A PATH FROM SLAVERY TO FREEDOM- A TRUTH OR A MYTH

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ABSTRACT: *This article is aimed to analyze the different historical and legal perspectives of slavery in England raised before and after the landmark case of Somerset v Stewart (1772). Lord Mansfield was petitioned to issue the writ of habeas corpus to free the negro slave, Somerset. His ruling settled the issue of slavery on two narrow points that*

i) A slave could not be seized by his/her master

ii) Against his/her will, a slave could not be removed from a country

But Lord Mansfield was wrongly credited (now agreed opinion) for the emancipation of slaves in England through Somerset's decision than for doing individual justice to Somerset (this, however, resulted in great anti slavery and abolition movement). Confusing the matter, it led to the development of debate by scholars and writers of the subsequent ages that how Lord Mansfield (King Bench) accommodated or avoided the different interests related to slaves' status in England and its colonies- particularly conflict of laws and positive law in this article. The conclusion endorses the fact that with significant impact, Mansfield discharged the black negro by uttering slavery odious but did not end it.

KEY WORDS: Conflict, Positive Law, Negro, Slavery, Habeas Corpu

INTRODUCTION:

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." **(Universal Declaration of Human Rights 1948, ART 4)**

Slavery is condemned everywhere by everyone in modern times though the category of slavery is expanded by inclusion of debt bondage, serfdom, forced marriage/sex and forced and child labor and still persist in either one form or another.Bales argues that there are some 27 million slaves in the world today [1].

The British trade in slaves from Africa began in the reign of Elizabeth I (1533-1603) resulting in brought about Africans being accumulated to Britain in huge numbers. John Hawkins is recorded as the first English slave trader to have sailed to Africa in 1562 with a fleet of three ships and 100 armed men and the first Englishman who broke the Spanish and Portuguese monopoly and English Courts encounter cases emerging out of the involvement of Britishers in the exchange of slaves from Africa to America and West Indies [2]. Some of the mentioned forms of slavery existed in England under the notion of near servitude and indentured slavery avoiding the two extremes of slavery were chattel slavery and emancipation. In spite of the fact that slavery was not supported by law in England and Scotland, this did not matter to the remaining British realm-its colonies [3].

***Somerset* case** is known as having made a pivotal contribution to abolish slavery in England though the judgment did not declare slavery unlawful. Mansfield's ruling in Somerset was misconstrued to abolish slavery because of ambiguity of the language of the judgement (brief judgement of about 200 words) which made the thinkers and writers to either challenge or agree with the different ingredients of his judgement specially its conflict of laws analysis and positive law issues. Does *Somerset* abolished slavery or assumed the legality of colonial slavery as mentioned by Story that slavery had "crept in" by 'general custom, overall through the European colonial dependencies , in the West Indies, and on the mainland of America, and which was cultivated and empowered by the business arrangement of the parent State [4]. It is to analyse that how the confusion and uncertainty of English law about slavery remained the prominent element of history of slavery before *Somerset* and even after.

1. Before *Somerset:*

Somerset stands amongst the most well known cases in the Anglo-American law of subjugation and slavery because before it, the common law in England in respect of slave and slave trade was uncertain [5]. Mansfield's decision in Somerset was not only to alter the English law but the American Framework of law of slavery as well. For near a century, the Case was referred as an authority in both English and American courts of law [6].

Slavery was provided in the laws of the West Indies and in English statutory law (navigation Acts) in the reigns of George II-George IV. The importance can be seen, for example, in 1663 when the Company of Royal Adventurers Trading in Africa was integrated/incorporated in royal charter (for one hundred years) but the company met extraordinary misfortunes and went bankrupt resulting into another trading organization, the Royal African Company in 1672- it was granted by its charter to exercise freehand and monopoly in the trading of "any redwood, elephants' teeth, negroes, slaves, hides, wax, guinea grains, or other commodities" [7]. The last word "commodities" of the above statement from the charter of the Royal African Company confirms that slaves were considered and viewed as only property and not human beings.

The subsequent success of Royal African Company in the trade of slaves in place of goods in England added further to the ambiguity of slaves' status in England. An Appeal for ruling to the Solicitor-General was made to clear the position of slaves because the Navigation acts (the cornerstone of the economics of slavery) dealt in trade of goods through English ships arising the question that are African slaves goods in accord to the Navigation Acts regulating maritime?- finally declared in 1677 that negroes must be considered commodities by the Acts of trade and Navigation [8].

Butts v Penny (1677), the first known English case to speak of the common-law doctrine that a slave when christened or baptized became enfranchised, confirmed the above chattel status of slaves by saying that "Africans usually bought and sold among merchants, as merchandise, and being infidels

there might be a property in them to maintain trover" [9]. *Butts v Penny* actually overturned the 1569 case of Cartwright (cited by Hargrave, counsel for *Somerset*) in which it had been ruled that slavery could not be recognize by English law [10].

In 1679, everyone either inhabiting or residing in England were given protection under Habeas Corpus Act passed of 1679 against illegal arrest, detainment or evacuation to another territory-further adding to the confusion of status of slaves. Chief Justice Sir John Holt's ruling in 1701 declared slave free soon after he arrived England –"England was too pure an air for a slave to breathe in"- and slavery was declared illegal adding that no slavery is lawful in England but villainage. In 1706, Sir John Holt in another case of *Smith v. Gould* stood by his point that no property rights can have there be in another person [11].

Holt's view of slave's freedom in later years, in 1729, once again contradicted by Yorke -Talbot opinion, This opinion, though an informal and unofficial one, was given high value and authority of a legal ruling twenty years later, in 1749 in *Pearne v Lisle* where Chancellor Hardwicke (the then Philip Yorke) declared the status of African Slaves as chattels in English laws [12].

Later in 1762, Lord Chancellor Henly in *Shanley v Harvey*, inserted to the perplexity of English law following the judgment of 1569 when he ruled that "as soon as a man sets foot on English ground he is free" [13] and that "a negro may maintain an action against his master for ill usage, and may have a Habeas Corpus if restrained of his liberty". This decision by Lord Chancellor Henly in respect of slave status and issuing habeas corpus was not new but significant in respect of time [14].

Preceding to Somerset , R. v Stapylton was the last slavery case involving the attempted forcible expulsion of an African slave by his master Stapylton. Lord Mansfield trialed this case where the defense taken by Stapylton was that the acts, complained of, were not criminal offenses because the slave was property. Jury was directed by Lord Mansfield that the owner should be declared guilty if Jury found Lewis not a slave. The case was considered defenseless of the past record of Lord Mansfield on the King's Bench where he had confirmed the Yorke and Talbot opinion several times. Jury decided against Stapylton but he was inflicted no punishment for his crime since Lord Mansfield declined repeatedly to punish the master for his crime and wrongdoing against his slave [15].

Slavery has rarely been ended by courts (Somerset judgment notwithstanding) and the abolition of slavery was the outcome of sufficient public opinion against slavery to influence the legislature. There was no legislative intervention until 1807 in respect of slavery and the courts had a free hand to develop- English courts first confronted with slavery cases in the seventeenth century, mostly resolved them by the common law with little interference from parliament and privy council [16].

Time was changing gradually in favor of slaves. Granville Sharp (1735-1813), the first great English abolitionist, won the case of a slave named Jonathan Strong in 1767 resulting in Strong's being given his freedom. By 1770, some fourteen to fifteen thousand slaves resided in the British Isles, most were Africans, attracted the attention of Sharp. Among these cases, the case of *Somerset v Stewart* was taken before the Court by Sharp who eventually forced the Lord Chief Justice Mansfield, though hesitant to give ruling, to make the famous decision of June 22, 1772- leading to the ambiguity that whether Somerset was liberated simply because of the absence of laws to guide slavery in England, or was he emancipated for setting foot on free soil and breathing free air? [17]

2. *Somerset* 1772 and Mansfield's Ruling:

In the light of above ambiguity, confusion, uncertainty and fluctuations in English law, Mansfield's decision in *Somerset*, though ambiguous and narrow in nature, played a remarkable role to develop the situation that resulted to end slave trade first and the freedom of slaves later perhaps. Being a Scottish, Mansfield's decision reflects his aspiration from slavery laws in Scotland. Scottish law seems quite clear and bold during this time as in *Joseph Knight v. Wedderburn (1778)* where the court talked decisively of West Indian laws as unjust and cannot be sustained in Scotland-set the Negro free under 1701 Act. Slave trade had been ended in England by 1807 Act though the uncertainty of English common law still persisted (Grace Jones 1825) [18].

As per facts, James Somerset, slave to a Virginian named Stewart, left his master in 1771during a business trip to England. Stewart then had Somerset seized by slave catchers and placed in irons on a ship boarded to Jamaica. Friends of Somerset and the social activists of the time applied for a habeas corpus writ before Lord Mansfield, who referred it to the whole Court King's Bench. There are several versions of the decision on slavery in *Somerset* case.

The economy and prosperity of England in 18th and early 19th century was mainly depended on slavery [19].

Mansfield was considered the father of modern British commercial law. The Somerset case, in which the right to property clashed with the right to liberty, troubled Mansfield to overlook the Economic consequences of his decision and tried to make the parties to negotiate outside the court. Stewart was tried to be convinced by Mansfield to let his slave free but West Indian slave planters wanted his decision in their favor –they financed the council of Stewart who promised them to decide the verdict in their favor. Mansfield was no political innocent, so the issue of slavery sensed political which could not be solved at judicial level but political rather. No solution to the conflict between the Act of Habeas Corpus and the Navigation Acts could not be found until Parliament decided which one had to take in preference and priority [20]. Somerset was decided that

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged and accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad.

So high an act of dominion must be recognized by the law of the country where it is used (…)"[21]

Mansfield's Judgment raised different issues to be pondered and answered related to the status of slave coming to England, two of which are discussed below.

i) **Conflict of Laws Issue:**

Conflict of Laws jurisprudence, known as private international law, is concerned with how to fairly decide a trial which includes a foreign element-at least one of party to the dispute must have a relation with a foreign legal system. Conflict of laws situation addresses the basic question of what to be done when the law of more than one state is concerned and the answer depends on the legal rule of which state is to be applied [22].

It is commonly believed that in 18th century, England developed the set of laws to handle the conflict situation with no such laws previously but the history shows that courts in England may have encountered with the problem of conflict of laws on slavery as early as in *Cartwright* in 1560s (a slave brought from Russia to England). By the end of eighteenth century, the business, settlement and conduct of slaves' merchants in England from foreign states and colonies resulted in substantial experience of courts of England in conflicts issue [23].

The most striking element of *Somerset's* decision is that it rejected the eighteenth-century element of uniform treatment of slave property and established a new source which defended and approved, so far slavery was concerned, the diversity of laws between England and its colonies. Hulsebosch rightly suggests that "Mansfield believed status issue to be resolved differently if it involved colonial law than if it involved foreign law" [24].

According to Watson, Mansfield seems to be theoretical that much of what is important is overlooked and he thought Somerset is and should be a slave which is clear from the opening sentence of his judgment,

"The question is, if the owner has a right to detain the slave, for the sending him over to be sold in Jamaica" [25]

where Mansfield follows 'Huber theory of conflict of laws whose theory of private international law showed his approach to territorial sovereignty.

Huber (1624-1694), who presented a new doctrine of comity among nations, was the first writer who made it clear that the recognition in each state of supposed foreign created rights was a mere concession which such a state made on the basis of convenience and utility, and not as the result of a binding obligation or duty-that Huber thought of comity as a political concession which might be granted or suspended arbitrarily by the sovereign. Being a logical positivist, Huber emphasized the sovereignty and independence of each state, stressing the sovereignty and territorial basis rather than a rigid boundary between internal and external policies of states. In his view, international law should limit intervention in the sovereign affairs of the state, especially in respect of territory- conflict rules are considered as a source of protecting state sovereignty from intervention [26].

Not exactly accurate but Huber combined the local doctrine of comity, which replaced the universalistic concept of private international law, with the international doctrine based upon a division of legislative competence and is represented in the form of his three maxims -thus foreign private law did not arise any duty (assumed by statutists) contrary to customary international law (the tacit pact between states) which gives full effect to foreign law [27].

Mansfield is the first who cited Huber in English reports in mid eighteen century in *Robinson v Bland*. If the Mansfield in Somerset had been to decide that either Somerset was free or a slave, then he would have had to decide, by following Huber's theory of conflict of laws (the concept of comity of axiom 3 gives international force to private law – State cannot be made bound by the laws of another state and have no direct impact outside its territory only if applied by the rulers of other territory under the principle of comity of nations even if differ from its own rules), that Somerset was a slave and the laws of Virginia to be applied as in *Holman v. Johnson*, three years later to *Somerset*, in 1775, where the legitimacy of colonial slavery was agreed and accepted by some of "the participants" in *Somerset*" [28]. From this it is clear that this subject is to be sought not from the uncompounded civil law *(ius civile)* but from the benefits and tacit agreement of peoples: because just As the laws of one people cannot have direct force among another, so nothing could be more inconvenient than that what is valid by the law of a certain place be rendered invalid by a difference in law in another place. This is the reason for the third axiom on which hitherto there has been on doubt" [29]. Lord Mansfield also approved the above point of Huber later by stating,

"the English court must give effect to foreign laws with regard to contracts legally made abroad" [30].

Contrary to this view of Watson of Mansfield ruling of conflict of laws question, Mansfield asserted that

"so high an act of dominion dominion [seizing a slave for sale abroad]- meaning detention and deportation that characterized slavery rather than servitude itself] - must be recognized by the law of the country where it is used with very different power of a master over his slave in different states" [31].

This statement laid down a common rule that the lex domicilii (law of the domicile) by which a person is held in slavery does not have force to determine the slave's status in England, even though the lex fori and the lex domicilii are based on the same general rule of statutory and common law, as was true of the metropolis and the colonies in the British empire. Further the relation between conflict of laws and status of slaves in England and its overall impact is summarized by Cleve in these words:

"slaves who came to England were no longer subject to chattel slavery but were not fully emancipated and were held to a lesser but substantial form of slavish servitude" [32].

While dealing with conflict of laws issue, Mansfield, in his defense, gave the example of marriage to support his view that Somerset was a slave. He stated that marriage was recognized everywhere, but so far its incidents like parent's power to discipline their children were concerned, they varied from state to state. This led to position that Stewart remained the owner of the Somerset but the incidents of that relationship were different in England than in Virginia [33].

The observation of Cleve on conflict of laws make it obvious that Mansfield was clever enough in suggesting a solution to

the problem that on which side of the Atlantic a slave existed and lived to be [34].

ii) **Positive Law Aspect:**

'The dreadful consequence of slavery is the same amongst every people and in every nation where it prevails'. (John Wesley, the Anglican founder of Methodism).

Different aspects of Mansfield's ruling in Somerset were conflict of laws , rejection of chattel slavery but continuation of near slavery, habeas corpus of Mansfield's judgment were relatively foreseen and touched by earlier law and does not make *Somerset*, a historic and landmark case.

Much controversial in England and North America, slavery and the slave-trade were a political reality which needed Mansfield to balance it against the interests of Britain and benefits of some colonies that generated a lot from it [35]. Mansfield attempted to accommodate the clash between different interests. He deliberately avoided to comment on any connection between colonial law on slavery and English common law and described slavery to be emerged from positive law only [36].

Positive law is law that exists by virtue of being posited and cannot itself rest upon yet another ground outside itself. Question arises that was positive law supposed by Mansfield truly free of destructiveness and how positive law can completely validates slavery with no reference to its moral specification? No net comments that positive law signifies at once the implementation of nihilism (Nietzsche understands nihilism as a 'devaluation of values') which denies all the possibility of an objective basis for truth- it fulfills itself by denying the lack, i.e. by denying that this world (slavery here) needs a ground outside it to give it support and it needs an end outside and above it to give it sense and value. Nietzsche's point is that positive law does not provide man an option to think in the manner of command but to refrain from doing violence to beings which places responsibility on Mansfield to make natural justice effective. Further the natural law must be regulated through the rule of reason and not by ethical and moral arguments or what the judges think, say or do-justice must not be different in indifferent places. The ruling of the Privy Council also added to the point that slavery was declared illegal in some of the colonies by *Holt* decisions. But Privy Council in 1720, adopted the position that the law operating in a colony would be dependent on fact that whether it was a settled or a conquered state. This manifested apparently that different colonies would be governed by different common Laws [37].

What comes to mind immediately is that what Mansfield meant by positive law as a ground for the legality of slavery? According to the radicals, who believed that slavery was everywhere illegitimate, argued that no positive law had ever purported establish slavery differentiating between American black codes and a hypothetical act that would have stated: 'There is hereby established a relation among men and slavery, by which one person may own the body or a right to the services of another. This relation is lifelong, alienable, and hereditable through the status of the mother'- only such a statute could have been the positive law that Mansfield had referred to [38].

Mansfield decides that:

"The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it but positive law" [39]

rendering that;

a) positive law and not the common law offers a remedy to the slaveholder

b) and Mansfield's reliance on positive law purposely damaged the ethical and religious elements of slavery .

c) the status of the slave was made wholly reliant on the law of individual states resulting in an increase slave flight as runaway slaves where they could be protected against cruelty and forced return [40].

Keeping above all in his view, Mansfield implicitly relied on natural law by pronouncing that slavery is odious. It was obviously the establishment of a new doctrine of slavery, neo-Somerset, stating that slavery was in clash with natural law and it could not legitimately exist unless explicitly established by positive law(though some abolitionists objected it that even the positive law cannot establish slavery) [41]. The Kentucky court agreed, depending on neo-Somerset principles, that since positive law legalized slavery, it would be dissolved when the master took his slaves to a free jurisdiction [42]. So slavery was not enforceable in the courts of a free state by *Somerset's* positive law element.

Mansfield judgment effected both domestic and imperial political scenarios. To domestic politics of England, ruling led to get rid of slavery litigation in the English courts and also put the issue of slavery to the Parliament while on imperial level, positive law rule overcome the difficult problem of imperial governance problem [43].

CONCLUSION:

West Indian dealers had acquired a guarantee from Mr. Stewart not to make any negotiation or compromise outside the court(as Mansfield attempted) , but to let the law determine the point of negro cause in court (the General Evening Post reported on 28 May 1772) for the reason that if the English laws do not approve colonial laws , no man of common prudence will never take the risk of investment in such a precarious business of slaves trade [44] (this was so because of the past approach of common law towards slavery i-e *Butts v. Penny* [45] and *Chambers v. Warkhouse*)- the Common Law of England witnessed slavery cases over the centuries.

So long as the issue of jurisdiction in common law is concerned, it is confirmed by Hulsebosch that in *Campbell v.Hall(1774),* the judgment of the King's Bench denied the authority of the courts of common law in overseas colonies [46]. Therefore Lord Mansfield in *Somerset* found the positive law as a solution to slavery rather than the common law to be set as a precedent (Somerset case) by applying the fundamental common law principles of personal security and liberty of the individual to rule that any kind of slave trade and slavery were in breach of the common law [47]. Such issues and pressures led to the narrow decision of Mansfield in Somerset who also remained indecisive in *Thomas Lewis's*

case in 1771. The ruling in *Somerset* raised different points which went unsatisfactory or were answered implicitly [48].

First, known to the end result of his judgment of freeing thousands of slaves in England, Mansfield deliberately preferred to decide the case on the narrow issue of habeas corpus only in order to avoid freedom of slaves. As a past practice, Lord Mansfield (during the trial in R v Stapylton) had issued several habeas corpus writs admitting to deliver negro slaves to their masters and all these were based on the property claims of slaves –Mansfield seemed biased by giving view that property rights in slaves could lawfully exist in England and no one became free by going or fleeing to free land [49]. The point is there for those who don't agree that if Mansfield had thought and was of the view that a slave is emancipated by law once he/she sets foot on England soil, Mansfield could have decided the evidence of Stapylton of title as unacceptable [50].

Secondly, so far the matter of jurisdiction was concerned, King's Bench and hence Mansfield had no imperial effects to bind colonial courts to their decision or to limit the authority of the courts in colonies. Lord Mansfield never clearly articulated the jurisdictional elements necessary to decide a case arising in the colonies to be heard in King's Bench. Mansfield deliberately kept away to talk on the issue of jurisdiction despite the fact that he represented, from 1736 to 1756, parties in five reported Scottish cases as council (became lord chief justice in the latter years), all involving conflicts of laws problem.

Third and another apparent problem in Mansfield's judgment is that he, like Scottish judges, has cited no statute, legal precedent in support of his ruling.

Fourth that Mansfield decision is largely dependent on social, economic and political events that had nothing to do with decision-these elements in decision were of rather greater importance to address slavery than Mansfield's decision itself. The judgment was not to free slaves from slavery but rather to declare their status in England and colonies. Despite this decision, slave owners continued to recapture slaves and ship them back to colonies. The most astonishing aspect of Masnfield position on slavery is his another ruling in 1785, few years after *Somerset*, that stated "black slaves in Britain were not entitled to be paid for their labor" (however free blacks were paid).

Fifth problem is that Mansfield, as Chief Justice, was under an obligation to decide the case according to law irrespective of his own views or potential consequences of the judgment. He decided Somerset on narrow grounds by not abolishing slavery because he could foresee a big financial disaster to many people in England in case slavery had abolished –he did not want to disturb the planters' interests, slave trade, or the property rights of slave masters (many to be effected financially and negatively were friends to Mansfield). West Indian merchants were also confident enough to believe that a true determination of the status of the enslaved African in England would be to the advantage of slave traders-especially as many past cases had been determined in favor of the freedom of the enslaved person in question (the reason for the merchants' boldness is not clear, but it is quite likely that their familiarity with Justice Mansfield contributed to their confidence)? Mansfield's views might have been assumed to be in favor of the powerful, who were property holders because Mansfield himself had become a property-holder of note over the years.

But the elements which made *Somerset* a remarkable case could be seen for a long time after *Somerset* where slaves were supposed to have been emancipated? Till 19th century, the legal status of African slaves remained unclear. But Mansfield's decision gathered much attention for he discussed the outcomes of the case that may have otherwise largely passed unobserved. Mansfield's decision is of great significance and value to the judge in colonies and slave states. If the judge at slave state would gives value and weight to the property claims of the master in slave, he would also feel the strength of claim that slave is free – laws of free state to be applied in slave state under the doctrine of comity. It led to the idea that moral arguments of natural law can and will be used in deciding cases.

The judgment in *Somerset* established a precedent to be followed by future courts. It went against the prevailed common law percept in both official opinion of Sir Philip Yorke (Attorney-General) and Mr. Talbot (Soliciter-General) which declared slaves as items of property. Mansfield actually signalized the parliament that legislation was needed. The element which count the most in making it a historical ,I think, is the time element as the human right movement began to rise and develop in England in late 18th century .French Revolution of 1789, many events such as those following the Haiti Revolution in 1791 and the events following it especially the humiliating British losses to the African General Toussaint L'Ouverture, the leader of the revolutionary slaves in St.Domingue in 1794-1797; the large revolt in Barbados in 1816,Guyana in 1823, Jamaica in 1831, and in other Caribbean islands, all forced the French and British governments to pass laws to end slave trade and slavery resulting in slavery abolition act of 1833 which later abolished slavery in British colonies even.

In nutshell Mansfield in *Somerset*, with significant effect on English slavery law, did not aim to unshackle slaves in England and his position and view on slavery was one which could be applied and enforced in free states (individual justice to a slave had been given). The greatest contribution of Mansfield by deciding *Somerset* was not to the laws of England but was the promotion and support he gave to commercial law to emerge capitalism- his brief decision of about 200 words reflected relationship between capitalism and slavery.

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