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A SKETCH OF A NEGRO CODE. EDMUND BURKE AND THE REGULATION OF SLAVERY¹

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Abstract

This paper analyses Edmund Burke's view of slavery, focusing in particular on his *Sketch of a Negro Code* and its legal background. Two forces in tension will be identified: the first one takes imperial economic necessities seriously, within a concept of a legal order based on an "organic" premise; the second one leads to a view of moral equality between human beings that does not exclude black people.

Keywords

Edmund Burke, Slavery, Negro Code.

Resumen

Este artículo analiza el punto de vista de Edmund Burke sobre la esclavitud, centrándose en particular en su *A Sketch of a Negro Code* y sus antecedentes legales. En el escrito se identifican dos fuerzas en contraposición: una que toma en consideración las necesidades económicas imperiales, dentro de un concepto de orden legal basado en una premisa orgánica y otra que guía una visión de igualdad moral entre los seres humanos, que no excluye a los negros.

Palabras clave

Edmund Burke, Esclavitud, Código Negro.

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Premise

In 1780, when Burke started to write his *Sketch of A Negro Code*, he decided not to apply again for the MP seat of Bristol. During the previous office (since 1774), he had expressed his position on slave trade and slavery in some circumstances, as testified by his *Speech on Conciliation with America* (1775), *Speeches on African Slave Trade* (1777), and the discourse *On the Use of Indians* (1778).

Until 1780, however, his public commitment against slavery was mitigated by his functions (Vantin, 2018). During the 1774-1780 Parliament, he supported the African Company's affairs. The *London Evening Post* noted, on 7th June 1777, that Burke «as an advocate for liberty, appeared somewhat awkward in the fetters, which he actually put on, as well as in the defence of the use of them» (Burke, 1996, p. 340).

In the 1775 speech, where he famously defined the trade of Africans as an «inhuman traffick» (Langford, 1996, p. 132), the Irish polemist also added that «in [some] countries [liberty] is a common blessing, [...] as broad and general as the air, [albeit it] may be united with much abject toil, with great misery, with all the exterior of servitude» (Burke, 1996, p. 122).²

In the discourses on the African Slave Trade, Burke stated that Africa was a «time out of mind» being «in a state of slavery», so that its «inhabitants [enslaved and traded to the American plantations] only changed one species of slavery for another» (Burke, 1996, p. 341)³. At the time, he was perhaps involved in an enquiry into the management of the Company of Merchant Adventurers trading to Africa as a result of charges that, among other things, it was using its annual grants from Parliament to maintain a monopoly⁴.

He replied to the attacks on the company invoking a «still farther parliamentary aim» (Langford, 1996, p. 340), on the basis that he could

by no means agree [...] that the servants of the Company have behaved themselves wrong; instead of having been wanting in oeconomy, they have exerted

2. Daniel I. O'Neill that the 1775 speech, mixing prudential and paternalistic reasons, expressed a position «firmly against the abolition of slavery» (O'Neill, 2016, p. 79).

3. «[Mr. Burke] had brought a convincing proof in his hand of the hardships of it, and it certainly was a proper object of enquiry, whether it might not be softened; but Africa, time out of mind, had been in a state of slavery, therefore the inhabitants only changed one species of slavery for another; however, he was sorry to say, that in changing from African to European slavery, they generally changed much for the worse, which certainly was a matter of reproach somewhere, and deserved serious consideration».

4. The relationship between Burke and the Company of Merchant Adventurers has been deeply analysed by Prof. P.J. Marshall's researches.

such an oeconomy as this House has not been used to; they have supported eleven forts, ten governors, and the establishments necessary for them, and treaties with the country powers; yet with all this, they are not accused of contracting a greater debt in so many years than 16,000l » (Burke, 1996, p. 341).

One year later, in *On the Use of Indians*, «the very best [speech] Mr. Burke has ever delivered» (Burke, 1996, p. 361), the «barbarous» manners of the North America populations, which «far exceeded the ferocity of all barbarians mentioned in history» (Burke, 1996, p. 356) and culminated in the «glory of destroying» and in the «glory of procuring the greatest number of scalps» (Langford, 1996, p. 356), were paired with those of the Africans, identified in terms of «murders, rapes and enormities of all kinds» (Langford, 1996, p. 359), as enemies of the civilized colonists (O'Neill, p. 80). Moreover, the “savages” were defined as «no longer a *people* in any proper acceptation of the Word - but several gangs of Banditti scattered along a wild of a great civilized empire» (Burke, 1996, p. 365).

At first sight, these positions could seem compatible with the pro-slavery arguments, justifying the “naturalness” of the practice of enslaving uncivilized populations, i.e. «gangs» of «slaves as these black people are» (Burke, 1996, p. 135).⁵

However, the Sketch shows a much more personal and in depth investigation on the topic.

This paper will focus on the most relevant aspect of the Burkean slave code in its judicial context, showing its legal background and analysing some of its dispositions⁶. Two forces in tension will be identified between the lines: the one leading to take the imperial economical necessities seriously, within a concept of legal order based on an organic premise (Chapman, 1967, pp. 1-13), the other guiding to a view of moral equality between humans that does not exclude black people.

5. «Slaves as these unfortunate black people are, and dull as all men are from slavery, must they not a little suspect the offer of freedom from that very nation which has sold them to their present masters? From that nation, one of whose causes of quarrel with those masters, is their refusal to deal any more in that inhuman traffick? An offer of freedom from England, would come rather oddly, shipped to them in an African vessel, which is refused an entry into the ports of Virginia or Carolina, with a cargo of three hundred Angola negroes. It would be curious to see the Guinea captain attempting at the same instant to publish his proclamation of liberty, and to advertise his sale of slaves». See also O'Neill (2016, pp. 78-83). On the contrary, some French satirists described the English themselves as “savages”: see, for example, Lesuire (1760).

6. For further analysis on this topic, see Vantin (2018a), and Vantin (2018b).

The Debate on Slavery in England. The Clash of Legal Sources, and the Vacuum of International Law.

The issue of the legitimation of slavery was notably discussed during the years of the British imperial strength's peak, resulting in a fluid situation both from the case law and the legislative perspective.

The jurisprudence, in particular, was characterized by a series of overruling judgements. John Holt (Tunncliffe Catterall, 1968, p. 11) and William Blackstone (Blackstone, 1765) had stated that slavery did not exist within the English borders, against the Aristotelian view of "slavery by nature", and Justinian's *Corpus Iuris Civilis* which based the foundation of slavery *jure gentium* (*mancipia, quasi manu capti*, as a consequence of a just war), *jure civili* (or voluntary sale), and *jure naturae* (*fiunt, servi nascuntur*) (Blackstone, 1765; Dalla, 2007).⁷

According to both the English jurists, whose view derived from the theory of the law's *favoris libertatis* formulated by Henry de Bracton, John Fortescue and Edward Coke,⁸ slavery was contrary not only to the English laws, but also to the laws of «anywhere», because it violated the principles of reason and of natural law.

Blackstone specifically asserted:

pure and proper slavery does not, nay, cannot, subsist in England: such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere (Blackstone, 1765, p. 411).

Another jurisprudential orientation considered instead slaves as chattels, or *tamquam bona*, by usage, following *Butts v. Penny* (1677), a case regarding a Trover for 100 Negroes (Tunncliffe Catterall, 1968, p. 9)⁹ in which the Court held that «Negroes being usually bought and sold among Merchants, so Merchandise, and also being Infidels,

7. According to Justinian's *Institutiones*, «*iure enim naturali ab initio homines liberi nascebantur*». The Justinian sources of slavery were also recognized by the *Siete Partidas*, the thirteenth-century legal code and juridical foundation of the Castilian monarchy.

8. Thirteenth-century jurist Henry de Bracton had already recognised the natural liberty of all men and the law's favour for freedom, even when comparing the free with the serf (Bracton 2012. See also Hyams, (1980). The same idea concerning common law's *favor libertatis* was expressed by Fortescue (2019) and later by Coke (2018).

9. See also *Noel v. Robinson*, 1687 and *Smith v. Gould*, 1706 (Tunncliffe Catterall, 1968, pp. 10-11), where, according to the commentary of Thomas Cobb, respectively «an action of trover was brought, and judgment obtained for the *fourth* part of a negro», and, despite the «trover was brought for a negro, and other articles of merchandise», it was stated that «owner's property was not absolute; "he could not kill him as he could an ox"» (Cobb, 1858, pp. 158-161).

there might be a Property in them sufficient to maintain Trover, and gave Judgment for the Plaintiff» (Tunnicliff Catterall, 1968, p. 9).

As maintained by James Stephen, the early-nineteenth-century British lawyer and abolitionist, slavery was in fact «introduced and established in our colonies [...] for the most part, on the authority of custom alone» (Stephen, 1824, p.14). He stressed that the rules referred to it followed social practices and presumptions, developing widespread ideologies included that slaves were private property, the absolute authority of the slave owner, and the assumption of the inferiority of the ‘Negro’ (Handler, 2016, p. 234) – a term which equalled that of ‘slave’.

In agreement with this customary view, the «legal characteristics» of the condition of the enslaved people were the «lifetime status», the «racial identification», the association with «chattels» and the «*partus sequitur ventrem*» (Handler, 2016, p. 235) or matrilineal descent. The latter was a condition typically derived from the Roman law, and popular in the Civil law systems, such as the French, Spanish, Portuguese ones, where the status of the child followed that of the mother. In the English common law, the condition of the offspring of a legal marriage was rather governed by that of the father and only if the parents were unmarried, the child could not inherit from him and took the status of the mother (Plucknett, 1936, pp. 297-300).

In general terms, the sources of the British slave customs could be identified in the Bible, the Greek literature, the Mediterranean slavery and, mostly, in the Roman law and in the Iberian previous regulations applied on the West territories. Nevertheless, as Thomas Morris stressed:

It was English law that provided the legal categories into which blacks as property could be placed. There was no need to adopt statutes to cover this; the common law of property already did, and it allowed wide authority to those who possessed property to use it as they pleased (Morris cited by Handler, 2016, p. 238).

Common law also provided precedents derived from the institute of ‘villeinage’ and from the Tudor-Stuart labor law, particularly those dispositions controlling servants and vagabonds (Nicholson, 1994, p. 48).

In any case, the precise status of slaves as property was unclear, for the common law provided essentially two choices: real property or personal (chattel) property and

neither category worked well. Jurisdictions that classified slaves as real property typically came to add that [...] a slave was a chattel for certain purposes. But where slaves were termed personal property, it was often added that they were still realty for purposes of inheritance or transfer by an underage heir (Bush, 1993, p. 427).

In 1772, Judge Mansfield famously set forth, in *Somerset v. Stewart*, that a slave brought to England became a free man, being re-enslaved only in case he left the island, from which he could not be forcibly expelled.

The questions arose upon a return to a writ of habeas corpus, served upon Captain Knowles, of the ship *Ann and Mary*. He produced the body of Somersett [sic], the negro, and returned for cause of detainer, that Somersett was a negro and native of Africa, in the regular course of the slave-trade, bought, carried to Virginia, and sold to the claimant, Charles Stewart. That, on the first day of October, 1769, said Stewart left America on a voyage to England, "having occasion to, and for the purpose of, transacting certain affairs and business in this kingdom, and with an intention to return to America as soon as the said affairs and business should be transacted". [...] That Stewart brought the negro along with him, to attend and serve him during his stay, and with an intent to carry him back when his business should be finished. That the negro served Stewart from the time of his arrival until the 1st October, 1771, when he abandoned the service without the consent of his master. That Stewart then delivered the negro to' the respondent, Knowles, for the purpose of being carried back to America to be sold (Bush, 1993, pp. 14-18; see also Cobb, 1858, pp. 163-164; Wiecek, 1974; Van Cleve, 2006)

The decision, welcomed as a pro-abolitionist argument, was partially overruled by the Judge Stowell in the *Grace case* (1827),¹⁰ where a domestic slave from Antigua was carried to England in 1822 by her mistress Ann Allan, and then transported back to the colony the following year.

10. Decided after the *Slave Act* (1807), abolishing the slave trade (Tunnicliff Catterall, 1968, pp. 34-37). See P.H. Minter, P.H. (2015): «Pointing out that transmarine law had never recognized the common-law principle of 'once free for an hour, free forever', Stowell argued that this only applied to English villeins. While acknowledging that Grace James would have remained in England as a free woman, the legal rights she may have possessed expired with her residence. Stowell then turned to Somerset, arguing that it implied no more than the suspension of colonial slave codes during a temporary sojourn to England».

Grace James, the slave, petitioned for her freedom on 31th August 1825, claiming protection under the laws regulating the importation of slaves. The case was brought on appeal to London, argued by Dr. Stephen Lushington, a leading member of the Anti-Slavery Society, and the King's Advocate Sir Christopher Robinson. Lord Stowell upheld the lower Court's decision, ruling that the slave Grace had reverted to slavery upon her return to Antigua. However, he also added that slavery could have existed in England with respect to its «ancient customs» (Cobb, 1858, p. 176)¹¹.

In broader terms, three maxims were often invoked or fought by the Courts. Firstly, «that England was too pure an Air for Slaves to breath in», as sentenced in *Cartwright's case* (1569) / (Tunncliffe Catterall, 1968, p. 9). Secondly, Mansfield's view that «as soon as a slave sets foot on English soil, he is free» (Tunncliffe Catterall, 1968, p. 2) Thirdly, that «once free for an hour, free forever», as reported by Stowell in *Grace* (Tunncliffe Catterall, 1968, p. 7)¹².

The question behind these concerns was relative to the statute of slavery itself: was slavery “by nature”, being superseded by positive law? Or, on the contrary, was slavery “by positive law”, overcoming a freedom set forth by the law of nature? And, also, which was the statute of *jus gentium*? Does it establish, according to a “comity principle” between States, that England has a duty to recognise the institution of slavery set forth under the laws of another State?

Even the legislative references were discordant. The *Habeas Corpus Act* (1679) gave everyone in England, whether «subject», «inhabitant» or «resiant»¹³, protection against illegal arrest, imprisonment or removal to a foreign country. But the 1651 *Navigation Act* (Lipson, 1931)¹⁴, which mandated that English goods be shipped in English-built vessels and staffed by crews of which 75 percent were to be English subjects, was interpreted as including the Negroes in the category of «commodities» (Mtubani, 2007, p. 73)¹⁵.

11. Where the commentator also added: «Of the very favourite expression of later days, “that the air of England was too pure for a slave to breathe”, Lord Stowell says, with well-deserved sarcasm [...] “How far this air was useful for the common purposes of respiration, during the many centuries in which the two systems of villeinage maintained their sway in this country, history has not recorded”».

12. See also, *ivi*, n. 35 where Coke's *I Inst. Lib. II*, Section 204, is quoted: «the common law differeth from the civil law; for Libertinum ingratum leges civiles in pristinum redigunt servitutem, sed leges Angliae semel manumissum semper liberum iudicant, gratum et ingratum».

13. See *Habeas Corpus Act*, at: http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html, in part. Sec. XII.

14. «The decade 1651 to 1660 witnessed two important measures, which not only developed in one comprehensive code the principles latent in earlier enactments, but provided the framework of English naval policy for nearly two centuries». In particular, the 1651 Navigation Act established that no commodities grown or manufactured in Asia, Africa or America could be imported into England, Ireland or the plantations except on British ships» (p. 121).

15. The slaves, however, were not enumerated explicitly as commodities in the Act (Bush, 1993, p. 431). Even the Preamble of the *West India Free Ports Act* (1766) seems to associate Negroes to merchandize: Thank to Prof. P.J. Marshall for the dialogue on this issue. This measure, taken by Oliver Cromwell, was directed against the threat of the Dutch commerce, competing with the English one especially in the colonies (Koot, 2011, p. 58).

Moreover, international law conflicts and legal remedies in case of motherland and colonial laws' disagreements were very few in England until the third and fourth decades of nineteenth-century (Burge, 1838; Story, 1846, Cobb, 1858, p. 171) as stated by the American jurist Thomas Cobb in his collection of slavery laws dated 1858 (Cobb, 1858, p. 156).

In this confused scenario (Bush, 1993 pp. 445-447)¹⁶ some colonies approved slave codes in their jurisdiction, based on the model of the Barbadian Code (1661)¹⁷, the hard set of laws providing sanctions and penalties against slaves especially in cases of escape and misconduct.

With English law thus largely indifferent to slavery – J.A. Bush wrote – only one body of significant slave law existed in the English colonies: the incomplete and analytically inadequate colonial statutes. [...] The influential Barbados Act of 1661, which formed the basis of later slave statutes in Jamaica (1664), South Carolina (1696), and Antigua (1702), covered such matters as slave crime, non-criminal policing of slaves, fight, and rebellion. Supplemental Barbadian statutes later addressed black-white commercial dealings and the enforcement of black deference. The South Carolina Acts of 1690 and 1740, and the North Carolina Act of 1741 are to the same effect. The planters of the Leeward Islands managed without a full penal statute until 1702, relying until that time only upon *ad hoc* legislation. But even these elaborate statutes from other jurisdictions are not truly codes. They are more akin to lengthy police measures, listing crimes and consequences but little more. And like the colonial laws classifying slaves as real or personal property, the various “codes” often left practical legal problems unanswered and unclear (Bush, 1993 pp. 432-433).

16. Secondary sources of common law are considered, such as the readings and lectures at the Inns of Court, the texts collected by the legal systematizers (such as Matthew Hale and Thomas Wood), Henry Swinburne's *A Brief Treatise of Testaments and Last Wills* (1521-1624), the *ius gentium* and its tradition of interpreters (from Spaniards like Vitoria and Suarez afterwards), the practical volumes written for trade lawyers and merchants, and the “centrifugal” constitutional law of the British empire.

17. See the presentation by Stefanie Kenney, titled *From Slave Code To Slave Constitution: African Enslaveability, White Supremacy, And The Seventeenth-Century Barbados Slave Laws*, at the Lawrence D. Stokes Seminars of the Dalhousie University, Canada, held on 29th September 2017 (typewritten document). 1661 Barbadian Code was the first comprehensive slave code of the Anglo-Atlantic world, influencing the legislations of South Carolina, Jamaica, St. Christopher, Tobago, St. Lucia, St. Vincent, Antigua. Although earlier slave codes did not survive, we know from the 1661 code that they existed though «imperfect and not fully comprehending the true constitution of this government» (p. 2). The 1661 slave code was emended in 1676, and later became a “slave constitution” in 1688. About the possible «earliest law that specifically addressed the governing of slaves», i.e. the Barbados law dated 30th August 1644, (Handler, 2016, p. 12 and n. 48)

This normative background changed when, three years after Burke's draft of a code, the end of the American Revolution completely modified the relationship between England and the West India colonies, and catalysed the abolitionist requests. These pleas reached their acme in the '20-30s of the nineteenth century, after the foundation of the "Society for the Mitigation and Gradual Abolition of Slavery Throughout the British Dominions", established in 1823, and the "British and Foreign Anti-Slavery Society", created in London in 1839.¹⁸

The proposal for the abolition of the slave trade, that Wilberforce¹⁹ had already presented to the Parliament of England in 1787,²⁰ passed as *Slave Act* in 1807 (Statute 45 of George III).²¹ Later in 1833, slavery itself was abolished in the West territories by adopting a gradual system (Statutes 3 and 4 of William IV).²²

During the long-term parliamentary discussions that brought to those results, Pitt's minister Henry Dundas²³ asked Burke a copy of his Sketch, and decided to display it to Wilberforce,²⁴ looking for an agreement on the contents. Precisely on Easter-Monday 1792, Burke came therefore back on his 1780 Sketch (Bourke, 2015, pp. 595-597) as testified by the cover letter he attached to the manuscript.

A Sketch of A Negro Code (1780).

Despite Dundas' intention, Wilberforce rejected the settlement, judging Burke's code too mild (Patisso, 2015, p. 147). The Sketch, therefore, never entered into force.

Three years before, however, Burke had publicly expressed a rather unusually harsh opinion, affirming that slavery and slave trade were to be eradicated on the basis of humanity and nature (Bourke, 2015, pp. 595-597).

18. The latter inspired the French *Société française pour l'abolition de l'esclavage* (1834), whose members were, *inter alia*, Victor de Broglie, Odilon Barrot, Alexis de Toqueville, François-André Isambert, Hyppolite Passy, Alphonse de Lamartine, Charles de Rémusat, La Rochefouchaud-Liancourt (Fioravanti, 2013, p. 36; Giurintano, 2016). See also (Brown, 1999; Ferguson, 2009). For further readings (Fladeland, 1972; Rawick, 1972; Temperley, 1975; Davis, 1975; Rice, 1975; Drescher, 1977; Franklin, Schwenger, 1999, p. 234.)

19. The same year he had founded the Abolition Society, together with Thomas Clarkson, author of *An Essay on the Comparative Efficiency of Regulation or Abolition Applied to Slave Trade* (Phillips, London, 1789).

20. The following year, the Parliament approved the *Dolben Act*, intended to regulate the slave trade, and to limit the number of slave that ships could transport with respect to their tonnage.

21. Retrieved from: <<http://www.esp.org/foundations/freedom/holdings/slave-trade-act-1807.pdf>>.

22. Retrieved from: <http://www.pdavis.nl/Legis_07.htm>. The Act entered completely into force in 1838.

23. Henry Dundas (1742-1811) was Home Secretary in William Pitt the Younger's government. He was favourable to the mitigation of the treatment of slaves, but against the abolition of slavery.

24. Burke sent Dundas the manuscript on Easter-Monday, 9th April 1792 (Marshall & Woods eds., 1968, pp. 122-125).

The code can be read according to this perspective, for it shows a gradual abolitionist system, but it also safeguards an attention for the economical interests involved, offering a sort of “win-win” solution. In the author’s intentions, in fact, the black slaves should practice a social and religious apprenticeship on the plantations, being educated to socialization and receiving baptism and religious training. After that, their *manumissio* (called «donation of freedom») could occur. In any case, they will continue to work on the American fields, as free agents, since the final goal of the project was «rendering, in a length of time, all foreign supply [of slaves] unnecessary» (Marshall & Woods, 1968, p. 124) and not destroying the plantation economy as such. In this way, the negroes will gain a double freedom: the freedom from slavery and the freedom from the ignorance of religion (Blackstone, 1765)²⁵ At the same time, this system will prevent the British economy from collapse.

The basic idea is that an immediate «total destruction» (Marshall, & Woods eds., 1968, p. 124) of slavery and slave trade would cause harmful effects both on the English and on the Africans. Providing «the *donation of freedom* by disposing the minds of the objects to a disposition to receive it without danger to themselves or to us», Burke demonstrated that he trusted «infinitely more [...] to the effect and influence of religion, than to all the rest of the regulations put together».²⁶ This also shows his concern for the executory principle (Marshall, & Woods eds., 1968, p. 125).²⁷

Burke’s proposal seems to apply generally to every British colonial dominions in the West Indies, as they were in the year 1780, notwithstanding their geographical and economical variety. A close link between the colonial economy based on slave manpower

25. The concern about the Christianization of Africans was a crucial aspect of the debate on slavery. «The infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection it. England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same, whatever it be, is he bound to render when brought to England and made a Christian». D.I. O’Neill notes that Burke looked at the Jesuit example with particular admiration (O’Neill, 2016, p. 77). See also (Davis, 1966, pp. 203-209) where he analyses the impact of religion in rendering the slaves better working, and in securing against disloyalty and insurrection. Also the French *Code noir* declared that enslaved individuals were to be baptized and instructed in the Catholic faith, and owners were prohibited from forcing the slaves to work on Sundays (Handler, 1974, pp. 203-209). According to Burke, the religious precepts could render the Africans true free men, from «creatures of power», (Marshall, & Woods eds., 1968, p. 124).

26. Burke also added: «This necessarily makes the work a matter of care, labour, and expense» (emphasis added).

27. In particular, male slaves were to be educated at school and in the church since their childhood, where a system of reimbursements for the slaveholders should be provided, proportionate to the time they spend in education without working and to their age (IV, 18). Catechism and instruction could accelerate the *manumissio* procedure, acting as instruments of civilization and acquisition of abilities necessary to live a social life (see IV, 36). The slaves which demonstrate a particular talent in studying could be selected by the Protector of Negros and sent to the Bishop of London, who will grant their education until the age of twenty-five before sending them back to the pertinent colony as free blacks.

and the trade of Africans is identified, so that prohibiting the slave trade is a necessary but not sufficient condition to address the moral concern of slavery in the Americas.²⁸ As the Irish affirmed:

a gradual abolition of Slavery in the West Indies ought to go hand in hand with any thing, which should be done with regard to its supply from the Coast of Africa. I could not trust a cessation of the demand for this supply to the mere operation of any abstract principle [...], knowing that nothing can be more uncertain than the operation of general principles, if they are not embodied in specifick regulations. [...] I am very apprehensive, that so long as the Slavery continues some means for its supply will be found (Marshall, & Woods eds., 1968, pp. 123-124).

It is therefore preferable «to allow the evil, in order to correct it» rather than «by endeavouring to forbid, what we cannot be able wholly to prevent, to leave it under an illegal, and therefore an unreformed, existence» (Marshall, & Woods eds., 1968, p. 124).

This is the reason why Burke's proposal aims at meticulously "regulate" the institute of slavery at every stage - since the departure of the slave ships from the English coasts, until the treatment of slaves in the American territories. «It is not that my plan does not lead to the extinction of the Slave Trade», Burke wrote, «but it is through a very slow progress, the chief effect of which is to be operated in our own plantations»(Marshall, & Woods eds., 1968, p. 124).

To this aim, the code is divided into four parts.²⁹ The first three sections introduce a sort of bureaucratization of slavery, while the fourth one deals with order and security within the American plantations. In the latter, the argument according to which slaves were mere commodities, i.e. objects not "capable of law", is demolished because they are equipped with some legal capabilities.³⁰

28. Burke considered his project «chimerical», when he firstly formulated it: (Marshall, & Woods eds., 1968, p. 123).

29. The parts are: 1. regulations for duly qualifying ships for the said traffic; 2. regulations for the mode and the conditions of permitting the said trade to be carried on upon the coast of Africa; 3. regulations for the treatment of the negroes in their passage to the West India Islands; 4. regulations for the government of the negroes which are or shall be employed in his Majesty's colonies and plantations in the West Indies. An extremely interesting provision is set forth at II, 14, where some exceptions are provided, with reference to certain subjects who cannot be sold: «no persons are to be sold, who to the best judgment of the said Inspectors, shall be above thirty five years of Age, or who shall appear on examination to be stolen, or carried away by the Dealers by surprize, nor any person who is able to read in the Arabian or any other Book, nor any Woman who shall appear to be advanced three Months in pregnancy, nor any person distorted or feeble, unless the said Persons are *consenting* to such sale - or any person afflicted with a grievous or contagious distemper - But if any person so offer'd is only lightly disorder'd, the said person may be sold; but must be kept in the Hospital of the Mart - and shall not be shipped, until completely cured».

30. References refer to the copy of the Sketch contained (Langford, 1996, pp. 562-581).

Firstly, they are protected by a Protector of Negroes, an Attorney General with judicial functions, which

is [...] authorized to hear any complaint on the part of any Negro or Negroes, and inquire into the same, or to institute an inquiry *ex officio* into any abuses, and to call before him, and examine, witnesses upon oath, relative to the subject matter of the said official inquiry or complaint; and [he] is [...] authorized and empowered, at his discretion, to file an information *ex officio* for any offences committed against the provisions of this Act, or for any misdemeanors or wrongs against the said Negroes, or any of them (Burke, 1996, IV, 1).

The Protector of Negroes grants the order in the colonial districts, based on a moral discipline founded on religious or moral precepts, e.g. the prohibition of drinking liquors close to the Church (IV, 12), the prohibition of being idle, dissolute, and vicious, (IV, 39), the prohibition and punishment of all acts of adultery, unlawful concubinage, and fornication (IV, 23). He also protects «any Negro hath been cruelly and inhumanly treated» ordering «the said Negro to be sold to another Master» (IV, 36-37), and, moreover, establishes that, in all cases of «injury to member or life», «the offences against a Negro shall be deemed and taken to all intents and purposes as if the same were perpetrated against any of his Majesty's Subjects» (IV, 35).

The negroes' Attorney General is also conferred the power of purchasing a slave who is excelling in a mechanical or liberal art, or knowledge (Burke, 1996, IV, 37), donating him the freedom; the power to act as a magistrate for the coercion of all «idle, dissolute, or disorderly free Negroes» and for the prosecution for the offences of «idleness, drunkenness, quarreling, gaming or vagrancy» (IV, 38); and the power of selling a free negro into slavery, in case of recidivism in idleness, dissoluteness or vice (IV, 39) (O'Neill, 2016, p. 87)³¹.

Secondly, the marriages between slaves are incentivized, «whereas a state of matrimony, and the government of a family, is a principal means of forming men to a fitness for freedom, and to become good Citizens»³² (IV, 20).

31. The broader thesis presented by the author (ivi, pp. 75-87) stresses the fact that Burke's Sketch, where a commitment for treating slavery more humanely is expressed, was merely based on economic reasons.

32. This excerpt can be read as ordering a patriarchal *ethos* as a precondition for the admission into society, but also as identifying a "concentric" view of the private and public relationships.

One of T.R.R. Cobb's thesis is founded, instead, on the denial of marriage on the basis of the principle according to which the slave is a "property" of the master. He affirmed: «*Servus nec persona est, nec sibi quidquam acquirit, sed domino. Ergo et stipulatione sibi nihil*» and «The inability of the slave to contract extends to the marriage contract, and hence there is no

With reference to this aspect, a husband and wife cannot be sold separately if originally belonging to the same owner and, in any case, the sale of a married slave will be null and void if the new owner employs him/her at such a distance as to prevent the duty of mutual help and cohabitation within the couple (IV, 26). Another disposition that restricts the freedom of the proprietor for the benefit of the marriage state is the provision according to which every man «who shall have served ten years, and is thirty years of age, and is married and has had two Children born of any Marriage, shall obtain the whole of Saturday for himself and his wife, for his own benefit, and after thirty seven years of age, the whole of friday for him and his wife» (IV, 28).

Thirdly and lastly, in their free time, slaves can properly work like free agents, becoming owners of the money earned (and of the goods and commodities they buy with them). They can also save money to pay for their freedom, and for the freedom of their wives and children (IV, 36).

A slave is therefore entitled to property «by purchase» but also by «donation, or testament» (IV, 30). After his death, in case he leaves a wife or children, his «land, house, cattle, goods or money» shall be distributed amongst them according to the usages; otherwise the estate shall go to the fund provided for the better execution of the code (IV, 30-31).

It should be emphasised that this reference to the *mortis causa* dispositions grants even to the wife a limited capability in law, subjected to the condition precedent of the *de cuius*' death. It is perfectly coherent with the marital *couverture* regime (Blackstone, 1765).

Two forces in tension. Final Remarks.

In *A Sketch of A Negro Code*, Burke tries to balance economic needs and moral urgencies. This duplicity has been variously interpreted among scholars.³³

Effectively, if the '70s descriptions of slaves as hordes of brutes lead to argue in favor of the justification of slavery, the *Reflections on the Revolution in France* (1790) will later show a moral equality in needs, considered as the foundation of the need for society (man's nature) (Burke, 1790, pp. 124, 138, 140, 149, 170, 197, 287-288, 303-304, 347-348, 355).

recognized marriage relation in law between slaves» (Cobb, 1858, pp. 140, 142-143). Differently, the *Knight v. Wedderburn* case dealt with a slave that «married in the country [of Scotland]» (Tunncliff Catterall, 1968, pp. 18-199).

33. In addition to the literature already quoted, the following scholars argue that Burke was an opponent of slavery (Cone, C.B., 1964; O'Brien, C.C., 1992; Gibbons, L., 2003). On the contrary, M. Kohn argues that Burke willingly accepted slavery (Kohn, M., 2006).

As anticipated, in 1775 Burke stated that he never could argue himself into a view in favor of emancipating the slaves in the southern colonies (O'Neill, 2016, p. 79). On 12th May 1789, however, he evoked the need for an urgent eradication of slavery on “natural” basis (Bourke, 2015, p. 597)³⁴.

Almost halfway between these statements, the Sketch can properly be interpreted as a crucial step in the development of the Burkean thought on this issue, showing the action of two forces in tension and leading to opposite directions.

The body of the slave, actually considered by customary ideologies as a property of the slaveholder (and not of the legitimate body-owner) physically represented the dispute between the individual rights and interests of the colonists and the general gains of the motherland economy.

Nevertheless, on the one hand, Burke provided those enslaved bodies with legal, truly human, functions, addressing a special jurisdiction to them³⁵. It is the seed of the position that he will release when he will look astonished at the danger of a new barbarism “from within” the European cradle. At that point, he will deny any relevant moral difference between humans, having probably in mind the Lockean idea according to which slavery, as a radical denial of the duty of self-possession, is inconsistent with the obligation of self-preservation (Bourke, 2015, p. 597; Dunn, 1969, pp. 107-110, 174-177).

On the other hand, he pushed that concept of moral freedom within a perspective which is based on an organic, historical view of legal order, where everyone «has his own place in society» (Burke, 1790, p. 193), as testified by the fact that even the freed blacks were still weighed by an obligation to work, deported in a far away land and forcibly converted to a religion they initially ignored. To all intents, the destine of those people was still determined by their “liberators” (Tuti, 2012, p. 320)³⁶.

34. Burke here expressed a view which was not inconsistent with the following criticism against the revolutionary vindication of the rights of men, being the natural rights as the rough basis which history develops in “social”, circumstanced, “real” rights, as he stated in the 1790 famous text.

35. It is necessary to remind that the latter was already prescribed by other slave regulations, such as in the Southern colonies of the West Indies, being the effectiveness of the slave protection the crucial concern. (Bush, 1993, pp. 417-418, and n. 193).

36. The status of the freed black reminds the late Greek law *paramone*, the slave who brought her freedom but bound herself to serve her master like a slave for the duration of his life, on pain of reenslavement; the Roman *statuliber*, a slave with a vested claim for future freedom; or the «half-slave» of the Talmud, initially owned by two masters, one of whom freed him so that he became free on alternate days (Bush, 1993, pp. 467-468).

References

- Anstey, R.T. (1975). *The Atlantic Slave Trade and British Abolition, 1760-1810*. London: Humanities Press, London.
- Blackstone, W. (1765). *Commentaries on the Laws of England* (1765). Retrieved from: <<https://archive.org/details/BlackstoneVolumeI/page/n4> >.
- R. Bourke, R. (2015). *Empire and Revolution. The Political Life of Edmund Burke*. Princeton-Oxford: Princeton University Press.
- Brown, C.L. (1999). Empire without Slaves: British Concepts of Emancipation in the Age of the American Revolution. *The William and Mary Quarterly*, (2), 273-306;
- Bourke, R. (2015). *Empire and Revolution. The Political Life of Edmund Burke*. Princeton-Oxford: Princeton University Press.
- Bracton, H. (2012). *De Legibus et Consuetudinibus Angliae*. Cambridge: Cambridge University Press.
- Burge, W. (1838) *On Foreign and Colonial Law*. London: Saunders and Benning
- Burke, E. (1996). *The Writings and Speeches of Edmund Burke*, Vol. 3: *Party, Parliament, and the American War: 1774-1780*, Elofson, W.M., Woods, J.A. Todd, W.B. (Eds.), Clarendo: Oxford University Press.
- Burke, E. (1790). *Reflections on the Revolution in France*. London: Penguin.
- Bush, J. A. (1993). Free to Enslave: The Foundations of Colonial American Slave Law, *Yale Journal of Law & the Humanities*, (5), 417-470.
- Chapman, G.W. (1967). *Edmund Burke. The Practical Imagination*. Cambridge (MA): Harvard University Press.
- Clarkson, T (1789). *Comparative Efficiency of Regulation or Abolition Applied to Slave Trade* London: Phillips
- Cobb, T.R.R. (1858). *An Inquiry Into the Laws of Negro Slavery in the United States of America To Which Is Prefixed an Historical Sketch of Slavery*. Philadelphia: Johnson & Co.
- Cone, C.B. (1964). *Burke and the Nature of Politics: The Age of French Revolution*. Lexington: University of Kentucky Press.
- Coke, E. (2018). *Institutes of the Laws of England, 1628-1644*. London: Forgotten Books.
- Dalla, D. (2007). *Note minime di un lettore delle Istituzioni di Giustiniano*. Torino: Giappichelli.
- Davis, D.B. (1966). *The Problem of Slavery in Western Culture*. Oxford: Oxford University Press.

- Davis, D.B. (1975). *The Problem of Slavery in the Age of Revolution, 1770-1823*. New York, Ithaca.
- Drescher, S. (1977). *Capitalism and the Decline of Slavery: the British Case in Comparative Perspective*. Pittsburg: University of Pittsburgh Press.
- Dunn, J (1969). *The Political Thought of John Locke. An Historical Account of the Argument of the "Two Treatises of Government"*. Cambridge: Cambridge University Press.
- Ferguson, C. (2009). Dread of Insurrection: Abolitionism, Security, and Labor in Britain's West Indian Colonies, 1760-1823, *The William and Mary Quarterly*, (4), 757-780.
- Fladeland, B. (1972). *Men and Brothers: Anglo-American Antislavery Cooperation*. St. Oak: University of Illinois Press.
- Ferguson, C. (2009). "Dread of Insurrection": Abolitionism, Security, and Labor in Britain's West Indian Colonies, 1760-1823, *The William and Mary Quarterly*, (4), 757-780.
- Fladeland, B. (1972). *Men and Brothers: Anglo-American Antislavery Cooperation*. St. Oak: University of Illinois Press.
- Fioravanti, M. (2013). Il lato oscuro del moderno. Diritto dell'uomo, schiavitù ed emancipazione tra storia e storiografia, *Quaderni fiorentini*, 42, 9-41.
- Fortescue, J. (2019). *De Laudibus Legum Angliae*, 1468-1471. Sale: Wentworth.
- Gibbons, L. (2003). *Edmund Burke and Ireland: Aesthetics, Politics and the Colonial Sublime*. Cambridge: Cambridge University Press.
- Giurintano, C. (2016), *L'abolizione della schiavitù nelle colonie francesi. Il rapporto della commissione Broglie (1840-1843)*. Milano: Franco Angeli.
- Handler, J.S. (1974). *The Unappropriated People: Freedmen in the Slave Society of Barbados*. Baltimore: John Hopkins University Press.
- Handler, J.S. (2016). Custom and Law: The Status of Enslaved Africans in Seventeenth-Century Barbados. *Slavery & Abolition*, 2(37), 233-255
- Hyams, P. R. (1980). *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries*. Oxford: Oxford University Press.
- Hope Franklin, J & Schweningen, L. (1999). *Runaway Slaves: Rebels on the Plantation*. Oxford: University Press, Oxford.
- Kohn, M. (2006). A Tale of Two Indias: Burke and Mill on Empire and Slavery in the West Indies and America. *Political Theory*, (2), 192-228.
- E. Lipson, E. (1931). *The Economic History of England. Vol. 3: The Age of Mercantilism*. London: Black.

- Lesuire, R. (1760). *Les Sauvages de L'Europe*. Retrieved from <http://gallica.bnf.fr/ark:/12148/bpt6k9740849m/f11.image>
- Marshall, P. J. & Woods J. A. (Eds.) (1968), *The Correspondence of Edmund Burke*, Vol. VII: *January 1792-August 1794*. Chicago: University of Chicago Press.
- Minter, P.H. (2015). 'The State of Slavery': Somerset, The Slave, Grace, and the Rise of Pro-Slavery and Anti-Slavery Constitutionalism in the Nineteenth-Century Atlantic World. *Slavery & Abolition*, (4), 603-617.
- Mtubani, V.N.C. (2007). *African Slaves and English Law*. Retrieved from: <http://pdf-proc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/PULA/pula003002/pula003002007.pdf>
- Nicholson, Bradley J. (1994). Legal Borrowing and the Origins of Slave Law in the British Colonies. *The American Journal of Legal History*, (1), 38-54.
- O'Brien, C.C. (1992). *The Great Melody: A Thematic Biography of Edmund Burke*. Chicago: University of Chicago Press.
- O'Neill, Daniel I. (2016). *Edmund Burke and the Conservative Logic of Empire*. Orlando: University of California Press.
- Koot, C.J (2011). *Empire and Periphery: British Colonists, Anglo-Dutch Trade, and the Development of the English Atlantic, 1621-1713*. New York: New York University Press.
- G. Patisso, G. (2015). *Lo Sketch of Negro Code di Edmund Burke. Una bozza di Codice Nero nell'impero coloniale britannico (1780-1792). Itinerari di ricerca storica*, (1), 123-147.
- Plucknett, T.F.T. (1936). *A Concise History of the Common Law*. Rochester: Lawyers Cooperative Publishing Co.
- Rawick, G.P. (1972). *The American Slave. A Composite Autobiography*. Westport: Greenwood.
- Rice, C. D. (1975). *The Rise and Fall of Black Slavery*. London: Macmillan.
- Stephen, J. (1824). *The Slavery of British West India Colonies Delineated as It Existed Both In Law And Practice, And Compared with The Slavery of Other Countries, Antient And Modern*. London: J. Butterworth and son.
- Story, J.(1846). *Conflict of Law*. Boston: Little and Brown.
- Temperley, T. (1972). *British Anti-Slavery, 1833-1870*. London: Longman.
- Tunncliffe Catterall, H. (1968). *Judicial Cases Concerning American Slavery and the Negro, Vol. 1: Cases from the Courts of England, Virginia, West Virginia, and Kentucky*. Shannon: Irish University Press.

- Turi, G. (2012.) *Schiavitù in un mondo libero. Storia dell'emancipazione dall'età moderna a oggi*. Roma-Bari: Laterza.
- Van Cleve G. (2006). Somerset's Case and Its Antecedents in Imperial Perspective. *Law and History Review*, (3), 601-645
- Vantin, S. (2018a). *Gli eguali e i diversi. Diritto, manners e ordine politico in Edmund Burke*. Modena: Mucchi.
- Vantin, S. (2018b). *Uomini e schiavi. Il codice negro burkeano tra realismo e missione civilizzatrice*. En P. Vincieri (Ed.), *Il negativo e il positivo. La varietà della natura e della natura umana* (pp. 99-114). Torino: Dupress
- Vantin S. (2018). Costruzione dell'alterità e imperialismo. Edmund Burke e il dibattito sulla schiavitù. *Materiali per una storia della cultura giuridica*, (2), 591-601.
- Wiecek W.M. (1974). Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World. *The University of Chicago Law Review*, (1), 86-146.
- 47° Georgii III, Session 1, cap. XXXVI. An Act for the Abolition of the Slave Trade (1807). Retrieved from: <http://www.esp.org/foundations/freedom/holdings/slave-trade-act-1807.pdf>.
- 3° & 4° Gulielmi IV, cap. LXXIII. An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves. Retrieved from: http://www.pdavis.nl/Legis_07.htm.

