How the law came to support slavery

Satvinder Juss investigates the shocking legal justifications that were used to excuse slavery

In the aftermath of the toppling of the slaver Edward Colston's statue in Bristol, we saw the ambivalence of those who applauded this as a pivotal moment in understanding the wealth of our cities and those who saw it as violation of a historic heritage. The ensuing controversy, however, obscured the ambivalence of the law, which is yet to be fully investigated in this much overlooked period of our history. The five men who, on 7 June 2020, allegedly unseated the statute from its plinth during a Black Lives Matter demonstration, and rolled it into Bristol harbour, are set to acquire unexpected fame. This is because they have been given cautions on the condition they give evidence to the Mayor of Bristol's History Commission.

Cartwrights Case in 1569 was the first recorded case of a slave before the English courts, and concerned a slave from Russia. The court famously ruled that the air of England was too pure for slaves to breathe in. That, however, was before the trans-Atlantic slave trade took off, which was on a different scale altogether. By the mid-17th century, one-third of the British merchant fleet was engaged in transporting 50,000 African slaves to the New World. But how could this have been allowed to happen in the eyes of the law? And, what of the rule of law treating all people as equals?

Colston himself is said to have transported 80,000 of them, of which 20,000 were thrown overboard *en route*. It would not appear to have mattered, it seems, because in the England of George II the slave trader was not only socially respectable, but his business was a recognised route to gentility, approved by the Board of Trade, the Navy, and the nobility, so that at its height Britain had 46,000 slave-owners. Of Bristol, which became Britain's second city during this period, it was said that there was 'not a brick in the city but that what is not cemented with the blood of slaves'. To get a sense of the enormity of English society's transformation, witness how Liverpool in 1700 had a mere population of 5,000 which shot up to 34,000 by 1773 once slave shipping had boomed. If slaves brought in so much wealth perhaps it's no surprise a city like Bristol had a statue or two devoted to them? But what of the law? Why did it remain silent? Or did it?

The law

The truth is that the law did get involved, but only in two types of case: either where a master sought to enforce his right of slavery against some merchant or where the slave himself turned to the courts for his freedom. They did not cover themselves in glory. Initially, they upheld the rights of owners to claim property in their African slaves on the basis they were not Christians, thus relying on the common practice of merchants, whose trade in slaves was presumed to be sanctioned by the *jus gentium*.

The first case from trans-Atlantic slavery that arose before them was *Butts v Penny* in 1677, which concerned an action for recovery of 100 slaves. The court held that slavery was legal in England because negroes were infidels and subjects of an infidel prince, and so had no rights enjoyed by English men. *Chambers v Warkhouse* in 1693 even described negroes as merchandise. The following year in 1694, *Gelly v Cleve* decided that trover (ie a law suit for recovery of damages for wrongful taking of personal property) would lie for a negro boy, since negroes were heathens and therefore a man may have property in them. When in 1783 in *Gregson v Gilbert,* the court heard how the owners of a slave ship had thrown 135 sickly slaves overboard so they could claim insurance from the underwriters (something Colston in Bristol would have been familiar with), Lord Mansfield observed that, 'though it shocks one very much, the case of slaves was much the same as if horses had been thrown overboard'.

Categorising slaves as infidels, however, had one fatal flaw. Slaves who became baptised Christians were deemed to acquire legal rights. So, slaves looked for clergymen to baptise them and English people to stand as godfathers. They had little difficulty in finding either. The practice spread. The masters grew

alarmed. So, they forbade their slaves to undergo baptism, and if they disobeyed, they were severely punished.

The colonies

In the colonies the position was less tricky for the courts. Here, they treated slavery as a relationship created under colonial law, 'without whose labour and service we shall be unable to manage our plantations here, thereby relieving our wants, and bringing that considerable increase of revenue which this place affords to His Majesty's coffers, as well here as in England', as was held in *Chamberlain v Harvey* in 1696. That was a case where Harvey, with force of arms, took away Chamberlain's negro. When he was sued by Chamberlain, the court noted the 'very considerable part of the wealth of this island' (ie Jamaica), which 'consists in our negro slaves…'. And that, 'all negro slaves in all courts of judicature, and other places within the island shall be held, taken and adjudged to be estates real, and not chattels, and shall descend unto their heir or widow of any person dying'. That allowed the courts to cross their hearts three times and to proclaim, as they did in the famous *Slave Grace Case* in 1827, that '[i]t has been said that the law of England discourages slavery, and so it certainly does within the limits of these islands, but the law uses a very different language and exerts a very different force when it looks to her colonies, for to this trade in those colonies it gives an almost unbounded protection'. But the ambivalence remained. And it made for an unedifying spectacle, as is clear from Lord Stowell's deep anxiety in the same case at '[t]he public inconvenience that might flow from an established opinion that negroes become totally free in consequence of a voyage to England' because this, 'if permitted, might establish a numerous population of free persons, not only extremely bothersome to the colony, but, from their sudden transition from slavery to freedom, highly dangerous to its peace and security'. Hardly a charter for freedom in England, therefore.

Nevertheless, on mainland England, some judges did try to work within this limited domain where the law was said to discourage slavery. They tried to mollify the harsh effects of colonial law. But they did not clarify the law. Holt CJ in *Smith v Browne and Cooper* in 1702, held that 'as soon as a negro comes into England, he becomes free'. The 1924 edition of Sir William Holdsworth's History of English Law refers to this as 'a case connected with colonial institutions which gave rise to what is perhaps the earliest direct judicial decision that English law does not recognise slavery' even though 'slavery was known in many countries'. Baron Thompson also held in *Galway v Cadee* in 1750 that 'as soon as a man puts foot on English ground he is free; a negro may maintain an action against his master for ill usage, and may have *habeas corpus*, if restrained of his liberty'. None of these cases set the slave free. The position remained far from satisfactory so that as Edward Fiddes lamented, in an article in Law Quarterly Review (1934), '[b]y the end of the seventeenth century, the long series of decisions had begun in which judges freely contradicted each other and occasionally themselves. For nearly a century there was a rhythmical see-saw of judicial opinion, now for slavery, now against'.

Somersett's case

One case that did purport to set the slave free is the 1772 case of *James Somersett*. Having escaped as a slave he was recaptured and then put on a ship bound for Jamaica, whereupon he applied to the court to be set free. It is a *cause celebre* of English slavery cases. It featured Lord Mansfield, eighteenth century England's most powerful judge. It is memorable for his famous words that, '[t]he state of slavery is of such a nature that it is incapable of being introduced on any reason, moral or political, but only by positive law'. With this came his thunderous declaration, cascading loudly down the ages, that, 'whatever inconveniences, therefore, may follow from the decision I cannot say that this case is allowed or approved by the law of England; and therefore the black must be discharged'.

And yet, Somersett's case changed nothing. Only a year later, *The London Chronicle* reported on a black slave in 1773 who intended to marry a white woman, his fellow servant, but upon being taken and sent on board a ship in the Thames, shot himself through the head. When in the *Inhabitants of Thames Ditton*, an African brought to England from America by her Master claimed that her settlement for a year in a parish as a hired servant entitled her to pauper relief, as was her due, it was no less a person than Lord Mansfield himself, who denied her relief. When it was argued on her behalf that 'the legislature could not mean to exclude the particular case of this negro' where 'the pauper had lived as a servant from year to year, and therefore, is to be considered as a servant as far as the laws of England will permit', it was Lord Mansfield who decided that '[t]he statutes do not relate to them (slaves) nor had they them in contemplation'. This was 13 years after the Somersett case.

The eulogies, nevertheless, continued. At its height, in the supremely confident England of Empire, upon whom the sun never set, the *Sunday Times* editorial of 11 November 1827 was joyously able to proclaim, '[t]o what kind of constitutional freedom is the slave who touches English shores entitled? Is it Austrian, French, Turkish freedom?…Is it some qualified or constitutional freedom…expiring, like the Lord Mayor's title, at the end of a certain period; or like Cinderella's triumph, when the clock strikes twelve? Certainly not. He is entitled to English Freedom, which is permanent and unalienable, integral and perfectly defined'. This despite the fact that even when Parliament finally abolished slavery in 1833, a contract by a British subject to sell slaves in Brazil was still not struck down by a British court some 30 years later—on grounds that possession of slaves was lawful in Brazil!

The paean continued in legal circles. In a much-overlooked early classic on constitutional law, it is possible to find Professor JDB Mitchell's defence of the common law's enduring importance on grounds, that it is 'made sufficiently obvious as to personal liberty' by the Somersett case, and that '[t]he weight of this tradition should not be under-estimated'.

One cannot help thinking how all of this serves only to expose the 'noble lie' behind the rule of law, a notion drawn from Plato's *Republic*, but used by lawyers liberally nowadays, to convey the idea of how elites often use a myth to knowingly propagate an elitist agenda that hides the truth. John Hasnes, in his *The myth of the rule of law*, had little doubt that the notion of the 'rule of law' is perpetrated by governments to make their populations more compliant. The reality is that 'there is no such thing as a government of law and not people' because 'the law is an amalgam of contradictory rules and counter-rules expressed in inherently vague language that can yield a legitimate legal argument for any desired conclusion'. In fact, Lord Bingham once acknowledged in an essay that the rule of law 'is a principle routinely invoked by the leaders of illiberal and authoritarian regimes, who rely on it as meaning that people should obey the laws which the government makes, and be published if they disobey'.

A sobering thought at a time when all our liberties are at stake. NLJ

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