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FREEDOM AS A NATURAL ABILITY IN ROMAN LAW

Abstract

The subject of this study is the issue of perception of individual freedom by Roman lawyers. It is generally accepted that slaves were treated as property. However, in order to understand what the actual perception of slaves and slavery was, it is necessary to analyze selected sources of law, especially such lawyers as: Florentinus, Ulpian, Marcianus or Hermogonianus. The institution of *favor debitoris* was also quite often used to resolve doubts about human freedom. The analysis of selected texts by Roman lawyers allows us to illustrate the technique of weighing the value of individual freedom with other values, especially those of a property nature or with the purpose of performing a legal act. The study analyzed general sources, and then in the scope of a family's application for regaining freedom by a relative and the case of freedom when a free human being was fraudulently sold. The analysis of these sources allows us to conclude that in many cases the value of individual freedom outweighed other property interests. This was the result of the recognition that freedom is a natural human condition, which was clearly expressed by the lawyer Florentinus.

Keywords: *slavery, individual freedom, Roman law, weighing values, trial for freedom.*

1. Introduction

In today's liberal culture, individual freedom, next to the right to life, is one of the basic values. Therefore, it is particularly protected in international law. We can point to numerous conventions or declarations of international law containing provisions on the protection of individual freedom. The article 3 of the Universal Declaration of Human Rights of 1948 states that *everyone has the right to life, liberty, and security of person.* A similar statement is found in the American Convention on Human Rights of1969. Consequently, individual freedom also finds protection in the legal systems of individual states, including Poland. The basic legal act containing guarantees of protection of individual freedom is the article 5 of the Constitution of the Republic of Poland, in which the legislator decided that the Republic of Poland (…) *ensures freedoms and human rights* ….. The most extreme manifestation of restriction of individual freedom is the state of slavery. It is worth noting that only the first significant act of international law abolishing slavery was the Slavery Convention of 1926. Subsequent normative acts were issued by the UN and the Council of Europe

after World War II of the 20th century. Individual countries abolished slavery already in the early 19th century. Slavery was abolished in Chile in 1823, in Mexico in 1929, in Great Britain in 1833, in France in 1948, and in the United States only in 1863 as a result of the Civil War (Lasocik, 2014: 238-241).

The society of the ancient world was basically divided into free people and slaves. Hence, it is recognized that slavery, had undoubtedly and still remained, one of the most shameful legal institutions and conditions in which human being has found her or himself, and there are also cases of this institution being introduced in the 21st century. Undoubtedly, one of the causes of ancient slavery were the needs of the economy of that time. The situation and status of individual slaves was varied and depended not only on the place of work, whether in the countryside or in the city, but also, or perhaps primarily, on the attitude of their owners towards the slave state (Longchamps de Bérier, 2001: 89-99; Sitek, 2001: 161-168).

Even the ancient Romans were aware that slavery was not the natural state of a human being. Therefore, the subject of this study is an attempt to familiarize modern people with the perception of slavery by Roman lawyers (*prudentes*) as a state *contra natura*. Nowadays, it could be said that the state of slavery was considered by them as a human situation contrary to the inherent dignity of human being. The belief of Roman lawyers that slavery was a state contrary to the natural order of things was also the basis for accepting the aspiration of every slave to return to this natural state, i.e., to freedom, as evidenced by the extensive and very detailed legally regulated system of liberation.

One of the tools allowing interpretation in doubtful issues regarding freedom was called *favor libertatis.* This institution has been the subject of Romanesque studies many times. H. Ankum rightly noticed that the phrase *favor libertatis* in doubtful situations was used by the Roman *prudentes* to interpret facts and legal provisions in favor of freedom. Thus, this institution allowed in doubtful situations as to a person's legal status to be resolved by judges or appropriate officials (*magistrates*) in favor of freedom (Ankum, 2006: 1-17; Starace, 2006; Stagl, 2023: 203-236).

The aim of this study is to analyze the provisions of Roman law, especially legal solutions created by *prudentes*, in terms of weighing the interests of a slave striving for freedom and the interests of his or her owner or third parties having

the right to dispose of the slave. The use of the word balancing *is* a reference to the American mechanism for resolving conflicts between different values or interests. The principle of proportionality developed in German law is applied in European courts (Śledzińska-Simon, 2019: 48). This is a relatively new look at the issue of slavery and freedom. Previous authors of studies on slavery approached this issue mainly holistically (Buckland, 2000; Nancka, 2023: 95-105) or focused their attention on selected issues related to slavery, such as *manumissio* or liability for damage caused by a slave (Wacke, 1989: 413-428).

In order to determine how *prudentes* weighs the interests of the owner and the interests of the slave, an analysis of selected texts by Roman lawyers collected in the book of 40 Digests in title 12 *of De liberali causa* will be used. Under this title there are fragments concerning the right to file a lawsuit to obtain freedom or to confirm the status of a free person. First, however, it is necessary to analyze the famous definition of Florentinus.

According to H.A. Sanchez, the Roman principle *of favor libertatis*, i.e. the resolution of doubts about the human status by the praetor or whether the judicial authorities were directed in favor of freedom, can be considered the prototype of today's constitutional and international law principle of freedom of every human being resulting from his or her dignity (Sánchez, 2022: 25).

2. Freedom as a timeless human value

How important the issue of freedom was for the Romans is evidenced by the huge number of legal texts in which it was discussed in connection with wills, liberations (I.J. 1.5.pr. *Manumissio autem est datio libertatis…*) (Świrgoń-Skok, 2015: 203), legal capacity and procedural issues. It is also possible to come across fragments of lawyers' writings, which contain various kinds of maxims or formulations of a metaphysical nature relating to freedom. One such statement is found in the institution of Florentinus, a lawyer who lived in the 2nd century.

> D. 1.5.4. pr.-1 (Florent. l. 9 *inst.*): *pr. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibitur.*
> 1. *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.*

Palingenesia by O. Lenel shows that only one text from book 9 *of De Statu hominum of* the Institutions by Florentinus has been preserved. The following book X *De testamentis* contains solutions regarding, among others: disinheritance (*exheredatio)* or the institution of the necessary heir (*heredes necessarii*). Therefore, in the immediate context of the text in question, slaves are not directly mentioned. The question therefore arises why Title IX of Florentinus' institution mentions freedom as the natural state of human being (*Libertas est naturalis facultas)* Unfortunately, the modesty of the sources does not allow us to give a clear answer. One can only assume that Book IX of Florentinus's institutions concerned the legal status of human being. It was a permanent element of institutions, including those of Gaius, who explicitly writes that people, and what is important here, he used the term *homines,* are divided into free and slaves (D. 1.5.3. G. l. pr. inst.: *Summa itaque de iure personarum divisio haec est quod omnes homines aut liberi sunt aut servi.*). Therefore, a slave, according to this lawyer, belongs to the species *human being*. Moreover, the subjectivity of slaves in Roman law was written about quite widely in Romanesque literature (Robleda, 1976: 70-72; Gamauf, 2009: 331-346; Watson, 1991: 63 ff).

According to Florentinus' text, human freedom can be achieved organically only as a result of the use of force (*vis*) or on the basis of statutory law (*ius)*. These two ways of falling into slavery are explained by Marcianus. D. 1.5.5.1: *Servi autem in dominium nostrum rediguntur aut iure civili aut gentium: iure civili, si quis se maior viginti annis ad pretium participandum venire passus est. Iure gentium servi nostri sunt, qui ab hostibus capiuntur aut qui ex ancillis nostris nascuntur.* The source of slavery is therefore, according to Florentinus, the law applied by human being (ius *gentium*). The essence of human enslavement manifests itself in having power over another person (dominium), which is in fact a state contrary to nature (*contra naturam*) (Robleda, 1976: 306). Hence, it is natural for a slave to strive to obtain freedom, that is, to return to the natural state of human being. It should also be noted that the value of freedom is not related to Roman citizenship. Therefore, we can say that freedom is the highest value for every person, regardless of citizenship (Bran, 2016: 137).

In the sources of Roman law and in Romanist doctrine, it is assumed that slaves were classified as things by the Romans (an example would be the inclusion of slaves in *the res corporales* – G. 2.13), but it was a special category

of things, referred to as speaking things – *instrumentum. vocale*. This is how Marcus Terence Varro referred to the slave in his work entitled *De re rustica* 1.17.1. (Rominkiewicz, 2020: 367-385; Amielańczyk, 2018: 9). As it has already been mentioned above, the treatment of man as a slave resulted mainly from the needs of the economy of that time, i.e. the need to obtain cheap labor (Sitek, 2015: 63-71; Cerami, 2004: 26; Kaser, 1976: 135; Rostovtzeff, 1926).

However, the situation and treatment of slaves in ancient Rome should also be looked at through the primacy of the famous definition of the post-classical lawyer Hermogenianus. According to him, all law was established for the sake of people – *Cum igitur hominum causis omne ius constitutum sit,* … (D. 1.5.2). According to Hermogenius, law is created by man and for man. However, the wording of the entire text suggests that the post-classical lawyer meant that only a potentially rational being is able to recognize the meaning of the content of a legal provision and the legal norm resulting from it. Hence, legal texts contain a number of legal provisions addressed specifically to slaves, thus recognizing them as rational beings. *A contrario,* in the Roman law system there are no regulations addressed to things, including animals or plants. It is important for the addressee to understand the content of the provisions and the legal norm built on their basis.

The results of the analysis of the above two texts by Roman lawyers confirm Ulpian's opinion on the value of human freedom, according to which freedom is the highest value for man: *Infinita aestimatio est libertatis et necessitudinis* (D. 50.17.176.1). (Giarto, 2010, pp. 14)

Further analysis will concern selected source texts mainly from the Digests, book 40 of title 12, in which the compilers collected fragments of the writings of Roman lawyers regarding the resolution of doubts about the status of man, his freedom or slavery.

3. Case studies

As previously mentioned in book 40, title 12 of *De liberali causa,* there are discussions of numerous forfeitures related to freedom proceedings. In the classical period, such trials took place in front of a special official/judge called *praetor de liberalibus cause* (Kaser, 1984: 2947-2956). For the purposes of this study, two cases will be selected, containing important information on resolving doubtful situations as to the status of a person, freedom or slavery.

3.1. The family's right to file a lawsuit for freedom

The first case concerns the family's right to file a lawsuit to declare a family member's freedom.

> D. 40.12.1 pr. (Ulp. l. 54 *ad ed.*): *Si quando is, qui in possessione servitutis constitutus est, litigare de condicione sua non patitur, quod forte sibi suoque generi vellet aliquam iniuriam inferre, in hoc casu aequum est quibusdam personis dari license pro eo litigare: ut puta parenti, qui dicat filium in sua potestate esse: nam etiamsi nolit filius, pro eo litigabit, sed et si in potesta non sit, parenti dabitur hoc ius, quia semper parentis interest filium servitutem non subire.*

One of the social phenomena occurring in ancient Rome was service by a free human being performed similarly to a slave. After some time, in order to determine the legal status of such a person, it was necessary to file a lawsuit to determine the status of such a person. Due to the uncertain legal status of such a person, this person did not have judicial capacity, and therefore could not initiate court proceedings in his or her case – *litigare de condicione sua non patitur.* Ulpian provides an exemplary explanation for such a solution, namely that a free person who served as a slave could have nefarious goals for his or her state, and by bringing a lawsuit by the interested person herself or himself, she or he could aim to harm relatives, third parties, especially the one for whom she or he serves or even harming herself or himself.

As mentioned above, a free person, due to the fact that he or she served as a slave, had no right to file a lawsuit in her or his case. As a rule, *the advertiser*

had such permission *libertatis,* i.e., defender of freedom (IJ. 4.10.pr). According to Ulpian, the praetor's edict introduced the possibility of bringing such an action by relatives who would be interested in regaining their freedom or confirming the status of a free person who is their relative (Lenel, 1985: 398 ff). The scope of persons entitled to file an action for confirmation of the status of a single person has been extended to include certain relatives (quibusdam *personis).*

The extension of the circle of persons entitled to file an action for declaration of unmarried status was dictated by considerations of equity (aequum *est).* An example of such a person authorized to initiate proceedings is always a parent, regardless of whether his or her child was under parental authority or has already left it. Moreover, the parent could bring a lawsuit regarding his or her child even if the child did not consent to such a procedural action. The motivation for this solution is the bond between the child and the parent. According to Ulpian, it is from this bond that the parent's interest in ensuring that his or her child is not in a state of slavery arises – … *quia semper parentis interest filium servitutem non subire.*

Children have the same right to file a lawsuit to determine the status of their parents.

> D. 40.12.1.1. (Ulp. l. 54 ad ed.): Versa etiam vice dicemus liberis parentium etiam invitorum eandem facultatem dari: neque enim modica filii ignominia est, si parentem servum habeat.

Ulpian also bases the justification for extending judicial capacity to children on the premise that the child's dignity is offended by the relatively low social status of its parents – *modica filii ignominia est,* in this case slavery. It is no accident that Ulpian used the term *ignominia* here, which is a derivative of the term infamia. The latter term had a specific meaning in legal language, both in private and criminal law. Infamy was an additional sanction imposed by the court, although sometimes it was possible to fall into infamy due to lifestyle, e.g., a free person practicing the profession of gladiator. In the case of the term *ignominia,* it meant a person's rather bad reputation in society (Sitek, 2023: 108, 188; Brasiello, 1937: 162). Undoubtedly, having parents who were slaves or having an unclear legal status as to freedom affected their children's reputation as freemen, for good or ill, especially in the public sphere. Hence,

according to Ulpian, it is normal for a child to bring an action regarding the legal status of his or her parents.

Then, the right to file a claim for freedom was extended to further cognitive relatives.

> D. 40.12.1.2. (Ulp . l. 54 ad ed.): Idcirco visum est cognatis etiam hoc dari debere**, … .**

Ulpian will not determine the degree of relationship of persons entitled to bring such an action. It can therefore be assumed that further relatives of a slave or a person with questionable legal status could also bring such an action. It is worth noting on this occasion that this fragment by Ulpian is evidence of the gradual departure of the Roman law system from agency towards cognatic kinship.

The earlier theme of feeling the pain and suffering caused by a relative's state of slavery is continued in the text by Gaius.

> D. 40.12.2 (G., ad ed. Praet. urb. tutulo de liberali anusa.): quoniam servitus eorum ad dolorem nostrum iniuriamque nostram porrigitur.

The above fragment shows that the very fact that the closest relative is in a state of slavery causes sadness (*dolor)*, pain and a sense of wrongdoing for the relatives. Gaius ' use of the term *iniuria* may also mean that the state of slavery of the closest relative caused the family to feel harm and injustice.

3.2. False (deceitful) sale of a free human being into slavery

The book of 40 digests contains fragments of writings by Roman lawyers regarding situations when a free man sells himself into slavery in order to obtain financial benefits from this legal action. According to O. Robleda, such a practice appeared in the period after Gaius, i.e., at the end of the 2nd century. This legal act consisted in a free man selling himself into slavery in order to share the money that the seller obtained from this legal act. As a rule, a sold free man still had hope of regaining his lost freedom in a freedom trial.

Such a situation was treated as an abuse of law; hence such cases were reflected in the normative solutions developed by *prudentes* (Robleda, 1976: 35-38).

> D. 40.12.7. pr. (Ulp. l. 54 *ad ed.*)*: Liberis etiam hominibus, maxime si maiores viginti annis venum se dari passi sunt vel in servitutem quaqua ratione deduci, nihil obest, quo minus possint in libertatem proclamare, nisi forte se venum dari passi sunt, ut participaverint pretium.*

Ulpian makes two important points in the above passage. The first one concerns the possibility of selling a free human being into slavery. From the point of view of the purpose of this editorial unit, reducing a free person to slavery for any reason other than sale (… *in servitutem quaqua ratione ded*uci …). In both cases, however, such a person may demand to regain her or his freedom. The human right to regain freedom did not depend on whether the person being sold was aware of the legal transaction being performed or not.

The second issue concerns the sale of a free human bring, the aim of which is to obtain money in order to divide it between the seller and the free person sold into slavery (… *nisi forte se venum Dari passi sunt, ut participaverint pretium)*. In this case, the decision to sell was a conscious act of will of the person who was the subject of the sale transaction. In this case, Ulpian states that it was not possible for someone sold into slavery to return to the state of a free human being. This is determined by bad faith on the part of the seller. He himself wanted to do this and gain unfair financial advantage. Seeking to regain his freedom would undoubtedly be to the detriment of the one who bought the slave in this way. Using modern legal terminology, Ulpian's solution protected the interest of a third party, i.e., the buyer, who was in good faith.

A similar presentation of the legal situation of a free person deceitfully sold into slavery can be found in the text of the Institutions by Marcianus.

> D. 1.5.5.1 (Marcian. L. 1 *inst.*): *Servi autem in dominium nostrum rediguntur aut iure civili aut gentium: iure civili, si quis se maior viginti annis ad pretium participandum venire passus est. Iure gentium servi nostri sunt, qui ab hostibus capiuntur aut qui ex ancillis nostris nascuntur* .

Marcianus discusses the legal basis of slavery. According to this lawyer, there are two bases, the first one has its source in civil law (ius *civile)*, the second in the law of nations (ius *gentium)*. The deceitful sale of a free man into slavery was included among the sources of slavery based on civil law, unlike those who were captured as a result of war gains (qui *ab hostibus capiuntur)* or being born to a slave woman. The latter two cases are considered among the sources of slavery, which have their basis in the law of nations (Ortu, 2012: 19; Watson, 1987: 8 ff).

The solution proposed by Ulpian, as well as Marcianus, had another peculiarity. Namely, the requirement to be 20 years old on the part of the person being fraudulently sold could result in various legal consequences. If the person being sold was over 20 years old at the time of the fraudulent sale, he or she could not apply for restoration to freedom status. This solution was different for a person under 20 years of age. In this case, such a person could still apply to regain freedom, even if the action was brought after he or she turned 20 years old. The reason for such a solution was the issue of human being's psychological maturity. It was considered that before the age of 20, a person agreeing to fraudulent sale in order to obtain financial benefits was not fully aware of the legal act itself and its legal consequences.

4. Final conclusions

The popular public message about slavery is extremely simplistic and essentially untrue. The analysis of Hermogenius' text shows that the law is created for the sake of human being – *homo.* This category of beings, defined as *homo,* included every human being, including slaves. This is evidenced by numerous legal provisions, and thus legal norms, which were also addressed to slaves. Therefore, it is not surprising that Florentinus' statement that every human being is being born free, then only human law (jus *gentium)* causes some to be free and others to become slaves for various reasons.

Freedom was a very important value for the culture of Roman law, but it was not absolute, as it is in modern legal culture. In my study, I assumed that

the value of individual freedom was confronted with other values or interests in specific cases. For this purpose, an analysis of two cases was conducted.

The first one concerned granting the family the right to seek determination of the status of a free person in relation to a relative. Initially, this right covered parents and children, but over time, based on the praetor's edict, this right was extended to further relatives, including cognitive relatives. The legal basis for authorizing family members to file a lawsuit for declaring or regaining the flower's freedom was an ethical motivation, mainly the bond of kinship.

The second case is more complicated, namely when a free person consciously agrees to be sold into slavery in order to obtain a financial benefit in the form of dividing the obtained financial benefit between the seller and the sold person. Such a legal action was considered illegitimate. In this case, if sold, he became a slave and had no possibility of regaining his freedom. From the text by Marcianus we learn that the barrier of reaching 20 years of age was important for deciding in favor of freedom. If the person to be sold was 20 years old at the time of the sale, he or she irrevocably lost the ability to apply for freedom. However, if he or she was under 20 years old in that moment, the person did not lose this right, and what is more, he or she retained it even if he or she later turned 20 years old.

Finally, it can be said that Roman lawyers, when considering issues of human status, weighed various rights and interests, considering the value of individual freedom.

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