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Defence Right of the Accused and the Evidence from Slave's Testimony in the Roman Criminal Procedure

Prawo oskarżonego do obrony a dowód z przesłuchania niewolnika w rzymskim procesie karnym

ABSTRACT

This article presents the question of the accused's right to defend himself in the light of the prohibition of interrogation of slaves in favour of their masters (*quaestio de servis pro domino*) expressed both in non-legal texts and in the writings of the jurists of the classical period, and in the imperial constitutions. It has been shown in the paper that the prohibition constituted a quite interesting procedural solution, which, in fact, did not entirely exclude the right of the accused owner to defend himself during the criminal trial. The testimony of the slave his master demanded to be interrogated as part of broadly understood *iudicium publicum* was therefore regarded as subsidiary (auxiliary) evidence. The admissibility of the evidence from the interrogation of a slave *pro domino* was within the discretionary power of the judge, the scope of which, however, was in this case statutorily defined. Seemingly restrictive procedural solutions concerning the admissibility of slave testimony introduced in criminal cases in Roman law in various historical periods did not contradict the main procedural principles developed by the Quirites over the centuries and known to this day.

Keywords: Roman criminal procedure; accused; defence right of the accused; evidence from the interrogation of a slave; *quaestio de servis pro domino*

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INTRODUCTION

The Roman criminal procedure was dominated by a particular category of participants, namely slaves (*servi*). *Servi* constituted, on the one hand, a unique source of evidence, a very valuable one, from which it was sometimes possible to find out the only information about the crime committed by their master and, on the other hand, they constituted assets owned by the latter.[1] As a result of the fact that the slave was owned by his master was the prohibition of interrogating the slave against his master (*quaestio de servis contra dominos*) without the consent of the latter. This procedural principle had been in force in the Roman procedural law (both criminal and civil) since ancient times.[2] It was a natural consequence of the social system in the Roman State, one of the pillars of which was the institution of slavery. While the prohibition of interrogating a slave against his master (*quaestio de servis contra dominos*[3]) constituted a completely natural procedural solution confirmed by numerous imperial constitutions, the prohibition of interrogation of slaves *pro domino*, that is to say, in favour of the master (referred to further in this study), mentioned as early as in the scriptures of the classical jurists, constituted a quite interesting solution, which limited the right of the accused owner to defend himself.

It has been shown in this paper that the prohibition constituted a quite interesting procedural solution, which, in fact, did not entirely exclude the right of the accused

[1] On the legal situation of slaves in the Roman criminal procedure, see in particular: P. Del Prete, *Le responsabilità dello schiavo nel diritto penale romano*, Bari 1937; M. Kaser, *Zur Kriminalgerichtsbarkeit gegen Sklaven*, "Studia et Documenta Historiae et Iuris" 1940, vol. 6(2), p. 357 ff.; O.F. Robinson, *Slaves and the Criminal Law*, "Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung" 1981, vol. 98(1), p. 213 ff. Recently, in the Polish roman literature on the subject, see K. Amielańczyk, *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*, "Studia Iuridica Lublinensia" 2020, vol. 29(5), pp. 11–27; P. Kołodko, *A Few Remarks on Slaves and Criminal Law: Deliberations Based on D. 48,2,12,4*, "Studia Iuridica Lublinensia" 2020, vol. 29(5), pp. 117–131. On slaves as participants (especially as witnesses) in Roman criminal procedure, see U. Steck, *Der Zeugenbeweis in den Gerichtsreden Ciceros*, Frankfurt am Main 2009, pp. 150–172; M. Dyjakowska, *The Evidence Given by Slaves in the Trials of crimen maiestatis*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 125–138.

[2] Cic. p. Rosc. Am. 41,120: *In dominos quaeri de servis iniquum est*; Cic. p. Deiot. 1,2–3: *Nam cum more maiorum de servo in dominum ne tormentis quidem quaeri liceat*; Cic. p. Mil., 22,59: *De servis nulla lege quaestio est in dominum nisi de incestu, ut fuit in Clodium*. See T. Mommsen, *Römisches Strafrecht*, Leipzig 1899, p. 412; W.W. Buckland, *The Roman Law of Slavery*, Cambridge 1908, p. 88.

[3] Cf. P. Del Prete, *Quaestio de servis contra dominos*, "Annali semin giur. – econom." 1933, no. 2, pp. 90–106. For recent Polish roman literature on this prohibition in Roman criminal trial, see E. Loska, *Kilka uwag na temat zeznań niewolników w procesie karnym*, "Zeszyty Naukowe KUL" 2017, no. 3, p. 449 ff.; eadem, *Inconvenient Witnesses: Testimonies of Slaves in a Criminal Trial During the Republic and the Principate*, "Studia Iuridica Lubliniensia" 2021, vol. 30(1), pp. 197–204.

owner to defend himself during the criminal trial. On the other hand, seemingly restrictive procedural solutions concerning the admissibility of slave testimony introduced in Roman law in various historical periods did not contradict the main procedural principles developed by the Quirites over the centuries and known to this day.

It is difficult to definitely state when this prohibition on interrogation of slaves *pro domino* started to be applied in the Roman criminal procedure. An interesting mention on this subject was included in Tacitus' account regarding the trial of Piso accused of poisoning Germanicus:

Tac. *Ann*. III,14: *Defensio in ceteris trepidavit; nam neque ambitionem militarem neque provinciam pessimo cuique obnoxiam, ne contumelias quidem adversum imperatorem infitiari poterat: solum veneni crimen visus est diluisse, quod ne accusatores quidem satis firmabant, in convivio Germanici, cum super eum Piso discumberet, infectos manibus eius cibos arguentes. quippe absurdum videbatur inter aliena servitia et tot adstantium visu, ipso Germanico coram, id ausum; offerebatque familiam reus et ministros in tormenta flagitabat. sed iudices per diversa implacabiles erant, Caesar ob bellum provinciae inlatum, senatus numquam satis credito sine fraude Germanicum interisse. scripsissent expostulantes, quod haud minus Tiberius quam Piso abnuere*.[4]

Owing to the account left by the historian, we know that in this case the evidence from the interrogation of slaves *pro domino* was not admitted. According to W.W. Buckland, the prohibition of *quaestio de servis pro domino* was not in force yet in the period in question.[5] It is difficult to unequivocally state on the basis of Tacitus's account, whether such a regulation was used as a general procedural rule as early as in AD 20. The above-mentioned case was considered before the Senate, and this procedural model was governed by slightly different rules than the ordinary trial and extraordinary trial.[6] One thing is beyond doubt that Tacitus does not treat

[4] *The Works of Tacitus*, transl. by A.J. Church, W.J. Brodribb, www.sacred-texts.com/cla/tac/a03010.htm [access: 21.21.2020]: "On all points but one the defence broke down. That he had tampered with the soldiers, that his province had been at the mercy of the vilest of them, that he had even insulted his chief, he could not deny. It was only the charge of poisoning from which he seemed to have cleared himself. This indeed the prosecutors did not adequately sustain by merely alleging that at a banquet given by Germanicus, his food had been tainted with poison by the hands of Piso who sat next above him. It seemed absurd to suppose that he would have dared such an attempt among strange servants, in the sight of so many bystanders, and under Germanicus's own eyes. And, besides, the defendant offered his slaves to the torture, and insisted on its application to the attendants on that occasion. But the judges for different reasons were merciless, the emperor, because war had been made on a province, the Senate because they could not be sufficiently convinced that there had been no treachery about the death of Germanicus".

[5] W.W. Buckland, *op. cit.*, p. 88.

[6] On the principles typical of the trial conducted before the Senate as a judicial body, see F. De Marini Avonzo, *La funzione giurisdizionale del senato romano*, Milano 1957; J. Bleicken, *Senatsgericht und Kaisergericht. Eine Studie zur Entwicklung des Prozessrechts im frühen Prinzipat*, Göttingen 1962; F. Arcaria, *Senatus censuit. Attività giudiziaria ed attività normativa del senato in età imperiale*, Milano 1992; idem, *Diritto e processo penale in età Augustea. Le origini della cognitio*

in his account the judges' decisions as a manifestation of breach of law. He only mentions that "the judges were merciless" but it does not follow from the historian's account that they were not entitled to refuse admitting evidence in such a situation.

DEFENCE RIGHT OF THE ACCUSED AND THE EVIDENCE FROM SLAVE'S TESTIMONY IN THE REPUBLICAN CRIMINAL PROCEDURE

An interesting source material concerning the issue in question (prohibition of *quaestio de servis pro domino*) can be found in Cicero's speech *pro Roscio Amerino*. In this case, the father of accused Roscius was murdered by two relatives who after the murder put his name on the proscription list through Chrysogonus, Sulla's influential freedman. Chrysogonus bought the victim's demesne very cheaply, and decided to get rid of young Roscius through a "court murder", by accusing him, with the help of accuser Erucius, of murdering his father.[7] The trial in question was held before *quaestio de sicariis*.[8] Cicero emphasized in his speech that the accused demanded that his slaves be interrogated, but due to the fact that they no longer were his property, his request could not be accepted, which is confirmed by the following account:

Cic. p. Sex. Rosc. Amer. 28,77–78: *O, di immortales, rem miseram et calamitosam! Quid? In tali crimine quod innocenti saluti solet esse ut servos in quaestionem polliceatur, id Sex. Roscio facere non licet? Vos qui hunc accusatis omnis eius servos habetis; unus puer victus cotidiani administer ex tanta familia Sex. Roscio relictus non est. Te nunc appello, P. Scipio, te, M. Metelle; vobis advocatis, vobis agentibus aliquotiens duos servos paternos in quaestionem ab adversariis Sex. Roscius postulavit; meministisne T. Roscium recusare? Quid? ei servi ubi sunt? Chrysogonum, iudices, sectantur; apud eum sunt in honore et in pretio. Etiam nunc ut ex eis quaeratur ego postulo, hic orat atque obsecrat. [78] Quid facitis? cur recusatis?*[9]

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criminale senatoria, Torino 2009; A. Chmiel, *Proces katylinarczyków jako przykład rzymskiego „procesu politycznego"*, [in:] *Prawo karne i polityka w państwie rzymskim*, eds. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2015, p. 47 ff. Cf. 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, pp. 299–310.

[7] For more detail on this trial, see J.H. Freese, *Pro Roscio Amerino*, London 1967, passim; K. Amielańczyk, *Cicero, pro Roscio Amerino – rzymski proces o zabójstwo*, "Biuletyn LTN. Humanistyka" 1993, no. 1, p. 47 ff.

[8] See K. Amielańczyk, *Cicero…*, p. 49 ff.

[9] As cited in Cicero, *Pro Publio Quinctio. Pro Sexto Roscio Amerino. Pro Quinto Roscio Comoedo. De Lege Agraria I., II., III.*, transl. J.H. Freese, London 1961, p. 191: "O immortal gods, what a misfortune! What a calamity! That which, as a rule, in accusation of such a kind, proves the salvation of an innocent man – the offer to put his slaves on the rack – is not permitted to Sextus Roscius! You, the accusers of my client, have in your possession all his slaves; out of numerous a household, not even a single boy has been left to attend to his daily meals. I now appeal to you, Publius Scipio, and to you, Marcus Metellus: when you were supporting him and acting on his behalf, did he not several

This account is usually cited in the literature as an example to confirm how, back in Cicero's days, defendants were still able to bring their slaves to court as witnesses in order to be cleared of the charges against the former.[10]

In the opinion of L. Schumacher, this case does not, even if seems so, prove that there was still no prohibition of slave interrogation *pro domino* in Cicero's time. According to this researcher, the whole situation and Roscius' demand should be referred not so much to the (public) criminal trial of the Republic but to the *iudicium domesticum*.[11] In the opinion of L. Schumacher, Cicero was not primarily concerned with proving the innocence of his client, but rather evoking his natural *pietas* (allegiance to his parents).[12] To fulfil his son's duty, young Roscius tried to explain the murder. In his speech, Cicero stresses that his client would also have summoned to testify the slaves suspected of the murder if he had not lost access to them as a result of the proscription. These all arguments, according to this researcher, did not concern the proceedings pending, but rather the *quaestio domestica* to which Roscius was not admitted due to exceptional circumstances. According to L. Schumacher, the key to resolving this issue lies in the ambiguity of the term *quaestio*,[13] which, on the one hand, referred to the act of interrogating slaves during a criminal trial and, on the other, also meant torture, which also took place as part of a domestic trial. According to him, the statement by Cicero (Cic. pro Am. 28,77): *in tali crimine, quod innocentibus saluti solet, esse, ut servos in quaestionem polliceantur*, does not at all mean that slaves should have been taken

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times demand two of his father's slaves from his adversaries for the purpose of putting them to the torture? do you not remember that Titus Roscius refused? Well? where are those slaves? Gentelmen, they are in the suite of Chrysogonus, by whom they are highly esteemed and valued. Even now, I demand that they be put to the question, my client begs and entreats you. [78] What are you about? Why do you refuse?".

[10] As in G. Geib, *Geschichte des römischen Criminalprozesses bis zum Tode Iustinians*, Leipzig 1842, p. 638; A.W. Zumpt, *Der Kriminalprozess der Römischen Republik*, Leipzig 1871, p. 312; T. Mommsen, *op. cit.*, p. 414; A. Ehrhardt, *s.v. tormenta*, [in:] *Realencyclopädie der Classischen Altertumswissenschaft*, vol. 6A, Alessandria 2010, p. 1791; D. Liebs, *Der Schutz der Privatsfäre in einer Sklavenhaltergesellschaft: Aussagen von Sklaven Gegen Ihre Herren nach Römischem Recht*, "Bulletino dell Instituto di Dititto Romano" 1980, vol. 83, p. 158; U. Steck, *op. cit.*, p. 168.

[11] L. Schumacher, *Servus index. Sklavenverhoer und sklavenanzeige im republikanischen und kaiserzeitlichen Rom*, Wiesbaden 1982, p. 85. On *iudicium domesticum* in more detail, see W. Mossakowski, *Iudicium domesticum w okresie republiki rzymskiej*, [in:] *Rodzina w społeczeństwach antycznych i wczesnym chrześcijaństwie. Literatura, prawo, epigrafika, sztuka*, ed. J. Jundziłł, Bydgoszcz 1995, pp. 85–97.

[12] Cf. for more on the Cicero's defence strategy: W. Stroh, *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*, Stuttgart 1975, p. 55 ff.; M. Varvaro, *Legittima difesa, tirannicidio e strategia difensiva nell'orazione di Cicerone a favore di Milone*, "Annali del Seminario Giuridico dell'Università degli Studi di Palermo" 2013, vol. 56, pp. 215–255.

[13] See D. Mantovani, *Quaerere, quaestio. Inchiesta lessicale e semantica*, "Index. Quaderni camerti di studi romanistici" 2009, vol. 37, pp. 25–67.

by Roscius to court for questioning.[14] The hearing might as well have taken place as part of *iudicium domesticum*, with the heir thus fulfilling his duty to explain the murder and thus weakening the suspicion that he was involved in the murder of his father. According to L. Schumacher, the latter alternative is supported by the fact that Roscius demanded that the suspected slaves be put at his disposal, and he did it on several occasions – including before the trial. Thus, according to this researcher, the speech in defence of Roscius cannot be considered as proof of the admissibility of *quaestio servorum pro domino* in the Roman public trial.[15] Cicero used this argument because he wanted to stress the integrity of his client, who, with a clear conscience, did not have to fear the interrogation of the slaves, but, as a *pius filius*, sought to solve the case. This was a brilliant trick of the defence counsel (Cicero), which Erucius could have not resisted. The Cicero's call, on behalf of the accused, for the release of "his" slaves by the accusers, defended, and this was Cicero's first motivation, the young Roscius' right to inheritance. On the one hand, the accuser could not meet this demand, otherwise Roscius would either be acquitted or convicted, both not in the interests of Chrysogonus. On the other hand, his refusal of the *quaestio* had to reinforce the suspicion, subconsciously expressed by Cicero, about who actually masterminded the crime. Actually, it must be stated that Cicero was not interested in the results of the interrogation of slaves he had requested for, but in fact he carried out an apparent struggle in order to relieve the burden on his client and to turn the suspicion of murder against the accusers.

On the occasion of the Roscius' trial, L. Schumacher pointed to a certain regularity or even a rule as to the admissibility of evidence from interrogation of a slave in the public trial in the Republic period. Namely, in murder cases, the questioning of a slave against his master was unacceptable.[16] However, that prohibition of interrogation, according to this researcher, also worked the other way around. The slave could not be interrogated in such a case at the request of his master in his defence.[17] Such a solution may seem strange, but quite natural and right, even from the point of view of the current science of criminal procedure, the principle of equality of parties or equality of arms of procedural parties, which are a manifestation the principle of adversarialism, known not only today but also in the Roman procedural law.[18] Therefore, following L. Schumacher's reasoning, during the period of the

[14] L. Schumacher, *op. cit.*, p. 86.
[15] *Ibidem*.
[16] Cf. *ibidem*, p. 207.
[17] *Ibidem*, p. 209.
[18] For more detail on the adversarial principle in the Roman criminal procedure, see A. Chmiel, *Zasada kontradyktoryjności w rzymskim procesie karnym*, "Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Prawo" 2018, no. 101, p. 42 ff. Generally on the principles in the Roman criminal and civil procedures, see K. Amielańczyk, *O kształtowaniu się niektórych zasad procesowych w rzymskim postępowaniu karnym okresu pryncypatu*, "Studia Iuridica Lublinensia" 2007, vol. 10,

Republic, the master could not defend himself in criminal proceedings with the help of his slaves, but they also could not be used against him. And conversely: where it was possible to interrogate a slave against the master, the latter was given the opportunity to defend himself by the right to appoint his own slaves as witnesses.

The master could, at least during the Republic period, interrogate the slave as part of *quaestio domestica* and provide the record of this testimony as evidence. However, it is difficult to equate the credibility of the testimony made during such a private hearing with that carried out during a public trial.[19] This can be evidenced, for example, by Cicero's statements about the credibility of the testimony of slaves obtained by Sassia during the *quaestio domestica* in the trial of Cluentius accused of poisoning.[20]

At this point, attention should be paid to how slaves were interrogated during public proceedings during the Republic period. Valuable information on this matter is contained in Cicero's speech *pro Milone*:

> Cic. *pro Mil.* 22,60: *Subito abrepti in quaestionem, tamen separantur a ceteris et in arcas coniciuntur, ne quis cum eis conloqui possit. Hi centum dies penes accusatorem cum fuissent, ab eo ipso accusatore producti sunt. Quid hac quaestione dici potest integrius, quid incorruptius?*[21]

The accounts of the Arpinate show that the slaves who were supposed to testify as witnesses during the trial were held in individual cells until the day of the trial, so that no one could talk to them. It follows from this account that even the accuser (at least in the case of the accused's slaves) did not have the opportunity to question them, as they were locked in a state custody. The difference between them and free witnesses in this regard was striking. While the latter were thoroughly instructed by the party who summoned them to court, the slave witnesses were locked up and individually led for interrogation. Of course, a free witness was expected to testify truthfully, despite intensive contacts with his party. In the case of slaves, on

p. 9 ff.; idem, *U podstaw prawa prywatnego: „Rzymski proces cywilny" i jego zasady*, "Gdańskie Studia Prawnicze" 2010, vol. 24, pp. 157–175.

[19] Cf. U. Steck, *op. cit.*, p. 152. The record of the testimony given by a slave as part of the *iudicium publicum* was characterised by a particular degree of detail. More broadly, see A. Chmiel, *Immediacy principle in the Roman criminal procedure*, "Krytyka Prawa" 2016, no. 2, pp. 8–9.

[20] Cic. *pro Cluentio*, 65,184–185.

[21] Cicero, *Pro T. Annio Milone. In L. Calpurninum Pisonem. Pro M. Aemilio Scauro. Pro M. Fonteio. Pro C. Rabirio Postumo. Pro M. Marcello. Pro Q. Ligario. Pro Rege Deiotaro*, transl. N.H. Watts, London 1958, p. 73: "They are haled off for toture without delay, and event then they are isolated and flung into separate cells, that none may hold communication with them. In this particular case, they had been in the custody of the prosecutor for a hundred days, and were then by the prosecutor himself produced. What could be more impartial or more unprejudiced than such a method of examination?".

the other hand, it was thought that they would be more or less willing to give false testimony. They were therefore subject to torturing.[22]

The way in which the slaves were interrogated was to guarantee the right of the accused to a fair trial. Nor was the slave interrogation itself carried out by the parties, i.e. they did not ask the questions to the slave or, most importantly, decide on the methods of torture. These issues were the responsibility of the *quaesitor*.[23] In the literature, the question of who played the role of *quaesitor* remains open: was it the president of the *quaestio* or rather some impartial person?[24]

DEFENCE RIGHT OF THE ACCUSED AND THE EVIDENCE FROM SLAVE'S TESTIMONY IN THE ROMAN CRIMINAL PROCEDURE OF THE IMPERIAL PERIOD

The prohibition on interrogation of slaves *pro domino* was in force during the period of post-classical law, but most probably also during the period of classical law. This is confirmed by the following account of Paulus, which was subsequently confirmed in the Justinian's Digest:

D. 48,18,18,7 (=PS. 5,16,8a): *Servus, nec si a domino ad tormenta offeratur, interrogandus est*.[25]

Paulus' account shows that the evidence from the interrogation of a slave was inadmissible when the accused *dominus* wanted to summon his slaves as witnesses to clear him of the charges against him with their testimony.[26] A similar provision was also included in one of the constitutions issued by Emperors Diocletian and Maximilian:

C. 9,41,7: *Imperatores Diocletianus et Maximianus A.A. Urbanae. Servos, qui proprii indubitate iuris tui probabuntur, ad interrogationem nec offerente te produci sineremus: tantum abest, ut et invita te contra dominam vocem rumpere cogantur*.[27]

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[22] On the reason why slaves were subject to tortures during the interrogation, see A.W. Zumpt, *op. cit.*, p. 255.

[23] A. Ehrhardt, *op. cit.*, p. 1792.

[24] For more detail, see A. Chmiel, *Zasada kontradyktoryjności…*, p. 47.

[25] Own translation: "A slave, even if assigned by the master to be put to torture, may not be interrogated in his case of a crime punished by death penalty".

[26] See O.F. Robinson, *op. cit.*, p. 238; U. Steck, *op. cit.*, p. 168. Cf. W.W. Buckland, *op. cit.*, p. 88; A. Ehrhardt, *op. cit.*, p. 1791.

[27] Translation from: *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*, vol. 3, Books VIII–XII, based on a translation by Justice F.H. Blume, ed. B.W. Frier, Cambridge 2016, p. 2403: "We would not permit slaves, who are shown to be yours by undoubted right, to be produced for questioning even if you were to offer this. So much the less, even against

These accounts confirm that, in the post-Classical period, a party's (in this case the accused) initiative to provide evidence involving the possibility to invoke, in the party's own case, the testimony of the one's own slaves was significantly restricted by law.

Interestingly enough, this rule (the prohibition on relying on the testimony of one's own slaves) bound, in the Roman criminal procedure of the Empire period, also the *accusator*.[28] Ulpian mentioned this in his work *De officio proconsulis*:

D. 48,18,1,3 (*Ulpianus libro octavo de officio proconsulis*): *Ad quaestionem non esse provocandos eos, quos accusator de domo sua produxit…*[29]

In view of this account, the slaves belonging to the master acting as the accuser, as well as *servi rei*, could not, at their master's request, be interrogated with the use of torture in a criminal trial.[30] The above-mentioned prohibition of interrogation of slaves *pro dominos* and *contra dominos* was also confirmed in the title *De testibus* of the Code of Justinian:[31]

C. 4,20,8 (*Idem A.A. et C.C. Deruloni*): *Servos pro domino, quemadmodum adversus eum interrogari non posse, pro facto autem suo interrogari posse non ambigitur*.[32]

As is apparent from the above juridical sources, the prohibitions in question constituted generally applicable rules in the Roman criminal trial during the Empire period, at least late. Undoubtedly, the ban on interrogating slaves *contra domino* was a natural consequence of the fact that a slave, as the property of his master, should not be compelled against the will of his master to testify against him. On the other hand, the prohibition, provided for in the Imperial Constitutions, of interrogating

your wishes, shall they be compelled to raise their voices against their owner. Posted November 1, in the consulship of Maximus, for the second time, and Aquilinus (286)".

[28] See O.F. Robinson, *op. cit.*, p. 238; A. Nogrady, *Römisches Strafrecht nach Ulpian. Buch 7 bis De officio proconsulis*, Berlin 2006, p. 242.

[29] *The Digest or Pandects of Justinian*, transl. S.P. Scott, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr/Anglica/D48_Scott.htm#XVIII [access: 22.12.2020]: "Those whom the accuser produces from his own house should not be tortured". See also PS. 5,15,1: *Suspectos gratiae testes, et eos vel maxime, quos accusator de domo produxerit vel vitae humilitas infamarit, interrogari non placuit*.

[30] See O.F. Robinson, *op. cit.*, p. 238; A. Nogrady, *op. cit.*, p. 242; U. Steck, *op. cit.*, p. 169. Cf. G. Geib, *op. cit.*, p. 638; D. Liebs, *op. cit.*, p. 159; L. Schumacher, *op. cit.*, p. 202, note 83.

[31] Cf. W.W. Buckland, *op. cit.*, p. 88; U. Steck, *op. cit.*, p. 168.

[32] Translation from: *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*, vol. 2, Books IV–VII, based on a translation by Justice F.H. Blume, ed. B.W. Frier, Cambridge 2016, p. 859: "(The same Augusti and Caesars to Derulo). There is no doubt that slaves cannot be interrogated (under torture) on behalf of their master, any more than against him, but they can be interrogated as to their own act. Given November 1, at Raginassi, in the consulship of the Caesars (294)".

slaves *pro domino*, i.e. in favour of the master when the latter was acting as a defendant in the trial, constituted, on the one hand, what might seem to be a restriction on the procedural rights of the accused,[33] especially, as has already been mentioned, his initiative to provide evidence. On the other hand, such a solution appears to have been aimed at strengthening the principle of objectivity and impartiality,[34] which, as can also be seen, was also known at the time, and even – as can be seen from the content of the constitutions cited (although not expressly) were articulated by the legislature in a statutory manner.

Interestingly, in the post-classical period, the testimonies of slaves obtained by the master during the *iudicium domesticum* could not constitute evidence in the criminal case which concerned the latter, as evidenced by the content of the imperial constitution cited below:[35]

C. 9,41,6: *Imperator Gordianus A. Heridiano. Pridem placuit domestica servorum seu libertorum propriorum vel maternorum interrogatione in causis ad dominos vel patronos pertinentibus abstinendum esse, ut neque pro his neque adversus eos in capitalibus vel pecuniariis quaestionibus veritatis vim obtinere possit, quod in confessionem ab eis fuerit deductum*.[36]

It follows from that regulation that, on the basis of the rescript of Emperor Gordian, domestic interrogations of slaves and freedmen were prohibited, and the testimonies obtained during such private investigations concerning their masters or patrons could not be used either against of for them (masters and patrons) in both criminal and civil matters.[37] The *Princeps*, when issuing that legislation in 240, prohibited the conduct of *quaestio domestica* and held that the record of testimony obtained during them had no probative value.[38] This provision substantially limited the right of the owner to dispose of his property. It was also probably a manifestation

[33] On the subject of the procedural position of the accused in the Roman criminal trial recently, see more A. Chmiel, *Reus vel suspectus? On the Status of the Accused and the Suspect in the Roman Criminal Procedure*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 63–79.

[34] Cf. "Agencies in charge of criminal proceedings shall be obligated to inquire into, and duly consider the circumstances both in favour and to the prejudice of the accused" (Article 4 of the Polish Act of 6 June 1997 – Criminal Procedure Code, Journal of Laws 1997, no. 89. item 555, as amended). English translation of the Act at: www.legislationline.org/download/id/4172/file/Polish%20CPC%201997_am%202003_en.pdf [access: 22.12.2020].

[35] Cf. O.F. Robinson, *op. cit.*, p. 238.

[36] Translation from: *The Codex of Justinian…*, vol. 3, p. 2403: "It has long been the rule that, in cases relating to masters or patrons, one should abstain from the judicial examination under torture of their own slaves or freed persons or those of their mother, so that what is drawn out of them by way of confession (during such examination) can furnish decisive evidence neither for or against masters and patrons in both civil and criminal trials. Posted May 9, in the consulship of Sabinus and Venustus (240)".

[37] As in D. Liebs, *op. cit.*, p. 166. See. L. Schumacher, *op. cit.*, p. 212.

[38] L. Schumacher, *op. cit.*, p. 212.

of humanitarianism and concern – on the part of the state – about the fate of the lowest social group, namely slaves. This was so because, during these *quaestiones*, numerous abuses were committed by the owners who by all means sought to obtain favourable testimony from their slaves, as can be evidenced by Cicero's account of the *quaestio* carried out by Sassia during the trial of Cluentius.

The prohibition of private *quaestiones domestica* discussed above closely resembles the prohibition of using private evidence arising in connection with pending criminal proceeding and for its purposes,[39] clearly articulated (until recently) in today's criminal procedure, which in the post-classical Roman criminal trial was finally embodied as a legal norm.

To sum up, the trial of Piso confirms that the evidence from the interrogation of a slave *pro domino* was inadmissible – in court practice – in the Roman criminal trial at least in the initial period of the Principate. Typical of this prohibition was the fact that it was applicable only when the interrogation of the slaves was applied for by their owner himself. In such cases, was the evidence from the interrogation of a slave inadmissible in criminal matters at all? To answer this question, it is necessary to refer to the general rule regarding the evidence from the testimony of a slave, which was included in the imperial constitutions and in the Ulpian's account, and then quoted in Justinian's Digest:

D. 48,18,1,pr.-1 (*Ulpianus libro octavo de officio proconsulis*): *In criminibus eruendis quaestio adhiberi solet. Sed quando vel quatenus id faciendum sit, videamus. Et non esse a tormentis incipiendum et divus Augustus constituit neque adeo fidem quaestioni adhibendam, sed et epistula divi Hadriani ad Sennium Sabinum continetur. 1. Verba rescripti ita se habent: "Ad tormenta servorum ita demum veniri oportet, cum suspectus est reus et aliis argumentis ita probationi admovetur, ut sola confessio servorum deesse videatur".*[40]

According to the regulations of Augustus and Hadrian, the content of which was published by Justinian's compilers at the very beginning of Title XVIII *De quaestionibus* of Book XLVIII of Justinian's Digest, one should not initiate the

[39] See "Any private documents prepared outside the criminal proceedings and not directlyfor its purpose may also be read aloud, particularly statements, publications, letters and notes" (Article 393 § 3 of the Criminal Procedure Code in the wording before amendment of 1 July 2015). Currently, Article 393 § 3 of the Criminal Procedure Code reads as follows: "Any private documents prepared outside the criminal proceedings may also be read aloud, particularly statements, publications, letters and notes".

[40] *The Digest or Pandects of Justinian…*: "It is customary for torture to be applied for the purpose of detecting crime. Let us see when, and to what extent, this should be done. A beginning ought not to be made by the actual infliction of the question, and the Divine Augustus decided that confidence should not unreservedly be placed in torture. This is also contained in a letter of the Divine Hadrian addressed to Sennius Sabinus. 1. The terms of the Rescript are as follows: 'Slaves are to be subjected to torture only when the accused is suspected, and proof is so far obtained by other evidence that the confession of the slaves alone seems to be lacking'".

proceedings in a given case with interrogating the slaves.[41] Slaves, according to Hadrian's rescript, could be interrogated in the case of their master if he was already suspected of committing a crime and, moreover, the other evidence carried out in the case substantiated his guilt and only evidence from the interrogation of his slaves was missing.[42] The decision to admit testimonies of slaves was therefore within the responsibility of the judge (imperial official) deciding the case. If, however, the master wanted to clear himself of the charges by demanding his slaves be interrogated, the court should probably reject such a request for evidence, especially if the master did it at the beginning of the trial. And when all the available evidence, which possibly proved to be against him, was demonstrated in the case, the master could probably defend himself and only then could his slaves, who had not yet been questioned, be interrogated. The admissibility of the evidence from the interrogation of a slave was within the discretionary power of the judge, the scope of which, however, was in this case statutorily defined (D. 48,18,1,pr.-1).

The testimony of the slave his master demanded to be interrogated as part of *iudicium publicum* was therefore regarded as subsidiary (auxiliary) evidence in the Roman criminal procedure. However, its admissibility was limited, especially if the master, as a party to the trial (the accused), put forward the proposal of evidence. In such a situation, it was for the court to assess whether such evidence could be taken or not. The master could, of course, interrogate his slaves as part of the *iudicium domesticum*, but as early as the first half of the 3rd century the evidence thus obtained was considered inadmissible.

CONCLUSIONS

There is no doubt that the prohibition of *quaestio de servis pro domino*, restricted the pure adversarial character of the Roman criminal trial in favour of the principle of officiality, i.e acting *ex officio*. But on the other hand, it was intended

[41] Cf. K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, p. 166; idem, *Quaestio per tormenta. O wartości dowodowej zeznań uzyskanych za pomocą tortur w rzymskim procesie karnym okresu pryncypatu*, [in:] *O prawie i jego dziejach. Księgi dwie. Studia ofiarowane Profesorowi Adamowi Lityńskiemu w czterdziestopięciolecie pracy naukowej i siedemdziesięciolecie urodzin*, vol. 1, Białystok–Katowice 2010, p. 57; A. Chmiel, *Ochrona bezpieczeństwa właścicieli niewolników świetle s.c. Silanianum – zagadnienia dowodowe*, [in:] *Ochrona bezpieczeństwa i porządku publicznego w prawie rzymskim*, eds. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2010, p. 61.

[42] Cf. K. Amielańczyk, *Rzymskie prawo karne…*, p. 166; A. Nogrady, *op. cit.*, p. 241; B. Sitek, *„Quaestionem" intellegere debemus tormenta et corporis dolorem ad eruendam veritatem*, [in:] *Crimina et mores. Prawo karne i obyczaje w starożytnym Rzymie*, ed. M. Kuryłowicz, Lublin 2001, p. 164; P.A. Brunt, *Evidence given under Torture in the Principate*, "Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung" 1980, vol. 97(1), p. 258; U. Vincenti, *Duo genera sunt testium. Contributo allo studio della prova testimoniale nel processo romano*, Padova 1989, p. 121.

to safeguard the implementation of the principle of impartiality and objectivity, which, in turn, were intended to ensure the functioning of one of the most important principles of the Roman criminal trial, namely the principle of substantive truth.[43] However, the possibility of sustaining evidence from the interrogation of a slave also *pro domino*, i.e. at the request of the accused master, legally guaranteed in D. 48,18,1,pr.-1, was undoubtedly a guarantee of his right of defence.

As can be seen, the seemingly rather restrictive procedural solutions introduced in Roman law in various historical periods have not conflicted with the basic procedural principles developed by the Quirites over the centuries and known to this day.

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[43] On the understanding of the principle of material truth in Roman criminal proceedings of the principate period, see K. Amielańczyk, *O kształtowaniu się niektórych zasad procesowych…*, pp. 26–27.

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ABSTRAKT

W niniejszym artykule przedstawiono zagadnienie prawa oskarżonego do obrony w świetle wyrażonego – zarówno w tekstach nieprawniczych, jak i w pismach jurystów okresu klasycznego oraz w konstytucjach cesarskich – zakazu przesłuchań niewolników na rzecz pana (*quaestio de servis pro domino*). Wykazano, że zakaz ten stanowił dość ciekawe rozwiązanie procesowe, które w rzeczywistości nie wykluczało w zupełności prawa oskarżonego właściciela do obrony podczas procesu karnego. Zeznania niewolnika, którego przesłuchania domagał się jego pan w ramach szeroko pojętego *iudicium publicum*, były traktowane jako dowód subsydiarny (posiłkowy). Dopuszczalność dowodu z przesłuchania niewolnika *pro domino* została pozostawiona dyskrecjonalnej władzy sędziego, której zakres został jednak w takim przypadku w ustawowy sposób zakreślony. Z pozoru restrykcyjne rozwiązania procesowe dotyczące dopuszczalności zeznań niewolników, wprowadzane w sprawach karnych w prawie rzymskim w różnych okresach historycznych, nie stały w sprzeczności z naczelnymi zasadami procesowymi wypracowanymi przez Kwirytów na przestrzeni wieków, a znanymi po dziś dzień.

Słowa kluczowe: rzymski proces karny; oskarżony; prawo oskarżonego do obrony; dowód z przesłuchania niewolnika; *quaestio de servis pro domino*