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Slave as a Subject of Legal Protection in the Roman Public Criminal Law: A Contribution to the Discussion on the Situation of Slaves in the Roman State

Niewolnik jako podmiot ochrony prawnej w rzymskim prawie karnym publicznym – przyczynek do dyskusji nad położeniem niewolników w państwie rzymskim

SUMMARY

The article is aimed at answering the question about the scope of the subjectivity of slaves in Roman public criminal law. Especially in cases of crimes committed against slaves, there was a situation in which the slave, as a victim, was granted the attribute of legal subjectivity and was subject to legal protection as a human being (*persona*) by the Roman state. This protection, present in many aspects of the punitive policy of the Roman state, was particularly visible in the regulations that prohibited the killing of slaves, abuse of slaves, assignment to castration, gladiatorial fights or prostitution. The legal protection of slaves, and thus their empowerment in public criminal law, was based on the Roman *utilitas publica*, but also the emerging humanitarian tendencies in imperial law.

Keywords: scope of the subjectivity of slaves; Roman public criminal law; *utilitas publica*; humanitarian tendencies

I.

Roman slavery, in its many facets, has always been of great interest to the scholars who deal with antiquity. Roman law specialists, of course, have addressed various legal issues arising from the covering of slaves by institutions of private law. Those studies are usually rooted in the paradigm that the slave was the object, not the subject of the law. However, the legal status of slaves in the Roman state

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was not one-dimensional and obvious, and the attitude of the Romans to them was not easily defined[1]. This concise study is intended to answer the question whether the slave was empowered in Roman public criminal law in such a way that it is possible to speak of the specificity of his position, not necessarily arising solely from the specific nature of public criminal law.

Possible findings as to this matter could have brought value not only to the dogmatic studies on Roman criminal law, but also have additional cognitive value and complement the available historical knowledge about the position of slaves in the Roman state. A certain didactic aspect can be seen in the latter dimension. Traditionally, a lecture in Roman law as part of legal studies is limited to private law. Such a narrowing of the legal matter results in a quite one-sided coverage of the social situation, including primarily the legal situation, of Roman slaves[2]. It is inevitably seen in such example phrases as: "the slave was a human being whose status was reduced to the category of things"[3], "the slave was the object of the law and belonged to the category of things"[4], based, after all, on unequivocal sources[5]. Even if the lecture is far-sightedly supplemented by examples to show that the position of slaves in Roman society did not exclusively mean objectification and, to put it colloquially, was not so bad[6] (e.g. the possibility of liberation, the *contubernia* of the free with slaves, the economic *peculia*, the limited capacity to perform acts in law, or the membership in the Roman family *sensu largo*)[7], the image of the legal position of slaves would remain incomplete without even a few remarks on the subjectivity of slaves in Roman public criminal law.

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[1] See just recently: P.A.J. Van der Berg, *Slaves: persons or property? The Roman law on slavery and its reception in Western Europe and its overseas territories*, "Osaka University Law Review" 2016, vol. 63, pp. 171–188. The main thesis put forward by the author is the ambivalence of the Romans' attitude towards slavery, resulting in a vague status of slave.

[2] The legal situation of slaves in private law would also require supplementing, for example, as regards the little-known problem of contractual clauses added to slave sale contracts, including those favourable for the slave (*ut manumittatur*, *nec exportetur*, *ne prostituatur*). See, recently, K. Amielańczyk*, Klauzule umowne w handlu niewolnikami jako narzędzie polityki społecznej administracji cesarskiej*, „Zeszyty Naukowe KUL" 2018, no. 4, pp. 7–20.

[3] A. Dębiński, *Rzymskie prawo prywatne. Kompendium*, Warszawa 2017, p. 119.

[4] M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne. Zarys wykładu*, Warszawa 2013, p. 91.

[5] See, especially: Paulus (D. 4, 5, 3, 1): *Servile caput nullum ius habet*; Ulpian (D. 50, 17, 32): *Servi pro nullis habentur*.

[6] The Romans used to treat their slaves in a relatively "humanitarian" way, which distinguished Romans positively against the backdrop of other civilisations of antiquity. See A. Borkowski, P. du Plessis, *Textbook on Roman Law*, Oxford 2005, p. 91.

[7] The Romans themselves had an "ambivalent attitude" to clearly refer to slaves as objects (see P.A.J. Van der Berg, *op. cit*., p. 172, 175, 187). This ambivalence was intrinsically related with the Roman concept of slavery. In fact, the situation of the slave was located somewhere between a thing and a person. For example, the textbook by M. Kuryłowicz and A. Wiliński (*op. cit.*, p. 91) refers to a "dual" situation of slaves. The textbook by W. Dajczak, T. Giaro and F. Longchamps de

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II.

In contemporary Roman law studies, no one today questions the validity of the distinction of the slave-related issues, particularly in research on Roman private law[8]. Suffice it to recall, for example, that such a conviction was already a part of W.W. Buckland's thinking when he wrote his monumental work devoted to the "Roman law of slavery" at the turn of the 20th century[9]. However, it seems that the independence of the study of slaves can be defended not only under private law but also under public criminal law. A good inspiration for dealing with the subject is provided by the scientific work of Professor Adam Wiliński, the founder of the Chair of Roman Law at Maria Curie-Skłodowska University in Lublin, Poland[10]. Professor A. Wiliński focused on the problems of Roman slavery, especially in private law[11], but he was also the author of several articles on slaves and criminal law[12]. At least part of his deliberations seems to confirm the thesis about a certain extent of slave's subjectivity in Roman criminal law. This concerns, firstly, the paper developed in the context of considerations on the extent of the master's power over a slave, entitled *Ustawy Konstantyna Cod. Th. 9, 12 De emendatione servorum na tle historycznego rozwoju ius vitae ac necis pana niewolnika*[13] and, secondly, the

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Bérier (*Prawo rzymskie. U podstaw prawa prywatnego,* Warszawa 2009, p. 197) points to the "ambiguousness of the slave's position". On the other hand, W. Wołodkiewicz and M. Zabłocka (*Prawo rzymskie. Instytucje*, Warszawa 2009, p. 72), wrote: "In the view of private law, the slave was a thing, but a peculiar one, sometimes referred to as *instrumentum vocale* – a speaking tool, he was also a human (*homo*), sometimes a very clever one".

[8] See, first of all: A. Watson, *Roman Slave Law and Romanist Ideology*, "Phoenix" 1983, vol. 37(1), DOI: https://doi.org/10.2307/1087314, pp. 53–65; idem, *Roman Slave Law*, Baltimore–London 1987; K.R. Bradley, *Roman Slavery and Roman Law*, "Historical Reflections" 1988, vol. 15(3), pp. 477–495.

[9] W.W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*, Cambridge 1908 (reprint 1970). The author devoted the whole first part of the dissertation (almost 400 pages) to the problem of slave's legal situation (*Condition of the slave*) in private law. The criminal matters has been outlined solely on several pages.

[10] The year 2019 was the 110th anniversary of the Professor's birth. The biography of Professor A. Wiliński has been outlined in: M. Kuryłowicz, *Prof. dr Adam Wiliński (w 100-lecie urodzin i 60-lecie doktoratu)*, „Studia Iuridica Lublinensia" 2009, vol. 12, p. 11 ff.; A. Chmiel, *Studia Adama Wilińskiego nad rzymskim prawem karnym*, „Studia Iuridica Lublinensia" 2010, vol. 13, p. 123 ff.

[11] The issue of contractual clauses attached to the slave sale contract was addressed in the following articles: A. Wiliński, *Studia nad alienacją niewolników w rzymskim prawie prywatnym. Sprzedaż niewolnika z zastrzeżeniem niewyzwalania*, „Annales UMCS sectio G (Ius)" 1972, vol. 19(2), pp. 29–52; idem, *Studia nad alienacją niewolników w rzymskim prawie prywatnym. Sprzedaż niewolnika z zastrzeżeniem miejsca pobytu*, „Czasopismo Prawno-Historyczne" 1972, vol. 24(1), pp. 1–34; idem, *Ricerche sull'alienazione degli schiavi nell diritto romano, Vendita dallo schiavo con la clausola "ne manumittatur"*, "Index" 1974–1975, vol. 5, pp. 321–330.

[12] A. Chmiel, *Studia Adama Wilińskiego…*, p. 123.

[13] A. Wiliński, *Ustawy Konstantyna Cod. Th. 9,12 De emendatione servorum na tle historycznego rozwoju ius vitae ac necis pana niewolnika*, „Roczniki Teologiczno-Kanoniczne" 1963, vol. 10(4), pp. 177–195.

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article published in German, entitled *Zur Frage der Totung von Sklaven in der lex Cornelia de sicariis et veneficis*[14]. Adam Wiliński's observations on the contractual clauses attached to the sales contracts for the benefit of slaves may also have some relevance to the issue of subjectivity of slaves in public criminal law. A comprehensive article by O. Robinson entitled *Slaves and the Criminal Law*[15] is also an incentive to consider the subjectivity of slaves in criminal law. Although the author does not explicitly address the issue of subjectivity, she has identified and defined various legal aspects of the slave's position under criminal law.

Referring to the slave's position in the sphere of private law, it should first of all be stated that, unlike in private law where the slave was also or primarily treated as an object[16], in Roman public criminal law slaves have acquired a significant degree of subjectivity in various aspects of it. This subjectivity – for the sake of ordering the arguments – should be perceived at two levels to be considered: from the point of view of the slave who was the victim of a crime (including the slave who was the accuser[17]), and from the point of view of the slave who was the perpetrator of a crime.

In cases of offences committed against slaves, there was a situation where the slave acquired the legal status as a victim of the crime (nowadays, crime victims are referred to using the terms "protected person" or "subject of assault"). However, this subjectivity of slaves is not only a subjectivity in the strict, formal sense of the word, defined by participation in criminal proceedings as a party to it. If it had not entailed real legal protection, it would have not, after all, represent a significant counterbalance to the miserable position of slaves in the Roman state, which was determined by the state of slavery and subordination to power – *dominica potestas*. When analyzing Roman legal solutions, it will also be possible to often speak of a kind of valuing "empowerment", or perhaps even "humanisation" of slaves, which means, in practice, improving their position by applying the protection of the state and Roman law to them.

At the second level, a slave perceived as the perpetrator of a crime became the accused in criminal proceedings, a party to it. Therefore, he was treated as an entity, not a subject of proceedings. Another question is, was he an entity with even a minimum

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[14] Idem, *Zur Frage der Totung von Sklaven in der lex Cornelia de sicariis et veneficis*, [in:] *Acta Conventus XI „Eirene"*, Warszawa 1971, pp. 229–234.

[15] O. Robinson, *Slaves and the Criminal Law*, "ZSS" 1981, vol. 98(1), DOI: https://doi.org/10.7767/zrgra.1981.98.1.213, pp. 223–254.

[16] The Romans saw no problem in their ambivalent attitude towards the status of slaves, probably because they did not see any moral objections to the existence of slavery as such; they recognized it as a universal institution governed by the *ius gentium*. See P.A.J. Van der Berg, *op. cit.*, p. 175, 187.

[17] Situations where a slave was allowed to accuse in criminal proceedings were not so rare, although they mainly concerned the crimes classified as *crimen maiestatis* and *crimen annonae* committed by their owners. This issue will not be discussed further herein. For more on the topic, see O. Robinson, *Slaves…*, p. 241 ff.

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of procedural rights?[18] By the way, comparing his position in relation to a free person would be an interesting research task. The position of a slave who was the perpetrator of a crime, in terms of both substantive and procedural law, was different from that of a free person. In addition, these differences looked different if one compares people with a low social status (*humiliores*) with those with a higher status (*honestiores*)[19].

From the point of view of the functions of criminal law, which include, above all, criminal repression, and considering that there is no doubt that Roman public criminal law has been characterized by considerable repression, the issue of the slave – perpetrator, the act he committed, the proceedings or the punishment for the crime – comes to the fore. It is therefore not surprising that issues relating to the commission of a crime are addressed more often in science. However, in order to find an answer to the question of the subjectivity of slaves in Roman public criminal law defined by the subject matter of the study, it will be much more interesting to look at a situation when a slave becomes the victim of a crime. We could then expect that, under favourable conditions of the criminal policy of the Roman state, the slave could be subject to legal protection to some extent. If this subjectivity were to be demonstrated especially in this respect, it could result in a more complete, or simply better balanced, assessment of the slaves' position in the Roman state and law[20].

[18] For example, on the one hand, an unjustly convicted slave had no right to appeal, although he had the right to beg for mercy (Marcellus, D. 49, 1, 15). On the other hand, an appeal could always be brought by the owner on his behalf (Modestinus, D. 49, 1, 18).

[19] Roman penal statutes were applicable to all inhabitants of the Roman state: the free and slaves, Roman citizens, Latins and peregrines, women and men. Certainly, however, the procedure was not the same for each category of people. Some of the perpetrators were tried by *quaestiones perpetuae*, while others by *tresviri capitales* (see M. Kuryłowicz, *Tresviri capitales oraz edylowie rzymscy jako magistratury policyjne*, „Annales UMCS sectio G (Ius)" 1993, vol. 40(9), p. 71 ff.). Scant references to sources, especially about the trials against slaves, and the observation of the direction in which the evolution of the penal procedure during the Principate period took place, are arguments that during the Republic period, slaves and people of low social status fell under the jurisprudence of *tresviri capitales*. W. Rein (*Das Kriminalrecht der Römer von Romulus bis auf Justinianus*, Aalen 1962, p. 413) even claimed that the rule was that the slaves used to be not accused at all, but handed over by their masters to the family of the dead victim. According to O. Robinson (*Slaves…*, p. 214) it must be considered that slaves remained outside the scope of the official penal procedure, since there is no convincing evidence that they were tried by *iudicia publica* during the Republic period. There are, however, examples of trials by *tresviri* (Asc. *in Mil*. 38), or by owners (Plutarch, *Cato maior* 21). The only text about judges who tried a slave is Val. Max 8, 4, 2, but *iudices* may well mean here *tresviri* or their *consilium*, or a *consilium* of the slave's owner (see *ibidem*, p. 215 ff.). The development during Principate went towards such a direction that they were classified as *humiliores* and since the end of the 2nd century they had been tried under the official penal procedure. They always faced death penalty for a grave crime, including manslaughter.

[20] Thus, the subjectivity of the slave as a crime perpetrator will not be covered by in-depth discussion. In support of the main thesis, it is worth mentioning the issue of *s.c. Silanianum* (10 A.D.) and interrogation of slaves using torture (*quaestio per tormenta*), where there were examples of relieving the legal situation of slaves, e.g. by narrowing the liability in the first case or reducing tortures

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III.

Returning to the research initiated by Professor A. Wiliński, one needs to look first of all at the problem of killing a slave. To sort out the arguments at the outset, it is worth distinguishing two research perspectives: private and public. Although there is no doubt that both can intermingle, there will not be a need to develop the former more broadly[21]. In private law, the slave was, in principle, deprived of his subjectivity as an object of property rights. And even if we notice the protection of slaves' lives by the *lex Aquilia*[22], formally it is, after all, the protection of the owner's property[23], nothing more than that. Perhaps the issue of the attitude of the Romans to the *ius vitae ac necis* exercised by owners towards slaves would provide more arguments for the "empowerment" of the latter. Such reflections must appear during the review of the policies of the Emperors of the Antonine dynasty, because at that time a tendency to limit this power emerged, in an era of clear humanitarian trends in criminal law[24].

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in the second one (see K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, p. 131 ff., 164 ff.). Although the easing of the rules in these areas can hardly be a direct argument for the existence of legal protection for slaves, can undoubtedly be perceived in terms of improving their position. The history of the Roman state, however, knows a high-profile case in which no leniency towards slaves was shown. In 61 A.D., the city prefect Pedanius Secundus was assassinated. According to the Senate resolution, all slaves who at the time of the assassination were *sub eodem tecto* – under one roof with you – had to be interrogated using tortures and then killed. At the time of his death, Pedanius had about 400 slaves under his authority, including men, women and children. The case was taken over by the Senate. After turbulent deliberations, the adjudicating panel composed of senators voted to execute all the slaves covered by the indictment. Following the riots of the Roman people protesting against the verdict, a mass execution was carried out. For *s.c. Silanianum* and the assassination of Pedanius see, e.g., O. Robinson, *The Criminal Law of Ancient Rome*, Baltimore 1995, p. 45 ff.; M. Kuryłowicz, *Prawo rzymskie. Historia, tradycja, współczesność*, Lublin 2003, p. 166; A. Chmiel, *Ochrona bezpieczeństwa właścicieli niewolników w świetle S.C. Silanianum*, [in:] *Ochrona bezpieczeństwa i porządku publicznego w prawie rzymskim*, eds. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2010, p. 53 ff.; idem, *Przykład zastosowania s.c. Silanianum, czyli o tym, dlaczego rzymska iustitia stawała się niekiedy okrutna*, [in:] *Przemoc w świecie starożytnym: źródła, struktura, interpretacje*, eds. D. Słapek, I. Łuć, Lublin 2017, p. 299 ff.

[21] Killing of a slave was the subject of many studies, including very comprehensive ones. Especially see the two publications: D. Nörr, *Causa mortis*, München 1986; M. Miglietta, *Servus dolo occisus*. *Contributo allo studio del concorso tra actio legis Aquiliae* e *iudicium ex lege Cornelia de sicariis*, Napoli 2001 (see also a review of this study: A. Burdese, "IURA" 2001, vol. 52, pp. 307–321).

[22] Cf. especially the deliberations on the relationship of the *actio legis Aquiliae* to the *lex Cornelia de sicariis et veneficis*: D. Nörr, *op. cit.*, passim; M. Miglietta, *op. cit.*, p. 30 ff.

[23] That is why O. Robinson (*Slaves…*, p. 213) wrote about a kind of an "advantage" sometimes enjoyed by slaves where they were subordinated to the owner's authority of their masters.

[24] That era was characterized by some significance of influence of Greek philosophy, including Hadrian's fascination with stoic views. On the possible influences of stoic philosophy on this emperor's policy towards slaves, see N. Lewis, M. Reinhold, *Roman Civilization*, vol. 2, New York 1955, p. 264. In particular, Seneca the Younger's attitude towards slaves and slavery should be noticed, which is best captured by the well-known quote from his work Sen. *Ep*. 47, 1: *'Servi sunt.' Immo homines.*

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It will be discussed further herein, but one should start with another issue, namely resolving the question of punishability of the murder of a slave during the Roman Republic period under the Sulla's law – *lex Cornelia de sicariis et veneficis*.

The universality of this law consisted not only in the fact that all perpetrators, regardless of status[25], were prosecuted under it, but also that it was applied in every case of threat to human life, regardless of whose life was at stake. It is quite difficult to determine the original purpose of the Republican Sulla's law against murderers and poisoners. However, detailed research conducted years ago by J.D. Cloud[26] shows that Sulla's intention was not to protect human life in the first place, but to prevent violations of security and public order committed by *sicarii*, *incendiarii* or *venefici*. In these circumstances, it would be all the more difficult to assume that the legislator's intention was to empower slaves by extending legal protection onto them in the conviction that every human life (including the slave's) requires it. Therefore, the effect of protecting the lives of slaves came with the Sulla's law virtually unintentionally: slave victims could not be excluded from the legal protection without weakening the police character of that law. Its purpose was to stop rampant criminals intending to kill, regardless of against who this intention could be concreted and fulfilled. The T. Mommsen's old assumption that the original *lex Cornelia* may not have yet contained a norm prohibiting the killing of slaves was developed and properly substantiated by A. Wiliński[27]. The main point of this substantiation coincided with J.D. Cloud's findings that the police (preventive) nature of the law, consisting in the protection of security and public order in circumstances of a significant increase

'Servi sunt.' Immo contubernales. 'Servi sunt.' Immo humiles amici. 'Servi sunt.' Immo conservi, si cogitaveris tantundem in utrosque licere fortunae. In the Polish literature, see G. Żurek, *Servi sunt, immo homines*, „Meander" 1967, no. 22, p. 216 ff. The idea of *humanitas* (humanitarianism) in the Roman law was perceived by: H. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 2013, p. 239 ff.; M. Zabłocka, *Przemiany prawa osobowego i rodzinnego w ustawodawstwie dynastii julijsko-klaudyjskiej*, Warszawa 1987, p. 134.

[25] Also slaves (see first and foremost K. Amielańczyk, *Lex Cornelia de sicariis et veneficis. Ustawa Korneliusza Sulli przeciwko nożownikom i trucicielom*, Lublin 2011, p. 133 ff.). This results clearly from Cicero's words, when he presented the Sulla's law to judges: *Quorum? Videlicet, qui supra scripti sunt. Quid interest, utro modo scriptum sit? Etsi est apertum, tamen ipsa lex nos docet. Ubi enim omnes mortales adligat, ita loquitur: "qui venenum malum fecit, fecerit". Omnes viri, mulieres, liberi, servi in iudicium vocantur* (Cic. *pro Cluentio* 148). A peculiar characteristics on the side of perpetrator to hold him liable, i.e. senatorship, was only required in the case of committing a judicial conspiracy to kill the defendant. See *ibidem*, p. 117 ff.

[26] J.D. Cloud, *The primary purpose of the lex Cornelia de sicariis*, "ZSS" 1969, vol. 86(1), DOI: https://doi.org/10.7767/zrgra.1969.86.1.258, pp. 258–286.

[27] A. Wiliński, *Zur Frage der Tötung...*, p. 229 ff. An opinion similar to that of T. Mommsen (*Römisches Strafrecht*, Leipzig 1899 (1955), p. 629) was stated by M. Wlassak (*Römische Processgesetze*, vol. 2, Leipzig 1898, p. 225).

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in organised crime, forced a broad interpretation of the meaning of the term *homo* (homicide victim) used in the provisions of the law[28] – as every person (also a slave)[29].

Adapting the above view for the purposes of this study, it can be concluded that at a time of decline of the Republic, the subjectivity of slaves as homicide victims seems highly questionable. It can only be referred to such subjectivity because Sulla, in order to ensure public safety with police provisions, had to protect the lives of all potential victims, including slaves. Therefore, whoever walked the streets of Rome armed and killed a slave he met, he could have been accused and convicted on the basis of the *lex Cornelia de sicariis et veneficis*. However, strictly speaking, not for having killed a slave, because such an act could then only be prosecuted under private law[30], but because "he walked with a weapon with the intention of killing a man" (*hominis occidendi causa cum telo ambulaverit*)[31]. In this sense, the death of a slave would only form the proof of the existence of a criminal intent to commit a covert killing – *crimen inter sicarios*. In classical law, however, as clear statements of the jurists prove, the Sulla's law had already been applied in cases of the murder of a slave[32], since it has become common legislation on manslaughter, and the perpetrator was responsible for homicide, understood as the murder of a free man, a Roman citizen, a foreigner, and also a slave[33].

[28] Cf. especially fragments of accounts left by jurists – Coll. Ulp. 1, 3, 1: *...hominis occidendi furtive faciendi causa cum telo ambulaverit*, *hominemve occiderit*; Marc. D. 48, 8, 1 pr.: *...qui hominem occiderit: cuiusve dolo malo incendium factum erit: quive hominis occidendi furtive faciendi causa cum telo ambulaverit*.

[29] The Sulla's law in its republican version may have even been deprived of a provision directly prohibiting killing (it did not regulate the crime of manslaughter). See first of all: W. Kunkel, *Untersuchungen zur Enwicklung der römischen Kriminalverfahrens in vorsullanischer Zeit*, München 1962, p. 64 ff.; J.D. Cloud, *The primary purpose...,* p. 258 ff.; idem, *Leges de sicariis: The first chapter of Sulla's lex de sicariis*, "ZSS" 2009, vol. 126(1), DOI: https://doi.org/10.7767/zrgra.2009.126.1.114, pp. 114–155 (with modified position and with a discussion of the newer literature); D. Nörr, *op. cit.*, p. 88 ff.; K. Amielańczyk, *The Guilt of the Perpetrator*, "Labeo" 2000, vol. 46(1), pp. 82–95; idem, *Lex Cornelia…*, p. 12 ff., and especially 47 ff.; J. Harries, *Law and Crime in the Roman World*, Cambridge 2007, p. 118; J.E. Gaughan, *Murder Was Not a Crime: Homicide and Power in the Roman Republic*, Austin 2010, p. 2 ff., 126 ff.

[30] Cf. Gai. 3, 213; 1, 53.

[31] A. Wiliński, *Zur Frage der Tötung…*, p. 233.

[32] G. 3, 213: *Cuius autem servus occissus est, is liberum arbitrium habet vel capitali crimine reum facere eum, qui occiderit, vel hac lege damnum persequi*.

[33] Ulp. Coll. 1, 3, 2: *Nec adiecit (lex Cornelia) cuius condicionis hominem, ut et ad servum et peregrinum pertinere haec lex videatur*; D. 48, 8, 1, 2 (*Marcianus libo quarto decimo institutionum*):

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IV.

The fact that for the imperial lawmakers of the time also the life of a slave was a value requiring protection, or in other words, the slave became an object of legal protection under public law, is evidenced by some imperial constitutions. To find out about this, it is enough to take a look at the policy of the Emperors of the Antonine dynasty towards slaves, which consisted of regulations prohibiting their killing (limiting, and in time waiving the *ius vitae ac necis*), prohibiting their abuse, prohibiting the sale of slaves to owners of gladiatorial schools (*lanistae*).

Ius vitae necisque had always been understood as a right that was common for the *patria potestas* and *dominica potestas*[34]. It has never raised any doubts that the master's authority over his slaves meant also that the owner could kill his slave. Meanwhile, Hadrian, as reported by the emperor's biographer in *Scriptores Historiae Augustae*, forbade the masters to kill their own slaves[35]. The prohibition of killing slaves under penalty of conviction by the court meant that the owner was deprived of the *ius vitae ac necis* and that the murder of a slave was defined as *homicidium*. The consequence of this regulation was that this act was punishable by *lex Cornelia de sicariis et veneficis*. The Hadrian's prohibition then inspired the extensive, comprehensive regulation of Antoninus Pius[36], which constructed

Et qui hominem occiderit, punitur non habita differentia, cuius condicionis hominem interemit. Both sources are congruous as to the fact that the Sulla's law punished for homicide of any human being regardless of their status, so also for killing a slave. The formulation of the prohibition of slave killing with regard to the Sulla's law was made possible for the jurists by the Hadrian's and Antoninus Pius's imperial constitutions, which in practice deprived the slave owner of the centuries-long *ius vitae necisque*. As regards Hadrian, see S.H.A. Had. 18, 7; as regards Antoninus Pius, see G. 1, 53; I. 1, 8, 2; D. 1, 6, 1, 2, Coll. 3, 3, 5. According V. Marotta (*Multa de iure sanxit*. *Aspetti della politica del diritto di Antonino Pio*, Milano 1988, p. 307 ff.) the owner did not lose this right during the Hadrian's and Antoninus Pius' reign. It should be noted that indeed it was not formally abolished but in practice the compulsory judicial procedure made this owner's right defunct, depriving him the right of autonomous decision.

[34] The Roman *familia* in the broad sense was composed both of people and objects. Therefore, the family, led by *pater familias*, included children, but also his slaves. All of them were subordinated to his authority (see D. 50, 16, 195, 1). This authority, originally uniform, as early as in the period of the Law of Twelve Tables divided into *manus* over the wife, *patria potestas* over the children, and the authority over slaves, later referred to as *dominica potestas*. For axample, see W. Wołodkiewicz, M. Zabłocka, *op. cit*., p. 90; M. Kuryłowicz, A. Wiliński, *op. cit*., pp. 145–146; P. Kubiak, *Skazanie na śmierć na arenie – wymiar sprawiedliwości czy operacja finansowa*, „Studia Prawnoustrojowe" 2010, no. 12, p. 94.

[35] S.H.A. Had. 18, 7: *...servos a dominis occidi vetuit eosque iussit damnari per iudices, si digni essent*.

[36] W. Wieacker (*Textufen klassicher Juristen*, Göttingen 1960, p. 393 ff.) noted that the phrase *quibusdam praesidibus provinciarum* in G. 1, 53 seems that the Pius's rescript was issued not only at the request of the proconsul of Betica but also governors of other provinces, so the problem needed a decided and comprehensive solution.

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a regime for the legal protection of slaves and showed that they were empowered to some extent[37]. The killing of slaves has been juxtaposed in one consistent regulation with their abuse.

Emperor Antoninus Pius decided that one must not maltreat one's slaves without due reason and excessively (*sine causa in servos suos saevire*). From the account of Gaius (G. 1, 53), it can be concluded that there were two such imperial constitutions which included the prohibition of killing one's own slaves and the prohibition of tormenting them[38]. According to the first of them, whoever killed his slave for no reason should be punished in the same way as those who killed someone else, according to the second, probably a rescript addressed to provincial governors[39], the emperor ordered that in cases where slaves sought refuge from the excessive severity of their owners in temples or under the statues of emperors, the owners who were accused of cruelty were forced by the governors to sell their slaves[40]. The Gaius's account can be a basis for a discussion about the concept of abuse of

[37] G. 1, 53: *Sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire: nam ex constitutione sacratissimi imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur: nam consultus a quibusdam praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. et utrumque recte fit: male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio*. The Antoninus Pius' regulation imposing a prohibition on abusing slaves, especially killing them, is known also from other legal sources: I. 1, 8, 2; D. 1, 6, 1, 2. Cf. also Coll. 3, 3, 5. More about the Antoninus Pius' regulation in: F. Longchamps de Bérier, *Dwie konstytucje Antonina Piusa zakazujące srożenia się nad niewolnikami*, [in:] *Crimina et mores*. *Prawo karne i obyczaje w starożytnym Rzymie*, ed. M. Kuryłowicz, Lublin 2001, p. 95 ff.; idem, *Nadużycie prawa w świetle rzymskiego prawa prywatnego*, Wrocław 2004, p. 22 ff.; K. Amielańczyk, *Rzymskie prawo karne…*, p. 155 ff.

[38] The translation of the Latin term *saevitia* into Polish as *znęcanie się* ("abuse") (as e.g. in the translation of the Institutes of Gaius by W. Rozwadowski, *Gai Institutiones. Instytucje Gajusa. Tekst i przekład*, Poznań 2003, p. 9), better reflects currently the unlawful nature of such behaviour and is more apt than *srożenie się* ("maltreatment") (like in the translation by C. Kunderewicz, *Gaius. Instytucje*, Warszawa 1982, p. 49).

[39] Apart from Aelius Marcianus, another official, Alfius, probably the governor of the province, also asked Antoninus Pius about the issue. This is known from a further excerpt from Ulpian's *de officio proconsulis*, preserved in Coll. 3, 3, 5, which is a continuation of that contained in D. 1, 6, 2. This text was analyzed by F. Longchamps de Bèrier (*Nadużycie prawa…*, p. 39 ff.).

[40] See also Ulpian (D. 1, 6, 2). In view of both accounts it appears that the favourite place of refuge for slaves was the space around a monument of the emperor, considered sacred. Although other places, such as temples, or their essential elements could serve as places of refuge: altars, statues of deities, one can speak of the distinctive importance of refuge *ad statuas confugere*. See W. Mossakowski, *Azyl w późnym Cesarstwie Rzymskim*, Toruń 2000, p. 58 ff.

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law in Roman law[41], but it can also be considered a programme of humanitarian empowerment[42].

In another well-known Ulpian's account of the above-mentioned constitutions of Antoninus Pius against the killing and tormenting of slaves, published in the Digest, the decree of Hadrian convicting Roman matron Umbricia for too severe punishment of her slaves was also cited[43]. The regulations of Pius were written relatively shortly after Hadrian, perhaps in the early fifties of the 2nd century A.D.[44], so they are an obvious continuation of his solutions. Antoninus Pius was influenced by Hadrian's policy towards slaves. He also probably accepted the prohibition on slave killing that Hadrian had formulated earlier. As a side note, it can be added here that the killing by the owner of his own slave in the times of Hadrian or Antoninus Pius could probably be considered lawful and neutral from the point of view of *lex Cornelia* only in one case, when it was based on a sentence issued against the slave[45]. This is the only way to reconcile the adjacent fragments of Gaius' lecture in his Institutions, when he first stated that the owners had the right to life and death

[41] The reason behind the regulation of Antoninus Pius provided by Gaius in the final sentence of his account: *male enim nostro iure uti non debemus* ("we must not use our right unduly") shows the negative attitude of the Romans to the abuse of rights by slave owners. From the older literature, see S. Solazzi, *L'abuso del diritto in Gai 1,53*, „Studia et documenta historiae et iuris" 1954, vol. 20, p. 309 ff. Recently, see F. Longchamps de Bèrier, *Nadużycie prawa…*, p. 21 ff. Cf. also the discussion related to this book: A. Stępkowski, *Wokół problematyki nadużycia prawa podmiotowego*, „Zeszyty Prawnicze UKSW" 2005, vol. 5(1), p. 255 ff.; idem, *Nadużycie prawa podmiotowego w świetle jurysprudencji kulturowej*, „Zeszyty Prawnicze UKSW" 2006, vol. 6(2), DOI: https://doi.org/10.21697/zp.2006.6.2.12, p. 189 ff.; T. Giaro, *Rzymski zakaz nadużycia praw podmiotowych w świetle nowej jurysprudencji pojęciowej*, „Zeszyty Prawnicze UKSW" 2006, vol. 6(1), DOI: https://doi.org/10.21697/zp.2006.6.1.15, p. 279 ff.

[42] The motives of the Emperor when he formulated a ban on the abuse of slaves remain unknown. It seems that both the "humanitarian considerations" and utilitarian ones quoted in the Justinian's Institutes can be identified here as follows: *expedit enim rei publicae ne quis re sua male utatur* (I. 1, 8, 2). The thesis of protection of public order (*utilitas publica*) as the main ratio of the prohibition was supported by F. Longchamps de Bèrier (*Nadużycie prawa…*, p. 57 ff., 278 ff.). B. Sitek (*Infamia w ustawodawstwie cesarzy rzymskich*, Olsztyn 2003, p. 170) justified the regulation of the Emperor with the requirements of the exercise of good management of property by the owner.

[43] D. 1, 6, 2: *…divus etiam Hadrianus Umbriciam quandam matronam in quinquennium relegavit, quod ex levissimis causis ancillas atrocissime tractasset*. The inclusion of information about Hadrian's judgement against the Roman matron after a prior (in line with G. 1, 153) account on the constitutions of Antoninus Pius indicates that Ulpian saw in the Hadrian's legislation the origins of his successor's legislation.

[44] See F. Longchamps de Bèrier, *Dwie konstytucje Antonina Piusa…*, p. 95.

[45] In the requirement of compulsory surrender of the slave, as a person under authority, to the court bears a symptomatic resemblance to the duty that *pater familias* had towards his son, as Ulpian reported in his account (D. 48, 8, 2). *Ius vitae necisque*, both to one's own slaves, as to one's own children, even if not was clearly, literally abolished, became brought down by Hadrian to an empty, insignificant antiquarianism, about which teacher Gaius taught more out of respect for tradition than anything else.

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over slaves (*ius vitae necisque*)[46], and then he quoted the words of the Antoninus Pius constitution prohibiting the unreasonable killing of one's slaves[47]. In the end, the prohibition of killing slaves was confirmed by Constantine the Great, who abolished the *ius vitae ac necis*. In this way, he equated the deliberate killing of a slave with the *homicidium*, i.e. the killing of any free man[48].

However, the origins of this imperial legislation, which significantly improved the position of slaves, should be found even earlier, in the content of the *lex Petronia de servis*[49]. An account of this law, coming from Modestinus, is included in the Justinian's Digest[50]. *Lex Petronia* forbade masters to assign their slaves to fight wild animals in the arena without the prior consent of a magistrate[51]. The magistrate could give such consent provided that he saw justification for imposing such punishment on the slave. Under this law, when a slave was sent to the arena to fight wild animals without a judgement, both the owner who sold the slave and the one who purchased the slave (probably the *lanista*) were to be punished. The account from Modestinus also mentions, in the plural, certain unspecified *senatus consulta* that referred to the *lex Petronia*, so this type of legislation was not occasional. Perhaps it was these *senatus consulta* that contained similar bans on the assignment of slaves to take part in gladiatorial games[52]. The difference in chances of survival of a novice in a fight with a well-trained and experienced gladiator, compared to a clash with wild animals, did not have to be significant at all and as a rule most of them faced certain death in the arena[53].

The later imperial constitution of Hadrian, in which he forbade the sale of male slaves to the owners of gladiatorial schools (*lanistae*) and female slaves to procurers

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[46] G. 1, 52: *...dominis in servos vitae necisque potestatem esse*.

[47] G. 1, 53: *...qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit*.

[48] C. 9, 14, 1.

[49] G. Rotondi (*Leges publicae populi Romani*, Milano 1912 [Hildesheim 1962], p. 468) dated the law at 61 A.D., while M. Kaser (*Das römische Privatrecht*, Bd. 1, München 1971, p. 285) placed it in the periods of Augustus or Tiberius. As regards the newer literature, see F. Longchamps de Bèrier, *Nadużycie prawa*..., p. 41, year 19.

[50] D. 48, 8, 11, 1–2 (*Modestinus libro sexto regularum*): *Servo sine iudice ad bestias dato non solum qui vendidit poena, verum et qui comparavit tenebitur. Post legem Petroniam et senatus consulta ad eam legem pertinentia dominis potestas ablata est ad bestias depugnandas suo arbitrio servos tradere: oblato tamen iudici servo, si iusta sit domini querella, sic poenae tradetur*. See also D. 18, 1, 42 (Marcianus).

[51] See F. Longchamps de Bèrier, *Nadużycie prawa*..., p. 41 ff.

[52] These *senatus consulta* could have been issued during the Hadrian's reign, as a result of the legislative initiative of the Emperor, which was his exclusive prerogative.

[53] The most agile gladiators came mostly from a small group of the free and freedmen who achieved the highest professionalism through strong motivation and training. See P. Plass, *The Game of Death in Ancient Rome: Arena, Sport and Political Suicide*, Madison 1995, p. 102; T. Wiedemann, *Emperors and Gladiators London*, London 1992, p. 110 ff.

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(*lenones*) for no good reason, proved to be in line with the *lex Petronia de servis*[54]. The only acceptable basis for this could be a public criminal trial, in which they would be found guilty and sentenced *ad arenas*[55]. It seems that the prospect of inevitable death, in the case of many slaves justified by nothing, and in a fight in the arena to actually entertain the Roman people, was the main reason why Hadrian banned the sale of slaves to *lanistae*. These considerations should therefore be deemed humane and confirming that the status of slaves under public law was based on the recognition of their subjectivity. This regulation was in line with the general characteristics of Hadrian's legislation on the position of slaves[56], and was a forerunner of increasing restrictions on the practice of holding the games imposed by successive emperors[57].

V.

The restrictions on the authority over slaves under imperial public criminal law, which involve the prohibition of abuse of slaves and the prohibition of their killing without prior judicial decision, strongly support the argument that they were provided with a certain degree of legal subjectivity. Although one cannot speak of some radical improvement in the position of slaves in Roman society, it is indisputable that there was a certain established humanitarian tendency. Moreover, the Roman legislature over the centuries can also be attributed to other efforts in the light of which the slave can be perceived as a subject of legal protection.

First of all, noteworthy are the efforts made by the imperial public authority to combat the practice of castration of slaves, widespread since the dawn of Roman history. The symptomatic culmination of the policy of empowering slaves was the equating of the crime of castration of a slave with the castration of a free man[58].

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[54] See K. Amielańczyk, *Rzymskie prawo karne…*, p. 149 ff. Also the later constitutions of Antoninus Pius against cruel, humiliating and unbearable practices of slave abuse referred to above, could cover a very broad range of illicit acts. B. Biondi (*Il diritto romano cristiano*, vol. 2, Milano 1952–1954, p. 275) pointed to a broad scope of the term *intolerabilem iniuria* in opinions of the jurists. Perhaps they also covered the prohibition of forcing the slaves to prostitution, or perhaps the prohibition of their sale for this purpose.

[55] S.H.A. Had. 18, 8: *…lenoni et lanistae servum vel ancillam vendi vetuit causa non praestita*.

[56] The Hadrian's regulations aimed at improving the position of slaves were listed by O. Robinson (*Slaves…*, p. 218 ff.). See also K. Amielańczyk, *Rzymskie prawo karne…*, p. 131 ff.

[57] Due to having introduced the rules of control of gladiatorial fights, including limits of spendings on these fights, Antoninus Pius and Marcus Antoninus were seen in S.H.A. as "good" emperors (S.H.A. Ant. Pius 12, 3; Marcus 11, 4; 27, 6). T. Wiedemann (*op. cit*., p. 132 ff.) rightly argued for humanitarian motives of such policy. On prohibitions related to gladiatorial fights, see O. Robinson, *Ancient Rome: City Planning and Administration*, London – New York 1992, p. 167.

[58] A castration of a slave was punishable by death and property confiscation under the Hadrian's constitution. See D. 48, 8, 4, 2 (Ulpianus); P.S. 5, 23, 13; D. 48, 8, 5 (Paulus); D. 48, 8, 6 pr. (Vene-

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The female slave (*ancilla*), on the other hand, was not, for most of the duration of the Roman state, considered a victim of adultery (*adulterium*) or rape (*stuprum*). Such acts were inconsistently classified either as an *iniuria*, either as corrupting a slave, or even stealing or kidnapping. It was not until the 5th century A.D. that the offence of forcing a slave into prostitution was introduced as a sanctioning of the earlier practice of courts recognizing slaves' complaints of sexual abuse as reasons for escape[59]. The problem of identification of the extent of the legal protection provided by the Roman state with regard to the crime of *iniuria* is complex. The crime of insult as a private law tort could also be committed against a slave. In such a case, it was the slave's master to file the suit on behalf of the slave on the grounds that it was not so much the slave as he himself was affected by the insult as the owner. However, the case was different with a form of *iniuria*, namely *iniuria atrox*. It used to be tried as a criminal act by a *iudicium publicum*. In such a case, where a prohibited act against a slave had been committed, the elements of the offence must have been confirmed by determining the extent of the subjective suffering inflicted on the victim, who was the slave and not the owner[60]. The same rule was applicable for torturing someone else's slave. Although such behaviour could normally be regarded as the tort of *iniuria*, it may well have been classified as *vis privata*, a criminal offence governed by the *lex Iulia de privata*[61]. In such cases, it can be argued that the slave, as a victim of a crime of public law rather than private law, became an independent subject of legal protection.

To conclude this brief review of public law regulations, under which a slave as a victim of a crime was taken into legal protection, we can also mention the *lex Fabia de plagiariis*[62], a law dated probably 63 B.C., which forbade the kidnapping of slaves. In this case, however, it would be more prudent to say that the purpose of the law, although it belongs to *leges iudiciorum publicorum*, was to protect the slave as an object of private property rather than as a human being – a subject of law[63].

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leius Saturninus). Severe prosecution of slave castration perpetrators, with the death penalty, was also confirmed by Emperor Constantine the Great (C. 4, 42, 1) and Emperor Leo (C. 4, 42, 2). On the crime of castration, especially with regard to slaves, see K. Amielańczyk, *Praktyka kastrowania niewolników i jej zakazy w prawie rzymskim*, [in:] *Crimina et mores*..., p. 11 ff.

[59] O. Robinson, *Slaves*..., p. 222 ff.

[60] Coll. 2, 4, 1; C. 9, 35, 1 (222); C. 9, 35, 8 (294).

[61] D. 48, 7, 4, 1 (Paulus).

[62] D. 48, 15 (*Ad legem Fabiam de plagiariis*); I. 4, 18, 10; C. 9, 20, 1–2 (213 A.D.); C. 9, 20, 7–9 (287 A.D., 290 A.D., 293 A.D.). See K. Amielańczyk, *Crimina legitima w rzymskim prawie publicznym*, Lublin 2013, p. 264 ff. (with further literature).

[63] As in O. Robinson, *Slaves*..., p. 222.

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VI.

The above considerations show that the tendency of Roman lawmakers to extend protection over slaves is best visible where *utilitas publica* requires it, i.e. (1) where this protection can serve the general goal of ensuring universal security and public order (*lex Cornelia* – a general prohibition of killing), and (2) where the provisions protect slaves from the actions of their own masters (prohibition of abusing slaves, ban on castration, ban on handing over slaves to owners of gladiator schools – *lanistae*, and procurers – *lenones*). In the latter case, however, the reason for that protection rooted in the public interest does not appear to be the only one. One can notice the increasingly stronger conviction of the Romans about the need to extend legal protection over slaves in the spirit of the emerging *humanitas*, and since Constantine the Great probably in the spirit of the emerging Christian ethics (the abolition of the *ius vitae ac necis*).

Some regulations, however, may suggest that the emerging subjectivity of slaves, even as victims of crime, could result not only from a genuine will to improve their legal position (intended empowerment), but from other, practical reasons. This is so, because one should agree with O. Robinson that the legal protection of slaves, which meant their significant empowerment in terms of public criminal law, most often could result from the fact that the slave as a victim was still perceived (simultaneously) as a property asset. The protection of slaves resulting from the provisions of public criminal law would thus pursue the interests of the owners, strengthening the regime for the protection of private-law Roman property.

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STRESZCZENIE

Celem artykułu jest odpowiedź na pytanie o zakres podmiotowości niewolników w rzymskim prawie karnym publicznym. Zwłaszcza w przypadkach przestępstw popełnianych wobec niewolników zachodziła sytuacja, w której niewolnik jako ofiara przestępstwa uzyskiwał przymiot podmiotowości prawnej i podlegał jako człowiek (*persona*) ochronie prawnej ze strony państwa rzymskiego. Ochrona ta, obecna w wielu aspektach polityki karnej państwa rzymskiego, szczególnie widoczna była w regulacjach zakazujących zabijania niewolników, znęcania się nad nimi, przeznaczania do kastracji, walk gladiatorskich czy prostytucji. U podstaw ochrony prawnej nad niewolnikami, a tym samym ich upodmiotowienia w prawie karnym publicznym, leżała rzymska *utilitas publica*, ale także rodzące się tendencje humanitarne w prawie cesarskim.

Słowa kluczowe: zakres podmiotowości niewolników; rzymskie prawo karne publiczne; *utilitas publica*; tendencje humanitarne