lot of problems based on prejudice and deep seated antagonisms between them. Relations between masters and slaves had a paternal character; the slave owner was always at the site of production and supervising the slave workers. Field hands were often indulgently treated. Black servants, who replace white servants in the household as well as in the field, were frequently on intimate and trusted terms with the master and his family and remained in the family generation after generation.

Most of the plantations raised their own food, wove their own cloths, and built their own houses. George Washington estate for example, benefited from such labour by slaves. In South Carolina and Georgia, the plantation economy followed a different pattern. The chattel slavery, which was predominantly practiced above, lost its patriarchal characteristics and transformed itself into a purely commercial system of exploitation based upon the production of a single money crop.

²⁷² Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p. 1866. Compare also Thomas, Hugh, *The Slave Trade, The Story of the Atlantic Slave Trade*, 1997, p. 21ff; Iliffe, John, *Geschichte Afrikas*, 2000, p. 173.

²⁷³ *New International*, Vol. 5, Number 12, December 1939, pp. 343-345; Compare *Wikipedia: The Free Encyclopaedia; The Slave Community: Plantation Life in the Antebellum South*. Rev. ed., 1979; Blassingame, John W., and Henderson, Mae G (eds.), *Antislavery Newspapers and Periodicals. 5 Vols.*, 1980; Blesh, Rudi and Harriet, Janis, *They all Played Ragtime*, 4th ed., 1971; Blier, Suzanne Preston, *African Vudu: Art, Psychology and Power*, 1995.

South Carolina and Georgia's economy was dependent upon slave labour and consequently became the strongholds of the slave system in the English colonies of the mainland.²⁷⁴ Until the rise of the Cotton Kingdom, the capitalist plantation system in the English colonies was perfected on the largest scale in Jamaica.

Economically considered, the whole island was converted into one vast plantation devoted to the cultivation of sugar cane and the making of sugar, which was then shipped overseas for sale. The individual plantations, carved in large sections out of the fertile soil were in many cases owned by landlords resident in England and managed by hired superintendents. They were extremely productive and worked entirely by slave labor.²⁷⁵ According to Ulrich B. Phillips, an average unit of industry in the Jamaican sugar fields became a plantation of the total of about two hundred Blacks, of whom more than half were workers in the field. The working conditions of the African slaves were deplorable and excruciating.²⁷⁶ Consequently, the concentration of production upon sugar combined with exclusive use of slave labour gave rise to social and economic tension amongst the workers in the Cotton Kingdom. The small farmers who had originally worked in the island were systematically removed and disappeared. The inhabitants came to be categorized into two hierarchies: the planters and their agents on top and the Black slaves at the bottom. A sprinkling of merchants and mechanics between them catered for the needs of the plantation owners. The sugar lords were absolute rulers of the island, exploiting it for their exclusive benefits and representing it at Westminster.²⁷⁷ As could be expected the chattel slavery began to determine the future and also predominated the economy of the Southern kingdom. Apart from the South, slavery was a decaying institution in the English coastal colonies at the time of the American Revolution.

²⁷⁴ *New International*, Vol. 5, Number 12, December 1939, pp. 343-345. See also www.pbs.org/wgbh/aia/part1/narrative.html.

²⁷⁵ *ibid.*; Chandra, Siddharth, 1969, *American Sugar Kingdom: The Plantation Economy of the Spanish Caribbean, 1898-1934* (review), *Technology and Culture*, Vol. 42, Number 2, April 2001, pp. 342-354, The John Hopkins University Press, London.

²⁷⁶ *New International*, Vol. 5, Number 12, December 1939, pp. 343-345. Compare von Schimmelmann, Heinrich Carl in *Hamburger Morgenpost* of Monday 18th September 2006, pp. 8-9; Chandra, Siddharth, 1969, *American Sugar Kingdom: The Plantation Economy of the Spanish Caribbean, 1898-1934* (review), *Technology and Culture*, Vol. 42, Number 2, April 2001, pp. 342-354, The John Hopkins University Press, London.

²⁷⁷ Thomas, Hugh, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, pp. 203-205; *New International*, Vol. 5, Number 12, December 1939, pp. 343-345.

The decline in the value of tobacco forced many planters to device other forms of crop rising in which slave labour could not profitably compete with free labour. Finding their slaves to be an economic liability, some masters began to nurse the idea of emancipation and therefore the slave institution began to disintegrate, giving way here and there to tenant farming, share-cropping, and even wage-labour.²⁷⁸

The importance and effectiveness of the Atlantic slave trade may not be adequately stated, if the role and the impulse of the merchants giving to slavery and slave trade are not mentioned. The Aristocratic economy had the responsibility of supplying slaves and retaining those who were optimal and useful for its use. The Aristocracy supplied the market with slaves but did not function through the market. In contrast, the merchant economy developed entirely around the market. For example, they bought captives from the aristocrats, conditioned them, transported and exported them to distant land from which demands have been transmitted through the merchants. In this context, they formed the pillar for the spread of slavery, opening up new markets along their route wherever local production could be exchanged for their merchandise and, in particular, for their captives. In this connection, they redirected and diffused slaving exchange, by making it accessible not only to aristocrats but also to ordinary people, as long as they had the means to buy slaves.²⁷⁹

Therefore, it would not be an exaggeration to postulate here that without the merchants, the effectiveness and quantity of slavery and slave trade would not have been achieved. However, the discovery of the new world in 1492 by Christopher Columbus marked the beginning of the transatlantic trading system. Through this new discovered trade, Africans were in large numbers exported to the various sites of production, thereby playing significant roles in the economies mentioned above. The genesis of this was the arrival of the Spanish adventurers in the Americas, who were hoping to trade for riches but soon began to enslave the Native American people in the search for gold and silver. The aim of the Spanish did not however succeed because disease, malnutrition and Spanish atrocities led to the deaths of millions of the Indians of the Americas and by 1520s, the depopulations of the Indians compelled the Spanish government to look for alternative sources of labour. As a result of this, the Spanish contracted the Portuguese merchants to supply African slaves to Spanish territory in the new world.

²⁷⁸ Compare Curtin, Phillip, *The Rise and Fall of the Plantation's Complex*, Cambridge, 1990; Galloway, J. H., *The Mediterranean Sugar Industry*, Geographical Review XVII, 1977, pp. 177-92.

²⁷⁹ Meillassoux, Claude, *The Anthropology of Slavery*, 1991, pp. 239-240.

The first transatlantic slave voyages from Africa to the Americas began in the early 1520s on Portuguese vessels sailing from West Africa to the large Caribbean island of Hispaniola, the earliest European name for present day Haiti and for Dominican republic.²⁸⁰ Around the mid-1500s, the transatlantic slave trade swelled when the Spanish began to use African slave labour alongside Native Americans to mine silver in Peru. The slaves were transported to Colombia and Panama and further to overland in the Pacific coast of South America. There was also a remarkable increase of slave supplies in 1570s when the production of sugar plantations in Brazil were intensified, particularly as the merchants adopted production techniques, which originated in Madeira and Sao Tome. By 1620s, African labour had replaced Indian labours on Brazilian sugar plantations. At the beginning of British colonies in Virginia and Barbados (1630s-1640s), Jamaica (1660s) and South Carolina (1690s) and the French colonies Saint-Domingue (present day Haiti), Martinique and Guadeloupe (1660s-1680s), most labourers on the plantations were young European males who agreed to work for three to five years in return for free oceanic passage and food and housing in the Americas.²⁸¹ These workers were called indentured labourers. By the late 17th and early 18th centuries, tobacco, sugar, indigo (used to make blue dye) and rice plantations switched from European indentured labour to African slave labour. By the mid-1700s Brazil, Saint Domingue and Jamaica were the three largest slave colonies in the Americas and by the 1830s, Cuba emerged as the principal Caribbean plantation colony. Throughout the history of the transatlantic slave trade, however, more Africans began to arrive as slaves in Brazil than in any other colony.²⁸² Though the Dutch merchants were not involved in extensive plantation colonies in the New World, however they were involved in the large-scale slave trading in the mid-17th century. Consequent upon this extensive trade in African slaves, the Dutch republic was among the first European nations to develop modern commerce, and the merchants had access to shipping, port facilities and banking credit.²⁸³ For example, the Dutch trade occupied several trading castles on the African coast, the most important of which was Armina (in Ghana).

²⁸⁰ Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p. 1867; Friedman, Saul S., *Jews and the American Slave Trade*, 2000, pp. 117-118.

²⁸¹ *ibid.* Appiah et al.

²⁸² *ibid.* Appiah et al.; Markham, Clements, Hakluyt Society, *The Haws Voyages*, Vol. LVII, London, 1878, p. 5; Compare also de Armas, Rumeu Antonio, *Viages de Hawkins an American*, Seville, 1947; Williamson, J. A., *Sir John Hawkins*, Oxford, 1927.

²⁸³ *ibid.* Appiah et al., pp. 1867-1870.

It is instructive to note here that the Atlantic slave trade in West Africa became a competitive ground for Europeans who threw overboard all sense of morality and competed amongst each other, in some cases going to war for the African slaves. The Dutch for example captured Armina from the Portuguese and rebuilt it.²⁸⁴

They also took control of the Atlantic slave trade from the Portuguese in the 1630s, but by the 1640s, they were faced with increasing competition from French and British traders. And by 1680s, a variety of nations, private trading companies, merchants, adventurers and slave traders sent slave ships to Africa: merchants from Denmark, Sweden and the German states also organized slave voyages. However, the Britons, the Portuguese and the French commanded and profited more from the Atlantic slave trade than others.²⁸⁵

2.10 The Organizational Astuteness of the Slave Trade

From the various geography of the Atlantic slave trade, it was therefore imperative to effect a meaningful distribution of large-scale slaves to the various places of demand in Europe and America, that is the routes or voyages had to be marked out and secured. The voyages based in Europe for example sailed through a route linking Europe, Africa, and the Americas. Contemporary historians saw this as a profitable triangular trade: i). European goods were exchanged for slaves in Africa; ii). Slaves were sold in the Americas for plantation produce, such as sugar, which was iii). transported back to Europe in the holds slave vessels. These slave trades, which were organized in Europe, amounted to several millions of Dollars, so that the profits made far outweigh any moral injunction.²⁸⁶ The cargos typically contained Indian curtain trade, cowry shells from the Indian Ocean, Brazilian tobacco, glass wear from Italy, brandies and spirits from France, Spain, Portugal, Irish linen and Beef and a range of British and European manufacturers.²⁸⁷

²⁸⁴ Appiah et al, *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p.1870.

²⁸⁵ Thomas, Hugh, *The Slave Trade, The Story of the Atlantic Slave Trade*, 1997, pp. 159-161; *ibid.* Appiah et al., p. 1870; compare Iliffe, John, *Geschichte Afrikas*, 2000, pp. 174-175; Hochschild, Adam, *King Leopard's Ghost*, 1999, pp. 37-38.

²⁸⁶ *ibid.* Appiah et al., p. 1870.

²⁸⁷ Compare Deveau, Jean-Michel, *La Traide Rochelaise*, Paris, 1990; Thomas, Hugh, *The Story of the Atlantic Slave Trade, 1440-1870* (1997) p. 154; Markham, Clements (ed.), *The Haws Voyages*, Hakluyt Society, Vol. LVII (London, 1878), p.5; de Armas, Antonio Rumeu, *Viages de Hawkins a America*, Seville, 1947; Williamson, J. A., *Sir John Hawkins*, Oxford, 1927; QU. Hale, John, *The Italian Renaissance*, London, 1993, p. 359.

As the trade by barter systematically and progressively increased, slave vessels from Europe began to sail with large crews, including surgeons, carpenters, coppers, cooks (some whom were of African descent), sailors (who apprenticed to sea at young age), and others, hired to guard slaves on the African coast and on the middle passage, where threats of rebellion and insurrection were the order of the day.²⁸⁸ The size of the slave ship varies, while some were small, some were large and had three decks and were more than 30m in length and 12m in breath; while some vessels were constructed specifically for the trade, some vessels were built of wood, iron and powered by steam by mid-1800s. These vessels sailed up rivers such as the Congo and sometimes held more than 1000 African slaves and the smaller vessels traded in the Gambia, Senegal, Sierra Leone Rivers in West Africa and along the windward coast (present day Liberia). In the gold coast, the slave vessels anchored several miles off shore, where they were met by large trading canoes because the gold coast lacks large river outlets.²⁸⁹

Furthermore, there were major slave trade sites at Whydah (the present day Republic of Benin), Bonny, Calabar (the present day Nigeria), and the slave vessels also anchored in lagoons or bays close to African villages and small towns.²⁹⁰ There were also the presence of large slave ships, which traded in rivers and bays on the Angolan coast and the Mozambique in South East Africa. The modus operandi of slave trade here was broken by variety of custom payment to local African rulers and merchants. As the slave trade progressed in many parts of Africa, a system of trade known as a “trust trade” developed whereby the European captains advanced trading goods to African slave dealers with the promise of future slave deliveries.²⁹¹ These dealers often were of small-scale traders who built factories with connecting warehouses to store goods and outdoor, fenced “pens” or enclosed “barracoons” to keep slaves. Periodically, sons or daughters of the local chiefs were given temporarily to the slave ship captains as a form of credit known as pawnship.²⁹² But when a captain kidnaps pawns (which occurred infrequently), the local African ruler will cut off all slave trading from the region and subsequently the captain and crew of the next vessel from that port would be killed or taken hostage as retribution.³¹³

²⁸⁸ Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds.), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p.1870; compare Iliffe, John, *Geschichte Afrikas*, 2000, pp. 181-182.

²⁸⁹ *ibid.* Appiah et al., p.1870

²⁹⁰ *ibid.* p.1871.

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ *ibid.*; see also Thomas, Hugh *The Story of the Atlantic Slave Trade*, 1997, p.167; Hochschild, Adam, *King Leopard's Ghost*, 1999, pp. 118-121.

The trade by barter exchange between European, Afro European and African agents included amongst others bundles or assortments of European trading goods were exchanged for a specified number of African units of exchange, which then were traded for a specified number of slave. This varied from region to region in Africa and included European iron bars, cowry shells from the Indian Ocean, Italian beads, blue-dyed Indian textiles, or Brazilian gold. During the late eighteenth century, an assortment of European textiles, firearms, and alcohol was equivalent to 12 ounces of gold along the gold coast and 12 ounces of gold was the price for an adult male African slave.²⁹⁴ It must be mentioned here also that most of the slave trade did not only function on the basis of trade by barter principle but in most cases on the basis of almost a war situation, while the African merchants and their cohorts including the so-called African chiefs were involved in extensive raid of Africans for sale, the Afro Europeans and the Europeans were kidnapping and capturing Africans from the interior. The aim of this strategy was to circumvent any payment or exchange for the slave whatever. Most of the slaves were taken away through this method and not only by trade by barter method mentioned above.²⁹⁵

²⁹⁴ Appiah et al., *Africana, The Encyclopaedia of the African and African American Experience*, 1999, p. 1871.

²⁹⁵ *ibid.*; Illiffe, John, *Geschichte Afrikas*, 2000, pp. 111ff; compare Qu Law, Robin, *The Slave Coast of West Africa*, Oxford, 1991, pp. 262-63; Adams, John, *Remarks of the Country Extending....* London, 1823, p. 129; R&P, *House of Commons Report of 1789, evidence of James and Penny*.

2.11 The Fundamentals of Atlantic Slave Trade and Current Debates

2.11.1 Introduction

Having gone through the various and current debates on the Atlantic slavery, I consider the thesis of Eric Williams (1974) in his book “Capitalism and Slavery” inevitable. The thesis is not a study on the nature of the slave trade, but rather a study on the role of slavery in the English economy. Williams advanced the concept that capitalism is a result of Atlantic Slave Trade and defines capitalism as when someone can use their resources to make a profit without that person actually being present.²⁹⁶

The capitalist system here was practiced by English investors, who made available funds to stock companies, such as Dutch East Indian Company, who made use of the funds to buy ships and trading goods. The stock companies would then rent a crew and send the ship to Africa, where their goods will be exchanged for African slaves (a form of trade-by-barter system). Subsequently, the purchased slaves would then be carried by ship to the Americas where they would be sold and the money derived used to purchase American goods. These Ships will then return to England and sell the American goods for capital, thereafter splitting the profits amongst the investors.

According to Williams, that was the first example of capitalism and that capitalist system was a consequence of Atlantic Slave Trade. Though, traces of capitalism such as buying and selling of goods were prevalent prior to the slave trade, however, this was the first time in history when private investors put their capital together in the form of a company, whose sole purpose was to increase that capital. The stock companies did not at all manufacture any product, rather they serve only to buy and sell commodities in such a way as to increase the capital of their investors.²⁹⁷

2.11.2 Historical Background

I shall turn my searchlight to the cause and causes of slavery and the slave trade, especially the institution of slavery in the United States. The slave trade contained several causes. The slavers were, in most cases, European and American merchants.

²⁹⁶ Williams, Eric, “Capitalism and Slavery”, 1974, pp. vii-viii.

²⁹⁷ *ibid.*, pp. vii-vii and p. 4.

The source of slave was Africa, though slaves were taken from other continents as well. The destination of the slaves is the so-called “New World” — especially the West Indies.²⁹⁸ Eric Williams asserts the extent to which slave trading was an international venture:

*“Negro slave trade became one of the most important business enterprises of the 17th century. In accordance with 16th-century precedents its Organisation was entrusted to a company, which was given the sole right by a particular nation to trade in slaves on the coast of West Africa, to erect and maintain the forts necessary for the protection of the trade, and also to transport and sell the slaves in the West Indies. Individuals, free traders or ‘interlopers,’ as they were called, were excluded. Thus the British incorporated in 1663 the Company of Royal Adventurers trading to Africa and later replaced this company by the Royal African Company in 1672; the royal patronage and participation reflected the importance of the trade and continued the fashion set by the Spanish monarchy of increasing its revenues. The monopoly of the French slave trade was at first assigned to the French West India Company in 1664, and then transferred, in 1673, to the Senegal Company. The monopoly of the Dutch slave trade was given to the Dutch West India Company, incorporated in 1621. Sweden organised a Guinea Company in 1647. The Danish West India Company, chartered in 1671, with the royal family among its shareholders, was allowed in 1674 to extend its activities to, Guinea. Brandenburg established a Brandenburg African Company, and established its first trading post on the coast of West Africa in 1682. The Negro slave trade, begun about 1450 as a Portuguese monopoly and by the end of the 17th century, it has become an international free-for-all trade”.*²⁹⁹

By the 15th century, England metamorphosed raising sheep and producing wool into manufacturing cloths. This was the genesis of capitalist production, where the basic reason for the slave trade could be located. It will be recalled that the feudal system preceded capitalist system in Europe and was anchored on the ownership of land by landlords, and the exploitation of serfs, who did not possess any land and had to offer their labour to these landowners to survive. The production of trades on goods and clothing was a monopoly enjoyed by few scaled craftsmen and merchants and because of the increase in international trade; production had to be carried out on a much larger scale.

²⁹⁸ Williams, E. *Capitalism and Slavery*, 1974, pp. 4, 8.

²⁹⁹ *ibid.* pp. 27, 30.

Though this system was not sufficient to make available the increased amount of goods required and had to be replaced by manufacturing firms, yet a system in which many craftsmen produced goods by hand were brought together to form a single factory. This strategy brought about specialization in production. For example, putting the heel on all shoes produced, instead of working on the entire shoe. This division of labour energized increase in production.

As a result of this conducive situation, commerce and trade kept expanding, particularly in overseas and more goods were in demand. Therefore the old manufacturing system was no longer in the position to cope with this astronomical demand, consequently machines were invented to speed production and large scale industries, based on the use of these newly invented machines steam and water power were developed. It is in this historical context that Africa and the slave trade were connected to this process.³⁰⁰ One can say that the slave trade was caused by the development of capitalism and this capitalist development was prominent in 2 continents – Europe and North America.³⁰¹

The connections to these relationships, markets, lands, labour and profit shall be the object of the next analysis.

2.11.2.1 Effective Demand

Mercantilism as an economic theory postulates that the possession of gold, silver, and other precious metals was the basis of wealth of nations. Thereafter, trade was an important mechanism for England and other nations as they struggle to monopolise sources of precious metals and to export more goods than they imported.³⁰²

It was the necessity for these precious metals and their shortage in Europe that led to the period of exploitations and discoveries. For example, Christopher Columbus, who “discovered” America in 1492, was conscious of his trip “*Gold is a wonderful thing! Whoever possesses it is lord of all he wants. By means of gold one can even get souls into Paradise.*”³⁰³ Other historical explorer, like Vasco da Gama, Sir Francis Drake, and even Estavanico (Little Stephen), the Black Spanish explorer, who discovered New Mexico, were all part of the struggle of European countries to find gold so as to increase their superiority and hegemony over other nations.

³⁰⁰ Williams, E., *Capitalism and Slavery*, 1974, p.18

³⁰¹ *ibid.* pp 18 ff

³⁰² *ibid.* pp.18-19, 26.

³⁰³ *ibid.* p. 3; Christopher Columbus, in his Letter from Jamaica (1503) in Bourne, E. G. (ed.), *The Northmen, Columbus and Cabot, 985-1503: The voyages of the Northmen, The voyages of Columbus and of John Cabot*. New York: Charles Scribner's Sons (1906), p. 412.

However, as capitalism increased and the techniques of production largely improved (which was characterised by more skilled labour, better machines, bigger ships, faster communications, electrical power, etc.), foreign lands were no longer needed so much for gold but rather as markets to sell the manufactured goods, which could not be sold at home.³⁰⁴

England, being a small island, wanted to expand and develop. For this purpose she requires both sources of raw materials for its factories and markets for the goods it produce. Colonialism became the instrument applied by capitalist countries like England, Germany, France, Belgium, Portugal and afterwards the United States, used to gain control over foreign territories and workers for exploitation. Almost every nation came under the influence of British domination. As the British themselves, were fond of saying until the peoples of the colonies rose in revolution and threw off the shackles of colonialism, “*the sun never sets on the British Empire.*”³⁰⁵

The colonisation of America and the West Indies prepared the way for the rapid capitalist development in England. These colonies were ideal for mercantilism and made available enormous wealth requiring very little investment. Carolina’s rice, the sugar of the West Indies, and New England’s timber and tar for ships were important goods that were exported exclusively to England. Added to this advantage were gold and silver mined by Indians and Africans, which were great source of wealth.³⁰⁶ It was because of England’s subjugation and colonial legacy and exploitation by England that the American people (as others before and after them) declared in 1776: “GIVE ME LIBERTY OR GIVE ME DEATH!”³⁰⁷ The lands occupied in America had to be tilled so as to yield economic profit. And for this purpose, human labour was needed. The ruling junta in England attempted to supply the labour from England by using indentured servants. Indentured servants were allowed to travel to America in exchange for their pledge to work for a set number of years (usually 4-7 years). As it was then discovered that labour was not sufficient, slavery became an alternative. It must be emphasised here that the first instance of slave trading and slave labour in the “New World” did not involve the Africans but the Indians.³⁰⁸ Excessive work, insufficient diet, and diseases of European origin decimated the Native American work force.

³⁰⁴ Williams, E., *Capitalism and Slavery*, 1974, p. 26; <http://www.history.com/topics/colonial-economy>.

³⁰⁵ *ibid.* p. 28; Wilson, John (April 1829), *Blackwood’s Edinburgh Magazine* pp. xxv, 527.

³⁰⁶ *ibid.* n.304, p. 28.

³⁰⁷ The Speech of Congress man, Patrick Henry (uttered at St. John’s Church in Richmond) with the immortal words: “*I know not what course others may take; but as for me, give me liberty or give me death.*” March, 1776.

³⁰⁸ *ibid.* n. 304, pp. 7-18.

The origin of Black slavery, according to Eric Williams in *Capitalism and Slavery*, “*can be expressed in three words: in the Caribbean, Sugar; on the mainland, Tobacco and Cotton.*” He went on to add, “*The reason (for slavery) was economic, not racial; it had to do not with the colour of the labourer, but the cheapness of the labour.*”³⁰⁹

The vacuum created by insufficient labour compelled the British people to look for another alternative somewhere else and then found Africa as an ideal alternative. Apart from racism, an elaborate set of lies and distortions that projected Africans as inherently inferior was formulated to facilitate slavers’ economic exploitation. Williams puts it like this: “*The features of the man, his hair, colour and dentifrice (teeth), his “subhuman” characteristics so widely pleaded, were only later rationalizations to justify a simple economic fact that the colonies needed labour and resorted to Negro labour because it was cheapest and best.*”³¹⁰

2.11.2.2 Source of Profit

If I may quote one influential mercantilist in the 18th century “*slaves were the fundamental prop and support*”³¹¹ of the English colonies, while another described slave trade as “*the first principal and foundation of the rest, the mainspring of the machine which sets every wheel in motion.*”³¹² The reason here is that the slave trade did not only provide the population with worker but also the plantations and the mines of the New World. It also made a large profit for both the slave trader and those who provided them with goods and services. The slave trade was as a matter of facts, one of the quickest source of making substantial profits during the slave trade and the triangular trade was the pivot of this economic development, as Eric Williams stated in his “*Capitalism and Slavery*”:³¹³

“In his triangular trade England, France and Colonial America equally supplied the exports and the ships; Africa supplied the human merchandise; the plantations the colonial raw materials. The slave ship sailed from the home country with a cargo of manufactured goods. These were exchanged at a profit on the coast of Africa for Negroes, who were traded on the plantations, at another profit, in exchange for a cargo of colonial produce to be taken back to the home country. As the volume of trade increased, the triangular trade was supplemented, but never supplanted, by a direct trade between home country and the West Indies, exchanging home manufactures directly for colonial produce.”

³⁰⁹ Williams, E., *Capitalism and Slavery*, 1974, pp. 23, 26, 19.

³¹⁰ *ibid.* p. 20.

³¹¹ *ibid.* p. 51.

³¹² *ibid.*

³¹³ *ibid.*

The triangular trade thereby gave a triple stimulus to British industry. The Negroes were purchased with British manufactures; transported to the plantations, they produced sugar, cotton, indigo, molasses and other tropical products, the processing of which created new industries in England; while the maintenance of the Negroes and their owners on the plantations provided another market for British industry, New England agriculture and the Newfoundland fisheries. By 1750 there was hardly a trading or a manufacturing town in England which was not in some way connected with the triangular or direct colonial trade. The profits obtained provided one of the main streams of that accumulation of capital in England which financed the Industrial Revolution."³¹⁴

Because of the increased use of machinery and the increased demand for more raw materials, the colonisation of the Americas to secure land (raw material), and the slave trade, which supplied the needed labour, became inevitable. The gains from the sale of slaves and slave produced products were used as profits to build bigger and better factories, which increasingly exploited the workers and the peasants. The various inventions of the industrial revolution, like Watts' Steam engine and several inventions in the textile industry were financed by slave-trade profits. Huge banking fortunes, like Barclays Bank, also began with the slave trade.³¹⁵

Significantly, the slave trade was the central aspect of the triangular trade in which the increasing demand for goods led to the expansion and increase of capitalist industries in Europe. This is an important historical fact in the understanding of the modern world of capitalism.³¹⁶

2.11.3 The Impact of the Slave Trade

The Impact of the slave trade is better understood when the colonial relationship between England and America, and the importance of the slave trade to the development of the United States is highlighted. It may not be a contradiction to hypothesize that American colonialism serves the interest of the English ruling class in various ways.

Economically, it provided England with land for agricultural production, valuable raw materials, a market for English goods, and a conducive place in which to invest.

³¹⁴ Williams, E., *Capitalism and Slavery*, 1974, pp. 52, 29.

³¹⁵ *ibid.* pp. 52 ff, 99-100.

³¹⁶ *ibid.* pp. 30, 53ff.

Taxation was introduced without American representation and the corresponding laws were made in England to serve her economic interests. To facilitate effective use of its colonies, The English government adopted a colonial division of labour, which enable each colony to specialise and produce more of certain goods. While the West Indies specialised in producing sugar that was shipped to England and the mainland colonies. The mainland colonies in return, supplied England with tobacco, cotton, rice, indigo, grains, fish, and naval supplies.³¹⁷ As a result of the increase in capitalist economies, the demand for these goods correspondingly increased, particularly in the Southern colonies and in the West Indies, which were best suited for large scale plantation agriculture. The demand for slavery and slave trade also expanded.

Though England and other capitalist countries in Europe were the main progenitors of slave-trade, American merchants were also deeply involved in the trade. The trade involving American merchants and Africa was concentrated in New England's Rhode Island and Massachusetts. For example, 93% of the exports of the American colonies to Africa between 1768 and 1772 were sent from New England.³¹⁸ This specialisation was prompted because New England was suited for plantation agriculture than other colonies, and it depended on shipping, shipbuilding, and fishing to pay its debts to England. This is why slave trade became an important factor of commerce in England's trade and was also instrumental to transporting of slaves between West Indian Islands and between the West Indies and United States.

New England was also engaged in the triangular trade: from New England, ships sailed with food — especially fish — and other goods to be exchanged in the West Indies for rum. The rum was then taken to Africa and, exchanged for slaves who were brought back to the West Indies and exchanged for more sugar, rum, and molasses.³¹⁹ Two cardinal points must be mentioned here so as to understand New England's involvement in the slave trade. In one part, the slave trade had the same influence on the development of capitalism in New England than it had in England. On the other part, the slave trade stimulated the development of industries, which supplied the slave traders with the goods they exchanged for slaves.³²⁰ For example, the manufacture of rum became the largest business in New England before the American Revolution.

³¹⁷ Williams, E., *Capitalism and Slavery*, 1974, pp. 53-54, 30.

³¹⁸ *ibid.*

³¹⁹ *ibid.* pp. 54 ff.

³²⁰ *ibid.* pp. 55-57.

Rum was so much in supply that it became the main item to be traded for slaves on the coasts of Africa.³²¹ New England therefore, benefited from these services it provided to slave traders instead of direct involvement and its ships were also widely used in the slave trade. While the economies of the West Indies were forced to produce sugar for England, they had little time or land to grow food.

According to Lorenzo Greene:

*“The effects of this slave trade were manifold. On the eve of the American Revolution it formed the very basis of the economic life of New England: about it revolved, and on it depended, most of her other industries. The vast sugar, molasses, and rum trade, ship-building, the distilleries, a great many of the fisheries, the employment of artisans and seamen, even agriculture — all were dependent upon the slave traffic.”*³²²

The slave trade provided wealthy Americans enormous capital and accumulated fortunes and wealth. Senators, governors, judges, philanthropists, journalists, scientists, educators, and many others were slave traders or profited from the trade. Josiah Franklin, Benjamin Franklin’s stepbrother, was a prosperous merchant who not only sold slaves at his tavern but also permitted other traders to show their slaves there. He was hardly alone, for as Lorenzo Greene points out: *“There was no stigma attached to trading in Negroes before the Revolution... Wealthy slave merchants, like the industrial captains of the present era, were successful men — the economic, political and social leaders of their communities — and were regarded by their fellows as worthy of emulation.”*³²³

The importance of the slave trade to United States’ economy could be seen in the role it played in elevating the industries to producing machines and water power on a large scale, the textile industries also moved United States in the age of industrial capitalism. One of the personalities that propelled this development is the Brown Family of Rhode Island – they were involved in shipping to all parts of the world, importing molasses and distilling it into rum, making candles which they monopolized, banking, insurance, and real estate. Brown University in Providence, Rhode Island was named after them for their financial support.³²⁴ They were also active in selling Africans into slavery or by supplying goods to those who did. The family’s wealth was used to finance experiments by Samuel Slater, an English mechanic, who, using new inventions from the textile industry in Europe, perfected the first water-power mill.

³²¹ Williams, E., *Capitalism and Slavery*, 1974, p. 30.

³²² *ibid.* pp.58-60.

³²³ Greene, Lorenzo J., *The Negro in Colonial New England, 1620- 1776*. New York: Atheneum, 1968 (first published in 1942); compare *ibid.* n.321, p. 39.

³²⁴ *ibid.* n.321, pp. 39 ff.

It pushed the United States into the first stage of its Industrial Revolution.³²⁵

In 1814, Francis Cabot Lowell incorporated a group of New England merchants — the Cabots, Amorys, Lowells, Jacksons, Higginsons, Russels, Lees, and Lawrences who initiated the second stage in America's Industrial Revolution.³²⁶ They revolutionised the cotton production by integrating the manufacture of cloth – from the processing of raw cotton to the finished product under one roof. And the amount of cloth produced increased to 30% between 1815 and 1833.³²⁷ It must also be mentioned here, because of the relevance of their role during slavery, that only a few of the Boston Associates were directly involved in the slave trade. Principally, they were dependent on the slave trade, selling rum, insurance, and other goods and services to the slave-traders. These merchants played key roles in the American Revolution, which declared that all men were created equal, shaped the U.S. Constitution (pre-Civil War), which condoned slavery in the antebellum South, and were leaders in the early period of United States history.³²⁸

The rise of capitalism paved the way for two important modern ideologies: the bourgeoisie or capitalist class, and the proletariat or working class. While the bourgeoisie own the means of production and services (factories, banks, land, mass media) and employ or buy labour (power of workers for wages), the proletariat were the working class of people who own no means of production of their own and who were forced to sell their labour (power for wages in order to get money for food, clothing and shelter).³²⁹ The ruling class (capitalist like the Mellons, DuPonts, Rockefellers, Fords, etc.) dominated the leadership of the United States and this class has its roots in the slave-trade, which was one of the important sources of profit from which this class accumulated the wealth that financed the early industrial development of the United States. It was the consequence of the accumulated wealth from slave-trade and exploitation that geared these early capitalists to build more factories, open banks, open newspapers to advertise their products and to shape public opinion in their interest, support the universities to train new personnel, elect presidents and congresses, and prosecute wars.³³⁰

³²⁵ Williams, E., *Capitalism and Slavery*, 1974, pp. 102-106.

³²⁶ *ibid.*

³²⁷ *ibid.* pp. 78-79, 131.

³²⁸ *ibid.* pp. 108-111.

³²⁹ *ibid.* pp. 96-100.

³³⁰ *ibid.* pp 98 ff.

It is therefore of paramount importance to conceptualise the relationship of African Americans history to this process, since any modern solutions to this sordid situation must be based on an accurate and thorough analysis of this history. It is also necessary to add here that slave trade and slavery goes beyond these economic factors.

The slave trade was the historical process that compelled and transported millions of Africans throughout the world and concentrated a significant number in the Black-Belt section of the Southern United States.³³¹ The slave-trade and the African slave tremendously influenced American life particularly, in social aspects (institutions like religion and the church, cultural life, language and artistic activities like music and dance). It is not farfetched to add that the slave trade also had important ideological ramifications, for example, racism, which was justified to enslave Africans for exploitation and oppression, was intensified during the slave-trade and nurtured during slavery in the antebellum South.³³²

2.12 Statistics

It was assumed that the Atlantic slave trade involved 15 million persons shipped between the 15th and the 19th century. Historians, journalists and demographers supported this statistic. However, in his work, "*The Atlantic Slave Trade, A Census*" (Madison, 1969), Philip Curtin pointed out that the estimate was based on a nineteenth century guess. Curtin put forward a more modest estimate.³³³

A serious estimate of the dimension of the African slave trade had been made in 1950 by Noel Derr, in his *History of Sugar*, 2 Vols. (London, 1950): on the basis of an analysis country by country, Derr suggested a figure of about 11,970,000.³³⁴ Curtin examined the estimates for different countries and suggested that the total might be lower: about 10 million, certainly not less than 8 million, probably not more than 10,500,000: say 9,566,100.³³⁵

³³¹ Williams, E., *Capitalism and Slavery*, 1974, pp. 117-124.

³³² *ibid.*

³³³ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison, 1969, pp. 268f.

³³⁴ Derr, Noel, *History of Sugar*, 2 Vols., London, 1950, p. 284.

³³⁵ *ibid.* n.333.

But Joseph Inikori in 1975 supported the 15 million to 15, 4 million estimates. He repeated his suggestion in 1982.³³⁶ A year earlier, in 1981, James Rawley, in a general survey put the figure at 11,345,000.³³⁷

Paul Lovejoy suggested in 1982 that 11,698,000 slaves might have been sent from Africa, of whom perhaps 9,778,500 may have arrived.³³⁸ Catherine Coquery-Vidrovitch called in terms of 11,7 million, between 1450 and 1900.³³⁹ David Richardson, the historian of the Bristol trade, suggested a revision and in the same year, Paul Lovejoy put forward yet another figure of 11,863,000.³⁴⁰ David Heni and Charles Becker have also made overall estimates.³⁴¹ The historian of La Rochelle, Jean-Michel Deveauv, in 1994 gave his total as 11,500,000.³⁴²

The diversity and contradictions in the estimates explain the fact that the yardstick used in obtaining an accurate figure, given the circumstances then was almost impossible. Inikori's criticism of Curtin was premised on this fact echoing Leslie Rout that Curtin underestimated both the illegal Cuban and Brazilian trades in the 19th century.³⁴³ Similar corrections were made by Henriqueta Vila Vilar in respect of the contraband Spanish deliveries in the early 17th century as well as Magalhaes-Godinho and C.L.R. Boxer.³⁴⁴ In 1999, the Dubois Institute of Harvard presented a so-called "Data Sheet", which recorded about 27,000 slave voyages, which was estimated to cover 90 percent British, French and Dutch slave ships and more than two thirds of the total.³⁴⁵

The figure of eleven million or 15 million may be accurate, but this figure definitely excluded the dead slaves, who were either killed by slave hunters, during their march to

³³⁶ Inikori, Joseph, *Forced Migration*, London, 1982, pp. 13-60; compare also, Inikori, Ohadikhe, D.C. and Unomah, A. C., *The Chaining of a Continent*, UNESCO, Paris, 1986.

³³⁷ Rawley, James, *The Transatlantic Slave Trade*, New York, 1981, p. 428.

³³⁸ Lovejoy, Paul, *The Volume of the Atlantic Slave Trade: A Synthesis*, JAH 23, 1982.

³³⁹ Coquery-Vidrovitch, Catherine, *Daget's Actes du colloque 78ceptical78zat sur La triate des noirs*, Vol. 2, Nantes, 1985, p. 58.

³⁴⁰ Richardson, David, *Slave Exports from West and West-Central Africa*, JAH 30; Lovejoy, Paul, *The Impact of the Slave Trade*, HAH 30, 1989.

³⁴¹ Heni, David, *Measuring the Unmeasurable*, JAH 27, 1986; Becker, Charles, *Notes sur les chiffres dela traite atlantique francaise au dix-huitieme siede*, Cahiers d'etudes africaines 26, 1986b, pp. 633-679.

³⁴² Deveauv, Jean-Michel, *France autemps des negrire Paris*, 1994.

³⁴³ Rout, Leslie, *The African Experience in Spanish America*, Cambridge, 1976, p. 65; compare also Thomas, Hugh, *The Slave Trade: The Story of the Atlantic Slave Trade, 1440-1870*, 1997.

³⁴⁴ Vila Vilar, Henriqueta, *Hispanoamerican y ell comercio de esclavos*, Seville, 1977; Magalhaes-Godinho, *Os Descobrimentos e a economia mundial*, Lisbon, 1963; Boxer, C. L. R., *The Portuguese Seaborne Empire*, London, 1963.

³⁴⁵ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison, 1969, p. 268.

The coast, during transportation by ships and of course those killed by captains. However, the recent UNESCO figure shows that 20 million Africans, apart from the dead, were exported into slavery.³⁴⁶

2.13 Modern Slavery

2.13.1 Introduction

In the previous chapters enough evidence and historical facts attest to the existence of slavery in all cultures irrespective of religion, cultures, moral beliefs e.t.c. However, changes in the world's economy, societies and cultures over the past 50 years have rekindled a resurgence of slavery.

Three reasons may be attributed to the rise of modern slavery. The first is population explosion, which has tripled the figure of people in the world, with the greatest increase in the so-called under-developing countries. The second are the rapid, social, and economic changes, which have displaced many to the urban centres and their outskirts, where people are not disposed because of lack of adequate qualification, insecurity and consequently live without job security. The third is attributable to worldwide corruption, particularly in third world countries, which allowed slavery to go unpunished even though it has been outlawed. In this way, millions have become vulnerable to a resurgent form of slavery. This new slavery has two characteristics that differentiate it from the slavery of the past: slaves today are cheap and they are disposable. In ancient slavery, slaves were expensive to purchase and in most cases not always productive. Since there was always a shortage of potential slaves and enormous costs associated with transportation from one continent to another, those already enslaved were considered investments and held for a long period of time. Their health and well-being were maintained at rudimentary levels and it was of utmost importance to assert ownership valuable properties. Slave owners therefore took great pains to emphasise the ethnic differences between themselves and their investments. Today, millions of economically and socially vulnerable people around the world are potential slaves and because of the cheap supply of slaves and transportation, the slave owners do not consider slavery as a major investment worth maintaining. And above all, ethnic colour does not play any major part in the modern slavery.³⁴⁷

³⁴⁶ Thomas, Hugh, *The Slave Trade: The Story of the Atlantic Slave Trade, 1440-1870*, 1997.

³⁴⁷ For the introduction, please see <http://freetheslaves.net/slavery/introduction>.

2.13.2 Statistics of Modern Slavery

According to U. S. State Department, during 2001, 700,000 and as many as 4 million men, women and children were world wide bought, sold, transported and held against their will in slave-like condition. In its annual report, the State Department discovered that modern slave traders or “person traffickers” use threats, intimidation and violence to force victims to engage in sex acts or to work under conditions comparable to slavery. Women and children constitute the overwhelming majority of victims being sold into the international sex trade for prostitution, sex tourism and other commercial sexual services, and into forced labour situations in sweatshops, construction sites and agricultural settings.³⁴⁸ In other forms of servitude, children are abducted and forced to fight for government military forces or rebel armies, and to act as domestic servants and street beggars. It was also recorded that the most vulnerable preys are families, violating their fundamental human rights, subjecting them to degradation and misery. As soon as victims are moved from their home country or location to foreign countries – they are usually isolated and unable to speak the language nor understand the culture and rarely possess immigration papers or have been given fraudulent identification documents by the traffickers. Victims also may be exposed to a range of health concerns, including domestic violence, alcoholism, or psychological problems, HIV/AIDS and other sexually transmitted diseases.³⁴⁹

The modus operandi of the traffickers is to lure their victims by advertising good jobs for high pay in exciting big cities or by setting new existent employments. They also lure their victims to modelling and matchmaking agencies and the unsuspecting young men and women usually fall into this trap because of poverty and less intellectual disposition. In some cases, traffickers trick parents into believing that their children will be taught a useful skill or trade once removed from their homes, but the children of course end up being enslaved. In most violent cases, victims are forcibly kidnapped and abducted.³⁵⁰

And finally, about 12.3 million people are enslaved worldwide and 2.4 million are victims of trafficking and their labours generate profits of over 30 billion dollars. It is pertinent here to mention that the most affected countries are East European countries and countries of the formal Soviet Union, poor Asian countries and Latin America, poor African countries but also more than 350,000 cases in the industrial world.³⁵¹

³⁴⁸ Compare Quirk, Joel, unfinished Business, pp.30-31.

³⁴⁹ *ibid.*

³⁵⁰ See <http://usgovinfo.about.com/library/weekly/aa061202a.htm>.

³⁵¹ See <http://news.bbc.co.uk/2/hi/europe/4534393.stm>.

2.14 Summary and Conclusion

The transatlantic slave trade principally followed the Middle Passage vis-à-vis the triangular routes, which took place between the continents of Europe, Africa and America from the 17th to the 19th centuries. The reason this trade was called the triangular trade was because it was made up of three different voyages, which formed a triangular trade pattern. However, some slave trading voyages were made directly between the continents of Africa and America. The first part of the triangular trade was the voyage from Europe to Africa. On arrival in Africa, the European slave traders bought and enslaved Africans in exchange for goods shipped from Europe. The second part of the triangular slave trade was the voyage from Africa to the Americas. This is the so-called Middle Passage.

This was the part of the triangle where they captured Africans, which were forcibly shipped across the Atlantic Ocean to the Americas. On arrival in the Americas, the Africans who had survived the terrible journey were sold as slaves to work on plantations. The third and final part of the triangular slave trade included the return voyage from the Americas to Europe. Slave ships returned to Europe loaded with goods produced on plantations using African slave labour. The journey could take ships up to one year to complete the entire triangular voyage. The triangular trade contributed to the accelerated macro-economic but also micro-economic growth of the slave owners and the economies. The money accruing from selling the slave labour in Europe was invested in further slave trading voyages. This then supplied plantations with more slave labour with which to produce more crops such as sugar, coffee, tobacco, rice and later cotton.³⁵²

The Atlantic Slave Trade was in 1840 within site of its end, the end of slavery itself in America took longer than had been imagined. Britain had already abolished slavery; France did so in eight years and the United States in twenty-five years. The possession of slaves was punishable in British India in 1882. In both Cuba and Brazil, slavery survived until nearly the end of the 19th century.³⁵³ Advertisements were still seen in Brazil in the 1870s for the sale of slaves. The wording was ambiguous, whether it was a human or an animal that could be bought: cobra might be a goat but could also mean a female quadron.³⁵⁴

³⁵² Appiah, Kwame Anthony and Gates, jr., Henry Louis (eds), *Africana, The Encyclopaedia of the African and African American Experience*, 1999, pp. 1872-1875; Thomas, Hugh, *The Story of the Atlantic Slave Trade, 1440-1870*, 1997, pp.153-157.

³⁵³ Thomas, Hugh, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, pp. 786-787; *ibid.* Appiah et al., p. 1875.

³⁵⁴ *ibid.* Thomas, Hugh, p. 786.

The Ten Years War in Cuba in 1868-1878 propelled emancipation. However, the revolutionaries did not commit themselves to immediate abolition, and they proclaim freedom only, as Bolivar had done, to slaves who fought for them. A new law of 1870 in Madrid of Segismundo Moret accounted for the liberty of children born to slave families; and it also conceded freedom to all slaves over the age of sixty-five (later amended to sixty). The slaves who fought for Spain in the war against Cuban nationalists were also proclaimed free, still there were about 200,000 Cuban slaves at the end of the War.³⁵⁵

The speech of the great liberal orator Emilio Castelar deserves a space here:

"I will say that we have had 19th centuries of Christianity and there are still slaves.³⁵⁶ They only exist in the catholic countries of Brazil and Spain... We have experienced barely a century of revolution and the revolutionary people, France, England and the United States have abolished slavery. Nineteen centuries of Christianity and there were still slaves among the Catholic people. One century of revolution and there are no slaves among the revolutionary people... Arise, Spanish legislator make this 19th century the century of the complete and total redemption of slaves!"³⁵⁷

Slavery was abolished in Puerto Rico in 1873, in Cuba only in 1886, and in 1869, the mother of slavery, Portugal, abolished slavery. However, between 1876 and 1900, she like France in Senegal, liberated the slaves, but put them to work for fixed periods, so that they were slaves in all but name.³⁵⁸ Portugal formally abolished slavery throughout its empire in 1875. In 1870, about one and half million slaves were recorded in Brazil many more than there had been in 1800. Only during the late 1880s did Brazilian slavery collapse. Three quarter of a million slaves were still left in March 1887, but by then, many were fleeing their farms, in acts of mass desertion. The unpunished escapes invoked again the sordid feeling of the flight from servitude, which occurred at the beginning of the eleventh century in Europe and which signalled the end of the institution of slavery there.³⁵⁹ Panthers began to free slaves on the condition that they sign labour contracts up to four years. The Church, for the first time, overtly backed abolition, because of fear that revolutionary blacks would sweep the country in an onda negra, in the style of Haiti.³⁶⁰

³⁵⁵ Thomas, Hugh, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, p. 787.

³⁵⁶ *ibid.* pp. 489, 786-787.

³⁵⁷ *ibid.*

³⁵⁸ *ibid.* p. 787.

³⁵⁹ *ibid.* pp. 787-788.

³⁶⁰ *ibid.* pp. 489, 786-788.

Paradoxically, the trade in Africa continued. Eunuchs were still in demand for northern harems; and late as the 1880s, slaves were still being exchanged for horses, as they had been by the Arabs and the Portuguese in the 1450s.³⁶¹ David Livingstone told audiences in London 1857 that while the European slave trade was declining, that of the Arabs in East Africa was growing. In the 1880s, in Senegambia, slaves accounted for two-third of the goods trade at markets. In 1883, Commandant Joseph-Simon Gillieni, the future pro-consul of Madagascar, described how nothing equals the harrow of the scenes of carnage and desolation³⁶² to which the incessant war gives rise in region renowned for their fertility and wealth of minerals.³⁶³ The villages were burnt; the old of both sexes put to death, while the young are carried into captivity and shared among the conquerors. Though slavery was abolished in British Gold Coast in 1874, still a generation later, slaves were used in the palm oil industry, including by the mulatto descendants of Danes who had experimented with cotton in Akuapem. About 750,000 slaves were carried into the Anglo-Egyptian Sudan in the 19th century. Newspaper reports indicated that despite abolition of slavery, slavery in Mauritania persisted.³⁶⁴

Slavery and slave trade existed in Africa before the Atlantic slave trade, but neither the continent nor the people of African origin were distinguished personalities in commercialised slavery. During the Atlantic slavery, the African rulers played a prominent role in procuring slaves for the Arabs and European buyers. Portugal and Spain served as an abattoir of African slaves and their GNP during and after Atlantic slavery derived in most cases from the sale and usage of African slaves. Thereafter slavery was internationalised. The European academic community also played a notable role in slavery and slave trade. While some were advocating abolition because of the dehumanisation of slaves, others who were benefiting either directly or indirectly from the trade supported it. The role of the Catholic Church in most cases was ambiguous. Their part did not quite depict their biblical calling.

³⁶¹ Thomas, Hugh, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, p. 789.

³⁶² *ibid.*

³⁶³ *ibid.*

³⁶⁴ *ibid.*, p. 790.

Chapter III: Racism and Cultural Difference as the Motive for African Slavery

3. Historical Background

The macro history and science of Europeans, which portrays the Africans as mentally inferior, was in most cases one of the reasons and motivation for African slavery. This pre-eminence of the Whites over Blacks became authoritative from 1890 to 1920, as the newly professionalized social sciences, backed by genetics, seemingly provided convincing proofs of Black inferiority, accepted by some neo-abolitionist and rejected by many. The later argued that these pseudo facts were only a smokescreen of the “Cursed be Canaan” mythology that had shaped white mentality for centuries.³⁶⁵

At the beginning of the twentieth century, the belief that Africans were inferior spread like bush fire both in science and in popular thought. Research in physical and social sciences seemingly offered irrevocable proofs of racial differences. The conviction of science for the inferiority of the Africans, concluded one historian, was so overwhelming especially among biologists and physician, that “*arguments to the contrary were simply not tenable in transactions and journals of the medical societies*”.³⁶⁶

Racists sentiments were omnipresent, not only among the large audiences who read Thomas Dixon’s anti-negro novels or watched the Broadway play “The Clansmen” and D. W. Griffith’s 1915 Movie,³⁶⁷ “The Birth of a Nation” based on Dixon’s book, but also among writers and political leaders, who shaped national opinion. As a race and in mass, wrote Theodore Roosevelt in 1906, Blacks are altogether inferior to whites. Earlier, the president’s younger cousin Franklin had advanced during his junior year at Harvard: “*Yes, Harvard had sought to uplift the Black, if you like, has sought to make a man out of a semi-beast. Nearly all socialists of the socialist party of America, regarded the Black as occupying a lower position of the evolutionary scale than the White*”.³⁶⁸

³⁶⁵ *The Independent*, December, Issue 1904; Schwarz-Bart, Simon, *In Praise of Black Women*, Vol. 1, 2001, with Andre Schwarz-Bart, p. 6.

³⁶⁶ *International Journal of Health Services*, Volume 17, Number 2, 1987, pp.259-278; Compare also Stuart, Hall (ed.), *Representation, Cultural Representation and signifying Practices*, The open University, 1997, pp. 2242-243.

³⁶⁷ *ibid.* Stuart, pp. 251-252.

³⁶⁸ Haller, Jr. John S., *Outcast from Evolution, Scientific Attitudes of Racial Inferiority, 1859-1900*, Urbana: III, 1971, pp. 207, 68; Theodore Roosevelt to Owen Wister, April 27th 1906, quoted in Wister, Roosevelt: *The Story of a Friendship, 1880-1919*, New York, 1930, p. 253; Roosevelt, Franklin D. quoted in James McGregor Burns Roosevelt: *The Lion and the Fox*, New York, 1956, p. 20; Congressman Fred Gillet quoted in Richard M. Abrahams, *Conservatism in a Progressive Era: Massachusetts Politics, 1900-1912*, Cambridge: Massachusetts, 1964, pp. 25-26; Moore, R. Lawrence, *Flawed Fraternity-American Socialist Response to the Negro, 1901-1912: the Historian XXXII*, 1969, p.12. For detailed studies of the Pervasiveness of racism, see Newby, Idus A., *Jim Crow’s Defence: Anti-Negro thought in America, 1900-1930*, Baton Rouge, 1965; Knuth, Helen, “*The Climax of American Anglo-Saxonism, 1898-1905*”, Ph.D. Dissertation, Northwestern University, 1958.

The “Chain of Being” is another symbol or rather reality to advance the racist theory almost to insanity.

The concept of the “Chain” has its principle of continuity, a principle that operated particularly to emphasize the close affinity of men with beast. According to this theory, it is virtually impossible, in fact to discuss gradation of men, without stressing the closeness of the lowest men to the highest animals. The prominent physician, Sir Richard Blackmore (1713, 1714), elaborated the surprising principle of continuity; as man, who approaches nearest to the lowest class of celestial spirits (for we may justly suppose a subordination in that order) being: half body and half spirit, becomes the Equator, that divides in the middle the whole creation and distinguishes the corporal from the invisible intellectual world: so the ape or monkey, that bears the greatest similitude to man, is next order of animals below him.³⁶⁹ Nor is the disagreement between the basest individuals of our species and the ape or monkey so great, that they were later endowed with the faculty of speech, they might perhaps as justly claim the rank and dignity of Human Race as the Savage Hottentots or stupid native of Nova Zembla.³⁷⁰

Obviously, any elaboration of the Chain of Being was going to associate some group of human beings with the ape. The apostles of racism and white supremacists did not stop at these pseudo-theories. They went further to propound even more insane theory; the theory of miscegenation. Miscegenation is the mixture of races.³⁷¹ These apostles sought to deepen on white anxieties by claiming that abolition of Slavery would lead to inter-marriage and degeneration of their race. Two thesis stand opposite each other: the “racial purity” and the “pollution”, which comes from inter-marriage, the so-called racial hybridity and interbreeding. The slave insurrections and revolt in Haiti (1791) had persuaded white to think of the instability of the black character. A degree of civilization they argued had rubbed off on the domesticated slave, but underneath, slaves remained by nature savage brutes and long buried passions once loosed, would result in the wild frenzy of revenge and the savage lust for blood.³⁷²

³⁶⁹ Blackmore, Richard, *The Lay-Monastery*, Consisting of Essays, Discourses, published singly under the Title of Lay-Monk, 2nd ed., London, 1713; Compare Hall, Stuart (ed.), *Representation, Cultural Representation and signifying Practices*, The open University, 1997pp.242-243.

³⁷⁰ Ibid. Blackmore, Richard, *The Lay-Monastery*, No. 5, pp. 77, 28-29.

³⁷¹ *Merridiam Webster's Collegiate Dictionary*, Tenth Edition, 1998.

³⁷² Fredrickson, Georg M., *The Black Image in the White Mind*, Hanover, NH, Wesleyan University Press, 1987, p. 54.

Having supposedly exhausted the theory of “racial Hybridity”, they moved on to the concept of “otherness and difference”. They say, difference matters because it is essential to meaning; without it meaning could not exist.³⁷³ These states of consciousness began when the West encountered black people giving rise to an avalanche of popular reorientations based on the marking of racial difference. There were three major moments. The 1st was about the 16th-century, which provided a source of black slaves for centuries.³⁷⁴ The second was the European colonization of Africa and the “scramble” between the European powers for the control of colonial territory, markets and raw materials in the period of Imperialism. And the third was the post-World War II migrations from the so-called Third World into Europe and North America.

During the Middle Ages, the European picture of Africa was ambiguous. Though a mysterious continent, it was however, regarded and viewed positively. After all the Gothic church (in Ethiopia) was one of the oldest “overseas” Christian congregations.³⁷⁵ Black saints appeared in medieval Christian iconography and Ethiopia’s legendary Prester John was reputed to be one of Christianity’s most royal supporters. However, with the passage of time, this image metamorphosed from dignity to shame. Blacks were declared to be the descendants of Ham, cursed in the Bible to be in perpetuity: “*A servant of servants unto his brethren*”.³⁷⁶ Since Africans are more in harmony with nature, they must symbolize the “primitive” in contrast to the civilized world. The enlightenment which elevated societies along an evolutionary scale from barbarism to civilization, taught Africa the pavement of everything that is monstrous in nature.³⁷⁷

Curvier dubbed the African race a monkey tribe.³⁷⁸ The philosopher Hegel declared that Africa was “*no historical part of the world*”.³⁷⁹ It has no movement or development to exhibit; one does not need a ghost to tell him that a python is also another word for a snake. When exploration and colonization of the African interior began, Africa was regarded as historically a nonentity, a fetish land, inhabited by cannibals, dervishes and witch doctors.³⁸⁰ The encounter with blacks was recorded and depicted in maps and drawings, etchings and learned treatise, official reports and privat adventure novels. Through the racializing of advertisement, the Victorian middle class home became a space

³⁷³ Stuart, Hall, *Representation, Cultural Representation and signifying Practices*, The Open University, 1997, p. 257.

³⁷⁴ *ibid.*

³⁷⁵ *ibid.* p. 252.

³⁷⁶ Genesis 9:25

³⁷⁷ *ibid.* n. 373, p. 239.

³⁷⁸ *ibid.*

³⁷⁹ *ibid.*

³⁸⁰ Long, Edward, 1774, quoted in McClintock, A., *Imperial Leather*, London, Routledge, 1995, p. 22.

for display of imperial Spectacle and the reinvention of race, while the colonies became a theatre for exhibiting Victorian Cult.³⁸¹ Furthermore, the galleries of imperial heroes, their exploits in darkest Africa were immortalized on matchboxes, biscuit tins, needle cases, toothpastes, pots, pencil boxes, cigarettes packets, board games, paperweights, and sheets music. Images of colonial conquest were stamped on soapboxes, biscuit tins, whisky bottles, tea tins and chocolate bars. Before this time, no form of organized racism had ever before been able to reach so large and so differentiated a mass of the population.³⁸² More devastating was the historical case that the black man had not undergone any form of civilization. Africa was and had always been the scene of unmitigated savagery, cannibalism, devil worship and licentiousness.³⁸³ Also postulated was an early form of biological argument based on real or imagined physiological and anatomical differences especially in cranial characteristics and facial angles, which allegedly explained mental and physical inferiority. There was appeal to a deep-seated white fear of widespread blackism.³⁸⁴ These stereotypical representations constructed by European people of the image of the African man still persist, for example in American movies in the first half of the twentieth century. In critical studies like Leab's from *Sambo to Super spade* (1976),³⁸⁵ *Cripps' Black film as Genre' Mulattos, Mammies and Bucks: an interpretative history of Blacks in American films* (1973), the persistence of the basic racial grammar of representation is brought to the surface.³⁸⁶ Bogle, however, identifies the five main stereotypes, which he argues made the cross-over. Tom, the Good Negroes: always chased, harassed, haunted, flogged, enslaved and insulted, they keep the faith, never turn against their white masters and remain heartily, submissive, stoic, generous, selfless and oh-so-kind, Coons, the eye-popping piccanninnies, the slapstick entertainer, the spinner of tales; The No Account "Niggers": those unreliable, crazy, lazy, subhuman creatures, good for nothing, more than eating watermelons, stealing chickens and shooting crops;³⁸⁷ The Tragic Mulatto: the mixed raced woman, cruelly laugh between a divided racial inheritance, beautiful, sexually attractive, sexy heroine, whose partly white blood makes her acceptable, even attractive to white men but whose indelible stain of black blood consigns her to abyss;³⁸⁸ The Bad Bucks: physically big, strong, no- good, violent, renegades on a

³⁸¹ Stuart, Hall (ed.), *Representation, Cultural Representation and signifying Practices*, 1997, p. 239.

³⁸² McClintock, A., *Imperial Leather*, London, Routledge, 1995, p. 22, p. 209.

³⁸³ *ibid.* n. 381, p. 243.

³⁸⁴ *ibid.*

³⁸⁵ *ibid.* p. 251.

³⁸⁶ *ibid.*

³⁸⁷ *ibid.*

³⁸⁸ *ibid.*

rampage and full of black rage, over sexed and savage, violent and frenzied as they lust for white flesh; And The Mugger: the drug baron, the yardie, the gangster-rap-singer, the niggers with attitude bands.³⁸⁹ To counter white ignorant propaganda, the abolitionists and its anti-slavery movement of 1834 did put into circulation an alternative imaginary of black-white relations. Abolitionists adopted slogans about the black slave: “*Are you not a man and brother? Are you not a woman and a sister?*”³⁹⁰ emphasizing not difference, but a common humanity. The anniversary coins printed by the anti-slavery societies represented this shift, though not without the marking of difference. However, the sentiment and the ignorance even by abolitionists persisted. Black people are still regarded as childish, simple and dependent. They were represented as either supplicant from freedom or full of gratitude for being freed and consequently still shown kneeling to their white slaveholders.³⁹¹

Blacks were reduced to being lazy and unfaithful; mindless looming, trickiness and childishness belonged to blacks as a race and also as species. There was nothing else to the kneeling slave but his servitude. Nothing to Uncle Tom except his Christian forbearing; nothing to Mummy but her fidelity to the white household and what Farion called the “sho” nuft good cooking.³⁹² The black women were eulogized as “*sun kissed embodiment of ardency, warmer race, from sable sprung, to love each thought, to lust each nerve is strong. The Samboe dark, and the Mulattos brown, the mestize fair, the well-limbed Quadroon and jetty Afric, from no spurious sire, warm as her soil and as her sun-on with fire. These sooty dames, well versed in Venus school, make love an art and boast they kiss by rule.*”³⁹³ Yet, however, white men were doing more than reporting pleasant facts. For by calling the black woman all passionate names, they were offering the best possible justification for their own passions. Not only did the black woman’s warmth constitute a logical explanation for the white man’s infidelity, but much more important, it helped shift responsibility from himself to her.³⁹⁴ If she was that lascivious, well, a man could scarcely be blamed for succumbing against overwhelming odds.

³⁸⁹ Griffiths, D. W.s Film: *The Birth of a Nation, 1915*; Stuart, Hall, *Representation, Cultural Representation and signifying Practices*, The Open University, 1997, p. 251.

³⁹⁰ *ibid.* Stuart, Hall, p. 249

³⁹¹ *New Africa*, August/September 2003, issue No. 421.

³⁹² *ibid.* n. 389 Stuart, H., p. 245

³⁹³ South Carolina Gazette and West Indian books. *Jamaica, a poem in three parts*, London, 1777, pp. 22-23; Sable Venus; *An Ode in Edward, Bryans, History, Civil and Commercial of the British Colonies in the West Indies*, Vol. II, London, 1801, pp. 32-38; Compare: *New Africa*, August/September 2002, No. 42, pp. 52-53.

³⁹⁴ *ibid.* n.389 Stuart, Hall, pp. 249-251.

The stereotyping of blacks took astronomical dimensions that cartoonist, illustration caricaturists could summon up a whole gallery of “black types” with a few, and simple essentialized strokes of the pen.³⁹⁵ They were reduced to the significant of their physiological difference: thick lips, fuzzy hair, broad face and nose e.t.c. It was part of white supremacists ideology and practice that white men should sit while slaves stand, that white women rode and slave men ran after them shading them from the animals or punish runaway slaves, like branding them or urinating in their mouths and those delinquents should kneel to receive their punishment.³⁹⁶

Another category of blacks prescribed through their lenses, tolerated though not admired. These include the happy native-black entertainers, minstrel and banjo players, sport men and women, who seemed not to have a brain in their heads but sang, danced and shared jokes all day long to entertain white folks. Stereotyping reduces people to a few, simple, essential characteristics, which are regarded as status quo.

Four concepts readily come to mind vis-à-vis:

- The construction of otherness and exclusion;
- Stereotyping and power,
- The role of fantasy and
- Fetishism.³⁹⁷

Firstly, without the use of types, they argue, it would be difficult to make sense to the world. We understand the world by referring to objects, people or events in our heads to the general classificatory schemer onto our culture.³⁹⁸

Secondly, stereotyping deploys a strategy of spitting; it divides the normal and the acceptable from the abnormal and the unacceptable. Stereotyping is part of the maintenance of social and symbolic order. It sets up a symbolic frontier between the normal and the deviant, the normal and the pathological, the acceptable and the unacceptable, what belongs and what does not or is “other”, between insiders and outsiders.³⁹⁹ It facilitates the binding or bonding together of all of us who are normal into one imagined community and it sends into symbolic exile all of them, the others, who are in some way difference beyond the pale.

³⁹⁵ Stuart, Hall, (ed.), *Representation, Cultural Representation and Signing Practice*, The Open University 1997, pp. 244-245.

³⁹⁶ *ibid.*

³⁹⁷ *ibid.* pp. 243-254.

³⁹⁸ *ibid.* p. 249.

³⁹⁹ Friedman, Saul S., *Jews and the American Slave Trade*, 2000, pp. 258-259. For more information, please refer to *Representation, Cultural Representation and Signifying Practice*, edited by Stuart Hall, The Open University 1997.

Stereotyping manifest where there are gross inequalities of power. Power is usually directly against the subordinate. One aspect of this power according to Dryer, is ethnocentrism-the application of the norms of one's own culture to that of others.⁴⁰⁰ It classifies people according to a norm and constructs the excluded as other. The reasons for the brutal and dehumanising treatment of blacks during slavery begin to unfold gradually.

Racism attained its zenith height with the logic of naturalization. This practice reduces the black culture to naturalizing difference. This is the logic. If the differences between black and white people are cultural then they are open to modification and change. But if they are natural, as the slave holders believe, then they are beyond history, permanent and fixed. Naturalization is therefore a representational strategy designed to fix difference and thus secure it forever. It is an attempt to halt the inevitable slide of meaning to secure discursive or ideological closure.⁴⁰¹ Added to these quagmires is the anthropological inference. Anthropology, which was prominent in the nineteenth century and which has more causal connections between race and culture amplified the race mentality. As the "inferior race" syndrome came to be regarded as fixed, socio-cultural differences became to be regarded as dependent upon hereditary characteristics.⁴⁰²

Socio-cultural differences among human populations became subsumed within the identity of the individual human body. In an attempt to trace the line of determination between the biological and social, the body became the totemic object and its very visibility the evident articulation of nature and culture. Arguments of racialized body and its meanings came to be seen in proper representation of difference and "otherness".⁴⁰³ It also highlights the connection between visual discourse and the production of knowledge. The representation of difference through the body became the discursive site through which much of this racialized knowledge was produced and circulated. This was justified with reference to the seemingly scientific and ethnological evidence, which shaped the basis of a new kind of "science racism". Conversely, blacks and whites had been created at different times according to the theory of polygenesis. Amongst blacks therefore, it was assumed, culture coincided with nature, whereas whites developed culture to subdue and overcome nature but for the blacks, culture and nature were interchangeable.⁴⁰⁴

⁴⁰⁰ Stuart, Hall, (ed.), *Representation, Cultural Representation and Signing Practice*, The Open University 1997, p. 254.

⁴⁰¹ *ibid.* p. 245.

⁴⁰² *ibid.* p. 245.

⁴⁹³ *ibid.* p. 257.

⁴⁰⁴ Green, David, *Anthropology*: 1984, pp. 31-32.

3.1 Conclusion

The Anthropology of slavery and slave trade presented in this book, evidently do not exhaust the case, and still less the search for a theoretical conceptualisation. However, in the historical framework of its reproductive force, a society is not based on production alone but also on the conditions of production. On the basis of present-day research into slavery, it is pertinent to state the followings: in the historical framework of its productive force, a society is not based on production alone but also on the reproduction of conditions of production, because the organisation of the relations of production is the mode of production and the organisation of the relations of reproduction is the mode of reproduction. Consequently, the juridical, political, ideological and cultural super structures are seen to be instruments of the mode of reproduction and a society is therefore, made up of the organic organisation of its modes of production and reproduction, whose specificity characterises the social system, which underpins it: the domestic community, slavery, serfdom, capitalism e.t.c.⁴⁰⁵

Every society receives productive forces, which are made up of accumulated intellectual knowledge and material properties, as well as the political, social and ideological capacity to put down to work for its own guidance and also relative to other societies. Thus, these productive forces determine the limits and the nature of the society's relations without all that is external to it, both the natural environment and foreign societies. The essential and restrictive relations of production, which are determined, are indispensable to the material maintenance of the member of the society and the system of production. And from the same framework of determination, social rules governing the relations of production geared toward the constant reconstitution of the relations of production and the human beings, which are inserted into them have been explained.⁴⁰⁶ Though, the social conditions of production are situated within a framework, which is historically determined by the level of productive force, however, social organisation must be made to conform to them through appropriate actions. Although, history offers a framework for determination: that the relations of production it makes are limited in form and content, but only functions through organised action by members of the society to create institutions, which establish and constantly renew the relations of production, for example, institutions such as kinship or wars of capture. These institutions are located at

⁴⁰⁵ Meillassoux, Claude, *The Anthropology of Slavery*, 1991, p. 325.

⁴⁰⁶ *ibid.*

the pinnacle of power relations: the existence implies a political choice, which is liable to affect the productive forces and therefore, to shift the point at which they become determinant. Through this intervention, society escapes absolute materialist determinism. It is in this respect that the society enjoys a degree of freedom.

In domestic societies, the productive forces function within the limits of self-sustenance as it applies to a population in which the relations of production are governed by kinship and kinship, which organises the social framework of procreation (marriage) and the devolution of progeny (filiation), frequently generates relations of production in conformity with the historical conditions in which they have to operate in order to be efficient. The main characteristics of the domestic relation of production, built around food cultivation (life-long relations, relations of anteriority and the intergenerational distribution of the product) can adapt to patrilineal or avuncular filiation. Slave reproduction can also originate in war or in races as stated earlier.

Under capitalism, the methods of reproduction imposed on the working class distinguished an integrated relatively stabilised proletariat from one which is migrant and temporary: *“the first is backed up by institutions of social security and the other by administrative and police apparatus, which organises shifts of populations between the domestic and the wage economy”*.⁴⁰⁷ Generally speaking, the relations of production and the relations of reproduction are congruent, since they apply jointly to the whole population. But this does not apply for slave owning societies where the mode of production is not directly determined by productive forces alone but is also determined relative to those of other societies whose demographic increase it can frequently and regularly plunder. Slave exploitation is organically grounded on foreign method of production, the domestic mode of production, which produces the men and women whom the slave mode of production transforms into slaves. Subsequently, the domestic mode of production and the slave mode of production are not homogeneous: they do not fit term for term into a single category mode of production.⁴⁰⁸ It is generally agreed that slave society is a class society and therefore, the dominant class also operates the institutions, which reproduce the society at large.

In aristocratic society, the dominant class wage slave wars, which form the means of reproduction of the slave class and consequently of slave-owning society as a whole.

⁴⁰⁷ Meillassoux, Claude, *The Anthropology of Slavery*, 1991, p. 327.

⁴⁰⁸ *ibid.*

Towards this aim, they build up military and political alliances, which contribute to social reproduction. The looting of other societies is the basis of the elementary class relationship between masters and slaves. The aristocracy, which is organised around war and power, sometimes reproduces itself in cooperative forms – like the band but more often through the model of dynastic kinship backed up by the ideological and segregative notion of consanguinity. While the merchant class relations of reproduction centre around the transmission and reconstitution of patrimony, the slave class, the institution of war and that of the market, set up by the dominant classes are the framework which govern its reproduction and in a historical context, evaluates kinship.⁴⁰⁹

Patrimonial kinship on the one hand capture and purchase on the other hand: these forms of social reproduction were mutually exclusive and therefore, sanctions the class relations through agamy, which prevented the emergence between these classes of relations capable of generating kinship. However, when individuals of low classes were incorporated into relations of production, they were constituted not as a class but as a social corps with its own specific methods of reproduction and its own specific relation to the dominant class. Historically, societies do not exactly repeat themselves because the mode of reproduction gives way to the model of contradiction, which transforms it dialectically, in conformity with the principles of historical materialism.⁴¹⁰

To be able to distinguish the method of reproduction of slavery from that of serfdom, it was essential, to take into account both the demographic conditions of the emergence of new generations of the economic conditions of their growth up to the productive age. The study of population laws presupposes an anthropological examination of the social divisions between sexes and which results also from the social recognition of the woman's reproductive function and the cultural position she occupies in this position. The study of slavery and the social definition of woman in turn orders the rule of kinship, since it is through her that the relations of kinship are established.⁴¹¹ For the progenitors of kinship slavery, it is instructive in that it is antinomic to kinship, it has not as such held the attention, either of the structuralist or of the functionalist, except to be situated in the universal scheme of a kinship, which is implicitly consanguine – that is essentially aristocratic.⁴¹²

⁴⁰⁹ Meillassoux, Claude, *The Anthropology of Slavery*, 1991, p. 328.

⁴¹⁰ *ibid.* p. 329.

⁴¹¹ *ibid.*

⁴¹² *ibid.* pp. 329-330.

The thesis of procreation cannot be said to be “natural” beginning point for the elementary social relation of motherhood, and still less of fatherhood. This relationship can only come to pass through active material exchanges between adults and children. But between slaves, these parental relationships depended only on the masters’ goodwill or his birth the pivotal point of social reproduction. As a matter of fact, the reproduction of a society is not realised with the birth of a new generation but only with its coming to economic maturity. Though there may be high fertility of the women, the proportion of children who reached maturity will depend in the final analysis on the active individual labour productivity in food production. Demographic potentials were subordinated to productive capacity.⁴¹³ Slavery and slave trade represent one of the first form of liberation of labour, that is: these women and men, torn from the native communities where they could work only with in the framework of the indissoluble and restricting ties of kinship, were transformed into a labour force supplied to all those who had the means to appropriate it for themselves. Consequently, a hugh shift of labour power took place along with its concentration and its reorganisation according to different norms of production.⁴¹⁴

From the various examinations of slavery, one can say that slavery led to a drop in food production and thus in population and the immobilisation of potential capitals in slave trade restricted the growth in labour productivity. Slavery provoked transfers of the surplus products but also its reduction, slavery was not only a means of exploitation but also of over-exploitation. However, one can also infer that it created and stimulated large scale trade, the specialisation of tasks and the diversification of production and therefore, the rise of merchant class.⁴¹⁵ The increase in production was destructive rather than productive through the intensification of wars of capture and the accumulation of numbers of slaves because there was no incentive to increase the labour productivity of the exploited. The coexistence and combination of aristocratic and merchant societies and of their respective slavery favoured an economy stretched between subsistence and luxury, in which productive investments were mostly limited to the instruments of war. Like all exploitative systems, slavery led to the alienation, not only of the exploited but also of the exploiters, it led to a negation of humanity of men and women, to contempt of them and to hatred. It is the causation to racism, to arbitrariness, to cruelty and to purifying murder, which are the characteristic weapons of the bitterest class struggle.

⁴¹³ Meillassoux, Claude, *The Anthropology of Slavery*, 1991, pp. 330-331.

⁴¹⁴ *ibid.* p.331.

⁴¹⁵ *ibid.* p.332.

It is likely that the alienation of the various actors involved in slavery has communicated itself even to us, borne by the unquestioned and uninterrupted culture of the exploiters, that is still imperceptible to us and present as humanist societies today, which were built on the plunder of man. ⁴¹⁶

⁴¹⁶ Meillaousuox, Claude, *The Anthropology of Slavery*, 1991, pp. 332-333.

Book Two

Chapter IV: Historical Background, Economic, Social, Political Aspects of Atlantic Slavery and Slave Trade and its Legal Implications

4. Introduction

Book two chapter IV shall evaluate and analyse the findings and results of Book one in economical, cultural and legal terms. Bearing in mind that a minima 97ceptical97zati varia ius may make all differences, in the final results and recommendations, a pragmatic and objective examination will be undertaken.

The slave trade first became a subject of historical discussion in the era of Abolition, beginning in the late 18th century. The contributors on this subject were Europeans or Euro-Americans, debating among themselves without any participation or even audience among African people. It was not unexpected therefore, that most of the arguments were expressed in the same economic terms as that of the slave traders themselves. William Clarkson, author of perhaps the first systematic book on this subject, could thus disprove the value of the slave trade to Britain's naval military preparedness by presenting statistics of mortality among European sailors on slaving vessels.⁴¹⁷ This argument and others propagated by abolitionists of slave accommodation on a ship did not question the complicity of slave trade at that time. Unconvincingly, they perceived their use of economic reasoning as consistent with the general project of Enlightenment thought, which was seen as a liberating ideology essentially opposed to such barbaric practices as enslavement. What many thinkers and clergymen had difficulty in recognizing was that the slave trade they attacked, the one, which took African people to plantations in the New World, was itself a rational thought-out modern institution based on the same economic principles propounded by those who most deplored it.⁴¹⁸

The contradiction with the above mentioned position may be seen in the most acclaimed and known African account of the slave trade in this period, the autobiography of an enslaved Olaudah Equiano. Equiano wrote of his anguish at being kidnapped from his family and shipped across the Atlantic,⁴¹⁹ but as a result of his ability, he bought himself out

⁴¹⁷ An Essay written by Austen, Ralph, *Committee on African and African-American Studies*; University of Chicago 5828 S, University Chicago Press, IL 60637, 1990; Compare Appadurai, Arjun, "Disjuncture and Difference in the World Cultural Economy", *Public Culture*, ca. 1991; Woodruff, Smith, "Private Tooth Decay as Public Economic Virtue: the Slave-Sugar Triangle, Consumerism and European Industrialization", in Inikori and Engerman, 1992, pp. 183-203.

⁴¹⁸ Williams, E., *Capitalism and Slavery*, 1974, pp. 18-19, 20ff.

⁴¹⁹ Equiano, Olaudah, *Equiano's Travels*, 2 Vol., ed. Paul Edwards, New York, 1967, pp. 1, 47; Hugh Thomas, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, pp. 377, 410, 414.

of slavery through conformity with the capitalist value of his enslavers. In short, despite the ultimate involvement of Equiano in the abolitionist's movement, he unapologetically tells of several occasions both before and after his emancipation, when he himself engaged in slave trading. This may be true, but the difficulty, which Equiano has in defining his own identity apart from the slave trade was indicated by the constant repetition in his life of the original rupture with his home society by continued series of voyages to places as remote as the North Pole.⁴²⁰ The ambiguous position expressed here treated slavery from two angles: one defending free trade and property right, which excluded the exchange and possession of legally purchased slaves, and the other, proclaiming universal rights to individual freedom, which precluded slavery. In the practical policy of dealing with the slave trade, these ambiguities were openly recognized, fought over, and also resolved so as to exclude human being from the category of legal property.⁴²¹

The initial academic historians of the slave trade attempted to resolve this imbroglio by stressing the religion as opposed to the secular enlightenment dimension of the abolitionist approach. They readily recognized that the slave trade was rational and profitable but simply use such an understanding to stress the disinterested virtue of those who abolished it. This historiography turned the story of the slave trade into imperial morality play, not to be dismissed lightly in its own context of British thoughts and politics, but profoundly and satisfactory from most other perspective.⁴²² In a larger extent, this abolitionist approach and research, though carefully documented had no decisive place in history because of its absence of insight into either the economics of slave trade itself or the ideological and religious forces, which opposed it. For Africans and African-Americans, it represents serious problems of "ownership". While property rights in slaves were roundly denounced by historians like Sir Reginald Coupland, they ascribed to their own culture all the agency for both the sins of trade and its redemption. In this story, Africans thus, become little more than victims, and victims who (in a scenario to be re-enacted in many forms from the missionary movement, through colonial tutelage, to postcolonial Food Aid concerts) could only overcome their situation through new, more benign forms of external hegemony.⁴²³ Another question that is yet to be answered is the focus upon where the

⁴²⁰ Equiano, Olaudah, *The Interesting Narrative of the Life of Olaudah Equiano or Gustavus Vassa, The African written by Himself*, reg. at Stationer's Hall London 1789.

⁴²¹ compare Drescher, Seymour, *Abolition: A History of Slavery and Antislavery*, Cambridge University Press, 2009, pp 3ff; http://en.wikipedia.org/wiki/History_of_slavery

⁴²² Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison, 1969, p. xv.

⁴²³ <http://jhunix.hcf.jhu.edu/>; Compare Coupland, Reginald, *The British Anti-Slavery Movement*, 1933.

slave trade and its abolition fit within an impersonal scenario of the development of capitalism. This is because slave trade formed an essential element in an early, mercantilist stage of capitalist development and abolition, which was a reflex of the resulting industrialism and its free trade commercial policies. Added to this problem is the argument about the significance of the Third World “periphery” and particularly, its now marginalized African and African-American sector, through the lenses prescribed by capital accumulation, class interests and industrial revolution.⁴²⁴

The above thesis and argument were generally rejected by the mainstream economic historians: what has emerged in its place is a more complex appreciation of those aspects of capitalism not directly connected to industrial production, which were very closely connected to the slave trade in its pre-industrial days and to a post modern, postcolonial world in which the location of centre, periphery, and the links between economic power and industry were no longer so evident.⁴²⁵ Before discussion on how the current perspective relates to the ownership of slave trade history, it will be imperative to consider some intervening aspects of slave history. One aspect of historiography where slavery and slave trade did not feature prominently was the myriad of works on continental African history, which accompanied the termination of colonial rule in the 1950s and 60s. The historical writing of this period is generally referred to by critics as “Africanist” because it attempted to endow enlightened African actors with the kind of agency, which had been denied them by colonialist writing.⁴²⁶ Since the slave trade had been giving a very prominent place in colonial historiography as one of the justifications for European intervention against the inhumanity of both Europeans and African perpetrators, it is not surprising therefore that it played a lesser role in writings concerned with more positive as well as active presentations of African leaders. According to the recent write-up on Africanist history of the early Atlantic slave trade 1400-1800, the largest number of slaves to leave Africa via the Atlantic occurred after 1680.

⁴²⁴ Williams, Eric (1944), *Capitalism and Slavery, History of the People of Trinidad and Tobago, Political legacy, 1964*, p.19; Blackburn, Robin, *The making of the New World Slavery: from the Baroque to the Modern, 1492-1800*, version 1997, reviewed 1998 by Matt Wrack; Williams, Eric, *Capitalism and Slavery*, Chapel Hill: U. of N. Carolina, 1942.

⁴²⁵ Compare Cain, P. J and Hopkins, A.G., *British Imperialism: Innovation and Expansion 1688-1914*, Vol. 1 and *British Imperialism: Crisis and Destruction 1914-1990*, Vol. 2, Longman 1993; Id. *The Revolutionary Road to Communism in Britain*, Larkin Publication, 1984, pp. 51-52; Id. “Imperialism, The Highest Stage of Capitalism”, *Collected Works*, Moscow 1964, pp. 187, 260 and 283; Williams, Eric, *Capitalism and Slavery*, Chapel Hill: U. of N. Carolina, 1942.

⁴²⁶ Compare Thornton, John, *Africa and Africans in the Making of the Atlantic World, 1400-1680*, Cambridge, 1992, pp. 1-2; Smith, Adam, *The Wealth of Nations*, New York, 1994, p. 89.

In this write-up, an attempt was made to show how the negotiation of rights over human being was consistent with African economic and social practices rather than something imposed from outside; thus Africans were seen, at least in the initial stages, as maintaining considerable control over the slave trade.⁴²⁷ As will be shown below, this write-up appears to suggest an approach to African economic history, which may bear further fruits. However they were not yet linked to any African claim to slave trade historiography since they were published long after the declining of the original Africanist school and in response to other kinds of economic history, which needed to be considered first.⁴²⁸ Consequently, two major legacies emerged here, one was the specific argument about industrial capitalism, which involved very strong claims to this history on the parts of its victims and their descendants. The order was the methodological break with previous abolitionist writings, which allowed a truly impersonal economic history of the trade to be written, one which had unwittingly raised questions of complicity. As a result of this new work, a clearer picture emerged on how the Atlantic sugar plantation system (which accounted for the greater part of the slave trade) actually functioned. It has also provided a clear understanding of how compatible the slave trade was with the needs of developing European capitalism, not only in the pre-industrial era of the 17th and 18th centuries, but also throughout the first stages of abolition in the 1800s.⁴²⁹

Thus, the historiography of the slave trade, which flourished from the late 1960s through the late 1980s accepted unquestionably the contradictions in the capitalist developments to which the abolitionist tradition had given little attention to.⁴³⁰ Questions arose rather around claims that the historiography appeared to reduce the onus of the slave trade either by some of the specific calculations of its scale and economic impact or by its very insertion into a normal discourse of economic rationality. One can not but work on hypothesis on what kind of claims would be made to the slave trade under the influence of contemporary trends in post-modern/postcolonial scholarship. A key condition of such scholarship would be a world in which the master narrative of European modernity are being challenged through the invasion of its physical and cultural space by representatives of the very communities, who appear to have been effectively repressed and marginalized during the last few centuries of history.

⁴²⁷ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison, 1969, pp.xv-xvi.

⁴²⁸ Thornton, John, *Africa and Africans in the Making of the Atlantic World, 1400-1800*, Cambridge, 1992. pp.1-3.

⁴²⁹ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison, 1969; Eltis, David, *Economic Growth and the Ending of the Atlantic Slave Trade*, N.Y., 1987.

⁴³⁰ Coupland, R., *The British Anti-slavery Movement*, London: Thornton Butterworth, Limited, 1933, pp.15-16, 36-40.

These Africans and African-Americans feature quite prominently and the slave trade is certainly a narrative, which they will continue to claim and rewrite.⁴³¹

4.1 The Consequences of Atlantic Slavery on African Economies

It is an empirical fact that the universal demand for African slaves reallocated the resources of African economies. A theoretical model of conflict and cooperation in Africa will expose the conditions under which the demand for slaves not only reallocated resources, but also produced externalities thought to impede long-time development. These impediments are constraints on the growth of African states, increases in ethnic and socio stratification, and a sustained culture of political violence.

The model shall be tested against the history of Asante (present day Ghana). This model shall help to highlight Asante origins and expansions, including the Asante Alliance, the causes and timing of territorial expansion, and the “southern problem.”⁴³² Most exponents of Atlantic Slave Trade had shown an inclination to focus on the depopulation of Africa as a consequence of African slavery. For example, Patrick Manning (1990), McEvedy and Jones (1978) assert that the slave trade delayed population growth in Africa and must have reduced the aggregate population between 1700 and 1850. It is however problematic to assess the causal impact of population growth and development.⁴³³

This write-up shall address the impact of slave production on its related externalities on the development process. Orlando Patterson (1982) calls the population of slaves the production of “social death.”⁴³⁴ It is a violent process where a person is brought to the brink of death, spared and then ritualistically put to social death, left to owe the remainder of their life to another person. The spill over of this social death to African economies cannot be underestimated because it left a devastating effect on the social life, institutions and development. The constant slave raiding impedes production, social life and obscured the ethnic boundaries and the ability to distinguish insider from outsider as the people scuttle to escape the risk of being caught. Similarly the increase in profit of slave raiding induced the allies to raid for slaves rather than build powerful states. The extent of Atlantic Slave Trade is difficult to phantom, however, one can guess that between 16th and 19th centuries more than 14 million slaves were produced in Africa and taken to overseas.⁴³⁵

⁴³¹ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison: University of Wisconsin, 1969.

⁴³² Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008 p. 1.

⁴³³ Compare Inikori, Joseph, *Forced Migration: The Impact of the Export Slave Trade on African Societies*. New York: Africana Publishing Company, 1982, pp. 27-59.

⁴³⁴ See Patterson, Orlando, *Slavery and Social Death*, 1982.

⁴³⁵ Curtin, Philip, *The Atlantic Slave Trade, A Census*, Madison: University of Wisconsin, 1969, p. 5; Fage, J.D., *Introduction to the History of West Africa*, Cambridge, 1955, pp. 59, 82-84.

About 77 percent of these slaves (10.1 million) were produced along the West and West-Central coasts of Africa during the 150 years between 1701 and 1850.⁴³⁶ In 1700, the estimated population in this region was 28 million people.⁴³⁷ Assuming the average life-span was 30 years, then the 10,1 million slaves were produced over 5 life times. That means 2.6 million slaves produced per life time, or 9.3 percent of the total population. If collateral damage is taken into consideration, the probability of being a victim of slave production accelerates. Captured slaves during the long trek to the coast, in the holding pens along the coast, and during the middle passage suffered various infirmities and death. Therefore, the physical and social death required to produce 13 million slaves' exports could have easily reached twice of that number.⁴³⁸

This paper shall also address the influence of effective demand on African economies and societies. Effective demand means here that the international demand for African slaves will essentially drive the value of people as slaves above their value as producers. In other words, there will be an increase in the economic returns to slave trading. The model here reveals the conditions, under which the slave trade reduced the size of states, increased social and ethnic stratification and create a reign of terror. It will also bring out the effect of changing slave prices and capture technology on the characteristics of African economies and societies.

In his book "*How Europe Underdeveloped Africa*" (1972), Rodney points out that the slave trade changed the African economies. In one hand, the slave trade impeded state building and encouraged slave raiding. It geared up the capture of slaves for sale and discouraged the capture of land and the cultivation of citizenry for the purposes of taxation. He further asserts that "*there have been times in history when social groups have grown stronger by raiding their neighbours for women, cattle, and goods, because they then use the "booty" from the raids for the benefits of their own community. Slaves in Africa did not even have that redeeming value. Captives were shipped outside instead of being utilized within any given African community for creating wealth from nature.*"⁴³⁹ And, "*if the prisoners were to develop into a true serf class, then those prisoners would have had to be guaranteed the right to remain fixed on the soil and protected from sale.*"⁴⁴⁰ Judging from the relationship between the GDP per capita ex ante and participation in the slave trade ex post, Nathan Nunn advanced convincingly that the slave trade had a negative long-time

⁴³⁶ Transatlantic Slave Trade Database 2009 at www.slavevoyages.org.

⁴³⁷ McEdey, Collins, and Jones, Richard, *Atlas of World Population History*, London: Penguin Book, 1978, pp. 241-256.

⁴³⁸ Equiano, Olaudah, *The Interesting Narrative of the Life of Olaudah Equiano*, Boston: Bedford Books, 1995, pp.37-48.

⁴³⁹ Rodney, Walter, *How Europe Underdeveloped Africa*, 1972, p.100.

⁴⁴⁰ *ibid.* p.118

effect on economic performance and gave evidence, which suggests that the legacy of the slave trade operated through increased ethnic diversity, underdeveloped political structures.⁴⁴¹ Studies of contemporary African history concord that ethnic diversity and underdeveloped states did contribute to African's poor economic performance in the post-World War II period. Other scholars argued that a quarter of the difference between the post-World War II growth experiences of African and Asian economies is traceable to centuries of slavery and slave trade which also increased the political and military challenges to its authority and laid the foundation for ethnic stratification.⁴⁴² In his contribution, Philip Curtin highlighted the empirical relationship between slave demand and slave export; he said that exports were insensitive to the level of demand because slaves were mostly produced by political events unrelated to the international demand for slave. This situation shall be explained in Fig. 1 by the inelastic slave supply curve and depicted by the positively-sloped supply schedule.

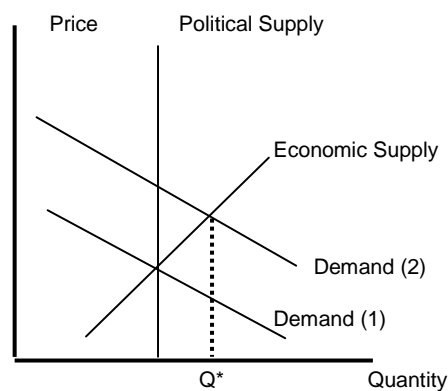


Figure 1: Political and Economic Models of Slave Supply

The result of this econometric test is that African slave exports were responsive to the international demand for slaves and this was increased by British commodity investment in the slave trade by 43%.⁴⁴³ Though the impact on the economies of the African countries was minimal, however, the negative externalities of producing slaves did deluged the private costs. For example using the Yoruba captives as a measure of Yoruba's welfare, Eltis finds out that "for every increase in slave departures (exports) of 1,000, a mean height of the birth cohort declined by more than one fifth of a centimetre."⁴⁴⁴ One can interpret this as an evidence that slave production had far-reaching and measurable effects on African financial and social welfare.

⁴⁴¹ Compare Nunn, Nathan, *Historical Legacies: A Model Linking Africa's Past to its Current Underdevelopment*: Journal of Development Economics 83 (1), 2007, p.157-175.

⁴⁴² Easterly, William and Levine, Ross, *Africa's Growth Tragedy: Policies and Ethnic Divisions*: The Quarterly Journal of Economics, Vol. 112, 1997; Bates, Robert H., *When Things Fell Apart: state failure in late-century Africa*, New York: Cambridge University Press, 2008.

⁴⁴³ Curtin, Philip D., *Economic change in pre-colonial Africa: Senegambia in the era of the slave trade*. Madison: University of Wisconsin Press, 1975, p.10.

⁴⁴⁴ Eltis, David, *Welfare Trends among the Yoruba in the Early Nineteenth Century: The Anthropometric Evidence*, Journal of Economic History, Vol. 50 (No. 3), 1990, p.519.

John Fage contends that the slave trade did encourage de facto, the consolidation of political states and influenced economic development positively in the long-run. Contrary to this state of affairs, effective demand reduced the incentive to build states and subsequently, the states that emerged in 18th century Africa would have been larger and less militaristic in the absence of slavery.⁴⁴⁵ John Thornton postulates that the production of slaves was basically a bi-product of political struggles, but differs in opinion to Curtin, in that, the slave trade “*changed the way wars were waged at the lowest level.*”⁴⁴⁶ Many scholars are of the opinion that the slave trade did change the political terrain of Africa “*by the end of the 17th century, the European demand for slaves had brought about a profound transformation of African societies of the Slave Coast. Although this was primarily an economic transformation, it had dramatic effects in the political sphere also; in the collapse of political order leading to the rise of the new state of Dahomey (which was a depot for African slavery).*”⁴⁴⁷ Joseph Inikori (1982, 2003) argues that the slave trade encouraged the formation and spread of banditry and militarised states. One finds similar conclusions in Boubacar Barry’s (1998) study of the Senegambia region and Kwame Daaku’s (1970) study of the Gold Coast.⁴⁴⁸

Nevertheless, other scholars agree that the effect of the slave trade on Africa is more complex than Curtin’s advancement. It is true that the slave trade changed the political pendulum of the supply function, with indigenous conflict producing a greater number of slaves, for example the ex post practice of “eating the countryside,” or selling the population of the vanquished as a way to weaken one’s enemy.⁴⁴⁹ The supply elasticity in the appendix (see appendix for slave prices) describes the minimum estimate of the impact of effective demand on slave exports. Some of the supply elasticity also, by estimating procedure, may come from changes in institutions and not simply reallocation of resources. Examples are the proliferation of banditry and marauding bands of slave traders as the demand for slaves increases; or the expansion on militarised slave raiding states at the expense of nation-building and the cultivation of citizenry; or a reduction in the probability of peaceful settlement of conflicts; or turning walled cities once havens for refugees, into garrisons for slave raiders.⁴⁵⁰

⁴⁴⁵ Compare Fage, John, *A History of West Africa*, Cambridge: Cambridge University Press, 1969.

⁴⁴⁶ Thornton, John, *Warfare in Atlantic Africa, 1500-1800: Warfare and History*, London: UCL Press, 1999, p. 151.

⁴⁴⁷ Law, Robin. *The Slave Coast of West Africa, 1550-1750: the impact of the Atlantic slave trade on an African society*, Oxford University Press, 1991, p. 345.

⁴⁴⁸ Compare Inikori, Joseph, *The Struggle Against the Atlantic Slave Trade: The Role of the State* 2003. In: *Fighting the Slave Trade: West African Strategies*, S. A. Diouf, ed. Ohio University Press; Id. *Forced Migration: The Impact of the Export Slave Trade on African Societies*, 1982; Barry, Boubacar, *Senegambia and the Atlantic Slave Trade*, 1998; Daaku, Kwame Y., *Trade and Politics on the Gold Coast, 1600-1720: a study of the African reaction to European trade*, London: Clarendon, 1970.

⁴⁴⁹ Compare Dupuis, Joseph, *Journal of a Residence in Ashantee*, London: Cass, 1824, p.163.

⁴⁵⁰ Compare *ibid.* n. 445 for similar examples in many parts of Africa.

The next section will attempt to highlight the outcome of effective demand on these types of institutional changes that could be referred to as externalities of the slave trade.

4.2 The strategy of Effective Demand

The degree by which effective international demand for African slaves and the influence it had on the institutional structure and cultural practices of African societies will be the object of this section. The actors in this scenario are the rulers of nations and villages. The nations were principally conquering villages and raiding for slaves and most of their instruments used for this purpose were war and raiding. For this purpose war is defined as aggression for the purpose of acquiring people and territory and raiding is defined as aggression for acquiring people for the slave trade. These were the two options open to nations.⁴⁵¹

It should be recalled that villages and nations practiced despotism – the community leaders (elder, chiefs or kings) had the absolute authority to make decisions for the people when it comes to war or raiding, and this authority was derived from the elite's claim to land, be it legitimised by oral history, lineage or religion.⁴⁵² Consequently, decisions were made to maximise the elites' utility and after conquering a land or a village in a war, the victor claims his right to the land by deposing of the elite (penalty of which is the death of the chief by beheading). Because of this sordid situation, there was diminishing return to war and constant return to slave raiding, but the result persist as the returns to raiding decline slower than the returns to war. The final result of this state of no war and no peace bestowed upon the victors to protect the accumulated territories from outside aggressors, to police and to administer internally, collection of tax, building of communication networks and roads and suppression of any form of insurrection.⁴⁵³

With the passage of time, diminishing return began to set in as populations migrate to avoid raiders.⁴⁵⁴ In the following three subsections, the predictions generated by the model under different scenarios in the presence and absence of effective demand for slaves will be discussed.

⁴⁵¹ Compare Whatley, Warren C. and Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p.8.

⁴⁵² Equiano (1995) gave a clear note about "absolutism": "When a trader wants slaves, he applies to a chief for them, and tempts him with his wares. It is not extraordinary, if on this occasion he yields to the temptation with a little firmness, and accepts the price of his fellow creatures' liberty, with as little reluctance as the enlightened merchant. Accordingly, he falls on his neighbour, and a desperate battle ensues", p. 40.

⁴⁵³ Compare Wilks, Ivor, *Asante in the nineteenth century: the structure and evolution of a political order*, African studies series. 13. London: New York: Cambridge University Press, 1975, chapters 1-4.

⁴⁵⁴ See Diouf, Sylviane A., *Fighting the Slave Trade: West African Strategies*, Athens, Western African Studies, Athens: Ohio: Ohio University Press, 2003 for examples of defensive strategies, including relocating in swamps, abandoning villages, changing crops, building walls around cities and organizing local militia and defensive alliances among villages.

The first scenario includes a single nation and a single village, the second scenario includes a single nation and many villages, while the third scenario include a single nation and several villages and allows for alliance formation.

First Scenario: A nation, A village: in this scenario, the presence of effective demand influences the behaviour of an African state situation and in this scenario, there is a single nation and a single village which share a common border. The nation's labour force is defined as L_n and the village's labour force is L_1 , while the nation's productivity is defined as b_n , the village's labour productivity is defined as b_1 . Hence the ruler's utility function is defined to be the logarithmic in produced goods (the value of produced goods in each region is the labour productivity times the regional labour force) minus a fixed cost, if aggressive action is taken (X is the cost of war, which is greater than R , the cost of slave raiding) plus an additional term paL_1 if slaves are captured, which is revenue from slaves captured. Thus, the lifetime utility function if a nation does nothing in all periods, raids in all periods, or goes to war in the first period (and then does nothing) is as follows:⁴⁵⁵

$$\begin{aligned}
 U(\text{Nothing}) &= \frac{\log(b_n L_n)}{1-\delta} \\
 U(\text{Raiding}) &= \frac{\log(b_n L_n) - R + paL_1}{1-\delta} \\
 U(\text{Conquest}) &= \frac{\log(b_n L_n + b_1 L_1)}{1-\delta} - X
 \end{aligned}$$

In the absence of effective demand, the slave price is equal to zero ($p=0$).⁴⁵⁶ Here are two possibility outcomes in the equilibrium: the nation may either conquer the village in the first period or choose to take no aggressive action and simply produce goods. The nation will never choose to conquer the village after the first period because it faces the same payoff decision in each period. To determine whether the nation will choose to conquer the village or simply produce, we compare the lifetime utility derived by the rulers of the nation in the two situations (conquering the village versus producing). The nation will choose to conquer the village if the lifetime utility obtained by conquest is greater than that obtained through production:⁴⁵⁷

⁴⁵⁵ Whatley, Warren C. and Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 9.

⁴⁵⁶ Or, in other words, there is no external market for slaves. Thus, it may be appropriate to think of this model as before and after the beginning of the international slave trade. Instead of a starting slave price at zero, the results are identical if, in the absence of effective demand, $paL_1 \leq R$ and in its presence $paL_1 \geq R$

⁴⁵⁷ *ibid.* n. 455.

$$U(\text{Conquest}) \geq U(\text{Production})$$

$$\frac{\log(b_n L_n + b_1 L_1)}{1-\delta} - X \geq \frac{\log(b_n L_n)}{1-\delta}$$

This means, the nation will conquer the village if the one-time cost of conquest, which is defined as X , is less than the discounted lifetime utility added through conquest (meaning that there is a net benefit to war):⁴⁵⁸

$$X \leq \frac{\log(b_n L_n + b_1 L_1)}{1-\delta} - \frac{\log(L_n)}{1-\delta}$$

Due to the economic benefits to war, the nations will continue to conquer villages and incorporates them. Assuming there is no net profit to war, the nation will do nothing and a peaceful equilibrium will be achieved and if effective demand is introduced in the above scenario, the equilibrium may be altered if there is a net profit to slave raiding ($paL_1 \geq R$). Resting still on the conquest equilibrium, effective demand will alter the equilibrium if the life time utility of the ruler is bigger under slave raiding than under conquest. That is:⁴⁵⁹

$$U(\text{Raiding}) \geq U(\text{Conquest})$$

$$\frac{\log(b_n L_n) - R + paL_1}{(1-\delta)} \geq \frac{\log(b_n L_n + b_1 L_1) - X}{(1-\delta)}$$

Therefore, if this inequality persist, the equilibrium will be altered in such a way that the nation will opt to raid the village in each period. Thus, for a sufficiently large value of paL_1 (the return to slave raiding) or sufficiently small values of R (the cost of slave raiding) the war equilibrium will be disrupted and replaced with a raiding equilibrium. The implication for this state of affair for the various ethnic groups, states and villages are enormous.

Second Scenario: One Nation, Many Villages: The 2nd scenario speaks about the 1st scenario to a situation with a large number of villages and a single nation place along an ordered line.⁴⁶⁰

⁴⁵⁸ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 10.

⁴⁵⁹ *ibid.* p. 11.

⁴⁶⁰ *ibid.* p. 12

Hypothetically, there should be a total of N villages and a single nation and it is assumed further that the size of the labour force for both villages and the nation is equal to L and that regional labour productivity is equal to b . If the effective demand is not obtainable, the nation is therefore, inclined to subdue at least one village if the ruler's life-time utility connected to the conquest of a village is greater than its utility when new villages are conquered. In this scenario, the nation will continue to conquer villages until the marginal life-time benefits of conquering another village is less than the one-time penalty associated with war (X).

This situation could be used to define the total number of villages that are conquered (n) in equilibrium. And this conquering mentality of villages shall continue unabated as long as the marginal benefit of conquest is greater than the marginal cost. The nation will continue conquering villages as long as the below inequality holds, where X is the marginal cost of conquering a village and the right term is the marginal benefit of conquering 1 more village (the benefit of conquering n villages minus the benefit of conquering $n-1$ villages):⁴⁶¹

$$X \leq \frac{\log(nbL)}{1-\delta} - \frac{\log((n-1)bL)}{1-\delta}$$

Thus, the nation conquers n villages where n is the largest value such that the above inequality holds. Under optimising behaviour, the nation achieves a size of nL while the number of independent villages in equilibrium is reduced to $N - n$. If we introduce effective demand into the scenario the equilibrium condition will be uttered. Supposing that N disposes a very large number (meaning that it is implausible for the nation to conquer all villages), the marginal condition now includes the opportunity cost of not raiding for the period in which the final village is conquered (meaning that, had the nation chosen not to go to war, it would have had the option to raid villages). Consequently, the nation will now overtake villages as long as the marginal cost of war is less than the marginal benefit (this inequality closely mirrors the previous inequality):⁴⁶²

$$X - R + paL \leq \frac{\log(nbL)}{1-\delta} - \frac{\log((n-1)bL)}{1-\delta}$$

⁴⁶¹ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 12.

⁴⁶² *ibid.* p. 13.

This above state of affairs determines a number of villages that are conquered in equilibrium n . Assuming there is a net benefit to raiding, the size of the nation will be smaller than in the absence of effective demand: the left hand term is greater than it was before the slave trade arrived. This condition is depicted in figure 2 for the general case as an increase in the marginal net economic return to slave raiding and their effects are similar to those described in the first scenario. But as there was economic increase in the slave trading, nations will generally be smaller in equilibrium and greater ethnic diversity will persist. Once more, there is a permanent reallocation of labour rather than a temporary one, as war occurs over a finite number of periods while raiding occurs indefinitely. Hypothetically, the continuous application of this scenario will definitely produce an increase of slaves if more raiding continues and subsequently generate a positively sloping supply curve.⁴⁶³

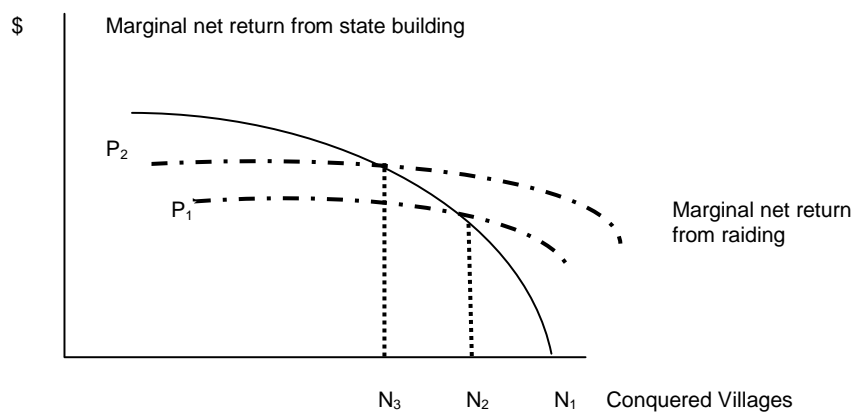


Figure 2: Fundamental Impact of Effective Demand

From the above-mentioned analysis, the net slave prices will be higher, the closer a village is to the coast because of availability of lower transport costs and correspondingly a nation in the interior will record a lower opportunity cost of war for any value of n (where n is the number of villages conquered) relative to a nation on the coast.

Third Premise: One Nation, Three Villages and Alliance: It is assumed here that a situation with a single nation and three villages with identical endowments arranged along a line with the nation at one end is given.⁴⁶⁴ It can also be assumed that the three villages can form defensive alliance against aggressive nations, but with the consequence that there is always a penalty (ϵ).⁴⁶⁵ There are various advantages in alliance formation because of the ability and effectiveness to conquer independent villages.

⁴⁶³ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 13.

⁴⁶⁴ *ibid.* p. 14.

⁴⁶⁵ *ibid.* p. 14.

Given the management of villages in this alliance, the hierarchical functions of the various actors are defined. It is however assumed that in the absence of effective demand, the parameters of the model are such that the nation will conquer all three villages.⁴⁶⁶ That is to say that the utility increase from conquering the 3rd village must be greater than the conquest penalty. Therefore all three villages are conquered if the marginal benefit of conquest is greater than the marginal cost.⁴⁶⁷

$$X \leq \frac{\log(4bL)}{1-\delta} - \frac{\log(3bL)}{1-\delta}$$

To change the equation here, the villages may choose to form an alliance. But failure to do this and they are conquered, the rulers of the villages will have utility as follows, where the 1st village is the one next to the nation, the 2nd village is next on the line followed by the 3rd village.⁴⁶⁸

$$U_1 = 0$$

$$U_2 = \log(bL)$$

$$U_3 = \log(bL) + \delta \log(bL) = (1+\delta) \log(bL)$$

As already explained above, the nation is only able to conquer a village in each period of war, that puts the 3rd village in the best position. Since the 3rd village has a higher utility if no alliance is formed, the binding constraint for forming alliance falls on the village. An alliance of village 3 with village 2 will be advantageous if the usefulness from the alliance is greater than remaining independent and being subdued. Thus, the 2nd and 3rd villages will necessarily go into alliance if the discounted continuous utility stream provided by survival is greater than the utility from independence and being conquered:⁴⁶⁹

$$\frac{\log(bL) - \varepsilon}{(1+\delta)} \leq (1+\delta)\log(bL)$$

⁴⁶⁶ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 14.

⁴⁶⁷ *ibid.* p. 15.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.* p. 16.

If the alliance penalty is greater than $\delta^2 \log(bL)$, the 3rd village will not enter into an alliance with the 2nd village, resulting in an equilibrium in which the nation conquers all three villages. Supposing the alliance penalty is large enough to prevent alliance formation, the application of effective demand will utter the equilibrium outcome in a way. With a positive resonance in slave price, the nation will only need to conquer all 3 villages if the value of conquering the 1st and the 2nd villages is stronger than the opportunity cost (not raiding for slaves in each period) of war and the value to conquering the 3rd village is greater than the value of raiding for all the remaining periods.⁴⁷⁰

This is a reduction to the 2nd premise in which there is less conquest, greater ethnic diversity, permanent reallocation of labour and more slaves produced. But if the consequence of alliance formation is reduced, villages 2 and 3 may choose to form an alliance in the presence of effective demand. This is vividly described in the next equation:⁴⁷¹

$$\frac{\log(bL)-S}{1-\delta} \leq \frac{\log(bL)-\epsilon}{1-\delta}$$

If one imagines a given value of S, it is more likely that the 3rd village will not make an offer of alliance to the 2nd village. This is an hypothesis likened to the state of absolutism in which the state is governed in the sole interest of the nation. The logic here is that the ruling elite in the 3rd village will maintain their status while their village is raided, but would lose that status if conquered. In this scenario, the application of effective demand decreases the size of the state, as the 3rd village is not conquered and results in a long-term reallocation of labour from productive purposes towards raiding.⁴⁷²

In a permutation of scenario three, we may consider another possible equilibrium in which villages two and three form an alliance (and the nation does not conquer village one) in order to raid the remaining village. This occurs if the value of conquest (of village one) for the nation is less than the value of raiding that village forever:⁴⁷³

$$\frac{\log(bL)+paL}{1-\delta} - R \geq \frac{\log(2bL)}{1-\delta} - X$$

⁴⁷¹ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 16.

⁴⁷¹ *ibid.* p. 17.

⁴⁷² *ibid.*

⁴⁷³ *ibid.*

The impediments placed on villages 2 and 3 to form an alliance is deleted such that it will only be necessary to form an alliance if the benefit to allying is greater than remaining independent:⁴⁷⁴

$$\frac{\log (bL) - \varepsilon - R + paL}{1-\delta} \geq \frac{\log (bL)}{1-\delta}$$

It is also possible that they do not wish to conquer the 1st village because the utility provided by raiding village 1 is greater than conquering the village and doing nothing for all future periods:⁴⁷⁵

$$\frac{\log (bL) - \varepsilon - R + paL}{1-\delta} \geq \frac{\log (1.5bL) - \varepsilon - X}{1-\delta}$$

All three scenarios suggest several stylised facts. Effective demand (or an increase in slave prices) should produce smaller states with more slave raiding, greater ethnic diversity and more alliances for the purpose of raiding. Effective demand (or price increases) should also result in fewer defensive alliances and decreased production. Increases in the productivity of labour should increase state building (and as such, decrease raiding and ethnic diversity).⁴⁷⁶

4.3 The Case study of Asante (today's Ghana)

The simple models mentioned above revealed the conditions under which increases in the international demand for enslaved Africans impeded the growth of states, increased ethnic and social stratification and produced a reign of terror. This model shall be used as a yardstick to interpret the social, economic and political developments along the Gold coast of West Africa during the 18th century.

Asante was a large militarised and bureaucratic state that emerged behind the Gold Coast of Africa (present-day Ghana) at the beginning of the 18th century. Eventually, all roads led to Kumasi, the capital city, located some 200 miles inland and encircled by an efficient farming sector that supported the military and bureaucratic classes that resided in the city.

⁴⁷⁴ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 18.

⁴⁷⁵ *ibid.*

⁴⁷⁶ Wilks, Ivor, *Asante in the nineteenth century: the structure and evolution of a political order*, African studies series 13. London, 1975, p. 20; Id. *One nation, many histories: Ghana past and present*, Accra: Ghana Universities Press, 1995, p.40; Orij, John N., *Igboland, Slavery, and the Drums of War and Heroism*, In *Fighting the Slave Trade: West African Strategies*, edited by S. A. Diouf, Athens: Ohio University Press, 2003, pp. 128-129.

The Asante were powerful enough to defend themselves against British invasion for over half a century. They were the largest and most powerful state in West Africa.⁴⁷⁷ This model predicts that the slave trade disrupted state building and if this is in the affirmative, how come that Asante did grow and developed into such an impressive state during the height of the slave trade? In the words of Ivor Wilks: “*The importance of Asante is most apparent from its sheer geographic extent. At the height of its power in the early 19th century, Asante’s empire ... extended not only over all of present day Ghana with the exception of the far northwest, but also over large parts of what is now Ivory Coast and smaller parts of what is now Togo.*”⁴⁷⁸

What would have been the motivating factor here to conquer large territory during the slave trade? Part of the answer lies with the common Akan ancestry of the Asante. According to the model, this would reduce the punishment for alliance, making its formation more likely. Asante did emerge out of an alliance of chieftaincies brought together to defeat Denkyira, the dominant power of the region in the late 17th and early 18th centuries. According to Wilks, “*Asante was not, then, a creation of an Asante tribe,... There was no Asante tribe. Asante was a creation of the Kumasis, Dwabens, Nsutas, and so forth, all of whom became Asantes under the new dispensation.*”⁴⁷⁹ In this model, the alliance penalty was low enough to allow the formation of the Asante alliance for the purpose of conquest and slaving. This predicts that such an alliance was more likely to be successful if it was attempted before the rise in slave prices than began in the mid — 18th century. Normally, the Akans could subdue the centrifugal political forces before the slave trade, but after the profitability of slave raiding, accelerated small differences could serve as a pretext for attack. The geographic largeness of Asante prompted the high value of labour on Asante land. Asante was interested in territorial expansion because of gold found in the land (a high value of *b*). All previous military campaigns followed this pattern.⁴⁸⁰ It would be recalled that the northern expansions beyond the gold fields, resulted not in annexation of territory but in tributaries, where local elites retained semi-autonomy if they made annual tribute payment to Asante, most often in captives.⁴⁸¹ But the model here predicts that Asante, though large enough, would have been larger in the absence of slave trade.

⁴⁷⁷ Ivor Wilks is the leading authority on Asante history.

⁴⁷⁸ Wilks, Ivor, *One nation, many histories: Ghana past and present*, Accra: Ghana Universities Press, 1996, p. 27.

⁴⁷⁹ *ibid.* p. 28.

⁴⁸⁰ Wilks, Ivor, *Asante in the nineteenth century: the structure and evolution of a political order*, African studies series 13. London, 1975, p. 39; Dumett, Raymond E., *El Dorado in West Africa: the gold-mining frontier, African labour, and colonial capitalism in the Gold Coast, 1875-1900*, Athens: Ohio University Press, 1998, p. 30.

⁴⁸¹ *ibid.* Wilks, 1975, pp. 20-23.

The increases in the price of slaves influenced political expansion negatively and encouraged slave raiding. According to Wilks, “*the campaign which destroyed the independent power of Asante’s neighbours to the north, south, east and west occurred for the most part in the half-century 1700-1750.*”⁴⁸² It is believed that Asante’s expansion was halted after 1750 because the price of slaves started a sharp upward trend such that by the end of the 18th century the price had increased by 50%.⁴⁸³ Based on this model Asante will expand towards the coast to raid for slaves in the villages along the coast, but that the coastal nations would not expand inland, but will instead focus on defending their territories because of low cost of transportation. This situation is called the “southern problem,” which encouraged war situations, and rebellion, and re-conquest were the order of the day.⁴⁸⁴

The Dutch and English merchants interested in attaining peace trade to the coast in 1750s attempted to initiate a peace treaty between Asante and the coastal nations of Wassa, Twifo, Denkyira and Akyem for the purpose of acquiring slaves. But the peace plan failed. There were various attempts by the Asantes to conquer the coastal city of Accra from the Akyem, however the southern coastal nations were able to resist Asante’s aggression because the gold they had, gave them the resources they required to resist the attacks.⁴⁸⁵ The coastal nations also had a better position in the slave trade with the Europeans by virtue of their coastal proximity. This pattern of expansion to the coast, as adopted by the Asantes were the modus operandi of the entire Guinea Coast from the Gold Coast (i.e. Ghana) to the Bight of Biafra (southeast Nigeria).⁴⁸⁶

⁴⁸² Wilks, Ivor, *Asante in the nineteenth century: the structure and evolution of a political order*, African studies series 13. London, 1975, p. 18.

⁴⁸³ See Richardson, David, *Prices of Slaves in West and West Central Africa: Towards an Annual Series, 1698-1807*, Bulletin of Economic Research 43 (1), 1991, pp. 21- 56 for the annual British prices paid on the coast of Africa in the 18th century; Miller, Joseph C., *Slave Prices in the Portuguese Southern Atlantic, 1600-1830*, In *Africans in Bondage: Studies in Slavery and the Slave Trade*, 1986 for the prices paid by Brazilian slavers operating in Angola in the 18th century. Both price series show a striking increase of some 400-500 percent in the second half of the 18th century.

⁴⁸⁴ *ibid.* n. 482, pp. 26-28.

⁴⁸⁵ *ibid.* p. 28.

⁴⁸⁶ Many of the zones were sources of captives between Asante and the coastal states along the Gold Coast, between Dahomey and the coastal states along the Slave Coast and between the Aro network and the coastal trading towns in the Bight of Biafra. See Lovejoy, Paul, *Transformations in Slavery: a history of slavery in Africa*, Cambridge: Cambridge University Press, 1983; Law, Robin, *The Slave Coast of West Africa, 1550-1750: the impact of the Atlantic slave trade on an African society*, Oxford: Oxford University Press, 1991; Oriji (2003).

4.4 Summary

What this model suggests is that the slave trade diverted the labour force from agricultural and industrial work, and concentrated the entire labour force to the slave trade with the Europeans.⁴⁸⁷

Another salient point here is that the concentration of slave trade undermines economic and political development and encouraged violence, social hierarchy, and ethnic diversity. Many features of modern African countries, once thought to be exogenous or “African” in nature (like political culture and ethnic diversity) turn out to be more endogenous. The conclusion here without trying to be sentimental is that the slave trade and slavery impeded or influenced albeit negatively African’s history: Pre-colonial history, colonial and post-colonial history and developments.⁴⁸⁸

⁴⁸⁷ Darity, William, Jr., *A General Equilibrium Model of the Eighteenth Century Atlantic Slave Trade*, *Research in Economic History* 7, 1982, pp. 287-326; Nunn, Nathan, *Historical Legacies: A Model Linking Africa’s Past to its Current Underdevelopment*, *Journal of Development Economics* 83 (1), 2007, pp. 157-175.

⁴⁸⁸ Whatley, Warren C. & Gillezeau, Rob, *The Fundamental Impact of the Slave Trade on African Economies*, 2008, p. 22.

Chapter V: The sanctity of Natural Law and Human Rights

5. Introduction

It is appropriate and even expedient that I begin this important capital with the admonition of Christian Wolff, since it constitutes the fundamental basis on the examination of natural law versus slavery. *“Since man shall not only perfect himself and his status and make himself safe from imperfection, but since he shall contribute, as far as possible and without failing in his duties towards himself, to the perfection of others and their status whenever they need help, and since he shall also refrain from everything which would make them and their status more imperfect, it follows that each man owes to himself in the same measure as far as the other person has these things not in his powers and he himself can do them for this other person without neglecting his duty towards himself. Consequently, the duties of a person towards others are the same his duties toward himself. Therefore, these duties be incumbent on others”*.⁴⁸⁹

5.1 Definition

Since the various definitions of natural law are not self explanatory, an attempt shall be made here to put forth various definitions and comment on them when necessary. Jean Porter defines “natural law” following D. J. O’Conner, as a view according to which *“basic principles of morals and legislation are in some sense or the other, objective, accessible to reason and based on human nature”*.⁴⁹⁰ The relation between belief in natural law and in human rights is therefore one of presupposition; that is to say, a doctrine of natural rights presupposes the moral realism, which in his view is a central core of natural law theories.⁴⁹¹ Though a theoretical claim, it raises however interesting historical events. One can say that natural law is explicitly linked with the doctrines of nature or human rights or perhaps something similar? Or hypothetically, what can one learn from what our ancestors drew connections, or fail to do so, between a natural law and human rights?

⁴⁸⁹ Wolff, Christian, *Grundsätze des Natur- und Völkerrecht*, 1980, Georg Olms Verlag, Hildesheim – New York, Paragraph 133, p. 87; Compare Muhn, Raoul, *Germania: La rinascita del diritto naturala e I crimini contro l’umanità/ Deutschland: Die Renaissance des Naturrechts und die Verbrechen gegen the Menschlichkeit/ Germany: The renaissance of natural law and crimes againgt humanity*, Vecchiarelli Editore Manziana, Roma, 2004.

⁴⁹⁰ Porter, Jean, *Nature as Reason: A Thomist View of Moral Autonomy*, 2005, pp. 322, 363.

⁴⁹¹ Perry, Michael J., *The Idea of Human Rights: Four Inquiries* 6, Oxford University Press, 1998; Porter, Jean, *From Natural Law to Human Rights: Or, Why Rights Talk Matters*, *Journal of Law and Religion*, Vol. 14, No. 1, 1999-2000, pp. 77-96.

The answer to these inferences may be difficult to fathom. However, personalities like Hugo Grotius, Thomas Hobbes, John Locke and a host of others agree that natural law tradition had some influence on the subsequent emergence of doctrines of natural law or universal human rights. The consequence of this definition is that mankind from creation through to slavery vis-à-vis Atlantic Slavery had always enjoyed a degree of human rights based on natural law and the forceful enslavement and inhuman treatment were a violation or an infringement on their universal human rights.

American History Central defines natural law as a set of principles, which govern human interactions, which are built into structure of the universe, as opposed to being imposed by human beings. Here we are told that natural law is something that man inherited from the genesis of creation and therefore sacrosanct and inalienable.⁴⁹² This definition does not define what kind of human interactions are referred to, whether the interactions of moral nature or based on positive law. Therefore, the activities of slave trade cannot be adequately addressed through the lenses prescribed by this definition.

The World Mind Society defines natural law as naturally occurring principles of existence, which regulate the manner in which manifestation occurs: those parameters of Nature/God which channel material existence in universally consistent ways to facilitate evolution, the will of God as the determiner for the ways and means of creation, in which consciousness is expanded.⁴⁹³

John F. Lynen defines natural law as the idea that not only is nature governed by laws, but that nature has in the hearts of human beings the laws by which they should govern their lives. In other words, we can know with the help of the Bible the difference between right and wrong. Natural law is conceived to be the foundation on which positive law, the specific laws of individual groups, tribes, nation, is built. It is considered a universal law and is still an operative concept, though the term itself may not be used. The notion of natural law is almost universally rejected by modern social science. Nevertheless, the Nuremburg war-crimes trials after World War II, for instance, had no foundation in written laws, and were based on the assumption of natural laws binding all human beings; the present insistence on human rights also implies the affirmation of a kind of natural law.⁴⁹⁴ This definition highlights the culpability of the slave owners and justifies their subsequent trials and eventual punishments if they were to be alive. More elaboration shall follow later.

⁴⁹² *American History Central* in internet, <http://www.historycentral.com/Civics/N.html>

⁴⁹³ *The World Mind Society* in <http://www.eoni.com/-visionquest>

⁴⁹⁴ Lynen, John F., *The Pastoral Art of Robert Frost*, 1960, New Haven: Yale University Press, 1967.

Mark O. Dickerson and Tom Flanagan define natural law as rules for conduct binding on humankind by virtue of human rationality alone.⁴⁹⁵ This is predicated on the premise that the omissions or commissions by man must be on the basis of rationality and reason. Whether the treatments of the slaves by slave owners fall under this category is a matter of conjecture, which shall be discussed later.

And finally, natural law (*jus 118ceptic*) is the principle that says some things are as they are, because that is how they are. This use is especially valid in Scotland, where “natural law” operates as a genre of law parallel to both civil and criminal law and its discussion is not limited to human beings. As a philosophical perspective, especially in the English and American legal traditions, the principles of natural law are expressed, obliquely or openly, in such documents as Magna Carta and the United States Declaration of Independence, when rights are discussed, explicitly or inexplicitly, as being inherent. For example, the expression “...*that all men are created equal, that they are endowed by their Creator with certain inalienable Rights...*”⁴⁹⁶ expresses such right that is discussed as being inherent. The words that immediately precede that expression: “*We hold these Truths to be self-evident, ...*” express a natural law philosophy.⁴⁹⁷

5.2 Historical Background of Natural Law

The application of natural law in its ramifications has evolved through its history. The recurrent theme among all variations is that their natural rights are given to every man by God, and therefore linking the concept of natural law to religious beliefs. Natural law however has meanings in ethics and jurisprudence,⁴⁹⁸ despite the core claims of both fields being logically independent. According to natural law ethics, the moral standards that govern the behavioural pattern of man is traceable to the nature of human beings as given by God. According to natural law jurisprudence, the fundamental principles of all law are derived from nature and the natural world, or from a supreme being, however depending on the particular perspective one sees this phenomenon. Social contract theorists, such as Hobbes, Locke or Rousseau, believed in natural law and in natural rights, which were transferred from the individual subjects to the sovereign states.⁴⁹⁹

⁴⁹⁵ See Glossary provided by Mark O. Dickerson & Tom Flanagan at http://www.comune.venezia.it/atlanter/documents/glossary/nelson_glossary.htm.

⁴⁹⁶ Hobbes, Thomas, *Leviathan*, Anaconda Verlag: Köln, 2009, pp.177-187.

⁴⁹⁷ *Wikipedia: The Free Encyclopedia* in http://en.wikipedia.org/wiki/Natural_law

⁴⁹⁸ Compare Irwin, Terence (tr.), *Nichomachean Ethics*, Indianapolis: Hackett Publishing Company, 1985; Kim, Hye-Kyung, *Nichomachean Ethics: Aristotle with an Introduction* translated by F. H. Peters in Oxford, 1893, Barnes and Noble, 2004.

⁴⁹⁹ Bertram, C., *Rousseau and the Social Contract*, 2003; Cooper, L., *Rousseau, Nature and the Problem of the Good life*, 1999; Macpherson, C. B., *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford, 1962.

The state is obligated therefore, to protect individuals from each other through the mediation of its monopoly on the legitimate use of physical force. The concept of law and morality that intersect in some way is called the “overlap thesis”.⁵⁰⁰ From historical point of view, there are different theories of natural law, which differ from each other with respect to the role that morality plays in determining the authority of legal norms. An attempt shall be made here to deal with its usages separately rather than an attempt to give a single concept that binds them all together.

Greek philosophy was preoccupied with the difference between “nature” (Physics), on the one hand and “law” or “custom” (nomos), on the other hand.⁵⁰¹ Though the application of the law varied from place to place, there was however, unanimity amongst nations that natural law is the same, this was followed religiously by later philosophers. The evolvement of this tradition into a natural law can be attributed to the Stoics.⁵⁰² These theories became highly influential among Roman jurists, and consequently played a great role in the subsequent legal theory. The pagan origin of natural law notwithstanding, a comfortable number of early church-fathers particularly, in the West sought to incorporate the natural law tradition into Christianity. Notable among these church fathers was Saint Augustine of Hippo, who equated natural law with man’s prelapsarian space state; as such a life according to nature was no longer possible and men needed instead to seek salvation through the divine law and grace.⁵⁰³ In the 12th-century, Gratian reversed this, equating the natural and divine laws but Thomas Aquinas restored natural law to its independent state, arguing that as the perfection of human reason, it could approach but not fully comprehend the Eternal law.⁵⁰⁴

⁵⁰⁰ Warner, Daniel, *An Ethic of Responsibility in International Relations*, Lynne Rienner Publishers, 1991, ISBN Google Print, p.155.

⁵⁰¹ Burnet, John, *Early Greek Philosophy*, 1930; William Keith Chambers Guthrie, *A History of Greek Philosophy: Vol. 1, The Earlier Presocratics and the Pythagoreans*, 1962.

⁵⁰² Compare Murray, Gilbert, *The Stoic Philosophy*, 1915, p.25; Russell, Bertrand, *History of Western Philosophy*, 1946; Harper, Douglas, November 2001, Online Etymology Dictionary-Stoic, Retrieved on September 2, 2006; Baltzly, Dirk (2004-12-13), Stanford Encyclopedia of Philosophy-Stoicism, Retrieved on September 2, 2006.

⁵⁰³ Compare Augustine of Hippo Sermons 358, 1 “*Victoria veritatis est caritas*”; Augustine of Hippo Sermons 336, 1 PL 38, 1472.

⁵⁰⁴ Aquinas, St. Thomas, *The Summa Theologica*, Benziger Bros, ed., translated by Fathers of the English Dominican Province, 1947; See Pojman, Louis, *Ethics*, Belmont, CA: Wadsworth Publishing Company, 1995; Kreeft, Peter, *Summa of the Summa*, San Francisco: Ignatius Press, 1990, pp. 74-77, 86-87, 97-99, 105, 111-112.

According to Aquinas, all human laws were to be judged by their conformity to the natural law and an unjust law is therefore no law at all. The common law accepted this in determining the content of the law in particular case. At this point, the natural law was not only used to pass judgment on the moral worth of various laws, but also to determine what the law said in the first place. The natural law was characteristically teleological, in that it aims at the human happiness. Its content was therefore determined by a conception of what things constituted happiness, be they temporal satisfaction (as with the Stoics) or salvation (as with the Christians).

The state, in being bound by the natural law, was conceived as an institution directed at bringing its subjects to true happiness, and in the 16th-century, the School of Salamanca (Francisco de Suarez, Francisco de Victoria) developed a philosophy of natural law.⁵⁰⁵

By the 17th century a divergent view on the followings became manifested. Thomas Hobbes then founded a contractualist theory of Legal Positivism on what all men could agree upon: that is that they seek, which is happiness and this happiness is subject to contention, but a broad consensus could form around what they feared, that is violent death at the hands of others. The natural law therefore, is how a rational human being, seeking to survive and to prosper, would act.⁵⁰⁶ In Hobbes opinion, the only way natural law could prevail was for men to submit to the commands of the sovereign because the ultimate source of law now comes from the sovereign and the sovereign's decisions need not be grounded in morality, on this basis, the Law of Positivism was born.⁵⁰⁷ From the various historical stages of slavery and slave trade, the analysis has shown that the application of natural law on the buying, capture, transportation and treatment of the African slaves cannot constitute any reasonable, meaningful object of discussion, because the slaves were handled without law.

To summarize the historiography of natural law, the quotation of Thomas Jefferson, who employed natural law in his appeal to inalienable rights in the declaring of independence will do justice here: "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*".⁵⁰⁸

⁵⁰⁵ *The School of Salamanca on the History of Economic Thought* at [http:// en.wikipedia.org/wiki/School_of_Salamanca](http://en.wikipedia.org/wiki/School_of_Salamanca)

⁵⁰⁶ Hobbes, Thomas, *Leviathan*, Anaconda Verlag: Köln, 2009, pp.177-187; Boucher, David and Kelly, Paul (eds.), *The Social Contract from Hobbes to Rawls*, Routledge, 1994.

⁵⁰⁷ See Hereth, Michael, *Montesquieu: An Introduction*, 1994, pp. 32f.

⁵⁰⁸ Jayne, Allen. *Jefferson's Declaration of Independence: Origins, Philosophy and Theology*, 1998, 200 traces TJ's sources and emphasizes his incorporation of Deist theology into the Declaration.

This compelling statement of Jefferson describes vividly the status vis-à-vis legal status of the enslaved and their slave masters. From the analysis of slavery and particularly the Atlantic Slave Trade, the kidnappings, the involuntary enslavement and eventually the killings or murder of protesting or rebellious African slaves were an offence and a crime that needed to be addressed. The slaves, therefore, or the Africans and the Africans in Diaspora, have at least theoretically legal rights to seek for justice, albeit post mortem of the slaves.

5.3 The Role of Natural Law and its Analysis and Exponents

5.3.1 Thomas Hobbes' Natural Law

Thomas Hobbes in his treatise advanced that natural law is a precept based on reason, by which a man is forbidden to do that which is destructive to his life or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved. The under followings are the nine laws of nature that Hobbes scholarly and intellectually presented:⁵⁰⁹

- a) His first Law of nature is that *every man ought to endeavour peace. As far as he has hope of obtaining it, and when he cannot obtain it, that he may seek and use all help and advantages of war.*
- b) The second Law of nature is that *a man be willing, when others are so too, for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.*
- c) The third Law is that *men shall perform the covenants entered into. In this law of nature, consisteth the fountain and original of justice...when a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just.*
- d) The fourth Law is that *a man, who receiveth benefit from another of mere grace, endeavour that he which giveth it, have no reasonable cause to repent him of his good will.* Breach of this law is called ingratitude.
- e) The fifth Law is complaisance: *that every man strives to accommodate himself to the rest.* The observers of this law may be called sociable; the contrary, stubborn, unsociable, forward, intractable.

⁵⁰⁹ Hobbes, Thomas, *Leviathan*, Anaconda Verlag, Köln, 2009, pp. 138-139

- f) The sixth Law is *that upon caution of the future time, a man ought to pardon the offences of the past and that repenting is desired.*
- g) The seventh Law is that *in revenges, men look not at the greatness of the evil past, but the greatness of the good to follow.*
- h) The eighth Law is that *no man by deed, word, countenance, or gesture, declare hatred or contempt of another. The breach of this law is commonly called contumely.*
- i) The ninth Law is that *every man acknowledges another for his equal by nature. The breach of this precept is pride.*⁵¹⁰

5.3.2 Contemporary Philosophy; Hugo Grotius

Hugo Grotius propounded in his philosophy that international law is based on natural law and in his writing on freedom of the seas and just war theory, he directly appealed to the natural law. Elevating the natural law to a celestial level, he postulated that “*even the will of an omnipotent being cannot change or abrogate*” natural law, which “*would maintain its objective validity even if we should assume the impossible, that there is no God or that he does not care for human beings*”.⁵¹¹ This is the famous argument *etiamsi daremus* (non esse Deum), that made natural law no longer dependent on theology.⁵¹² By this theory, the available natural laws today that apply to slavery and slave trade can be used to adjudge the merits and demerits and above all, the legality or illegality of the Atlantic Slave Trade, since international law is partly derived from natural law. The question whether natural law should form a legal basis for any reparation claim or whether positive law should take precedence according to Grotius, is not relevant because natural law does not independently of positive law constitutes a basis for reparation.

⁵¹⁰ Hobbes, Thomas, *Leviathan*, 1651, C. B. McPherson (ed.), London: Penguin Books, 1985.

⁵¹¹ Grotius, Hugo, *De iure belli ac pacis*, Prolegomeni, 1625, p. 11.

⁵¹² *ibid.* (On the Laws of War and Peace), 1625; Grotius, Hugo, *De iure praedae* (On the Right of Capture), including *Mare liberum* (The Free Seas), 1604.

5.3.3 Comparative Jurisprudence

In jurisprudence, natural law is the doctrine that pronounces just laws as imminent in nature – i.e., they can be “discovered” or “found”, but not “created” by such things as a bill of right; that they can emerge by the natural process of resolving conflicts, as embodied by the evolutionary process of the common law. These two propositions are different from each other and can either oppose or complement each other, though they share a common trait that rely on inherence as opposed to design, in finding just laws. In either case, natural law is considered something that exists independent and outside of the human legal processes itself, rather than a principle whose origin lies inside the legal system. In Legal Positivism, a law can be unjust without it being any less a law, a natural law jurisprudence would say that there is something legally deficient about an unjust law and legal interpretivism, defended by Ronald Dworkin, would claim that there is a difference between natural law and positive law.⁵¹³ Apart from utilitarianism and Kantianism, natural law jurisprudence has in common with virtue ethics: that it is a life option for a first principle ethics theory in analytical philosophy.⁵¹⁴

The natural law concept was crucial in the development of English common law. This is particularly evident during the struggle between parliament and the monarch; parliament regularly made reference to the fundamental laws of England, which embodied natural law principles and stipulated limits on the power of the monarchy. The natural law concept was also contained in the Magna Carta, the English Bill of Rights, and the United State Declaration of Independence.⁵¹⁵ The various natural law jurists have been trying to construct a new version of natural law.⁵¹⁶ The new natural law focuses on “basic human goods”, such as human life, which are “self-evidently” and intrinsically worthwhile, and states that these goods reveal themselves as being incommensurable with one another.⁵¹⁷ Since there is no ambiguity in the interpretation and application of natural law by the above mentioned authors and philosophers, a further discussion and analysis of natural law vis-à-vis jurisprudence is dispensable.

⁵¹³ Cohen, Marshall (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984.

⁵¹⁴ Gardiner, Stephen M. (ed.), *Virtue Ethics: Old and New*, Cornell University Press Ithaca and London, 1st May 2005, pp. 3-4.

⁵¹⁵ Jayne, Allen. *Jefferson's Declaration of Independence: Origins, Philosophy and Theology*, 2000 traces TJ's sources and emphasizes his incorporation of Deist theology into the Declaration; Holt, J. C., *Magna Carta*, Cambridge: Cambridge University Press, 1992; Jennings; *Magna Carta and its Influence in the World Today* 1965 in Butterfield, H., *Magna Carta in the Historiography of the 16th and 17th Centuries*.

⁵¹⁶ Compare Yarros, Victor, 1936, *Philosophical Anarchism: Its Rise, Decline, and Eclipse* 41 (4): pp. 470-483; Avrich, Paul, *Oriole Tucker Riche, Anarchist Voices*, Princeton University Press, 1996, p.11.

⁵¹⁷ Kainz, Howard P., *Natural Law: An Introduction and Re-examination*, Open Court, 2004.

In the journey to highlight further the authors of natural law and philosophy, I shall advance the views of some other natural law philosophers and jurisprudence because they may be relevant to further examinations on the problem of reparation.

5.4 The Role of Natural Law/International Law in the Lives of People as Propounded by Christian Wolff

In this meticulous amalgam of socio-historical exploration and textual exegesis, Christian Wolff cast his intellectual foresight on the development of natural law in Germany and beyond. In particular he, at least in this thesis, draws attention to the significance of man's duty to man vis-à-vis man's moral responsibility to man. Every man according to Christian Wolff shall, as far as it is in his power, endeavour to help other person who needs his help. He shall improve the goods of the soul, of the body and of fortune, and shall take precautions lest the others be overtaken by the diseases of the soul or of the body and ill fortune. Since natural law does not restrict the moral responsibility to man, man shall not therefore refuse to help others who may be in need. Natural obligation is therefore absolutely unchangeable.⁵¹⁸ If another person does not fulfil this obligation, this fact does not allow you not to fulfil it either. Consequently, it is not permissible to transgress natural law by referring to the examples of others, and our duties toward others do not cease because they fail in their duties toward us. This being understood, also concerning the things the natural law prohibits, it follows too that we owe the duties of humanity to those who harm us.⁵¹⁹

Christian Wolff further advances the concept of categorical imperative later propounded by Immanuel Kant when he said that the duties of man toward others are the same as those towards himself. Unconditional moral obligation derived from pure reason, is binding on consciences as ultimate moral law⁵²⁰ towards other people. Consequently, because love of our fellow man is the essence of this obligation, and love, the essence of the disposition of the soul to feel pleasure through the happiness of another, everybody should have sympathy and love for his fellow man as well as for himself.⁵²¹ In this moral journey, Christian Wolff stated that perfection of the soul consists in the intellectual and moral virtues.

⁵¹⁸ Wolff, Christian, *Grundsätze des Natur- und Völkerrechts*, 1980, pp. 86f.

⁵¹⁹ Wolff, Christian, *Grundsätze des Natur- und Völkerrechts*, Paragraph 135, 1980, p. 88.

⁵²⁰ The Concise Oxford Dictionary of current English, Sixth Edition; Der Brook Haus von A-Z, 2000

⁵²¹ *ibid.* n. 518 Paragraph 136, p. 88.

It is therefore, our obligation to extend them and to imbibe them to others so as to make them acquitted with love and virtues. Consequently, we shall give them good examples that teach those virtues that we try to impact and inspire them to like the virtues and apply them. Vices should be eschewed so as not to mislead others and we shall endeavour to omit actions by which another man or his status is made more imperfect. And since we shall contribute to the perfection of other people as much as we can, it follows that nobody shall prevent another from obtaining any perfection nor shall he prevent a third person from helping him in it.⁵²² Furthermore, nobody shall prevent anyone from eliminating another person's sickness of the soul or of the body or ill fortune, or from delivering him from evils. Even less, shall one deprive him of any good, either by acting himself or through others.

The evaluation of this pregated philosophical and natural law advanced by Christian Wolff will be adequately addressed against the Natural Law and Natural Rights propounded by Max Radin and I quote: *"that there is a moral unity of mankind is not a new idea. But it is, after all, not as old as man himself"*.⁵²³ It is not an idea inherent in the existence of man. There is reason to believe that as long as three hundred thousand or even five hundred thousand years ago, there were creatures on this earth sufficiently like us to be called men. It is quite possible that they possessed a social instinct, that is to say, that they lived in groups and not as solitary animals,⁵²⁴ in defiance of Thomas Hobbes. But that they had any idea or ideas about the moral unity of man, I am fairly sure, was not the case. But if only those things are natural, which men do instinctively, or as conditioned reflexes or in whatever other way we described the non-deliberate activity of the human body, then to have an idea about the moral unity of man is non-natural. But at various times and places such an idea did develop. To take one example, it can be found at a time, which in view to these hundreds of millennia must be called very recent indeed. The society depicted in the Homeric poems is one in which war is a matter of course and in which indiscriminate slaughter, sacking and burning are incidents of war. But the suppliant stranger, whose peaceful intentions are assured by his helplessness or his obvious good faith, may not only be molested, but must even be protected and sent with gifts on his way. And there is not any indication that this situation is conditioned by community of speech or origin or a previously established formal relationship of guest-friendship, *hospitium*.⁵²⁵

⁵²² Wolff, Christian, *Grundsätze des Natur- und Völkerrechts*, Paragraph 139, 1980, p. .89.

⁵²³ Radin, Max, *Natural Law and Natural Rights*, 59 Yale L. J. (1949-1950), p. 214

⁵²⁴ *ibid.* n.522 Paragraph 133, p. 86

⁵²⁵ *ibid.* n.522 Paragraph 136, p. .88 & Paragraph 138, p. 89.

Accordingly, a man as such, not merely a Greek or the ally or the “guest-friend” of a Greek, had claims upon those Homeric Greeks, who asserted that they were civilized. The existence of such claims is enough to establish an incipient world-order in which men, as men, have a place.

Within the next thousand years, there appeared both in the Far East and in the Mediterranean area certain movements, which were definitely based on an assumed moral unity of man. We speak of Buddhism as a religion but it was not a religion in the older sense of the term, though it could well be called a religious philosophy. On the other hand, a Hellenistic philosophy like Stoicism had much the function of a religion in the modern sense for the Greeks and Romans. And the Stoic emphasis on world-citizenship was shared in theory by Cynics and Epicureans and had earlier precursors among pre-Hellenistic Greeks. The spread of Christianity and Islam in the West in the millennium after Alexander, followed the pattern of the spread of brotherhood among mankind”.⁵²⁶ Simply put, natural law as propounded by Christian Wolff places upon man a moral responsibility not only on the premise of categorical imperative concept but also the responsibility to ensure that man is morally duty bound to help others in any circumstance. The natural law concept by Christian Wolff appears to be devoid of any strong religious connotation like other natural law philosophers. On the basis of this, it was not only an offence or crime for one man to enslave the other because every form of slavery is inhuman but also the maltreatment and death brought upon the enslaved by the slavers was a crime or an offence. The moral philosophy and natural law of Christian Wolff demonstrates that man has a duty to man, the colour, race, status, religion notwithstanding; and what a man cannot do unto himself he should not do to others. The slave is first and foremost a commodity to be bought, disposed and inherited. He is chattel, always in possession of another person.⁵²⁷

5.5 Bartolomé de Las Casas

Unlike Christian Wolf’s concept on natural law philosophy, Las Casas based his natural law on theological precepts and morality. But for a proper understanding of the works of Las Casas, it is incumbent to highlight on his background. He was born in 1484 and grew up in Seville, where he witnessed the return of Christopher Columbus in 1493.⁵²⁸

⁵²⁶ Radin, Max, *Natural Law and Natural Rights*, Yale Law Journal, Vol. 59, No. 2, Jan., 1950, pp. 214-237.

⁵²⁷ Kopytoff & Miers, *African Slavery as an Institution of Marginality*, 1977, pp. 3-5.

⁵²⁸ Columbus, Christopher, *His Life, His Work, His Remains*. Vol. 1 New York: GP Putnam’s Sons, 1903-04, p. 459.

His father accompanied Columbus on his second voyage to Americas and in 1498 he returned on a ship loaded with slaves, one of whom he gave to Bartolomé. In 1507, he was ordained a priest at Rome and after studying the canon law for two years, he sailed back to Espanola with Admiral Diego Columbus, who gave him a land in Cibao with a *repartimiento* (allotment) of Indians. He also witnessed the massacre of 3000 Indians by the Spaniards at Caonao after they had brought food to share with the Christians.⁵²⁹ In 1514, Las Casas had a change of heart towards slavery and slave trade; he then realized that denying the slaves or the labourers his wages is compared to shedding the blood of a neighbour, and a tyrannical treatment of the natives. Thereafter, he gave up his Indian slaves and began to preach against the robbery and wrongs of the Spaniards, telling his congregation that it was sinful to make Indians serve them. In 1515, he returned to Spain to report to King Fernando of the evils he witnessed and presented his *Memorial de remedios* to Cardinal Cisneros on how Spaniards and Indians could live together.⁵³⁰ In 1516, he was appointed protector of the Indians and thereafter, led to influence the Jeronymite commissioners to abolish slavery but his efforts were frustrated by the Spaniards, who were benefiting from the slave trade and when he told the Bishop of Burgos that about 7000 Cuban children had died of starvation in 3 months, because their parents had been taken to work in the mines, Fonseca asked how that concerned him or the King.⁵³¹ In 1526, after having experienced the enslavement of Indians and the subsequent inhuman treatments, he wrote various reports to Spain, thereby influencing the government to legislate against slavery.⁵³² The efforts of Las Casas to free the Indians did not go unnoticed because Bernardino de Minaya conveyed his ideas to a conference in Rome in 1536, and subsequently a year later, Pope Paul the III pronounced that American Indians should not be deprived of their liberty or property even if they are outside of the Christian fold; he threatened therefore, those who enslave Indians with excommunication.⁵³³ The contrast between Christian Wolff and Las Casas is that while Wolff advanced philosophy and natural law to entrench and consolidate the rights of man irrespective of colour, race and religious disposition, Las Casas invoked theology and ecclesiastic law⁵³⁴ to free mankind from bondage.

⁵²⁹ Bakewell, Peter, *A History of Latin America*, Malden, MA Blackwell, 1997; Konezke, Richard, *La esclavitud de los indios como elemento en la esructuracion social de Hispanoamerica* in Kaahle, Günther, Horst, *gesammelte Aufsätze*, Köln – Wien - Böhlau 1983, pp. 257-293; Mires, Fernando, *im Namen des Kreuzes, Der Genozid an den Indianern während der spanischen Eroberung: theologische und politische Diskussionen*, Fribourg/ Brig, 1989, pp. 33-200.

⁵³⁰ de Las Casas, Bartolomé and his *Utopia*, Sevilla: 1552.

⁵³¹ de Las Casas, Bartolomé, *Apologetica Historica*, p. 127-129 quoted in Hanke, Lewis, *The Spanish Struggle for Justice in the Conquest of America*, 1949, p. 126.

⁵³² Sean, Galvin, editor and translator, *A Description of the Kingdom of New Spain* by Sr. Dn. Pedro Alonso O'Crouley, 1774, John Howell Books 1972, pp. 114-115.

⁵³³ compare Sullivan, Francis Patrick, ed., *Indian Freedom: The Cause of Bartolome de Las Casas*, 1995, p. 354

⁵³⁴ Pope Julius II, *Bull Universalis Ecclesiae*, 1508.

Christian Wolff was not only concerned and confined himself to a particular race or country but also with mankind, and Las Casas addressed the problems of the Indians. In order to highlight the modus implored by Las Casas to address the misery of the Indians, it is important in this regard to mention his "*Remedies for the Existing Evils, with Twenty Reasons* (1533)". But the ninth reason was the most simple and universal, namely that all people in the new world are free.⁵³⁵ From this concept, Las Casas is echoing the universal principle of the aforementioned philosophers like Wolff that man is free from birth and has the fundamental right to determine how to shape his destiny. This therefore, contradicts all norms and justifications for slavery and slave trade. The contribution of Las Casas to the abolition of slavery and slave trade against the Indians yielded further dividend as Charles V in 1542 promulgated new laws to abolish encomiendas systems. Thereafter, Indians were no longer to be enslaved and all existing Indian slaves were to be freed and they were to have the same rights as the Spaniards.⁵³⁶ There were however, many oppositions to the new law, the conquistadors opposed it, which resulted in the assassination of the viceroy in Peru. Clergies and princes also resisted the reform and in 1545 the council of Mexico advocated suspending the new laws and making encomiendas perpetual and thereafter Carlos V abrogated the new laws and encomiendas later that year.

In his book "*A Defense for the Just Causes for the War*" (1550), Sepulveda justifies encomiendas by arguing that because of the idolatry and sins against nature, the Indians should be subjugated and protected by the superior Spaniards and that they do not have any written laws or even private property. In a swift reaction, Las Casas responded that the Indians were quite rational and even in some respects, superior to the Greeks and Romans. He wrote, "*No nation exists, no matter how rude, uncultivated, barbarous, gross, or almost brutal its people may be, which may not be persuaded and brought to a good order and way of life and made domestic, mild, and tractable, provided the method that is proper and natural to men is used; that is, love and gentleness and kindness*".⁵³⁷ Before the death of Las Casas in 1566, he published eight tracts, which were translated in the 16th-Century into English, Flemish, French, German, and Latin.

⁵³⁵ Compare Author, Veuthey Michel, *Source: Foresight – The Journal of Future Studies, Strategic thinking and policy*, Vol. 7, Number 1, (21), 2005, pp. 26-46; Pope Paul III: *Bull, Sublimis Deus*, 1537.

⁵³⁶ de Las Casas, Bartolomè, *A Short Account on the Destruction of the Indies*, 1542, published in 1552; see also Fanon, Frantz, *The Wretched of the Earth*, pref. by Jean-Paul Sartre, translated by Constance Farrington, London: Penguin Book 2001; Gines se Sepulveda, Juan, *Democrates Alter, Or the Just Causes for War Against the Indians*, excerpts *The New Laws*, 1542; Lopez de Gomera, Fransisco, *How the New Laws were received in Peru* *Royal Ordinances on "Pacifications"*, 1573.

⁵³⁷ Sullivan, Francis Patrick, ed., *Indian Freedom: The Cause of Bartolome de Las Casas*, 1995, p. 354.

In the prologue, he explained that it would have been a criminal neglect of his duty to remain silent about the enormous loss of life because of the conquests. He summarized the most egregious violations he was describing in his longer history. The native population of Espanola had been reduced from three million to two hundred. Cuba, Puerto Rico, Jamaica, and the Bahamas were similarly devastated. On the mainland, Christians had caused the deaths of between 12 and 15 million people by unjust war and brutal slavery in order to get gold and amass private fortunes. Las Casas repeatedly argued that the natives had done nothing wrong to deserve such ill treatment. They had welcomed the Europeans, believing they came from heaven until they realized what their oppressive purposes were. Only then did some of them take up their inferior weapons to try and defend themselves. Europeans were ruthless and vowed to slaughter one hundred natives for every Spaniard that was killed.⁵³⁸

Las Casas wrote amongst others, a treatise on imperial sovereignty in which he advanced that the Pope had no coercive authority to force unbelievers to accept Christianity because the so called unbelievers had their own rightful kings and properties, which should be restored by the encomenderos who had robbed them. In his “*Thirty Very Juridical Propositions (1548)*”, he argued that everything the Spaniards had done in the new world was illegal and unjust. As a result of this and other writings and also his sermons, he became the most hated man in the Spanish empire, so that the council of Mexico City urged Philips II to restrain him and prohibit the printing of his books.⁵³⁹ And in his last will and testament he described his call as:

*“To act here at home on behalf of all those people out there in what we call the Indies, the true possessors of those kingdoms, those territories. To act against unimaginable, unspeakable violence and evil and harm they have suffered from our people, contrary to all reason, all justice, so as to restore them to the original liberty they were lawlessly deprived of, and get them free of death by violence, death they still suffer.”*⁵⁴⁰

Then in the same will he left behind a disturbing prophecy:

⁵³⁸ Las Casas, Bartolome, *A Short Account on the Destruction of the Indies*, 1542, published in 1552.

⁵³⁹ Compare de Las Casas, Bartolome, *Thirty Very Juridical Propositions*, excerpts, 1548; Id. “The Laws of Burgos”, 1512; Id. “Synopsis”, “Prologue”, “Preface” and “Hispaniola”, from *A short Account of the Destruction of the Indies*, 1542.

⁵⁴⁰ Sullivan, Francis Patrick, ed., *Indian Freedom: The Cause of Bartolome de Las Casas*, 1995, p. 354.

"I think that God shall have to pour out his fury and anger on Spain for these damnable, rotten, infamous deeds done so unjustly, so tyrannically, so barbarously to those people, against those people. For the whole of Spain has shared in the blood-soaked riches, some a little, some a lot, but all shared in goods that were ill-gotten, wickedly taken with violence and genocide and all must pay unless Spain does a mighty penance".⁵⁴¹

5.6 Francisco de Vitoria, Francisco de Suarez and the Principles of God

Vitoria was a Dominican professor of theology at the University of Salamanca. He was born about 1492 and studied for 7 years at the University of Paris and after teaching for three years at Valladolid. In 1526, he won the chair of theology at the University of Salamanca where he lectured until his death. Vitoria was motivated by the cruelty of his Spaniards towards the Indians particularly, after the violence in the Spanish conquest of Peru in 1536. He lectured principally on the rights of Indians and the laws of wars and because of his early discussions on the principles of international law and the laws of war, Vitoria is now generally recognized by scholars as the founder of modern international law.⁵⁴² His philosophy was based on the premise that God has ordained certain principles for all by the law of nature, and these includes not stealing, not killing an innocent person, and not doing to anyone what we would not let others do to us. From his natural law concepts, one could deduct that he contrasted with the laws made by human will, which he called positive law and he observed that human societies are established to help bear each others burdens. In this respect, Vitoria's concept of natural law is in conformity with Las Casas' duty towards man principle as already mentioned above.

⁵⁴⁰ Ibid.

⁵⁴¹ Francisco de Vitoria shows birth date of 1483 as quoted in the preference of DE INDIS ET DE IVRE BELLI RELECTIONES: Rare Books of Spain; Schroeder, Joseph, Francis of Vitoria from Catholic Encyclopedia, 1911, Nihil Obstat, September 1, 1909; de Vitoria, Francisco, *De Jure belli Hispanorum in 130ceptical*, 1532.

*For a detailed reading of the biography of Francisco de Vitoria: see *Commentaries to the Secunda Sekundae of Santo Tomas*, 6 vol., edition of Vicente Beltran de Heredia, Salamanca, 1932-1952; Vitoria, Francisco of, *Justice: Commentaries to the Secunda Sekundae of Santo Tomas*, pp. 57-61, preliminary Study, translation and notes of Luis Thin Frayle, Tecnos, Madrid, 1998; RELECCIONES Of eo quod tenetur homo cum primum venit ad usum rationis, 1534 Or 1535, in: Works of Francisco de Vitoria, *Relecciones theological, critical Edition of the Latin text, Spanish version, general introduction and introductions with the study of its theological-legal doctrine* by Teofilo Urdanoz, BAC, Madrid, 1960, pp. 1302-1375; Of homicidior (1539), in Francisco de Vitoria: *Relecciones theological*, T. Urdanoz (ed.), Madrid, 1960, pp. 1083-1130.

In his attempt to justify the inalienable rights of man to existence and to own property, he suggested the idea of state sovereignty because only the state have the authority or right to use public power by governing in order to protect and preserve people otherwise individuals would be torn apart if they were not a providential force, a state, to consider the common good and provide for the general welfare. A ruler therefore, should subordinate both peace and war to the common good of all. Consequently, the government is not legitimate unless a majority agrees with the exercise of power.⁵⁴²

While the laws of nations are derived from natural law and confer rights and obligations, the world as a whole nevertheless, has the power to create international laws that are just for all persons, and no country should be allowed to violate these international laws. Any war that confers advantage to one nation but is injurious to the world is therefore unjust. This is in allusion to Spain's imperial claim over the Indians. He further argued that the Indians have the right of possession of their goods and must be treated as the rightful owners, and unbelief in the Christian God does not deprive one of owning property because believe in God and owning property are not synonyms. Therefore, the Pope and the Christian world had no authority either over non-believers or could they wage war against the Indians because they did not acknowledge the papacy.⁵⁴³ According to Vitoria, any act of depravity from one person to the other irrespective of race, colour, religion, country, belief is an act of aggression and infringement upon the fundamental human rights of the victims which are contrary to the laws of nature. But on the enforcement of Spanish laws, Vitoria conceded to the Spanish sovereign's minimum rights to stop human sacrifices and cannibalism by force in order to protect innocent people. It appears Vitoria advocated the tit-for-tat policy when he postulated that oppressors, robbers, and plunderers should not be allowed to commit their crime with impunity without others having the right to retaliate.⁵⁴⁴ For a proper understanding and appreciation of Vitoria's concept and philosophy, the analysis of the historical role that the School of Salamanca in the renaissance and more so in natural law played, shall be the object of analysis. The School of Salamanca was the centre of learning for diverse intellectual Spanish theologians, who were rooted in the intellectual and pedagogical work of Francisco de Vitoria.⁵⁴⁵

⁵⁴² Compare de Vitoria, Francisco, *De Poteste Civili*, 1528 (= College.Philosophical Texts), introduction by Robert Schnepf, Berlin 1992; Id. *Natural Law and Church Law 1150-1625*, Emory University Studies in Law and religion, NR. 5, Atlanta, GA 1997.

⁵⁴³ de Vitoria, Francisco, *De Iure Belli* 1, 1539, p.34; Compare Aristoteles, *Politics* (=The Loeb classical Library 264), published from H. Rackham, London 1977.

⁵⁴⁴ de Vitoria, Francisco, *De Jure belli*, 1532, p.23, tr. Jose Maria G.

⁵⁴⁵ Burckhardt, J., *The Civilization of the Renaissance in Italy*, trans. S. G. C Middlemore, 1878; *The Cambridge modern History, Vol. 1: The Renaissance*, 1902; Cronin, V., *The Florentine Renaissance*, 1969; Id. *The Flowering Renaissance*, 1992; Ferguson, W. K., *The Renaissance, Europe in Transition, 1300-1500*, 1962; Haskins, C. H., *The Renaissance of the Twelfth Century*, 1927.

The beginning of the 16th-century marked the traditional Roman Catholic conception of man and of his relation to God and to the world, which had been assaulted by the rise of secular humanism, by the Protestant Reformation and by the new geographical discoveries and their consequences. These problems and others were addressed by the School of Salamanca. Francisco de Vitoria, Domingo de Soto, Martin de Azpilcueta (or Azpilicueta), Tomas de Mercado and Francisco de Suarez, all scholars of natural law and of morality, founded a school of theologians and jurists, which undertook the reconciliation of the teachings of Thomas Aquinas with the new economic order.⁵⁴⁶ Their topics were based on man and his practical problems (morality, economics, jurisprudence e.t.c.). The School of Salamanca could be divided into two schools of thoughts, i.e. School of the Salmanticenses and that of the Conimbricenses. While the first began with Francisco de Vitoria (1483-1546), and reached its zenith point with Domingo de Soto (1494-1560), the Conimbricenses were Jesuits who, from the end of the 16th-century took over the intellectual leadership of the Roman Catholic world from the Dominicans. Among those Jesuits were Luis de Molina (1535-1600), the aforementioned Francisco de Suarez (1548-1617), and Giobanni Botero (1544-1617), who would continue in Italy. The name Conimbricenses refers to the University of Coimbra in Portugal.⁵⁴⁷ The doctrines of the School of Salamanca were all embracing and represented the end of the medieval concepts of law, with a revindication of liberty in Europe. The natural rights of man came to be the centre of attention, including rights to a corporal being (right to life, economic rights such as the right to own property) and spiritual rights (the right to freedom of thought and to human dignity).

⁵⁴⁶ For more details about Thomas Aquinas, see Bibliography of Additional Readings, In Adler, Mortimer J., (ed.), *Great Books of the Western World*, 2nd ed., v. 2, Chicago: Encyclopedia Britannica, 1990, pp. 987-988; Peterson, Craig and Pugh, Mathew S., (eds.) *Analytical Thomism: Traditions in Dialogue*, Ashgate, 2006; Nicholis, Aidan, *Discovering Aquinas*, Grand Rapids, MI: Eerdmans Publishing Company, 2002, pp. 173-174; Aquinas, Thomas, *Aquinas Shorter Summa*, Manchester, NH: Sophia Institute Press, 2002, pp. 228-229.

⁵⁴⁷ "Commentarii Collegii Conimbricensis Societatis Jesu in octo libros physicorum Aristotelis Stagyrtae", Coimbra, 1591; "Commentarii Collegii Conimbricensis Societatis Jesu in quattuor libros physicorum Aristotelis de Coelo", Coimbra, 1592; "Commentarii e.t.c. in libros meteorum Aristotelis Stagyrtae", Coimbra, 1592; "Commentarii e.t.c. in libros Aristotelis qui parva naturalia appellantur", Coimbra, 1592; "Commentarii e.t.c. in libros Ethicorum Aristotelis ad Nichomachum aliquot Cursus Conimbricensis disputationes in quibus praecipua quaedam Ethicae disciplinae capita continentur", Coimbra, 1595; "Commentarii e.t.c. in duos libros Aristotelis de generatione et 132ceptical132", Coimbra, 1595; "Commentarii e.t.c. in tres libros Aristotelis de Anima", Coimbra, 1592; this treatise was published after the death of Father Emmanuel Golz (whom Father Fonseca had commissioned to publish the earlier volumes by Father Comas Maggalliano, Magalthaens. To it he added a treatise of Father Balthazaar Alvarez "De Anima Separata" and his own work "Tractatio aliquot Problematum ad quinque Sensus Spectantium"; "Commentarii e.t.c. in universam dialecticam nunc primum (ed. Venice), 1606.

If one recalls that these laws existed before, during and after Atlantic slavery, it will not be far fetched to conclude that the apostles and masters of the Atlantic Slavery and slave trade knew the existence of these laws or ought to know the existence of these laws but nevertheless, compromised these rules and regulations to perpetuate their buying and selling of human beings. Detailed analysis will follow later. The School of Salamanca also reformulated the concept of natural law and that law originated from nature itself. The implication here is that, giving that all humans share the same nature, they also share the same rights such as equality or liberty. This principle was contrary to the view then predominant in Spain and Europe viewed the American Indians or Africans as children or as incapable in the recognition of their rights — such as rights to reject forcible religious conversion or the right to their own land and therefore should be led by the Europeans so as to achieving these goals. Given that we all live not isolated but in society, so is natural law not limited to individuals. Thus, for example, justice is an example of natural law realized in society.⁵⁴⁸ For Gabriel Vazquez (1549-1604) natural law dictates an obligation to act in accord with justice.

5.7 Francisco de Vitoria on the Theory of *ius gentium*

Francisco de Vitoria was perhaps the first to develop a theory of *ius gentium* (the rights of peoples), and this is an important figure in the transition to modernity. He extrapolated his ideas of legitimate sovereign power to society at the international level, concluding that this scope as well ought to be ruled by just forms respectable of the rights of all. The common good of the world is a category superior to the good of each state. This meant that relations between states ought to pass from being justified by force to being justified by law and justice. Francisco de Vitoria essentially invented international law.⁵⁴⁹ Francisco de Suarez subdivided the concepts of *ius gentium* into *ius intra gentes*.

⁵⁴⁸ Barry, Brian, *Theories of Justice*, Berkeley: University of California Press, 1989, p. xiii; Rawls, John, *A Theory of Justice*, revised edn. Oxford: OUP, 1999, p. 3; Nagel, Thomas, *The Problem of Global Justice*, *Philosophy and Public Affairs* 33, 2005, pp.113-47; Anscombe, Elizabeth, *Modern Moral Philosophy*, *Philosophy* 33, 1958, pp. 1-19; see further MacIntyre, Alasdair, *After Virtue*, 2nd edition, London: Duckworth, 1985; O'Neill, Onora, *Towards Justice and Virtue*, Cambridge: CUP, 1996, chapter 1.

⁵⁴⁹ Greig, D. W., *International Law*, 2nd edn, Butterworths: London 1976; Columbia Law School, Mckeever, 2003 – Institutions involved in the Process.

ius intra gentes corresponded to modern international law, and was something common to the majority of countries (although being positive law, not natural law, it was not necessarily universal); ius intra gentes or civil law is specific to each nation. Positive law is usually man-made law, that is, law established by governmental authority especially that, which has been codified into written forms (statutory law). The term is often used with natural law and legal realism.⁵⁵⁰ Various philosophers have put forward theories contrasting the value of positive law relative to natural law. The normative theory of law gave pre-eminence to positive law because of its rational nature. Classical liberal and libertarian philosophers usually favour natural law over positive law.⁵⁵¹ Since the merits and demerits of slavery and slave trade rest on the question whether slavery during the 17th and 18th centuries was legally justified or not, the yardstick to answering this question is prescribed through legal positivism and natural law and therefore, needed some elaborations.

5.8 Legal Positivism and Natural Law

Legal Positivism is a body of legal theory asserting that there is an essential connection between law and justice; but many legal positivists endorse the separation thesis: that the ideal of legal validity has no essential connection with morality or justice.

The principal claims of legal positivism are that:

- 1). Laws are rules made, whether deliberately or unintentionally by human beings;
- 2). There is no inherent or necessary connection between the validity conditions of law and ethics or morality.

Jeremy Bentham, the English philosopher of utilitarianism distinguished between people he called “expositors”, whose task it was to explain what the law in practice was; and “censors”, those who criticize the law in practice and compared it to their nations of what it ought to be. According to him, the philosophy of law, strictly considered, was to explain the real law of the expositors, rather than the criticisms of the censors.⁵⁵²

⁵⁵⁰ Leiter, Brian, *American Legal Realism, in the Blackwell Guide to Philosophy of Law and Legal Theory*, W. Edmundson & M. Golding (eds.), 2003; Green, Michael Steven, *Legal Realism as Theory of Law*, *William & Mary Law Review* 1915, p.46 (2005); MacCormack, Geoffrey, *Scandinavian Realism* 11 *Juridical Review*, 1970.

⁵⁵¹ Barnett, Randy, *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Clarendon Press, 1998; Epstein, Richard, *Skepticism and Freedom: A Modern Case for Classical Liberalism*, Chicago: University of Chicago Press, 2003; Hayek, Friedrich, *Law, Legislation and Liberty: The Political Order of a Free People*, Chicago: University of Chicago Press, 1981.

⁵⁵² Mill, John Stuart. “*On Liberty*”, ed., Himmelfarb: Penguin Classics, 1974, Ed.’s introduction, p. 11; Id. “*On Liberty*”, Himmelfarb: Penguin Classics, 1974, “Introductory” of main text, p. 68; Waldron, Jeremy, “*Rights*” in *A Companion Political Philosophy*, Goodin, Robert E. and Pettit, Philip (eds.), Blackwell Publishing, 1995, p. 581.

John Austin distinguished a feature of legal positivism or legal system by which the existence of a sovereign is recognized by most members of the society, but who is not bound by any human superior.⁵⁵³ His criterion therefore, is the validity of a legal rule in such a society, which bears the warrant of a sovereign and which will be enforced by the sovereign power and its agents. The American judge, Oliver Wendell Holmes, sees legal positivism in a sense, as the science of those who observe and give counsel as to what government might do. Therefore, law is not so much a body of rules and procedures as it is a body of knowledge that predicts what courts are likely to do. He acknowledged that the rules printed in statute books and precedents can be swayed by effectively marshalled cases and legal arguments.⁵⁵⁴ Similarly, Niklas Luhmann advances that the essence of positive law is that it is a decision. “*We can reduce this concept of positive law to a formula, that law is not only posited (that is, selected) through decision, but also is valid by the power of decision (thus, contingent and changeable).*”⁵⁵⁵ Positive law, therefore, is changeable law. For example, abortion can be illegal yesterday, legal today, and again illegal tomorrow.⁵⁵⁶

The conclusion deductible from the foregoing is that positive laws are wilful laws and are those branches of laws that must justify themselves with reason. It is for this reason that the rise of positive laws is accompanied by the rise of legal science as a means of giving reasons and justifications for laws. It is no surprise, therefore, that law, today, is infused with the language and practice of social sciences, from law and economics to the sociology of law and other normative socio-legal studies.

5.9 Summary

It is however doubtful whether any universal kind of positive law existed during slavery vis-à-vis Atlantic Slave Trade.

⁵⁵³ Rumble, Wilfred E., *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* London: Dover, N. H.: Athlone Press, 1985.

⁵⁵⁴ Holmes, Oliver Wendell, *The Collected Works of Justice Holmes*, S. Novick (ed.), Chicago: University of Chicago Press, 1995; See also Abrams, Floyd, *Speaking Freely*, 2005, p. 66; Holmes, Oliver Wendell Jr., *Common Law*, 1881, p. 1.

⁵⁵⁵ Luhmann, Niklas, *Social Systems*, 1987.

⁵⁵⁶ Luhmann, Niklas, *Social Systems*, 1984; Id. *A Book Series: Die Gesellschaft*, 1988-1997; Id. *Art as a Social System*, 2000.

There were legal status by the Romans, the Greeks, the Jews, the Arabs as discussed above but these collections of legal norms did not deal specifically with the question of slavery and slave trade beyond their borders and culture and therefore, these laws had no erga omnes obligations. Any further analysis on this topic at this stage appears to be superfluous since it may not have any relevance to the subsequent examinations on reparations.

5.10 The Incompatibility of Law and Ethics

Since there is no evidence to suppose that legal positivism had a universal application to slave societies and slave trade, efforts shall be made here to ascertain the combination of law and ethics so as to accord legal basis or otherwise to slavery vis-à-vis Atlantic Slave Trade.

Legal positivism is not synonymous to ethics, because it is possible that legal rules do not have ethical components and laws that are positively evil, such as the laws of slavery and apartheid. Some jurists argued however, that even the most pedestrian of laws carry the moral or ethical requirements that, as Samuel Adams said, the state of Nature may be abridged only for the basic maintenance of the greater society. Such order is a moral imperative. For example, a law requiring driving on the right side of the road indeed has a philosophical moral basis, but not that the right side is socially preferable to the left side. But, that right is socially preferable to nothing.⁵⁵⁷ Legal positivism is not synonymous with ethical positivism or for that matter, with moral relativism. It is at least a possible view point that there exists a natural ethical code while maintaining that its translation into law remains local and contingent. The argument of legal positivism is not that ethics is irrelevant to every law; rather, that law and ethics are two different things, two fields that occasionally overlap but whose underlying logic remains separate. The legal positivist emphasizes that the law that forbids theft and the law that commands that you drive on the proper side of the road are two exemplars of the same phenomenon.⁵⁵⁸

⁵⁵⁷ Butchvarov, Panayot, *Skepticism in Ethics*, Bloomington and Indianapolis: Indiana University Press, 1989; Cornman, James, *Philosophical Problems and Arguments – An Introduction*, 4th ed., Indianapolis, 1992; Hackett, Macintyre, A., *A Short History of Ethics*, Routledge, 2002; Singer, P. (ed.), *A Companion to Ethics*, Massachusetts: Blackwell, 1993.

⁵⁵⁸ Rorty, Richard, *Consequences of Pragmatism*, Minneapolis: University of Minnesota Press, 1982; Cardinal Ratzinger, Josef, Marcello Pera, *Without Roots: The West, Relativism, Christianity, Islam*, Perseus Books Group, 2006.

Lon L. Fuller took a contrary view and postulated that law has its own internal morality. Thus, laws must be promulgated, announced to the public and not self-contradictory. Unless laws fulfil these requirements, they cannot fulfil their role in the social order; for without fulfilling these requirements, it would be impossible for anyone to know the laws or obey them. These requirements, according to Fuller, are ethical requirements and they constrain laws even without regard to any rules of ethics exterior to the legal process. This thesis may contradict the tradition of natural law, which asserts that natural justice is explained through the dispute-resolving function of the courts and the extension of precedence by analogy through the common law process.⁵⁵⁹ As A. P. Herbert observed, “*there is no precedent for anything until it is done the first time*”.⁵⁶⁰ Ronald Dworkin distinguishes between principles and rules. Rules are like the law that tells you, which side of the street to drive on, they are essentially binary in application; they either govern a case or they don’t. Principles are substantially more vague statements of policy and ethical norms, brocades, and/or similar maxims. From the perspective of the common law tradition, the difference between rules and principles is roughly analogous to the difference between law and equity.⁵⁶¹ *Riggs v Palmer* is a classic case, which Dworkin often cites in which principle trumped law. The case held that a murderer cannot inherit his victim’s property, despite the fact that the victim’s will said unambiguously that the murderer was the heir, and the statute of wills said the will was valid and should be carried out.⁵⁶² Robert Alexy argues that every legal rule is ethically relevant, since it affects freedom, which according to Alexy, is of obvious ethical significance.⁵⁶³

⁵⁵⁹ Fuller, Lon Luvois, *The Morality of Law*, 1964.

⁵⁶⁰ Pound, Reginald, “*Herbert, Sir Alan Patrick, 1890 – 1971*”, rev. Katherine Mullin, Oxford Dictionary of National Biography, Oxford University Press, 2004; Dworkin, Ronald, *Taking Rights Seriously*, 1977; Id., *A Matter of Principle*, 1985: this book includes the article “*Is There Really no Right Answer in Hard Cases? Liberalism*”, 1978; Id., *Law’s Empire*, 1986.

⁵⁶¹ Compare Dworkin, Ronald, *Law’s Empire*, 1986; Alexy, Robert, *Theorie der juristischen Argumentation, Die Theorie des 137ceptical Diskurses als Theorie der juristischen Begründung* 1983, translated by Neil MacCormick as “*A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*”, Clarendon, 1989, p. 26f;

⁵⁶² *ibid.* Alexy, R., 1989, p. 26f; Id., *The Argument from Injustice: A Reply to Legal Positivism*, translated by Stanley Paulson and Bonnie Litschewski Paulson, Oxford University Press, 2002.

⁵⁶³ *ibid.* Alexy, R., 1989, pp.26ff.

5.11 Conclusion

The instrument of interpretivism may help to summarize the aforementioned thesis and perhaps accord the ethics of law on positivism its role in the evaluation and consequences of slavery and slave trade. Interpretivism is a school of thought in contemporary jurisprudence and philosophy of law. Interpretivism is usually a thesis based on the nature of law, which is sometimes seen as a third way between natural law and legal positivism. The word also covers continental legal hermeneutics, legal hermeneutics can be seen as branch of philosophical hermeneutics, whose main authors in the 20th century are Heidegger and Gadamer, both drawing on Husserl's phenomenology.⁵⁶⁴ In a wider sense, interpretivism includes even the theses of, in chronological order, Josef Esser, Theodor Viehweg, Chaim Perelman, Wolfgang Fikentscher, Castanheira Neves, Friedrich Muller, Aulis Aarnio, Robert Alexy and the main claims of interpretivism are:

1. Law is not a set of given data, conventions or physical facts, but what jurists aim to construct or obtain in their practice. This marks a first difference between interpretivism and legal positivism. But the refusal that law be a set of given entities opposes interpretivism to natural law too.
2. There is no separation between law and morality, although there are differences. This is the opposite of the main claim of legal positivism.
3. Law is not immanent in nature nor do legal values and principles exist independently and outside of legal practice itself. This is the opposite of the main claim of natural law theory.⁵⁶⁵

⁵⁶⁴ Betti, Emilio, *Attualita di una teoria generale dell'interpretazione*, 1967. For further reading on Emilio Betti see Ciocchetti, Mario, *Emilio Betti, Giureconsulto e umanista, Belforte del Chient*, 1998.

⁵⁶⁵ Frank, D. A. & Bolduc, M. K., *Chaim Perelman's "First philosophies and regressive philosophy": Commentary and translation*, *Philosophy and Rhetoric*, 36(3), 2003, pp. 177-88; Perelman, C., *First Philosophies and regressive philosophy*, *Philosophy and Rhetoric*, 36(3), 2003, p. 21 pp. 189-206; Castanheira Neves, Antonio, *Questao-de-facto – questao-de-direito ou o problema metodologico da juridicidade*, Coimbra: Almedina/ *Matter of Fact/Matter of Law, or the Methodological problem of legality*, 1967; Castanheira Neves, Antonio, *Metodologia juridical, Problemas fundamentais*, Coimbra: Coimbra Editora, 1993/ *Legal methodology/Fundamental Problems*. And one of his notable quotations is found in his book: Castanheira Neves, Antonio, *O actual problema metodologico da interpretacao juridical*, Coimbra: Ciombra Editora/*The Present Day Methodological problem of legal interpretation*, (2003), p. 586. "Law is not an element, but a synthesis, not a premise for validity, but fulfilled validity, not a prius, but a posterius, not given, but a solution, it is not in the beginning, but in the end", (Castanheira Neves, 1967, p. 586).

Chapter VI: The Meeting of Cultures and the Element of Pacta Sunt Servanda

6. Pacta Sunt Servanda

6.1 Historical Background

The sanctity of contracts called “pacta sunt servanda” was developed in the East by the Chaldeans, the Egyptians, and the Chinese. According to the view of these people, the national gods of each party took part in the formation of the contract. Therefore the gods were guarantors of the contracts and threatened to intervene against the party that may breach the contract. The formulation of contracts was subsequently bound in a solemn religious formula and a cult of contracts thereafter developed.⁵⁶⁶ The Islamic people also adopted the principle of pacta sunt servanda and this also had a religious connotation. Muslims contracting partners must abide by their stipulations and these can be found in the Quran, for example, where it is said: “*Be you true to the obligations, which you have undertaken....Your obligations, which you have taken in the sight of Allah...For Allah is your Witness.*”⁵⁶⁷ With the peoples of the Mediterranean era, the combination of common interests in a regulated trade and religious motive was preferable. The juridical sense of the Romans recognized that a well regulated trade was possible if contracts were kept.⁵⁶⁸ Though contracts were considered as being under divine protection, their psychological basis then was, above all, the necessity of a legal regulation of international contractual relations.⁵⁶⁹ Christianity also played a great influence on the principle of pacta sunt servanda. Its basic tenet demanded that one’s word be kept, as is clearly written in the Gospel according to Saint Matthew, chapter 5 verses 33 to 37, where it is written: “*But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil.*”⁵⁷⁰ Later, the Fathers of the Church set forth in detail the notion of the sanctity of contracts. Thus St. Augustine (354-430), for example, taught that one must keep one’s word even with one’s enemies. The same idea is to be found in the Decretum Gratiani.⁵⁷¹

In the Middle Ages, after the empire of Charles the Great was dissolved, the principle of vassalage acquired a decisive meaning; simultaneously, the Roman laws were also strengthening the concept of an obligation to perform contract. This feudal system

⁵⁶⁶ de Taube, Baron Michel, *L’inviolabilité des traités*, 32 Hague Academy Recueil des Cours, II, 1930, p.299; Redslob, Robert, *Histoire des Grands Principes du Droit des Gens*, Paris, 1923, p.107.

⁵⁶⁷ Jenks, C. Wilfred, *The Common Law of Mankind* and the bibliography set out therein, London, 1958, p.144.

⁵⁶⁸ Wehberg, Hans, *Pacta Sunt Servanda*, 53 AJIL 1959, p. 775

⁵⁶⁹ *ibid.* n.566 de Taube, p. 321.

⁵⁷⁰ Gospel according to Saint Mathew, chapter 5 verses 33 to 37.

⁵⁷¹ *ibid.* n.566 de Taube, Second section, Ch. 23, pp. 1, 3.

involved a chain of contracts, which was voluntarily entered into by lords and vassals. The Christian Knight was required to keep to his given word⁵⁷² and at the same time the Roman law was also strengthening the concept of an obligation to perform contract. And thereafter, the renaissance and the reformation followed. Machiavelli (1469-1527) particularly unreservedly supported the general value of religion. Though he adhered unreservedly to the general value of religion, morality and law,⁵⁷³ nevertheless, his political thought was influenced by the concept of necessity and expediency. He asserted that the Prince could put himself above law and justice, should this be necessary for the state. To be sure, Michiavelli said that the Prince ought, if he could, to follow the paths of goodness; but he was justified in doing wrong in cases of necessity. In order to protect the interests of the state, explained Machiavelli, the Prince must be ready to act "*against loyalty, against charity, against humanity and against religion.*"⁵⁷⁴ However, the influence that Machiavilli exercised upon contemporary thinking especially in the field of international law, cannot be overestimated. The fact that Machiavelli, in *Il Principe* (first published in 1532) had broken with Christian ethics and taken up ancient heathen ideas prevented the spread of his teaching and immediately afterwards the focus of politicians was redirected to religious contest, which divided the Christian world and "*the ancient and heathen State idealism of Machiavelli was no longer understood by the people of the time of the Counter-Reformation, even by the free-thinkers, who continued the secular Spirit of the Renaissance.*"⁵⁷⁵ There were lots of oppositions to the concept of Machiavelli, particularly the progenitor of the modern theory of sovereignty, Bodin. Though Machiavelli's views were however helpful and positive to those who admitted exemptions to the sanctity of contracts vis-à-vis *pacta sunt servanda*, Thomas Aquinas, who on principle demanded that contracts be performed even with regard to enemies, has also said that, if the circumstances existing in reference to person or objects at the time of making the contracts had changed, non-performance of the contract was permissible.⁵⁷⁶ On the basis of this principle, the doctrine of *clausula rebus sic stantibus* was born. There is a general consensus amongst philosophers, that this doctrine could be regarded as justified even till today, however only on the basis and circumstances at the time when the contract was entered into and also when each contracting party demands the right for a revision –

⁵⁷² de Taube, Baron Michel, *L'inviolabilité des traités*, 32 Hague Academy Recueil des Cours, II, 1930, p. 337.

⁵⁷³ Meinecke, Friedrich, *Die Idee der Staatsräson*, Munich-Berlin, 1924, p.31 ff., especially p. 50 ff; Reibstein, Ernst, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis*, Freiburg-Munich, 1958, Vol. I, p. 241 ff.

⁵⁷⁴ *ibid.* Meinecke, p. 50.

⁵⁷⁵ *ibid.* n. 573 Meinecke, p. 56 ff.

⁵⁷⁶ S. Théol., 2, p. 140; see also *ibid.* n.572 de Taube, p. 360.

a right, which must be exercised in good faith. On the other hand, a unilateral right of termination or alteration was not permissible.⁵⁷⁷

Jean Bodin in his major work, “*De la Republique*” (1577) defined national sovereignty, as the highest authority independent of state laws, with respect to the citizens as subjects of the state (*summa in cives ac subditos legibusque solute potestas*). He added that no one could bind himself through his own laws and that no law was so sacred that it could not be changed under the pressure of necessity. Nothing could be discreditable, he said, which was connected with the welfare of the state.⁵⁷⁸

6.2 Analysis

It may not be far-fetched to conclude here on the basis of the above-mentioned subjects that international agreements need not be kept if their performance is no longer in the interest of the state. However such a conclusion may be superfluous because of the following. Jean Bodin set up his theory of sovereignty in order to build up the complete autonomy of the French state as against the three powers which, in the Middle Ages, threatened its independence; the church, the Roman empire and the feudal lords.⁵⁷⁹

On the principle of *pacta sunt servanda*, Bodin stated expressly that the sovereign is subject to legal rules and the princes “*are all bound by God’s law and also by the law of nature.*”⁵⁸⁰ The prince must keep his word, for “*feudality and loyalty are the very basis of all justice, not only in the state but also in the whole human community.*”⁵⁸¹ Contracts concluded with foreign countries must be faithfully performed and the danger of destruction cannot release the state from its contractual obligations.⁵⁸² In his contribution, Jellinek postulated that the theory of Bodin and the political theories of the 16th, 17th and 18th centuries were illogical. Jellinek restricted, “in conformity with the Spirit of the times, “*the sanctity of contracts for states, according to Bodin’s concept of sovereignty to such contracts “which established a lasting situation (e.g., treaties of peace or of cession) or which provided for a short period of performance by the State with the means at its disposal.*”⁵⁸³ He thought that a lasting restriction of the legislative and administrative powers

⁵⁷⁷ Jolls, Christine, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, *Journal of Legal Studies* 26 (January), 1997, pp. 203-237. <http://legal-dictionary.thefreedictionary.com/contracts>.

⁵⁷⁸ Heller, Hermann, *Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts*, Berlin and Leipzig, 1927, p.14 ff; Meinecke, Friedrich, *Die Idee der Staatsräson*, Munich-Berlin, 1924, p.70 ff.; Verdross, Alfred, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Tübingen, 1923, p.14 ff; Seidl-Hohenveldern, Ignaz, *Völkerrecht*, 9. Aufl., 1997, p. 89, RdN. 401-410.

⁵⁷⁹ Cf. Jellinek, Georg, *Allgemeine Staatslehre*, 3rd ed., Berlin, 1914, p.440 ff.

⁵⁸⁰ Bodin, Jean, 1961, p.149ff.

⁵⁸¹ Wehberg, Hans, *Pacta Sunt Servanda*, 53 *AJIL* 1959, p. 777 ; Compare *ibid.* n. 578 *Meinecke, Friedrich*, pp. 70 ff. ; Jellinek, Georg, *Allgemeine Staatslehre*, p. 440 ff. (3rd ed., Berlin), 1914.

⁵⁸² *ibid.* Wehberg, Hans, p. 777.

⁵⁸³ *ibid.* n.581, Jellinek, 1914, p.740.

of the state, as is frequently found in modern contracts, would amount to “*an unacceptable surrender of sovereignty*.”⁵⁸⁴ However if Bodin’s thought is adapted to its contemporaneous world setting, where there were neither unions, nor supra-national organizations, then it would appear that Bodin’s theory included all the national contracts, which could be made at the time, and that his principle of sanctity of contracts was not limited to a special kind of convention. It is a fact that Bodin made exemption to the rule, for example, “*in cases where what you have promised is by nature unfair or cannot be performed*.”⁵⁸⁵ Such exemptions gave the support of power politics a privilege for extensive interpretation.⁵⁸⁶ In his reaction, Grotius argued that the king himself cannot reverse a position that was previously established in a civil law, and nullify a contract or release himself from his oath.⁵⁸⁷ These reservations portrayed that Bodin’s doctrine has scarcely been disadvantageous to international law and in particular to the sanctity of contracts. Francisco de Vitoria (1483-1546),⁵⁸⁸ and Francisco de Suarez (1548-1617),⁵⁸⁹ amongst others had also supported the principle of sanctity of contracts. However in the 17th century, an antithesis of the principle of sanctity of contracts arose from two great philosophers, Hobbes and Spinoza, also called the exponents of the doctrine of *raison d’Etat*. Thomas Hobbes (1588-1679), the English philosopher of utilitarianism, propounded in his “*Leviathan*”, that the holder of state power had an almost unlimited power and must not be bound by the principle of justice but those of wisdom.⁵⁹⁰ Nevertheless, Hobbes recognised as natural law the principle that agreements are to be honoured. The idea of wrong emanates out of the non-performance of a contract, the promisor being therefore, in contradiction with himself. And finally, he sacrificed the sanctity of contracts at the altar of state security.⁵⁹¹ In his “*Tractatus Theologicopoliticus*” (1670), Spinoza (1632-1677) said that no holder of state power can adhere to the sanctity of contracts to the detriment of his own country without committing a crime.⁵⁹² Therefore, for Hobbes, the sanctity of contracts is only sacrosanct, if the security of the state is not in question. This is undoubtedly a rejection of the principle of *pacta sunt servanda* and Spinoza can in fact be described as a forerunner of Hegel.⁵⁹³ Other notable writers in this field are Samuel Pufendorf (1632-1694) and Cornelius van Bynkershoek (1673-1743).

⁵⁸⁴ Jellinek, Georg, *Allgemeine Staatslehre*, 1914, p.740.

⁵⁸⁵ Wehberg, Hans, *Pacta Sunt Servanda*, 53 AJIL, 1959, p. 777.

⁵⁸⁶ Meinecke, Friedrich, *Die Idee der Staatsräson*, 1924, p.80.

⁵⁸⁷ Grotius, Hugo, *De Jure belli ac pacis*, Liber II, chap. 14, No. 1, 1625

⁵⁸⁸ de Vitoria, *De potestate civili*, p.21; Reibstein, Ernst, *Völkerrecht*, Vol. I, p. 287.

⁵⁸⁹ Suárez, *De legibus ac Deo legislatore*, II, cap. XVIII, No. 19, 1612.

⁵⁹⁰ Hobbes, Thomas, *Leviathan*, Anaconda Verlag, Köln, 2009, 18. Teil, pp.177-187 & 19. Teil, p.188 ff;

⁵⁹¹ Compare *ibid.* n.586, p.273.

⁵⁹² *ibid.* n.590, chap. 13; *ibid.* n.586, p. 272; Spinoza, B., *Theologisch-politischer Traktat*, 1670, p. 273f.

⁵⁹³ *ibid.* n.586, pp. 427-428.

In his book, “*De jure naturae et gentium*” (1672), the former described as one of the inviolable rules of natural law that each man must keep his word without breaking it.⁵⁹⁴ The latter expressed the opinion that without the principle of good faith and that of the binding force of contracts, international law would be entirely destroyed.⁵⁹⁵ Emer de Vattel (1714-1767) in his famous “*Droit des Gens*” (1757), accorded this question a special section of his book, under the title “Obligation to keep Contracts.”⁵⁹⁶ He advanced that nations and their leaders must hold fast to their oaths and their contracts, since no security and no commerce would otherwise be possible between nations. He pointed out on several occasions what he called “foi des 143cepti”. He meant something more as was shown by Ernst Reibstein,⁵⁹⁷ than the mere sanctity of contracts between the contracting parties. He shared the same opinion with Abbe de Mably (1709-1785), who, in his “*Droit public de l’Europe*” (1748), referred to the trust that all powers should and must create through the establishment of an objective legal order, even though limited to single states.⁵⁹⁸ By the application of the *clausula rebus sic stantibus*, Vattel cautioned: it would be a shameful misuse of the clause – in his opinion – if a contracting party took advantage of any change in the circumstances to release himself from his obligations.⁵⁹⁹

Nothing would then be left upon which one could rely⁶⁰⁰ and Johann Jacob Moser (1701-1785), the founder of the positivist school of international law, explained, in his “*Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten*” (1763), that contracts could only be canceled “with the consent of all interested parties.”⁶⁰¹ Georg Friedrich von Martens (1756-1821) explained in his “*Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet*” (1796):⁶⁰² a valid and binding contract creates, for nations and individuals alike, the complete right to demand from the other party the performance of the contract, so long as the contracting party, on his side, has performed satisfactorily his obligations. Johann Ludwig Klüber (1762-1837) in his *Europäisches Völkerrecht* (1821)⁶⁰³ devoted to the sanctity of contracts a special chapter in which he emphasised that the performance without breach of international contracts was a principle of all nations and was required by the very purpose of the state.

⁵⁹⁴ Pufendorf, Samuel, *De jure naturae et gentium*, 1672, Book II, Chap. III, § 23; Id., Book III, chaps. III, IV, §§ 1, 2.

⁵⁹⁵ van Bynkershoek, Cornelius, *Quaestionum jurae publicae libri duo*, 1737, II, Chap. 10.

⁵⁹⁶ de Vattel, Emer, *Droit des Gens*, 1757, Book II, Chap. XII, § 163.

⁵⁹⁷ Reibstein, Ernst, *Die Dialektik der souveränen Gleichheit bei Vattel*, Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht, 1958, p. 629.

⁵⁹⁸ de Mably, Abbe, *Droit public de l’Europe*, 1748.

⁵⁹⁹ Compare Seidl-Hohenveldern, Ignaz, *Völkerrecht*, 9. Aufl., 1997, Rd.N. 424.

⁶⁰⁰ *ibid.* n.596, Book II, chap. XVII, § 296; Reibstein, Ernst, *Völkerrecht*, 1958, p.594.

⁶⁰¹ Moser, Johann Jacob, *Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten*, 1763, p 574.

⁶⁰² von Martens, Georg Friedrich, *Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet*, 1796, p. 59.

⁶⁰³ Klüber, Johann Ludwig, *Europäisches Völkerrecht*, 1821, pp. 234, 235.

There were also notable voices against the philosophy of *pacta sunt servanda* and foremost in this vanguard of dissenters was the German philosopher, Georg Friedrich Wilhelm Hegel (1770-1831) who had an immense influence on the thinking of the 19th century on international law. For him the law was a product of the will. The will of the nation was the carrier of the law. Contracts could therefore be valid only so long as they contributed to the welfare of the state. The sanctity of the state was for Hegel preeminent.⁶⁰⁴

The influence of his theory on the German, Italian, English and French doctrine of international law has been clearly portrayed by Verdross.⁶⁰⁵ One can see this influence with the German's scholar, August Wilhelm Heffter (1796-1880) on the sanctity of contracts in his book, "*Das Europäische Völkerrecht der Gegenwart*" (1844), pointed out that *Pacta sunt servanda* was a foremost principle of international law but however limited the scope of the principle as follows: "*one can scarcely disagree with the view that a contract in itself creates a right only through the union of wills (duorum vel plurium in idem consensus) and thus only for so long as this union exists.*"⁶⁰⁶ This Observation prompted the editor of the last two editions of the work, F. Heinrich Geffcken, to add: "*but nevertheless for so long as the will of the contracting parties has bound them, unless there exists a special reason to justify a withdrawal from the contract.*"⁶⁰⁷

These divergent views prompted international jurists to find a synthesis to the application of the sanctity of contracts because of their perception that international law was being undermined and the principle of sanctity of contracts was based on the will of the state. They therefore, suggested a basis which would leave unaltered the principle of the sanctity of contracts in spite of a continued adherence to the will of the state as a foundation of international law. Consequently, George Jellinek (1851-1911) rested the validity of international contracts on the self-imposed obligation of states: "*The state can release itself of any self-imposed restraint, but only in legal forms and in creating new limitations. The restraint, but not the particular limitation is permanent.*"⁶⁰⁸ It is clear in so far that the state, if its will is decisive in the final analysis, can release himself from a self-imposed obligation and if there is no higher will, which compels the state to keep its word, then there is no sufficient basis given to the contract, which obligates the state to observe

⁶⁰⁴ Verdross, Alfred, *Die Einheit des rechtlichen Weltbildes*, Tübingen, 1923, p.4 ff; Meinecke, Friedrich, *Die Idee der Staatsräson*, Tübingen, 1923, p.434 ff.

⁶⁰⁵ *ibid.* Verdross, p. 6 ff.

⁶⁰⁶ Heffter, August Wilhelm, *Das Europäische Völkerrecht der Gegenwart* 144, Berlin, 1844, pp. 234-235.

⁶⁰⁷ *ibid.* (8. ed.), revised by Geffcken, F. Heinrich, Berlin, 1888, pp.183-184.

⁶⁰⁸ Jellinek, Georg (1851-1911), *Allgemeine Staatslehre* (3rd ed.), 1914, p. 482.

it. This theory did not go down well with modern theorists of jurisprudence. In his attempt to reconcile the doctrine of the will of the state with the rule of *pacta sunt servanda*, Heinrich Triepel (1868-1946) in his classical work, “*Völkerrecht und Landesrecht*” (1899), rejected Jellinek’s theory of self-imposed obligation, and therefore sought to show that the source of contracts was a common will of the contracting parties, “*which arises through interaction with the will of other states.*”⁶⁰⁹ This principle also turned out to be a failure, because the binding character of a contract is based not on a higher law but on the will of the states. even if it is based on the will of majority of states, the hypothesis of a “common will” is a mere fiction.

It should be added that Triepel limited the application of his theory to agreements in the sense of law-making treaties (“*145cepti-lois*”). Above all, however, only a law which stands above the will of the state can create the binding power of contracts. This theory was abandoned later and another principle of *pacta sunt servanda* was sought. Dionisio Anzilotti (1867-1950) described the principle of *pacta sunt servanda* as a hypothetical basic norm, which can be assumed but not proven.⁶¹⁰ For him, the rule *pacta sunt servanda* is the basic norm for all international law. This principle cannot, however, explain the validity of customary law and above all the validity of contracts cannot rest upon a mere postulate. This new theory of international law, whether it is regarded as positivist or not, adheres to the validity of the term *pacta sunt servanda*. This is hardly surprising, since any other view will amount to denying the existence of international law in general. If one considers that the law of nations was built less upon customary law than upon contracts, if contracts validly concluded were not binding, then international law would be deprived of a decisive foundation and a society of states will no longer be possible. International law, and with it also the sanctity of contracts, results by a natural necessity from the inevitability of social intercourse; the binding force of contracts is an obligation, which exists, not only *vis-à-vis* the contracting parties, but also *vis-à-vis* the international community as a whole.⁶¹¹

6.3 The Maxim of Pacta Sunt Servanda

In this subchapter, the legal sources of the sanctity of contracts *vis-à-vis* *pacta sunt servanda* will be evaluated and the application of this concept to international law.

⁶⁰⁹ Triepel, Heinrich, *Völkerrecht und Landesrecht*, Leipzig, 1899, p. 79.

⁶¹⁰ Anzilotti, D., *Lehrbuch des Völkerrechts*, Berlin and Leipzig, 1929, Vol. I, pp. 38 ff., 49 ff ; Strupp, Karl, *Grundzüge des positiven Völkerrechts* (5. ed.), Bonn and Cologne, 1932, p. 11 ; Kelsen, Hans, 14 *Hague Academy Recueil des Cours*, 1926, IV, p. 299; Rousseau, Charles, *Principes généraux du Droit international public*, Paris, 1944, Vol. I, p. 359.

⁶¹¹ Basdevant, Jules, 58 *Hague Academy Recueil des Cours*, 1936, IV, p. 643.

The principle of the sanctity of contracts is a general legal principle, which is found in *146ceptica* in all countries.⁶¹² It is one of the most important general principles of law particularly in the relations between nations. For example, was the slave trade between the Europeans and Africans contracted, and if the answer is in the affirmative, what was the nature of the contract and its wordings? Was this contract infringed upon by one or two parties? Suppose this question cannot be adequately accommodated by *pacta sunt servanda*, then the available historical documents do not show any adherence to contracting principles, like stipulating the rights and duties of seller and buyer. It can be said that without this instrument of contract, no international law would have been possible.⁶¹³ *Pacta sunt servanda* is also a part of customary law and the phrase *pacta sunt servanda* as I have examined above, has a religious origin and was subsequently integrated into international law.⁶¹⁴ The usage (*consuetudo*) exists - that is to say, the application, always repeated, of the principle (in spite of many breaches of the same) – in the life of individuals and nations alike. One could even speak of a “use from time immemorial,” if this was a necessary condition of custom, which is, however, not the case.⁶¹⁵ Likewise the *146ceptic iuris sive 146ceptical146za* is given. For governments have always taken the view that the principle corresponded to their conviction. Though breaches of contracts had been recorded in the course of history, however the principle of the sanctity of international contracts has through the ages preserved its validity and its breach has always being regarded as a wrong, which entitles the wronged party to demand for compensation.

⁶¹² Cheng, Bin, *General Principles of Law as applied by International Courts and Tribunale*, London, 1953, pp. 105, 112; Dahm, Georg, *Völkerrecht*, Stuttgart, 1958, Vol. I, p. 158; Fitzmaurice, Sir Gerald, in *Symbolae Verzijl, The Hague*, 1958, p. 158; von der Heydte, Friedrich August Freiherr, *Völkerrecht*, Cologne, 1958, Vol. I, p. 67; Spiropoulos, Jean, *Die allgemeinen Rechtsgrundsätze im Völkerrecht*, Kiel, 1928, p. 64; Verdross, Alfred, *Völkerrecht* (3rd ed.), Vienna, 1955, p. 23; see 18 *Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht*, 1958, pp. 641, 648; Compare also Art. 26, *WVÜ*; Bederman, 1871 London Declaration, *rebus sic stantibus*, *AJIL* 82, 1988, p. 1 ff; Haraszti, *Fundamental Change Circumstances*, *RdC* 146, III, 1975, p.1ff; Köbler, *Die „clausula rebus sic stantibus“ als allgemeiner Rechtsgrundsatz*, 1991; Pott, *Clausula rebus sic stantibus*, 1992; Rohls, *Die Voraussetzungen der clausula rebus sic stantibus im VR*, 1989.

⁶¹³ De Visscher, Charles, *Théories et Réalités en Droit International public*, Paris, 1953, p. 324: “. . . treaties still remain the most powerful instrument for progress and for the diffusion of international law.” Also p. 299; The Arbitration Tribunal in the Matter of P.T.T. vs. R.C.A. has emphasized in its opinion of April 1, 1932, the phrase “*Pacta sunt servanda*” as a general principle of law. See *Recueil général, périodique et critique des décisions, conventions et lois relatives au droit international public et privé*, La Pradelle, 1938, pp. 2–3; Rousseau, Charles, *Principes généraux du Droit international public*, 1944, p. 360.

⁶¹⁴ Basdevant, Jules, *58 Hague Academy Recueil des Cours*, 1936, p. 642; Guggenheim, Paul, *Traité de droit international public*, Geneva, 1953, Vol. I, p. 67; Kelsen, Hans, *Grundprobleme des Internationalen Rechts. Festschrift für Jean Spiropoulos*, Bonn, 1957, p. 263 ; de Louter, J., *Le Droit international public positif*, Oxford, 1920, Vol. I, p. 471; Oppenheim-Lauterpacht, *International Law*, 8th ed., London, 1955, p. 881; Whitton, John B., 49 *Hague Academy Recueil des Cours*, III, 1934, pp. 217,239; Kunz, Josef L., *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 *A.J.I.L.*, 1945, pp.180-197.

⁶¹⁵ Judge D. Negulesco required a “usage 146ceptical146” in his dissenting opinion to the decision of the Permanent Court of International Justice in the case of the European Danube Commission, *Advisory Opinion*, No. 14, p. 105.

Many declarations have been made by leaders and rulers of nations in the course of centuries, so as to emphasize the obligation to observe the sanctity of contracts.⁶¹⁶ Few examples will suffice here. Lord Russel, British foreign minister, in a dispatch dated December 23rd 1860, to the British ambassador in China, Earl James Bruce Eigin, said that the universal notion of justice and humanity teach even the worst barbarians among human beings, that, if an agreement have been made, the law demands its observance.⁶¹⁷ And later the American Secretary of State, Cordell Hull, on July 16th 1937, in his speech on international affairs, said of American foreign policy:

*“We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefore arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations.”*⁶¹⁸

There were also many declarations made by many states in favour of *pacta sunt servanda*. One of the most famous is the statement made by the Powers in the case of the neutralization of the Black Sea, when Russia, on October 19-31, 1870, suddenly repudiated her obligation, under the Paris Peace of 1856, to keep in the neutralized Black Sea henceforth only a fixed number of warships of a fixed tonnage. In the London Protocol of January 17, 1871, it was said that the representatives of North Germany, Austro-Hungary, Great Britain, Italy, Russia and Turkey, having met in a conference, recognized as a necessary principle of international law that no Power can repudiate the obligations of a contract nor change its provisions without having obtained first the consent of the other contracting parties by a peaceful understanding.⁶¹⁹ Further, one can read in a communiqué of the Atlantic Council of December 16, 1958, in response to the Russian withdrawal from the provisions of the Inter-Allied Agreement on Berlin, that no State has the right, by itself, to free itself unilaterally from its contractual obligations. The Council declares that such a procedure destroys the mutual trust between nations which represents one of the foundations of peace.⁶²⁰

⁶¹⁶ Frangulis, A. F., *Théorie et Pratique des traités internationaux*, Paris, 1934, pp. 94–95; Bruns, Viktor, *Fontes juris gentium*, Ser. B, Sec. I, Vol. I, Para I, p. 742, Vol. II, Para 2, p. 199.

⁶¹⁷ *ibid.* Frangulis, A. F., p. 94 ; Basdevant, Jules, *58 Hague Academy Recueil des Cours*, 1936, loc. p. 641.

⁶¹⁸ Hackworth, *Digest of International Law*, Washington, 1943, p. 164.

⁶¹⁹ *ibid.* n.616 Frangulis, A. F., p. 95.

⁶²⁰ *Neue Zürcher Zeitung*, Dec. 17, 1958, Noon ed.; 40 Dept. of State Bulletin, 1959, p. 4.

Treatise of the sanctity of contracts had been extraordinarily numerous. Here are also some examples, the preamble of the Covenant of the League of Nations characterizes as an important fundamental principle, in order to promote international co-operation and to achieve international peace and security, the rule of “*scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.*”⁶²¹ In the preamble of the Charter of the United Nations one finds likewise, “*respect for the obligations arising from treaties and other sources of international law.*”⁶²² Not less important is the reference in Article 5 of the Charter of the Organization of American States that international order is based, among other things, on the faithful fulfilment of the obligations arising from treaties and from other sources of international law.

Arbitral tribunals have, through the ages, respected the sanctity of *pacta sunt servanda*⁶²³ and few examples shall be given here: In his decision of April 7, 1875, the U. S. Ambassador in Santiago, as sole arbitrator in the dispute between Chile and Peru, held:

*“It is a principle well established in international law that a treaty containing all elements of validity cannot be modified except by the same authority and according to the same procedure as those which have given birth to it.”*⁶²⁴

In the case of Ch. Adr. Van Bokkelen, between the United States and Haiti, the arbitrator, A. Porter Morse, in his decision of December 4, 1888, stated:

*“Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.”*⁶²⁵

In a controversy between the United States and Great Britain, the Permanent Court of Arbitration in The Hague held, in its award of September 7, 1910: “*Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations.*”⁶²⁶

⁶²¹ The Council of the League of Nations in its Resolution of April 16, 1935, cited this when, contrary to the provisions of the Versailles Peace Treaty, Hitler reintroduced universal military training in Germany. *League of Nations Official Journal*, May, 1935, p. 551; Briggs, Herbert W., *The Law of Nations*, 2nd ed., London, 1953, p. 869; Basdevant, Jules, loc. 58 *Hague Academy Recueil des Cours*, 1936, p.641; McNair, Arnold Duncan, *The Law of Treaties*, Oxford, 1938, p. 351.

⁶²² <http://www.un.org/en/documents/charter/preamble.shtml>

⁶²³ Law of Treaties. Draft Convention, with Comment, prepared by the Research in International Law of the Harvard Law School, 29 A.J.I.L. Supp. 977, 1935; Frangulis, A. F., Frangulis, A. F., *Théorie et Pratique des traités internationaux*, 1934; Whitton, John B., 49 *Hague Academy Recueil des Cours*, III, 1934, p. 236.

⁶²⁴ La Fontaine, *Pasicrisie Internationale*, Bern, 1902, p. 165.

⁶²⁵ Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party 1807, 1849 - 1850*, Washington, 1898, p. 2.

⁶²⁶ Scott, James Brown, *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague*, Boston, 1912, p. 500.

In its first Advisory Opinion on July 31, 1922, on the designation of the workers' delegate to the International Labour Conference, the Permanent Court of International Justice emphasized that a contractual obligation was not merely "*a mere moral obligation*" but was an "*obligation by which, in law, the parties to the treaty are bound to one another.*"⁶²⁷

Later on, the International Court of Justice, in its Advisory Opinion of May, 28, 1951, on Reservations to the Genocide Convention, stated that "*none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention.*"⁶²⁸ In his statement following the Judgment of the International Court of Justice of November 28, 1958, in the case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), the Soviet Judge, Mr. Kojevnikov, expressly based his opinion on the principle, *Pacta sunt servanda*;⁶²⁹ the Mexican Judge, Mr. Córdova, in his dissenting opinion, referred to the rule as "*a time-honoured and basic principle.*"⁶³⁰

The rule of *pacta sunt servanda* as a general principle of law is seen and found to be binding on all nations and is also valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies or whether the contracts of a state with a foreign company for the purpose of granting a concession as being quasi international law agreements or whether on ascribing to them another character, the principle of the sanctity of contracts must always be applied.⁶³¹

6.4 Conclusion

The examination so far has been proven beyond any reasonable doubt that the sanctity of contracts is an essential ingredient of the life of any social community and in the life of international community particularly on relations between states and foreign co-operations or foreign individuals because the principles of *pacta sunt servanda* was sacrosanct to the various parties.

⁶²⁷ Publications of the Permanent Court of International Justice, Ser. B, No. 1, 1922-1946, p. 19.

⁶²⁸ *International Court of Justice* (Rep. 21), in its Advisory Opinion of May 28, 1951.

⁶²⁹ *International Court of Justice* November 28, 1958, the Soviet Judge, Mr. Kojevnikov, in his statement referred to the principle of *pacta sunt servanda*.

⁶³⁰ *International Court of Justice*, in its Advisory Opinion of November 28, 1958, the Mexican Judge, Mr. Córdova, in his dissenting opinion, referred to the rule as "a time-honoured and basic principle."

⁶³¹ *Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht*, 1958, p. 638 ff.

The economic relations between states and foreign co-operations would have been difficult without the principle of *pacta sunt servanda*. But one of the most notable proof in history and the best proof for that matter is because of the following facts: It has long been suggested that disputes between states and foreign companies (or foreign individuals) should be submitted to international adjudication. Such a course would be meaningless if the principles of *Pacta sunt servanda* were not applicable also to that kind of relations. How would it be possible to suggest the creation of such an International Court of Justice if contracts between a state and a foreign company were not binding? Verdross has shown that such contracts are subject to the general principle of law: *pacta sunt servanda*.⁶³² Moreover, evidence of historical origins of slavery began with the enslavement of captives taken in violent conflict. This has often been expressed in the language of a bargain, with prisoners agreeing to serve as slaves to avoid certain death. It is also clear, for example that this one-sided bargain usually involves individuals deemed to be of potential value with more troublesome adult men regularly being killed. But in most cases, enslavement was not simply an indirect consequence of warfare directed towards other ends, but was also a major source of martial motivation, as internal and/or external demands for new slaves regularly proved to be an important catalyst for large-scale organised violence.⁶³³ The nexus between acquisition had far reaching ramifications and attracted various modalities.⁶³⁴ The failure of the Europeans to adhere to these principles in their overseas business activities and later territories is beyond the scope of this thesis, however a careful examination of European activities and colonialism will show a general pattern of strategy and that is manipulation, coercing, intimidation and outright war to achieve their various interests.

⁶³² Verdross, Alfred, *Die Einheit des rechtlichen Weltbildes*, Tübingen, 1923, p. 6 ff.

⁶³³ Sikainga, A., *Slaves into Workers: Emancipation and Labour in Colonial Sudan*, Austen, University of Texas Press. 1996, pp. 11-35.

⁶³⁴ Qiurk, *Unfinished Business*, p. 52.

Chapter VII: Radbruch's Formula of Ratio Juris, Its Logicality and the Nature of Legal Theory

7. Background

A serious attempt will be made in this chapter to portray the laws that legalised slavery and slave trade in the United States as a bad law, using the Radbruch's formula and analysis to justify this standpoint. Robert Alexy's conceptual analysis and theory about the nature of law shall be an indispensable instrument to the formula's result.

Historically and empirically speaking, philosophers often acquaint themselves with one tradition of legal philosophy, either natural law or legal positivism. Gustav Radbruch did combine dialectically, the central theses of traditional natural law theory and legal positivism. He maintained that law is manifest in nature and is universally accessible and discernible because humans are rational beings.⁶³⁵ Natural law is a reflection of morality and therefore laws are only legally valid if they conform to morality. But if morality is in conflict with a law, the law is deemed null and void. For the sake of argument, "*Legal validity is identified by a purely legal criterion wholly separate from morality. For example, legislative laws*".⁶³⁶ The two theses of Radbruch dialectic, the morality thesis and the separability thesis, are defined in terms of antithesis. With the passage of time, intellectuals have argued that the morality thesis and the separability thesis are both mutually exclusive and jointly exhaustive.

Other theories different from both traditional theories (i.e. positivism and natural law) seem disguised versions of the one or the other.⁶³⁷ This quagmire was resolved by Paulson, who argued that the philosopher Hans Kelsen resolved this jurisprudential antimony with his Pure Theory of Law whereby Kelsen attempts to develop a third alternative.⁶³⁸ Kelsen combined elements of the morality and separability thesis into a new distinct theory, and thereby reflecting the two traditions postulated that the traditional theories are not exhaustive.⁶³⁹

⁶³⁵ Aquinas, St. Thomas, one of the most influential natural law theorists, states in his *Summa Theological* — "It's moral nature is stamped on a human act by its object, taken with reference to the principles of moral activity that is according to the pattern of life as it should be lived according to the reason. If the object as such implies what is in accord with the reasonable order of conduct, then it will be a good kind of action if on the other hand, it implies what is repugnant to reason, then it will be a bad kind of action"; See also Rachels, James, *The Elements of Moral Philosophy*, 1986, pp. 45-46.

⁶³⁶ Hart, H.L.A., *The Concept of Law*, 1961. Outlining Hart's working rules of recognition and ultimate rule of recognition illustrate that legal positivism can be quite complicated; Paulson, Stanley L., *Continental Normativism and its British Counterpart How different are they?* 6 ratio juris 227, 1993, pp. 236-241.

⁶³⁷ Paulson, Stanley L., *Introduction to Hans Kelsen, Introduction to the Problems of Legal Theory*, pp. xvii-xxi, Paulson, Bonnie Litschewski and Paulson, Stanley L. trans. 1992.

⁶³⁸ *ibid.* pp. xvii-xxi.

⁶³⁹ *ibid.* pp. xvii-xxi.

Radbruch asserted that the objective of legal philosophy is to appraise the law in terms of congruency with its ultimate goal, i.e. “*to realize the idea of law*”.⁶⁴⁰ He buttressed this statement with analogy. The idea of a table is to serve human beings; consequently, it is reasonable to measure the reality of tables by the concept of a table and in what ways it serves human beings. Yet, the concept of tables does not adequately describe all that encompasses the idea of tables. Tables may be made of wood or metal, but usually of a hard, stable material; tables are in most cases flat on the top with three or four legs that lift the flat surface a specific height above the ground. The table is viewed as the complex of general descriptors whose ultimate idea is to serve humans in particular tasks.

Radbruch finds that, although the concept of law is justice, this alone does not comprehensively exhaust the concept of law. Justice, he says, leaves open the two questions, whom to consider equal or different, and how to treat them. For the law concept to be completed, Radbruch applies three general precepts: purposiveness, justice and legal certainty.⁶⁴¹ He therefore defines law as “*the complex of general precepts for the living-together of human beings*” whose ultimate goal is geared toward justice or equality.”⁶⁴² Relevant to the examination here is Radbruch’s works, *Five Minutes of Legal Philosophy*⁶⁴³ and *Statutory Non-law and Supra statutory Law*.⁶⁴⁴ He demonstrated that where “*sacred principles are in conflict with statutory law, sacred principles will prevail*”. There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. To be sure, their details remain somewhat doubtful, the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate sceptics can still entertain doubts about some of them.⁶⁴⁵

⁶⁴⁰ Radbruch, Gustav, *Legal Philosophy*, in *The Legal Philosophies of Last*, Radbruch and Dabin 43, Wilktrans, Kurt, , p. 112.

⁶⁴¹ Compare the “*American Supreme Court*” declaration of the Religious Freedom Restoration Act as unconstitutional *city of Boerne v. Flores*, 521 U.S. 507, 1997 and The Statute of Limitations title by adverse possession, the protection of possessory estate in private law, and the status quo in international law.

⁶⁴² *ibid.* n.640, pp. 90-91; Thomas, Hugh, *The Story of the Atlantic Slave Trade 1440-1870*, 1997, p. 787.

⁶⁴³ Radbruch, Gustav, *Five Minutes of Legal Philosophy*, in *Philosophy of Law*, Fienberg, Joel and Gross, Hyman (eds.), 1991.

⁶⁴⁴ Radbruch, Gustav, *Statutory Non-law and Suprastatutory Law*, Paulson, Bonnie Litschewski and Paulson, Stanley L. trans., 1993.

⁶⁴⁵ *ibid.*, p. 140.

Assuming the whole positive laws fail to address the issue of restitution that resulted out of the murder of millions of Africans adequately, the Law of Nature according to Radbruch and Kant should be sufficient. And finally he elevated human rights as surpassing all written laws, and appealed to the inalienable, immemorial law that denies validity to the criminal dictates of human tyrants.⁶⁴⁶ Gustav Radbruch efforts were geared towards harmonising legal positivism and morality in the application of jurisprudence. He did this by localizing the ordinary and extraordinary into different fields; in ordinary times, a relativistic approach will be adopted. However, individuals must balance and reconcile the three antinomies of law: Justice, legal certainty, and purposiveness.

Accordingly, legal certainty should prevail only when what is just is indeterminable. He made a distinction between extraordinary times from the ordinary and develops two formulae to facilitate the determination of “statutory non-law” when a law lacks the very nature of law. This is an allusion to a German attorney who absconded to Holland before the outbreak of the war.⁶⁴⁷ The 1941 Reich law called into question the citizenship of the attorney. The German Federal Constitutional Court decided in 1968 that “*legal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgement of non-law rather than law*”.⁶⁴⁸ The second case involved the former East German border guards who were being prosecuted for shooting at the Berlin Wall. The German Federal Supreme Court for Civil and Criminal matters decided on the case in 1992 and pondered in the interpretation and validity of section 27 of the East German Border Law. The law entitles the border guards to fire their weapon at unauthorized persons trespassing the border. In its judgement, the Court asserted: “*The conflict between the positive law and justice must be so intolerable that the law quasi false law, must yield to justice*”.⁶⁴⁹ Radbruch’s formula is not without controversy and seeming contradictions. He nevertheless saw his work as a single whole.

⁶⁴⁶ Radbruch, *Statutory Non-law and Suprastatutory Law*, 1993.

⁶⁴⁷ Paulson, Stanley L., *Radbruch Laws: Competing Earlier and Later Views?* 15 Oxford J. Legal Stud., 1995, p. 491; Hart, H.L.A., *Positivism and the Separation of Law and Morals* 71 HARV. L. Rev., 1958, pp. 593 and 617.

⁶⁴⁸ *ibid.* n. 646.

⁶⁴⁹ *ibid.* n. 647, Paulson, p. 492.

*“So it is but emphasis on one link in a closed ring, and not a break in the ring, to point sometimes to the individual personality, sometimes to the collective personality, and sometimes to the culture of work as the ultimate end of individual and collective life. These three possible views of the law and the state result from emphasizing different elements of an individual.”*⁶⁵⁰

7.1 Radbruch’s Legal Philosophy

The significance of Gustav Radbruch’s legal philosophy is principally based on his thesis on the relationship of justice, legal certainty and usefulness, which find their final expression in the “Radbruch’s formula” of 1946: Firstly, *“the conflict between justice and legal certainty should be able to be solved because positive law secured by statutes and power takes priority even when its contents are unjust and inappropriate, unless the contradiction between positive law and justice reaches such an extent that law as “unjust legislation” gives way to justice.”*⁶⁵¹ And secondly: *“It is impossible to draw a sharper line between the cases of statutory injustice and the laws, which still remain valid despite incorrect content; however another line can be drawn with more preciseness: where justice is not even aimed at, where equality, which is at the core of justice, is consciously repudiated when laying down positive law, then the law is not even only “incorrect law”, but completely dispenses with the legal structure.”*⁶⁵²

This legal philosophy prevailed and influenced the 20th century jurisprudence. According to this theory, a judge who encounters a conflict between a statute and what he perceives as just, has to decide against applying the statute if the legal concept behind the statute in question seems either “unbearably unjust” or in “deliberate disregard” of human equality before the law. This theory is rooted in a civil law system.⁶⁵³

⁶⁵⁰ Paulson, Stanley L., *Radbruch Laws: Competing Earlier and Later Views?* 1995, p. 98.

⁶⁵¹ Radbruch, Gustav, *Statutory Lawlessness and Supra Statutory Law*, 1993, p. 7.

⁶⁵² *ibid.* p. 7.

⁶⁵³ Compare Paulson, S./Dreier, R., *Einführung in die Rechtsphilosophie*, Studienausgabe, Heidelberg, 1999, pp. 235-250, p.245.

This Radbruch's legal theory is based on the case law of German courts to correct the national socialist's injustice and was taken up again for the purposes of judgement of German Democratic injustice in the trials over the Berlin wall shootings. This philosophy is highly controversial and has been fiercely criticised. Robert Alexy supported some parts of Radbruch's formula and advanced more sophisticated arguments for his thesis. The 2 philosophers assumed that their positions are incompatible with legal positivism.

I will look at both positions and focus more on what the abstractions and methodology of Radbruch's and Alexy's formulations had to offer in legal philosophy vis-à-vis the interpretation of Atlantic Slavery and their strengths and weaknesses.

7.2 Analysis of the Formula

One may have the impression that the 2nd quotation was intended to throw light on the 1st, however, the outcome has in fact being 2 different formulations.⁶⁵⁴ The 1st formulation has been the bulwark of the court's judgement in one part,⁶⁵⁵ on the other hand, the 2nd formulation would have been difficult to apply unless seen in the light of the 1st formulation. How would a lawmaker apply this "not even (to) attempt ... justice" or "deliberately to betray equality? Empirically, lawmakers are known and seen by the masses to be enacting reasonable and logical law. During the leadership of NAZI government in Germany, many laws were enacted by the parliament, which were not intended to be bad laws but in the application of it by the NAZI government, the laws lost its content of justice and equality.

In any case this article will focus more on the 1st part of the formula, rather than the 2nd because it gives guidelines to the court judgements. One can infer that Radbruch postulates that a norm lacks legal status (due to extreme injustice) with the conclusion that the norm was void ab initio, or at least that it should have no application in legal disputes before a court.⁶⁵⁶

⁶⁵⁴ Compare Paulson, S.L., Radbruch on Unjust Laws: Competing Earlier and Later Views? In: OJLS 15 ,1995.

⁶⁵⁵ Paulson, S., *On the Background and Significance of Gustav Radbruch's Post-War Papers*, in: OJLS 2006, pp. 26-27.

⁶⁵⁶ Radbruch, G., *Five Minutes of Legal Philosophy* (1945), OJLS 26, 2006, pp. 13-15. "There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity." *ibid*, p.14; Compare also *ibid*. n.655, p. 26; There are cases where for some purposes, a practical difference between stating that a norm was void ad initio and saying that it was invalid or voidable, later being invalidated by a court through constitutional review. Compare for example 39 US. Op. Atty Gen. 22, 1937; *Norton v. Shelby County*, 118 US 425, 442, 1886.

A classical case of a bad law or an unbearable law is the Jim Crow legislation (see sub-section 9.4.2.) where the rights of voting to African Americans were limited. Radbruch will have no problem in summarising this legislation as a bad law that should not or ought not to be applied in the court of law. A second example of extreme injustice is the case of North Carolina Supreme Court decisions in *State v. Mann*, which overturned the criminal conviction of a white man for abusing a slave in his custody: *“the end is the profit of the master, his security and the public safety. ... The power of the master must be absolute, to render the submission of the slave perfect. ... This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from subjection.”*⁶⁵⁷

It is a perversion of justice to argue that because slavery was legal therefore, there should be no punishment against the infringement upon the slaves. A third example are the laws enacted during slave trade particularly in Southern states where the owner of a slave can sue a third person for either using the services of slave person without his approval, abusing the slave or exploitation. These laws did not give the slave any right either over his person or property. Radbruch’s formula will, in fact, refuse to accord such judgement legal approval. Another example is the Fugitive Slave Law of 1793, which provided: *“No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.”*⁶⁵⁸ By interpretation, the Congress made the constitution even more proslavery than it perhaps was.

Robert Alexy has in his theory of law, approved Radbruch’s formula ⁶⁵⁹ with his own formula “Correctness Thesis.”⁶⁶⁰ This following section will address Alexy’s work, analysing it in the context of general legal theory.

⁶⁵⁷ *State v. Mann*, 13 N.C. (2nd Dev.) 263, 1829, p. 266.

⁶⁵⁸ *U.S. Constitution*, Art. IV, Sec. 2, Par. 3.

⁶⁵⁹ Compare Alexy, Robert, *A Defense of Radbruch’ Formula*, in: D. Dyzenhaus (ed.), *Recrafting the Rule of Law*, Hart 1999, pp. 15-39; Alexy, Robert, *An Argument of Injustice*, Oxford, 2002, pp. 28-31, 40-81.

⁶⁶⁰ Alexy, Robert, *Law and Correctness*, in: *Current Legal Problems* 51, 1998, p. 205.

7.2.1 Legal Theory and Practice

Legal theory, as will be used in this section is a theory that offers to explain the nature of law. Anyway, there is more to this explanation: for example should we assume (and if so, why?) that there is or should be a general or universal theory of law?; And are theories of law theories about the concept of law,⁶⁶¹ and if so, how many concepts are there?⁶⁶² These questions may not be the object of intensive analysis so as to concentrate on the basic methodologies.

Radbruch's formula and Alexy's application of it is in the area of judiciary: primarily the resolution of disputes that turn, or might turn, on the legal validity of an evil law, but also other disputes where the use of "higher law" may affect the outcome. Extremely unjust laws according to Radbruch/Alexy approach lose their features as laws, and are not to be applied in legal disputes, and therefore do not affect citizen's legal rights and obligations. Notwithstanding the advantages of this claim,⁶⁶³ has also been presented⁶⁶⁴ as a claim in the realm of the nature of law, a non-positivistic or anti-positivistic approach offered as an alternative to or a refutation of legal positivism. It is therefore, essential to discuss the merits and demerits of positivism and non-positivism.

The extent by which a theory of law may have implication on the resolution of practical legal disputes had been argued with a wide variety of answers by many law philosophers; Ronald Dworkin argues that a judge's legal theory always has an impact on the resolution of individual's case⁶⁶⁵ but Alexy differs and hold a middle position such that legal theory is decisive in a small number of cases, but otherwise has little or no effect.⁶⁶⁶

⁶⁶¹ Leiter, B., *Beyond the Hart/Dworkin Debate: The Methodology Problem* in *Jurisprudence in: American Journal of Jurisprudence* 48, 2003, pp. 17-51; Fodor, J, *Water's Water Everywhere*, in: *London Review of Books*, Vol. 26, no. 20, 2004.

⁶⁶² Raz, J., *On the Nature of Law in Archiv für Rechts- und Sozialphilosophie* 82, 1996, p.1; Id., *Can There be a Theory of Law?* In M.P. Golding/W.A. Erdmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell 2005, pp. 324-342.

⁶⁶³ Alexy, Robert, *A Defence of Radbruch's Formula*, 1999, pp. 19, 36

⁶⁶⁴ Paulson, S., *On the Background and Significance of Gustav Radbruch's Post-War Papers*, 2006, pp. 35-38

⁶⁶⁵ Dworkin, R., *Law's Empire*, Harvard, 1986, p. 90; Id., *Legal Theory and the Problem of Sense*, in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy*, Oxford 1987, pp. 11-20, 14-15.

⁶⁶⁶ Radbruch, G., *Die Problematik der Rechtsidee*, in *Die Dioskuren, Jahrbuch für Geisteswissenschaften* 3, 1924, pp. 43-50, 45; Radbruch, G., *Statutory Lawlessness and Supra Statutory Law*, 1993, pp. 6-7.

On the other hand, “one theory of law has (or should have) no effect on the resolution of some particular case”.⁶⁶⁷ The connection between legal theories and practice viewed from another perspective argued that a particular legal theory will justify their preference by reference to actual cases: that the preferred theory better fit the actual results of cases (descriptive fit), that the preferred theory would lead to better outcomes in certain cases (prescriptive superiority). One question posed to the connection of legal theories and the resolution of particular disputes is that the same legal results can be characterised, rationalised, or justified in different ways. It is possible therefore, that legal theories are frequently orthogonal to the results of legal disputes because the same resolution can be explained or justified under most or alternative theories. This does not mean that actual disputes may not offer any evidence at all. For example, the debate within legal positivism, in which “exclusive legal positivism” interprets legal positivism’s separation thesis as requiring that the validity and content of legal norms be ascertainable without recourse to moral norms; while “inclusive legal positivism” allows for recourse to moral norms, but only where such recourse has been authorised within the legal system by positive sources.⁶⁶⁸ Inclusive legal positivism’s view of law may more easily and elegantly explain what is going on in certain cases of constitutional judicial review based on moral-sounding constitutional norms than would an exclusive legal positivist account – but that evidence would remain far from conclusive regarding the inclusive-exclusive debate.⁶⁶⁹

In the “grudge informer” case, the merits of Radbruch’s formula is a good example of how theory can be orthogonal to practice.⁶⁷⁰ During the NAZI regime in Germany, a woman used a NAZI statute to try to get her husband killed. Under a later regime, she was tried for endangering the husband’s civil rights, and she defended that her actions were allowed, if not required, by the NAZI law. Lon Fuller argued that the later court was justified in treating the NAZI rule as “not law”, and therefore no possible defence to the charge of the woman faced. H. L. A. Hart would have preferred that the same result be reached by the enactment of retroactive legislation making the woman’s action subject to punishment. (As Fuller pointed out, it is not clear what, if retroactive lawmaking is to be encouraged, it would make much difference whether it was done by the legislature or the court.).⁶⁷¹

⁶⁶⁷ Bix, B., *Legal Positivism*, in Golding, M.P. & Edmundson, W.A. (eds.), *The Blackwell Guide to the Philosophy of Law Theory*, 2005, pp. 29-49, 36-38.

⁶⁶⁸ *ibid.*

⁶⁶⁹ *ibid.* pp. 37-38

⁶⁷⁰ Hart, H.L.A., *Positivism and the Separation of Law and Morals*, in *Harvard Law Review* 71, 1958, pp. 593-629, 615-621; Fuller, L.L., *Positivism and Fidelity to Law – A Reply to Professor Hart*, in *Harvard Law Review* 71, 1958, pp. 630-672, 648-657.

⁶⁷¹ *ibid.* p. 649.

A norm that is considered unjust, and that is also considered legal can be defined in different ways. A judge's refusal to apply a statute according to its grammatical meaning maybe interpreting the statute in light of its purposes and or in order to make the entire area of law more coherent or he may treat the law as invalid due to its inconsistency with constitutional rules or with "higher law" that goes beyond positive sources or he may be using his legislative power to modify or repeal existing legal norms.⁶⁷² However, the courts proffer to offer explanations and characterisations of their own actions, but theorists need not take this at face value.

7.2.2 Alexy's Claim of "Correctness"

His argument is that for a norm to be legal or a system of norm, it must claim "correctness".⁶⁷³ This concept has a strong bearing to Joseph Raz's argument.⁶⁷⁴ However, Alexy differs from Raz when he states that not only does a legal system, which does not claim authority/correctness, not a legal system, but that a legal system (or legal norm) that did not succeed at being correct/authoritative will be, for that reason, defective.⁶⁷⁵ Raz advocates that a system that is authoritative but fails, is still legal and believes that this is likely the characterisation for most legal systems.⁶⁷⁶

It may not be logical to say that an entity must claim correctness or authority and that its failure to achieve correctness or authority means that it is defective. If the only standard of legality is a kind of claim, subsequently, to fail to achieve legality is to fail in some way in the making of this claim.

On a similar note, Alexy postulates that it would be "defective" and "absurd" for a constitution to announce the creation of an "unjust republic".⁶⁷⁷ Alexy's analysis poses a semantic problem here, that is essential to law interpretation. For example if one is trying to sell, persuade, or encourage, one uses positive language. To use pejorative terms in any context that calls for support of persuasion is, at least from the beginning, paradoxical.⁶⁷⁸

⁶⁷² Radbruch, G., *Statutory Lawlessness and Supra Statutory Law*, 1993, pp. 2-6.

⁶⁷³ Fuller, L.L., *Positivism and Fidelity to Law*, 1958, p. 655.

⁶⁷⁴ Raz, J., *Legal Principles and the Limits of Law*, in M. Cohen (ed.), *R. Dworkin and Contemporary Jurisprudence*, Rowman & Allenheld, 1993, pp.73-87; Dworkin, R., *A Reply by Ronald Dworkin*, in *ibid.*, pp. 247-300, 260-263..

⁶⁷⁵ Raz, J., *Can There be a Theory of Law?* In M.P. Golding/W.A. Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell 2005, pp. 324-342.

⁶⁷⁶ Alexy, R., *The Argument from Injustice*, 2002, p. 36; Kramer, in *Defense of Legal Positivism*, Oxford 1999, pp.101-108.

⁶⁷⁷ Raz, J., *Ethics in the Public Domain*, Oxford, 1994, p.199.

⁶⁷⁸ *ibid.* n. 676 Alexy, R.; Murphy, M., *Natural Law Jurisprudence*, in *Legal Theory 10*, 2003, pp. 241-267.

This is therefore, the problem of language or semantic but not about law or morality.

I think Alexy's conceptual judgement and his basic analysis seem to be an inquiry on when and whether an ascription of legal status or legal character would seem absurd or contradictory. According to Raz ⁶⁷⁹ – to consider the foundational questions of conceptual analysis: e.g., whether there is a single concept of law, or many concepts of law (and, if the later, how is the theories to choose amongst the concepts of law?); and whether concepts of law change overtime. Retuning to Alexy's analysis, if one was to come across a country that decided not to treat seriously – unjust laws as Alexy and Radbruch suggest – the courts and other legal officials in this country continued to treat the evil laws as valid and binding (until changed by normal legislative processes) – what would one see? One could certainly see that this was an unwise way to run a legal system, and likely an immoral way to run a legal system, but would one say that the officials were all simply mistaken – that they thought that the laws were valid, but they were all wrong? Or could Alexy and Radbruch conclude that what one has found was a non-system that did not warrant the label legal.⁶⁸⁰

7.3 Summary

Conceptual thesis and analysis and theories about the nature of law in particular pose a big problem and if they are to be justified at all, it is of paramount importance that their fundamentals are intensively investigated. It is also imperative that any and all purported connections between theories about the nature of law and theories about how to decide cases are to be explained and justified.

Gustav Radbruch's formula and its application by Robert Alexy may offer an important milestone of judicial decision making, it is however doubtful and unreasonable when remoulded as a theory about the nature of law.

⁶⁷⁹ Raz, J., *Ethics in the Public Domain*, Oxford, 1994, pp. 200-202.

⁶⁸⁰ Alexy, R., *The Argument from Injustice*, 2002, pp. 36-37; Alexy, R., *A Defense of Radbruch's Formula*, 1999, p. 27.

Chapter VIII: Abolition and Emancipation of Slavery

8. Introduction

Joel Quirk exegesis and interpretation of abolition appear here to be inevitable:

*“The legal abolition of slavery constitutes a profound break with thousands of years of historical precedent, with a ‘natural’, venerable and often highly profitable institution being formally abolished throughout the globe over the course of two and a half centuries. Throughout the history of slavery, there have been consistent objections to the enslavement of the ‘wrong’ types of people (i.e. untarnished social insiders), but there appear to have been few – if any – politically significant challenges to slavery as a general institution until the 18th century. The emergence of organised anti-slavery not only required a determination that the end of slavery was morally desirable. All historical societies have recognised that slavery was frequently an exceptionally loathsome institution. It also required a political determination that ending slavery was actually feasible, and not simply an utopian proposition, which could be left to moral philosophers and theologians. Until this critical juncture was reached, reformers primarily concentrated their energies upon regulation, mitigation, salvation and/or manumission, rather than general abolition.”*⁶⁸¹

Abolitionism was a political movement that sought to abolish the practice of slavery and the worldwide slave trade. It began during the period of the Enlightenment and grew to large proportions in several nations during the 19th-century, largely succeeding in its goals.⁶⁸²

According to Wikipedia Encyclopaedia, abolition is the act of formally destroying slavery through legal means, either by making it illegal or simply no longer allowing it to exist in any form.⁶⁸³ Abolition was also defined by the American Heritage Dictionary as the act of doing away with or the state of being done away with.⁶⁸⁴ The Dictionary by Labour Law Talk defined Abolition as the act of abolishing a system or practice or institution (especially abolishing slavery),⁶⁸⁵ and finally the Oxford Advanced Learners Dictionary of current English defines abolition as a campaign for the abolition of slavery and slave trade and an abolitionist is one who agitates for the immediate, unconditional, and total abolition of slavery all over the world.⁶⁸⁶

⁶⁸¹ Quirk, Joel, *Unfinished Business*, pp. 73-74

⁶⁸² *Britannica Concise Encyclopedia*

⁶⁸³ See *Wikipedia Encyclopedia*

⁶⁸⁴ *American Heritage Dictionary of the English Language*.

⁶⁸⁵ *Dictionary by LabourLawTalk* available at <http://www.laborlawtalk.com/forum.php>

⁶⁸⁶ *Oxford Advance Learner's, Dictionary of Current English*, Fifth Edition, Oxford University Press, 1995.

A further explanation or analysis on the various definitions of abolition given here may be superfluous because there is neither ambiguity nor contradiction in the definitions, therefore I shall quickly turn to the genesis of one of the most important movements in the abolition of slavery.

On the 22nd May 1787, twelve men assembled at a printing shop in the city of London. They were Quakers, Anglicans, including the veteran anti-slavery campaigners, Granville Sharp and Thomas Clarkson. The twelve, who established themselves as the committee for the abolition of slave trade, solicited the help of a young Yorkshire MP, William Wilberforce, to lead the campaign in the House of Commons. The well connected Wilberforce and his closest allies were inspired by biblical injunctions to fight for the emancipation of slaves. The cause was promoted in a flood of publications: sermons, pamphlets, treatise, poems, narratives, newspapers articles, reports and petitions.⁶⁸⁷ Within years of that meeting on the 22nd May 1787, the slave trade had been abolished throughout the empire. In 1833, the British parliament abolished slavery in its colonies and five years later, in 1838 the slaves were finally emancipated. By the 1880s, slavery have been abolished in the Southern United States and across most of the earth.⁶⁸⁸

8.1 The Rise of Christian Abolitionism

The role of religious people vis-à-vis Christians in the course of abolition will be highlighted in this section. As far as British slave trading is concerned, which had begun in the late 16th century and grew astronomically during the 17th and 18th centuries, by 1807 about 3 million slaves had been transported to the Americas on British ships. Though some Christians denounced the slave trade, for example Richard Baxter, who declared that slave traders were ‘fitter to be called devils than Christians’, and the Puritan Samuel Sewall, who published America’s first antislavery tracts, *The Selling of Joseph* (1700), but they still accepted slavery as a part of life. The evangelist, George Whitefield deplored the cruelty of slave owners in the American south but owned over fifty slaves in Georgia. The Anglican Evangelical, George Newton, who was converted to Christianity while capturing a slave ship in the 1750s, did not see anything bad about slave trade until 3 decades later.⁶⁸⁹

⁶⁸⁷ Thomas, Hugh, *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870*, 1997, pp. 423, 514, 517, 526, 529, 530, 536,537-38, 539-41, 556, 585-86, 590, 592, 600, 636, 650, 776 and 797.

⁶⁸⁸ Davis, D. B., *Slavery and Human Progress*, Oxford University Press, 1984, p. 108.

⁶⁸⁹ Newton, John, *Thoughts upon the African Slave Trade*, 1788.

The Anglican Society for the Propagation of the Gospel in Foreign Parts owned many slaves in the Caribbean – in fact the word ‘SOCIETY’ was branded on their chests with a red-hot iron to identify them as property of the SPG. For most Britons, the brutality of the slave trade was out of sight, out of mind. British slave traders were carrying almost 40,000 slaves from Africa to the New World every single year, yet there was no public outcry.

The Christian abolitionist movement began to take shape from the mid 18th century and beginning with American Quakers. Three distinguished figures, Benjamin Lay, John Woolman and Anthony Benezet, refused to accept the further existence of slavery. As a result of their critic and opposition to slavery, in 1754, the Philadelphia Quakers officially renounced the practice of slaveholding.⁶⁹⁰ Philosophers like Montesquieu and Rousseau also gave impetus to the abolition of slavery, but it were Christian activists who initiated and organized abolitionist movement.⁶⁹¹

From the 1760s, the Anglican Evangelical campaigned with some success on behalf of Black Britons. In the Somerset case of 1772, Lord Mansfield ruled that once in Britain, slaves could not be compelled to return to the colonies.⁶⁹² During the 1770s, the Evangelicals inspired by Benezet and Sharp, the British Methodist, John Wesley and the American Presbyterian, Benjamin Rush, condemned the slave trade in notable and influential pamphlets. With these exposures, the horrors of the traffic in human beings were being exposed to human view and the atrocity involving the slave ship *Zong*, whose captain had thrown 130 slaves overboard in order to claim insurance for their deaths became known.⁶⁹³ In 1788-92, there was a media blitz and petitioning campaign aimed to coincide Wilberforce parliamentary bills.

Thomas Clarkson had assembled enough evidence before parliament against the trade and the abolitionist pioneered many of the tactics of modern pressure groups: logos, petitions, rallies, book tours, letters to MPs, a national organization with a local chapter and the mass mobilization of the grassroots agitation.⁶⁹⁴ There were also boycotts of consumer goods particularly rum and sugar, that came from slave plantations in the Caribbean.

⁶⁹⁰ Shenstone, William, *Complete Works*, Edinburgh, 1852, p. 233; Pope, “*Essay on Man*”, 1, p. 107; Compare Wax, Darold, *Quaker of Merchant and the Slave Trade in Colonial Pennsylvania*, Pennsylvania Magazine of History and Biography LXXXVII, 1962, pp. 143-59.

⁶⁹¹ Thomas, Hugh, *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870*, 1997, pp. 449, 464, 465-66.

⁶⁹² Wise, Steven M., *Though the Heavens may Fall: The Landmark Trial that led to the end of Human Slavery*, Pimlico, 2006.

⁶⁹³ <http://www.hullwebs.co.uk/content/j-georgians/people/william-wilberforce/slaveship-zong.htm>.

⁶⁹⁴ *National Anti-Slavery Standard*, April 16, 1870; *National Standard*, May, 1870, pp. 46-48.

Christians of the Methodist church were also asked to sign petition against the slave trade, which they did.⁶⁹⁵ Within a generation, a dramatic change on the attitude towards slavery was recorded. “*Thirty years ago*”, wrote the American Jonathan Edwards Jr., ‘*scarcely a man in this country thought either the slave trade or the slavery of Negroes to be wrong*’. His own father, the famous theologian and revivalist, Jonathan Edwards Sr., had owned slaves. But the practice could no longer be excused. ‘*Our pious fathers*’, wrote the younger Edwards, “*lived in a time of ignorance, which God winked at but now he commandeth all men everywhere to repent of this wickedness.*”⁶⁹⁶

There had been divergent views of the dramatic rise of abolitionism at this time in history; while some postulate the impact of cultural change and the new bourgeois cult of sensibility, others still advanced that abolitionism served the interests of the new industrial capitalism and the most recent analysis argues that the key lies in the anxieties and dislocations created by the American revolution.⁶⁹⁷ The various campaigners, particularly Clarkson and the Evangelical James Steven, did convince the parliament that dismantling the Atlantic Slave Trade would undermine the colonial power of Britain’s rivals, especially France. Parliament therefore abolished the trade in 1806-1807 after abolitionists exploited an unpredictable and fortuitous conjuncture of political-economic circumstances.⁶⁹⁸ However, the grass-roots support against slavery was motivated and mobilized by overwhelming majority of the Quakers and dissenting church members.⁶⁹⁹ According to Davis “*the fall of new world slavery could not have occurred if there had been no abolitionist’s movements*”. *This was a moral achievement that has no parallel*”.⁷⁰⁰ The various groups and organisations, and particularly Clarkson, presented to parliament a water-tight argument and evidence of the injustice done to fellow human beings, of course using their Holy Bible as the yardstick.⁷⁰¹

Slave emancipation movements in the light of the abolitionists’ philosophy developed into the principal means by which the abolition of slavery would be accelerated, piecemeal by piecemeal. The dramatic cases of Brazil, Cuba, Haiti, and Jamaica appear to be the most representative violent protests and revolts, collective escape, individual

⁶⁹⁵ Bradburn, Samuel, *An Address to the People called Methodist concerning the Evil of Encouraging the Slave Trade*, 1792, pp. 13-14.

⁶⁹⁶ Edwards, Jonathan Jr., *The Injustice and Impolicy of the Slave Trade*, 1791, pp. 29-30.

⁶⁹⁷ Carey, B., *British Abolitionism and the Rhetoric of Sensibility, 1760-1807*, Palgrave, 2005; Davis, D. B., *The Problem of Slavery in the Age of Revolution, 1770-1823*, Cornell University Press, 1975; Brown, C. L., *Moral Capital Foundations of the British Abolitionism*, University of North Carolina Press, 2006.

⁶⁹⁸ Anstey, R., *The Atlantic Slave Trade and British Abolition, 1760-1807*, Macmillan, 1975, p. 412.

⁶⁹⁹ Davis, D. B., *Slavery and Human Progress*, 1984, p. 139.

⁷⁰⁰ Davis, D. B., *Inhuman Bondage: The Rise and Fall of New World Slavery*, Oxford University Press, 2006, p. 331.

⁷⁰¹ Hochschild, A., *Bury the Chains: The British Struggle to Abolish Slavery*, Pan, 2006, p. 366.

reactions, presumed submission, destruction of property, cane fields set on fire, e.t.c.⁷⁰² One must take greater account of intellectual change in the 18th century and study in detail the interplay between the moral purpose of the political nation, muted as it was by a strong and deep-rooted sense of national importance of the West Indies, and the high moral purpose, daunting perseverance and political skill and for the most part warmly Christian inspiration of the abolitionists.⁷⁰³ One of the motivating factors for the emancipation was the news, laws, incidents, and common arguments prevalent at this time. Through public channels, passing whispers of group conversation, and among the slave huts, on the plantation, in the house, in the city, on the country estate, in the mines - in all these places, bands of workers traded views on the Haitian Revolution, the debates in the Assembly of Cadiz, the British Parliament, or the American Parliament.⁷⁰⁴

8.2 The Other Side of the Bible

The abolitionists, as we shall see here, were inspired principally by the Holy Bible. They were convinced in the fatherhood of God and the brotherhood of men and indeed their campaigns logo was an image of a manacled slave on his knees beseeching his capture: “*Am I not a man and a brother?*” The abolitionists had the inspiration that all people were made in God’s image (see Genesis chap. 1 vers. 26-27) and precious in his sight. God was the father of all mankind; all nations were his “*offspring*” and “*of one blood*” (see Acts of the Apostles chap. 17 v. 26). Though the Africans have a darker skin, they are nevertheless human beings that deserved to be respected because they also bear the image of God.⁷⁰⁵ Pagans and Christians are all equal before God. Oppressed Africans are also brethren of the human kind.⁷⁰⁶

⁷⁰² Sellman, James Clyde, in Apiah et al., *Africana, The Encyclopaedia of the African and Africa American Experience*, 1991; Compare Fernandez de Oviedo, Manuel, Perez de Tudela, Juan (ed.), *Madrid*, 1959, bk. 4, chap. 8; Saco, Jose Antonio, *Historia de la Esclavitu Africana en el Nuefvo Mundo*, 3 Vols., Paris, 1879, (6,14) Vol.1, p. 158; *Daily Sun*, Monday, January 12, 2004, p. 11 (Nigerian Daily Newspaper).

⁷⁰³ Anstey, Roger, *A Re-interpretation of the Abolition of the British Slave Trade, 1806-1807*, *English Historical Review*, 87, 1972, pp. 331-332; See also McDonald, Roderick A., *West Indies Accounts, Essays on the History of the British Caribbean and The Atlantic Economy*, 1996.

⁷⁰⁴ Apotheker, Herbert, *American Negro Slave Revolts*, 6th ed., 1993; Williams, C. *The Destruction of Black Civilization*, pp. 5 and 7; Greenspan, Ezra, *Walt Whitman and the American Reader*, Cambridge University Press, 1990, p. 54; Compare 1846 and 1847 debates in various political forums-congress, the Democratic Party of national and state levels, and the New York State legislature. For an excellent discussion of the debate over the Wilmot Proviso, see Mcpherson, James M., *Battle Cry of Freedom: The Civil War*, Oxford University Press, New York, 1988, pp. 44-76; Whitman, Walt, *The Gathering of the Forces*, Rogers, Cleveland and Black, John, (eds.) 2 Vols., G. P. Putnam’s sons, New York 1920, Vol. 1 pp. 205-206.

⁷⁰⁵ More, Hannah, *Slavery A Poem*, 1788, p. 10.

⁷⁰⁶ Booth, Abraham, *Commerce in the Human Species, and the Enslaving of Innocent Persons, inimical to the Law of Moses and the Gospel of Christ*, 1792, p. 17.

“We are the common offspring of one universal Parent”, wrote the Anglican Thomas Bradshaw, ‘with whom there is no respect of persons’.⁷⁰⁷ When William Cowper contemplated slavery, he lamented that “the natural bond of brotherhood is severed.”⁷⁰⁸

Every reader of the Scripture should know, wrote Cowper, that souls have no discriminating hue, alike important in their Maker’s view; that none are free from blemish since the fall and love divine has paid one price for all.⁷⁰⁹ The doctrines of creation, fall and redemption underscored human equality in the eyes of God and the Christian belief in equality before God militates against the theories of polygenesis and African inferiority promoted by infidel philosophers. Early antislavery writers like James Ramsay and Granville Sharp repeatedly identified the theory of racial inferiority with Hume, Voltaire, and materialistic philosophy in general; they explicitly presented their attacks on slavery as a vindication of Christianity, moral accountability and the unity of mankind.⁷¹⁰ The writings of converted Africans to Christianity like Ignatius Sancho, the poems of Phillis Wheatley and Olaudah Equiano debunked the ideas of racial inferiority and contributed immensely to abolitionism.⁷¹¹ Equiano, who quoted the Scripture argued that the Negro race nor any race for that matter, is not an inferior and added indignantly: “Oh fool! See the 17th chapter of the Acts, verse 26: “God hath made of one blood all nations of men, for to dwell on all the face of the earth”.”⁷¹²

8.3 Fundamental Human Rights and Natural Law

An analysis of the fore-goings clearly shows that the abolition movements were inclined not only to emancipate the slaves but also to grant them equal rights and especially the right to liberty because liberty according to the abolitionist was a gift of God which is not at the disposal of anybody and therefore, no slave can dispose of it by selling himself into slavery, nor could anybody lawfully deprive anyone else of their liberty by force.

⁷⁰⁷ Bradshaw, Thomas, *The Slave Trade Inconsistent with Reason and Religion*, 1788, p. 13.

⁷⁰⁸ Cowper, William, *The Task*, 1784, book 2.

⁷⁰⁹ Id. *Charity*, 1782.

⁷¹⁰ Davis, D. B., *Slavery and Human Progress*, 1984, pp. 130-136.

⁷¹¹ Caretta, V., (ed.) *Unchained Voices: An Anthropology of Black Authors in the English Speaking World of the 18th Century*, University of Kentucky Press, 1996.

⁷¹² Equiano, Olaudah, *The Interesting Narrative and Other Writings*, Caretta, V., (ed.), Penguin 2003, pp. 334, 331-32.

The claim of the slave owners that Africans as a result of slavery were now the property of Europeans was without foundation or justification in natural law and consequently constituted a violation of natural rights. “*Liberty*”, wrote John Wesley “*is the right of every human creature, as soon as he breathes the vital air. And no human can deprive him of that right, which he derives from the law of nature*”.⁷¹³ The keeping of a human being as a slave was a seeming contradiction to 18th century Britons and Americans who saw themselves as free people living in an enlightened age.⁷¹⁴ In the words of the centenary of the Glorious Revolution in 1788, there is a glaring contradiction between the slave trade and Britain’s boasted love of liberty and as Hannah More put it: “*Shall Britain, where the sole of freedom reigns, forge changes for others she herself disdains?*”⁷¹⁵ For abolitionists like Jonathan Edwards Jr., Samuel Hopkins and Benjamin Rush, slavery was incompatible with the declaration of independence, which stated inter alia that all men are created equal and endowed by their Creator with certain inalienable rights.

In the journey to bring about the end of slavery and slave trade, the abolitionists made an analogy of the Exodus in Israel’s history and added that it revealed divine opposition to any form of human oppression and bondage.⁷¹⁶ The African slaves saw America as a place of Egyptian bondage, and sang about deliverance in their spirituals — one historian wrote that “*No single symbol captures more clearly the distinctiveness of Afro-American Christianity than the Symbol of Exodus*”.⁷¹⁷ The African American, Phillis Wheatley wrote: “*In every human Breast, God has implanted a Principle, which we call Love of Freedom; it is impatient of Oppression, and pants for deliverance; and by the Leave of our modern Egyptians, I will assert that the same principle lives in us.*”⁷¹⁸ Abolitionists also quoted Proverbs chapter 14 verse 31 and Job chapter 30 verse 25 to buttress their points for abolitionism ⁷¹⁹ but above all, they quoted the mission statement of Jesus Christ himself, taken it as the text for antislavery sermons:

“*The Spirit of the Lord is upon me, because he hath anointed me to preach the Gospel to*

⁷¹³ Wesley, John, *Thoughts upon Slavery*, 1774, p. 27.

⁷¹⁴ Bradburn, S., *An Address*, 1792, p. 6.

⁷¹⁵ More, H., *Slavery*, 1788, p.18.

⁷¹⁶ Coffey, John, *The Abolition of the Slave Trade: Christian Conscience and Political Action*, Vol. 15, No. 2, June 2006, available at <http://www.jubilee-centre.org/document.php?id=51>.

⁷¹⁷ Raboteau, A., *African Americans, Exodus and the new Israel*, in Hackett, D. G., (ed.), *Religion and American Culture*, Routledge, 1995, p. 81.

⁷¹⁸ Gaustad, E. S. & Noll, M. A., (ed.), *A Documentary History of Religion in America to 1877*, Eerdmans, 2003, pp. 224-25.

⁷¹⁹ Equiano, O., *The Interesting Narrative*, 2003, pp. 330, 334-335, 340.

the poor...to preach deliverance to the captives...to set at liberty them that are bruised" (St. Luke 10:18).⁷²⁰ The emancipation of slaves, they argued, was on the agenda of Jesus, and an outworking of his Gospel of the Kingdom. The British philosopher Francis Hutcheson brought ethical and moral arguments for the abolition of slavery and postulated that moral action should increase human well-being, producing "*the greatest happiness of the greatest number*".⁷²¹ The notion of "benevolence" was promoted by Latitudinarian theologians, but before long Evangelicals too adopted the new language.⁷²² The Calvinist philosopher and revivalist, Jonathan Edwards, presented "benevolence" as a key element of "true virtue", and his followers came to see slave-owning as incompatible with "disinterested benevolence".⁷²³ Granville Sharp declared that "*The glorious system of the gospel destroys all narrow, national partiality; and makes us citizens of the world, by obliging us to profess universal benevolence; but more especially, we are bound as Christians to commiserate and assist to the utmost of our power all persons in distress and captivity*".⁷²⁴ The Baptist, James Dore, wrote that Christianity was "*a religion calculated to inspire universal benevolence by teaching us that all mankind are our Brethren and that they stand in the same common relation to God, the universal Parent...it is calculated for general utility*".⁷²⁵ If this was classical Enlightenment language, it was linked to the biblical concept of "mercy". "*That slave-holding is utterly inconsistent with Mercy*", wrote Wesley, "*is almost too plain to need a proof*".⁷²⁶ In Hannah More's poem on slavery, the cherub "Mercy" descends softly to shed "celestial dew" on "feeling hearts" until "every beast the soft contagion feels".⁷²⁷

The cult of sensibility blended with Christian values helped to create a humanitarian ethos (see The Gospel according to St. Matthew chapter 7 verse 12). The Baptist preacher, Abraham Booth pictured himself, his family and thousands of his fellow countrymen "kidnapped, bought and sold into a state of cruel slavery". He was left with a sense of outrage.⁷²⁸

⁷²⁰ The Gospel according to St. Luke chapter 10 verse 18

⁷²¹ The Gospel according to Saint Luke chapter 10 verse 18

⁷²² Davis, D. B., *The Problem of Slavery in Western Thought*, Cornell University Press, 1966, chaps. 11-12.

⁷²³ Minkema, K. and Stout, H., "*The Edwardsean Tradition and Antebellum Slavery*", *Journal of American History*, 92, 2005, pp. 47-74.

⁷²⁴ Sharp, Granville, *An Essay on Slavery*, 1773, pp. 22-23.

⁷²⁵ Dore, James, *A Sermon on the African Slave Trade*. 1788, pp. 34-35.

⁷²⁶ Wesley, J., *Thoughts upon Slavery*, 1774, p. 18.

⁷²⁷ More, H., *Slavery*, 1788, p. 19

⁷²⁸ Booth, Abraham, *Commerce in the Human Species*, 1792, p. 28.

The Quaker Benjamin Lay even kidnapped a child (temporarily) from its slave-owning parents to help them see the distress their practice caused! Thinking about the Golden Rule required people to consider how their actions impacted on others, including African slaves on the other side of the Atlantic.⁷²⁹ The Methodist, Samuel Bradburn, observed to his horror that though he had “always abhorred slavery in every shape”, he had been “*in some degree accessory to the Bondage, Torture and Death of myriads of human beings by assisting to consume the produce of their labour, their tears and their blood!*” He asked God’s pardon and hoped that by boycotting sugar he could “*make some restitution for my former want of attention to my duty in this respect*”.⁷³⁰ The emotion that attended the disgust of slavery and slave trade was so loud that Wesley prayed for the deliverance of the Africans’ souls and emancipation “*Oh burst thou all their chains in sunder, more especially the chains of their sins; Thou Saviour of all, make them free that they may be free indeed*”.⁷³¹ Wesley and others knew that slave owners deprived the dissemination of the gospel to their slaves because of the fear that conversion to Christianity would undermine their slavery. The rise of antislavery movement was also traceable to the growth of converted Africans to Christianity. This is because in the 18th-century Africans and Europeans were involved collectively in the antislavery activism. However in the 19th-century, the white Evangelicals in the American South began to soft-peddle the social ramification of the gospel.⁷³²

8.4 The Consequence of the Law of God upon Disobedience

All through the Bible i.e. from Genesis to Revelation, Christians were called upon to repent of their sins so as to receive the forgiveness from God and eventually go to heaven. This slogan became the corner stone of the abolition movement. Like Quaker Benezet asked “*Will not the groans of these deeply afflicted and oppressed people reach heaven, and must not the inevitable consequence be pouring forth of the judgment of God upon their oppressors*”.⁷³³ William Cowper warned those engaged in the trade: “*remember, heaven has an avenging rod, to smite the poor his treason*”.⁷³⁴

⁷²⁹ <http://www.jubilee-centre.org/document.php?id=51>

⁷³⁰ Bradburn, S., *An Address*, 1792, p. 20

⁷³¹ Wesley, John, *Thoughts upon Slavery*, 1774, p. 28

⁷³² Matthew, D., *Slavery and Methodism: A Chapter in American Morality, 1780-1845*, Princeton University Press, 1965.

⁷³³ Benezet, Anthony, *A Caution and a Warning to Great Britain and her Colonies*, 1766, p. 9.

⁷³⁴ Cowper, Williams, *Charity*, 1782.

And Equiano concluded these biblical injunctions when he said: “*remember the God who has said vengeance is mine, and I will repay not only the oppressors but also the justifiers of the oppressor.*”⁷³⁵ And finally, another African Christian Ottobah Cugoano warned slave masters that if they did not repent, they would meet with the full stroke of the long suspended vengeance of the heaven.⁷³⁶ Many abolitionists used many mediums to fight for the abolition of slavery and particularly using pamphlets to highlight the threats of divine judgment and in one of these pamphlets Granville Sharp (1776) wrote the law of retribution: “*A serious warning to Great Britain and her colonies, founded on unquestionable examples of God’s temporal vengeance against tyrants, slaveholders and oppressors*”; at its close, James Ramsey (1807) published the danger of the country.⁷³⁷

Paradoxically, the ideas of brotherhood, liberty, benevolence and judgment, which were propagated by the abolitionists and also rooted in the Bible, both in the Old Testament and in the New Testament, seem to tolerate the institution of slavery. As Cugoano postulated, the claim that the Old Testament sanctioned slavery was the greatest bulwark of defence, which the advocates and supporters of slavery can advance. Cugoano thought that this was an inconsistent and diabolical use of the sacred writing. And he continued to say how ironic it was to see slave-traders ransacking the Pentateuch to legitimate slavery while blithely ignoring texts, which made slave trading a capital crime.⁷³⁸ “*He that stealeth a man and selleth him, or if he be found in his hand, he shall surely be put to death*” (Exodus chap. 21 v. 16; Deuteronomy chap. 24 v. 7).⁷³⁹ Though it was admitted that the Law of Moses did outlaw a form of slavery and it was legitimate in its time and place, however, there is a difference in the perpetual enslavement of Gentiles and the qualified servitude of fellow Jews. The enslavement of Jews was to be dissolved at the year of Jubilee and abolitionists often argued that it was “not, properly speaking slavery” – which by definition involved permanent rights of ownership.⁷⁴⁰ The enslavement of the gentiles they argued, was a peculiar punishment for exemptional wickedness and formed no precedence for other nations.

⁷³⁵ Equiano, O., *The Interesting Narrative*, 2003, p. 339.

⁷³⁶ Cugoano, Ottobah, *Thoughts and Sentiments on the Evil of Slavery*, 1787, p. 25; Anstey, R., “*A Re-interpretation of the Abolition of the British Slave Trade, 1806-1807*”, *English Historical Review*, 87, 1972, p. 313.

⁷³⁷ Compare Peckard, Peter, *National Crimes the Cause of National Punishments*, 1795, p. 17; Booth, A., *Commerce in the Human Species*, 1792. p. 26; Benezet, A., *A Caution and a Warning*, 1766, p. 33.

⁷³⁸ Minkema, K. and Stout, H., “*The Edwardsean Tradition and Antebellum Slavery*”, 2005, pp. 47-74.

⁷³⁹ *ibid.* n.736, pp. 29-30 and 64-66.

⁷⁴⁰ Bradshaw, T., *The Slave Trade*, 1788, p.12.

The Hebrews biblically were exhorted to remember their own bondage in the land of Egypt, and to treat their servants with same lenity they wish to experience themselves.⁷⁴¹

On the other side, the pro-slavery Christians argued that neither Christ nor the apostles acquiesced to the abolition of slavery and responded that slavery was tolerated as an evil by the early church just like the sanguinary despotism of Nero and the sport of gladiators, neither of which was expressly condemned in the New Testament.⁷⁴² Despotism and slavery were inimical to the spirit of Christianity and eventually undermined both institutions.⁷⁴³ The outlawing of slavery could not take place in the first centuries because the church was weak and slavery was integral part of the Roman economy. As Equiano observed, if Paul “*had absolutely declared the iniquity of slavery...he would have occasioned more tumult than reformation*”. Yet his letter to Philemon plainly showed “*that he thought it derogatory to the honour of Christianity, that men who are bought with the inestimable price of Christ’s blood shall be esteemed slaves and the private property of their fellowmen*”.⁷⁴⁴ Paul had pointed the way; it was for later Christians to complete the journey.⁷⁴⁵ There is agreement amongst abolitionists that Christianity was anathema to the institution of slavery. In this regard William Robertson pointed out that “the spirit and genus of the Christian religion” had systematically undermined many evils of the ancient world, including the practice of slavery. He maintained that the enslavement of fellow Christians had been widely forbidden by the church and its Bishops, so that slavery largely disappeared from Christians in Europe by the 12th-century.⁷⁴⁶ And the Baptist, Robert Robinson argued that in the central right of communion, slaves and slaveholders ate and drank together as brethren, thereby undermining any hierarchical structure.⁷⁴⁷ The revival of slavery in the 16th-century was therefore, a terrible setback on the application of Christian principles.⁷⁴⁸

⁷⁴¹ Wright, C., *Old Testament Ethics and the People of God*, IVP, 2004, pp. 333-37; Schultze, M. and Ashcroft, J. (eds.), *The Jubilee Manifesto*, IVP, 2005, pp. 193-95; Sharp, G., *An Essay on Slavery*, 1773, p. 22.

⁷⁴² Booth, A., *Commerce in the Human Species*, 1792, p. 26.

⁷⁴³ Bradshaw, T., *The Slave Trade*, 1788, p.13.

⁷⁴⁴ Equiano, O., *The Interesting Narrative*, 2003, p. 337-38.

⁷⁴⁵ Swartley, W., *Slavery, Sabbath, War and Women: Case Issues in Biblical Interpretation*, Herald Press, 1983, chap. 1; Webb, W., *Slaves, Women and Homosexuals: Exploring the Hermeneutics of Culture Analysis*, IVP, 2001.

⁷⁴⁶ Robertson, W., *The Situation of the World at the Time of Christ’s Appearance*, 1755, pp. 28-32.

⁷⁴⁷ Robinson, R., *Slavery Inconsistent with the Spirit of Christianity*, 1788, pp. 12-13, 5-8.

⁷⁴⁸ Stark, R., *For the Glory of God: How Monotheism led to Reformations, Science, Witch-Hunts and the End of Avey*, Princeton University Press, 2003, chap. 4.

They also suppressed knowledge of slave rebellions and represented them as the re-emergence of the supposedly innate savageness that had been subdued but not eliminated by their subordination to so-called civilized people. In using their antics to suppress the knowledge of rebellion, they typically employed images of volcanic eruptions and earthquakes to describe slave rebellion, which they viewed as a cataclysmic disruption of the natural order. The representation of slave rebellion was a heightened state of ideological struggle between pro-slavery and abolitionists. Anti-slavery advocates used every opportunity to raise moral, ethical, political, and legal questions regarding slavery. One newspaper writer called abolition “*disorganising in the extreme*”, while another officer called abolitionist a “*faction that, as a U.S. American, he could wish to see destroyed*”.⁷⁴⁹

⁷⁴⁹ News coverage of the *Amistad Affair* was copious in newspapers of the Northern Eastern United States, New York City and New Haven, Connecticut. In particular, Abolitionist Presses, not surprisingly present the greatest debates that arose in conjunction with the *Amistad*, often quoting selections of newspapers from a wide area, including the slave holding-states. The emancipator and liberator provided coverage of events relating to the *Amistad* and extensive interpretation of those events. In addition to the newspaper, the Abolitionist press published at least five pamphlets and books on the subjects of the *Amistad* captives Argument of Adams, John Quincy, Argument of Baldwin, Roger S.; Barber, John, *A History of the Amistad Captives (HAC)* 1840, Id. *Trial of the prisoners of the Amistad (TPA)*, and US Congress House of Representatives, *Africans taken in the Amistad (ATA)*. Two kinds of papers with a wider distribution than the abolitionists' presses also covered the *Amistad* Story, e.g. the *Penny Press*, the *Commercial Papers* and *The New York Sun*. *Penny Press* was the first to publish official account of the rebellion together with a sensational report of a visit to the *Amistad*; *Commercial Papers*, *Journal of Commerce* and the *Advertiser and Express*, consistently covered the trials and judicial decisions, some Southern commercial papers, such as the *New Orleans Picayune* did no more than to note the capture of the “piratical vessel” and published the official account of the rebellion. Others, such as the *Richmond Enquirer*, also commented on the trials and judicial decisions but generally refused to print the particulars of debates raging in the north. With respect to the *Amistad*, several histories and many novels provided versions of what happened on board the schooner and in the court trials that followed. See for example, Cable & Martin (*The Black Odyssey*, 1977) and Owens *The Black Mutiny*, 1839. Information about the *Amistad* is available from a variety of sources, most of which discuss the trial in relation to one of the many famous white men involved in it, like John Quincy Adams of Lewis Tapan (see Able and Kinsbery, eds.); Barbara Chase-Riboud's *Echo of Lions*, 1989, which she calls a none-fiction novel, focuses on and imagines a subjectivity for the captives and offers a very different view of “what happened” that was provided by Jones's legal history; See also Strother for the role of the *Amistad* affair in developing the Underground Railroad. In addition, the rebellion of the Creole has proved to be an important event for African American writers, including William Wells Brown, Pauline Hopkins, and Frederick Douglass, with her novella, *The Heroic Slave*, 1852. See Yarborough, pp. 176-179 for an analysis of the texts by Brown, Hopkins, and Lydia Maria Child in relation to the *Heroic Slave*, 1990.

In August 22, 1831, a thirty-year-old slave named Nat Turner staged a bloody slave revolt in rural Southampton Country, Virginia. Over two days, Nat and his men killed approximately 57 whites. By the time the revolt was crushed on Tuesday, August 23, 1831, an estimated 60 to 80 blacks had taken part in the uprising. The rebellion persuasively undermined the story of slave docility.⁷⁵⁰

By 1840, the abolitionists were divided into three categories:

1. The Garrisonians, who were anti-clericalists, anti-statists and radicalists on such issues as women's right that had driven away most churches inclined and politically motivated abolitionists of the American anti-slavery society.
2. The evangelical, who continued to work through their churches for emancipation,
3. The political abolitionists, who hoped to achieve abolition through the political process.

On the ideological spectrum from immediate abolition on the left to conservative anti-slavery on the right, it is often hard to tell where abolition (which demanded unconditional emancipation and usually envisaged civil equality for the freed slaves) ended and anti-slavery or free soil (which desired only the containment of slavery) began.⁷⁵¹

8.5 Conclusion

The profoundly Christian nature of abolitionism constituted a serious challenge for secular philosophers who criticize the mixing of religion and politics. The secular Europeans and Americans considered religion as an essentially malign force in human affairs, one that should be separated from public life, and consigned to the private sector. The abolitionists movement proved however that religion was a pivot and a powerful force for the reform in western society and in the last half century, Christian churches had made a tremendous contribution to the American civil rights movement, the overthrow of communist regimes in western Europe and the fall of Apartheid in South Africa.⁷⁵² There is no denying the fact that Christian social and political activists contributed to the modern culture of western civilization. Contrary to secular opinion that the 18th-century enlightenment constituted a clean break with the religious past, the reality is rather different.

⁷⁵⁰ Davies, Mary Kemp, *Fictional Treatments of Southampton Slave Insurrection*, Louisiana State University Press, Baton Rouge 1999.

⁷⁵¹ McPherson, James M., *The Abolitionist Legacy from Reconstruction to the NAACP*, 2nd Printing, 1977.

⁷⁵² De Gruchy, J. W., *Christianity and Democracy*, Cambridge University Press, 1995.

As would be noted from the foregoing, a great deal of enlightenment thoughts still bore a Christian character, and Christian activism spread and flourished during the “Age of Reason” and has been a vital force since then.

The lessons and ideas of the abolitionists apply not only to secularists but also to contemporary Christians. Modern Christianity has been dented by separating evangelism from social activities. Though liberal churches often embrace the political activities of the abolitionists but seem embarrassed by the very thought of evangelism. Consequently, the church has become a mere rubber stamp where spiritual activities are left to social activities. The three cardinal points, i.e. brotherhood, benevolence and human rights, that once shaped the abolitionists’ movement, are conspicuously missing today among the so-called Christians. Consequently, the quest to underline slavery and slave trade as a crime and sin against Africans seemed to be impossible, yet it is far from clear that we should avoid one reductionist view of Christian mission (the social gospel) only to replace it with another kind of reductionism (a Christianity show of concern for the created order for the poor and the oppressed).⁷⁵³

For the abolitionist Christians, converting people into Christianity and ending slave trade were complimentary activities and, for example, Equiano’s interesting narrative was both an antislavery tract and an evangelical conversion story. Evangelical movements like the Methodist and the Baptist were at the forefront of British antislavery movement from the 1780s -1830s. And Seymour Drescher observes, “*the take-off of British abolitionism coincided with the revival of British missionary movement*”.⁷⁵⁴ Evangelisation and social reform flowed from a revitalized Christianity. Together, they bore eloquent testimony to the transforming power of the gospel and as David Brion Davis added, Christian abolitionism served to rehabilitate Christianity as a force for human progress in the face of challenges from rationalists scepticism.⁷⁵⁵ Thomas Clarkson in his contribution argued that the slave trade was the greatest of the social evils addressed by the Christian religion and he urged his readers to: “*retire to their closets, and pour out thy thanksgivings to the Almighty for this his unspeakable act of mercy to thy oppressed fellow-creatures*”.⁷⁵⁶

⁷⁵³ Macaulay, Renald, *The Great Commission*, Cambridge Papers, 7:2, 1998; Chester, T., *The gospel to the Poor: Sharing the Gospel through Social Involvement*, IVP, 2004.

⁷⁵⁴ Dawson, W. W., *Antislavery, Religion and Reform*, Bolt, C. and Drescher, S., (eds.), 1980, p. 47.

⁷⁵⁵ Davis, D.B., *Slavery and Human Progress*, pp. 129-53.

⁷⁵⁶ Clarkson, Thomas, *The History of the Rise, Progress and Accomplishment of the Abolition of the African Slave Trade* by the British parliament, 2 Vols. 1808, Vol. I, pp. 5-9; Vol. II, p. 587.

The Christians among the abolition movement were not unblemished. Some were against the slave trade but more willing to tolerate slavery itself; some rejected racism, but retained condescending attitudes towards Africans; some showed little concerns for exploited Africans in Britain's industrial cities; and some were uncritical of British imperialism. But for all their weakness and prejudice, the clarity of their moral vision of the slave trade stands as a challenge to later generations. Just as the 18th-century Britons learned that their consumption of sugar sustained the slave economy, so humanity need to see that the injustices of the past against the slaves are accessed today. In spite of this historical injustice and plethora of woes, the lesson of the abolitionists was and is that God can use Christians to think globally and act locally to accomplish seemingly impossible situations. When the philosopher, John Stuart Mill, reflected on the abolition of slave trade and the demise of slavery itself, he concluded that these events had happened not because of any change in the distribution of material interest, but by the spread of moral convictions. "*It is what men think*", wrote Mill, "*that determines how they act*".⁷⁵⁷ Politicians, historians and modern societies may disagree with this interpretation of abolition because of their emphasis on the importance of the political contingencies and economic expediency. However, they must agree or they ought to agree that they have a moral burden toward the Africans to address their sins and crimes of the past. Whether the laws passed by the various slave societies can form a basis for reparation is a matter of conjecture. This aspect shall be taken care of in the on-going analysis, in particular, on the basis of natural law and modern laws.

⁷⁵⁷ Mill, John Stuart, *Representative Government*, 1861, chap. 1.

Chapter IX: The Case for Reparation

9. Historical Background

In this chapter, the conceptual, legal, moral and historical issues surrounding reparations will be evaluated. The aim here is to provide analytical tools, which shall be used to sort out the normative arguments from the sentimental and emotional arguments. The normative recommendations for or against any particular ground of reparations must be sensitive to the question of how the reparation scheme is to be designed: the question of whether reparations should be paid turns crucially on choices about the form of payment, the identity of the beneficiaries, the identity of the parties who will bear the costs of payment, and so on and so forth. The prudential and institutional issues surrounding reparations schemes are as important as the high-level questions about justice and injustice that are usually the focus of reparations debates.⁷⁵⁸ Despite a cascade of recent writings on reparations, and unassociated topics in transitional justice,⁷⁵⁹ the legal and moral analysis of reparations is dramatically under-theorized.

The analytically sophisticated literatures on reparations tend to adopt a positive and explanatory orientation,⁷⁶⁰ rather than the normative orientation. The proponents of normative debates on reparations usually focus monomaniacally on the historical injustices inflicted upon victim groups, while minimizing the serious policy designs that reparations pose. Opponents of reparations, on the other hand, minimize the relevant injustices and portray reparation proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another. Generally speaking, writers and scholars on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed.⁷⁶¹

I shall portray in this chapter that reparation as a concept is quite old. France paid Germany reparations after the Franco-Prussian War of 1872.⁷⁶²

⁷⁵⁸ Posner, E. & Vermeule, A., *Reparations for Slavery and other Historical Injustices*, in *Columbia Law Review*, (1901), 2003, p. 689.

⁷⁵⁹ Robinson, Randall, *The Debt: What Americans owe to the Blacks*, 2000; Teitel, Ruti G., *Transitional Justice*, 2000.

⁷⁶⁰ Levmore, Saul, *Changes, Anticipations, and Reparations*, 99 *Columbia Law Review*, 1999, pp.1657, 1686-1699.

⁷⁶¹ *ibid.* n.758, p. 690.

⁷⁶² Howard, Michael, *The Franco-Prussian War*, 1961, pp. 446-451; See *ibid.* n.761, p. 694.

Germany paid France reparations after World War I and the Soviet zone of Germany paid reparations to the Soviet Union after World War II.⁷⁶³ Iraq has paid, and continues to pay, reparations on account of the destruction it caused during the Gulf War.⁷⁶⁴ The famous reparations are the holocaust reparations paid by West Germany after World War II.⁷⁶⁵

The current wave of reparations in Eastern Europe arose with the end of the Cold War. In the newly democratic states, individuals whose property had been confiscated by communist governments sought the return of that property or compensation. Notable amongst these reparations were established in the Czech Republic and Germany. Also in the 1990s, reparations programs were established in Japan and in Chile.⁷⁶⁶ In the USA, the first reparation program was established by Congress in 1946 so as to redress a wide range of claims by Indian tribes, including violations of treaties for which a judicial remedy was denied, and the laws of lands under treaties signed under duress.⁷⁶⁷ The USA Congress also authorized reparations for Japanese Americans who had been interned during the World War II.⁷⁶⁸ The table below portrays major reparations that have either been authorized or considered seriously at high-levels of government. While panel A lists American products or proposals, panel B lists reparations from other countries.

⁷⁶³ Kuklick, Bruce, *American Policy and the Division of Germany* 205, 1972; Trachtenberg, Marc, *Reparation in World Politics: France and European Economic Diplomacy, 1916-1923*, 1980, pp. 1-10; Posner, E. & Vermeule, A. *Reparations for Slavery and other Historical Injustices*, in *Columbia Law Review*, (1901), 2003, p. 694.

⁷⁶⁴ Burns, John F., *A Cadillac and Other Plunder: Iraq-Kuwait Issue Resurfaces*, N.Y. Times, Dec. 30, 2002, p. A1; See also *ibid.* n.763 Posner, E. & Vermeule, A., p. 694

⁷⁶⁵ For details see Schwerin, Kurt, *German Compensation for Victims of Nazi Persecution*, 67 *Nw. U. L. Rev.*, 1972, p. 479.

⁷⁶⁶ See sources for Table I.B, *ibid.* n.770.

⁷⁶⁷ Newton, Nell Jessup, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 *Ga. L. Rev.*, 1993, pp. 453, 468.

⁷⁶⁸ *Pollard v. United States*, 69 F.R.D. pp. 646-647, 649 (M.D. Ala. 1976); see Mitchell, Alison, *Clinton Regrets "Clearly Racist"* U.S. Study, N.Y. Times, May 17, 1997, p. A10; Trejo, Frank, *Tuskegee Apology Part of Effort to Heal Old Wounds*, Dallas Morning News, May 11, 1997, p. 1J.

Table 1: Major Reparations ProgramsPanel A: United States⁷⁶⁹

PROGRAM	YFAR (S)	PAYER	RECIPIENT	PAYMENT	TOTAL CASH	CAUSE
Indian Claims	1946	U.S.	Indian tribes	Various	-\$800 million	Land taken by force or deception
Japanese	1988	U.S.	Internees	\$20,000	-\$1,65 billion	Internment of Japanese Americans during World War II
Radiation Exposure	1990	U.S.	People exposed to radiation	\$50,000-\$100,000	-\$117 million	Exposure to radiation from nuclear tests, or from mining
Hawaiian Annexation	1993	U.S.	Descendants of native Hawaiian groups	(apology)	\$0	Loss of lands after annexation in 1897
Rosewood	1994	Florida	Survivors, descendants	\$375 - \$150,000	\$2.1 million	Murder and destruction of black town in 1923
Syphilis Experiments	1997	U.S.	Victims of experiments	\$5000 - \$37,500	-\$9 million	Denied treatment for syphilis without telling victims, 1932-1972
Mexican American Land Titles	1997-1998	U.S.	Descendants of property owners	(investigation of claims)	\$0	Failure to recognize Mexican or Spanish land titles under 1848 treaty

⁷⁶⁹ Posner, E. & Vermeule, A., *Reparations for Slavery*, 2003, p. 696; For Indian Claims reparations, see Final Report of the United States Indian Claims Commission, H.R. Doc. No. 96-383, 1980, p. 21; Danforth, Sandra C., *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. Rev., 1973, pp. 359, 388-389; On the Japanese Internment, see Yamamoto, Eric K., *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. Rev., 1998, pp. 477, 515; On Radiation Exposure, see D'Antonio, Michael, *Scars and Secrets: The Atomic Trail*, L.A. Times, Mar. 20, 1994, Magazine Section, p. 14; U.S. Dep't of Justice, *Radiation Exposure Compensation System, Claims to Date: Summary of Claims Received by October 23, 2002*, at <http://www.usdoj.gov/civil/omp/omi/Tre-SysClaimsToDateSum.pdf>; For Hawaiian Annexation, see S.J. Res. 19, 103d Cong., 1st Sess., 107 Stat. 1510 (1993); Chock, Jennifer M.L., *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. Haw. L. Rev., 1995, pp. 463, 512; For Rosewood, see Ryles, Richard A., *The Rosewood Massacre: Reparations for Racial Injustice*, Nat'l B. Ass'n Mag., March/April 1995, pp. 15, 24; On Syphilis Experiments, see *Pollard*, 69 F.R.D. p. 647; See Mitchell, Alison, *Clinton Regrets "Clearly Racist" U.S. Study*, N.Y. Times, May 17, 1997, p. A10; On Mexican Land Titles, see Jon Michael Haynes, *What Is It About Saying We're Sorry? New Federal Legislation and the Forgotten Promises of the Treaty of Guadalupe Hidalgo*, 3 Scholar, 2001, pp. 231-232.

PROGRAM	YEAR(S)	PAYER	RECIPIENT	PAYMENT	TOTAL COST	CAUSE
Holocaust	Various, 1947-1992	West Germany, Germany	Israel; Holocaust victims, descendants; organizations	Various	> DM 100 billion	Holocaust
East Germany	1990, 1993, 1994	Property recipients	Property owners	Restitution of property, or compensation	-\$9 billion in cash	Confiscation of property by Communist government, 1949-1990
Czechoslovakia (now Czech Republic)	1991	Property recipients	Property owners	Restitution of property, or compensation	\$11 billion, of which - \$2 billion in cash	Confiscation of property by Communist government, 1948-1990
Chile	1992	Chile	Victims of Pinochet, descendants	Monthly pension of 140,000 pesos, plus other benefits		Execution, torture, and exile of at least 200,000 people
Korean Comfort Women	1995-1996	Japan (through printed donations)	"Comfort Women" in Japanese-occupied Asian countries	\$19,000 (through "private" funds)	\$20 million proposed	200,000 women used as sex slaves by Japanese army during World War II
Canada	1998	Canada	Aboriginals	Various	CA \$350 million	Forced assimilation of children

Table 1: Panel B: International Programs ⁷⁷⁰

⁷⁷⁰ Posner, E. & Vermeule, A., *Reparations for Slavery*, 2003, p. 697; For Holocaust related programs, see Schwerin, Kurt, *German Compensation for Victims of Nazi Persecution*, 67 *Nw. U. L. Rev.*, 1972, pp. 490, 511, 515-518; On East Germany, see Stack, Heather M., *The Colonization of East Germany?: A Comparative Analysis of German Privatization*, 46 *Duke Law Journal*, 1997, pp. 1211, 1218, 1226; On Czechoslovakia, see Crowder, Richard W., *Restitution in the Czech Republic: Problems and Praguensis*, 5 *Ind. Int'l & Comp. L. Rev.*, 1994, pp. 237, 240-246; *Prague Votes to Return Nationalized Property*, *Chi. Trib.*, Feb. 22, 1991, p. C1; Green, Peter S., *Czechoslovak Restitution Could Cost \$11 Billion*, *UPI*, Feb. 21, 1991; Obrman, Jan, *Rehabilitating Political Victims*, in 50 *Rep. on E. Eur.*, pp. 5, 6-7, Dec. 14, 1990; On Chile, see Gonzdlez, Alejandro, *Treatment of Victims and of Their Families: Rehabilitation, Reparation and Medical Treatment*, in *Int'l. Comm'n of Jurists, International Meeting on Impunity of Perpetrators of Gross Human Rights Violations*, 1993, pp. 323, 330-334; Edelstein, Jayni, *Rights, Reparations and Reconciliation: Some Comparative Notes* (July 27, 1994), available at <http://www.csvr.org.za/papers/papedel.htm> (on file with the *Columbia Law Review*); On Korean Comfort Women, see Hicks, George, *The Comfort Women Redress Movement*, in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, (Roy L. Brooks ed., 1999), pp. 113, 119, 124; Yu, Tong, *Recent Development, Reparations for Former Comfort Women of World War II*, 36 *Harv. Int'l L.J.*, 1995, pp. 528, 530; Pollack, Andrew, *Japan Pays Some Women from War Brothels, but Many Refuse*, *N.Y. Times*, August 15, 1996, p. A11; On Canada, see O'Connor, Pamela, *Squaring the Circle: How Canada Is Dealing with the Legacy of Its Indian Residential Schools Experiment*, 28 *Int'l J. Legal Info.*, 2000, pp. 232, 251; *Id. Indian & Northern Affairs Canada, Background: Gathering Strength-Canada's Aboriginal Action Plan*, available at <http://www.ainc-inac.gc.ca/nr/prsj-a1999/98123Bk.html> (on file with the *Columbia Law Review*).

9.1 The Genesis of African American Reparations

Since this chapter is about the quest for reparations of the Blacks against the Whites, this sub-section shall be dedicated to the historical reparations initiated by the Blacks and also to portray that reparation is after all not a new phenomenon.

The term “European American” instead of white American and “African American” instead of Blacks shall be used throughout this book. The African American reparation movement is not a recent phenomenon. Claims for reparation were, in fact, made decades before the end of slavery. Since the time of slavery, each generation of African Americans have reasserted and embellished a claim for reparation. For example, African Americans like Marcus Garvey and Martin Luther King have called for slave reparations. Currently proponents of reparation include the National Association for the Advancement of Coloured People (NAACP), Secretary of State Colin Powell, Jesse Jackson and Louis Farrakhan.⁷⁷¹

A. Antebellum Period

The pioneer of slave reparation, Paul Cuffe was born in 1759 in Massachusetts. Paul Cuffe, Gustavus Vassa, Benjamin Banneker, Phillis Wheatley, and Jupiter Hammon constituted the demand for reparations.⁷⁷² Filled with post-revolutionary spirit, Cuffe financed his return and other 38 African Americans to Africa in 1816. However, he was convinced that the government ought to repatriate both slaves and free African Americans to their home land. The return to Africa was understood to be a specific, “*narrowly tailored form of restitution for slavery*.”⁷⁷³ The federal government during this time financed the repatriation of a fraction of freed African American in 1922 and sent them to Liberia.⁷⁷⁴ This fit was accomplished by American Colonization Society (ACS) and whose prominent members amongst others include Justice Bushrod Washington, George Washington’s

⁷⁷¹ For a discussion of the civil rights theories of Marcus Garvey, Martin Luther King, Louis Farrakhan, and other civil rights leaders, see Brooks, Roy L., *Integration or Separation? A Strategy for Racial Equity*, 1996, pp. 125-188, 283-284.

⁷⁷² Franklin, John Hope & Moss Jr., Alfred A., *From Slavery to Freedom: A History of African Americans* p. 111, 8th edn. 2000; Brooks, Roy L., *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, in *The Notre Dame Law Review*, 1982, 2004, p. 261.

⁷⁷³ Johnson Jr., Robert, *Repatriation as Reparations for Slavery and Jim-Crowism*, in *When Sorry Isn’t Enough: The Controversy over Apologies and Reparations for Human Injustice*, Roy L. Brooks (ed.), 1999, pp. 427-429.

⁷⁷⁴ On the history of Liberia, including the beginning of a protracted civil war that seems to have ended with the resignation and exile of its president, Charles Taylor, in August, 2003, pp. 156-158; Harris, Edward, *Marines Withdraw to ships after 11-Day stay in Liberia*, San Diego Union-Trib., August 25, 2003, p. A3; Trofimov, Yaroslav, *In Liberia’s War, Woman Commanded Fear and Followers*, Wall Str. J., August 22, 2003, p. A1.

Brother, was its first president, followed by Thomas Jefferson, James Monroe, Andrew Jackson, Henry Clay, Daniel Webster, and Abraham Lincoln.⁷⁷⁵ The ACS did not equate colonization with reparations but simply believed that deportation was in that circumstance the best option for both races and as Jefferson explained in Notes of the State of Virginia:

“Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and convulsions, which will probably never end but in the extermination of the one or the other race.”⁷⁷⁶

However, the reparation movement did not make any remarkable progress.⁷⁷⁷ In 1842, an English barrister criticized the society’s treatment of African Americans and the slave trade and criticised further the federal government and its citizens, both north and south, for not *“redressing long and enormous injustice without any atoning sacrifice or reparatory expense, {for not} restoring and elevating,... without any surrender of interest or convenience, the rights and the dignity of a numerous race of men whom they and their fathers have ruined and degraded.”⁷⁷⁸* A precursor of the atonement model,⁷⁷⁹ this early articulation of slave reparation gave way to a more demand for reparation in the years following the Civil War.

B. Postbellum Period

Ex-slave claims for reparations can be divided into 2 parts. The first contained individual claims lodged by former slaves against their former masters. A typical example was a letter dated August 7, 1865, written by Jourdon Anderson to his former owner, Colonel P.H. Anderson. The letter said in part: *“I served you faithfully for thirty-two years, and Mandy {his wife} twenty years. At twenty-five dollars a month for me, and two dollars a week for Mandy, our earnings would amount to eleven thousand six hundred and eighty dollars.”⁷⁸⁰*

⁷⁷⁵ Johnson Jr., Robert, Johnson Jr., Robert, *Repatriation as Reparations for Slavery and Jim-Crowism*, in *When Sorry Isn't Enough*: 1999, pp. 156-157.

⁷⁷⁶ Jefferson, Thomas, *Notes of the State of Virginia*, in *Thomas Jefferson: Writings*, Merrill D. Peterson, ed. 1984, pp. 123, 264.

⁷⁷⁷ Brooks, Roy L., *Getting Reparations for Slavery Right*, 2004, p. 191.

⁷⁷⁸ Brooks, Roy L., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, 1999, pp. 347, 349; *ibid.* n.777, p. 262.

⁷⁷⁹ Brooks, Roy L. et al., *Civil Rights Litigation: Cases and Perspectives*, 2nd Ed., 2000.

⁷⁸⁰ *Letter from Jourdan Anderson to Col. P.H. Anderson* (August 7. 1865), in Robinson, R., *The Debt: What America owes to Blacks*, 2000, pp. 240-241; *ibid.* n. 777, p. 262.

Since then private reparation claims continued in the form of lawsuits filed against families and corporations that benefited from slavery.⁷⁸¹ A second set of claims for reparations were anchored on a federal promise of “*forty acres and a mule.*” *Section 4 of the Freedmen’s Bureau Act of 1865 authorised the Commissioner of the Freedmen’s Bureau “to lease not more than forty acres of land within the Confederate states to each freedman or refugee for a period of three years; during or after lease period, each occupant would be given the option to purchase the land for its value.”*⁷⁸² Section 4 was designed to codify Major General William T. Sherman’s Special Field Order No. 15, issued on January 16, 1865, three months before Section 4 was enacted.⁷⁸³ The promise of “forty acres and a mule” was never carried out. In a recent lawsuit, a federal district court judge, Paul L. Friedman, explained what happened:

*“Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen’ Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plough that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen’s Bureau, and he reversed many of the policies of the Bureau. Much of the Promised Land that had been leased to African American farmers {approximately 400,000 acres to about 40,000 ex-slaves} were taken away and returned to Confederate loyalists. For most African Americans, the promise of forty acres and a mule was never kept.”*⁷⁸⁴

In 1890, an “Ex-slave Pension and Bounty Bill” was introduced in Congress by Republicans. The Bill was intended to provide a maximum payment of 15 dollars per month and a maximum Bounty of 500 dollars for each slave.⁷⁸⁵

⁷⁸¹ Brophy, Alfred L., *Reconstructing the Dreamland: The Tulsa Race Riot of 1921: Race, Reparations and Reconciliation*, 2002; Brooks, Roy L., *Getting Reparations for Slavery Right*, 2004, pp. 263, 285.

⁷⁸² *ibid.* Brooks, Roy L.; *Berry v. United States*, No. C-94-0796-DLj, 1994 WL 374537, p. *1 (N.D. Cal. July 1. 1994); *Act of March 3, 1865*, ch. 90, 13th Stat. p. 507.

⁷⁸³ *ibid.* n.781, p. 263; See Headquarters, Military Div. of the Mississippi, Special Field Order No. 15, in *When Sorry isn’t Enough*, 1999; Johnson Jr., Robert, *Repatriation as Reparations for Slavery and Jim-Crowism*, in *When Sorry Isn’t Enough*, 1999, p. 36.

⁷⁸⁴ *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999); see Farmer-Paellmann, Deadria C., *Excerpt from Black Exodus: The Ex-Slave Pension Movement Reader*, in *Should America Pay? Slavery and the Raging Debate on Reparations*, New York: HarperCollins, 2003; *ibid.* n.783, Johnson Jr., Robert, pp. 22, 25; *ibid.* n.781, Brooks, Roy L., p. 263.

⁷⁸⁵ Blight, David W., *If You don’t tell it like it was, it can never be as it ought to be*, Keynote Address at the Yale, New Haven and American Slavery Conference, September 27, 2002.

However, the Bill was never enacted into law ⁷⁸⁶ because the Congress rejected the Bill on the ground that, the “ex-slave Pension will be too large a burden on tax payers”⁷⁸⁷ while some Congress members believe that only education can ameliorate the situation.⁷⁸⁸ Between 1890 and 1917, over 600,000 of the four Million emancipated African Americans lobbied the government for pensions because they believed their unpaid labour subsidized the building of the nation’s wealth for two and a half centuries.⁷⁸⁹ Through the establishment of “Ex-Slave Pension Clubs”, the National Ex-slave Mutual Relief Bounty and Pension Association, the African Americans fought unsuccessfully for a federal ex-slave pension bill.⁷⁹⁰

C. Early Twentieth Century

What maybe the first ever lawsuit on reparations was filed in Federal District Court of Columbia in 1916 by four African Americans. The lawsuit alleged that the Treasury Department owed blacks “\$68,073,388.99, which was the amount of taxes collected on cotton between 1862 and 1868.”⁷⁹¹ This lawsuit was dismissed like many others without a decision on its merit.⁷⁹² In 1934, the final attempt was made by African Americans to secure pensions for their servitude and they wrote to President Franklin Roosevelt: “Is there any way to consider the old slaves?” They wanted to know, in particular, if anything was being done about the idea of “giving us pensions in payment for our long days of servitude.”⁷⁹³

D. Post-Holocaust

The Holocaust influenced the way many proponents of slave reparations conceptualised the movement. It heightened the spirit of human understanding among the community of nations. One of the greatest lessons of Holocaust was that atrocities can only occur when the perpetrator fails to identify with its victims and fails to recognize a common humanity between itself and the victims.

⁷⁸⁶ Grahame, James, *Why the North and South Should Have Apologized, in When Sorry Isn't Enough*, 1999, p. 349

⁷⁸⁷ Blight, David W., *If You don't tell it like it was, it can never be as it ought to be*, Keynote Address at the Yale, 2002, p. 69; Brooks, Roy L., *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 2004, p. 265.

⁷⁸⁸ *ibid.*, Brooks, Roy L., p. 265.

⁷⁸⁹ *ibid.* 784, Farmer-Paellmann, Deadria C., *Excerpt from Black Exodus: The Ex-Slave Pension Movement Reader, in Should America Pay? Slavery and the Raging Debate on Reparations*, New York: HarperCollins, 2003, p. 27; Brooks, Roy L., *Getting Reparations for Slavery Right*, 2004, pp. 265-266.

⁷⁹⁰ *ibid.* Farmer-Paellmann, Deadria C.,

⁷⁹¹ *Johnson v. McAdoo*, 45 App. D.C., pp. 440-441 (1916).

⁷⁹² Brooks, Roy L., *The Slave Redress Cases*, 2004, p. 43.

⁷⁹³ *ibid.* n. 787, Blight, David W., p. 10.

Conversely, when identity exists between the government and the governed, the government will understand that people of different religious and racial backgrounds have equal moral and legal standing.⁷⁹³ Comparatively speaking, the Holocaust vision of heightened morality, identity, egalitarianism, and restorative justice was reflected in the African American reparation movement during the turbulent 1960s.⁷⁹⁵ The movement was mostly associated with James Forman's "Black Manifesto." It shaped the slave reparations' claim in recent years, beginning with Congressman John Conyer's slave reparation bill,⁷⁹⁶ first introduced in Congress in 1989.⁷⁹⁷ Whether the slave reparation is justified on backward-looking notions of corrective justice or forward-looking precepts of restorative justice, the historical records on slave reparations, I think, should form the bulwark of subsequent write-up on reparation's analysis. The African Americans are not asserting a new or delayed claim. There is no unconscionable or prejudicial procrastination, as the slave reparation claim was first brought even before the institution of slavery was abolished.⁷⁹⁸ Consequently, the slave reparation claim may not come under the status of limitation because it is not the fault of those bringing the claim today since the same claim has been asserted repeatedly since the 18th century but each time denied legal hearing in spite of its prima facie content.

⁷⁹⁴ Brooks, Roy L., *The Age of Apology*, in *When Sorry isn't Enough*, 1999, pp. 3-11.

⁷⁹⁵ The "*Black Manifesto*," presented in 1969, outlined in detail many ambitious economic demands, including "*the creation of banks, presses, universities, and training centres for African Americans, all to be established as repayment for centuries of racist degradation and exploitation.*" Feagin, Joe R. & O'Brien, Eileen, *The growing Movement of Reparations, in When Sorry Isn't Enough*, 1999, pp. 341-342. These demands were, of course, largely ignored. The "Black Manifesto," officially titled, "*Manifesto*," was adopted by the National Black Economic Development Conference in Detroit, Michigan, on April 26, 1969. The "Manifesto" is reproduced in its entirety as Appendix A in Boris I. Bittker's seminal work on slave redress, *The Case for Black Reparations*, 1973, pp. 159-175.

⁷⁹⁶ H.R. 40, 10th Cong. §2(b) (3) (1997).

⁷⁹⁷ Conyers, John, *The Commission to Study Reparations Proposals*, in *When Sorry Isn't Enough*, 1999, p. 367.

⁷⁹⁸ See *ibid.* n. 772; *ibid.* n. 773; *ibid.* n.774.

9.2 Introduction

This chapter shall encompass all the arguments for and against reparations with various instruments and concepts used by various authors and scholars to buttress their pro and contra for slavery reparations. This chapter shall also determine whether the quest for reparations can stand a water-tight-compartment argument in the courts, parliaments, governments, ethical and moral injunctions and individual private opinions. Consequently, I shall consider it imperative to begin this important and indispensable chapter with the definition of reparation.

9.2.1 Definition of Reparation

The word reparation does not have clear conceptual boundaries that demarcate reparations from ordinary legal remedies and other large-scale governmental transfer programs. Paradigmatic examples of reparations ordinarily presented in the relevant literatures in law, politic, philosophy, and moral theory are inclined to having the same goal. Posner and Vermeule defined reparations as:

*“Schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under the prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, or similar rules), and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence of future wrongdoing.”*⁷⁹⁹

Though various policies, programs and decisions have been at a time or the other described as reparation concepts, but without any linguistic ambiguity, the concept “reparations” can be used to describe a scheme that dispenses with any of them. While an ordinary legal remedy can effect a transfer from an identified individual wrongdoer to an identified individual victim of the wrong, reparations scheme usually relaxes one condition or the other or both. For example, reparation schemes might effect a transfer from tax payer to identified individual victims, as in the case of Japanese-American reparations. It might also effect a transfer from identified wrongdoers to a group or institution that serves as a stand-in for deceased or unidentified victims, like the compensatory payments made to Jewish charities or the state of Israel as representatives of deceased victims of the Holocaust.

⁷⁹⁹ Posner, E. & Vermeule, A., *Reparations for Slavery and Other Historical Injustices*, 2003, p. 689.

It might even ease both limitations imposed in proposals for living tax payers to pay money to living African Americans based on harms inflicted by dead people (antebellum European Americans) on dead people (antebellum African Americans). One can also postulate that reparations schemes are justified on the basis of backward-looking reasons – remediation of, or compensation for, past injustices. Legal injunctions, for example a judicial order is not classified according to Posner and Vermeule under reparations concept.⁸⁰⁰

David Levine (2003), in his article in the Windsor Yearbook of Access to Justice concord with Posner and Vermeule in his definition of reparation but added that reparations fit conceptually somewhere in between ordinary judicial remedies and legislatively-mandated transfer programs and that judiciary imposed reparations for slavery are controversial.⁸⁰¹ Contrary to Posner and Vermeule, Roy Brooks (2004) in his essay, “*Getting Reparations for Slavery Right*,” said that the above definition is “over inclusive” and as it is used in international and domestic redress movements, reparations do not simply apply to “wrongs” or wrongs involving “a large group of claimants.” They apply only to certain types of wrongs, to wit, gross violations of fundamental international human rights, such as slavery, genocide, and Apartheid.⁸⁰² Usually, reparations are more stronger on forward-looking-ground of restorative justice, specifically reconciliation and redemption.⁸⁰³ Properly conceived, reparations are connected to a statement of deep remorse from the perpetrator. They are redemptive response to an atrocity.⁸⁰⁴

⁸⁰⁰ Posner, E. & Vermeule, A., *Reparations for Slavery and Other Historical Injustices*, 103 Columbia Law Review, 2003, pp. 691-692, “These distinctions are just for conceptual clarity; in practice there is a range of intermediate cases. Reparations schemes, for example, sometimes add a means test to the definition of the beneficiary class. A reparative payment might be limited to the poorest members of the victim class; a scholarship program might be limited to members of the victim class who cannot otherwise afford to buy education. In such cases the addition of the supervening means test pushes reparations programs closer to a transfer program justified on the grounds of end-state distributive justice. Note, however, that typically, and in these examples, the means test only applies within a beneficiary class that is initially defined solely on compensatory, backward-looking grounds.”

⁸⁰¹ *ibid.* p. 691. One prime example is *Rizzo v. Goode*, 423 U.S. 362 (1976), where the U.S. Supreme Court rejected a remedy imposed by a federal trial court upon the police department in Philadelphia, Pennsylvania, for police misconduct because the court majority thought there was an insufficient nexus linking: 1). The harm proven to have been done to a relatively small number of victims by certain uniformed police officers; 2). The plaintiffs who brought the case, who were largely citizens of the city rather than the direct victims of brutality; and 3). The defendants, principally the Major, the City Managing Director and the Police Commissioner. For further discussion on this case see Cooper, Phillip, *Hard Judicial Choices*, NY: Oxford University Press, 1988, pp. 297-327.

⁸⁰² *ibid.* n.800 Posner, E. & Vermeule, A., pp. 691-689; Brooks, R.L., *The Age of Apology*, in *When Sorry Isn't Enough*, 1999, pp. 3-8.

⁸⁰³ Newton, N.J., *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *When Sorry Isn't Enough*, 1999, pp. 261-265; Ulrich, George, *The Moral Case for Reparations: Three theses about Reparations for Past Wrongs*, in *Human Rights in Development*, 2001, pp. 369, 377-379.

⁸⁰⁴ *ibid.* Newton, N.J., p. 262; Boraine, Alexander, *Alternatives and Adjuncts to Criminal Prosecutions*, in *When Sorry Isn't Enough*, 1999, p.469.

A reparation therefore, is the tangible act that transforms a rhetorical apology into a meaningful, material reality and also the revelation and realisation of an apology.⁸⁰⁵ A combination, essentially from Posner & Vermeule backward-looking-ground and Brooks forward-looking concepts of slavery reparation, give an adequate definition of reparation, which will comprise the nuclear of the subsequent analysis of the various concepts, thesis and instrument of slavery reparations.

9.3 The Causation and Attenuation Argument of Reparations

This sub-section will deal with causation and various attenuations arguments for reparations.

9.3.1 Causation in Tort Liability

Causation in tort liability demands an evidence of proximate causation.⁸⁰⁶ Claimants must prove not only conceptual “but-for” causation; that “but for” a party’s actions, the harm would not have occurred – but must also establish legally actionable “proximate cause.”⁸⁰⁷ In reparations cases, the attenuated nature of the harm makes it difficult to show proximate cause.⁸⁰⁸ Attenuation is diminished causation.⁸⁰⁹ Attenuation is seen as a conceptual separation between two actors, events, a dilution and weakening of the conceptual connection between the two. Therefore, attenuation severe theoretical “but-for” causation from legally actionable proximate cause. Attenuation arguments, as propagated in the debate for reparations, can be divided into three parts, namely: victim attenuation, wrongdoer attenuation, and act attenuation.

⁸⁰⁵ Brooks, Roy L., *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, in *The Notre Dame Law Review*, 1982, 2004, p. 275,.

⁸⁰⁶ Wright, Richard W., *Causation in Tort Law*, 73 *Cal. L. Rev.*, 1985, pp. 1735, 1737-1739; Calabresi, Guido, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 *U. Chi. L. Rev.*, 1975, pp. 69-72.

⁸⁰⁷ Price, Elisabeth C., *Toward a unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 *Tenn. L. Rev.*, 1994, pp. 1277, 1347; Forde-Mazrui, Kim, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 *Cal. L. Rev.*, 2003, pp. 683, 727; Keeton, W. Page et al, *Prosser and Keeton on Law of Torts*, West 5th ed., 1984, pp. 264, 301-308; See 57A *AM. JUR. 2D Negligence* § 491 (2004). “For such consequences the original wrongdoer is responsible, even though he or she could not have foreseen the particular results which did follow or results of a similar nature”; Gray, Oscar S., *The Law of Torts*, (Aspen 2nd ed.) 1986, pp. 86-87.

⁸⁰⁸ Massey, Calvin, *Some Thoughts on the Law and Politic of Reparations for Slavery*, 24 *Boston College Third World L.J.*, 2004, pp. 157, 166; Hackney, James R., Jr., *Ideological Conflict, African American Reparations, Tort Causation and the case for Social Welfare Transformation*, 84 *B.U. L. Rev.*, 2004, p. 1193; Alcausin, Hall, Art, *There is a lot to be repaired before we get to Reparations: A critique of the underlying issues of race that impact the fate of African American Reparations*, 2 *Scholar* 1, 2004, pp. 42, 52; Posner, E. & Vermuele, A., *Reparations for Slavery and Other Historical Injustices*, 103 *Columbia. Law Review*, 2003, pp. 689, 708.

⁸⁰⁹ *Spadola v. N.Y.City Transit Auth.*, 242 *F. Supp. 2nd*, (S.D.N.Y. 2003), pp. 284, 294; see 57 *AM. JUR. 2D Negligence* §§ 465, 491 (1989 & Supp. 2000).

Victim attenuation is advanced in the argument that modern African Americans have no direct connection to slaves; wrongdoer attenuation argues that modern Americans tend to lack specific individual connection to slave holders; and act attenuation articulates the idea that modern injury to African Americans is unrelated to the harms of slavery.⁸¹⁰ And above all, the concepts from mass tort jurisprudence that may apply to reparations debate shall also be the object of analysis here.⁸¹¹

However, claims for slavery reparations consist of two major constituents of tort law, i.e. tort and unjust enrichment.⁸¹² Historically African American slaves went through many deprivations that could potentially ignite tort liability.⁸¹³ They suffered harms, physical injury, loss of property, lost wages, loss of liberty, loss of family and family relations, loss of consortium and mental anguish.⁸¹⁴ And also their descendants suffered and are still suffering today from residual racism, a consequence of slavery.⁸¹⁵ It is difficult to put this concept in a water tight compartment claims arising from slavery because it is unclear whether slave owners hold a legal duty to slaves, or whether they hold any duty to slave descendants.⁸¹⁶ Nevertheless, it could be argued that slave owners indeed hold a duty to slaves or their descendants, or that they ought to know that the regime of slavery was legally dubious in a way that they should be held responsible to have owed a duty to slaves or their descendants.⁸¹⁷ I shall work on the hypothesis, in order to focus on causation concept, that slave owners owed the duty either to slaves or to their descendants and tort compensability of slavery is not negated by its legality at the time.⁸¹⁸ Conversely, unjust enrichment claims defer from tort claims.

⁸¹⁰ Brophy, Alfred L., *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L., 2002, pp. 497, 505-509; Posner, E. & Vermeule, A., *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev., 2003, pp. 698-699; Hylton, Keith, N., *A Framework for Reparations Claims*, 24 B.C. Third World L.J., 2004, pp. 39-40; Robinson, Alfreda, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 Rutgers L. Rev., 2003, pp. 309, 365; Hackney, James R., Jr., *Ideological Conflict, African American Reparations, Tort Causation and the case for Social Welfare Transformation*, 84 B.U. L. Rev., 2004, pp. 1195-1197.

⁸¹¹ *ibid.* n. 810 Brophy, Alfred L., p. 519; *ibid.* n. 810 Posner, E. & Vermeule, A., p. 739; *ibid.* n. 810 Hackney, J. R., Jr., pp. 1195-1197; *ibid.* n. 810 Hylton, Keith, N., pp. 31, 43; see also Brophy, Alfred L., *Reconstructing the Dreamland: The Tulsa Riot of 1921*, 2002.

⁸¹² *ibid.* n.810 Brophy, Alfred L., p. 516; Robinson, Randall, quoted in Winbush, Raymond A., *Should America Pay? Slavery and the Raging Debate on Reparations*, New York: HarperCollins, 2003, p. 33; Wenger, David, *Slavery as a Takings Clause Violation*, 53 Am. U.L. Rev., 2003, pp.191, 193.

⁸¹³ Sebok, Anthony J., *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. Rev., 2004pp. 1405, 1417.

⁸¹⁴ Hylton, Keith, N., *Slavery and Tort Law*, 84 B.U. L. Rev., 2004, pp. 1209, 1213-1237; *ibid.* n 813, p. 1417; Hopkins, Kevin, *Forgive U.S. Our Debts?, Righting the Wrongs of Slavery*, 89 Geo. L.J., 2001, pp. 2531, 2534.

⁸¹⁵ *ibid.* n. 812 Wenger, D., pp. 224-226.

⁸¹⁶ Keeton, W. P. et al, *Prosser and Keeton on Law of Torts*, 1984, pp. 301-320; *ibid.* n. 810 Brophy, A. L., p. 516

⁸¹⁷ *ibid.* n. 814 Hylton, Keith, N., p. 1212.

⁸¹⁸ *ibid.*

While a tort claim is a claim at law arising from a breach of duty or negligent or intentional harm, and unjust enrichment claim is a hybrid claim in law and equity and requires therefore, a claimant to show only that a defendant unjustly obtained some benefits from the claimant that should be refunded.⁸¹⁹ The measure of damages are the amount of unjust claims.⁸²⁰ These concepts have been used successfully in Holocaust and Tobacco cases that shall be expanded in subsequent discussions.⁸²¹

Academics are divided on the appropriateness of these concept in reparations.⁸²² While some have suggested that economic laws should be treated as non discernible,⁸²³ others suggested that economic law claims ought to be viewed as discernible,⁸²⁴ and one scholar also argued that unjust enrichment is the only viable strategy remaining for reparations quagmire.⁸²⁵ That means in de facto that successful litigation of an unjust enrichment claim will result in defendants paying unjust enrichment damages and based on whatever amount of unjust enrichment they received from their acts. Thereafter, slave descendants will recover the amount of enrichment that the defendants gained through involvement in slave labour or the slave trade. There is also the problem of reparations between ancestor-based and descendants-based theories. The two theories have their own advantages and disadvantages. While the ancestor-based approach will have no problem showing harm because the harms done to the slaves are historically and adequately documented.⁸²⁶ However, “*since no slaves are currently alive, ancestor-based approach encounters difficulties on remedy: should a slave descendant receive remedies for harms done to an ancestor?*”⁸²⁷ A descendant-based approach omits that difficulty but encounters another problem. The descendants may have less problem in establishing the claimants remedy since they can prove that a harm has been done to them.

⁸¹⁹ Sebok, Anthony J., *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. Rev., 2004, p. 1427; see also Sebok, Anthony J., *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. Ann. Surv. Am. L., 2003, pp. 651, 654-655; Brophy, Alfred L., *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L., 2002, p. 521.

⁸²⁰ Sebok, Anthony J., *Prosaic Justice*, Legal Aff., 2002, pp. 51-52; Sherwin, Emily, *Reparations and Unjust Enrichment*, 84 B.U. L. Rev., 2004pp. 1443, 1447-1449.

⁸²¹ Sebok, Anthony J., *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. Ann. Surv. Am. L., 2003, pp. 653, 655; *ibid.* n.820 Sebok, Anthony J., pp. 52-53; *ibid.* n.820 Sherwin, Emily, pp. 1449-1451; *ibid.* n. 819, Sebok, Anthony J., *Two Concepts*, pp. 1407, 1418.

⁸²² *ibid.* n.819, Sebok, Anthony J., *Two Concepts*, pp. 1440-1442; *ibid.* n.820, Sherwin, Emily, p. 1454-1465; Dagan, Hanoch, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, And Legal Transitions*, 84 B.U.L. Rev., pp. 1139, 1158-1163.

⁸²³ *ibid.* n. 819 Sebok, A. J., *Two Concepts*, pp. 1431-1441.

⁸²⁴ *ibid.* n. 822 Dagan, H., pp. 1158-1164.

⁸²⁵ *ibid.* n. 820, Sebok, A. J., p. 52.

⁸²⁶ Knull, Andrew, *Restitution in Favour of Former Slaves*, 84 B.U. L. Rev., 2004, p. 1277.

⁸²⁷ Wenger, Kaimipono David, *Causation and Attenuation in the Slavery Reparations Debate*, in University of San Francisco Law Review, 1967, p. 286 (2006).

Nevertheless, the descendant-based theory is confronted with the difficult question of establishing harm, i.e. how modern slave descendants are harmed by slavery. Ultimately, each theory depends on the resolution of the same difficult questions of causation, such as how slaves can be connected to modern claimants.⁸²⁸

9.3.2 Universal Doctrines of Causation

The concept of causation, however, is often difficult to apply in particular cases. Some conceptual problems may complicate any attempt to apportion liability for an act to a preceding “cause”⁸²⁹ – while an infinite number of factors may be considered “but-for” or “factual” causes of a harm,⁸³⁰ only some of those will be considered legally actionable causes - those which the law deems “proximate.”⁸³¹ The determination of legal causation depends in part on whether an initial event is *necessary*, *sufficient*, or *both*, in the causing of a second event.⁸³² In a normal causative scenario, an initial event is both necessary and sufficient to cause a second. For example, Tope might run into Hui with her car causing her leg to be broken. The causative event – Tope’s collision with Hui – is both necessary and sufficient to cause Hui’s broken leg. In a situation where a causative event is either not necessary or not sufficient to create second event, causation becomes complicated. But if an initial event is not necessary, causation is then overdetermined. In the standard example, two negligently set fires merged, and a property is destroyed by the joint fire.⁸³³ Either fire on its own would have destroyed the property, and so neither fire taken individually was necessary to cause the end result. If Fire A had never been set, Fire B would still have led to the result. To juxtapose, if an initial event is not sufficient to bring about a second event, the causation can be said to be underdetermined.⁸³⁴

⁸²⁸ Wenger, Kaimipono David, *Causation and Attenuation in the Slavery Reparations Debate*, in University of San Francisco Law Review, 1967, 2006, p. 286.

⁸²⁹ Malone, Wex S., *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev., 1956, pp. 60, 62; Wright, Richard W., *Causation in Tort Law*, 73 Cal. L. Rev., 1985, pp. 1737, 1780-1788; Robinson, Glen O., *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 Va. L. Rev., 1982, pp. 713-714.

⁸³⁰ Hart, H.L.A. & Honore, Tony, *Causation in the Law*, Clarendon Press 1967, 1959, p.10-11; Keeton et al, *Prosser and Keeton on Law of Torts*, 1984, p. 266, (“Many courts have derived a rule commonly known as the “but for “ or “sine qua non” rule, which may be stated as follows: The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it.”); Gray, Oscar S., *The Law of Torts*, (Aspen 2nd ed.) 1986, pp. 90-91.

⁸³¹ *ibid.* Keeton et al, p. 263; *ibid.* n.830 Gray, pp. 85-91.

⁸³² *ibid.* n. 830, Hart, H.L.A. & Honore, Tony, p.10-20; *ibid.* n.830 Keeton et al, pp. 263-267.

⁸³³ *ibid.* Hart, & Honore, pp. 10-15; *ibid.* n.828 Wenger, Kaimipono David, p. 287.

⁸³⁴ *ibid.* n. 829, Malone, W.S., pp. 64-65; Frege, Michael Dummett, *Philosophy of Language*, 1981; Twerski, Aaron & Sebok, Anthony J., *Liability without Cause? Further Ruminations on Cause-In-Fact as Applied to Handgun Liability*, 32 Conn. L. Rev., 2000, pp. 1379, 1380.

Thus, in the well-known case of *Palsgraf v. Long Island Railroad Company*,⁸³⁵ the initial event i.e. the negligent handling of a box precipitated a chain of future events. The box was dropped (a second necessary condition) that exploded; the box contained fireworks (a third necessary condition) that exploded; explosion toppled a set of scales (a fourth necessary condition); and finally the plaintiff was harmed.⁸³⁶ The dropping of a box is normally not sufficient to cause such chains of events. Causation was found to be underdetermined in *Palsgraf*, leading to a finding of no liability.⁸³⁷ Similarly, if a sailor falls off of a ship and drowns, and the ship did not have adequate safeguards, it may be impossible to know if the safety measures would have saved the sailor. The sailor may have been swept overboard despite the precaution; the cause of his death is underdetermined.⁸³⁸

Both underdetermined and over-determined causations are peculiar to mass tort law. For example, a defendant's product may not be necessary to cause a particular harm thereby making individual cases over-determined. But where the harm manifests in physical disease that can have many causes, showing conventional causation can be difficult.⁸³⁹ The harms for which plaintiffs seek compensation may be "*found in others who have not been exposed to the substance or product in question.*"⁸⁴⁰ Consequently, "*it is impossible to tell whether any individual plaintiff's injury is attributed to the product or whether it would have manifested itself anyhow.*"⁸⁴¹ Insidious diseases generally have several sources, each of which may by itself be sufficient to bring about the condition.⁸⁴² Mass tort typically involve a large number of plaintiffs harmed by defendant's products. Some of their cases may involve simple causation, while others may have underdetermined or over-determined causative chains.

These analysis and summary of the doctrines of causation shall be used in the subsequent chapter to address the case of reparations for slavery.

⁸³⁵ 162 N.E., N.Y. 1928, pp. 99-100.

⁸³⁶ *ibid.*

⁸³⁷ *ibid.* p.101.

⁸³⁸ Malone, Malone, Wex S., *Ruminations on Cause-In-Fact*, 1956, p. 76; Twerski, Aaron & Sebok, Anthony J., Twerski, Aaron & Sebok, Anthony J., *Liability without Cause?* 2000, pp. 1379-1382; *ibid.* n. 837, p. 76.

⁸³⁹ Berger, Margaret A., *Eliminating General Causation: Notes towards a New Theory of Justice and Toxic Torts*, 97 Colum. L. Rev., 1997, p. 2117, 2123; Gold, Steve, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 Yale L.J., 1986, p. 376, 380.

⁸⁴⁰ *ibid.* Berger, Margaret A., p. 2122.

⁸⁴¹ *ibid.* n.839 Gold, pp. 376-377.

⁸⁴² Rosenberg, David, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev., 1984, pp. 849, 856; Weinstein, Jack B., *Individual Justice in Mass Tort Litigation*, 1984, pp. 148-1455; Robinson, Randall, *Should America Pay?* 2003, p. 759.

9.3.3 The various Types of Attenuation in Reparations

Empirically, many scholars that challenged the idea of causation used the language of attenuation to emphasize that whatever causal relationship exists between the defendant's act and the plaintiff's harm is insufficient to sustain a cause of action since the harm incurred is too remote from the defendant's act. Though interrelated, the connection between the deceased slaves and present claimants (victim attenuation), between slave beneficiaries (slaveholders and government) and modern citizens or government (wrongdoer attenuation), and between harmful acts of slavery and any present injury (act attenuation) are established.⁸⁴³ Understanding of these thematic arguments is indispensable yardstick for analysing the complexity of causation and attenuation based challenges.

9.3.3.1 Act Attenuation

The act attenuation is preoccupied with the concept that there is no direct connection between past wrongdoing and present harm. For example, Palsgraf's case was a unique example of act attenuation.⁸⁴⁴ Act attenuation is an attack on the move from conceptual "but for" causation to legally actionable proximate cause.⁸⁴⁵ An act attenuation is a common objection to slavery reparations.⁸⁴⁶

It constitutes a legal quagmire to connect the harms of slavery to specific disadvantages of African Americans today and it is also not easy to characterise African Americans as a coercive economic group because there are vast differences in wealth, status, and class among individual African American.⁸⁴⁷ Some individuals appear to have integrated into society, while others have not.⁸⁴⁸ The problem here is to prove the connection between past wrong and present claim.⁸⁴⁹ Act attenuation affects reparation cases not only at trial but also affects indirectly claimant's right to press for a claim. Courts usually entertain claims of those who can show standing – i.e., a direct connection between

⁸⁴³ Brophy, Alfred L., *Some Problems*, 2002, pp. 502-503, 505; Hylton, Keith, N., *Slavery and Tort Law*, 2004, pp. 39-40; Posner, E. & Vermeule, A., *Reparations*, 2003, p. 698; Robinson, Alfreda, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV., 2003, pp. 309, 365; Verdun, Vincene, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV., 1993, pp. 628-630; Hackney Jr., James, *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV., 2004, pp. 1195-1197.

⁸⁴⁴ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928); Wenger, p. 291

⁸⁴⁵ Keeton et al., *Prosser and Keeton on Law of Torts*, West 5th ed., 1984, p. 266.

⁸⁴⁶ Bittker, p. 9; Brophy, *Some Problems*, 2002, pp. 518-519, 523-525; Posner & Vermeule, p. 711; Marcus, Maria L., *Learning Together: Justice Marshall' Desegregation Opinions*, 61 Fordham L. Rev., pp. 69, 90-95 (1992); Forde-Mazrui, pp. 728-733.

⁸⁴⁷ Matsuda, p. 375; Westley, Robert, *Many Billions Gone, Is It Time to Reconsider the Case for Black Reparations?* 40 B.C. L. Rev., pp. 429, 471-472 (1998).

⁸⁴⁸ Matsuda, p. 375.

⁸⁴⁹ Matsuda, pp. 385, 373-374; Horowitz, David, *Ten Reasons why Reparations for Blacks is a Bad Idea for Blacks — and Racist too*, Front Page, Jan. 3, 2001, p. 6.

a wrongful act and a claimant's injury.⁸⁵⁰

The American Supreme Court has stated a relevant question in deciding standing, "*Is the line of causation between the illegal conduct and injury to attenuated?*"⁸⁵¹ In some cases the problem of act attenuation could be dealt with. The unjust enrichment claims may elude act attenuation because unjust enrichment depends only on the proof that a defendant was unjustly enriched.⁸⁵² However, the strategy for overcoming act attenuation is a factual one, and claimants generally overcome by showing evidence of causal links. Apart from the standard act attenuation that arise in reparation, intergenerational mass harm claims such as slave reparations involve two more specialised variance of the lack of causation argument.

9.3.3.2 Victim Attenuation

Victim attenuation means that modern claimants are not adequately linked to the original harmed parties. The lack of connection creates victim attenuation, a phenomenon that is prevalent only in intergenerational claims. Another area where this problematic of victim attenuation does not only arise in slavery reparation cases but also in others that seek compensation for intergenerational harms. For example, cases involving harms to native Americans, Holocaust victims, and Japanese-American internees.⁸⁵³

Some scholars argue that victim attenuation is manifested in the argument that African Americans today are not sufficiently linked to slaves and are therefore undeserving of any compensation for slavery⁸⁵⁴ because African Americans living today were not directly subject to the harms of slavery.⁸⁵⁵ Evidently, many African-Americans may be slaves' descendant but many others are also more recent arrivals who do not have that connection to slavery.⁸⁵⁶ The present African-Americans asking for reparations are not original victims and may have a relatively low proportion of descent.⁸⁵⁷ Victim attenuation have been essential in judicial decisions on reparations because it affects directly the legal analysis of a claimant's standing. For example, the Ninth Circuit Court of Appeals, in *Cato v. United States*,⁸⁵⁸

⁸⁵⁰ Matsuda, pp. 380-381; Brophy, *Some Problems*, p. 505; Verdun, p. 624.

⁸⁵¹ *Allen v. Wright*, 468 U.S. pp. 737, 752 (1984).

⁸⁵² Sebok, *Two Concepts*, pp. 1416-1417.

⁸⁵³ Matsuda, pp. 364-368, 381-385; Bradford, William, *Beyond Reparations*, 66 Ohio St. L.J., pp. 1, 52-60 (2005).

⁸⁵⁴ Keshner Stephen, *The Inheritance-Based Claim to Reparations*, 8 Legal Theory, pp. 243, 247-251 (2002).

⁸⁵⁵ Hall, p.30; Brophy, *Some Problems*, pp. 518-520; Miller, p. 52; *ibid* 849, Horowitz.

⁸⁵⁶ Brophy, *Some Problems*, p. 519; Huges, Graham, *Reparations for Blacks?*, 43 N.Y.U. L. Rev., pp. 1063, 1064 (1968); Posner & Vermeule, pp. 712, 739; Chavez, Linda, *Promoting Racial Harmony, in The Affirmative Action Debate*, pp. 314-322 (George E. Curry ed., 1996); Verdun, p. 623

⁸⁵⁷ Hopkins, pp. 2542-2548.

⁸⁵⁸ 70 F.3d 1103 (9th Cir. 1995).

dismissed reparations claims brought against the government, stating that:

*“Cato proceeds on a generalised, class-based grievance; she neither alleges, nor suggests that she might claim, any conduct on the part of any specific official or as a result of any specific program that has run foul of a constitutional or statutory right and caused her a discrete injury. Without a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing.”*⁸⁵⁹

Similarly, the district court in the recent *“In re African-American Slave Descendants Litigation”*⁸⁶⁰ decision dismissed a number of consolidated claims in related cases brought against corporations.⁸⁶¹ The court wrote:

*“Plaintiffs’ alleged injury is derivative of the injury inflicted upon enslaved African-Americans over a century ago... This is insufficient to establish standing, and contrary to centuries of well-settled legal principles requiring that a litigant demonstrates a personal stake in an alleged dispute... Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago.”*⁸⁶²

Plaintiffs claim to have standing by postulating that they were slave descendants and added that as the rightful heirs of their ancestors’ assets, they suffered injury and also because their ancestors were not compensated for their labour.⁸⁶³ The court’s objection to this claim of the economic wealth of the ancestors’ labour is conjectural. The assumption that they would be the beneficiaries of their ancestors’ wealth upon their demise remains an assumption.⁸⁶⁴ The court also ruled that the plaintiffs did not satisfy the requirements for third party standing: *“Plaintiffs have not alleged a legally sufficient relation to their ancestors. All that plaintiffs allege is a genealogical relationship, and more is required under the law in order to confer third-party standing.”*⁸⁶⁵

⁸⁵⁹ 70 F.3d (9th Cir. 1995), pp.1109-1110.

⁸⁶⁰ *Slave Descendants Litigation*, 375 F. Supp. 2nd 721 (N.D. Ill. 2005).

⁸⁶¹ *ibid* 860, pp. 721, 770-780; See *In re African-Am. Slave Defendants Litigation*, 304 F. Supp. 2nd 1027 (N.D. Ill. 2004); Sebok, Anthony, *The Lawsuit Brought by African-Americans Seeking Compensation from Corporations for the Wrongs of Slavery: Why the Opinion Dismissing the Suit is Unpersuasive*, Findlaw, Aug. 8, 2005; Robinson, *Corporate Responsibility*, pp. 266-368; Wenger, pp. 244-248.

⁸⁶² *ibid* 860, pp. 748, 752.

⁸⁶³ *ibid.*, p. 748.

⁸⁶⁴ *ibid.*, p. 748.

⁸⁶⁵ *ibid.*, pp.752-753.

While act attenuation states that a claimant has suffered no legally perceptible harm, victim attenuation asserts that the claimant is a person who should not bring a claim at all. In the relation to descendant-based reparation suits, victim attenuation states that modern claimants are insufficiently linked to harmed parties, thus relying on act attenuation. In the context of slave-based reparation, victim attenuation does not depend on act attenuation but rather on the intergenerational gap itself and on the idea that modern claimants are not representatives of slaves, who may have themselves once had colourable claims. Consequently, victim and act attenuation are interrelated.⁸⁶⁶ It should be noted that victim attenuation defences also apply to both tort and unjust enrichment claims and victim attenuation has featured prominently on both sides of the Slave Descendant litigation and both concepts have found their place in courts due in part to victim attenuation.⁸⁶⁷

9.3.2.3 Wrongdoer Attenuation

The wrongdoer attenuation exists because the present day citizens of U.S.A. and governments may not be closely related to slave owners, suggesting that perhaps they should not be required to pay for harms caused by slavery⁸⁶⁸ because many modern European Americans are not descendants of slave owners and therefore have no apparent direct connections to them.⁸⁶⁹ All living descendants are a generation or more removed from slave descendants.⁸⁷⁰ All these uncertainties compound the task of apportioning blame to living descendants. Just as Vincene Verdun sums up the concepts underlying wrongdoer attenuation:

“From the dominant perspective, it would be unfair to make all white people or society pay for slavery because that would necessarily include people who did not participate in the wrong. These people include whites who are descendants of abolitionists and non-slaveholders, and immigrants, or descendants of immigrants, who came to this country after slavery was abolished; post slavery immigrants cannot be connected with a wrong associated with slavery.”⁸⁷¹

⁸⁶⁶ *Slave Descendants Litigation*, 375 F. Supp. 2nd (N.D. Ill. 2005) p. 752 ; Wenger, p. 296.

⁸⁶⁷ *ibid.* pp. 721, 770-780.

⁸⁶⁸ Brophy, *Some Problems*, p. 519; Matsuda, p. 375; Posner & Vermeule, p. 736; Hall, p. 30.

⁸⁶⁹ *ibid.*, Brophy, p.519; Miller, p. 52; Verdun, p. 629.630; Zengerle, Jason, *Lost Cause*, *New Republic*, August 2, 2004, p. 14; Darvis, Carter, *Race and Reparations*, *City Mag.* (Tuscaloosa, Ala.), April 24, 2004, p. 5.

⁸⁷⁰ Sebok, *Two Concepts*, p. 1419-1420.

⁸⁷¹ Verdun, p. 630; Massey, p. 162; Brophy, *Some Problems*, p. 504.

Wrongdoer attenuation underdetermines the moral force of reparations arguments, which are in most cases advanced or presented as a demand for justice.⁸⁷² Wrongdoer attenuation arguments maybe statistical, such as noting a number of people who have arrived in the country since 1865, the percentage of the population descending from post-bellum immigrants. While victim attenuation maybe concerned with unjustified windfall, wrongdoer attenuation reminds us of the image of an unjustified penalty.⁸⁷³ Eric Posner and Andrea Vermeule “*argue that it is a tradition in the U.S.A. that individuals are not blame worthy for acts over which they have no 196ceptic.*”⁸⁷⁴

Group sanctions are an exception.⁸⁷⁵ Representative Henry Hyde, the then chairman of the House Judiciary Committee, argued: “*The notion of collective guilt for what people did (200-plus) years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did (own slaves) generations before I was born.*”⁸⁷⁶

The political wrongdoer attenuation argument is couched in the moral language of wrong and right, rather than in legal language.⁸⁷⁷ Similar moral inflected arguments are used by many prominent media critics of reparations.⁸⁷⁸ Wrongdoer attenuation is not strictly a causation argument but rather an attack on the identity of the party against whom claim is made. Wrongdoer attenuation intersects with other kinds of attenuation, including act attenuation in various ways.⁸⁷⁹

The weight of wrongdoer attenuation arguments vary with a number of factors, primarily, the identity of the party against whom a claim is made.

⁸⁷² Brophy, Some Problems, p. 519; Miller, p. 49-52; Harris, Lee A., Political Autonomy as a Form of Reparations, 29 S.U. L. Rev., p. 25 (2001); Harris, Lee A., “Reparations” as a Dirty Word: The Norm Against Slavery Reparations, 33 U. Mem. L. Rev., p. 409 (2003).

⁸⁷³ Waldron, Jeremy, Superseding Historic Injustice, 103 Ethics, p. 4, 26-27 (1992); Posner & Vermeule, pp. 730-731; Horowitz, p. 9.

⁸⁷⁴ Brophy, Some Problems, p. 548 (American law ties legal liability to moral culpability); Levinson, Daryl, Collective Sanctions, 56 Stan. L. Rev., pp. 345, 347-348 (2003); Posner & Vermeule, p. 699.

⁸⁷⁵ *ibid.* Levinson, D., pp. 347-349; Massey, p. 165.

⁸⁷⁶ Merida, Kevin, Did Freedom alone Pay a Nation’s Debt? Rep. Conyers Jr., John, Has a Question. He’s willing to wait a Long Time for the Right Answer, Wash. Post, November 23, 1999, p. C8; 136 Cong. Rec. S1312-03 (February 21, 1990).

⁸⁷⁷ Yamamoto, Eric, Racial Reparations: Japanese-American Redress and African-American Claims, 40 B.C. L. Rev., pp. 477, 494-497 (1998)

⁸⁷⁸ Armstrong criticises reparation movements as „ seeking to penalise our current government for what white slaveholders did centuries ago.” Williams, Armstrong, Presumed Victims, in Should America Pay?, pp.167, 170; Compare McWhorter, John, Against Reparations, in Should America pay? P. 191; Horowitz, David, p.1; Brophy, Cultural War, p. 1201; Malkin, Michelle, Get Out Your Reparations Calculator, TownHall.com, August, 15, 2002, available at <http://www.townhall.com/columnists/michellemalkin/mm20020815.shtml>; Wenger, p.299

⁸⁷⁹ Twerski & Sebok, p. 1398; Wenger, Kaimipono David & Hoffman, David A., Nullificatory Juries, 2003 Wis. L. Rev. p.1115, pp.1148-1156.

Many reparation's claims are brought against corporations, these corporate entities may in fact be the same legal entity as that which originally harmed slaves.⁸⁸⁰ Because this strategy side tracts wrongdoer attenuation, many reparation cases involved such long-lived entities.⁸⁸¹ While this move may lessen wrongdoer attenuation, it can increase act attenuation, since the particular corporate entity against whom the suit is brought maybe removed from direct participation in harmful act.⁸⁸² Victim attenuation and wrongdoer attenuation maybe a less compelling defence against claims of unjust enrichments because unjust enrichment claims are not based on the guilt of a particular defendant, but only a proof that he has been enriched. In spite of this advantage, wrongdoer attenuation concerns were expressed by the Slave Descendants courts as it dismissed reparation claim, noting that "*the allegations of plaintiffs' (complaint) do not link these defendants to the alleged harm*"⁸⁸³ and that the "*complaint is devoid of any allegations that connect the specifically named defendants of their predecessors and any of the plaintiffs or their ancestors*".⁸⁸⁴

9.3.4 Summary

The three types of attenuation concepts are usually used collectively, to suggest that reparation for slavery would not be appropriate. These critics are not only unique to the case of African-American reparations.⁸⁸⁵ Many scholars are of the opinion that attenuation fatally undercut the case for reparations and reflects also the judicial reality at present. In Slave Descendants, the court based part of its opinion in all three types of attenuation, namely wrongdoer attenuation — "*the allegations of plaintiffs' complaint do not link these defendants to the alleged harm*"⁸⁸⁶ – and act attenuation — "*plaintiffs' complaint is devoid of any allegations that any specific conduct of the defendants was a cause of the continuing injuries of which plaintiffs complain.*"⁸⁸⁷

⁸⁸⁰ Compare Robinson, Corporate Responsibility, pp. 338-342; Miller, pp.57-60.

⁸⁸¹ Coffee, John C., No Soul to Damn: No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev., p.386 (1981); Arlen, J., & Carney, W., Vicarious Liability for Fraud Based on Securities Markets: Theory and Evidence, 1992 U. Ill. L. Rev. p.691, pp. 699-702

⁸⁸² Bazylar, Michael J., Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. Rich. L. Rev., p.1, pp.204-206 (2000)

⁸⁸³ In re African-Am. Slave Descendants Litig., 375 F. Supp. 2d pp. 721,749 (N.D. Ill.2005).

⁸⁸⁴ *ibid.*, p.740.

⁸⁸⁵ Matsuda, p. 372; Posner & Vermeule, p. 699-711.

⁸⁸⁶ Slave Defendants Litig., 375 F. Supp. 2N p. 749, 740.

⁸⁸⁷ *ibid.* n. 886, p. 750.

It is evident that the problems of victim, wrongdoer and act attenuation certainly have been paramount in derailing reparations suits in the court.⁸⁸⁸

The application of all the three kinds of attenuation is a bottleneck for those seeking attenuation. Attenuation concerns operate in legal and moral domain to create doubts about the viability of any judicial or legislative progress towards reparations settlement.⁸⁸⁹ Various opinions in reparation literatures suggest that successful resolution of slave reparation litigations maybe a natural extension of other successful mass litigation, such as restitution to Holocaust victims or Japanese internees.

9.4 The Tort Law Analogy on Slavery Reparations, Landscape Examination of known Cases and Constitutional Requirements

9.4.1 Introduction

This sub-chapter will examine the current landscape of reparations for slavery, identifying the contour of reparations lawsuits, exploring the ability of tort law to help apportion moral culpability in reparations and above all, examining the constitutional requirements for past reparations lawsuits and incidents such as Jim Crow, Lynching, the Tulsa Race Riot, Japanese American Internship and many others. It will also, citing practical cases, assess the viability of obtaining reparations through tort and unjust enrichment claims by addressing issues such as causation, damages and also explore the obstacles presented by American Law Liberalism.

This sub-chapter will go beyond litigation argument to contemplate the ability of tort law to

⁸⁸⁸ Compare *Bells v. United States*, No. Civ. A. 301CV0338D, 2001 WL 1041792, p. *2 (N-D. Tex. Aug. 31, 2001); *Bey v. United States Dep't of Justice*, No. 95 Civ 10401, 1996 WL 413684, p. *1 (S.D.N.Y. July 24, 1996); *Langley v. United States*, No. C 95-4227, 1995 WL 714378, p. *2 (N.D. Cal. Nov. 30, 1995); *Himiya v. United States*, No. 94 C 4065, 1994 WL 376850, p. *2 (N.D. Ill July 15, 1994).

⁸⁸⁹ Forde-Mazrui, p. 685; Miller, p. 50-51: "*Reparations, on this account, involves a demand for restoration of the ill-gotten gains of slavery to the group that was wronged. In so doing, it suggests both a legal strategy and an emotionally compelling moral argument. The legal strategy requires us to identify the various ways that African-Americans were harmed by European Americans who profited from slavery and to sue for the repayment of those profits either to individuals or into some central fund for more general disbursement. The moral argument asserts that European Americans as a group were, and continue to be, responsible for the ills of the African American community. It is the power and simplicity of that moral claim that makes reparations at once so compelling an argument and so difficult for the vast majority of European Americans to endorse*"; Yamamoto, p. 518; Massey, p.157.

serve as a vehicle for framing discussions about moral culpability.⁸⁹⁰

There have been intensive discussions since 1980s in America about reparation for slavery and racial crimes and many scholars have been critical of the existing system – critical of American Law Liberalism and its seeming inability to provide the language for thinking about reparations.⁸⁹¹ The scholars, building on prominent precedents like Civil Liberty Act of 1998, which provided compensation for Japanese Americans interned during World War II, recognised that legislative reparations were possible and how it could be applied to handle interracial justice and also the Tulsa Race Riot.⁸⁹² In 1995, the Ninth Circuit Court of Appeals dismissed a lawsuit for reparations.⁸⁹³ In March of 2002, a class action case was filed in Federal District Court in New York⁸⁹⁴ and in February 2003, the victims of the 1921 Tulsa Race Riot filed a claim.⁸⁹⁵

⁸⁹⁰ Brophy, Alfred L., *Reparations Talk: Reparations for Slavery and the Tort Law Analogy* in Boston College Third World Law Journal, 1980, p. 81 (2004).

⁸⁹¹ Matsuda, Mari J., *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. (1987), p. 323; Bittker, Boris, *The Case for Black Reparations* (1973).

⁸⁹² Yamamoto, Eric, *Interracial Justice* (1999); see also Su, Julie A. & Yamamoto, Eric., *Critical Coalitions: Theory and Praxis*, in Crossroads, Directions And A New Critical Race Theory, (Francisco Valdes et al. eds., 2002) p. 379; Yamamoto, Eric K., *Conflict and Complicity: Justice Among Communities of Colour* 2 Harvard Latino L. Rev. (1997), p. 495; Yamamoto, Eric K., *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. (1997), p. 821; Yamamoto, Eric K., *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. (1998), p. 477; Yamamoto, Eric K., *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. Am. L.J. (1995), p. 33; The most ambitious of the state investigations was the commission that investigated the 1921 Tulsa Race Riot. The commission was remarkably successful in recovering an understanding of the riot's origins in the racial violence of the United States after World War I. Despite that history, however, there were no reparations paid; Compare Brophy, Alfred L., *Reconstructing the Dreamland: The Tulsa Riot of 1921* (2002).

⁸⁹³ Compare *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995); *Obadele v. United States*, 52 Fed. Cl. 432, 441, 444 (2002). Other recent cases seeking reparations for slavery have been dismissed. See *Abdullah v. United States*, No. 3:02-CV-1030, 2003 WL 1741922 (D. Conn. March 25, 2003); *Bell v. United States*, No. 3:01-CV-0338-D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. 2001); *Powell v. United States*, No. C94-01877 CW, 1994 U.S. Dist. LEXIS 8628 (N.D. Cal. 1994); *Jackson v. United States*, No. C94-01494 C/V, 1994 U.S. Dist. LEXIS 7872 (N.D. Cal. 1994); *Lewis v. United States*, No. C94-01380 CW, 1994 U.S. Dist. LEXIS 7868 (N.D. Cal. 1994). *Cf. United States v. Bridges*, 46 F. Supp. 2d 462, 463 (E.D. Va. 1999 *aff'd*, 217 E3d 841 (4d Cir. 2000); *Wilkins v. Commissioner*, 120 T.C.109 (2003).

⁸⁹³ See Plaintiffs' Complaint & Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y filed Mar. 26, 2002) available at <http://www.nyed.uscourts.gov/O2cv1862cmp.pdf>, in *Should America Pay? Pp. 354-366*; *Hurdle v. FleetBoston*, No. CGC-02-412388 (Cal. Super. Ct. filed September 10, 2002). These and other cases are discussed in Friedman, John S., *Corporate Bill for Slavery*, NATION, March 10, 2003, p. 6; See *In re African American Slave Descendant Litig.*, 231 F. Supp. 2d 1357 (J.P.M.L. 2002); *Cato*, 70 F.3d at 1106-11. It advances four main claims: that the plaintiffs lack standing, that the statute of limitations bars claims, that the claims are barred by the political question doctrine, and that the plaintiffs have not alleged facts sufficient to support a cause of action. Of those claims, the most damaging in my mind are the statute of limitations and lack of standing claims, which might also be considered as a common law problem—a lack of connection between those who are harmed and those who are asserting a claim. The standing problem might be cured fairly easily by identifying people who are descended from those who were employed as slaves by the defendant companies and their predecessors. There may still be problems, as the defendants argue, that descendants are not the proper claimants — that the claims must be asserted by a representative of the estate. See Memorandum in Support of Defendants' Joint Motion to Dismiss pp. 6-7, *In re African American Slave Descendant Litig.*, 231 F. Supp. 2d 1357 (N.D. I1. 2003) (No. CV 02-7764).

⁸⁹⁴ See *Plaintiffs' Second Amended Complaint, Alexander v. Oklahoma*, No. 03-CV-133 (N.D. Oklahoma filed April 29, 2003), available at [http://www.tulsareparations.org/Complaint 2nd.Amend.pdf](http://www.tulsareparations.org/Complaint%202nd.Amend.pdf); see also Staples, Brent, *Coming to Grips with the Unthinkable in Tulsa*, N.Y Times, March 16, 2003, § 4, p. 12; See, e.g., Harris, Lee A., "Reparations" as a Dirty Word: The Norm Against Slavery Reparations, 33 U. Mem. L. Rev. (2003), pp. 409, 435 ("To say the least, the literature on slavery reparations is threadbare.").

9.4.2 Lawsuits for Jim Crow

The movement for reparation for Jim Crow is the period between the end of reconstruction and the beginning of the modern civil rights movement when African-Americans were subject to state-sponsored discrimination in education, housing, employment, and public accommodations – aimed at the entire system of racial crimes during that era. Legislators and municipalities passed laws that limited voting rights, provided grossly disproportionate funding of schools and mandated racial segregation in housing and streetcars. Private actors limited employment opportunities. Collectively, government and private actions led to dramatically limited opportunity for African-Americans to rise economically and these discriminatory acts continued unabated. A United States Senator, James Henry Hammond referred to this situation as a “mud-sill” class: former slaves and their descendants became the “defenceless scapegoat” used for cheap labour while segregated from the live of the European American community.⁸⁹⁵ Thereafter, parallel communities developed with all its attendant evil.⁸⁹⁶

9.4.2.1 Constitutional Requirements

As can be deduced from the above stated various arguments, lawsuits as ground for reparations demands a class of plaintiffs, specific defendants and linked them together with a cause of action.⁸⁹⁷ An example is the Supreme Court judgement in a minority-owned construction businesses in city of Richmond v. J.A. Croson, Company:

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. Defining these sorts of injuries as “identified discrimination” would give local governments’ license to create a patchwork of racial preferences based on statistical generalisations about any particular field of 200ceptica... These defects are readily apparent in this case.

⁸⁹⁵ See Cong. Globe app., 35th Cong., 1st Sess. Pp. 68, 71 (1858) (speech of Senator Hammond, March 4, 1858); Ellison, Ralph, *Going to the Territory*, in *The Collected Essays OF Ralph Ellison* pp. 591, 595 (John F. Callahan ed., 1995) (“Having won its victory, the North could be selective in its memory, as well as in its priorities, while leaving it to the South to struggle with the national problems which developed following the end of Reconstruction. And even the South became selective in its memory of the incidents that led to its rebellion and defeat. Of course a defenceless scapegoat was easily at hand, but my point here is that by pushing significant details of our experience into the underground of unwritten history, we not only overlook much which is positive.) but we blur our conceptions of where and who we are.”); Munford, Clarence J., *Race and Reparations*, pp. 207-221 (1996).

⁸⁹⁶ *ibid* 895 Munford, pp. 207-221.

⁸⁹⁷ Alfred L. Brophy, *Some Conceptual and Legal Problems with Reparations for Slavery*, 58 N.Y.U. Ann. Surv. AM. L., p. 502-520 (2003).

*The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.*⁸⁹⁸

The linkage between harm and relief is inherent in American Law, which looked into individual plaintiffs and individual defendants. The Supreme Court has repeatedly stated in the 1980s and early 1990s that generalised societal discrimination cannot be the basis for supporting race-based affirmative action. Subsequently, the Supreme Court has imposed similar lawsuits-like restrictions on Congress's powers under Section Five of the Fourteenth Amendments referring to the limited power of findings of societal discrimination to support race-based actions.⁸⁹⁹ The Supreme Court decision in the case of *Grutter v. Bollinger* maybe a turning point in the requirement that a representative action must be linked to harm. As a matter of fact, *Grutter*, by finding that diversity itself is a compelling state interest,⁹⁰⁰ produces an independent ground for race-conscious action that is completely devoid of rectifying past discrimination. The importance of statutes of limitation played an important role in the Court's decision. It was argued that there is no reason why the race-conscious action should last 25 years as supposed to 10. In rejecting the attempt to find a non-racial basis in *Missouri v. Jenkins*, *Jenkins* supports a broad remedial program that may remove constitutional objections to reparations.⁹⁰¹ The *Grutter* decision may have a spillover effect particularly in the discussions of reparations with a tendency in recognising that diversity is a goal and moving away from consideration of the past, history of racial crimes and discrimination.⁹⁰² Though, reparations may continue to justify affirmative action, but now, that diversity opens up a separate rationale; there is less need for discussing it, however, the supposed victims of reparations and the people reparations will mostly help, perhaps not the same people, who may receive preferential treatments through diversity programs.

⁸⁹⁸ *City of Richmond v. J.A. Croson Company*, 488 U.S. (1989), pp.469, 499; *Wenger v. Jackson Bd. Of Educ.*, 476 U.S. (1986), pp. 267, 276-277 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.... [A] public employer ... must ensure that before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.').

⁸⁹⁹ *Shaw v. Hunt*, 517 U.S. (1996), pp.899, 909-910; *Adarand Constructors v. Pena*, 515 U.S. (1995), pp.200, 220; *Wygant*, 476 U.S. pp. 274-776, 288; *Bd. Of Trs. Of the Univ. of Ala. V. Garrett*, 531 U.S. (2001), pp. 356, 368-374.

⁹⁰⁰ *Grutter v. Bollinger*, 123 S. Ct. (2003), pp. 2325, 2339.

⁹⁰¹ *Missouri v. Jenkins*, 515 U.S. (1995), pp. 70, 88; Brophy, *Some Conceptual and Legal Problems with Reparations for Slavery* (2003), pp. 525-35; Posner & Vermeule, pp. 711-725.

⁹⁰² Stuart Eizenstat, *Racial Preferences as Slavery Reparation*. L.A.TIMES, March 31, 2003, p. B11.

9.4.2.2 Prerequisites for Jim-Crow Lawsuits

The success of a lawsuit particularly for reparation is premised on legal grounds that plaintiffs will have to show that they (or someone for whom they owe the right to sue) were injured, that the injury was caused by some persons who owe them a duty, and that the injury resulted in damage. And these must have occurred within the statutes of limitation.⁹⁰³

The Tulsa Riot Lawsuit seems particularly compelling because it fits into the context and framework that the law on reparations is able to recognise, because many plaintiffs can still be identified (more than 100 people still survived, those who were alive during the riot and were victimised by it), and there are identifiable defendants (the city and state). There are also evidently lines of action that were introduced in this case, which deputised hundreds of men who subsequently participated in the riot and also city and local units of the state-guard took part in the mass arrest of everyone in African-American section of Tulsa.⁹⁰⁴ Another legal problem encountered in reparations for slavery, particularly in the Tulsa Litigation is the statute of limitation. Some scholars argue that the statute of limitation is dispensable because courts were, de facto, not available at that time, when the African-Americans attempted to assert their legal right. Most of them were lynched, their homes and properties were destroyed by rioters, thereafter the riot, the Ku Klux Klan dominated and commanded the state of Oklahoma, the Tulsa and Oklahoma City Courts. This state of affair compelled the governor then to declare a martial law and conveyed a military tribunal to investigate the Klan. The subjugation and victimisation of African Americans, Native Americans, and Greek immigrants sponsored and carried out by the Tulsa police department, aggravated the situation.

One of the essential arguments by which a court can dispense with the statute of limitations is unavailability of relief:⁹⁰⁵

⁹⁰³ Fogarty, Paige A., *Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations for Slavery*, 9 CONN. INS. L.J. (2002), pp. 211, 224-241; Sebok, Anthony, *Prosaic Justice*, LEGAL AFF., Sept. 10, 2002, p. 51; Story, Justice Joseph, *A Discourse Pronounced at the Funeral Obsequies of John Hooker Ashmun, Esq.*, Royal Professor of Law in Harvard University, Before the President, Fellows, and Faculty in the Chapel of the University (April 5, 1833); Bates, Elizabeth Tyler, *Reparations for Slave Art*, 55 ALA. L. REV.

⁹⁰⁴ For more on *Tulsa Riot* see *Talking History*, (December 3, 2002), available at <http://talkinghistory.Oah.org/shows/2002/TulsaRiots.mp3>; See generally Brophy.

⁹⁰⁵ See *Bodner v. Banque Paribas*, 114 F. Supp. 2d (E.D.N.Y 2000), pp. 117, 134-135; *Rosner v. United States*, 231 F. Supp. 2d (S.D. Fla. 2002), pp. 1202, 1208; *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), the Ninth Circuit Court of Appeals invalidated a California statute that extended the period of limitations for victims of World War II-era forced slave labour on the grounds that the statute ran afoul of the Foreign Affairs Doctrine and was therefore unconstitutional. See *ibid.*; CAL. Civ. Pro. Code § 354.6 (West 2003); Brophy, Alfred L., *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 19 HARV. Blackletter L.J. (2004); Brophy, Alfred L., *Racial Legislation, Violence, and the Breakdown of Law in the Tulsa Riot Era* (2003).

*“Because courts were unavailable, we should not expect plaintiffs to have sought relief. We then enter into an equitable argument about whether the complete failure of the legal system to provide justice should, at least in limited circumstances, be remedied. Particularly where someone asserts claims based on heinous and discrete crimes, rather than general societal discrimination – the case for discarding the statute of limitations is compelling. In such a situation, the courts serve their intended function in ways that work well. Courts in the Tulsa riot cases can provide relief in limited cases where there are identifiable victims and defendants, where there is a well-defined cause of action, and where damages are proven with specificity and at the level of detail required in other lawsuits. When there is a claim for limited relief, where relief should have been available through the courts at the time, and where relief would have been available had the world been even minimally fair, riot victims or victims of other Jim Crow crimes have a compelling argument”.*⁹⁰⁶

Some scholars are of the opinion that there should be repose at some points so that institution, corporations, and people can move forward. Repose is however, a weak argument when weighed against the argument that there was never an opportunity – during the statute of limitations – to challenge the defendants or to hold them accountable.⁹⁰⁷ The decision whether to allow or not to allow the statute of limitations should be dependent on many factors: the availability (or unavailability) of relief at the time of the racial crime, the identity of the victims (and whether they are still alive), the identity of the defendants, the significant of the crime, the continuing impact of the crime on victims, and the quality of the evidence. Tulsa race riot appears to be a model and a strong case for reparations of some sort, either through the court or through the legislator. There are four determining factors for this argument, particularly in the case of Tulsa victims: (1) some of the victims are still alive, (2) the Tulsa riot is concentrated in time and place, (3) the government sponsored the harm and (4) promises were made at the time to help rebuild the city.⁹⁰⁸

9.4.2.3 Riots

The Tulsa case is at once compelling and at the same time limiting when weighed against larger reparations programs beyond Tulsa. For example, the East St. Louis riot of 1917, was a combination of racial hatred, fuelled by race-baiting politicians and the use of African Americans as strike breakers in the local iron and metal parking plants led the African

⁹⁰⁶ Brophy, Reparations Talk: Reparations for Slavery and the Tort Law Analogy, pp. 92-93.

⁹⁰⁷ See Weinrib, Ernest J., *Restitutionary Damages as Corrective Justice*. 1 Theoretical Inquiries L., p.1 (2000).

⁹⁰⁸ Brophy, Alfred L., Reparations Talk: Reparations for Slavery and the Tort Law Analogy, p. 93.

American community to take actions to protect itself.

The attack riot began when African Americans attacked an unmarked police car on the evening of July 3, convinced that it contained passengers or culprits who had shot into African American homes earlier that evening. The attack, which left a police officer dead, led to random attacks on African Americans working in the European American section of East St. Louis the next day. Subsequently, the African Americans were brutally attacked throughout the city by the state-guard in conjunction with the local police. The congressional investigation charged with the investigation blamed the local industries for using recent African American migrants from the South to keep wages low. The committee's report concluded:

*"The strike in the plant of the Aluminium Ore Company was caused by a demand on the part of the organized labor for an adjustment of wages, a reduction in hours and an improvement of conditions under which the men worked. The company refused to meet any of these demands, declined to discuss the matter with the workmen's committee, and added insult to injury by importing negro strike breakers and giving them the places of the white men . . . The bringing of negroes to break a strike, which was being peaceably conducted by organized labour sowed the dragon's teeth of race hatred that afterwards grew into the riot, which plunged East St. Louis into blood and flame."*⁹⁰⁹

East St. Louis case may defer from the Tulsa case because the riot victims here were compensated. And existing Illinois Statute gave victims of more violence a cause of action against the municipality where the violence took place. The statute was therefore, an attempt to give incentive to municipalities to protect their citizens against mob violence. This statute was an early form of strict liability and liability without regards to fault was also tested in the Supreme Court and the Supreme Court upheld the statute.⁹¹⁰ There are other well-known riots, like those in Chicago and Washington in 1919. For example, the Atlanta riot of 1906 may not be able to produce any survival still alive today or if they are, they would have to be at least 97 years old, yet the African American community in Atlanta suffered a great loss and also thereafter.

⁹⁰⁹ The Report Of The Special Committee authorised by Congress to Investigate the East St. Louis Race Riots, H.R. Doc. No. 65-1231 (1918), pp. 1, 15. Compare following books for Race Related Labour Conflicts: Arneson, Eric, *Brotherhoods of Colour: Black Railroad Workers and the Struggle for Equality* (2001); Grossman, James R., *Land of Hope: Chicago, Black Southerners & the Great Migration* (1989); Halpern, Rick, *Down on The Killing Floor: Black And White Workers in Chicago's Packinghouses* (1997), pp. 1904-1954.

⁹¹⁰ Compare *City of Chicago v. Sturgis*, 222 U.S. (1911), pp. 313, 322-324 (upholding the constitutionality of Illinois statute imposing liability on cities for three-quarter value of mob damage regardless of fault); see also *Horwitz, Morton, The Transformation Of American Law 1870-1960* (1992), pp 123-126 (discussing Justice Holmes's views on strict liability in tort law).

As John Gottschalk has advanced, there was substantial police involvement in the riot which was a catalyst and a re-enforcement of the racial segregation of Atlanta.⁹¹¹ There appear to be more questions than answers, for example, how does one repair that damage? What shape should the reparation for the riot look like if there are no more survivors?

9.4.2.4 Lynchings

The lynchings that shall be examined here are individual cases of lynching but supported in most cases and supervised by local officials. There are notable documented cases for example, in Oklahoma, where the Anthony General investigated cases of lynching in the early 1920. Though the investigations did not result in prosecutions, however, it provided important details about the role of government officials in lynching of African Americans. Empirically, as in case of many riots, one can identify victims (the family members of lynched victims) and governmental defendants. Reparation may take the form of payment to family members of the victim using the perpetrators of lynching as a yardstick to viewing the legacy of Jim Crow, one would understand how the whole system of racial legislation, extralegal violence, and private discrimination functioned.⁹¹²

The issue of legalised lynching poses a legal quagmire. What is to be expected of criminal defendants convicted of crimes evident before politically motivated judges, prosecutors and an inflamed jury? One might look to cases like *Moore v. Dempsey*, which arose out of the 1919 Elaine, Arkansas massacre for evidence of how legalised lynching worked.⁹¹³ However, the convicted 8 African Americans, who had been convicted unto death sentences for their role in that uprising was nullified.⁹¹⁴ The prosecutions of *Jesse Hollins*⁹¹⁵ and the *Scottsboro boys*⁹¹⁶ are further examples of biased proceedings. Reparations lawsuits throw more questions than answers in these cases.

⁹¹¹ Godshalk, John F., *In the Wake of Riot: Atlanta's Struggle for Order, 1899-1919*, pp. 35-39 (on file with Southwest Missouri State University); Compare Capeci Jr., Dominic J. & Knight, Jack C., *Reckoning with Violence: W.E.B. Du Bois and the 1906 Atlanta Race Riot* 62 J. S. HisT. (1996), pp. 727, 741-746.

⁹¹² Brophy, Alfred L., *The Tulsa Race Riot Commission, Apologies, and Reparations: Understanding the Functions and Limitations of a Historical Truth Commission*, in *Apologies and Truth Commissions* (Alexander Karn ed., 2004); Ifill, Sherrilyn S., *Creating a Truth and Reconciliation Commission for Lynching*, 21 L. & Inequality (2003), pp. 263, 309-311.

⁹¹³ *Moore v. Dempsey*. 261 U.S. (1923), pp. 86, 88-89.

⁹¹⁴ *Ibid.* pp. 91-92; Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, p. 97

⁹¹⁵ See *Hollins v. Oklahoma*, 295 U.S. (1935), pp. 394-395.

⁹¹⁶ Compare *Powell v. Alabama*, 287 U.S. (1932), pp. 45, 50-51; Carter, Dan T., *Scottsboro: A Tragedy Of The American South* (1969) (providing a narrative account of the Scottsboro case, addressing such issues as racism, radicalism, and the southern judicial system); Goodman, James L., *Stories Of Scottsboro* (1994) (telling the story of Scottsboro and addressing controversial issues ignored by past authors).

Can one sue for wrongful prosecutions? And if yes, what would be the standard? What if the defendants are dead? As David Levine has suggested, one form of reparations might be the individualised review of African Americans, who were convicted on questionable grounds.⁹¹⁷ The result herein may be the return of voting rights for those wrongfully convicted of felonies, which may also result in compensation for those wrongfully convicted.⁹¹⁸

9.4.2.5 Jim Crow Legislation

The examination here shall conceptualise lawsuits for Jim Crow on the basis of legislation particularly, in cases of disenfranchisement of African Americans. In this case, there are identifiable defendants: The state legislators that passed discriminating voting legislation and the state officers charged with implementing the legislation. Some of the victims are also still alive. Just after independence of Oklahoma, the Oklahoma legislator passed a restrictive voter registration's statute and in many cases, imposed ridiculously literacy tests for voting. For example, in *Guinn v. United States*, the Eighth Circuit Court of Appeals discussed several outrageous denials of voting rights.⁹¹⁹ In one instance, J. Hilyard, the principal of the Cimarron Industrial Institute, who had graduated from Alcorn A&M College in Mississippi, Lincoln University of Pennsylvania, and the Bryant & Stratton Institute in Buffalo, New York, was prevented from voting. As the court concluded, "*There is not the slightest room for doubt as to whether he could vote.... There seems no room for doubt that the defendants knew that fact.*"⁹²⁰ In other instances, African Americans who were entitled to vote because their ancestors had been entitled to vote were denied their rights.⁹²¹ In some instances, there were no literacy tests administered; African Americans were simply turned away.⁹²²

In reaction to these various miscarriage of justice, the Supreme Court nullified the Oklahoma grandfather's clause which denied voting rights for all those who could not read except for those people (and their descendants) who had been allowed to vote prior to 1866, in *Guinn v. Oklahoma* in 1915, it provided only a limited remedy: it stroke out the statutes.⁹²³

⁹¹⁷ Email from David I. Levine, Professor of Law, University of California at Hastings College of Law, to Alfred L. Brophy, Professor of Law, University of Alabama (Oct. 31, 2003).

⁹¹⁸ See Lopez, Alberto B., *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. Rev. (2002), pp. 665, 721-722 .

⁹¹⁹ *Guinn v. United States*, 228 F. pp.103, 109-110 (8th Cir. 1915).

⁹²⁰ *ibid.*, p.109

⁹²¹ *ibid.*, pp.109-110

⁹²² *ibid.*, p. 110

⁹²³ See *Guinn v. Oklahoma*. 238 U.S. 347, 363-64 (1915).

Subsequently, the Oklahoma legislator re-passed the voter registration statute, which again limited the right to register. That statute was also torpedoed in 1930. Though, the entire African American community suffered a harm, which could be compensated in some way⁹²⁴ but maybe seen as a claim for general societal discrimination, which is unlikely to succeed.⁹²⁵ Another area that may fair better in reparations is the case against municipalities that limited funding to segregated schools. Here also, there are identifiable victims (all the school aged students in an entire community who suffered the harm) and identifiable governmental actors (the bodies that provided inadequate fundings to African American schools). The questions here are more of a philosophical nature: What would the class action recover for the lost educational value? And in legal terms, damages would be difficult to determine and how much did the poor schooling limit students later job opportunities? Could there be a more limited recovery for negative unjust enrichment for the value of money saved by underfunding segregated schools? Such recovery may grossly underestimate the harm, but it might avoid other proof problems of linking education to later income.⁹²⁶

Some of these problems were tackled in the years after *Brown v. Board of Education* case⁹²⁷ where plaintiffs sought relief for segregated schools. Other segregation statutes include those that segregated libraries, that kept people segregated on railroads, on streetcars, and those that limited the aboard of people. Particularly intriguing, is the library segregation, which suggest that the European Americans would want to block access of African Americans to knowledge.⁹²⁸ The remedies for this segregation would be increased library facilities in the community, where the discrimination took place,⁹²⁹ because the African Americans suffered harm.

⁹²⁴ Compare Klarman, Michael J., *Race and the Court in the Progressive Era*, 51 *Vand. L. Rev.* 1998, pp. 881, 914-915; McCrary, Peyton, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics. 1960-1990*, 5 *U. Pa. J. Const. L.* 2003, pp. 665, 669-670; Tushnet, Mark V., *Progressive Era Race Relations Cases in their "Traditional" Context*, 51 *Vand. L. Rev.* 1998, pp. 993, 996-997; Compare *Cater v. Piphus*, 435 U.S. 247, 266 (1978); *Bell v. Southwell*, 376 F.2d 659, 664-65 (5th Cir. 1967).

⁹²⁵ See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 1989, pp. 469, 498; *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 1986, pp. 267, 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. ").

⁹²⁶ compare Brophy, p. 100.

⁹²⁷ 347 U.S. 483 (1954).

⁹²⁸ See LeFrancois, Arthur, *Our Chosen Frequency: Norms, Race and Transcendence in Ralph Ellison's Cadillac Flambe*, 26 *Okla. City U. L. Rev.* 2001, pp.1021-1022; Compare Graham, Patterson Toby, *A Right to Read: Segregation and Civil Rights in Alabama's Public Libraries, 2002*, pp.1900-1965.

⁹²⁹ See *ibid.* Graham, pp.1900-1965.

Redirection of library fund to promote education, this at least will repair for past Jim Crow discrimination in education.⁹³⁰ All these efforts require locating cases in which one can overcome statute of limitations defences, as well as locate substantive basis for recovery. All these hypothetical victories would then be intertwined with legislative reparations, which are not so bounded by the requirements of lawsuits. The damage and harm that the African Americans suffered are incontrovertible; however, defining particular individuals, businesses or entities, and culpability is difficult. The problematic legal issues of proof remain a herculean task. Notwithstanding, three types of solution comes to mind (1) disgorgement of benefits retained by the community (2) recovery in which specific proofs of loss is provable, and (3) recovery where community-based relief is appropriate. In each case, the onus of proof of loss is reduced and this can be applied to Jim Crow crimes. But in using tort law for reparations claims poses a lot of hurdles: statutes of limitation, sovereign immunity, identification of victims, identification of plaintiffs, causation, and measurement of harm. Conversely, tort law might provide the basis for apportioning moral culpability and as a framework for understanding the harm of slavery and its effect on the current generation.⁹³¹

9.4.2.6 Retrospective Analysis and Intentions

There have been an increase of civil rights litigations in the 20th Century and structural injunctions have redirected prisons and school systems to overhaul and reordering of American societies into a lawsuit.⁹³² Reparations' suits maybe a panacea to repairing the damage to particular plaintiffs who can show some kind of particularised harm.⁹³³ Other hurdles are the sovereign immunity and statute of limitations. Historically, reparation damage claims have had many more successes in the court system. Cases like the suit filed by Japanese-American interned during World War II in 1980s,⁹³⁴ and the recent claims by American soldiers, who were forced to work as slave labourers by the Japanese military during World War II had been successful. While there have been several

⁹³⁰ See *Palmer v. Thompson*, 403 U.S. 217, 228 (1971) The problem with these suits is that the behaviour was legal at the time. If the behaviour was legal, it becomes difficult to find a cause of action. See *U.S. Census Bureau*, 2000 Census of Population and Housing: Mississippi Summary Population and Housing Characteristics 74, tbl.4 (2003), available at <http://www.census.gov/lrod/cen2000/phc-1-26.pdf>.

⁹³¹ Compare Brophy, *Reparations Talk*, p. 103.

⁹³² Douglas, Davison N., *Reading, Writing and Race: The Desegregation of the Charlotte Schools* (1995); Yackle, Larry W., *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (1989)

⁹³³ *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)

⁹³⁴ Compare *Hohri v. United States*. 586 F. Supp. 769 (D.C. 1984), *aff'd*, 847 F.2d 779 (Fed. Cir. 1988); *Higashi v. United States*, 225 F.3d 1343, 1349 (Fed. Cir. 2000); *Kanemoto v. Reno*, 41 F.3d 641, 647 (Fed. Cir. 1994) (transferring claim of person who was forcibly relocated to Japan as part of "prisoner" exchange to Court of Claims); *Jacobs v. Barr*, 959 F.2d pp. 313, 321-322 (D.C. Cir. 1992); *Mochizuki v. United States*. 43 Fed. Cl. P. 97,98 (1999) (approving class action settlement for Japanese people living in Latin America who were interned during World War II).

notable successes, most often the successes involved a favourable ruling on a motion that keeps cases alive long enough for settlement.⁹³⁵ In 2003, the Supreme Court declared unconstitutional a California law that required insurance companies to disclose their connections (and those of affiliated companies) to insurance policies sold in Europe from 1920-1945.⁹³⁶ It was a legislative attempt to discover the connections between insurance companies and policies that were taken by the NAZIs.⁹³⁷ The President however, vetoed the act. This decision has little bearing on statutes that required U.S. Companies to disclose their dealings with slavery.⁹³⁸ Most pundits of reparations claims envisioned the real ordering of American societies: redistribution of wealth, and a breakdown of racism and European American privilege.⁹³⁹

“More than any other remedy, reparation transforms the material condition of recipients. Moreover, it connotes culpability: for a majority that rejects group hierarchy, harm, and responsibility, reparation is a radical redistribution of wealth, rather than a disgorgement and reallocation of an unjust acquisition, that exacerbates unrest. Reparation thus yield resistance, backlash, and “ethnic elbowing.” As it would strip their racial privileges along with their currency, reparation is opposed by all but the most altruistic whites. ⁹⁴⁰

In the case of European American privilege, the value of such privilege are the African-Americans living in poverty and are trapped in low-paying jobs.⁹⁴¹ Professor Wesley’s article in Boston College Third World Law Journal agreed with other scholars that the compensation for African American for the injustice suffered must be in monetary nature, sufficient enough to reflect not only the extend of unjust African American suffering, but also the need for African American economic independence from societal discrimination.

⁹³⁵ Compare *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d pp.173. 176 (2d Cir. 2001) *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d pp.139, 141 (E.D.N.Y.2000); *Sampson v. Federal Republic of Germany*. 250 F.3d 1145, 1146 (7th Cir. 2001); *Princz v. Federal Republic of Germany*, 26 F.3d pp. 1166, 1168 (D.C. Cir. 1994) *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370. 389-90 (D.N.J. 2001).

⁹³⁶ *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2379 (Supp. 2003).

⁹³⁷ Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (Supp. 2003).

⁹³⁸ *ibid.*, § 13812; Compare Haynes, V. Dion, *Report Names Slaves. Owners and Insurers*, Chi. Trib., May 2, 2002, § 1, p.1; *L.A. Council Moves Toward Slavery Law*, San Diego Union-Tribe., June 21, 2003, p. A6

⁹³⁹ Byrnes, Erin E., *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 *Ariz. L. Rev.*, 1999, pp. 535, 554 (“*Unmasking the operation of white privilege is essential to the goal of reaching equality under modern theories of affirmative action.*”); Harris, Cheryl, *Whiteness as Property*, 106 *Harv. L. Rev.*, 1993, pp. 1707, 1721 (“*White identity and whiteness were sources of privilege and protection; their absence meant being the object of property*”); Powell, John A., *Whites will be Whites: The Failure to Interrogate Racial Privilege*, 34 *U.S.F. L. Rev.*, pp. 419, 422-427 (2000); Brophy, *Reparations Talk*, p.109.

⁹⁴⁰ Bradford, William, “*With a very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 *Am. Indian L. Rev.*, 2002- 2003, pp. 1, 99-100.

⁹⁴¹ Kirby, Moss, *The Colour of Class: Poor Whites and the Paradox of Privilege* (2003); Thernstrom, Stephen & Thlernstrom, Abigail, *America in Black and White* (1997); Proctor, Bernadette D. & Dalaker, Joseph, *U.S. Census Bureau, Poverty in the United States 2 tbl.1 (2003) available at <http://www.census.gov/hhes/www/poverty02.html>*

Furthermore, freedom for African American people today means economic and security freedom. The ground for that freedom and security can be established through group reparations in the form of monetary compensation, along with free provision of goods and services to African American communities across the nation. But the guiding principles of reparations must be that of self-determination.⁹⁴² Others like Professor Asante suggested amongst others, educational grants, health care, land or property, and the combination of such grants. Reparations remedy should not be confined only to one-time cash payment.⁹⁴³ The realisation of these goals depend mostly in proving the relief and harm closeness and that relief should meet with dessert.⁹⁴⁴ There is still enormous homework to be done, so as to streamline American Law into line with ideas about group-based reparations. Even the most radical structural injunctions, such as the busing in *Swann v. Charlotte-Mecklenburg Board of Education* and *Keyes v. School District 1, Denver Colorado*, pale by comparison with what is necessary for reparations.⁹⁴⁵ The *de iure* segregation played an important part in the court decisions. The Supreme Court judgment was relevant in this case because it sought to place the children in the position they would have been in the absence of past *de iure* segregation and I quote, “*as with any equity case, the nature of the violation determines the scope of the remedy.*”⁹⁴⁶ In the Supreme Court Judgement in *Dayton Board of Education v. Brinkmann*,⁹⁴⁷ it states that the court must first determine how much past discrimination by the school board has led to segregation within the school system and then “*the remedy must be designed to redress that difference. Only if there has been system-wide impact may there be a system-wide remedy.*”⁹⁴⁸

From the above empirical datas, one can advance that every lawsuit demands a close connection between harm and relief and between wrongdoer and the person for whom Relief is to be granted and it would be extremely difficult for reparations’ advocates

⁹⁴² As Professor Asante has phrased the issue, “[O]ne way to approach the issue of reparations is to speak about *money*, but not necessarily about *cash*. Reparations will cost, but it will not have to be the giving out of billions of dollars of cash to individuals, although it will cost billions of dollars.” Asant, Molefi Kete. *The African American Warrant for Reparations: The Crime of European Enslavement of Africans and Its Consequences*, in *Should America Pay?* Pp. 3, 12; Westley, p. 470, (In the end, determining a method by which all Black people can participate in their own empowerment will require a much more refined instrument than it would be appropriate for me to attempt to describe here.”).

⁹⁴³ *ibid.* Asante, p. 12.

⁹⁴⁴ See Pyle, Jeffrey J., Note, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*. 40 B.C. L. Rev. 1999, pp. 787, 806; Westley, pp. 438-439.

⁹⁴⁵ *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 1973, p. 189; *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1971, pp. 1, 15, 29-31.

⁹⁴⁶ *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. p. 16 (1971); Professor Laycock has phrased the issue similarly in Douglas Laycock, *Modern American Remedies* (2d ed. 1994), pp., 11-15, 1079, 1080, 1179; See Brophy, *Some Concepts*, 2003, pp. 517-519.

⁹⁴⁷ 433 U.S. 406 (1977).

⁹⁴⁸ *ibid.*, p. 420.

to gain relief in many instances despite examples like *Brown v. Board of Education*.⁹⁴⁹ It would be difficult for lawsuits to rework fundamentally the distribution of power and wealth in the United States. Nevertheless, there is a ray of hope that tort suits are a vehicle for limited reparations in specific context – like the Tulsa Riot of 1921 or cases, where descendants of enslaved people were able to identify the successors to the companies that benefited from their ancestors’ labour. Tort suits are also a harbinger for moral culpability and liability.

Opponents of reparation emphasize the limitations of lawsuits: Professor Hylton postulated a well thought out attack on tort laws; inadequacy for compensating for the evils of slavery.⁹⁵⁰ Hylton sees slavery as non-government issue. Defining slavery as essentially private conduct that carries with it an important implication: it limits federal and state governments’ liability. He says slavery is solely the fault of private actors and that those private actors are all gone to the life beyond, a logical conclusion is that there is no one from whom descendants of slaves might appropriately seek compensation. But the fact that slavery was legal – indeed protected by the federal constitution in the years before the 13th amendments – may have other implications for the imposition of liability under tort law. Or, as Hylton says,

*“There is no getting around the fact that any attempt to apply tort law to slavery means applying today’s law to an institution that existed within the law a century and a half ago.... Applying today’s law to events that happened within the law yesterday opens up a messy can of worms, to say the least. And once courts go along with plaintiffs and open up that can, it is not easy to see why the plaintiff’s approach should be confined to slavery lawsuits.”*⁹⁵¹

Hylton suggested one all embracing solution: to view slavery as an institution that was not legal *“the appropriate model is in which warlords have displaced the state and held it at bay while they imposed their own law on their subjected populations.”*⁹⁵² Well, contrary to these assertions, there were no conquering warlords and the vast majority of voters, Northern and Southern, embraced slavery. The fact that slavery was repealed by federal and state laws does not prevent the attempt to rectify this ugly situation through lawsuits.

⁹⁴⁹ 347 U.S. 483 (1954).

⁹⁵⁰ Hylton, Keith, *Slavery and Tort Law*, p. 10 (Boston University School of Law. Working Paper No. 03-02, 2003 Social Science Research Network Election Paper Collection) available at http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK012803.pdf; see also Massey, Calvin, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. Third World L.J. 157 (2004), pp. 158-161.

⁹⁵¹ Hylton, p. 10.

⁹⁵² *ibid.* p. 11.

Hylton decisive argument is that slavery did not lead to the vast disparities in wealth and educational achievements between the African and European Americans communities today, rather he blames subsequent events of Jim Crow, yet other opponents of reparations blame the African culture. People like Professor McWhorter and Abigail and Stephen Thernstrom suggested that the high rate of single parents is responsible for the difference in wealth amongst the African Americans.⁹⁵³ It should also be recalled that because of the magnitude of harm, slavery was a catalyst for other harms, namely, false imprisonment, assault and battery wrongful death and common law enslavement.⁹⁵⁴ It is necessary to mention here that one of the virtues of lawsuits is that courts can impose retroactive liability more easily than could a legislator. Correspondingly, whether a claim also exists against it that permitted slavery because the states established the legal framework that permitted the exploitation of the African Americans, they enacted laws that permitted group of people to enslave a particular group of people, separated from their families, denied education – just about everything that can be done to destroy a person’s humanity was contemplated or mandated by the laws of state slaves.⁹⁵⁵ Claims of reparations can be established here as soon as the problem of sovereign immunity is taken care of. Finally, the task of reparations is to create a line of causation linking past harm to present condition and to harmonise such a causal line into a framework that courts will be willing to recognise.

Professor Hylton also touched on the 19th Century’s limitations of wrongful death claims. Throughout the slavery era, owners did have a cause of action for someone who killed their slave.⁹⁵⁶ Some courts were willing to impose liability in the absence of a statute and that legislators frequently imposed liability by statutes.⁹⁵⁷ These facts suggest that it is not unreasonable to impose liability for tort associated with slavery.

⁹⁵³ Mcwhorter *John*, *Losing the Race: Self-Sabotage and Black Culture*, 2000, pp.9-10; Thernstorm & Thernstorm, *ibid.* 84, pp. 337-341.

⁹⁵⁴ Brophy, *Reparations Talks*, p. 119

⁹⁵⁵ Harriet Beecher Stowe, *a Key to Uncle Tom’s Cabin* (William Loren Katz ed., Arno Press 1968) (1854), pp. 124-223.

⁹⁵⁶ *Hedgepeth v. Robertson*. 18 Tex. 858 (1857) ; *Harvey v. Epes*. 53 Va. (12 Gratt.) 153 (1855) ; *Gray v. Crocheron*, 8 Port. 191 (Ma. 1838) ; *Harrison v. Berkley* 32 S.C.L. (1 Strob.) 525 (S.C. 1847) ; *Delery v. Mornet*. 11 Mart. (o.s.) 4 (La. 1822).

⁹⁵⁷ *Knightstown & S.R. Co. V. Linsay*, 8 Ind. 278 (1856) (Indiana statute) ; *Doedt v. Wiswall*, 15 How. Pr. 128 (N.Y Stip. Ct. 1857) ; *Langlois v. Buffalo & Rochester R.R. Co.*, 19 Barb. 364 (N.Y Sup. Ct. 1854) ; *Dunhene’s Adm’x v. Ohio Life Ins. & Trust Co.*, 12 Ohio Dec. Reprint 608 (Ohio Super. Ct.1856). The common law’s reasons for refusing compensation for wrongful death are surveyed in *Connecticut Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 1856, p. 265. See also *Carey v. Berkshire R. Co.*, 55 Mass. 1848, p. 475.

One can infer that even at that time, law protected masters' interests in slaves' lives. It is therefore not difficult to recognise a cause of action that protects the slaves' interests in their own lives.⁹⁵⁸

9.4.2.7 The Essential Ingredients of Unjust Enrichment in Relation to Slavery Reparations

The legal searchlight shall be turned to this concept so as to ascertain whether the slave owners were unjustly enriched as a result of their exploitative methods and actions against the slaves and if the answer is in the affirmative, what are the legal implications.⁹⁵⁹ As the American Law Institute in a draft of reinstatement on restitution and unjust enrichment points out that, "*numerous cases in which natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident.*"⁹⁶⁰ The drafters point out the difference between moral and legal objections to retention of property and argued that only transactions, where there is "unjust enrichment" contain a necessary prerequisite for a lawsuit.⁹⁶¹ It could be argued that the benefits of slavery were conferred under duress and left the receiver without title.⁹⁶² One can also argue and conclude that the benefits were obtained by tort, such as conversion or trespass.⁹⁶³ In both cases, one can infer that slavery was recognised as legal in its time and therefore, a court approaching a claim of unjust enrichment might well conclude that during the period when slavery was recognised as legal in the United States, benefits obtained from enslaved people were not recoverable in restitution. Some recent precedents suggest however, that the court will examine a transaction to ask whether it is legal in some fundamental sense, rather than merely technically or temporarily legal. In *Altmann v. Republic of Austria*,⁹⁶⁴ the Ninth Circuit Court of Appeals revived a claim for six Gustav Klimt paintings that had been stolen from a family during the Holocaust.

⁹⁵⁸ Brown, Michael K. et al., *Whitewashing Race: The Myth of a Colour Blind Society* (2003); See also Kershner, Stephen, *Reparations for Slavery and Justice*, 33 U. Mem. L. Rev. 277. 278-82 (2003) (arguing that contemporary slave descendants are not unjustly harmed by the enslavement of their ancestors).

⁹⁵⁹ Laycock, Douglas, *The Scope and Significance of Restitution*, 67 Tex. L. Rev., 1989, pp. 1277, 1279-1283; Restatement (Third) of Restitution and Unjust Enrichment § I (Discussion Draft, Mar. 31, 2000).

⁹⁶⁰ *ibid.*, Restatement, Para. I .

⁹⁶¹ *ibid.*, Restatement, Para. I .

⁹⁶² *ibid.*, Restatement, Para. 14(3) ("If a wrongful threat is tantamount to physical compulsion, a transfer induced thereby is void, and the purported transferee obtains no title.").

⁹⁶³ There is not yet a section exploring the nature of those breaches, but they are scheduled to appear as § 37. *Ibid.* p. xxi.

⁹⁶⁴ 317 F.3d 954 (9th Cir. 2002).

Though the transactions maybe legal then, the court however concluded that the transaction could not be legal under international law, and consequently, the heirs, the people from whom the property was taken might assert an unjust enrichment claim for its return.⁹⁶⁵ As far as the case of slavery is concerned, a similar unjust claim could be inevitable because unjust enrichment addresses the cases of benefits or tangible property that is retained, there is a connection between past wrongdoing and present benefit that is evident than many reparations cases. Furthermore, the moral claim that one person has property that rightfully belongs to another is easier to establish than the claim that taxpayers who may have no benefits and also who took no part in the wrongdoing must be held accountable. However, there is a knotty question to be answered in unjust enrichment claim for slavery – that slavery was legal at the time. As far as former legality of slavery is concerned the court is required to examine the legality of a system that has since been rejected and was evidently subjected to challenge at the time. For example, it was recognised within the southern legal system that property rights in humans is the basis for the slave system. Claimants are now asking for an accounting of the benefits of that labour. The legality of slavery, the recognition that slaves produced something valuable, can be the basis for a reparation claim.⁹⁶⁶

There are two claimants in unjust enrichment model: the descendants of the slave and the subsequent purchaser of the property; often both are innocent, but the property must be apportioned to one person or the other. There is a compelling equity argument in the case of the current possessor, who is gratuitous beneficiary of the original wrongdoer. In this case, the statute of limitations does not have compelling argument for disgorging a benefit from someone, who has received it unjustly. However, if slaveholders were still alive, the case against unjust possessors will be compelling and as a matter of fact there are still some who hold property from slaveholders – gratuitous beneficiaries of those slaveholders.⁹⁶⁷ Professor Palmer argued that a case in which *“one who is the innocent recipient of a benefit that came from the plaintiff by virtue of a wrongful act of a third person is obliged to make restitution, unless he gave value for the benefit.”*⁹⁶⁸

⁹⁶⁵ 317 F.3d 954 (9th Cir. 2002)

⁹⁶⁶ *Wilkinson v. Moseley*, 30 Ala., 1857, pp. 562, 573-577; *Carter v. Streater*, 49 N.C. (1 Jones) 1856, pp. 62-63; *Seay v. Marks*, 23 Ala., 1853, pp. 532, 536-537; *Harrison v. Lloyd*, 17 S.C.L. (9 Rich.) pp. 161, 166-167 (S.C. 1851); *Lacoste v. Pipkin*, 11 Miss. (13 S. & M.) 1850, pp. 589, 591; *Knox v. N.C. R.R. Co.*, 51 N.C. (1 Jones) 1859, pp. 415, 416-417; *Helton v. Caston*, 8 S.C.L. (2 Bail.) 95 (S.C. 1831) (The world of property relationships established that, while owners might have virtual license to treat their slaves anyhow they would like, whites who rented” slaves from their owners were responsible to the owners for harm to the slave).

⁹⁶⁷ See Brophy, 2003, pp. 514-515.

⁹⁶⁸ 1 George Palmer, *Law of Restitution* § 2.20 (1978).

When a case of a beneficiary of a gratuitous transfer is established, there is at least the possibility of treating that beneficiary as standing in the shoes of, and taking the property subject to same obligations as, the grantor.⁹⁶⁹ The following thesis may help in summarising this sub-chapter:

- The labour of enslaved people was unjustly converted and used to build a plantation home or some other tangible property that continues to exist today; that labour can then be traced into a new form-the plantation house.
- Particularly in cases where the property is gratuitously transferred, there is a claim between descendants of the enslaved people and the current possessor of the property.
- Even in cases where the property has been sold, the people whose labour was converted might have a claim against the subsequent purchaser. In a limited number of cases, constructive trusts imposed on real property allow the trust beneficiary to trump the claims of a bona fide creditor.⁹⁷⁰

Assuming reparations could be made on tort lawsuits, the extent at which slavery affected each subsequent generation of African Americans must be examined. The undermentioned several models of liability in a suit by descendants of enslaved people may help in the examination:

- In the nature of a survival action: damages are calculated according to the damage done to the descendant's ancestors.
- In the nature of loss of consortium claim: damages are the harms that slavery imposes on the subsequent generations, which involve proof of damage due to torts of slavery.
- In the nature of unjust enrichment: damages are the benefits ancestors conferred on others, which are still retained.⁹⁷¹

The degree by which the harm of slavery affects the descendants of slaves remains problematic. However, one of the ways to ameliorate this problem is to look at the current gap between African-American and European American income. For Example, the measure of the harm to each individual slave is the difference between that slave's descendants' income and the average income of European Americans.

⁹⁶⁹ See *U.S. for Use of Palmer Constr., Inc. v. Cal. State Elec.*, 940 F.2d 1260, 1262 (9th Cir. 1991); Brophy, *Reparations Talk*, p. 129.

⁹⁷⁰ Brophy, *Reparations Talk*, p. 129 (Such cases are limited, but on occasion either constructive trust or equitable liens can be used to trump a prior, bona fide purchaser or creditor).

⁹⁷¹ Brophy, *Reparations Talk*, p. 130.

Another reasonable formula is calculating the difference between a descendant's income and the amount necessary to reach the poverty line. These two formulas may not form a watertight solution to calculating the harms of slavery and reparation because it does not necessarily dispense justice for individuals of slaves who earn above the European American income. Secondly, these formulas cannot address other legacies of slavery and Jim Crow years of under-compensated labour, lost educational opportunities, and the lack of hope that is derived from it. But the difference in current income is measurable and justifies that the harms of slavery is a continuum that needed to be addressed.

9.4.3 Summary

Two ways emerged in the following analysis on the application of tort law over reparations for racial crime. Firstly, tort law is a way for providing substantive relief through the court. Particularly, where there are identifiable plaintiffs, people who have sufficient connection to the most immediate victims of slavery or Jim Crow, and identifiable defendants, municipalities, people and corporations⁹⁷² who can be identified and held liable. Alternatively, Verdun suggested an economic and emotional injury for reparations: the failure to pay for slaves' labour and "*the presumption of inferiority, devaluation of self-esteem, and other emotional injuries, pain, and sufferings that resulted from the institution of slavery.*"⁹⁷³ Verdun proposes two ways of measuring the economic injury to individuals, which appear in keeping with the African American perspective, although she maintains they are consistent with the dominant perspective: "*establish who would have gone to college if the opportunity had been available and then compensate them;*" or "*distribute the compensation for all students who would have entered professions, calculated by comparative ratios with a white control group, to all African Americans who were undereducated.*"⁹⁷⁴ There is also a compelling argument in discarding the statute of limitations and in those instances, lawsuits may offer some relief to victims.

⁹⁷² See Ogletree Jr., Charles J., *Tulsa Reparations: The Survivors' Story*, 24 B.C. Third World L.J., p. 13, 23-24 (2004); Spielman, Fran, *Company Admits its Ties to Slavery*, Chi. Sun-Times, Nov. 24, 2003, p. 9.

⁹⁷³ Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TULANE L. REV., pp. 631-632 (1993).

⁹⁷⁴ *ibid.* p. 643. Verdun argues that every loss to an individual also represents a loss to the larger African American community. *Ibid.* p. 644 ("*It is easy to see that if injuries to all individuals who could be identified under the dominant perspective were evaluated from the African-American consciousness, every African American would be an injured party as the result of the collective harms caused by discrimination against such individuals.*"). She does not offer a formula for measuring what those harms might be. And, while few would deny that the community is harmed by harm to its constituent members, it is very difficult to measure that harm. And such a remedy would run up against the Supreme Court's complaint in *Richmond v. J.A. Croson*, 488 U.S. pp. 469, 499 (1989), that "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.... See also *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999).

Tort law can also provoke and guide discussions of moral culpability, since tort laws are used by scholars in analogies to apportion moral culpability to governmental entities and the community. The tort law can also be used to buttress the connection between past victims and current victims and those who are currently suffering the harms of slavery and Jim Crow. Ironically however, there is notable disinterest amongst the American people.⁹⁷⁵ But whether reparations legislation is the panacea to address both inequality in income and educational opportunities, the plagues of the African Americans and European American communities should be the best or effective solution of achieving racial reconciliation or other humanitarian programs to appease the grieved, is a matter of conjecture.⁹⁷⁶

⁹⁷⁵ Compare Singer, Joseph William, *Entitlement: The Paradoxes of Property*, 2000, p. 194.

⁹⁷⁶ See Brophy, Alfred L., *The Cultural Wars over Reparations for Slavery*, 59 DePaul L. Rev., 2004, pp. 1181-1214 for further discussion on the conflict over the goals of reparations.

9.5 The Application of Restitution in Slavery Reparations, Genealogical Determinism and other Concepts

9.5.1 Introduction

Restitution as a “*body of law that deals with benefit-based liability or benefit-based recovery*”⁹⁷⁷ has become an increasingly powerful tool in the quest, particularly for mass wrongs. This definition as it is common with jurisprudence is not without controversy. Because restitution is also defined as “*the obligation to account for certain benefits (though not to others) obtained at the expense of another party.*”⁹⁷⁸ Those parties may have constituted one party who mistakenly received a payment and the party for whom the payment was intended,⁹⁷⁹ or one party who wrote a book that violated a confidentiality agreement and the second party with whom that agreement was signed.⁹⁸⁰ These cases usually involve bipolar disputes that overlapped with contract and property disputes, though, restitutorial law lacks the coherence found in other cases of private law.⁹⁸¹

Two classical examples of restitution come to mind here – the Holocaust, which I have dealt with and the Tobacco Industry Restitution, which I shall address subsequently.⁹⁸² According to Sebok “Both the Holocaust and tobacco litigations are examples of a phenomenon I have described elsewhere under the rubric of “mass restitution.”⁹⁸³ The basic definition of a mass restitution claim is that it is a suit for restitution brought against a private party (usually a corporation) for the monetary equivalent of property or labour taken from a large number of people during a period when the wrongdoing leading to the unjust enrichment was accepted by the society in which it occurred (or at least by those who controlled that society). A further feature of the mass restitution suits is that they are a result of a change in attitudes within society itself — not only is the earlier period recognized as wrong, but it is viewed as a period of great wrongdoing that was made possible because of the breakdown of the political system, a fact, which helps to justify, in the eyes of later generations, the use of law.”⁹⁸⁴

⁹⁷⁷ Kull, Andrew, *Rationalizing Restitution*, 83 CAL. L. REV. pp. 1191, 1195 & n. 14, 1241 (1995) (Kull argues that American lawyers today have no idea what restitution is).

⁹⁷⁸ Kull, Andrew, *Rationalizing Restitution*, 83 CAL. L. REV., pp. 1191, 1192 (1995).

⁹⁷⁹ Citibank, N.A. v. Warner, 449 N.Y.S.2d 822, 824 (N.Y. Sup. Ct. 1981)(requiring restitution from a woman in whose account a check for \$23,000 was mistakenly deposited and who subsequently wrote checks drawing on the account); see also Andrew Kull, *Defenses To Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev., pp. 919-920 (2001) (discussing the merits of a restitution claim based on mistaken payment).

⁹⁸⁰ *Snepp v. United States*, 444 U.S. 507, 523 (1980)

⁹⁸¹ *ibid.* 977, Kull, Andrew, pp. 1194-95; Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 892 (1999).

⁹⁸² Sebok, Anthony, Two Concepts of Injustice in Restitution for Slavery, 84 Boston University L. Rev., 1922, p.1406.

⁹⁸³ Compare Sebok, Anthony, *A Brief History of Mass Restitution Litigation in the United States*, in *Calling Power to Account: Law's Response to Past Injustice* (D. Dyzenhaus & M. Moran eds., 2004)

⁹⁸⁴ Sebok, Anthony, Two Concepts of Injustice in Restitution for Slavery, 84 Boston University L. REV, 1922, p.1406.

9.5.2 Tobacco Litigation

The state tobacco Litigation was instituted after forty years of attempt to hold the tobacco companies responsible for manufacturing a defective product.⁹⁸⁵ While some suits alleged that cigarettes were defective because they were associated with decease, other suits focussed on the failure of the tobacco industries to warn the public about the risks of tobacco use, ranging from the health effect of smoking to the addictive properties of nicotine.⁹⁸⁶ Though there were minimum victory, however, personal injury claims arising from the manufacturing and marketing of tobacco products did not succeed.⁹⁸⁷ Most of the suits failed because of the inability of the state to justify enough liability of the tobacco company.⁹⁸⁸

In 1994, Mississippi instituted Medicaid restitution action against the tobacco companies.⁹⁸⁹ The suit accused the tobacco companies of unjust enrichments because the Mississippi Medicaid payment saved the tobacco companies the money they ought to have paid to smokers.⁹⁹⁰ Within a short period of time, many other states also filed similar law suits. The Mississippi lawsuit settled in July of 1997 for \$3.6 billion to be paid by the tobacco companies over twenty-five years.⁹⁹¹ Florida settled its suit against the industry in August 1997 for \$11.3 billion,⁹⁹² Texas settled its suit in January 1998 for \$15.3 billion⁹⁹³ and Minnesota finally settled its suit for \$6.1 billion on the eve before the jury was to render its verdict. Following this trend, the Attorneys General from the remaining states negotiated a \$206 billion global industry settlement in reimbursement for Medicaid and related health care costs.⁹⁹⁴ Though, the state claims were not exclusively aimed at getting the industries to reimburse the states, the unjust enrichment in the constitution dimension of litigation strategy gave the states' litigation strategy its shape.

⁹⁸⁵ Rabin, Robert L., *The Third Wave Of Tobacco Litigation*, in *Regulating Tobacco* (Robert L. Rabin & Stephen D. Sugarman eds., 2001), pp.176, 178.

⁹⁸⁶ *ibid.* pp. 184-185.

⁹⁸⁷ LaFrance, Arthur B., *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED., pp. 187, **190** (2000) (citing Elsa F. Kramer, *Waiting To Exhale: Tobacco Lawyers are Getting Burned by Damaging Industry Revelations. Can They Rise From the Ashes?*, RES GESTAE, May 1996, p. 20; Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988), *a affirmed in part and reviewed in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992); Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829 (W.D. Pa. 1955), *rev'd*, 350 F.2d 479 (3d Cir. 1965), *amended by* 370 F.2d 95 (3d Cir. 1966)).

⁹⁸⁸ Rabin, pp. 184-185.

⁹⁸⁹ DeBow, Michael, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV., pp. 563, 566 (2001).

⁹⁹⁰ Rabin, pp. 189-193

⁹⁹¹ Geyelin, Milo, *Mississippi Becomes First State to Settle Against Big Tobacco Companies*, WALL ST. J., July 7, 1997, p. B8; Sebok, A., Two Concepts, p. 1411

⁹⁹² Meier, Barry, *Cigarette Makers Agree to Settle Florida Lawsuit*, N.Y. TIMES, Aug. 26, 1997, p. A1; Sebok, A., Two Concepts, p. 1411.

⁹⁹³ Geyelin, Milo, *Tobacco Firms to Pay Texas \$15.3 Billion*, WALL ST. J., Jan. 19, 1998, p. A3; Sebok, A., Two Concepts, p. 1411.

⁹⁹⁴ See Geyelin, Milo, *Top Tobacco Firms Agree to Pay States Up to \$206 Billion in 25-Year Settlement*, WALL ST. J., November. 16, 1998, p. A3; Sebok, A., Two Concepts, p. 1411.

The focus was shifted from the harms smoking can cause to smokers, to the harms smoking caused to the health care system. Two strategies are notable in this case.

Firstly, the states are convinced that by focussing on the losses suffered by the states, the question of smokers' own conduct would be hypothetical, removing the single most power weapon in the tobacco industries defensive repertoire.⁹⁹⁵ Secondly by making the state plaintiff, all issues of class certification raised in the context of earlier failed attempts at personal injury class action litigation were mooted as well, because instead of millions of plaintiffs, there would be only one. Concerns over predominance and superiority tests of federal and state class action statutes will no longer prevent the law suits. This single, unitary plaintiff concept is not without some risks. Even if it is proved that the tobacco companies had lied to smokers and sold the product deliberately designed to cause injury and addiction, the question arises as what standing did the state have to bring a claim? Though there are many ways of establishing standing, however, the best would have been for the states to sue under the equivalent of "contractual" subrogation, a right that they had under both state and federal law.⁹⁹⁶ Some other states conducted their claim for reimbursement as a claim of indemnity.⁹⁹⁷ A typical example of indemnification occurs in tort, when one party, who has a duty to an injured victim pays that victim (either as a result of judgement or settlement) and then sues another party, who also owed a duty to the victim for the whole amount paid to the victim.⁹⁹⁸ It should be noted however, that the application of indemnification is confined to limited circumstances⁹⁹⁹ and even in the few cases, where it has to be applied, the claimant i.e. the state, must prove that the tobacco companies owed a duty to compensate the smokers on whose behalf the state had expended fund¹⁰⁰⁰ and the tobacco industries could as well argue that indemnification for the entire class of smokers who received medical care could not be proved, but would have

⁹⁹⁵ DeBow, Michael, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. REV., pp. 563, 571 (2001) "(T)he states could not successfully frame their claims against the tobacco companies in terms of either the traditional tort doctrine of subrogation or the codified version of the doctrine that allows most state governments to seek reimbursement for medical expenditures. Subrogation ... would put the states in the shoes of smokers — who, as we know, had uniformly failed in their lawsuits against the tobacco companies up to that point."; Moore, Mike, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J., p. 53 (1997).

⁹⁹⁶ Compare N.Y. Soc. SERV. LAW § 367-a(2)(b) (Gould 2004); 18 N.Y. COMP. CODES R. & REGS. Tit. 18, § 542(1) (2004) ; MD. CODE ANN., HEALTH-GEN. § 15-120 (2003); 62 PA. CONS. STAT. § 1409 (2004); compare also Pryor Jr., William H. et al., *Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. p. 575, 585-586 (1997).

⁹⁹⁷ Restatement (First) of Restitution: Quasi Contracts and Constructive Trusts § 76 (1935).

⁹⁹⁸ Keeton, W. Page et al., *Prosser & Keeton on the Law of Torts* § 51 (5th ed. 1984).

⁹⁹⁹ Compare Daniels v. Hi-Way Truck Equip., 505 N.W.2d 485, 490 (Iowa 1993); State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d pp. 401, 406 (Iowa 1998); see also Maryland v. Philip Morris, Inc., No. 96122017, 1997 WL 540913, pp. *9-11 (Md. Cir. Ct. May 21, 1997).

¹⁰⁰⁰ 55 Restatement (Third) of Restitution, §26.

to be proven on an individual, case-by-case basis, thereby putting the sales states back in the same place they would have been in had they pursued multiple subrogation claims. Subsequently, many of the states therefore, choose to describe their reimbursement as demands for restitution based on unjust enrichment.¹⁰⁰¹ Douglas Rendleman pointed out that the unjust enrichment claims by the states were an attempt to establish that the funds the tobacco companies never spent for tort compensation was a benefit *unjustly* conferred on them by the states, which had, by offering medical care for free, somehow eliminated that liability.¹⁰⁰² Though, like the Holocaust Litigation there was no water tight legal argument or legal support for the admittedly unusual use of restitution law in the states campaign against the tobacco industries, the defendants however settled.¹⁰⁰³

Finally, as with the Holocaust Litigation, it could be assumed that the managers of the tobacco companies decided that the cost of the settlement would be worth paying in exchange for putting the issue behind them and as many commentators noted the master settlement agreement, provided the industries with a variety of benefits with a relatively modest cost, since the 240 billion dollars paid out would be collected from smokers over twenty five years much like a tax privately negotiated between the government and the firms who would collect the tax on their behalf.¹⁰⁰⁴

9.5.3 The Application of Mass Restitution on African American Slavery

I shall begin this sub-heading by quoting Anthony Sebok who claimed that “*the use of unjust enrichment and restitution in the contexts of the Holocaust and American Slavery is a dangerous and potentially degrading strategy for addressing such horrible human rights violations.*”¹⁰⁰⁵ Sebok’s critique invokes two arguments: that the use of restitution is a mere lawyerly strategy, which might produce arbitrary outcomes; and that even if successful, this strategy may turn out to be self-defeating by trivializing the wrong of slavery. The arguments that would be advanced here may underline the arguments of Sebok or debunk it, but at least a synthesis will emerge from both standpoints.

¹⁰⁰¹ See Restatement (Third) of Restitution, §26.

¹⁰⁰² Rendleman, Doug, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?* 33 GA. L. REV., pp. 852-855 (1999).

¹⁰⁰³ Phelps, David & Ryback, Deborah Caulfield, *Jury Instructions Spurred Settlement Talks*, STAR TRIB., Nov. 25, 1998.

¹⁰⁰⁴ Dagan & White, pp. 379-80; See also ViSCUSI, W. Kip, *Smoke-Filled Rooms: A Postmortem On The Tobacco Deal* (2002).

¹⁰⁰⁵ Sebok, Anthony J., *Prosaic Justice*, pp. 51-53; Sebok, Anthony J., *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, pp. 651, 654-657 (2003); Sebok, Anthony J., *Should Claims Based on African-American Slavery be Litigated in the Courts? And if so, How?*, at <http://writ.news.findlaw.com/sebok/20001204.html> (December 4, 2000); Sebok, Anthony J., *The Brooklyn Slavery Class Action: More Than Just a Political Gambit*, at <http://writ.news.findlaw.com/sebok/20020409.html> (Apr. 9, 2002).

In 2002, series of lawsuits were filed in states and federal courts asking of some form of compensation from corporations that benefited from slavery.¹⁰⁰⁶ In the words of Deadria Farmer-Paellmann, “the perpetrators of the crimes committed against Africans are still here... They profited from stealing people and labour, torturing and raping women to breed children.”¹⁰⁰⁷ Accordingly, the aim of suit was to secure atonement from those who had done wrong to the plaintiffs.¹⁰⁰⁸ This statement poses a semantic problem because of the disjunction between the language of punishment and atonement and the structure of restitution law. Usually, the purpose of most restitution law is not to punish wrongdoers or to force wrongdoers to compensate victims for the wrongful injuries they have caused – these functions are effectively addressed by public law or tort law.¹⁰⁰⁹

Restitution function, as Andrew Kull has put it, “*is not to compensate the plaintiff, but to strip the defendant of a wrongful gain ... and disgorgement, prima facie at least, does not punish.*”¹⁰¹⁰ The normative reechoing of Farmer-Paellmann’s language is instructive to restitution: that the enslavement of the Africans by the Europeans, their transport to the Americas, the treatment and suffering, and the subsequent generations before emancipation was immoral and tortious, the human rights of the enslaved, including women and children were violated and in the language of tort, these are wrongful losses as a result of the acts ranging from battery to force imprisonment, negligence and intentional infliction of emotional distress.¹⁰¹¹ Therefore, it is only reasonable and logical that some kind of legal actions should be initiated to punish and secure compensations for the victims. While it could be said that the Holocaust and Tobacco litigations were based on restitutionary claims, the slavery litigation was based on criminal and compensatory claims. The Holocaust suit was negotiated after the World War II had settled the question of political and criminal responsibility for all the acts of NAZI Germany.¹⁰¹²

¹⁰⁰⁶ Hurdle v. FleetBoston Fin. Corp., No. 02-CV-4653 (N.D. Cal. Filed Jan. 17, 2003); Porter v. Lloyds of London, No. 02-CV-6180 (N.D. Ill. Filed Aug. 29, 2002); Johnson v. Aetna Life Ins. Co., No. 02-CV-9180 (E.D. La. Filed Sept. 3, 2003); Barber v. N.Y. Life Ins. Co., No. 02-CV-2084 (D.N.J. filed May 2, 2002); Carrington v. FleetBoston Fin. Corp., No. 02-CV-1863 (E.D.N.Y. filed Mar. 26, 2002); Farmer-Paellmann v. FleetBoston Fin. Corp., No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002); Hurdle v. FleetBoston Fin. Corp., No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002); See *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1038 (N.D. Ill.2.004). The cases were dismissed without prejudice on January 26, 2004. *Id.* At 1075.

¹⁰⁰⁷ Beale, Lewis, *Seeking Justice for Slavery’s Sins*, L.A. TIMES, April 22, 2002, pt. 5, p. 1

¹⁰⁰⁸ *ibid.*, p. 1.

¹⁰⁰⁹ Weinrib, Ernest J., *Restitutionary Damages as Corrective Justice*, in 1 *Theoretical Inquiries L.*, pp.1, 12 (2000).

¹⁰¹⁰ Kull, Andrew, *Restitution’s Outlaws*, 78 CHI.-KENT L. REV., pp. 17, 19 (2003).

¹⁰¹¹ Hylton, Keith, *Slavery and Tort Law*, 84 B.U. L. REV., pp. 1209, 1212 (2004).

¹⁰¹² Sebok, Anthony, *A brief History*, pp. 21-22.

And the treaties signed by the succeeding German government and the trials conducted by the Allies were the only punishment imposed on the parties responsible for the atrocities that would later form the basis of the Holocaust restitution suits.¹⁰¹³ The major compensation demanded in the Holocaust cases were for contract damages.¹⁰¹⁴ The tort like damages were in connection with the suffering that resulted from the confinement of the slave labourers, not the evils that formed the main core of the Holocaust – the campaign to exterminate certain populations on the basis of their religion, ethnicity, or sexual orientation.¹⁰¹⁵ Like the tobacco litigation, there was no evidence that either the state or the federal government wanted to penalise tobacco industries for the wrongdoing alleged in the state’s restitution suits ¹⁰¹⁶ because the governments did not want to encounter the problems with affirmative defences that had defeated many of its previous suits for personal injury; the restitution suits did not depend on proof that the tobacco industries caused wrongful losses, only that it had acted wrongfully and thereby profited.¹⁰¹⁷

The consolidated lawsuits on slavery characterised the same emphasis on restitution.¹⁰¹⁸ This time plaintiffs sealed only corporate defendants and not the United States, neither any single states nor any individuals.¹⁰¹⁹ There were 14 count suits, ranging from crimes against humanity to violations of consumer protection laws of five different states.¹⁰²⁰ The relief sought for each count was the same: “*an accounting of profits earned from slave labour, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages.*”¹⁰²¹ In particular, the demand for an accounting profit and the focus on the identification and return of the wealth the corporate defendants gained illegally and still possess are of restitutorial nature.

¹⁰¹³ Compare Bazylar, Michael J., *Holocaust Justice: The Battle for Restitution in America’s Courts* 59 (2003), p. 291. (By 1998, Germany (the Federal Republic) had paid at least \$60 billion in reparations to the various parties entitled under the treaties described above); *Burger-Fischer v. De Gussa AG*, 65 F. Supp. 2d 248, 270 (D.N.J. 1999); Ramasastry, Anita, *Banks And Human Rights: Should Swiss Banks Be Liable For Lending To South Africa’s Apartheid Government?*, FINDLAW, at <http://writ.news.findlaw.com/ramasastry/20020703.html> (July 3, 2002).

¹⁰¹⁴ Neubome, Burt, *Litigation in a Free Society: Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 814 (2002).

¹⁰¹⁵ See BAZYLAR, p. 177.

¹⁰¹⁶ *United States v. Philip Morris Inc.*, C.V. No. 99-2496, 116 F. Supp. 2d 131, 134 (D.D.C. 2000)

¹⁰¹⁷ *ibid.*, p. 135.

¹⁰¹⁸ First Consolidated and Amended Complaint and Jury Demand at 8, *In re African-Am. Slave Descendants Litig.*, 272 F. Supp. 2d 755 (N.D. I112.003) (MDL No. 1491), http://www.aetna.com/legalissues/suits/06-26-03_complaint.pdf (last visited Sept. 28, 2004).

¹⁰¹⁹ *ibid.* §2(a).

¹⁰²⁰ The fourteen causes of action alleged in the First Amended Complaint were Conspiracy, Accounting, Crime Against Humanity, Piracy, Intentional Infliction of Emotion Distress (for Rape, Breeding, Torture, Abuse, and the Spread of Racist Beliefs), Conversion, Unjust Enrichment, 42 U.S.C. § 1982, Alien Torts Claims Act, Illinois State Claim, Louisiana State Claim, New Jersey State Claim, New York State Claim, and Texas State Claim, pp. 93-115.

¹⁰²¹ *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d pp. 1027, 1042 (N.D. Ill. 2004).

However, in *Cato v. United States* as discussed in the previous chapter, the court ruled that the government cannot be sued for slavery¹⁰²² because the suit did not satisfy the requirements of the Federal Tort Claims Act, the law that sets out the condition under which the federal government has consented to be sued.¹⁰²³ Apart from the problem of the statute of limitations, the court emphasised that the plaintiffs lacked standing, since their claim essentially was that the U.S. Government had failed to take certain steps to positively enforce the Thirteenth Amendment.¹⁰²⁴ Evidently, private individuals are not targets for suits because those directly responsible for human rights violations and the tort committed before emancipation are not available to be sued.¹⁰²⁵ Consequently, the effective method to put claims for personal injury directly would be to identify a defendant that is still living, which will naturally entail identifying a corporate defendant that will then be held responsible either derivatively under the doctrine of respondent *superior* or directly under the theory that its agents engaged in wrongdoing under the direction of the firm's management.¹⁰²⁶

Another legal quagmire is the extent by which the descendants of individual slave owners, slave traders, and other officials, who operated the machinery of slavery, hold property that belonged to slaves or hold wealth created by slaves they are likely to be immune from suits under the good faith purchaser doctrine.¹⁰²⁷ Usually, an heir is not a purchaser but someone who received money and relied on good faith that the transfer was valid by making expenditures and, in the case of slavery, passing the property on to another generation of heirs, who also acted in good faith.¹⁰²⁸ Theoretically, a claim for restitution of wealth inherited by the heirs of wrongdoers from the 19th century may be possible, in de facto, any suit would require tracing the movement of chattel and money over many generations and a difficult task to overcome the balance of equities, which would, as an initial matter, favour the defendants.¹⁰²⁹

¹⁰²² 70 F.3d, pp.1103, 1111 (1995).

¹⁰²³ *ibid.*; see 28 U.S.C. § 1346 (2004).

¹⁰²⁴ *Cato*, 70 F.3d, pp. 1109-1110.

¹⁰²⁵ Matsuda Mari J., *Looking to the Bottom*: (1987) p. 323; Posner & Vermeule, *Reparations for Slavery and Other Historical Injustices*, (2003), p. 689; Schedler, George, *Responsibility for and Estimation of the Damages of American Slavery*, 33 U. Mem. L. Rev. (2003), p. 307; Waldron, Jeremy, *Superseding Historic Injustice*, 103 ETHICS (1992), p.4; Wenger, Kaimipono David, *Causation and Attenuation in the Slavery Reparations Debate*

¹⁰²⁶ Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. Rev., pp. 309, 358-361 (2003).

¹⁰²⁷ Restatement (Third) of Restitution, § 26.

¹⁰²⁸ Brophy, Alfred L., *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, pp. 81, 127; Dagan, Hanoch, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. Rev. (2004), pp. 1139, 1156-1157.

¹⁰²⁹ *ibid.* Brophy, p. 127; Schlegelmilch, Stephan J., Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. Rev., pp. 87, 96-98 (1999); Bates, Elizabeth Tyler, *Contemplating Lawsuits for the Recovery of Slave Property: The Case of Slave Art*, 55 Ala. L. Rev., pp. 1109, 1121 (2004); Sebok, Anthony J., *Reparations*, (2003), pp. 651, 655.

Though, the claimants alleged in their complaint that the defendants inflicted personal injury upon the victims, the argument for their claims was not time-barred by application statutes of limitations depends in crucial on the wrong arising from the failure on the parts of the defendants to disgorge their wrongful gains.¹⁰³⁰ The non application of the statute of limitations was because of the common law and statutory claims that ranged from one to six years because the plaintiffs invoked discovery rule, the continuing violation doctrine, equitable estoppel, equitable tolling.¹⁰³¹ Though this argument did not convince the presiding judge, Norgle, it revealed that the claims for restitution against existing corporations would be more likely to survive a statute of limitations attack than a suit of personal injury against an individual or corporation or a suit for restitution against a corporation. They argued that the original plaintiffs (the slaves) themselves could not know about the investment, insurance policies, joint ventures and other schemes developed by defendants to profit from slavery.¹⁰³²

This is in contrast to the kidnapping, beatings, murder, and rape the slaves knew about and over which they could have sued after emancipation.¹⁰³³ In order to avoid affirmative defences, the plaintiffs choose the path of restitution. As the media noted, the suits clearly arose from one of the most wide spread and injurious assault on human rights in history, yet the logic of mass restitution forced the plaintiffs to depict slavery not as a personal or dignitary injury, but as a dispute over wrongfully held property and as Farmer-Paellmann will put it, that tactical and legal concerns led the lawyers to focus their claims on only a subset of wrongdoers (corporations) and a subset of private law remedies (unjust enrichment): “*We focus on the path of least resistance, the corporations... The theory, basically, is that the corporations are in possession of our inheritance.*”¹⁰³⁴

¹⁰³⁰ First Amended Complaint, pp. 85-91.

¹⁰³¹ *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d, pp. 1027, 1070, 1074 (N.D. Ill. 2004).

¹⁰³² *ibid.* p.1070.

¹⁰³³ *ibid.* p.1074. Judge Norgle did not accept this argument: It is true that because of the institution of slavery, the Jim Crow laws, and the lingering bigotries and separatist views following the Civil War, African-Americans were obstructed from obtaining necessary information on their claims and in some instances access to the legal system. Nevertheless, Plaintiffs’ ancestors knew of their injury at the time that it occurred. They knew, or should have known that they were wrongfully being forced to work without compensation, and that somebody was making a profit from their labor. Yet, neither Plaintiffs nor their ancestors ever asserted these claims in a court of law until now. Plaintiffs have not shown that they acted with all due diligence in attempting to obtain vital information about their claims, and assert them timely.

¹⁰³⁴ Zanto, Peabody, *Forum Addresses Slave Reparations: Speakers Urge Black Descendants to Join Fight for Financial Redress*, HOUSTON CHRON., November 17, 2002, p. A42.

9.5.4 Genealogical Determinism

Whether the applications of tort law, unjust enrichment and restitution may be qualified instruments for successful claims in reparation for slavery is a matter of conjecture. However, it seems qualified to examine and analyse the eligibility of African Americans entitled to receive reparations for slavery. It is unlikely that the United States government will concede to any reparations without guidelines for determining eligibility. Three determinant factors come to mind, the genealogical, the blood and genetic factors.

9.5.4.1 *The Genealogical Research*

In cases of eligibility, the people are required to show proof of their ancestry through genealogical research. With the emergence of such organisations such as the National Genealogical Society, the Black Genealogy Search Group of Denver, the Institute of African American History, and the Afro-American Historical and Genealogical Society, the tracing of family histories for many African Americans has become more viable.¹⁰³⁵ Though, the technological advances in genealogical research is commendable, constructing a family history, is for the most part, expensive and often fails to provide significant information about a persons ancestry.¹⁰³⁶ Another problem is determining African American pedigree that African slaves were legally classified as chattels.¹⁰³⁷ Therefore, they could be separated from their family members and sold to plantation owners in other parts of the same states, or in entirely different state.¹⁰³⁸ The mass illiteracy of slaves are also impediment to codifying family records and histories. Added to internet promising potential in the tracing of family histories, many African Americans have no assess to computers or internet in this regard.¹⁰³⁹ And therefore, requiring African Americans to produce genealogical evidence will not be far-fetched because it would result in the exclusion of large number of African Americans with legitimate claims.

¹⁰³⁵ *Genealogy Opens Window to the Past*, RICHMOND TIMES-DISPATCH, May17, 1999, p. B1 (discussing the Afro-American Historical and Genealogical Society); Jackson, Robert, *'Roots' Type Research in Reach*, Rocky Mountain News (Denver), Mar. 7, 1994, p. 19A; Tarver, Anissa, *Arthur Webb Agency Helps to Research Family History*, Com. Appeal, Augüst 18, 1991, p. B1; Wilkens, John, *Family Ties Digging Up Roots*, San Diego Union-Trib., April 29, 1995, p. E1; Compare Ghannam, Jeffrey, *Repairing the Past*, A.B.A. J., November 2000, p. 39; compare <http://www.ancestry.com>; <http://www.genealogy.com>; <http://www.cyndislist.com>; <http://www.rootsweb.com>.

¹⁰³⁶ compare *Tracing Your Own Roots-Advice from an Expert*, U.S. NEWS & WORLD REPORT, March 14, 1977, p. 57.

¹⁰³⁷ compare U.S. CONST. art. IV, § 2, cl. 3.

¹⁰³⁸ compare Fede, Andrew T., *People Without Rights: An Interpretation Of The Fundamentals Of The Law Of Slavery In The U.S. South*, pp. 221-225 (1992); Fede, Andrew T., *Gender in the Law of Slavery in the Antebellum United States*, 18 Cardozo L. REV., pp. 411, 416-418 (1996).

¹⁰³⁹ Katie Hafner, *Ideas & Trends; A Credibility Gap in the Digital Divide*, N.Y. TIMES, Mar. 5, 2000, § 4, p 4.

9.5.4.2 The Blood Factor

The persons required to receive reparation for slavery would have to apply the “one-drop-rule,”¹⁰⁴⁰ a rule of hypo-descent that is inherent in the American system of racial classification. The rule denotes that “*any trace of African ancestry makes one Black,*” regardless of physical appearance.¹⁰⁴¹ This rule is based on the premise that not only persons whose black or African ancestry was visible is to be considered black, but also those persons with any known trace of African history.¹⁰⁴² Practically, the rule resulted in the classification and designation of “Negro,” “coloured,” or “black”; that is any person who possessed even one drop of African blood.

The historical aim of this rule was to perpetuate American slavery¹⁰⁴³ and basically to discourage interracial relationship through marriage so as to prevent persons of African ancestry from acquiring economic power in the United States, and to ensure that all children with any degree of African ancestry, no matter how small, remain chattels.¹⁰⁴⁴ Many states and legislatures adopted the rule of hypo-descent through the 18th and early 19th centuries.¹⁰⁴⁵ The test failed however, to distinguish between the descendants of U.S. slaves and those of other nationality with African heritage such as Haitians, Caribbean Blacks, or European Blacks. This laps may open the door for porous claims by Africans who may possess the visual characteristics of African ancestry and current U.S. citizenship, but lack any relationship at all to those Africans brought to the United States between 1619 and the abolition of the slave trade.¹⁰⁴⁶ Notwithstanding the problem of determining race, the “one-drop-rule” remains the unofficial way of distinguishing between blacks and whites – the American society continue to designate any individual with any indiz of black ancestry (such as skin colour, physical characteristics or blood) as African American.

¹⁰⁴⁰ Harris, Marvin, *Patterns of Race in the Americas* (1964), pp.37, 56. It means that a subordinate classification is assigned to the offspring of a union when there is one “superordinate” and one “subordinate” parent. Thus, under this classification, the child of a black parent and a white parent is considered black.

¹⁰⁴¹ Gotanda, Neil, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. (1991), pp.1, 6; Davis, F. James, *Who is Black? One Nation’s Definition* (1991), pp.4-5; Malcomson, Scott L., *One Drop Of Blood: The American Misadventure Of Race* p. 356 (2000).

¹⁰⁴² *ibid*, Gotanda, p. 24.

¹⁰⁴³ *compare* Payne, Richard J., *Getting Beyond Race: The Changing American Culture* pp. 42, 61 (1998); Paul R. Spickard, *Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America*, pp. 374-375 (1989); See, e.g., *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 240 (1834); Stroud, George M., *Sketch of the Laws Relating to Slavery*, pp.16-21 (2d ed. 1856).

¹⁰⁴⁴ *ibid*. Payne, p. 42.

¹⁰⁴⁵ Harris, p. 1738 n.138.

¹⁰⁴⁶ Nat’l Advisory Comm’n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* 95 (1968). In 1865, slavery was officially abolished through the Thirteenth Amendment. U.S. CONST. amend. XIII.

Interestingly, black people with mixed ancestral heritage continue to support the “one-drop-rule”¹⁰⁴⁷ and the civil rights movements of the 1950s and 1960s adopted the “one-drop-rule” as a yardstick to promoting racial solidarity.¹⁰⁴⁸

9.5.4.3 The Genetic Factor

The eligible persons here are expected to undergo deoxyribonucleic acid (DNA) testing.¹⁰⁴⁹ DNA is the material located in the nucleus of an individual’s cells that stores one’s unique genetic information.¹⁰⁵⁰ The importance of DNA test can not be overestimated in our contemporary world, considering the fact that DNA testing has been used extensively in establishing paternity and criminal culpability¹⁰⁵¹ and it constitutes a persuasive proof in paternity suits.¹⁰⁵² The advantage of DNA testing in determining lineage and ancestry has been encouraging. A notable instance occurred in 1999 when, after years of assertions and speculations, DNA testing provided near-conclusive proof that Thomas Jefferson, the 3rd President of the United States fathered Children by his slave, Sally Hemings.¹⁰⁵³

Geneticists at Harvard University and Massachusetts Bay Community College are working to develop DNA test designed to assist African Americans in tracing whether their ancestors came from regions of Africa, where traders purchased slaves.¹⁰⁵⁴ The combination of knowledge, history, and technology with DNA according to scientists may help in giving accurate information for determining the eligibility of African Americans for slavery reparations. The magnitude of the damage inflicted upon African Americans and the current effects upon modern day African Americans cannot be quantified in this paper because in my opinion it does not constitute the crux of successes or failures in reparations of slavery.

¹⁰⁴⁷ See *Payne*, pp. 162-163.

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ See Nat’l Research Council, *DNA Technology In Forensic Science*, p. 2 (1992); Pelczar, Michael J., Jr. et al., *Microbiology: Concepts and Applications*, pp.350-400 (1993).

¹⁰⁵⁰ *ibid.* Nat’l Research Council, pp. 2-3.

¹⁰⁵¹ See *James W. v. Superior Court*, 21 Cal. Rptr. 2d 169 (Cal. Ct. App. 1993); Jenkins, Helen Bishop, *DNA and the Slave- Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 HARV. Blackletter L.J., p. 211 (2000).

¹⁰⁵² *ibid.* Jenkins, p. 211.

¹⁰⁵³ Smith, Leef, *Race Resurfaces at Monticello Reunion; Jefferson Family Association Still Balks at Admitting Descendants of Hemings*, WASH. POST, May 8, 2000, p. B7; Eugene A. Foster et al., *Jefferson Fathered Slave’s Last Child*, *Nature*, November 5, 1998, pp 27, 27-28

¹⁰⁵⁴ Carey Goldberg, *DNA Offers Link to Black History*, N.Y. TIMES, Aug. 28, 2000, p. A10.

9.6 The Axiom of Libertarianism as a Political Philosophy with Private Property Right

9.6.1 Introduction

Libertarianism shall be used as a yardstick to assessing the merits and demerits of reparation claims. While analysing this philosophy, a critical view advanced in favour of reparations put forward by Robinson and those against it by Horowitz shall be the crux of this sub-section.¹⁰⁵⁵

9.6.2 Libertarianism: Terminology

Libertarianism is a political philosophy with private property right at its core. It is based on the premise that physical invasion of properties or persons are unjustified,¹⁰⁵⁶ and should be punished. It is anchored on a variant of Lockean homesteading theory, according to which mixing one's labour with the land justifies ownership of it whether or not Locke's proviso of "enough and as good still being available" is met.¹⁰⁵⁷ This proviso is tenable when there are unsettled vast lands, but difficult to apply when virtually all visible land has been occupied. One can proffer some solutions here.

¹⁰⁵⁵ Robinson, Randall, *The Debt: What America Owes to Blacks*; See also America, Richard, *Paying the Social Debt: What White America Owes Black America*; Horowitz, David, *The latest civil rights disaster: Ten reasons why reparations for slavery are a bad idea for black people—and racist too* at <http://www.salon.com/lnewscollhorol20001051301_reparations/index.html>.

¹⁰⁵⁶ Anderson, Terry and Hill, P.J., *An American Experiment in Anarchy-Capitalism: the not so Wild, Wild West*, *Journal of Libertarian Studies* Vol. 3, No. 1, 1979, pp. 9-29; Barnett, Randy E., *The Structure of Liberty: justice and the Rule of Law*, Oxford: Clarendon Press, 1998; Benson, Bruce L., 1989, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, *The Journal of Libertarian Studies*, Vol. IX, No. 1, Winter, pp. 1-26; Id., *The Spontaneous Evolution of Commercial Law*, *Southern Economic Journal*, 55: 644-661, 1989; Id., *The Enterprise of Law: Justice Without the State*, San Francisco: Pacific Research Institute for Public Policy, 1990; Cuzfin, Alfred G., "Do We Ever Really Get Out of Anarchy?," *Journal of Libertarian Studies*, Vol. 3, No. 2 (Summer, 1979); De Jasay, Anthony, *The State*, Oxford: Basil Blackwell, 1985; Friedman, David, *The Machinery of Freedom: Guide to a Radical Capitalism*, La Salle, IL: Open Court, 2nd ed., 1989; Id., "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies*, 8:399-415, 1979; Hoppe, Hans-Hermann, *A Theory of Socialism and Capitalism: Economics, Politics and Ethics*, Boston: Kluwer, 1989; Id., *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*, Boston: Kluwer, 1993; Id., "The Private Production of Defense," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter 1998-1999, pp. 27-52; Hummel, Jeffrey Rogers, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 Rev. *Austrian Econ.* 88 (1990); Morriss, Andrew P., "Miners, Vigilantes and Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law," *Land and Water Law Review*, Vol. XXXIII, No. 2, 1998, pp. 581-696; Peden, Joseph R., 1977, "Property rights in Celtic Irish law," *The Journal of Libertarian Studies*, Vol. 1, No. 2, Spring, pp. 81-96; Rothbard, Murray N., *For a New Liberty*, Macmillan, New York, 1978; Id., *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982; Id., "Society Without a State." J. R. Pennock and J. W. Chapman (eds.), *Anarchism: Nomos XIX*. New York: New York University Press, 1978, pp. 191-207; Id., *Man, Economy and State*, Auburn AL: Mises Institute, 1993; Skoble, Aeon J. "The Anarchism Controversy," in *Liberty for the 21st Century: Essays in Contemporary Libertarian Thought*, eds. Tibor Machan and Douglas Rasmussen, Lanham MD: Rowman and Littlefield, 1995, pp. 77-96; Sechrest, Larry J., "Rand Anarchy, and Taxes," *The Journal of Ayn Rand Studies*, Vol. I, No. 1, Fall 1999, pp. 87-105; Spooner, Lysander, *No Treason*, Larkspur, Colorado, (1870) 1966; Stringham, Edward, "Justice Without Government," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter 1998-1999, pp. 53-77; Tinsley, Patrick, "With Liberty and Justice for All: A Case for Private Police," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter 1998-1999, pp. 95-100; Tannehill, Morris and Linda, *The Market for Liberty*, New York: Laissez Faire Books, 1984; Woolridge, William C., *Uncle Sam the Monopoly Man*, New Rochelle, N.Y.: Arlington House, 1970.

¹⁰⁵⁷ Locke, John, *An Essay Concerning the True Original, Extant and End of Civil Government*, in *SOCIAL CONTRACT* pp. 17-18 (E. Barker ed., 1948).

For example, government ownership of land ¹⁰⁵⁸ but with the problem of workability, since it does not fair better with economic variety. This argument is however, dispensable since member of the apparatus of the states, by definition, did not mix their labour with the land, or do anything else, which would remotely justify their ownership status over it. Practically, the government can sell off the land to the highest bidder or on a first-come-first-serve basis, which poses the problem of preferability of ownership based on homesteading. The claim theory postulates that ownership is based on a mere affirmation. This also fails to establish any link between the owner and that which is owned. And finally, there is also the problem of vast overdetermination as anyone would be free to claim anything he wishes. When an ownership or property is established, the next logical step is to determine justice in property titles so as to outline a theory of how they can legitimately change hands from one person to another. For example through trade, gifts, inheritance or gambling,¹⁰⁵⁹ that is to say if I give you my book for an exchange for your bicycle, this is logically consistent with property rights; if I merely cease your bicycle, it is not – i.e. “legitimate title transfer.”¹⁰⁶⁰ The logic behind libertarian punishment theory ¹⁰⁶¹ is to compensate the victim totally.

¹⁰⁵⁸ Anderson, Terry L., and Hill, Peter J., “Property Rights as a Common Pool Resource,” *Bureaucracy vs. Environment: The Environmental Costs of Bureaucratic Governance*, John Baden and Richard L. Stroup, eds., Ann Arbor: University of Michigan Press, 1981; Anderson, Terry L., and Leal, Donald R., *Free Market Environmentalism*, San Francisco: Pacific Research Institute, 1991; Block, Walter, “Ownership will save the environment,” *New Environment*, First Quarter, 1991, 41-43; Block, Walter, “Protection of property rights key to maintaining resources,” *Environment Policy and Law*, Vol. 1, No. 3, June 1990, p. 28; Id., *Economics and the Environment: A Reconciliation*, Vancouver: The Fraser Institute, 1990; Id., “Earning Happiness Through Homesteading Unowned Land: a comment on ‘Buying Misery with Federal Land’ by Richard Stroup,” *Journal of Social Political and Economic Studies*, Vol. 15, No. 2, Summer 1990, pp. 237- 253; Hill, Peter J., and Meiners, Roger E., eds., *Who Owns the Environment?*, New York: Rowman and Littlefield, 1998; Hoppe, Hans-Hermann, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*, Boston: Kluwer, 1993; Horwitz, Morton J., *The Transformation of American Law: 1780-1860*, Cambridge: Harvard University Press, 1977; Margaret N. Maxey and Robert L. Kuhn, eds., *Regulatory Reform: New Vision or Old Curse*, New York: Praeger, 1985; Rathje, William L., “Rubbish!,” *Atlantic Monthly*, Vol. 264, No. 6, December 1989, pp. 99-109; Ray, Dixie Lee, 1990, *Trashing the Planet*, Washington D.C.: Regnery Gateway; Rothbard, Murray N., “Law, Property Rights, and Air Pollution,” *Economics and the Environment: A Reconciliation*, Walter Block, ed., Vancouver: The Fraser Institute, 1990; Stroup, Richard L., and John C. Goodman, et. Al., (1991) *Progressive Environmentalism: A Pro-Human, Pro-Science, Pro-Free Enterprise Agenda for Change*, Dallas, TX: National Center for Policy Analysis, Task Force Report; Stroup, Richard L., and Baden, John A., “Endowment Areas: A Clearing in the Policy Wilderness,” *Cato Journal*, 2 Winter 1982, pp. 691-708.

¹⁰⁵⁹ Nozick, Robert, *Anarchy, State and Utopia*, New York: Basic Books Inc., 1974; N. Stephan Kinsella, “A Theory of Contracts: Binding Promises, Title Transfer, and Inalienability” (paper presented at Auburn, Alabama, April 1999, Ludwig von Mises Institute’s Aus- 230cept Scholars Conference 5.

¹⁰⁶⁰ Nozick, Robert, *Anarchy, State, and Utopia*, New York: Basic Books Inc., 1974, p. 150.

¹⁰⁶¹ see Barnett, Randy, and Hagel, John, eds., *Assessing the Criminal*, Cambridge MA: Ballinger, 1977; Block, Walter, “Toward a Libertarian Theory of Guilt and Punishment for the Crime of Statism,” Huelsmann, Guido, ed., *The Rise and Fall of the State*, forthcoming; Id., “National Defense and the Theory of Externalities, Public Goods and Clubs,” Hoppe, Hans-Hermann, ed., *Explorations in the Theory and History of Security Production*, forthcoming; King, J., A Charles, *Rationale for Punishment*, 4 J. Libertarian Stud. 151, 154 (1980); Kinsella, Stephan N., “A Libertarian Theory of Punishment and Rights,” (volume) 30 Loy. L.A.L. Rev. 607-45 (1997); Id., “New Rationalist Directions in Libertarian Rights Theory,” 12:2 J. Libertarian Studies 313-26 (Fall 1996); Id., “Punishment and Proportionality: The Estoppel Approach,” 12:1 J. Libertarian Studies 51 (Spring 1996); Id., “Estoppel: A New Justification for Individual Rights,” Reason Papers No. 17 (Fall 1992), p. 61; Kinsella, N. Stephan, “Inalienability and Punishment: A Reply to George Smith,” *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter, 1998- 1999, pp. 79-93; Rothbard, Murray N., *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982.

Crimes, in this regard, are not committed against defined society and the main emphasis is not on incarceration, much less reform. Rather, a crime such as assault and battery, murder, rape, e.t.c., is seen and aimed primarily at the victim. Jail sentences as seen in libertarian society, is merely a way of forcing hard labour upon the perpetrator in an attempt to get him to compensate the victim.

9.6.3 Thesis on Libertarianism

Reparation, simply put, is the forced return of stolen property even after a significant amount of time has elapsed.¹⁰⁶² For example, if my grandfather stole a ring from your grandfather, and then bequeathed it to me through the intermediation of my father, then I am, presently, the illegitimate owner of that piece of jewellery. Normally, your grandfather had inherited the ring from his own parents and then given it to you. It is not a violation of property rights but a logical implication of them, to force me to give this ill-gotten gain to you.¹⁰⁶³

“In short, we cannot simply talk of defense of ‘property rights’ or of ‘private property’ per se. For if we do so, we are in grave danger of defending the ‘property right’ of a criminal aggressor, in fact, we logically must do so.” Of course, *“possession in nine tenths of the law.”*¹⁰⁶⁴

It is therefore, not sufficient in the face of law, on your part to claim that the ring now on my finger rightly belongs to you. You must present evidence. Secondly, it is only I who owe you this piece of jewellery not my neighbour or the general taxpayer,¹⁰⁶⁵ and it is owed only to you, not to any person who wants it, or to those of a given race or ethnicity. I am not a criminal for innocently possessing the ring before you came to claim it, but I am guilty of a criminal act, once it is proven that the ring belonged to your grandfathers and I refused to surrender it to you. This is the basic argument of slavery because the libertarian law places slavery as a crime. It therefore means that those who owned slaves in the pre-Civil War in the United States were guilty of the crime of kidnapping, though such acts were legal at that time. If justice was dispensed in 1865, the slave owners would have been incarcerated, and that part of the value of their properties attributable to slave labour would have been turned over to the ex-slaves but rather these slave masters had their freedom and bequeathed their properties to their own children and their great grandchildren.

¹⁰⁶² Block, p. 54.

¹⁰⁶³ Rothbard, Murray N., *The Ethics of Liberty*, New York: New York University Press, 1998 [1982], pp. 51-52.

¹⁰⁶⁴ Block, p. 54.

¹⁰⁶⁵ see Spooner, Lysander, *No Treason*, Larkspur, Colorado, (1870) 1966.

From the foregoing, it is an application of private property rights, if African Americans can prove that their ancestors were forced to work on these plantations. The near insurmountable problem in pressing for reparations is the problem in tracing back property titles back in history for any great length of time, particularly, if there were no written records kept.¹⁰⁶⁶ Reparation application may not be difficult to apply in recent occurrences, such as land stolen in the USSR, Cuba, East Germany, e.t.c., where scrupulously accurate records were kept. African American slavery in the U.S. took place a century and half ago, and while there were written records in some cases, many have been lost in the passage of time. Another setback in libertarian reparation theory may be the fact that if 500 slaves were found on a plantation, but at the end, only the grandchildren of one of them could be found. They are entitled to split amongst themselves not only the contributions made by all the slaves, but rather only one-five-hundredth of the estimate of the productivity of their own ancestor alone.¹⁰⁶⁷ This concept is incompatible with libertarian law because the example above must be viewed not from the lenses prescribed through the years of 1865, and also on the assumption that the children of all 500 slaves can be found, but rather from the perspective of the case, one is assuming that is, it is now the modern era, almost a century and a half after these historic events have unfolded, and one can demonstrate a connection between only one slave and persons now living, because the property in question should not have remained in the hands of the slave masters. They however, handed it over to their innocent children, and they to theirs. And now one is faced with African Americans, who can trace their root back to only one of the 500 slaves. The question here is: why should they be entitled to land to which they have no connection?¹⁰⁶⁸

¹⁰⁶⁶ A court in Canada has ruled that written records are not required for proof of ownership. The recollections of tribal elders will suffice in their stead. Here is the court's finding in *R. v. Van Der Peet*, [1996] 2 S. C. R. 507, from the summary: "A court should approach the rules of evidence and interpret the evidence that exists, conscious of the special nature of aboriginal claims and of the evidentiary difficulties in proving a right which originates in times when there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts." This finding played a role in the decision concerning a land reparations case, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, which cited paragraph #68 of *R. v. Van Der Peet*, [1996] 2 S. C. R. 507, which has been just summarized. To say the least, this determination is not at all compatible with libertarian requirements of proof. For one thing, the testimony may be a lie. For another, it is not disinterested. For a third, it may be honestly believed, but mistaken. This seems to be the conclusion in many cases of recovered memory of girl-hood incest charges on the part of adult women. But there is a practical implication as well. If this unwarranted decision were to become a precedent, then, truly, the 232ceptical ad absurdum charge against the libertarian position that it would open the floodgates of land reparations cases back before the beginning of recorded history could then be sustained. But this is only a utilitarian consideration, unworthy, probably, of our attention.

¹⁰⁶⁷ Block, W., p. 56.

¹⁰⁶⁸ compare Block, W., p. 56.

Rothbard' thesis may help here:

“But suppose that Jones (Jones is the white grandchild of the slave owner, who is now in possession of the property under dispute) is not the criminal, not the man who stole the watch, but that he had inherited or had innocently purchased it from the thief. And suppose, of course, that neither the victim nor his heirs can be found. In that case, the disappearance of the victim means that the stolen property comes properly into a state of no-ownership. But we have seen that any good in a state of no-ownership, with no legitimate owner of its title, reverts as legitimate property to the first person to come along and use it, to appropriate this now unowned resource for human use. But this ‘first’ person is clearly Jones, who has been using it all along. Therefore, we conclude that even though the property was originally stolen, that if the victim or his heirs cannot be found, and if the current possessor was not the actual criminal who stole the property, then title to that property belongs properly, justly, and ethically to its current possessor. To sum up, for any property currently claimed and used: (a) if we know clearly that there was no criminal origin to its current title, then obviously the current title is legitimate, just and valid; (b) if we don’t know whether the current title had any criminal origins but can’t find out either way, then the hypothetically ‘unowned’ property reverts instantaneously and justly to its current possessor; (c1) if we do know that the title is originally criminal, but can’t find the victim or his heirs, then (c1) if the current title-holder was not the criminal aggressor against the property, then it reverts to him justly as the first owner of a hypothetically unowned property. But (c2) if the current title-holder is himself the criminal or one of the criminals who stole the property, then clearly he is properly to be deprived of it, and it then reverts to the first man who takes it out of its unowned state and appropriates it for his use. And finally, (d) if the current title is the result of crime, and the victim or his heirs can be found, then the title properly reverts immediately to the latter, without compensation to the criminal or to the other holders of the unjust title.”¹⁰⁶⁹

Perhaps Horowitz’s thesis against reparations and the reasons of Block for reparations may help to buttress more on this concept (Block Walter, On Reparations to Blacks for Slavery’ in Human Rights Review, July-September 2002).

Horowitz: Assuming there is actually a debt, it is not at all clear who owes it. Because no one living now was alive during slavery and not everyone in the U.S. has illegitimately inherited properties not properly belonging to their ancestors.

¹⁰⁶⁹ Rothbard, Murray N., *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982, pp. 58-59

The present possessors of wealth handed down to them through the generations emanating from slavery, do owe a debt to those who can prove that they are the direct descendants of the slaves. Horowitz argued that it was not European Americans, who enslaved African Americans but their brothers and sisters in Africa, who were abetted by dark skin Arabs, who also organised the slave trades. It should be noted that slave-holding and slave-capturing are crimes irrespective of skin colours of masters or victims.¹⁰⁷⁰

Suppose a land in the South was stolen by carpetbaggers and suppose the carpetbaggers stole the land from the guilty slave owner and subsequently soled it to its present owner. Definitely the present owner will escape liability in this case, if the carpetbagger (or his heirs, to whom he bequeathed his ill-gotten gains) can be located, consequently, the grandchildren of the slave will have no case against the present occupier, but instead must obtain their compensation from the grandchildren of the carpetbagger. Suppose again, that the carpetbagger and his offsprings have vanished without a trace, and then we have only the grandchildren of the slave and the present (innocent) owner. The question then arises, which of them is the legitimate title-holder? The libertarian law is emphatical on this question: the property must go to its rightful owner, the children of the slave. According to Rothbard:

“Suppose that a title to property is clearly identifiable as criminal, does this necessarily means that the current possessor must give it up? No, not necessarily. For that depends upon two considerations: (a) whether the victim (the property owner originally aggressed against) or his heirs are clearly identifiable and can now be found; or (b) whether or not the current possessor is himself the criminal who stole the property. Suppose, for example, that Jones possesses a watch, and that we can clearly show that Jones’s title is originally criminal, either because (1) his ancestor stole it, or (2) because he or his ancestor purchased it from a thief (whether wittingly or unwittingly is immaterial here). Now, if we can identify and find the victim or his heir, then it is clear that Jones’s title to the watch is totally invalid, and that it must promptly revert to its true and legitimate owner. Thus, if Jones inherited or purchased the watch from a man who stole it from Smith, and if Smith or the heir to his estate can be found, then the title to the watch properly reverts back to Smith or his descendants, without compensation to the existing possessor of the criminally derived title.”¹⁰⁷¹

¹⁰⁷⁰ Block, W., pp. 59, 64.

¹⁰⁷¹ Rothbard, M. N., pp. 57-58.

In the example above, Jones is the present owner of the land, the carpetbagger is the thief, and Smith is the grandchild of the slave.

*“To allow Jones to keep his land in the face of proof from Smith that he is the rightful owner, is to not uphold legitimacy in private property rights; it is to denigrate it. If A is the rightful owner, B steals property from A, sells it to C and then disappears, there is only one correct answer to the question of who should keep it, according to libertarianism: A. C is out of luck, unless he can somehow locate B. An unjust owner cannot legitimately bequeath his property and therefore, cannot sell it either. In the law of libertarianism, the search for the successor of the original owner will have to include those who purchased the land and every land transaction after 1860 will have to be declared null and void.”*¹⁰⁷²

Rothbard easily comes to help here:

*“If we do not know if Jones’s title to any given property is criminally derived, then we may assume that this property was, at least momentarily, in a state of non ownership., and therefore that the proper title of ownership reverted instantaneously to Jones as its first (i.e., current) possessor and user. In short, where we are not sure about a title but it cannot be clearly identified as criminally derived, then the title properly and legitimately reverts to its current possessor.”*¹⁰⁷³

The burden of proof in this case rests squarely on the shoulders of those who wish to overturn duly registered property.

The various arguments advanced against reparations: that the white southerners who permitted blacks to live on their lands should not be held more responsible for reparations than northerners who refused to even allow blacks to pass through their borders; that the slaveowners fed and sheltered their properties and these expenses should be offset against any debt owed by their progeny to the grandchildren of slaves; that white landowners paid freed blacks a form of private welfare after their emancipation; that the whites in the U.S who bought the slaves, purchased them not from freedom but from slavery, from the states in which they were found in Africa; that many blacks after the war, were drafted into the army and sent West to slaughter Indians. Public slavery in effect replaced private slavery; that the demand for slavery reparations to put all Americans – Black, White, Brown – off their guard as taxed slavery emerged on a global scale are all arguments of modality for reparations but do not negate the application and relevance of libertarianism.¹⁰⁷⁴

¹⁰⁷² Block, W., p. 65.

¹⁰⁷³ Rothbard, M. N., p. 57.

¹⁰⁷⁴ *Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. 13, No. 2, Summer 1998; compare Block, W., pp. 65-67.

9.7. The Status of Reparation for Slavery and Colonialism under International Law: The Case for Africa

9.7.1 In General

The following analysis will deal once again with the issue of reparations for slavery and this time, advance the claim for reparations by African states. Reparation has been a prominent idea in public international law even before the emergence of international human rights law. International Arbitration panels, the International Court of Justice and the International Law Commission define the notion of reparation in relation to the notion of international responsibility of states.

Under international law, any conduct, which is attributable to the state and which constitutes a breach of an international obligation of the state is an international wrongful act. An international wrongful act falls under the domain of state responsibility. And the legal consequences of the international responsibility of the state are the obligation to cease the wrongful act and or the obligation to make reparation. Reparation is therefore, the various ways in which a state can redress an international wrong and in doing so, discharges itself from state responsibility towards injured states' parties and individual or groups of victims for a breach of an international (human rights) obligation.¹⁰⁷⁵

This section shall also consider political solutions to slavery reparations. The political analysis shall examine the various criteria for economic development for African states and also examine the issue of reparation for colonialism.¹⁰⁷⁶

¹⁰⁷⁵ Article 31 of draft Articles on State Responsibility, adopted by ILC drafting Committee, (2000 session of the ILC) annexed to UN Document A/55/10

¹⁰⁷⁶ Du Plessis, Max, *Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery in Human Rights Quarterly* 25, 1981 (2003), p.624

9.7.2 Introduction

Apart from the various reparations crusaders in the U.S., human rights apostles, anti-slavery movements, the events in Durban at the United Nations World Conference against Racism, Discrimination, Xenophobia and Related Intolerance to which South Africa played host in 2001, all combined together rekindled the hope and conviction that a sort of reparation or restitution may address the issue of this epoch injustice.¹⁰⁷⁷

I shall highlight the international law implications of the claim for reparation and also explore the visibility of demands made by Africa against the West for restitution and compensation. The degree and complexity of Atlantic Slavery calls for reparation.¹⁰⁷⁸ The examination here will be confined to Atlantic Slave Trade that began four centuries from 1440-1870 ago.¹⁰⁷⁹

9.7.2.1 The Current Status of Reparation in Public International (Human Rights) Law

There is no gain saying that moral argument for reparation for slavery is a powerful weapon as confirmed at the Durban Conference which states that:

*“Slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organised nature and especially their negation of the essence of the victims, and ... that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade.”*¹⁰⁸⁰

Aside from this moral argument, there had been various calls also for legal approach to reparation. At the domestic level, African Americans have advanced claims for reparation against surviving businesses within the U.S. that profited from slavery.¹⁰⁸¹

¹⁰⁷⁷ Compare Henkin, Louis, *International Law: Politics Values and Functions*, 13 Collected Courses of Hague Academy of International Law 208 (Vol. IV 1989), cited in Henry Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 127 (2nd ed. 2000); <http://www.arm.arc.co.uk>; <http://www.sosig.ac.uk/roads/subject-listing/World/slavery.html>; Compare also *Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 31 August – 8 September 2001(Durban, South Africa), available at <http://www.un.org/WCAR/>;

¹⁰⁷⁸ Thomas, Hugh, *The Slave Trade*, 1997, pp. 805-806; Mazrui, Ali, *Global Africa: From Abolitionists to Reparationists*, 37 *Afr. Stud. Rev.*, 1994, p. 3.

¹⁰⁷⁹ Lovejoy, Paul, *Transformations in Slavery: A History of Slavery in Africa*, 1983, pp.232-234; Welsh, Frank, *A History of South Africa* (rev. ed. 2000), pp. 59-61.

¹⁰⁸⁰ *ibid* Durban Declaration, Art. 13; compare also Chisolm, Tuneen, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 *U. Pa. L. Rev.*, 1999, pp.677-678. Chisolm described the Atlantic Slave Trade as “one of the most callous, Vexatious, near-genocidal violations of human rights in world history”, *ibid.*, p.677.

¹⁰⁸¹ Kong, Deborah, *Second Lawsuit filed asking Reparations*, *Wash. Times*, 2 May 2002 available at <http://www.washingtontimes.com/national/20020502-91603120.htm>.

And at the international level, claims are intended by states (or international organisations on their behalf) against other states for their practice or endorsement of slavery during the Atlantic Slave Trade.¹⁰⁸² The latter shall be of paramount importance in the examination here, since the claims of wrongs or guilt are proffered against the states and therefore conjure the issues of state responsibility in international law.

International responsibility is variously seen in relation to other states as subjects of international law.¹⁰⁸² Therefore, all disputes that are to be adjudicated here and the right sought to be vindicated is that of the state and not of individual or direct victim. The Permanent Court of International Justice (PCIJ) noted in the *Mavrommatis Palestine Case* that “*by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.*”¹⁰⁸⁴

Professor James Crawford has advanced tremendous responsibility as a general principle of international law and whose project has come to a close in the recent adoption by the International Law Commission (ILC) in 2001.¹⁰⁸⁵ The principle of responsibility is a natural concomitant of the substantive rules of international law, and the law of responsibility addresses the occurrences and consequences of illegal acts and the reparation, which such illegal acts are contained. The PCIJ noted in the *Chorzow Factory (jurisdiction) Case* that: “*it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.*”¹⁰⁸⁶

The term “satisfaction” is an important term in the ILC Articles on State Responsibility. “*The state responsible for an internationally wrongful act is... obliged to give satisfaction for the injury caused by that act in so far as it cannot be made good by restitution or compensation.*”¹⁰⁸⁷ Such measures usually take the form of “*acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.*”

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¹⁰⁸² Gifford, Lord Anthony, *The Legal Basis of the Claim for Reparations*, 1993. He stated that the enslavement of Africans was a crime against humanity such that reparation, a concept that “is firmly established and actively pursued by states, on behalf of their injured nationals, against other wrongdoing states”, is due under international law principles. Available as <http://www.arm.arc.co.uk/legalBasis.html>.

¹⁰⁸³ Brownlie, Ian, *Principles of Public International Law* (3d ed. 1982), p.431.

¹⁰⁸⁴ *Mavrommatis Palestine Concessions Case* (Greece v. UK), 1924 P.C.I.J. Reports (Ser. A) No. 2, p. 12.

¹⁰⁸⁵ Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002.

¹⁰⁸⁶ See *Chorzow Factory Case*, 1927 P.C.I.J. (Ser. A) No. 9, p. 29.

¹⁰⁸⁷ Crawford, *ibid* 324, Art. 37(1).

¹⁰⁸⁸ *ibid.*, Art. 37(2).

Satisfaction tenders reparation particularly, in moral damage cases such as emotional injury, mental suffering, injury to person and similar damage suffered by nationals of the injured state.¹⁰⁸⁹ It is not a standard of reparation, in the sense that the injury to a state may be fully repaired by restitution and/or compensation, but its place is well established in international law and it serves a useful role in providing reparation for those injuries, not financially assessable, which amount to an affront to the state.¹⁰⁹⁰ The ILC Articles treat these reparation forms as part of a coherent package aimed at providing “full reparation” for international wrongs. Article 31 states that “*the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*” Accordingly, the pursuit of “full reparation” involves the flexible use of each of the forms of reparation mentioned, to the extent that if one form of reparation is dispensed with or is unavailable in the circumstances, others become correspondingly more important.¹⁰⁹¹

The Organisation of African Unity (OAU) and now called African Union (AU) represented Africa and on behalf of all Africans on the continent, and those who still suffer the consequences of the crime of mass kidnapping and enslavement at the first Pan African Conference on Reparations.¹⁰⁹² The defendants here, as enunciated by Anthony Gifford, are the government of those countries that promoted and were enriched by the African slave trade and the institution of slavery.¹⁰⁹³ The hurdles in enforcing this claim is embodied in the language of state responsibility i.e. by proving that present day Western states are responsible for the slavery practice during the Atlantic Slave Trade because of the evident difficulties of state’s succession, continuity and identity.¹⁰⁹⁴ And they also face the problem of proving that the action of the states were unlawful at the time it was committed.

The ILC on State Responsibility has definitely something to say here. While chapter 1 defines the basic principles of responsibility, chapter 2 defines the conditions under which conduct is attributable to the state and chapter 3 highlights in general terms, the conditions under which such conducts amount to a breach of international obligation of the state concerned.

¹⁰⁸⁹ See the Commentary to Article 37, I.L.C. Articles on State Responsibility in Crawford, *ibid* 324, p. 231; Compare also Borchgrave P.C.I.J. (Ser. A/B) No. 72 (1937), p.165

¹⁰⁹⁰ Crawford, p. 231; compare Du Plessis, p. 631

¹⁰⁹¹ See Articles 34 & Commentary to it in Crawford, p. 212; compare Du Plessis, p. 631

¹⁰⁹² Gifford, Legal Basis, *ibid* 321

¹⁰⁹³ *ibid*.

¹⁰⁹⁴ Compare Crawford, J.; *ibid* 325; Gifford, A., *ibid* 326

In essence, the only conduct attributable to the state at an international level is that of its agents, organs of government, or of others, who have acted under the direction, instigation or control of those organs. These general rules qualified the conduct of all nations who through their agencies involve themselves in slave trade and therefore making such conducts attributable to these nations. However, the attribution must be clearly distinguished from the characterisation of conduct as internationally wrong.¹⁰⁹⁵ The rules mentioned in chapter 2 of the ILC Articles are concerned with establishing prima facie acts of the state for the purposes of responsibility, yet says nothing about the international legality or otherwise of that conduct. In order to consider this breach, it is imperative to consider the general conditions of state responsibility as spelled out in chapter 3 of the Article and the doctrine of inter-temporal law.

Article 3 of chapter 3 states that: “*an act of state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs.*”¹⁰⁹⁶ Article 13 defines the basic principle that, for international responsibility to exist, the breach must take place at a time when the state is bound by the obligation, and is a guarantee for states against the retrospective application of international law in matters of state responsibility.¹⁰⁹⁷ International human rights law adopts the same view in Article 11(2) of the Universal Declaration of Human Rights (1948);¹⁰⁹⁸ in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);¹⁰⁹⁹ and in Article 15(1) of the International Covenant on Civil and Political Rights (1966).¹¹⁰⁰ Moreover, an examination of international practice and jurisprudence shows that this principle has hitherto been constantly applied, being either explicitly mentioned or implicitly followed.¹¹⁰¹

¹⁰⁹⁵ See the Commentary to I.L.C. Articles (2001), Chap. II, Attribution of Conduct to a State in Crawford, *ibid* 324, p.92.

¹⁰⁹⁶ *ibid.*, Art. 13, Chap. III.

¹⁰⁹⁷ Compare U.N., R.I.A.A., Vol. II, 1949, pp.829, 845: Higgins, Rosalyn, Time and the Law: International Perspectives on an Old Problem, 46 *Int'l & Comp. L.Q.*, 1997, p.501.

¹⁰⁹⁸ Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Session (Resolutions, part 1), p. 71; Du Plessis, p. 633.

¹⁰⁹⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, *Europ. T.S. No. 5* ; Du Plessis, p. 633.

¹¹⁰⁰ International Covenant on Civil and Political Rights, adopted 16 December 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 1966, 999 U.N.T.S. 172; Du Plessis, p. 633.

¹¹⁰¹ See The Council of Europe, 7 *Eur. Comm'n H.R.*, *Recueil Des Decisions De La Commission Europeene des droits de l'homme* (March 1962, Strasbourg), 119 ; Du Plessis, p. 633.

It follows from the foregoing that the lawfulness or wrongfulness of an act in international law must be established on the basis of obligations enforced at the time when the act was committed. In terms of slavery and slave trade,¹¹⁰² it would be difficult to convince that these acts were outlawed in international law during the period of the Atlantic Slave Trade. Furthermore, principles of morality alone are not a sufficient condition for the emergence of international law rule – there must be evidence of a wide state practice before a rule crystallises. In 1825, a U.S Chief Justice was able to point out in the *Antelope* case that slave trading was lawful because it was sanctioned by law of all nations who possessed distant colonies.¹¹⁰³ Sir Robert Jennings and Sir Arthur Watts, outstanding jurists in public international law, indicated that in the early years of the 19th century, customary international law did not condemn the institution of slavery and the trafficking of slaves. The abolishment of the slave trafficking and the condemnation of the slave trade by the major actors in slavery and slave trade¹¹⁰⁴ were not enough to make the traffic in slaves a crime *jure gentium* at the time.¹¹⁰⁵

Though, slavery and traffic in slaves are today prohibited in customary and conventional international law, however, the exact point at which these practices became outlawed in international law is difficult to ascertain. In the words of Geoffrey Robertson,

*“There was no defining moment like the Nuremberg judgement, but rather an accumulation of treaties throughout the 19th century and a gradual abandonment by the Great Powers of their toleration of the practice, marked in turn by military offensives against traders ... and by domestic court declarations that freed any slave brought within its jurisdiction. The point came somewhere between 1885 (the Treaty of Berlin forbidding slave trading) and 1926, when Slavery Convention confirmed that states had jurisdiction to punish slavers whenever they were apprehended.”*¹¹⁰⁶

¹¹⁰² Laremont, Ricardo, *Political Versus Legal Strategies for the African Slavery (sic) Reparations Movement*, 2 Afr. Stud. Q., 1999 pp. 2-3. Available at <http://www.africa.ufl.edu/asq/v2/v2i4.htm>; compare Gifford, j., Legal Basis; Jorgensen, Nina, *The Responsibility of States for International Crimes*, 2000, pp.32-35.

¹¹⁰³ 23 US (10 Wheat) 64, 1825 cited in Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice*, 2000, p. 209.

¹¹⁰⁴ Oppenheim's *International Law*, Vol. 1, p. 979 (Sir Robert Jennings & Sir Arthur Watts eds. 1996).

¹¹⁰⁵ *ibid.*, p. 979.

¹¹⁰⁶ Robertson, p. 209 ; Du Plessis, p.635

The claims for reparations for Atlantic Slave Trade will have to surmount the doctrine of inter-temporal law.¹¹⁰⁷ The argument advanced by protagonists of reparation is that the acts of slavery committed then amount to a violation of fundamental norms of international law thereby circumventing the problem of inter-temporal law principle. The protagonists point out that the outlawing against slavery had attained the force of a jus cogens norm in contemporary international law with the result that there is some form of retrospective responsibility for the states that perpetrated slavery in those days.¹¹⁰⁸

The ILC Articles on State Responsibility take exemption to retrospective law in this case. Article 13 of ILC states:¹¹⁰⁹

1). State Responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence ... this does not entail any retrospective assumption of responsibility. ...

2). Accordingly, it is appropriate to apply the inter-temporal principle to all international obligations, and article 13 is general in its application.

Though Article 13 does not forbid voluntary reparation for damage, courts, as a result of the conduct that was not at the time committed, a breach of international obligation in force for that state, did forbid it.¹¹¹⁰ However, the affected states and their delegates in the Durban Conference made sure that the semantic of the final Declaration would form no basis for legal claims by African states for reparation.¹¹¹¹

¹¹⁰⁷ Rölling, Bernard Victor Aloysius, *International Law in an Expanded World*, 1960, p. 15.

¹¹⁰⁸ Gifford, Lord Anthony, *The Legal Basis of the Claim for Reparations*, 1993, available at <http://www.arm.arc.co.uk/legalBasis.html>.

¹¹⁰⁹ Compare ILC Articles on State Responsibility, Art. 13 in Crawford.

¹¹¹⁰ *ibid.* Commentary to Art. 13, Para. 6, pp. 132-133.

¹¹¹¹ Sebok, Anthony, *The Hidden Legal Issues Behind the U.N. Racism Conference*, available at http://humanrights.uconn.edu/documents/papers/Howard-Hassmann_Slavetrade.pdf

9.7.3 Political and Moral Arguments for Reparations

It is obvious from the above arguments that legal basis for reparation may not be achieved as a result of the various legal impediments, however given the structures of the legal paradigm, it seems reasonable and advisable to fall on the arguments of moral and political doctrines for reparation for slavery.¹¹¹² African countries and their leaders convinced that the legal path for slavery is not feasible, had constituted various organs under the OAU now AU since 1992 to press for reparations.¹¹¹³

The Western countries with its democratic institutions and human rights appear to have a problem on how to deal with its own past and the historical injustices of slavery and colonialism.¹¹¹⁴ This political limbo of the Western countries gave the Africans the impetus to argue that reparation for slavery is a prerequisite of a moral global economy, and they did so by pointing to a growing trend in the international community for governments to provide reparation for victims of historical human rights abuses.¹¹¹⁵

There are notable examples where these instances were applied in the past: Germany's payment of over 50 billion US dollars of reparation to post 2nd World War victims; Japanese 1 billion US dollar program to undertake cultural and vocational projects as a token of apology for wrongs committed against former "comfort women";¹¹¹⁶ in 1990, Austria made payments to the total of 25 million US dollars to Jewish survivor of the Holocaust.¹¹¹⁷

¹¹¹² Hughes, Graham, *Reparations for Blacks*, 43 N.Y.U. L. Rev., 1968, pp. 1063-1064 cited in Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tulane L. Rev., 1993, pp. 597, 629 n. 96.

¹¹¹³ Compare Laremont, pp. 2-3.

¹¹¹⁴ Franck, Thomas, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L., 1992, p. 46; Crawford, James, *Democracy in International Law*, 64 Brit. Y.B. J. Int'l L., 1992, p. 539; Marks, Susan, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology*, 2000; Barkan, Elazar, *Payback Time: Restitution and the Moral Economy of Nations*, TIKKUN, Sept.-Oct. 1996, pp. 52, 58.

¹¹¹⁵ Love, David, *US Needs to Pay Reparations for Slavery*, *Progressive Media Project*, 26 Jan. 2000 available at <http://www.progressive.org/mpbvlo00.htm>.

¹¹¹⁶ Yu, Tong, *Reparations for Former Comfort Women of World War II*, 36 Harv. Int'l L.J., 1995, pp. 528-529, 537.

¹¹¹⁷ Gifford, *Legal Basis*.

And the already mentioned Japanese American internment.¹¹¹⁸ According to the moral argument, a reparation may achieve two goals: it provides a means to rectify historical injustices¹¹¹⁹ and it serves to facilitate higher awareness of public morality through the use of market mechanisms, and in the process, both parties' histories are given recognition, ultimately leading to a transfer of economic resources.¹¹²⁰ These are invariably accomplished through agreements based on free will.¹¹²¹

The obstacles for reparations are evidently shown by the affected Western countries, particularly, reparation on the basis of moral obligation, this is so because of the arguments of the reparationists saying that reparation should be an integral part of any moral global economy, for without it, the injustice of slavery will not be dealt with and the history of Africa may not be legitimised.¹¹²² In a counter argument, the affected Western countries argued that they cannot endorse the notion of a just world order while simultaneously avoiding the issue of reparation for past injustices.¹¹²³

The insistence of the African states in Durban for reparation whether on moral or legal ground will have to confront the problem of causation, particularly, in proving liability for past wrongs in relation to slavery and showing that the current Western states should bear responsibility for the actions of their predecessors during the period of the Atlantic Slave Trade. As noted above from the various concepts and legal terminologies for reparations, it is almost impossible to prove the historical causation to claim compensation, particularly in the US courts and legal system. Most of the cases were dismissed as a result of lack of causation and standing.¹¹²⁴

¹¹¹⁸ Chisolm, *ibid.* 12, pp.713-716.

¹¹¹⁹ Nozick, Robert, *Anarchy, State, and Utopia*, 1974, pp. 152, 231; Rawls, John, *A Theory of Justice*, 1971, pp.100-101; Johnson, David, et al., *Jurisprudence – A South African Perspective*, 2001, p. 187.

¹¹²⁰ Barkan, *ibid.* 60, p. 54.

¹¹²¹ *ibid.*, p. 54

¹¹²² Silverman, Jon, *Compensation for Slavery*, BBC News: World: Americas, 4 Sept. 2001, available at <http://bews.bbc.co.uk/2/hi/americas/1523669.stm>; Compare also the summary of the findings of the Tribunal in the matter of The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan, Para. 5, 12 Dec. 2000, available at www.jca.apc.org/vaww-net-japan/e_new/judgement.html.

¹¹²³ Durban Declaration, *ibid.* 3, Art. 102.

¹¹²⁴ 70 F.3d 1103, 1110-1111 (9th Cir. 1995) cited in Chisolm, *ibid.* 12, p. 709.

According to Tuneen Chisolm, a US academic, the standing doctrine and causation are barriers to African American reparation suits in courts because of the theory of rights.¹¹²⁵ Chisolm noted, *“In keeping with the dominant perspective that the individual wrongdoer must pay for the wrong, the law accepts the corollary principle that a non-wrongdoer should not be required to pay for the wrong.”*¹¹²⁶ So the demise of the last slaves and slaveholders eliminate the need for slavery reparations through legal relief. He professed further that *“cases based in tort necessarily fail for lack of standing and/or causation. Therefore, the tort suit as a vehicle for African American reparations is not a viable option.”*¹¹²⁷ There is no remarkable difference at the international level because the international law that rules on state responsibility presupposes that there must be a connection between a past wrong and present claim¹¹²⁸ and therefore, any legal claim for reparation for slavery at the international level faces the problem of proving that the present day Western states caused the injury.

Because of the seeming impossibility, particularly in the legal terms, the reparationists postulate the concept of solidarity. For example, the African Americans framed their claims for reparation in terms of group identity¹¹²⁹ and Mari Matsuda described the kinship wrought of common struggles in the following terms:

*“Victims necessarily think of themselves as a group, because they are treated and survived as a group. The wealthy black person still comes up against the colour line. The educated Japanese still comes up against the assumption of Asian inferiority. The wrongs of the past cut into the hearts of the privileged as well as the suffering ones.”*¹¹³⁰

The Africans attempted to advance the theory of reparation with what they termed “African Consciousness”. This consciousness is reflected in the preambles to the Draft Declaration of the African Preparatory Regional Meeting for the World Conference Against Racism: *“the great importance African peoples attach to the values of solidarity, tolerance and multiculturalism ... constitute the moral ground and the inspiration for our struggle.”*¹¹³¹

¹¹²⁵ Chisolm, p. 710.

¹¹²⁶ Verdun, 1993, p. 622.

¹¹²⁷ Chisolm, p. 712.

¹¹²⁸ Brownlie, 19982, p. 436.

¹¹²⁹ Verdun, 1993, p. 631.

¹¹³⁰ Matsuda, Mari J., *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev., 1987, pp.323, 376.

¹¹³¹ Compare the Report of the Regional Conference for Africa (Dakar, 22-24 Jan. 2001), available at <http://www.un.org/WCAR>.

Consequently, this group identity will allow the Africans to view reparations through the lenses of communalism, collectivism, and to identify a continuing and uncompensated wrong to a corpus of Africans throughout the world. The perpetrators or the wrongdoer, from the African point of view, are not only limited to some prescribed set of individual such as slaveowners, and one guilty state in particular ¹¹³² but also the West, through governments, laws, courts, consumers, producers, economic ideology and institutions. This is what they called collective guilt, because the countries that practiced slavery are progressing economically and still reaping the fruits of slave labour. ¹¹³³

One is confronted with the question: what is the uncompensated wrong? However, three classifications here come to mind: firstly, the mass kidnapping and enslavement of Africans, secondly, the contribution made by slaves to the prosperity of the slave owning nations and thirdly, the consequences of slavery, which manifest themselves in continuing systematic discrimination and racism. Historically, the injuries to Africans are adequately documented: *“the invasion of African territories, the mass capture of Africans, the horrors of the middle passage, the chattelisation of Africans in the Americas, the extermination of the language and culture of the transported Africans.”*¹¹³⁴ To prove the injury factor, historical, sociological, and economic evidences are required. Some scholars argued that the slave trade was a principle factor contributing to the generation of wealth by the Western nations and in the words of Marketti, who developed a mathematical formula to determine the value of slave labour exploited from African Americans, states:

*“I am convinced that the United States’ present day wealth, rather than a result of how economic activity was organised or of access to natural resources, is more attributable to the fact that at a crucial point in the development of the industrial United States, large amounts of free labour were deployed, from which surplus was extracted and filtered through various exchange mechanisms to nearly every budding industrial enterprise in the nation.”*¹¹³⁵

Though the degree of economic development through slavery is contentious, it is equally clear that the use of slave labour was a significant contributing factor to economic development. ¹¹³⁶

¹¹³² Verdun, 1993, p. 636.

¹¹³³ *ibid.*, pp. 638-639; Human Right Watch, *An Approach to Reparations* 19 July 2001, available at <http://www.hrwatch.org>.

¹¹³⁴ Gifford, *Legal Basis*, 1993.

¹¹³⁵ Marketti, Jim, *Black Equity in the Slave Industry*, 2 Rev. Black Pol. Econ., 1972, pp. 43-44 quoted in Verdun, *ibid.* 57, pp. 631-632 and n. 99.

¹¹³⁶ Gifford, *Legal Basis*, 1993; Robinson, Randall, *The Debt: What America Owes Blacks*, 2000.

It may also be argued that racial inequality exists and still exists between individuals and nations.¹¹³⁷ In this regard, Oliver and Shapiro argued that:

*“Disparities in wealth between Blacks and Whites are not the product of haphazard events, inborn traits, isolated incidents or solely contemporary individual accomplishments. Rather, wealth inequality has been structured over many generations through the same systematic barriers that have hampered Blacks throughout their history in American society: slavery, Jim Crow, the so-called de jure discrimination, and institutionalised racism.”*¹¹³⁸

And Lord Gifford concurred:

*“There is a further element in the legacy of the slave trade, which is the damage done within Britain, within the United States and other Western societies. The inhuman philosophy of white supremacy and black inferiority was inculcated into European peoples to justify the atrocities, which were being committed by a Christian people upon fellow human beings. That philosophy continues to poison our society today.”*¹¹³⁹

Mazrui in his contribution indicated:

*“And why should all the permanent seats of the United Nations Security Council be given to countries, which are already powerful outside the UN? Is there not a case for giving Africa a permanent seat with a veto – not because Africa is powerful but because it has been rendered powerless across generations? ... There is a primordial debt to be paid to black people for hundreds of years of enslavement and degradation. Some of the causes of global apartheid lie deep in that history.”*¹¹⁴⁰

¹¹³⁷ Chisolm, 1999, p.687; Durban Declaration, Art. 13.

¹¹³⁸ Oliver, Melvin & Shapiro, Thomas, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, 1995, pp. 12-13.

¹¹³⁹ Verdun, 1993, pp.631-632.

¹¹⁴⁰ Mazrui, p. 8.

There is no denying the fact that economic inequalities between Europeans and African Americans, West and Africa could be traceable to patterns of discrimination and slavery.¹¹⁴¹ It should be recalled that slavery as an institution advanced the concept that people were inferior and therefore, subordinated because of their race, this practice is inexorably linked with the ideology of racism.

Another problem to be confronted in claims for reparation is determining the exact nature of reparation and its mechanisms. Three forms of reparations may be considered in the context of slavery – restitution, compensation, and satisfaction.¹¹⁴² These claims cannot function within the context of state responsibility paradigm of international law, but could be used as a reference for the parties involved and useful nevertheless, in the political context in which claims may be advanced by Africa.

A. Restitution

It is sufficient to note that restitution as a form of reparation has limited legal application, given the scale of slavery and statute of limitations. It may be used in relation to acts, which were committed generally as part of the policy of slavery perpetrated by the West. For example, various treasures and works of art that were forcibly removed by the colonial masters in the process of enslaving African people could be restored to African states, *“the need to develop programs for the socio and economic development of developing countries in various areas, one of which is a restitution of arts, objects, historical artefacts and documents to their countries of origin”*,¹¹⁴³ and granting of assistance to persons who wish to return to Africa. This form of reparation was recognised by the delegates at Durban. Various Programs could then be initiated to facilitate the journey and the resettlement of the descendants of enslaved Africans.¹¹⁴⁴

¹¹⁴¹ Chisolm, 199, pp. 689-702; Durban Declaration, Art. 158.

¹¹⁴² ILC Articles on State Responsibility; Lovejoy, Paul, pp.232-234.

¹¹⁴³ Durban Declaration, Art. 158.

¹¹⁴⁴ *ibid.*, Art. 158.

B. Compensation

Compensation appears to be the most difficult form of reparation because the core of reparation is the compensatory theory of justice that goes with it: *“Injuries can and must be compensated. Wrongdoers should pay victims for losses. Afterwards, the slate can be wiped clean.”*¹¹⁴⁵ *“This ... notion of justice is commonplace in the context of bankruptcy, contracts, and even personal injury in law.”*¹¹⁴⁶ International law governing state responsibility endorses the same notion of justice and provides that compensation is available as legal recompense for *“any financially assessable damage.”*¹¹⁴⁷ The problem, as Minow points out, is that there is a sense of *“inappropriateness of putting a value on losses from mass atrocity.”*¹¹⁴⁸ Anthony Gifford suggested that the damage could be classified and researched under different headings: economic damage, cultural damage, socio damage and psychological damage. The monetary leverage to be placed on these elements is impossible to quantify. Gifford pointed out:

*“How do you assess the value of the loss to an African people of a young person, kidnaped and transported over 200 years ago? What figure can be placed on the psychological damage inflicted by a system which is still deeply racist?”*¹¹⁴⁹ *Can it be proved that the slave system destroyed old and flourishing African civilisations, and if so, how is their value to be measured? What level of restitution is appropriate for the African peoples of the Diaspora?”*¹¹⁵⁰

Added to these seemingly intractable legal and political problems in the claims for reparations is the fact that not all Africans (individuals or states) suffered equally and some may not have suffered at all.¹¹⁵¹ For any meaningful reparation to be achieved, injured victims must be segregated to avoid some, being over-compensated and other under-compensated.¹¹⁵²

¹¹⁴⁵ Minow, Martha, *Between Vengeance and Forgiveness*, 1998, p. 104.

¹¹⁴⁶ *ibid.* p. 104

¹¹⁴⁷ ILC Articles on State Responsibility in Crawford, p. 36(2).

¹¹⁴⁸ *ibid.* p. 36.

¹¹⁴⁹ Chisolm, p. 723.

¹¹⁵⁰ Gifford, Legal Basis.

¹¹⁵¹ A Primary Example here is South Africa. Although she had a legitimate call for reparation for colonialism,, it is however, difficult to make a similar claim in respect of Slavery.

¹¹⁵² Verdun, p. 658.

As propagated by reparationists, the solutions lie in communitarianism – a uniform award consistent with group injury, for example, the Japanese American Internment Compensation. Opponents of slavery however argued, that only those, who were to blame for slavery ought to pay compensation, and then only such amount as is commensurate with their blame. Other advocates of reparation suggested the possibility of forcing payments from companies and individuals that derived advantages from slavery. But Gifford is skeptical:

*“Such an approach would create more problems than it solved. Enormous research would be needed to identify the companies and their families, to determine how much money was made by their ancestors, and to calculate how much should be forfeited by the present shareholders or family members. The process would inevitably be somewhat arbitrary, and potentially oppressive, and it would be rejected both by the targets themselves and their government.”*¹¹⁵³

A viable alternative to this problem is to concentrate on the governments of the countries, which fostered, supported the slave trade, legitimised institution of slavery and profited thereof. Another problem posed in this quest for reparation is the concept of statute of limitations: How far back should one go in assessing compensation claims? And as Human Rights Watch points out *“because human history is filled with wrongs, many of which amount to severe human rights abuse, significant particle problems arise once a certain time has elapse in building a theory of reparations on claims of descendancy alone.”*¹¹⁵⁴ By going back too far, *“almost everyone could make a case of some sort for reparations, trivialising the concept,”* and of course, *“the older a wrong is, the less the residents of countries called on to provide reparations will feel an obligation to make amends.”*¹¹⁵⁵

An effective means of reparation would be to emphasis less on the monetary aspect but to address the legacy of slavery which manifest itself in the continuing racial inequality that pervades the world in the form of socio and economic discrimination and then seek for compensation.¹¹⁵⁶ The concept of empowerment could also be used for the call for reparation.

¹¹⁵³ Verdun, p. 658.

¹¹⁵⁴ Gifford, *Legal Basis*.

¹¹⁵⁵ Human Rights Watch, p. 1.

¹¹⁵⁶ *ibid.* p. 1.

As Mazrui points out, “empowering the African people in relation to their ... states is the challenge of democratisation. Empowering the ... African states in relation to the world system is the challenge of international centring.”¹¹⁵⁷ “The details of how compensation can be used to democratise and internationally centred needed to be worked out, but some tentative suggestions are advanced here.”¹¹⁵⁸ International jurists have been advancing the concept of empowerment of the people within states through the creation of democratic government that represent them.¹¹⁵⁹ This will also encourage developing programs, which are essential for the reconstruction of Africa and also lend credence to the idea of a right to development in international law.¹¹⁶⁰

This development program will create an impact on past slavery practices on economic and socio rights in the world order ¹¹⁶¹ and also enlighten the Western public about the wrong connected to a historical injustice, so as to enable them acquiesce reparation. Subsequently, reparation payment could be used for investment in education, housing, health care, job training, and technological transfer. And more importantly, the cancelling of debts, which has been an impediment to sustainable development in many African countries, is desirable. ¹¹⁶²

And finally, Article 158 of the Durban Declaration declares “that these historical injustices have undeniably contributed to the poverty, underdevelopment, marginalisation, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries”. ¹¹⁶³ The Conference recognises the need to develop programs for the social and economic development of these societies and the Diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect, in the “... areas of (inter alia) debt relief; poverty eradication; building or strengthening democratic institutions; transfer of technology; infrastructure development; education.”¹¹⁶⁴

¹¹⁵⁷ Mazrui, p. 5.

¹¹⁵⁸ Quist-Arcton, Ofeibea, *Slavery Issue Struggles to get a Hearing in Durban*, 4th September 2001 at <http://allafrica.com/stories/200109040564.html>; Ajayi, Abe, *Unfinished Business: Confronting the Legacies of Slavery and Colonialism in Africa* at http://www.african-century.com/acphp/ac_show_article.php?path=ajayi_reparations.

¹¹⁵⁹ Barkan, pp.52. 58.

¹¹⁶⁰ compare ibid. 1158.

¹¹⁶¹ Human Rights Watch, p. 4.

¹¹⁶² Mazrui, p. 7.

¹¹⁶³ *Durban Declaration*, Art. 158.

¹¹⁶⁴ *Durban Declaration*, Art. 158.

C. Satisfaction

Satisfaction as a form of reparation for slavery is gaining momentum. This succeeds formal apology for the acts of slavery. Bill Clinton and Pope John Paul have set precedence by apologising informally to distinct African communities for slavery. While Bill Clinton apologised for Americas part in slave trade, the Pope asked for forgiveness for slavery in 1992.¹¹⁶⁵ These apologies were however, of an informal nature in contrast to formal apology, which constitutes, usually, a measure of satisfaction; a recognised form of reparation in international law.

In the Draft Declarations of the Durban Conference, the African countries called for such an apology:

*“The first logical and credible step to be taken at this juncture of our collective struggle is for the World Conference (against racism) to declare solemnly that the international community as a whole fully recognises the historical injustices of the slave trade and that colonialism ... are ... the most massive ... human rights violations in the world... This recognition would be meaningless without an explicit apology by the former colonial powers or their successors for those ... violations, and ... this apology should be duly reflected in the final outcome of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.”*¹¹⁶⁶

The Durban Declaration also urged the UN, other appropriate international and regional organisations, and states

*“to redress the marginalisation of Africa’s contribution to world history and civilisation by developing and implementing a specific and comprehensive program of research, education and mass communication to disseminate widely a balanced and objective presentation of Africa’s seminal and valuable contribution to humanity.”*¹¹⁶⁷

Though not connected directly to reparation, Chinweizu advanced the creation of “Black Heritage Education Curriculum,” to teach Africans their true history and restore their sense of self-worth.¹¹⁶⁸

¹¹⁶⁵ Gifford, House of Lords, *ibid.* 1082.

¹¹⁶⁶ *Draft Declaration of the African Preparatory Meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.* Arts. 17-18, 8th December 2000

¹¹⁶⁷ *Durban Declaration,* Arts. 118-119.

¹¹⁶⁸ Chinweizu, *Reparations and A New Global Order: A Comparative Overview,* Paper read at the 2nd Plenary Session of the First Pan-African Conference on Reparations, Abuja, Nigeria (27th April 1993), available at <http://www.arm.arc.co.uk/NewGlobalOrder.html>.

9.8 Reparation for Colonialism

Reparation for colonialism is intertwined with the call for reparation for slavery because the period of slavery and the slave trade was followed by the period of colonialism. One can say without contradiction that colonialism is a state approval of exploitation, particularly of Africa and, which prevented African states from presenting independent claim for reparation for slavery. As Gifford points out until recently African countries had no independent voice in the world community:

*“How could the people of, say, Ghana ... make a claim for reparations when their country was considered to be an overseas possession of the very country whose people had kidnaped and enslaved their ancestors? ... Even after the independence of African nations from colonialism, the shackles of neo-colonialism have fettered the power of African governments to speak with any real independence against their former conquerors.”*¹¹⁶⁹

The African delegates to the Durban declaration affirmed their acknowledgement of “*the suffering caused by colonialism and affirmed that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented.*”¹¹⁷⁰ After affirming that colonialism is an evil never to be repeated, the delegates continued that “*we further regret that the effects and persistence of these structures and practices have been among factors contributing to lasting social and economic inequalities in many parts of the world today.*”¹¹⁷¹

As with the case with slavery so also is the case with colonialism, because reparation does not fit easily within the context of state responsibility and if one had to focus on the idea of inter-temporal law, the act of state cannot be considered a breach of an international obligation unless a state is bound by the obligation in question at the time the act was committed.¹¹⁷²

¹¹⁶⁹ Gifford, *Legal Basis*.

¹¹⁷⁰ *Durban Declaration*, Art. 15.

¹¹⁷¹ *ibid.* Art. 15.

¹¹⁷² *ILC Articles on State Responsibility*, Arts. 9-13 in Crawford.

It will be recalled that from the 17th to the early 20th centuries, Western countries established colonies in many areas previously occupied by traditional societies¹¹⁷³ and thereafter, almost the entire African continent came under colonialism.¹¹⁷⁴ Until at least 1945, colonialism was not a violation of international law. The Charter of the United Nations, drafted 1945, implicitly affirmed the legitimacy of colonialism while at the same time sowing the seeds for its demise in recognising the principles of “*self-determination of the people*.”¹¹⁷⁵ By 1960, colonialism appeared to be outlawed in international law by a gradual process geared towards the notion that colonial people had the right to “self-determination” in their economic, culture and social features that culminated in their adoption of the declaration on the granting of independence of the colonial countries and people by the General Assembly of United Nations in 1960.¹¹⁷⁶ And thereafter, the principle of self-determination was accorded judicial approval by the International Court of Justice in Namibia,¹¹⁷⁷ Western Sahara¹¹⁷⁸ and East Timor cases.¹¹⁷⁹

In the case of East Timor, the erga omnes character of self-determination was proclaimed and it was stated that self-determination was “*one of the essential ingredients of contemporary international law*.”¹¹⁸⁰ In spite of the recognition of the contemporary international law, the right to self-determination was not legally recognised before the adoption of the UN charter.¹¹⁸¹ Consequently, legal claims for reparation for colonialism will thus be opposed by the former colonial powers through a reliance on the doctrine of inter-temporal law. The only alternative left in this case to attain reparation for colonialism will be a political plausibility based on moral argument.

Professor Anthony Giddens in an attempt to describe the huge differences in wealth and power between the West and the third world, particularly Africa states, stated:

¹¹⁷³ Giddens, Anthony, *Sociology* (2nd ed. 1993), p. 54.

¹¹⁷⁴ Mazrui, p. 9.

¹¹⁷⁵ Dugard, John, *International Law – A South African Perspective* (2nd ed. 2000), p. 85.

¹¹⁷⁶ *ibid.* p. 86.

¹¹⁷⁷ See 1971 I.C.J. 16, p. 31.

¹¹⁷⁸ 1975 I.C.J. 12, p. 31.

¹¹⁷⁹ 1995 I.C.J. 90, p. 102.

¹¹⁸⁰ *ibid.*, pp.105-106; Shaw, Malcolm, *Peoples, Territorialism and Boundaries*, 3 Eur. J. Int'l L. 1997, pp. 478, 480.

¹¹⁸¹ Compare Harris, p.113.

*“How valid are these theories? They all agree that the imbalance in wealth and resources between the first and third worlds has its origins in colonialism. In this they are surely correct, and without doubt it is also right to claim that the dependency relationships established during the colonial period have been maintained, and even accentuated, since then. Most third world countries find themselves enmeshed in economic relations, which hamper their economic development, but from which it is very difficult for them to break free. The result is that the industrialised areas of the world become increasingly prosperous, while many third world countries stagnate.”*¹¹⁸²

The obstacles identified with regards to the different modalities of reparation in the slavery context will be equally applicable to reparation in the colonial context and calls for compensatory reparation that focus on empowerment of African studies today shall be preferred over loose claims for compensation on account of historical victims of colonialism.

9.9 Summary

There is no gain saying that the difficulties inherent in reparation for slavery and colonialism, particularly the legal problems, appear to be insurmountable. The panacea to this imbroglio for reparation can be overcome by political exigencies strategy. Some of these forms of reparation may take the form of return of stolen artefacts, expression of regrets for the slave trade, established programs to raise public awareness of slavery and its attendant evil in Africa and the West, legitimate and feasible forms of reparation that the affected African communities may deem necessary for development. There must be unanimity amongst African states in their course for compensatory justice because any approach that focusses on contemporary development problems has the advantage of being aligned with existing international human rights struggles under the banner of social-economic advancement and the right to development.¹¹⁸³ The various forms of reparations have merits and demerits but with the latter appearing all-encompassing.

¹¹⁸² Giddens, p. 542.

¹¹⁸³ Human Right Watch, p. 5.

It is historical, categorical imperative for the affected Western countries to accept these incontrovertible facts about slavery, render apology and take all necessary political and moral measures to ameliorate this sad situation. These measures will further entrench the human rights philosophy of the Western countries and its democratic institutions all over the world. The Western countries should be careful not to portray itself as being hypocritical, because empiricism dictates that a man that feels aggrieved and is denied justice can never give up fighting. That is the precarious situation of Africa and its people.

Chapter X: Conclusion

There is no doubt that the institution of slavery enormous moral wrong will always remain a blot on the nations' history that participated in slave trade and slavery into the future. I do not think anyone can reasonably argue otherwise. Consequently, the subsequent discussions and judgements should not be focussed on the relevance or irrelevance of slavery in history, but over its proper place in our present time. The various debates over reparations to African Americans should not be directed towards the argument of whether something should be done but should be directed to asking about what should be done.¹¹⁸⁴

However, one of the effective instruments that can be used to address the issue of reparations is the private law of America. Private law, more than any other part of law, regulates the daily interactions as individuals. It is therefore, no wonder that its doctrines encapsulate some fundamental normative lessons that are relevant to the resolution of social matters, which at first seem intractable and complex than the simple pragmatic cases that shaped private law.

The various theories that throw light on private law's ordinary treatment of claims for restitution because of wrongful enrichments and of cases of legal transition also help to address some difficult challenges faced by the recent restitution claims for wrongful enrichments. Six propositions may be deductible:¹¹⁸⁵

1. The demand for reparation and restitution for enslavement is not alien to America. On the contrary, it epitomises a line of cases in which the law of wrongful enrichment is used to vindicate people's most fundamental rights and dignity. Restitution for wrongful enrichment can also vindicate such interests, rather than merely an interest in lost utility, aligning claim for wrongful enrichment need nor commodify the horrors of slavery.
2. For the effective use of wrongful enslavement's claims so as to vindicate autonomy, the application of recovery should include the perpetrators' ill-gotten gains, rather than the slaves' lost wages.
3. In cases where restitutionary claims vindicate autonomy, allowing responsibility between defendants is unnecessary, because in such cases each is liable to disgorge its ill-gotten gains.

¹¹⁸⁴ Bryan, Chad W., *Precedent for Reparations? A Look at Historical Movements for Redress and where Awarding Reparations for Slavery might fit*, *Alabama Law Review*, 2003, pp. 614-615.

¹¹⁸⁵ *ibid.*

4. The question of whether descendants of slaves should have standing in pursuing reparation is, at its core, a concern of transforming the ancestors inalienable rights to control their labour into money, standing should therefore be allowed if the descendants' claim is understood as a vindication of the infringement of their ancestors' right, which continuously and directly harms their own dignity.
5. Also, the restitutive defence of bona fide purchasers for value can be understood as an alternative and indeed superior doctrinal instrument to that of limitations in dealing with the difficulty of intergenerational justice entailed by the attempt to redress historical injustice.
6. The past legal cases (even constitutional cases) of slavery should not prevent restitutionary claims for wrongful enslavement because legal transition rules at times impose – and indeed should impose – some of the burden of moral progress and beneficiaries of past immorality.

There is also a cogent reason for assigning legislators, rather than judges; the responsibility of prescribing the specific modality of the remedy for these types of historic social wrongs. Even if these matters are not in the affirmative, these matters should not be addressed in the court of law but by the court of public opinion; the court of public opinion can be informed by these normative judgements to which the law is committed.¹¹⁸⁶

The statistical causation arguments should be used to ascertain the cause requirements, lack of harm and standing concerns. The arguments should be further developed and refined for use in showing causation at trial, ultimately address act attenuation concerns that may arise at that stage. Other instruments may include trying these causal tools to particular proposals for asset distribution.¹¹⁸⁷

It is also possible that mass tort law may be useful in addressing attenuation in the reparation debate. Indeed, attenuation, like many other concerns about reparations “*grist for the mill of reparations critics, but ... is familiar in law, and the law has developed methods for dealing with (or ignoring) it.*”¹¹⁸⁸

¹¹⁸⁶ Dagan Hanoch, 2004, pp. 1175-1176.

¹¹⁸⁷ Wenger, 2003, pp. 253-256 ; Logue, Kyle D., *Reparations as Redistribution*, 84 B.U. L. Rev., 2004, pp. 1319, 1354-1370.

¹¹⁸⁸ Posner & Vermeule, p. 702.

To round it all up, it is sufficient here to quote the UNESCO Slave Route Project report of 1994, which states that

“Humanity’s collective conscience must not forget this tragedy, symbolising the denial of the most basic human rights. By virtue of its scale, its duration and the violence that characterised it, the slave trade is regarded as the greatest tragedy in human history. Moreover, it has caused profound transformations, which account in part, for a large number of geo-political and socio- economic changes that have shaped today’s world. It also raises some of the most burning contemporary issues e.g.; racism, cultural plurality, construction of new identities and citizenship”.¹¹⁸⁹

¹¹⁸⁹ http://portal.unesco.org/culture/en/ev.php-URL_ID=25659&URL_DO=DO_TOPIC&URL_201.html

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Lists of Abbreviations

Abe Lincoln:	Abel Lincoln (Republican President in 1860s in America)
AD:	Anno Domini (after death of Christ)
Afr. Stud. Rev.:	African Studies Review
A.J.:	American Journal
AJIL:	American Journal of International Law
ALA:	Australian Liberty Party
AL. L. Rev.	Alabama Law Review
Am. Indian L. Rev.:	American Indian Law Review
Am. Ins. Ass'n v. Garamendi.:	American Insurance Ass'n v. Garamendi.
Am. J. Int'l L.:	American Journal of international Law
AM. J.L. & MED.:	American Journal of Medicine
Am. U.L. Rev.:	American University Law Review
Ann.:	Annex (e), (s)
anno domini Nostri Iesu Christi:	("In the Year of Our Lord Jesus Christ"), commonly shortened to Anno Domini ("In the Year of the Lord")
APA US:	Administrative Procedure Act of the United States
Arist. Pol.:	Aristotle Politics
Arthur Epictetus:	AD 60-120, Greek Stoic Philosopher and teaching mainly in Rome
Art.	Article
Arts.	Articles
ASIAN PAC. Am. L.J. :	Asian Pacific American Law Journal
ATA:	Africans taken in the Amistad
Attic:	Pertaining to, or characteristic of Greece or of Athens
AVR:	Archiv des Völkerrechts
B. C.:	Before Christ
B.C. L. Rev.:	Boston College Law Review
Bd. of Educ.:	Board of Education
Bd. of Trs. of the Univ. of Ala.:	Board of Trustee of the University of Alabama
BCE:	Before the Common (or Christian) Era

BGBI:	Bundesgesetzblatt (Bundesrepublik Deutschland)
BGH MDR:	Bundesgerichtshof, Monatszeitschrift für das Deutsche Recht
BGHSt:	Sammlungen der Entscheidungen des Bundesgerichtshofes für Strafsachen
BICE:	Bureau of Immigration and Customs Enforcements
BIE:	Bureau of Immigration and Enforcement
Brit. Y.B. J. Int'l L.:	British Year Book Journal of International Law
B.U. L.Rev.	Boston University Law Review
B.Y.or BYBIL:	British Year Book of International Law
Calif.W.Int'l L.J:	California Western International Law Journal
Cal. Ins .:	CALIFORNIA INSURANCE CODE
Cal. L. Rev.	Califonian Law Review
Cal. Super. Ct.:	California Supreme Court
C. E.:	Common Era
Cf.:	Confirmed Reference
Chap./chaps/Cp.:	Chapter/Chapters
Chi. Trib.:	Chicago Tribune
CHI.-KENT L. REV.:	Chicago-Kent Law Review
cit:	citation or citizen
Cir.:	Circuit
Colum. L. Rev	Columbia Law Review
Cong.:	Congress/Congressional
Cong. Rec.:	Congressional Record
Cong. Globe app.:	Congressional Globe Application
Conn.:	Connecticut
CONN. INS. L.J.:	Connecticut Insurance Law Journal,
Conn. L. Rev.:	Connecticut Law Review
Constr., Inc. v. Cal. State Elec.:	Construction Inc. v. Cal State Electric Inc.
Corr.:	Correction
D.C.:	District of Columbia
D. Conn.:	District of Connecticut.
D.C. Cir.:	District of Columbia Circuit.
D.D.C.:	Detroit Diesel Corporation

Dev.:	Devision
DHS:	Department of Homeland Security
diss.:	Dissertation
Diss.op.:	Dissenting opinion
DNA:	Deoxyribonucleic acid
doc.:	document
ed.:	editor (of a text or book)
E.D.N.Y.:	Eastern District of New York
E.D. Va.:	Eastern District of Virginia
e.g.:	exempli gratia (lat.)/For example
EMRK:	(Europäische) Konvention zum Schutz der Menschenrechte und Grundfreiheiten vom 4. November 1950
Eng.:	England
esp.:	especially
Esq.	Esquire
et:	conj. Latin and
Eur. J. Int'l L.:	European Journal of International Law
Europ. T.S.:	European Treaty Series
Fed. Cir.:	Federal Circuit
F. Supp.:	Federal Supplement
FleetBoston Fin. Corp.:	FleetBoston Financial Corporation
F.R.D.:	Foundation for Research Development
G.A.:	General Assembly
Ga. L. Rev.:	Georgia Law Review
GAOR.:	General Assembly Official Records (United Nations)
G.A. Res.:	General Assembly Resolution
Geo. L.J.:	Georgetown Law Journal
GG:	Deutsches Grundgesetz
Grot:	Grotius
HAC:	History of the Amistad captives
Harv. C.R.-C.L. L. Rev.:	Harvard Civil Rights-Civil Liberties Law Review
HARV. L. Rev.:	Harvard Law Review

Harv. Int'l L.J.:	Harvard International Law Journal
Hg.:	Publisher (Herausgeber: german)
H.R. 40:	High Commission to Study Reparation Proposals for African-Americans Act
HUM.RTS.L.J.:	Human Rights Law Journal
Ibid:	(Ibidem) in the same book, chapter, place, in the aforementioned place
Id.	The same Author in the aforementioned note
ICC:	International Criminal Court
ICJ:	International Court of Justice
ICLQ:	The International and Comparative Law Quarterly ab BD. 35 (1985): International and Comparative Law Quarterly
ICR:	International Commission of Red Cross
ICTR:	International Court of Criminal Tribunal for Rwanda
ICTY:	International Court of Criminal Tribunal for Yugoslavia
idem:	the same as previously given or mentioned (1350-1400, MECL idem)
IL:	International Law
ILC:	International Law Commission
ILO:	International Labor Organization
ILRF US:	International Labor Right Found of the United States
IMT:	International Military Tribunal
Inc.:	Incorporated
Ind. Int'l & Comp. L. Rev.:	Indiana International & Comparative Law Review
Inst.:	Institution /Institute
Int'l:	International
Int'l. Comm'n of Jurists:	International Commission of Jurists
Int'l J. Legal Info.:	International Journal of the Legal Information
loc. Cit.:	loco citato (ital.)
IVP:	Intravenous Pyelography
J.C.L.:	Journal of Comparative Legislation and International Law
J. Libertarian Stud.:	Journal of Libertarian Studies
J.P.M.L. 2002:	Judicial Panel on Multidistrict Litigation 2002

J.:	Journal
jr.:	junior
J. S. HisT.:	Jewish Studies History
JZ:	Juristenzeitung, Vorg: Süddeutsche Juristenzeitung und Deutsche Rechts-Zeitschrift
Legal Aff.:	Legal Affairs
L.A.:	Los Angeles
LNTS:	Société des Nations, Recueil des Traites et Engagements Internationaux enregistre par le Secrétariat de la Société des Nations-League of Nations, Treaty Séries. Treaties and International Engagements registered with the Secretariat of the League of Nations
L.A.L. Rev.:	Louisiana Law Review
Marx, Karl:	German economist, philosopher and socialist
MD. CODE ANN., HEALTH-GEN.:	Maryland Code Annotated Health General Section
MDL No.	Method Detection Limit/ Model Number
MEW:	Marx Engels Werke
MI:	Michigan:
Mich. L. Rev.:	Michigan Law Review
NAACP:	National Association for the Advancement of Coloured People
Nat'l B. Ass'n Mag.:	National Bar Association Magazine
Nazi:	National Socialist (Nazionalsozialist, Germany)
N-COBRA:	National Coalition of Blacks for Reparation in America
N.D.:	Northern District
N.D. Cal.:	Northern District of California
N.D. L. Rev.:	Northern Illinois University Law Review
N-D. Tex.:	Northern District of Texas
Neths.Int.LR:	Netherlands International Law Reports
Neths. Yrbk:	Netherlands Yearbook
NH:	New Hampshire
N.J.:	New Jersey
NJW:	Neue Juristische Wochenschrift
No.:	Number

Nw. U. L. Rev.:	Northwestern University Law Review
NY:	New York
N.Y.:	New York Reports, Reports of cases decided in the Court of appeals of the State of New York, Reports of cases decided in the Commission of appeals of the State of New York, Reports of cases argued and determined in the Court of appeals of the State of New York, New York Reports
N.Y. COMP. CODES R. & REGS. Tit.:	New York Codes, Rules and Regulations
NYS:	New York State
N.Y. Soc. SERV. LAW:	New York State Social Services Law
N.Y. Sup. Ct.:	<u>New York State Supreme Court</u>
N.Y.U. Ann. Surv. Am. L. :	New York University Annual Survey of American Law
N.Y.U. L. Rev.:	New York University Law Review
Nys:	Le droit International. 2 nd ed., 3 vols. (1912)
ÖBGBl :	Bundesgesetzblatt für die Republik Österreich
Okla. City U. L. Rev.:	Oklahoma City University Law Review
OJLS:	Oxford Journal of Legal Studies
o.s.:	Operating System/ohne seiten
Op. Atty Gen.	Opinions of the Attorney General
p.:	page
Para./par.:	Paragraph
PA. CONS. STAT.:	Pennsylvania Constitutional Statutes
pp.:	pages
PCIJ:	Publications de la Cour Permanente de Justice Internationale-Publications of the Permanent Court of International Justice Ser. A....Recueil des arrêts.- Collection of Judgements Ser. A/B....Arrêts, ordonnances et avis consultatifs.- Judgements Orders and Advisory opinions. Ser. C....bis 19: Actes et documents relatifs aux arrêts et aux avis consultatifs de la Cour.- Acts and Documents opinions given by the Court....ab Nr. 52: Plaidoiries, exposes oraux et documents.- Pleadings, Oral Statements and Documents

P.C.I.J. (Ser. A):	<u>Permanent Court of International Justice</u> (Series A)
Ph.D. (lat.)	Philosophiae Doctor
pol'y:	policy
pref.:	preface, preference
prov.:	Proverbs in the Old Testament of the Scriptures
Pub.In IL:	Public International Law
Qu:	Quaker, a popular name for a member of the Religious Society of Friends (1590-1600)
Rdc/RCADI:	Recueil des cours de / Académie de Droit International
Rdn:	Randnummer
Rep. on E. Eur.:	Representation on East Europe
Rev. :	reviewer or reviewed, reviser or revised
Rev. Black Pol. Econ.:	Review of Black Politics and Economies
Res:	Resolution
R.G.:	Revue générale de droit international public
RGDIP:	Revue Générale de Droit International Public
RGST:	Entscheidung des Reichsgerichts in Strafsachen
RI:	Revue de droit international et de législation comparée
RIAA:	United Nations-Nation Unies, Reports of International Arbitral Awards- Recueil des sentences arbitrales
Rz:	Randzahlen
RzN.:	Randzahlnummer
S.C.:	subkutane Injektion
Sc.Eccl:	Science Ecclesiastes
Schw. JIR	Schweizerisches Jahrbuch für Internationales Recht (Zeitschrift)
S.D. Fla. 2002:	SOUTHERN DISTRICT OF FLORIDA 2002
S.D.N.Y.:	Southern District of New York
Sec.:	Section
SETON HALL L. Rev.:	SETON HALL Law Rev.
Ser.:	Series
S.J. Res.:	Senate Joint Resolution
Sess.:	Seesion
Stan. L. Rev.:	Stanford Law Review

Stat.:	Statements
St.:	State
Soc:	Socrates or social
S/RES:	Security Council Resolutions
S.U. L. Rev.:	Southern University Law Review
supra:	(above) esp. when used in referring to park
tbl.:	Table
Tenn. L. Rev.:	Tennessee Law Review
Tex. L. Rev.:	Texas Law Review
Third W. L.J.	Third World Law Journal
TPA:	Trial of the Prisoners of the Amistad
trans.:	translator
trans./tr.:	translated
TX:	Texas
u.a.:	unter anderen (german): meaning and many others
U. Chi. L. Rev.:	University of Chicago Law Review
U. Haw. L. Rev.:	University of Hawaii Law Review
U. Ill. L. Rev.:	University of Illinois Law Review
U. Mem. L. Rev.:	University of Memphis Law Review
UN/GAOR:	United Nations, official Records of the General Assembly
U.N. GAOR:	United Nations, General Assembly, Resolution
Union-Trib.:	Union Tribune
UNO:	United Nation Organization
U. Pa. L. Rev.:	University of Pennsylvania Law Review
U. Pa. J. Const. L.:	University of Pennsylvania Journal of Constitutional Law
UPI:	United Press International
U.N., R.I.A.A.:	Reports of International Arbitral Awards, United Nations
UNTS:	United Nations-Nations Unies, Treaty Series. Treaties and International agreements registered or filed and recorded with the Secretariat of the United Nations-Recueil des Traités. Traités et accords Internationaux enregistrés ou classés et inscrits au répertoire du Secrétariat de l'Organisation des Nations Unies

U. Rich. L. Rev.:	University of Richmond Law Review
U.S.C.:	United States Code
U.S. Const.	United States Constitution
U.S. Dep't.:	United States Department
U.S. Dept. of State:	United State Department of State
U.S. Dist.:	United States District
U.S. D.N.J.:	United States District of New Jersey
U.S.F. L. Rev.:	University of San Francisco Law Review.
USSR:	The Union of Soviet Socialist Republics
v:	verse
Vand. L. Rev.:	Vanderbilt Law Review
vers:	verses
vols:	volumes
VR:	(Völkerrecht) International Law
vs.:	versus
Wall Str. J.:	Wall Street Journal
WASH. POST:	Washington Post
WASH. U. L.Q.:	Washington University Law Quarterly
W.D. Pa.:	WESTERN DISTRICT OF PENNSYLVANIA
Wis. L. Rev.:	Wisconsin Law Review
WVÜ:	Wirtschaftsverbund Überlingen
Y.B.I.L.C.:	Yearbook of International Law Commission
Yrbk:	Yearbook
Zanji:	referred to the Ethiopian blacks
Z.I.:	Zeitschrift für Internationales Recht
Z.a.ö.R.u.V.:	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Skubiszewski, 1971)

Appendixes

Figures and Tables

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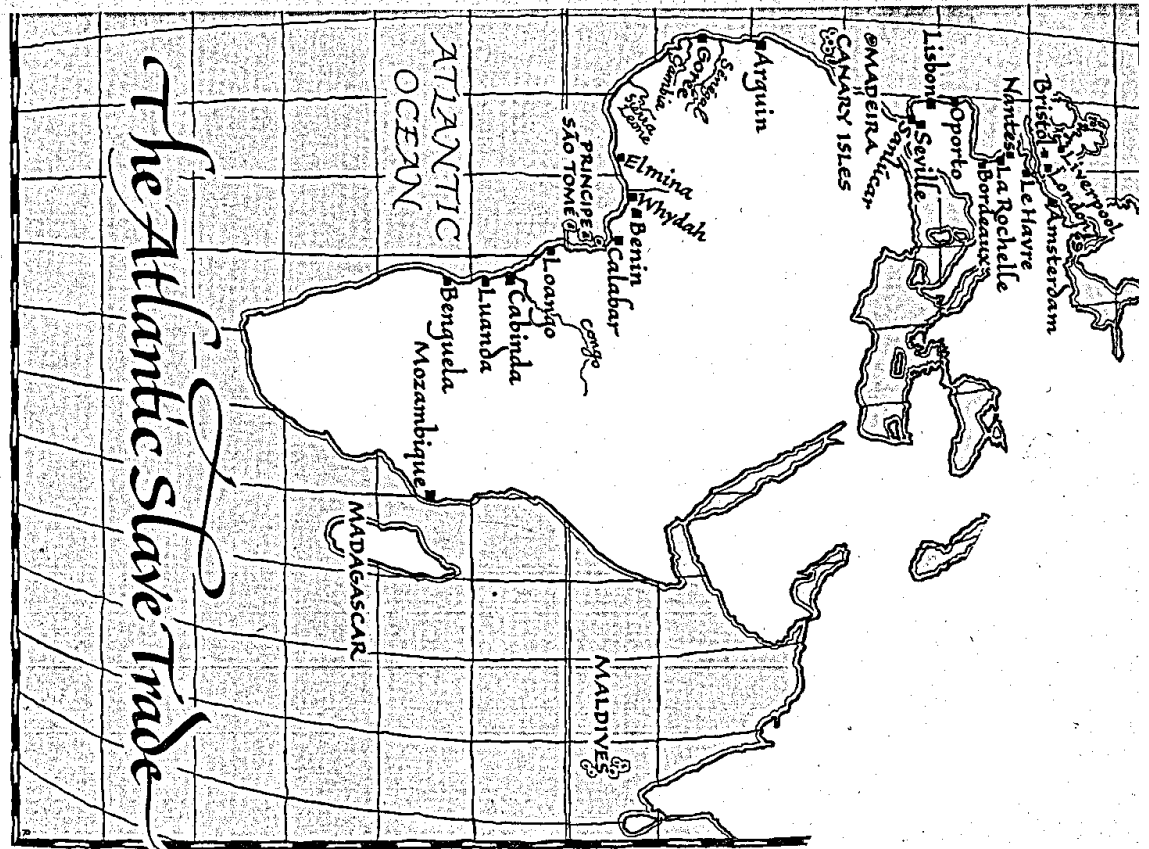
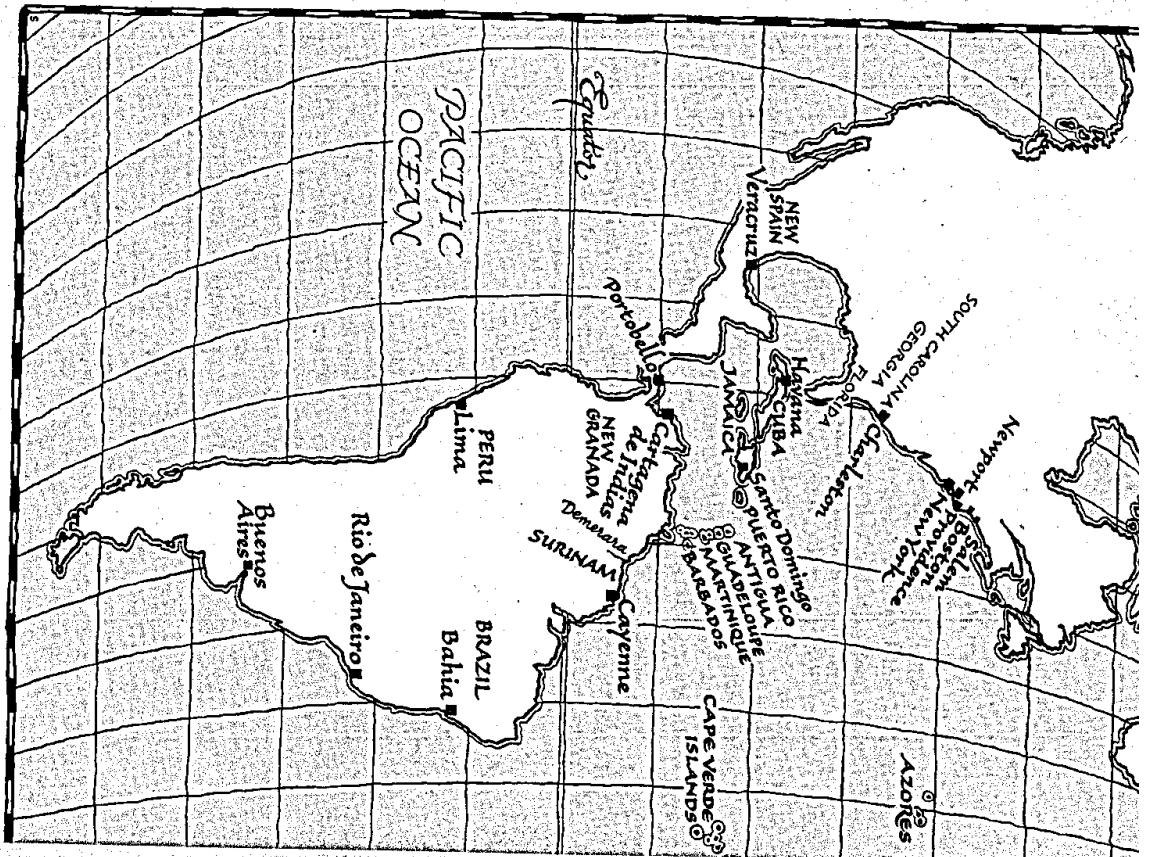
Table A.1: Test for Effective Demand (Slave Prices)..... p. 334

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Slave Prices

Table A.1. Test for Effective Demand

<i>Dep. Variable = SLAVES</i>		
	Linear	Log-Log
<i>d(INVEST)</i>	0.02**	0.4318**
	(5.93)	-7.09
<i>d(GUNS)</i>	0.006**	0.1279**
	-2.09	-2.19
<i>d(SugarP)</i>	410.40.	0.0592.
	-0.29	-0.51
<i>d(SugarQ)</i>	0	-0.016.
	-0.81	(-0.06)
<i>d(War_7yrs)</i>	1079.77	0.0597.
	-0.32	-0.44
<i>d(War_AmRev)</i>	-3633.34	-0.1579.
	1.05	1.14
<i>d(War_Napoleon)</i>	-4585.99	(-0.1225).
	-0.79)	0.59
<i>Constant</i>	-194.91	(-0.0076).
	-0.41	-0.39
<i>Adj. R-squared</i>	0.6461.	0.633.
<i>N</i>	102	102
<i>F stat</i>	27.34	25.8



The Atlantic Slave Trade

Africans sold into slavery in the Americas often received brutal punishments, even for minor infractions. Hanging by the ribs, as depicted by William Blake (1757-1827) in Captain John Gabriel Stedman's account of the 1772-1777 maroon wars in Suriname, was reserved for slaves who tried repeatedly to escape. *Image of the Black Project, Harvard University*



Kings and Princes of the Slave Trade



Henry the Navigator whose captains looked for gold, but found slaves (c. 1440).



Pope Pius II (Piccolomini) who declared that baptized Africans should not be enslaved (1462).



Ferdinand the Catholic who, as Regent of Castile, first approved the despatch of African slaves to the Americans (1510).



Charles II of England who backed the Royal Africa Company, on a golden "guinea".



Louis XIV of France who started the practice of giving bounties to French slave traders.



William IV who, as Duke of Clarence, opposed abolition in the House of Lords.

Slave Mercants

Maria Christina, Queen
Mother of Spain in the
1830s, whose slave interest in Cuba were vast



Sir Robert Rich, among the
earliest entrepreneurs to carry
slaves to Virginia.



John Blount: the brain
behind the South Sea
Company, whose main business
was to ship Africans to the Spanish
Empire.



Humphrey Morice: Governor of the Bank of England, MP, London's major slave trader (c. 1730).



Thomas Golightly, mayor of Liverpool, JP, who traded slaves up till the last legal minute in 1807.



Henry Laurens: a major slave trader in Charleston, South Carolina, who, in the 1760s, opposed the traffic, before becoming President of the Continental Congress (1776).



Philip Livingston of New York who traded slaves in his youth, signed the Declaration of the Independence in his maturity, and founded a chair of

Theology at Yale in his old age. Colonel Handasyd Perkins of Boston whose firm specialized in carrying slaves from a Caribbean island to another (1790s).



Aaron Lopez of Newport, born in Portugal, the only important Jewish slave trader in the Anglo-Saxon world.



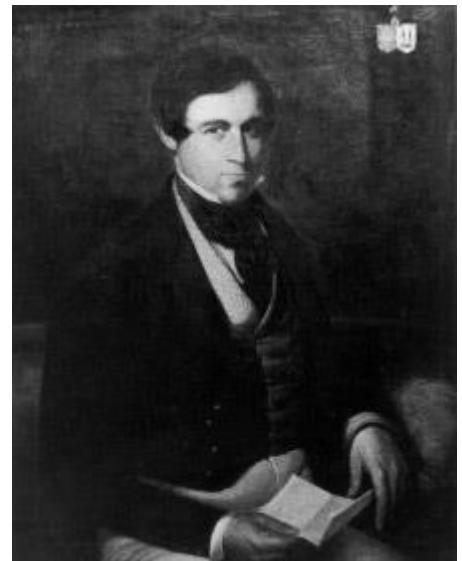
Antonie Walsh of Nates who conveyed 10,000 slaves from Angola to the Americas, and Bonny Prince Charlie to Scotland.



Pierre-Paul Nairac, the most active slave trader of Bordeaux, who was refused a peerage because he was a Protestant.



Joaquim Pereira Marinho, among the last great slave traders of Brazil, a philanthropist in Bahia.



Julian Zulueta of Havana, the greatest merchant in the last days of the Cuban trade, carried his vaccinated slaves by steamer to his plantation.



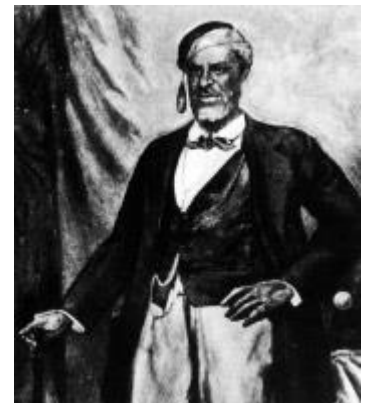
King Tegesibu of Dahomey who made £250,000 a year from selling Africans about 1750: far more than any English duke received as income.

King Alvares of the Kongo who provided slaves to the Portuguese (c. 1686).





The King of Benin (c. 1686) whose ancestors refused to sell men; but his descendants sold everxone.



Francisco Felix de Sousa (Chacha), a Brazilian who dominated the slave trade in Dahomey in the 1840s.



Slave Mercants

Portuguese traders in Benin (c. 1500)
who obtained five slaves for a horse.



John Newton, the slave
captain who wrote "How sweet
the name of Jesus sounds".



Hough Crow from Liverpool: one
of 1,000 captains from there who
sailed for Africa to obtain slaves.



Newport slave traders carouse in Surinam (c. 1755). Those still sober include Esek Hopkins, later commander of the United States Navy, and Joseph Wanton, later Governor of Rhode Island.



“Captain Jim” de Wolf of Bristol, Rhode Island: in his youth a slave captain, then a merchant, later a United States Senator and cotton manufacturer.



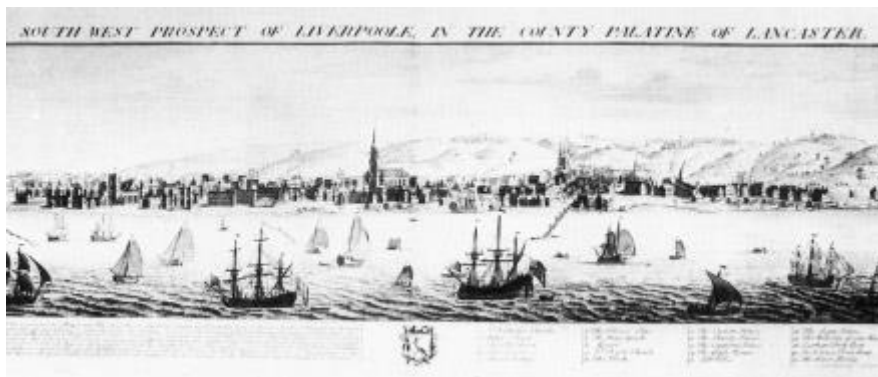
Pierre Dese, a slave captain of Bordeaux in the illegal days (c. 1825).



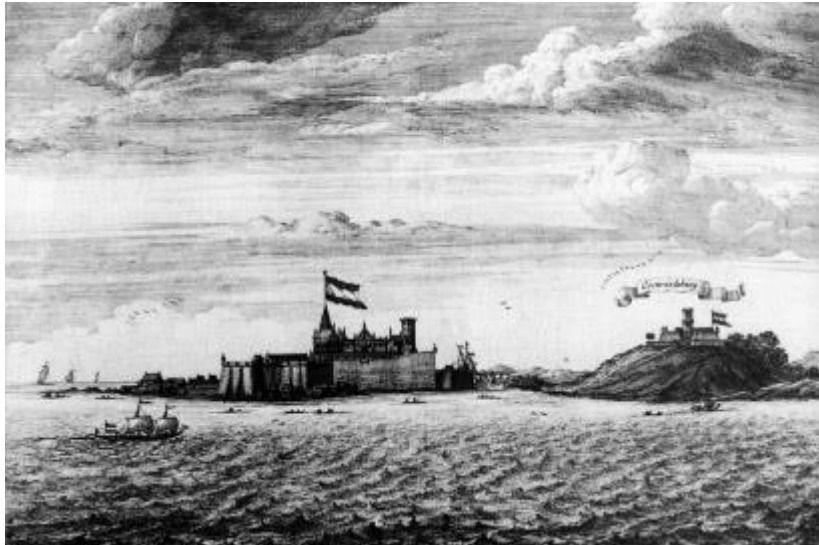
Robert Surcouf, corsair of Saint Malo, who revived the French slave trader after 1815.



Lisbon: at least 100,000 slaves were brought here from Africa in the fifteenth and sixteenth century.



Liverpool: the largest slaving port in Europe; her merchants sent 4,000 slaving voyages to Africa between 1700 and 1807.



Elmina, the Portuguese stone-built castle on the Gold Coast, captured by the Dutch in 1637. Slaves were exported from here for 350 years.

Nantes: France's main slaving port sent 2,000 voyages to Africa for slaves.





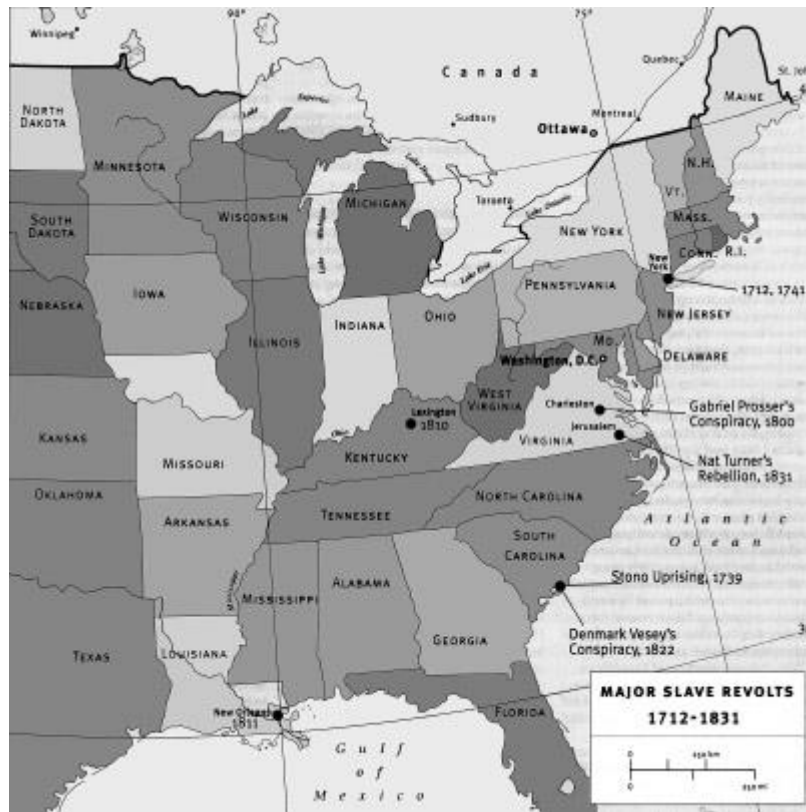
Cape Coast castle, built by Heinrich Carloff, became the English headquarters on the Gold Coast in the 1660s.

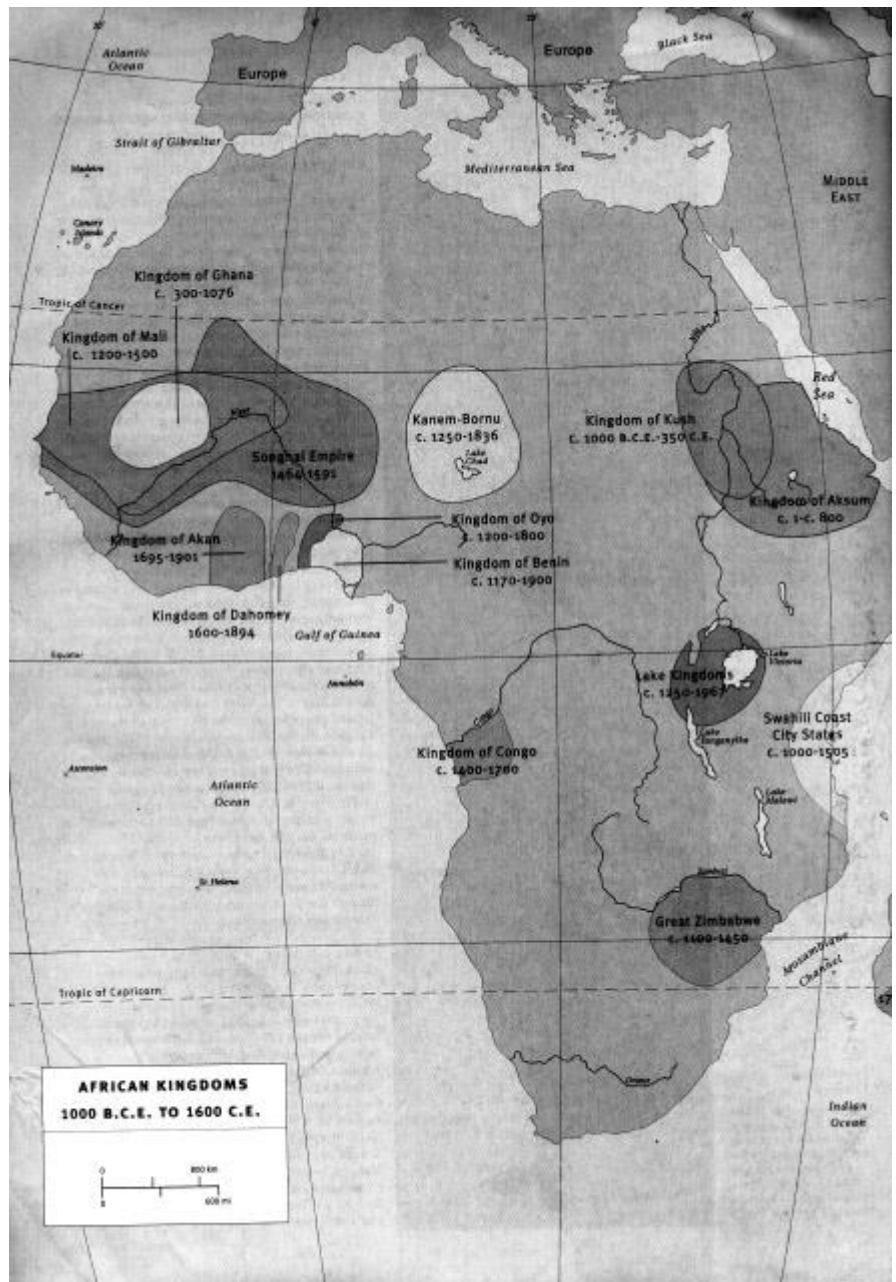


Top: Rio de Janeiro, the major slave port of Brazil, whose merchants sent for and recieved several million Africans c. 1550–1850.

Bottom: Havana: in the ninetennth century the largest slave port in the world, both as reciever of slaves and as a planner of voyages. Here the British are seen moving into the city after their defeat of Spain in 1762.





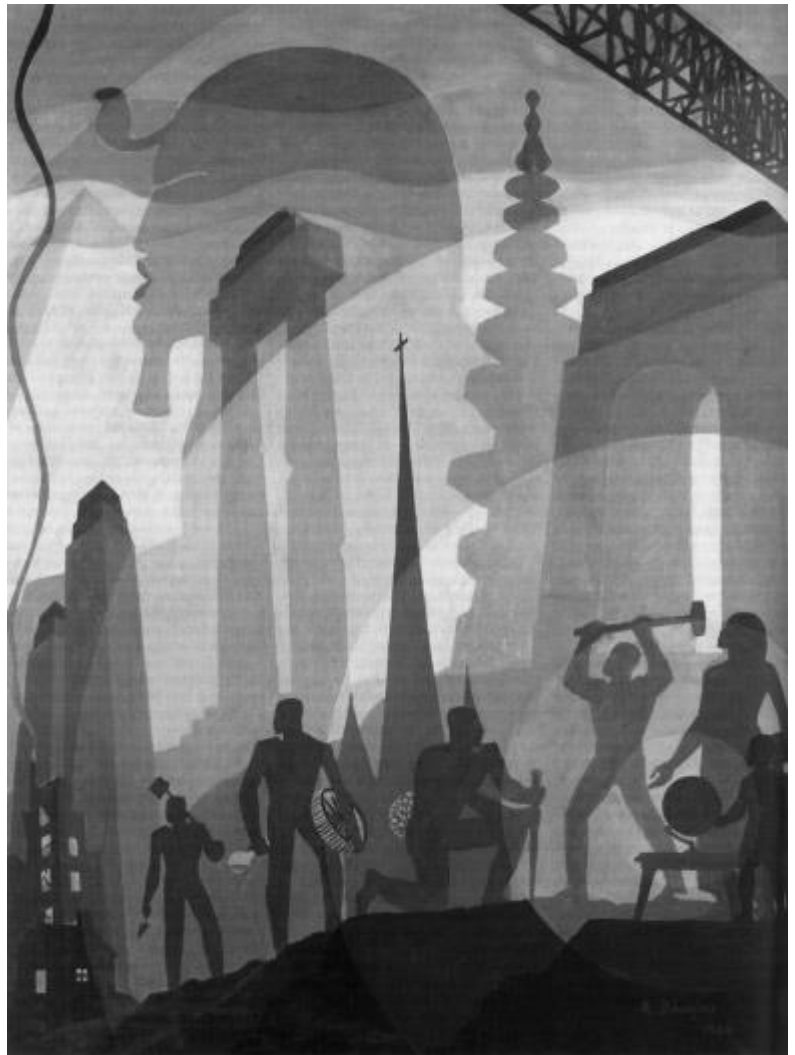


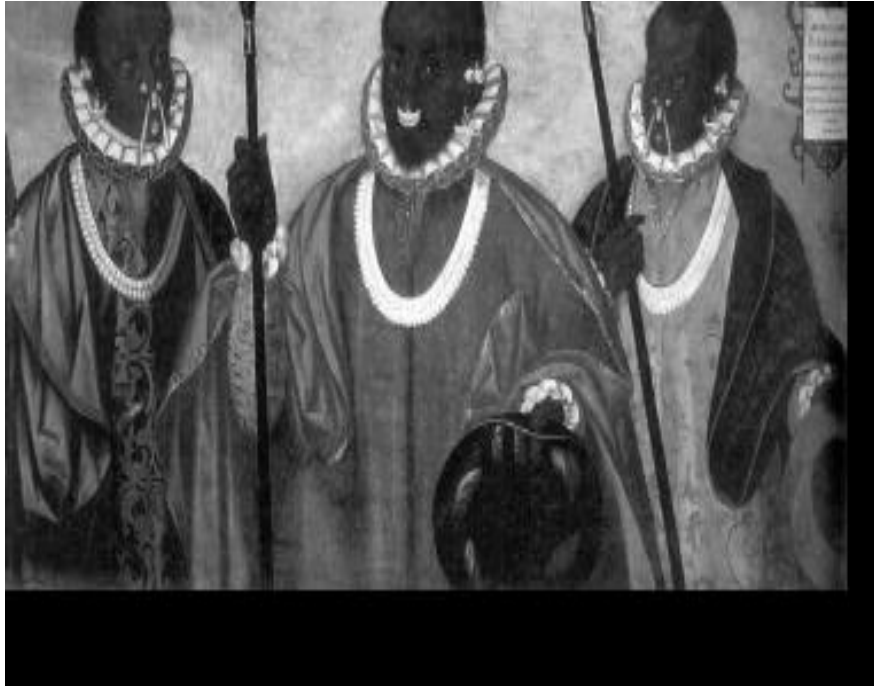


A colossus of the Nubian pharaoh Aspelta who ruled Egypt and Nubia between 600 and 580 B.C.E. The two slaying cobras on his forehand were royal symbols. (Museum Expedition/Courtesy, Museum of Fine Arts, Boston)

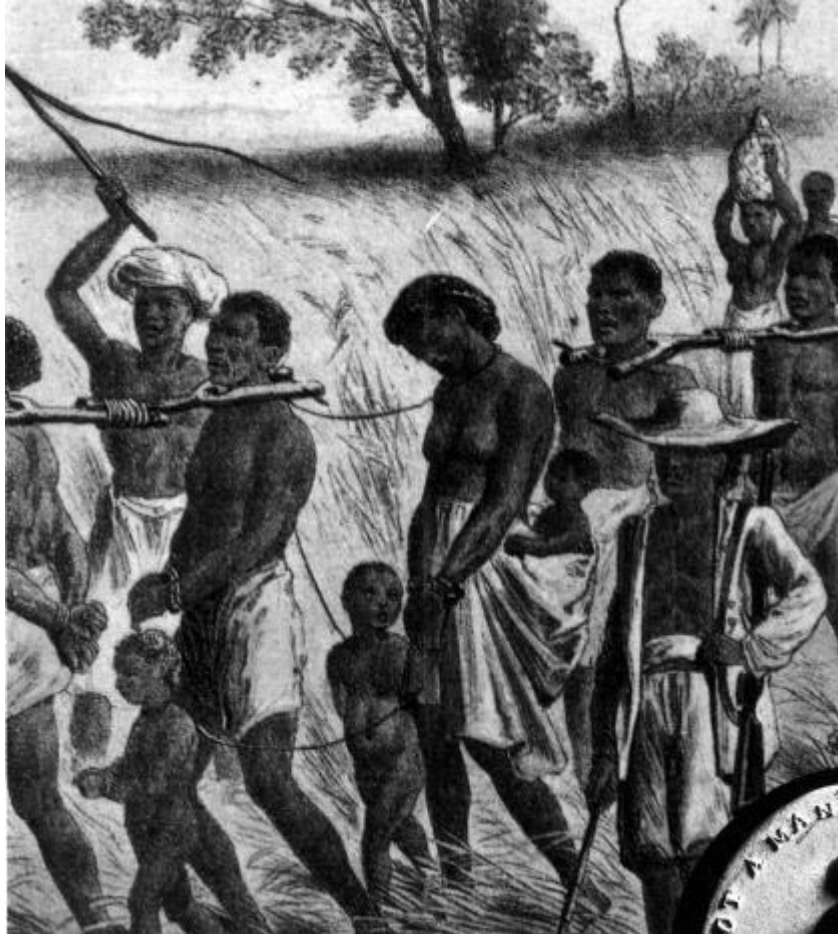
Opposite:

Aaron Douglas portrayed the heroic contributions black workers have made to the building of the world's civilisations, from ancient Egypt to twentieth century America. This 1944 painting is entitled *The Creation*. (Collection of Fisk University, Nashville, Tennessee)





Adrian Sanchez Galquez painted this 1599 work titled *Mulatto Ambassadors to Province Esmeraldas*, showing Afro-Indian ambassadors from Esmeraldas (Ecuador). This is the earliest signed and dated painting from South America. (CORBIS/Archivo, S.A.)



The accepted method of kidnapping and Transportation to the shores



TIYE

Queen of Egypt

Little known today since she was black, Queen Tiye is nonetheless among the woman who have most market human history...



Above left: Ausare, Lord of Resurrection, holds the Ancient Egyptian staff of office (the flail and the shepherds staff, otherwise called the crook). The Greeks called him Osiris; he is the first figure in the history of religion to have died and become resurrected. His statue now resides in Room 13 of the Musee du Louvre, Paris. Middle: The Ancient Egyptian priest Horemakhet, wears the Ankh, the symbol of life, one exclusive to Ancient Egyptian priest. Compare it with the Christian cross, a symbol of death (of Jesus) that came thousand of years ago and (right) see how the Archbishop of Canterbury displays the "crook". Who then borrowed what from whom? The African or the Christian who came millennia after him?



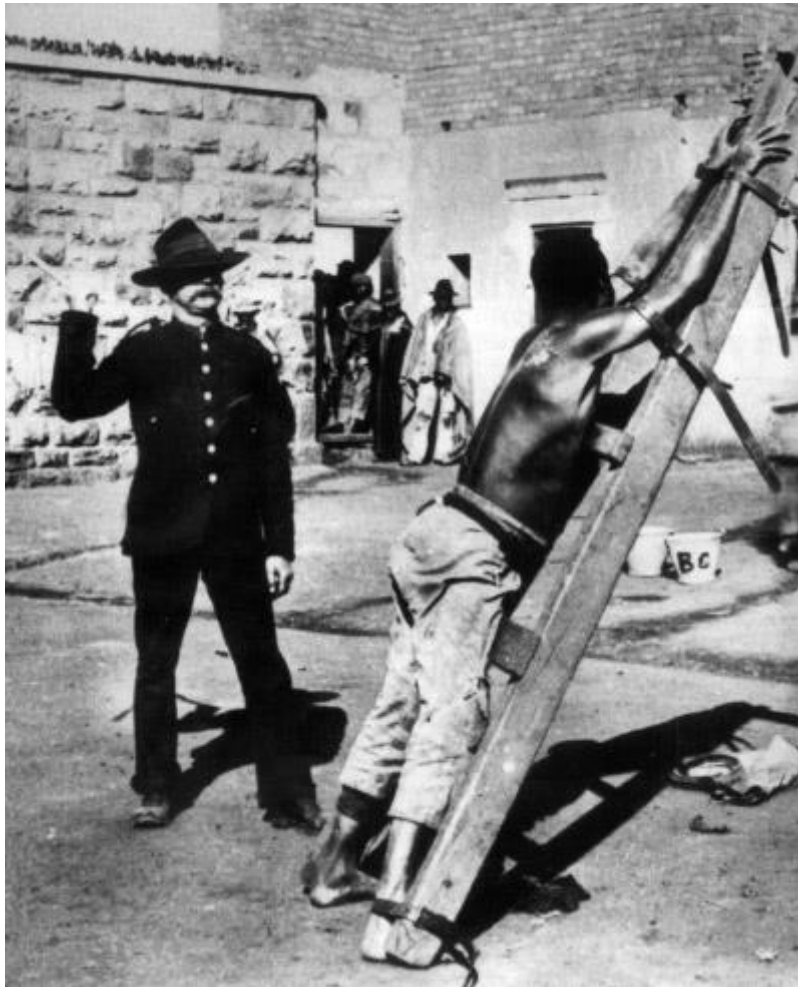


Above left: King Senusert I displays the symbol of life - the Ankh while (right) a close up of the priest Horemakhet (25 Dynasty) also wearing the Ankh. Compare how Christians wear the Cross today.

opposite: Left: Pope Pius II after his coronation, compare his head gear with that of Ausare. Right: The courtier of the Yoruba king, Ooni of Ife, carries the traditional staff of office - the flail and the crook.



Inhuman treatment: how disobedient slaves were punished like animals



Land of suffering: the apartheid police treated black South Africans