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ANIMAL AND SLAVE IN ROMAN LAW. TAXONOMIC ISSUES RELATED TO THE NOTION OF RES

Dr. Roberto Garetto

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ABSTRACT

A new awareness around animal welfare has risen in the last decades. While in the past the animal used to be considered as *res* to exploit, nowadays many people see them as life companions. This new condition of the domestic animal originates, from a legal perspective, significant questions, and it can have non-negligible implications. Some scholars believe that in order to give more effective protection to animals a form of legal subjectivity has to be recognized. Such a relevant change needs anyway a deeper reflection on a taxonomic plane. The notion of *res* of the Roman law can still be considered the basis of the contemporary legal concept of the animal as an "object" related to a property right.

The Roman notion of *res* never implied the characteristic of inanimate object. On the contrary both animals and slaves were considered *res*, despite their nature of living being. The analogy between animal and slave in Roman law is significant also on another plane. The animal has a sensitivity. Its sensitivity often is considered, in the contemporary debate, as a reason to change the legal *status* of the animal. Actually in the Roman culture the sensitivity of slaves and animals was incontrovertible, and that did not affected their legal classification as *res*. The process that led to the ban of slavery in Roman law was not based on the sensitivity of the slave, but on his human nature.

Keywords: Animal; slave; Roman law; property right; *res*.

INTRODUCTION

In the last decades, a new awareness around animal welfare started rising. In the past, the animals were considered mainly as elements of an economic order based on agriculture, while nowadays, many people see them as life companions. This new condition of the domestic animals originates, from a legal perspective, important questions. In the contemporary legal debate, some claim a form of legal subjectivity for the animals in order to give them more effective protection. Such a pretended change needs a deeper reflection on a taxonomic plane. The notion of the *res* of the Roman law is the basis of the contemporary legal concept of property right over the animal. Animal sensitivity often considered the decisive element in order to attribute to the animals some forms of legal subjectivity, does not seem an unquestionable issue. With relation to ~~the~~ Roman law, the animal was considered *res,* just like the slave. The analogy

"animal-slave" must be deepened, having in mind the fundamental taxonomies of the Roman law. The notion of *persona*, in particular, requires specific attention. Any purpose of future redefinition of the legal subjectivity implies a formal comparison with the taxonomic categories that are rooted in the Roman law.

1. THE ANIMAL IN THE ROMAN LAW. THE ANALOGY "ANIMAL-SLAVE"

The perception of the animal from the perspective of the human being changed over time. On the anthropological plane, the animal is initially seen as a menace against which to defend or as prey to capture for feeding. Only successively the animal is taken into consideration for the utility that it can offer to the human beings: animal husbandry, in order to obtain animal-derived products or use of the animal as a work tool. The rise of the "legal notion" of the animal in Rome is placed right in this evolutionary phase. The animals' taxonomy in Roman law is somewhat schematic: the wild animal is considered as *res nullius*. However, as it can be captured, it becomes more properly *res in commercio*, relevant for commercial trade, as not only can it be used, but also sold or bought. Gaius, in the *Institutiones* (Gai., II, 66) pointed out the possibility of appropriating of the animal: «[*n*]*ec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione acquuntur, sed etiam occupando ideo erimus, quia antea nullius essent; qualia sunt omnia quae terra mari caelo capiuntur*».

Until the animal remains in the availability of the owner, it belongs to him. Even if the animal is allowed to pasture free, as long as it has a constant *animus revertendi*, that is to say, that it returns each day to the place that the owner assigned, it is *res mancipi*, belonging to the owner (Gai., II, 67). The Roman law also establishes rules on the alienation of the animal (Gai., I,119) and the guarantees to be provided in case of damage that it could cause.

The assimilation of the animal, a sensitive being, to the general category *res*, mainly composed of inanimate things, needs a careful reflection. It certainly did not escape to the ancient philosophical culture, nor to the Roman law thinking, that the animal distinguishes from the inanimate *res* by well more than one aspect.

In ancient philosophy, two approaches about the animal can be pointed out. One, followed just from a minority, and attributable to the Pythagorean and the Empedoclean philosophy, meant the animal as a being endowed with reason and, because of that, akin to man [1]. The animal was considered being worthy of attention and ethics. Based on metempsychosis, Pythagoras believed that animals were similar to humans, and, because of this claim, the killing of any animal was not to be considered legitimate for food or any other purpose. The Pythagorean thought, for the deep connection with the controverted issue of metempsychosis, at the end of a long historical process, did not prevail. The other approach is related to Aristotle [2]. In his conception, the animal is different from the human being, and in some way, it is just intended as a mere object. The Aristotelian scientific thought finally prevailed on the pre-Aristotelian taxonomies [3].

Aristotle in the *Historia Animalium* (HA VIII, 1) provides an extensive prove of such awareness: referring to the animals, he writes that «they differ from man, and man from the other animals, in a greater or less degree» (translation of Richard Cresswell, George Bell & Sons, London 1887, p. 194). This notion of the animal contributes to configuring

it as *res* in Roman Law. However, some glimmers of the Pythagorean influences on the Roman Law can probably be noticed in the definition of *ius naturale* provided by Ulpianus, as the common law of men and animals: «[*i*]*us naturale est, quod natura omnia animalia docuit*» (Ulp. 1 Inst. Dig. 1.1.1.3).

About the assimilation of the animal to the general category *res* the analogy in the *status* of animal and slave is particularly impressive. The two of them are living beings, and both are sensitive - but they are *res* for all intents and purposes of Roman law. The analogy "animal-slave" is based on a principle of utility: the animal becomes *res* relevant for the law in a society of subsistence, in which the animal provides food and work, and in some cases, even company. From that derives a "value" of the animal that is identified as a relevant object, from a legal perspective, such as any other good, although inanimate. The "value" of the animal makes it deserving care and protection, in addition to discipline and punishments, sometimes. About the slaves, they were considered property under Roman law and had no legal personality. Animals and slaves had substantially the same treatment: it must be remarked that the *pater familias* had a *ius vitae ac necis* over the slave, as he had on the animal (and, in the archaic Roman family, he had a similar right also over his *filius*) [3].

Undoubtedly the owner of an animal, or a slave, had an awareness of the particular characteristics of his property. Despite being *res mancipi*, each of them had a capacity of interaction with the owner. The situation of the animal, a sensitive living being, could offer the possibility of a closer connection with the owner. Initially, this particular relationship has developed from the perspective of utility, like the unique cooperation between the hunter or shepherd and their dogs. Later the animal started being conceived, in some cases, as a "companion." An example in the classic literature can be the recognition of Ulysses from the dog Argos, that is emotionally narrated in the seventeenth book of the Odyssey (verses 291-327), and that is represented in a Roman sarcophagus of the 2nd Century BC at the National Museum "San Martino" of Naples [4]. Paradoxically, the domestic animal in the antiquity, although deprived of the freedom deriving from the state of nature, generally had more favorable living conditions than the wild animal. Such privilege was paid by the animal with the state of captivity, which implied employment and exploitation of the resources that it could offer. The possible forms of relation slave-master were quite more complex and varied, depending on several factors, such as the human characteristics of both of them, the workplace, and the historical period. For sure, the slave was formally a *res*, but his human nature was relevant also on a procedural plane, as the slave could represent his master in individual juristic acts. If the master could not personally acquire a property right, an obligation, or an inheritance, he could do this employing his slave. This way, the slave was not merely an object of property but was regarded as the "instrument" of a juristic act [5].

2. THE *STATUS* OF SLAVE: SIMILARITIES WITH THE CONDITION OF THE ANIMAL IN THE ROMAN LAW

The ancient philosophical thought considered the issue of slavery. Aristotle conceived the «slave by nature» (Arist., *Politics*, I-2, 1252a32-35). In Roman law, the Twelve Tables had brief references to slavery (Table VII; VIII; Table X; Table XII), indicating that the institution was of long-standing.

In the tripartite division ("*tria genera")* of law by Ulpian, slavery was an aspect of the *ius gentium*:«[*q*]*uae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi*» (Ulp. 1 Inst. Dig. 1.1.4).

In the same years of Ulpian, Gaius wrote that slavery is the *status* that is recognized by the *ius gentium,* in which someone is subject to the dominion of another person contrary to nature: "[*s*]*ervitus est constitutio juris gentium qua quis domino alieno contra naturam subjicitur*". (Gai., 1.3.2[2]). Gaius indeed considered the potestas of a master over a slave as "*iuris gentium*" (Gai., I.52), but as the Romans conceived liberty as a natural state, slavery was regarded as a condition contrary to the natural state. The *ius gentium* was neither considered natural law, thought to exist in nature and govern animals as well as humans, nor *ius positum*, namely the law actually and specifically enacted or adopted by proper authority.

The relation "slave-master" in the Romans law is expressed by the terms *servus* and *dominus*. The power that the master had over the slave is expressed by the word *dominium*. The term *dominium,* or ownership, regarding a slave, points out that the slave is merely considered as a thing, an object of ownership. The slave's situation is substantially equivalent to the animal's one. Both slave and animal belong to the category of *res mancipi*, and are classed with other objects of ownership.

The gradual decline of slavery in the Christian phase of the Roman Empire is due to a great change in the culture. Since Christianity gave slaves an equal place within the religion, allowing them to participate in the liturgy, the same idea of considering a slave as *res* seemed incongruous. Considering the analogy "animal-slave," it must be pointed out that the element that determined the overcoming of the institute of slavery in the Roman Empire does not seem attributable - on a logical plan – to the sensitivity of the slave, but to his humanity. This is a relevant factor, as the contemporary debate on the legal subjectivity that focuses on the animal is based on its sensitivity [6]. In the late Roman Empire, the element that led to the overcoming of slavery, recognizing to the slave what, today, would be called "legal subjectivity", is his identity of the human person. Slavery represents an injury to the dignity of the person. From Justinian on forwarding the discrimination between free men and slaves, based on a philosophical position held that all men by nature were born free, started being a formal obstacle to reducing the person to *res* [7].

Certainly, the ancient world had an awareness of the animal's sensitivity, but that was not believed sufficient to assimilate, in the right treatment, the animal to the human being. When such temptation occurred, it was not seen as an example of civilization, but as a sign of mental imbalance. Caligula, inviting his own horse Incitatus to the official banquets or announcing the intention to attribute to it the position of consul, had for sure awareness of the sensitivity of his animal - in fact he did not arrange to grant such privileges or a similar *status* to a statue, for example - but contemporaries saw that as a derogatory act for the Senate and as a symptom of mental unhealthiness [8]. The horse, in fact, lacking the human condition, was not able to enjoy privileges and rights and to take charges, even though his sensitivity was unquestionable. On the contrary, the

former slave, after being freed – and having full recognition of his rights [9] - could have theoretically line to occupy the bench of the senator. Animal and slave in Roman law were *res,* and both were endowed with sensitivity. However, only the slave, ceasing to be *res*, would have found rights and duties (as a free man). The animal, at most, ceasing to be *res mancipi*, would have become *res nullius*. The common element of animals and slaves in the Roman law was their connotation as *res*. That depended on their economic utility: in a subsistence economy, both were taken into consideration by the law for their economic function and the great importance they had for the survival of society itself.

3. **TAXONOMIC ISSUES RELATED TO *PERSONAE*/*RES***

At this point, it needs to take into consideration the dichotomy "subject-object" of law, that characterizes the *status* of both slave and animal in Roman Law. The taxonomy proposed by Gaius is particularly relevant [10]: «[*o*]*mne autem ius quo utimor vel ad personas perinet vel ad res vel ad actiones*» (Gai. I, 8). He distinguishes so among *personae*, *res* and *actiones*, but the last of the tree categories does not concern the matter that we are deepening. This taxonomy stands at a very high level compared to the previous systematic classifications into the *ius civile*. Gaius expressed the dynamism of juridical relations, as he was conscious of the possibility of losing or acquiring the "subjectivity." In the systematic conception of Gaius the distinction between *personae* and *res* is not as clear as it might appear according to a superficial consideration. There is indeed a connection between the concept of *personae* and that of *res*, represented by the slave. The slave in the Roman law has no subjectivity: he is a *res,* so he should be considered a "nonperson*,"* but the traditional taxonomy of *personae* according to their *status* (*staus liberatis*) mentions *liberi* and *servi*. The situation of the slave, as a human being, does not exclude the possibility that before being reduced to a servile condition (like a *res*), he was a free man, namely a *persona*. Similarly at some point, due to the liberation disposed of by the owner, the slave can become a *libertus*, that is to say (again) a *persona*. A comparable possibility was instead completely excluded for the animal.

It must be emphasized that the categories of "subject" and "object" of law are elements not available in Roman law. The condition of the slave shows us how the terms *persona* and *res* do not represent antithetical concepts, but different ways of manifesting the same reality. For Gaius, in the distinction between *res* and *person*, the human being is sometimes considered *res*, other times a *persona*. This is the proof of the close relationship between the two concepts.

The notion of *persona* needs specific attention. The prominent characteristic of the traditional legal use of the concept of *persona* is the artificial dimension. *Homo* is related to a real being, while *persona* tends to be a "fictitious" appearance. The original meaning of *persona* comes from a theatrical mask (*prosôpon*) and contains a fundamental ambiguity, which we find in the legal concept of *persona*. The theatrical mask allows to concealing of the differences, but at the same time, it characterizes the actors' roles, as to say the different social roles [11]. Cicero refers to «*personam gerere*» (*Off.* 1, 32, 115), in the sense of representing someone or something. The meaning is clear: the aim is to indicate to whom an action should be attributed, who is responsible for it. In contemporary legal systems, juridical personality is attributed to

entities that are not human individuals, such as trading companies. It would be a mistake thinking that the Roman law created the category "*persona*" as an expedient to impute rights and duties to collective entities. That would mean transferring our concepts to the Roman legal though. In Roman law, *persona* is not an empty abstractionism, but a more precise legal way of considering the human being.

Ancient Roman culture considered the human being an actor. The Stoic philosopher Epictetus expresses it clearly in paragraph 17 of the *Enchiridion*: «[r]emember that thou art an actor in a play of such a kind as the teacher (author) may choose: if short, of a short one; if long, of a long one: if he wishes you to act the part of a poor man, see that you act the part naturally; if the part of a lame man, of a magistrate, of a private person, (do the same). For this is your duty: to act well the part that is given to you; but to select the part, belongs to another» (translated by George Long, Dover Publications, New York 2004, p. 7).

The notion of *homo* can be retrieved in the Digest: «[*c*]*um hominum causa omne ius constitutum sit*» (Dig. 1.5.2). However, it needs to be noted that *homo* is a more specific concept, that differs from other similar ones, like *mulier* and *puer*. The concept of person is instead suitable to include every human being, regardless of sex (*homo*/*mulier*) or age (*homo*/*puer*). The main characteristics of the Roman notion of *persona* are its abstraction and its all-encompassing semantic function. This is the profound imprint that Roman law has transmitted to contemporary law: the concept of the person as an abstract category. Another characterizing element of the notion of *persona* that the Roman law transmitted to us is the concept of the capacity of discernment. The person is the one that acts, that moves in the scene, that plays a part [12].

The Roman law distinguished three kinds of personal *status*, on the basis of certain existential situations that indicate the possession of individual rights and duties, as well as particular forms of legal protection and specific prerogatives: *status libertatis,* according to which persons were either free (*liberi*) or slaves (*servi*), and free persons were either freeborn (*ingenui*) or freedmen (*libertini*); *status civitatis*, according to which freemen were either Roman citizens (*cives*) or aliens (*peregrini*); *status familiae*, according to which citizens were either independent (*sui iuris*) or subject to the authority of another (*alieni iuris*) [13]. The concept of *status personae* has actually evolved. A significant example of this evolution is related to the *status libertatis*. In the beginning, the free *status* was attributed only to children born of a free woman. In the classical period, it was also extended to the children of a woman slave at the time of childbirth but free during the gestation, even if for a concise time [14]. The abstract, all-encompassing concept of *persona,* acted, therefore, from within the *status*, pushing towards the progressive overcoming of the divisions. The mask (*prosôpon*) indicates that the person has many faces.

The legal notion of *res* in the Roman law does not correspond to the semantic meaning of "thing" in current English, conceived as an inanimate material object. As already pointed out, slaves and animals were living beings and were at the same time *res*. In legal English, "things" are «[t]he objects of dominion or property as contradistinguished from "persons".» If so, it would seem to overcome the extended Roman notion of *res*. But more specifically, the "thing" is considered «[t]he object of a right; *e.*, whatever is treated by the law as the object over which one person exercises a right, and with reference to which another person lies under a duty» (*Black's Law Dictionary*, West

Publishing, St. Paul 1968, p. 1649). This further definition fits for any animate or inanimate thing, and it perfectly matches the Roman notion of *res*.

Moreover, contemporary legal systems still consider the animal – a living being - as an object, even if in the last years that started being a controverted aspect [6]. The taxonomy of *res*, in Roman law, did not make any reference to qualities such as "animate" or "inanimate". A fundamental distinction was, on the contrary, relate to things governed by divine law (*res divini iuris*) and others subjected to human law (*res humani iuris*). *Res humani iuris* were either public or private. Both animals and slaves were related to the private sphere of *res humani iuris*. The main division of things that could be privately owned (*res in commercio*) was between *res mancipi* and *res nec mancipi*. The most important assets in an agricultural society - like the Roman one was – can be identified in land, slaves, and animals. They were *res mancipi*, and the ownership of them could be transferred only in a formal way (*mancipatio* or *iure cessio*) instead of the informal *traditio*, as provided for the *res nec mancipi*, that had less value [15].

CONCLUSION

The analogy "animal-slave" offers an interesting deepening on taxonomic issues in the Roman law. The bipartition *persona*/*res* expresses the dynamism of juridical relations. Not only did *res* comprise a heterogeneous body of animate and inanimate "things," including slaves and animals, but it allowed interpenetration with the related category of *persona*. The slave indeed could be *persona* before being led in slavery or could become *persona* after being released from slavery. Other relevant aspect deals with the sensitivity of the animal. Often, in the last years, proposals of attribution of "rights" to the animals are based on their sensitivity. This characteristic had no legal relevance in Roman law. Bearing in mind the analogy "animal-slave," it must be admitted that the social and cultural evolution that led to the overcoming of slavery in Rome was based on the human nature of the slave. His sensitivity was not a relevant argument. The expansive notion of *persona*, on the contrary, allowed the slave to shift from the category *res* to the category *persona*. This last category is the main imprint that Roman law has transmitted to contemporary legal thought. Thanks to its abstract, all-encompassing semantic function, the category *persona* resulted in suitable to include every human being. *Persona*, in line with its etymological meaning (*prosôpon*), allows to concealing the differences, but at the same time, characterizes the roles.

The metaphor of dwarfs standing on the shoulders of giants is entirely appropriate in this case: the contemporary debate on the redefinition of legal subjectivity needs to root on the Gaius' taxonomy *res*/*persona*. The analogy "slave/animal" can be a stimulating point of reflection.

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