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If a Maidservant "Dies a Horrible Death": Canon 5 of the Synod of Elvira in the Light of the Norms of Roman Criminal Law

Gdy niewolnica „wyzionie ducha w mękach" – kanon 5 synodu w Elwirze w świetle norm rzymskiego prawa karnego

ABSTRACT

This article aims to analyse canon 5 of the Synod of Elvira (beginning of the 4th century) taking into account the norms of Roman law concerning the legal protection of slaves. This canon provided for the punishment of repentance and a prohibition of giving Eucharistic Communion to a woman who, in anger caused by jealousy, caused the death of her slave as a result of whipping. It was probably adopted based on a certain, particularly shocking matter, perhaps related to the intimate life between the master and her slave. The content of the canon suggests that the person responsible for its editing was familiar with Roman law, including probably in particular Emperor Hadrian's rescripts – especially those addressed to the Governor of Baetica, where Elvira was located. The canon provided slaves with a wider scope of protection than the norms of Roman law did, both those in force at the time of its release and later introduced by Emperor Constantine the Great. It was also an expression of the generally discernible attitude of Christian communities towards the institutions of slavery. On the one hand, the existence of slavery was accepted and, on the other hand, there were efforts to improve the situation of slaves, especially if they were Christians.

Keywords: slavery; Roman criminal law; legal protection of slaves; Synod of Elvira

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INTRODUCTION

The attitude of Christians to the institution of slavery widely known in the ancient world was determined by many different factors. There were no ontological differences between the slave and the free man, which was closely linked to the biblical vision of man's creation and the common genesis of all people as descendants of Adam and Eve, and at the same time as children of God.[1] However, just as the Kingdom of Christ was "out of this world",[2] this particular egalitarianism in the ancient world had a mostly spiritual dimension. This is how the famous words of St. Paul of Tarsus: "[…] there can be neither slave nor freeman"[3] should be read. In the ancient period, Christians did not advocate the abolition of slavery in itself, initially perhaps because of the prospect of the expected Parousia, and later because of the necessary realism.[4] In practice, there was no known social reality other than that in which people were divided into free and slaves, even though even pagan intellectuals saw the contradiction of this state of affairs with natural law (*ius naturale*).[5]

Therefore, the Church encouraged slaves to obey their owners, and the owners to behave gently towards the slaves.[6] Despite the absence of a general postulate to abolish slavery, the strict laws for slaves were considered inhumane, as expressed e.g. by Origen.[7] However, not all the rights of the owners related to punishing slaves were negated; they were clearly accepted even by such a prominent intellectual as St. Augustine, who, at the same time, called for moderation and the use of verbal

[1] See, e.g., Lact., *Div. Inst*. 5.14.17 (*in fine*): *Nemo apud eum servus est, nemo dominus. Si enim cunctis idem pater est, aequo jure omnes liberi sumus*. Cf. Lact., *Div. Inst*. 5.15.5. As St. Paul the Apostle stated, there is no favouritism with God, as he is the Master for both the free and slaves – Galatians 6.9. Apostolic Constitutions recommended to bestow brotherly love (*agápe*, *ἀγάπη* – Const. *Ap*. 4.12.4) upon slaves. Also a brilliant preacher, St. John Chrysostom, called for leniency towards slaves. See Joan. Chris., *In ep. ad Phil. hom*. 2.

[2] See John 18.36.

[3] Galatians 3.28.

[4] See, e.g., J. Gaudemet, *La formation du droit séculer et du droit de l'Église aux IVe et Ve siècles*, Paris 1957, p. 197; N. Borckmeyer, *Antike Sklaverei*, Darmstadt 1979, p. 192. Cf. B. Biondi, *Il diritto romano cristiano*, vol. 2, Milano 1952, p. 382.

[5] In this regard, of particular interest are the observations of Roman jurists who were undoubtedly men of great culture and wide intellectual horizons. They pointed to the contradiction between slavery and the *ius naturale*. See, e.g., D. 1.5.4.1; D. 1.1.4; D. 50.17.32. Likewise, see the arguments of St. Augustine – Aug., *De civ. Dei* 19.15: *Nullus autem natura, in qua prius Deus hominem condidit, servus est hominis aut peccati*.

[6] The best example of this is the letter of St. Paul the Apostle to Philemon (especially Philemon 1.8–20). Other sources from the New Testament: Colossians 3.22–24; 1 Timothy 6,1–2; Ephesians 6.5–9. From the later period, see also: Origenes, *De prin*. 3.1.11; Joan. Chris., *In ep. ad Phil. hom*. 1–2; Aug., *De civ. Dei* 19.15.

[7] Origenes, *De prin*. 2.9.3.

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admonitions rather than whipping.[8] It is therefore not surprising that even the activities of the Synods addressed also topics relating to slavery, containing various orders and prohibitions of a disciplinary nature. The first chronologically was the Synod held in Elvira, Spain (ca. 306 A.D.).[9] It was attended by a later adviser to Emperor Constantine the Great, Bishop Ossius of Corduba, and 18 other bishops and 26 priests.[10] As is assumed in the relevant literature, Ossius' influence on the content of the canons adopted during the Synod could have been considerable, since he signed the document as the second of the participating bishops.[11]

CANON 5 OF THE SYNOD OF ELVIRA – NORMATIVE CONTENT AND SOCIAL CONTEXT

The authenticity of the Elvira canons had been contested in the past, and the issue re-emerged with the publication of the famous article by M. Meigne questioning the integrity of the collection and pointing out that it is rather a compilation in which only the first 21 canons, identified as group "A", were actually adopted in Elvira.[12] Although Meigne's view faced criticism in the literature,[13] it is worth noting that canon 5, which is the subject of further analysis is authentic, even according

[8] Aug., *De civ. Dei* 19.16.

[9] There is abundant literature on this Synod. See, e.g., A.W.W. Dale, *The Synod of Elvira and Christian Life in the Fourth Century: A Historical Essay*, London 1882; K.J. Hefele, *A History of Christian Councils from the Original Documents*, vol. 1: *To the Close of the Council of Nicea A.D. 325*, Edinburgh 1894, p. 131 ff.; J. Gaudemet, *Concile d'Elvire*, [in:] *Dictionnaire d'histoire et de géographie ecclésiastiques*, vol. 15, Paris 1963, pp. 312–348; M. Meigne, *Concile ou collection d'Elvire*, „Revue d'Histoire Ecclésiastique" 1975, vol. 70, pp. 361–387; E. Reichert, *Die Canones der Synode von Elvira: Einleitung und Kommentar*, Hamburg 1990; J.F. Ubina, *Le concile d'Elvire et l'esprit du paganisme*, „Dialogues d'histoire ancienne" 1993, vol. 19(1), pp. 309–318; P. Badot, D. De Decker, *Historicité et actualité des canons disciplinaires du concile d'Elvire*, „Augustinianum" 1997, vol. 37(2), pp. 311–322; D. Ramos-Lissón, *Osio di Córdoba, la data del concilio de Elvira y los possibiles influjos de otros concilios contemporáneos*, [in:] *Historiam perscrutari. Miscelnaea di studi offerti al prof. Ottorino Pasquato*, ed. M. Martino, Roma 2002, pp. 343–355; J. Garcia Sánchez, *El derecho romano en el concilio de Elvira (s. IV)*, [in:] *Concili della cristianitá occidentale*, Roma 2002, pp. 589–606; J. Lewandowicz, *O brzmieniu i tłumaczeniu kanonu 33. synodu w Elwirze – najstarszego oficjalnego tekstu Kościoła o celibacie duchowieństwa*, „Vox Patrum" 2013, vol. 60(33), pp. 209–219.

[10] A. Baron, H. Pietras, [in:] *Synodi et Collectiones Legum*, vol. 1: *Acta Synodalna. Ann. 50–301*, eds. A. Baron, H. Pietras, Kraków 2006, p. 49*, footnote A.

[11] I. Čairović, *Possible Influence of Hosius of Cordoba on Decisions Made at the First Ecumenical Council (325): Analogy of Canons from the Councils of Elvira, Arles and Nicaea*, "Bogoslovni vestnik" 2017, vol. 77, pp. 102–103. See also D. Ramos-Lissón, *Osio di Córdoba…*, p. 343 ff.

[12] M. Meigne, *op. cit.*, p. 361 ff.

[13] See D. Ramos-Lissón, *En torno a la autenticidad de algunos canones del concilio de Elvira*, „Scripta Theologica" 1979, vol. 11(1), pp. 181–186. The author argues, i.a., that some Meigne's arguments of a philological nature are strongly doubtful (*ibidem*, pp. 184–185). Cf. also an overview

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to the criteria adopted by this author. It was therefore passed by bishops gathered in this Spanish town.[14] According to its content:

Conc. Eliberritanum, can. 5: *Si qua femina furore zeli accensa flagris verberaverit ancillam suam, ita ut intra tertium diem animam cum cruciatu effundat, eo quod incertum sit voluntate an casu occiderit; si voluntate, post septem annos, si casu, post quinquennii tempora, acta legitima poenitentia ad communionem placuit admitti; quod si infra tempora constiuta fuerit infirmata, accipiat communionem*.[15]

The genesis behind the adoption of this canon is quite mysterious. Particular difficulties are caused by the fact that it only concerns the murder of a slave by a woman (*femina*, in other editions of the Elvira canons – *domina*).[16] This suggests two possible solutions – the canon was either based on a specific case, or its content was determined by the belief that women were particularly quick-tempered character, which resulted from the lack of due self-control.[17] However, it is impossible to see in this unusual regulation an attempt to "patch" a gap existing in Roman law, since it is known that Hadrian had already condemned a woman guilty of abusing slaves to a five-year exile (*relegatio*).[18]

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of studies, written by M.J. Lázaro Sánchez in *L'état actuel de la recherche sur le concile d'Elvire* („Revue de Sciences Religieuses" 2008, vol. 82(4), pp. 517–546).

[14] It was an argument proposed by Meigne's adversaries, such as Ramos-Lissón, who argued that Meigne could not demonstrate the lack of authenticity of the first 22 canons of Elvira and considered them authentic. See D. Ramos-Lissón, *En torno a la autenticidad*..., p. 186.

[15] Synod of Elvira, canon 5: "If a woman in a fit of rage whips her maidservant so severely that she dies a horrible death within three days, and it is not certain whether she killed her on purpose or by accident: provided that the required penance has been done, she shall be readmitted to communion after seven years if it was done on purpose, and after five years if by accident; if she becomes ill during the prescribed time, let her receive communio" (English translation at: https://earlychurchtexts.com/public/elvira_canons.htm [accessed 14.12.2020]).

[16] According to the Moses' law a slave owner who had beaten his slave to death was subject to a severe punishment (Exodus 21.20). In the event the slave is injured by depriving him of an eye or knocking out a tooth, the slave be liberated (Exodus 21.26–27). Slaves who fled from foreign peoples, which probably means Israelites who had been previously captured, could not be handed over to the owners (Deuteronomy 23.16–17). The Wisdom of Sirach recommended not to let the slaves be idle and to clap the disobedient ones in irons, but at the same time prohibited "over-exacting with anyone", and "doing nothing contrary to justice" (Ecclesiasticus 33.25–33). However, there is no particular norm that would refer to killing or beating a female slave by a female owner. In view of the above, it does not seem that the canon in question directly refers to the norms of the Jewish law. Other detailed issues related to the contradiction between the regulation under analysis and the rules of the Moses' law are addressed further in this paper.

[17] The same view in: H.G. Franco, *La «cuestión femenina» en el primitivo cristianismo hispano: a propósito de los cánones V, XXXV y LXXXI del Concilio de Elvira*, "Helmantica: Revista de filología clásica y hebrea" 1998, vol. 49(150), p. 242. The author also points out that none of the canons of Elvira regulates the issue of possible liability of men for killing a slave or mistreatment of slaves.

[18] See D. 1.6.2 (*in fine*): *...Divus etiam Hadrianus Umbriciam quandam matronam in quinquennium relegavit, quod ex levissimis causis ancillas atrocissime tractasset*. See also P. Bonfante, *Corso*

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Both proposed solutions to the problem of the genesis of the discussed canon are not mutually exclusive. They could have occurred together, intertwining and ultimately determining the content of the regulation. However, the thesis about the crucial significance of a specific matter, unknown to us today in details, may be supported by the fact that the given canon concerned a situation in which not only the perpetrator, but also the victim should be a woman.

An alternative reason for establishing precisely such content of the canon concerns the perception of women in early Christian communities (and even more broadly – in society, regardless of its religious profile). However, the attitude of early Christian writers towards women was not uniform.[19] Although it is pointed out in the First Epistle to Timothy that it was Eve who was the first to be deceived by Satan, becoming the cause of the fall of humankind,[20] but at the same time, further in the letter, one can read about the necessity of showing reverence to widows living in chastity.[21] St. Paul the Apostle also allowed the ministry of women, referred to as *diakonissa* (*δἰᾱκόνἴσσᾰ*), while indicating that they should be chaste, avoid gossiping, remain sober and faithful.[22] In later sources – preceding the Synod of Elvira or coming from a period close to it – the lack of self-control of women does not appear in the context of any particular aggression against slaves or others; it rather regards concerns about chastity of young widows and virgins.[23] In this context, Tertulian also accused pagan women of fondness for their own slaves and freedmen, which, moreover, caused public scandals.[24] Such relationships were not socially accepted.[25]

The maintenance of intimate relations between female owners and male slaves probably was quite frequent, since it was strictly prohibited by Constantine the

di diritto romano, vol. 1: *Diritto di famiglia*, Roma 1925, p. 149; K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, p. 163.

[19] See, e.g., E. Wipszycka, *Kościół w świecie późnego antyku*, Warszawa 1994, p. 281 ff.

[20] See 1 Timothy 2.13–14. Cf. Genesis 3.1–7. This argument used to be raised in early Christian writings. See, e.g., Tert., *De cultu feminarum* 1.1.1–2. It is worth noting that even those of the authors who pointed to this fragment were not fully consistent. In his other writings, Tertullian equally harshly assessed the Adam's behaviour. See Tert., *De exhortatione castitatis* 2.5 and *Adversus Marcionem* 2.8.2. More on Tertullian's views, see D. Zalewski, *Kobiety u Tertuliana w kontekście historii zbawienia*, „Vox Patrum" 2016, vol. 66(36), p. 57 ff.

[21] See 1 Timothy 5.3.

[22] See 1 Timothy 3.11.

[23] See, e.g., Hipp., *Trad. Ap*. 1.9 and 1.11.

[24] Tert., *Ad uxorem* 8.4: *Nonnullae se libere et seruis suis conferunt, omnium hominum existimatione despecta, dummodo habeant a quibus nullum impedimentum libertatis suae timeant*. The apologist referred also to the regulation contained in *s.c. Claudianum*, according to which a woman who had had an intercourse with a slave without the consent of his owner became a slave herself – Tert., *Ad uxorem* 8.1: S*cilicet ne in lasciuiam excedant, officia deserant, dominica extraneis promant. Nonne insuper censuerunt seruituti uindicandas quae cum alienis seruis post dominorum denuntiationem in consuetudine perseuerauerint?*

[25] M. Kuryłowicz, *Rzymskie prawo oraz zwyczaje grobowe i pogrzebowe*, Lublin 2020, p. 182.

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Great in a constitution[26] addressed *ad populum*, and therefore having the value of the law generally applicable throughout the empire. The Emperor deemed such relations to be a *crimen publicum* and ordered the punishment of both the woman and the slave with death.[27] It seems that the canon in question was also associated with this phenomenon, and perhaps also with some particularly shocking issue that had emerged in this context. His first words indicate this: *si qua femina furore zeli accensa flagris verberaverit ancillam suam*. The term *zelus* clearly emphasizes that the killing of a slave must have resulted from anger caused by jealousy (*zeli*),[28] perhaps due to fondness for a male slave who was in a relationship with one of the female slaves. This interpretation of the canon makes it possible to rationally explain its origins and does not remain completely detached from the preserved sources and our knowledge of the relations – including intimate ones – between slaves and free people in Roman antiquity.

The public acceptance towards maintaining intimate relationships between a female slave and her owner was greater than was the case with relationships between female slaves and male slaves. As M. Kuryłowicz points out, having offspring with one's own slave could lead to her liberation and subsequent marriage, as evidenced by numerous tombstone inscriptions with formulas such as *libertae et coniugi* and *patrono et coniugi*.[29] The liberation of one's own slave in order to marry her was considered a legitimate cause (*iusta causa manumissionis*) under *lex Aelia Sentia*.[30] Of course, one can guess that not every owner was that high-minded, and children born of slaves themselves became slaves.[31] Much less was the acceptance

[26] C.Th. 9.9.1. Cf. D. 48.5.24, which mentions low-class people with whom women committed *adulterium*, and D. 48.5.27 and D. 48.5.33 describing procedural differences in proceeding with a slave accused of that crime.

[27] C.Th. 9.9.1.1: *Si qua cum servo occulte rem habere detegitur, capitali sententiae subiugetur, tradendo ignibus verberone, sitque omnibus facultas crimen publicum arguendi, sit officio copia nuntiandi, sit etiam servo licentia deferendi, cui probato crimine libertas dabitur, quum falsae accusationi poena immineat*. In this case, it was allowed that the denunciation against the owner came from other slaves, who could be granted freedom for its submission. This emphasized the seriousness of the crime – as was the case with such serious crime as *crimen laesae maiestatis*. Cf. C.Th. 9.5.1.

[28] K. Kumaniecki, *Słownik łacińsko-polski*, Warszawa 1976, p. 545 (*s.v. zelus*).

[29] M. Kuryłowicz, *op. cit.*, p. 182, footnote 42.

[30] G. 1.19: *Iusta autem causa manumissionis est, ueluti si quis filium filiamue aut fratrem sororemue naturalem aut alumnum aut paedagogum aut seruum procuratoris habendi gratia aut ancillam matrimonii causa apud consilium manumittat*. See also D. 40.9.21.

[31] See G. 1.82–86. Gaius discussed in detail the issue of the status of offspring from relationships between the free and slaves, which may indicate that it was a significant problem. Pursuant to this constitution of Constantine the Great, the offspring from a relationship between a male slave and his female owner could only inherit where their parents died before bringing the action (C.Th. 9.9.2–5). The Emperor argued that such children should not "suffer for the sins of their late parents" (*ne defunctorum parentum vitiis praegravetur*). In this regard, cf. a metaphorical, but rooted in the Torah (Genesis 21.10), statement by St. Paul the Apostle: Galatians 4.30.

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towards marriages between freedmen and free-born women which were not shown on tombstones.[32] On the other hand, according to *s.c. Claudianum*, intercourse of a woman with someone else's slave without the consent of his owner resulted in her falling into slavery if she did not break the relationship despite three calls to do so.[33] During this period, this resolution was still in force, as it was repealed only by Emperor Justinian the Great (527–565).[34] Moreover, shortly after the Synod of Elvira, Emperor Constantine issued several constitutions which directly referred to the application of *s.c. Claudianum* in court practice.[35]

Therefore, taking into account both the social context and the content of the canon, it may be considered that it arose based on a particular case. The owner of a slave in the fury caused by jealousy whipped the slave to death, which had to shake the local Christian community. The bishops could therefore consider that this issue required disciplinary regulation. Thus, it is doubtful that the content of the canon should be determined by any prejudice against women or even by the condemnation of the phenomenon of adulterous relations between female slave owners and their slaves.

CANON 5 OF THE SYNOD OF ELVIRA AND THE NORMS OF ROMAN LAW PROTECTING THE LIFE OF SLAVES

Another issue that needs to be discussed more further is the relationship between the canon cited and the norms of Roman law, which to some extent had protected the lives of slaves from attack by the owner since the days of Antoninus Pius,[36] and

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[32] M. Kuryłowicz, *op. cit.*, p. 182, footnote 44.

[33] G. 1.84 and 91; Tac., *Ann*. 12.53. For more on the topic, see B. Sirks, *Ad senatus consultum Claudianum*, "ZSS" 1993, vol. 111(1), pp. 436–437; K. Harper, *The SC Claudianum in the Codex Theodosianus: Social History and the Legal Text*, "The Classical Quarterly" 2010, vol. 60(2), pp. 610–638 and the literature referred to therein.

[34] See C. 7.24.1.

[35] See C.Th. 4.12.1–3. These constitutions were fervently discussed in the literature on the topic, which was briefly summed up by K. Harper (*The SC Claudianum…*, p. 611 ff.).

[36] Cf. G. 1.53: *Sed hoc tempore neque ciuibus Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in seruos suos saeuire: nam ex constitutione sacratissimi imperatoris Antonini, qui sine causa seruum suum occiderit, non minus teneri iubetur, quam qui alienum seruum occiderit. sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur: nam consultus a quibusdam praesidibus prouinciarum de his seruis, qui ad fana deorum uel ad statuas principum confugiunt, praecepit, ut si intolerabilis uideatur dominorum saeuitia, cogantur seruos suos uendere. et utrumque recte fit: male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio*. See also: I. 1.8.2; D. 1.6.2; Coll. 3.3.2. Cf. W.W. Buckland, *Roman Law of Slavery*, Cambridge 1908, pp. 37–38; G.F. Falchi, *Diritto penale romano. I singoli reati*, Padova 1932, pp. 153–154; B. Biondi, *op. cit.*, pp. 433–434; O. Robleda, *Il diritto degli schiavi nell'antica Roma*, Roma 1976, pp. 87–88; F. Longchamps de Bérier, *Nadużycie prawa w świetle rzymskiego prawa prywatnego*, Warszawa 2004, p. 21 ff.

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perhaps even Hadrian.[37] Even earlier, there was already a tendency to legally protect slaves, for example by prohibition, under *lex Petronia*, of assigning them by their owners to fight wild animals in the arena (*ad bestias*).[38] Over time, it was assumed that the murder (*homicidium*) of a slave was punished based on *lex Cornelia de sicariis et veneficis*, which during the period of Principate – as a result of the creative interpretation of its provisions by Roman jurists – became a general law against murder.[39] It is also worth noting that after the Synod of Elvira, in 319, Emperor Constantine the Great issued a constitution on the same issue.[40] Apparently, this might suggest that the earlier rescript of Antoninus Pius went into oblivion and became

[37] *Script. Hist. Aug*., *Hadr*. 18.7–8: *Servos a dominis occidi vetuit eosque iussit damnari per iudices, si digni essent. Lenoni et lanistae servum vel ancillam vendi vetuit causa non praestita*. According to K. Amielańczyk (*Rzymskie prawo karne…*, pp. 59, 162–163), this account suggests that Hadrian restricted the authority the owners had over their slaves, by depriving them the traditional *ius vitae ac necis*. On the other hand, A. Wiliński (*Ustawy Konstantyna Cod. Th. 9,12 De emendatione servorum na tle historycznego rozwoju ius vitae ac necis pana niewolnika*, „Roczniki Teologiczne" 1963, vol. 10(4), pp. 180–181) points out that the prohibition issued by Hadrian had to be ineffective, most probably because it did not expressly associate killing of a slave with *homicidium.* Scepticism about authenticity of the account contained in *Historia Augusta* was expressed by O. Robleda (*op. cit.*, p. 87, footnote 389).

[38] D. 48.8.11.1–2.

[39] D. 48.8.1.2: *Et qui hominem occiderit, punitur non habita differentia, cuius condicionis hominem interemit*. After all, as K. Amielańczyk (*Lex Cornelia de sicariis et veneficis. Ustawa Korneliusza Sulli przeciwko nożownikom i trucicielom. 81 r. p.n.e.*, Lublin 2011, pp. 134–135) notes that *lex Cornelia de sicariis et veneficis* was originally intended for the protection of public safety, but indirectly protected also slaves, even though Sulla himself had never introduced any prohibition of killing slaves (otherwise, though in conditional, O. Robinson, *The Criminal Law of Ancient Rome*, Baltimore 1996, p. 43). On the other hand, the very murder of other's slave in the period of late republic only resulted in the liability of a private-law nature under *lex Aquilia de damno iniuria dato* (see K. Amielańczyk, *Lex Cornelia…*, p. 135; D. 9.2.2.pr.). Ulpian accentuated the unlawful character of killing a slave as a necessary precondition for liability under the first "chapter" (as the editorial units of this law are usually referred to – R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 953) *lex Aquilia* – see D. 9.2.3. Killing a slave owned by someone else did not entail liability under *lex Aquilia* even in circumstances which today are defined as necessary defence (see D. 9.2.4.pr.). For more on *lex Aquilia*, see R. Zimmermann, *op. cit.*, p. 953 ff. The problem of conflicting actions – *actio legis Aquliae* and *iudicium ex lege Cornelia* – has been analysed in detail by M. Miglietta in *Servus dolo occisus. Contributo allo studio del concorso tra 'actio legis aquiliae' e 'iudicium ex lege Cornelia de Sicariis'* (Napoli 2001).

[40] C.Th. 9.12.1: *Si virgis aut loris servum dominus adflixerit aut custodiae causa in vincla coniecerit, dierum distinctione sive interpretatione depulsa nullum criminis metum mortuo servo sustineat. Nec vero inmoderate suo iure utatur, sed tunc reus homicidii sit, si voluntate eum vel ictu fustis aut lapidis occiderit vel certe telo usus letale vulnus inflixerit aut suspendi laqueo praeceperit vel iussione taetra praecipitandum esse mandaverit aut veneni virus infuderit vel dilaniaverit poenis publicis corpus, ferarum vestigiis latera persecando vel exurendo admotis ignibus membra aut tabescentes artus atro sanguine permixta sanie defluentes prope in ipsis adegerit cruciatibus vitam linquere saevitia immanium barbarorum*. Cf. W.W. Buckland, *op. cit.*, p. 38; P. Bonfante, *op. cit.*, p. 150; M. Sargenti, *Il diritto privato nella legislazione di Costantino*, Milano 1938, p. 51; B. Biondi,

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invalid through *desuetudo*. It must be remembered, however, that the jurists of the late classical period also dealt with the issue of the murder of a slave committed by the owner.[41] It therefore appears that the canon in question was adopted under the influence of solutions known in Roman law.

The need to confirm the Roman norm may have been due to the situation in which were all the followers of Christianity at the time. Although in the areas of Gaul and Spain, which were first under the rule of Constantius Chlorus and then his son Constantine, persecution was never too severe and limited to the demolition of several meeting places of Christian communities, Christianity was tolerated by the power of the ruler's authority rather than by law.[42] It certainly did not have the status of *religio licta* at the time, and the followers of Christ probably preferred to avoid closer contact with Roman officials. It is also supposed that there may have been various conflicts and even tumults between local pagan and Christian communities related to attacks on "hostile" places of worship.[43] This forced them to settle disputes in a somewhat amicable manner, by subjecting them to the judgement of

op. cit., pp. 432–434; A. Wiliński, *op. cit.*, p. 187 ff.; G. Rizelli, *C.Th. 9.12.1 e 2*, „Rivista di diritto romano" 2005, no. 5, pp. 1–14.

[41] See P.S. 5.23.6: *Servus si plagis defecerit, nisi id dolo fiat, dominus homicidii reus non potest postulari: modum enim castigandi et in servorum coercitione placuit temperari*. Coll. 3.2.1: *Paulus libro sententiarum quinto sub titulo ad legem Corneliam de sicariis et veneficis dicit: Servus si plagis defecerit, nisi id dolo fiat, dominus homicidii reus non potest postulari; modum enim castigandi et in servorum coercitione placuit temperari*.

[42] The limited scope of the persecution in these areas was pointed out by e.g. Lactantius: Lact., *De mort. pers*. 15.7: *Nam Constantius, ne dissentire a maiorum praeceptis videretur, conventicula, id est parietes, qui restitui poterant, dirui passus est, verum autem dei templum, quod est in hominibus, incolume servavit*. A strongly idealised view on this matter is in an account left by Eusebius of Caesarea: Euseb., *Vita Const*. 1.15–16 (doubts as to authenticity of this account are raised also by A. Cameron, S.G. Hall, *Commentary*, [in:] Eusebius, *Life of Constantine*, Oxford 1999, p. 196). See also A.H.M. Jones, *The Later Roman Empire. 284–602: A Social, Economic and Administrative Survey*, vol. 1, Oxford 1964, pp. 71–72; T.D. Barnes, *Constantine and Eusebius*, Cambridge–London 1981, pp. 13–14. Generally on Diocletianic Persecution, see R. Paribeni, *Storia di Roma*, vol. 8: *Da Diocleziano alla caduta dell'Imperio d'Occidente*, Bologna 1941, p. 41 ff.; W.H.C. Frend, *Persecutions: genesis and legacy*, [in:] *The Cambridge History of Christianity*, vol. 1: *Origins to Constantine*, eds. M.M. Mitchell, F.M. Young, Cambridge 2008, p. 503 ff. As noted by R. Migliorini (*La giurisdizione criminale romana tra principato e dominato gli atti dei martiri come testimonianze processuali*, Citta del Vaticano 2008, pp. 55–56), the situation of Christians in Africa and Italia under the rule of Maxentius was similar.

[43] This may be evidenced by canon 60 adopted at the Synod of Elvira, which states that people killed during smashing pagan idols may not be placed in the list of martyrs – Conc. Eliberritanum, can. 60: *Si quis idola fregerit et ibidem fuerit occisus, quatenus in Evangelio scriptum non est neque invenietur sub apostolis unquam factum, placuit in numerum eum non recipi martyrum*. More on this topic, see A. González Blanco, *El cristianismo en la Hispania preconstantiniana. Ensayo de interpretación sociológica*, „Anales de la Universidad de Murcia" 1981–1982, vol. 40(3–4), p. 59 ff.

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the local bishop. This may have also entailed the need to regulate certain matters of criminal nature, including the issue of the murder of a slave.

The normative content of the canon proves that its author was a person with at least basic legal knowledge. This is indicated by the differentiation of sanctions for a murder committed intentionally (*voluntate*) and unintentionally (*casu*), described using terms known from the writings of classical jurists and imperial rescripts.[44] The content of the canon also points to the need to conduct some kind of investigation in order to establish the existence of the possible intention of the perpetrator (*…quod incertum sit voluntate an casu occiderit…*).[45] The issue of intention is particularly interesting due to the fact that, according to an excerpt from the comment *ad legem Corneliam de sicariis et veneficis*, which the author of *Collatio legum Mosaicarum et Romanarum* attributed to Paulus, the owner of a slave who died as a result of flogging, could only be accused of murder (*homicidium*) when he acted intentionally (*dolo*).[46] In this respect, therefore, the Elvira regulation protected slaves better than secular Roman law, which only provided for criminal liability against the perpetrator of unintentionally killing a free man.[47]

[44] See Coll. 16.2; Coll. 1.11.3–4; D. 48.8.14; D. 48.19.5.2. Cf. K. Amielańczyk, *Crimina leigitma w rzymskim prawie publicznym*, Lublin 2013, p. 125 ff.; idem, *Coll. 1.0. De sicariis [et homicidiis casu vel voluntate] – czyli krótki wykład o transformacji rzymskiej ustawy przeciwko „nożownikom" w powszechne prawo przeciwko zabójstwu*, „Studia Iuridica Lublinensia" 2013, vol. 19, pp. 27–39.

[45] It is a regulation considerably different from that adopted in the later constitution of Constantine the Great of 326 A.D., in which the Emperor expressly prohibited conducting an evidence-taking proceeding related to the intention of the owner in situations where the slave died after being punished as part of *domestica potestas* using ordinary measures (*simplices quaestiones*) – C.Th. 9.12.2: *Quoties verbera dominorum talis casus servorum comitabitur, ut moriantur, culpa nudi sunt, qui, dum pessima corrigunt, meliora suis acquirere vernulis voluerunt. Nec requiri in huius modi facto volumus, in quo interest domini incolume iuris proprii habere mancipium, utrum voluntate occidendi hominis an vero simpliciter facta castigatio videatur. Toties etenim dominum non placet morte servi reum homicidii pronuntiari, quoties simplicibus quaestionibus domesticam exerceat potestatem. Si quando igitur servi plagarum correctione, imminente fatali necessitate, rebus humanis excedunt, nullam metuant domini quaestionem*. Therefore, the master was granted the "comfort" of flogging without concerns about possible initiation of criminal procedure against him. Cf. E. Hermann-Otto, *Konstantin, die Sklaven und die Kirche*, [in:] *Antike Lebenswelten: Konstanz, Wandel, Wirkungsmacht*, Wiesbaden 2008, p. 362. See also A. Wiliński, *op. cit.*, p. 193; F. Longchamps de Bérier, *op. cit.*, p. 45; G. Rizelli, *op. cit.*, pp. 9–10. On the other hand, the ruler in his earlier constitution of 319 (cited above C.Th. 9.12.1) introduced the presumption of intentionality in cases of particularly cruel treatment of a slave, which led to his death. Perhaps this question was evident for the bishops in Elvira, who dealt with the case of death of a female slave as a result of whipping.

[46] Coll. 3.2.1 (*Paulus libro sententiarum quinto sub titulo ad legem Corneliam de sicariis et veneficis dicit*): *Servus si plagis defecerit, nisi id dolo fiat, dominus homicidii reus non potest postulari: modum enim castigandi et in servorumm coercitione placuit temperari*. Cf. P.S. 5.23.6.

[47] See, e.g., a fragment from Ulpian's writings preserved in *Collatio*, referring to a situation where a freeman died as a result of injuries suffered due to an unfortunate fall during a feast, when tossed in a blanket by his friends: Coll. 1.11.1–4 (*Ulpianus libro et titulo qui supra*): *Cum quidam per lasciviam causam mortis praebuisset, conprobatum est factum Taurini Egnati proconsulis Bae-*

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As a side note, it is also worth mentioning that the jurists' writings lack full consistency in the concept of guilt.[48] The more general account of Martianus indicates that crimes can be committed in three ways: with premeditation (intention – *proposito*), in a state of agitation (in heat of passion – *impetu*), and accidentally (unintentionally – *casu*).[49] It seems that Martianus' concept was not known to the authors of the canon at all (or they rejected it). The "causative act" defined in canon 5 of the Synod of Elvira had to occur *in furore* – in anger, under the influence of anger, while maintaining the distinction between intentional (*voluntate*) and unintentional (*casu*) action. Therefore, the difference from Martianus' concept, where the action *impetu* can be regarded as equivalent to the commission of an act *in furore*, is clear.

The canon also clearly defined the "criminal instrument" used by a woman for whipping a slave. It was a *flagrum*, also known as a *flagellum*.[50] According to the mention in Seneca's writings, the *flagrum* was used for disciplinary flogging.[51] So it was surely not any special torture device. This is confirmed by the account of Suetonius, who claims that the father of Emperor Otho used to whip him with a *flagrum* in his youth because of his night loitering and fights.[52] It can therefore be guessed that he did not use a tool that would torment his son, let alone kill him.

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ticae a divo Hadriano, quod eum in quinquennium relegasset. 2. Verba consultationis et rescripti ita se habent: 'Inter Claudium, optime imperator, et Euaristum cognovi, quod Claudius Lupi filius in convivio, dum sago iactatur, culpa Mari Euaristi ita male acceptus fuerit, ut post diem quintum moreretur. Atque adparebat nullam inimicitiam cum Evaristo ei fuisse. Tamen cupiditatis culpa coercendum credidi, ut ceteri eiusdem aetatis iuvenes emendarentur. Ideoque Mario Evaristo urbe Italia provincia Baetica in quinquennium interdixi et decrevi, ut impendi causa duo milia patri eius persolveret Evaristus, quod manifesta eius fuerat paupertas'. 3. V(erba) r(escripti): 'Poenam Mari Evaristi recte, Taurine, moderatus es ad modum culpae; refert enim et in maioribus delictis, consulto aliquid admittatur an casu'. 4. Et sane in omnibus criminibus distinctio haec poenam aut iustam provocare debet aut temperamentum admittere. On the issue of guilt of the perpetrator in view of this text, see K. Amielańczyk, *Rzymskie prawo karne…*, p. 68 ff.; *idem*, *Crimina legitima…*, p. 140 ff.

[48] It is clearly pointed also by K. Amielańczyk (*Crimina legitima…*, p. 146) who states that Roman jurists failed to create a consistent concept of subjective aspects of the offence and frequently confused accidental events with negligence and recklessness.

[49] D. 48.19.11.2: *Delinquitur autem aut proposito aut impetu aut casu. Proposito delinquunt latrones, qui factionem habent: impetu autem, cum per ebrietatem ad manus aut ad ferrum venitur: casu vero, cum in venando telum in feram missum hominem interfecit*.

[50] P. Kołodko, *Rzymska terminologia stosowana na określenie narzędzi używanych podczas chłosty*, „Zeszyty Prawnicze" 2006, no. 6/1, p. 130, footnote 34.

[51] Sen., *De ira* 3.32.2: *Sine id tempus ueniat quo ipsi iubeamus: nunc ex imperio irae loquemur; cum illa abierit, tunc uidebimus quanto ista lis aestimanda sit. In hoc enim praecipue fallimur: ad ferrum uenimus, ad capitalia supplicia, et uinculis carcere fame uindicamus rem castigandam flagris leuioribus*.

[52] Suet., *Otho* 2.1: *A prima adulescentia prodigus ac procax, adeo ut saepe flagris obiurgaretur a patre, ferebatur et vagari noctibus solitus atque invalidum quemque obviorum vel potulentum corripere ac distento sago impositum in sublime iactare*.

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It should therefore be guessed that, following Roman law, the synodal legislation essentially rejected responsibility for flogging a slave, which was of a purely disciplinary nature,[53] but only on condition that the master did not act in anger and that there was no result in the form of the death of a slave. It is this departure that is a kind of novelty as compared to the principles laid down in Roman law, which, moreover, has not even been adopted in the legislation of Christian emperors.[54] Here, however, we deal with elements of the stoic philosophy, specifically the views of Seneca, who, like Socrates, clearly encouraged slave owners to refrain from punishing slaves when agitated.[55]

The canon in question confers liability for an act which today could be described as an offence characterised by its result – in order for it to be committed, the slave should "die a horrible death" (*animam cum cruciatu effundat*). The very provision also provided for a kind of facilitation for the determination of the issue of the owner's liability, since it expressly stated a period of three days during which it was considered that the death of the slave was the result of previous flogging (*verbera*).[56] This solution was contrary to the rules of Jewish law, which excluded liability for the murder of a slave in a situation where death occurred at least one or two days after the flogging.[57] Instead, it can refer to the principles known in Roman law:

Coll. 2.7.1: *Paulus libro sententiarum quinto sub titulo ad legem Corneliam de sicariis et veneficis: Causa mortis idonea non videtur, cum caesus homo post aliquot dies officium diurnae vitae retinens decessit nisi forte fuerit ad necem caesus aut letaliter vulneratus*.[58]

The cited fragment from the *Collatio* suggests that Paulus assumed that there is no causal link between the slave being flogged and his death when the slave only dies after a few days but throughout this period is fit enough to perform his or her duties. Thus, it must be assumed *a contrario* that such a causal link would take place if the slave who had been beaten were bed-ridden and in pain during that time, as provided for in the Elvira canon in question.[59]

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[53] See the fragment cited below: Coll. 3.2.1.

[54] Cf. C.Th. 9.12.1–2, where the Constantine the Great rejected the possibility of holding liable an owner whose slave had died as a result of flogging imposed as a corrective measure (*emendatio*, *correctio*).

[55] Sen., *De ira* 1.15.3.

[56] Cf. P. Kołodko, *op. cit.*, p. 123 ff.

[57] See Exodus 21.20–21. Cf. Coll. 3.1.1.

[58] Paulus in the fifth book of *Sentences*, entitled *On the Lex Cornelia having reference to assassins and poisoners*: "1. When a beaten-up servant dies after a few days of fulfilling his daily duties, the beating does not seem to be the actual cause of death, unless he has been either beaten to death or fatally wounded". Cf. P.S. 5.23.5.

[59] Hence, the thesis put forward by K. Harper (*Slavery in the Late Roman World: AD 275–425*, Cambridge 2011, p. 232), who argues that the content of the canon concerned could have affected the

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The sanction provided for in the content of the canon was long-term penance (*acta legitima poenitentia*), connected with the inability to take Eucharistic Communion. The length of penance – as mentioned – depended on whether the act was done intentionally or unintentionally. In the first case, there was a seven-year penance, in the second case a five-year penance.[60] This brings to mind the penalty of five-year relegation, prescribed by Emperor Hadrian for a woman who mistreated her female slaves.[61] The five-year relegation was also applied to the perpetrator who inadvertently caused death in one of the cases examined in detail by Ulpian, *nota bene* also in connection with Hadrian's resolution.[62] This punishment was not particularly severe in comparison with others provided for in the canons of Elvira, because the lifetime ban on taking Holy Communion was provided, for example, for baptised people who made sacrifices to pagan deities, people who contributed to the death of another person "by means of a spell" (*maleficio*) or multiple harlots.[63]

CONCLUSIONS

To conclude, there are serious grounds for believing that the canon in question was issued on the basis of some specific, high-profile case which has particularly shocked the local Christian community. The influence of Roman law on the content of the canon is clearly evident, which may suggest that it was edited by a person with some legal knowledge and perhaps even legal education. However, the view that Jewish law influenced this regulation can definitely be rejected. In a broader context, it should be noted that the canon is the expression of a general attitude of Christian communities towards slavery, which was realistic and accepted the existing social order, but with a tendency to improve the situation of slaves, especially if they were Christians. Therefore, the ancient Church did not call for the abolition of slavery, but, on moral grounds, taught that slaves should be treated in a lenient way, for which they should repay with humility and the best possible performance of their duties.

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later solutions adopted in the constitution of Constantine the Great of 319 A.D. (C.Th. 9.12.1) should be considered erroneous, although this author may be right as to possible Jewish law influences.

[60] Cf. the discussion on interpretation of the term *acta legitima poenitentia* in the Spanish-language literature: M. Sotomayor Muro, T. Verdugo Villena, *Traducción de las Actas del Concilio de Elvira Una respuesta a J. Vilella y P.E. Barreda*, „Florentia Iliberritana" 2008, vol. 19, p. 391; J. Vilella, P.-E. Barreda, *nuevo sobre la traducción de los cánones pseudoiliberritanos*, „Veleia" 2013, vol. 30, p. 233.

[61] See D. 1.6.2.

[62] Coll. 1.11.1–4. It is not insignificant that the Hadrian's rescript was addressed to the proconsul of Baetica where the synod was held. See A.W.W. Dale, *op. cit.*, p. 1 ff.

[63] See *Conc. Eliberritanum*, can. 1 and can. 6–7.

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ABSTRAKT

Niniejszy artykuł ma na celu dokonanie analizy kanonu 5 synodu w Elwirze (początek IV w.) z uwzględnieniem norm prawa rzymskiego dotyczących ochrony prawnej niewolników. Omawiany kanon przewidywał karę pokuty oraz zakaz udzielania Komunii eucharystycznej kobiecie, która w gniewie powodowanym zazdrością doprowadziłaby do śmierci swojej niewolnicy na skutek wymierzonej chłosty. Prawdopodobnie został on przyjęty na kanwie jakiejś konkretnej, szczególnie bulwersującej sprawy, być może związanej z pożyciem intymnym między właścicielką a jej niewolnikiem. Treść kanonu sugeruje, że osoba odpowiedzialna za jego redakcję była obeznana z prawem rzymskim, w tym zapewne w szczególności z reskryptami cesarza Hadriana – zwłaszcza tymi, które

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adresowane były do namiestnika Betyki, w której położona była Elwira. Kanon zapewniał niewolnikom szerszy zakres ochrony niż normy prawa rzymskiego, zarówno te obowiązujące w czasie jego wydania, jak i wprowadzone później przez cesarza Konstantyna Wielkiego. Stanowił on też wyraz ogólnie dostrzegalnego nastawienia gmin chrześcijańskich do instytucji niewolnictwa. Z jednej strony bowiem akceptowano istnienie niewolnictwa, z drugiej zaś dążono do poprawy bytu niewolników, zwłaszcza jeżeli byli oni chrześcijanami.

Słowa kluczowe: niewolnictwo; rzymskie prawo karne; ochrona prawna niewolników; synod w Elwirze

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