

PROLEGOMENA

I. LIBERTAS—A CIVIC RIGHT

Freedom, comprising as it does two different concepts, namely “freedom from” and “freedom to”, neither of which admits of any but general definitions, is a somewhat vague notion. This is also true of the Latin “libertas”. Libertas primarily denotes the status of a “liber”, i.e. a person who is not a slave,¹ and comprises both the negation of the limitations imposed by slavery and the assertion of the advantages deriving from freedom. In view of its twofold meaning, liberty can perhaps more easily be explained if slavery, its direct opposite, is explained first.

Without entering into detailed discussion, the salient characteristics of slavery in Roman law can be described as follows:² slavery at Rome is a legal institution whereby one person is subjected to the mastery (dominium) of another person:³ slaves are almost entirely rightless and can neither be entitled to possess or do anything, nor to contract liabilities:⁴ a slave is always “in potestate” and “alieni iuris”.⁵ Broadly speaking, therefore, slavery consists in rightlessness and subjection to dominion.

It appears from these characteristics of slavery that the term “persona sui iuris”, which signifies the status of complete personal freedom, implies that to be free means to be capable of possessing rights of one’s own, and this is possible only if one is not subjected to someone else’s dominium (or patria potestas). Libertas therefore consists in the capacity for the possession of rights, and the absence of subjection. Obviously, the positive and negative aspects of libertas, though notionally distinct, are essentially interdependent and complementary.⁶

¹ See Th. Mommsen, *Römisches Staatsrecht*, III, p. 62.

² For a full discussion of this subject see W. W. Buckland, *The Roman Law of Slavery* (1908) (= *Slavery*), pp. 1 ff.; Id. *A Text-Book of Roman Law* (1921) (= *Text-Book*), pp. 62 ff.

³ *Gai Inst.* I, 52; *Inst.* I, 3, 2; *Dig.* I, 5, 4, 1.

⁴ *Servile caput nullum ius habet*, Paulus, *Dig.* IV, 5, 3, 1. Cf. *Inst.* I, 16, 4; *Dig.* I, 17, 22 pr.; XXVIII, 8, 1 pr. See also Buckland, *Slavery*, p. 3.

⁵ *Gai Inst.* I, 48–52 = *Inst.* I, 8 pr. sq. = *Dig.* I, 6, 1 pr. sq.

⁶ Subjection to dominium causes ipso facto the extinction of all the rights and liabilities of a freeman, and, on the other hand, release from dominium (i.e. manumission) causes ipso facto a slave to acquire rights and to contract liabilities.

The negative aspect of *libertas*, as any other negative concept, is self-defined (although, of course, it is of necessity ill-defined). On the other hand, the definition of the positive aspect presents some problems. For if, positively, freedom means the capacity to enjoy certain rights of one's own, two questions arise: First, whence does that capacity spring? Is it innate or acquired? Secondly, what is the character and extent of the rights in which freedom consists? To answer these questions we must inquire into the nature and foundation of *libertas*, and may well start with the definition of freedom in the *Digest*.

"*Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium qua quis dominio alieno contra naturam subicitur.*"¹ If, as this definition lays down, freedom is a natural faculty, everyone is originally free; and, since the positive institution of slavery is contrary to nature, it follows that freedom is a natural right innate in every human being.² But noble though it is, this concept of freedom was foreign to Roman law under the Republic and the Early Principate.³ The theory concerning freedom and slavery prevalent in that period may be gathered from the legal practice, most clearly perhaps from the peculiar institution whereby Roman citizenship, and not freedom only, was bestowed on slaves manumitted in due form.⁴ This institution did not arise from generosity

¹ *Dig.* 1, 5, 4 pr. Cf. also *Dig.* 1, 1, 4 and XII, 6, 64. Since the word "naturalis" is possibly interpolated, the definition as it now reads in the *Digest* may be of later date than its original author, Florentinus, a jurist of the late second or early third century A.D. Cf. F. Schulz, *Prinzipien des römischen Rechts*, Munich, 1924, p. 95 n. 2.

² Buckland, *Text-Book*, p. 62, explains this definition as meaning that liberty is dependent upon the subject's internal freedom from the restrictions of his lower nature. But if that were the case it would be difficult to see why subjection to dominium should be "contra naturam", i.e. contrary to Nature.

³ *Ius naturale* from which this conception of freedom derives is, with the exception of Cicero, a product of the Imperial period. See Buckland, *Text-Book*, pp. vi and 52 f. It is noteworthy that Gaius (second century A.D.), *Inst.* 1, 52, regards a master's potestas over his slave as an institution of *Ius Gentium* but not as being contrary to nature.

⁴ See Cic. *Pro Balbo*, 24; Ulp. *Reg.* 1, 6; *Dig.* xxxviii, 2, 1 pr. Bestowal of Roman citizenship on slaves manumitted in due form was unrestricted under the Republic, see Buckland, *Slavery*, pp. 444 f. Restriction in this matter was introduced by the *Lex Aelia Sentia* of A.D. 4. Informally manumitted slaves

on the part of the Romans; had manumission effected merely release from dominica potestas, the slave would have become a *res nullius*, not a free man, because to be free means to be a member of a civic body.¹ A Roman citizen who by being made a slave is excluded from any polity suffers extinction of all his rights, personal and political,² whereas a slave admitted to Roman citizenship by manumission “*vindicta aut censu aut testamento*” acquires full freedom.

The essentially civic character of *libertas* can also be seen from the status of foreigners at Rome. The Roman State recognized and protected the freedom of those foreigners alone who were citizens of States which concluded a treaty with Rome. All other foreigners, although not necessarily treated as actual slaves, were, while in Roman territory, in the legal position of a *servus sine domino*, which meant that they were considered rightless and the Roman State would not protect them if they were deprived of their freedom.³

It is therefore clear that the Romans conceived *libertas* as an acquired civic right, and not as an innate right of man.

2. LIBERTAS AND CIVITAS

We must now consider the extent of *libertas*. At Rome and with regard to Romans full *libertas* is coterminous with *civitas*. A Roman's *libertas* and his *civitas* both denote the same thing, only that each does it from a different point of view and with emphasis on a different aspect: *libertas* signifies in the first place the status of an individual as such, whereas *civitas* denotes primarily the status of

enjoyed *de facto* freedom while considered as *de iure* slaves; see Tac. *Ann.* XIII, 27, 4: *quos vindicta patronus non liberaverit velut vinculo servitutis atineri*. Cf. also Buckland, *Slavery*, p. 445. The compromise resulting in the creation of the so-called *Latini Iuniani* was an innovation of the Early Empire. For the date of the *Lex Iunia* see Buckland, *Slavery*, pp. 534 f. and *C.A.H.* vol. x, p. 888 ff. For a recent discussion of manumission see D. Daube, *Two Early Patterns of Manumission*, *J.R.S.* xxxvi (1946), pp. 57 ff.

¹ See Buckland, *Slavery*, p. 136 n. 4, p. 439; *Text-Book*, p. 73. Cf. Daube, *op. cit.* p. 62.

² This is the so-called *Capitis Deminutio Maxima*.

³ See Th. Mommsen, *Bürgerlicher und peregrinischer Freiheitsschutz im römischen Staat*, *Juristische Abhandlungen, Festgabe fuer Georg Beseler* (1885), pp. 255, 263; id. *Staatsrecht* III, pp. 590 f., 596, 598 f.; and also E. Schönbauer, *Z. Sav. St. Rom. Abt.* XLIX (1929), p. 371.

an individual in relation to the community.¹ Only a Roman citizen enjoys all the rights, personal and political, that constitute *libertas*.

The so-called *Capitis Deminutio Media* whereby a Roman loses citizenship while retaining freedom² does not contradict this conclusion. For *Capitis Deminutio Media* means loss of Roman citizenship as a consequence of the acquisition of a different citizenship.³ And, besides, the freedom which one retained after the loss of Roman citizenship was qualitatively different from that which one had enjoyed before, for *libertas ex iure Quiritium* is freedom in respect of private and public law alike, whereas the *libertas* of a person who was not a Roman citizen (*Quiris*) was freedom in respect of private law only.

If then the *libertas* of a Roman is conditioned by his *civitas*, the amount of freedom a Roman citizen possesses depends upon the entire political structure of the Roman State. In Rome—as elsewhere—freedom of the citizen and internal freedom of the State are in fact only different aspects of the same thing. Therefore *libertas civis Romani* or *libertas ex iure Quiritium* must be defined in terms of *libertas populi Romani Quiritium*.

3. LIBERTAS POPULI ROMANI

With regard to peoples or States *libertas* is used in either of the following two senses:

(a) Sovereign independence and autonomy,⁴ the prominent feature of which is “*suae leges*”,⁵ a term equivalent to the Greek *autonomia*. The opposite of a *populus liber* is *populus stipendiarius* or *subjectus*.⁶ This aspect of *libertas* need not be

¹ See Mommsen, *Freiheitsschutz*, p. 255.

² *Gai Inst.* 1, 161; *Inst.* 1, 16, 2; *Ulp. Reg.* 11, 12.

³ *Festus, s.v. deminutus* (p. 61, ed. Lindsay): *Deminutus capite appellatur qui civitate mutatus est*. Mommsen, *Staatsrecht* III, 42 f., pointed out that loss of citizenship was as a rule a consequence of *mutatio soli*.

⁴ On the practical interpretation of freedom and autonomy in Roman foreign policy in the East, see A. H. M. Jones, *Civitates Liberae et Immunes in the East, Anatolian Studies presented to W. H. Buckler*, Manchester, 1939, pp. 103 ff. See also M. Grant, *From Imperium to Auctoritas*, Cambridge, 1946, pp. 338 ff., 346 ff., 401 ff.

⁵ *Carthago libera cum suis legibus est*, *Livy* xxxvii, 54, 26; *Liberos, immunes, suis legibus esse iubent Corinthios*, xxxiii, 32, 5.

⁶ See Jones, *loc. cit.*

dealt with in the present study, since during the period with which it is concerned Rome's own independence was too secure to be a problem at all.

(b) Republican form of Government. In this respect the opposite of *libertas* is *regnum* which, if used in its proper sense, invariably implies absolute monarchy.¹ The relation between king and people is considered to be analogous to the relation between master and slaves. Consequently monarchy is called *dominatio*; and subjection to monarchy *servitus*. Freedom enjoyed by a State negatively means absence of *dominatio*, just as freedom enjoyed by an individual negatively means absence of *dominium*. But in respect of States, just as in respect of individuals, the negative aspect of freedom does not alone constitute complete liberty. Tacitus voiced a deep-seated conviction of the Romans when he said that the Armenians, who had expelled their queen, were “*incerti solutique et magis sine domino quam in libertate*”;² for mere removal of *dominatio* may eventually result in anarchy, whereas *libertas* consists in rights which rest on positive institutions.

The Romans dated their own freedom from the abolition of monarchy and identified it with the republican constitution of the commonwealth.³ The *res publica populi Romani Quiritium*⁴ is the practical embodiment of *libertas populi Romani*, just as *civitas Romana* is the embodiment of *libertas civis Romani*. Ultimately, therefore, the nature and extent of *libertas* are determined by the nature and form of the Roman constitution.

¹ When Porsenna sent an embassy to Rome urging the restoration of Tarquin (*cum ille peteret quod contra libertatem populi Romani esset*) the Romans replied: *Non in regno populum Romanum sed in libertate esse. ita induxisse in animum, hostibus portas potius quam regibus patefacere; ea esse vota omnium ut qui libertati erit in illa urbe finis, idem urbi sit* (Livy II, 15, 3). This passage is typical of the republican attitude towards monarchy. For *regnum* as a somewhat loose term of political invective implying domination rather than monarchy, see below, pp. 62 ff.

² *Ann.* II, 4, 3.

³ See *Ad Herenn.* IV, 66; Sallust, *Cat.* 7, 2–3; Cic. *Pro Flacco*, 25; Livy I, 17, 3; 60, 3; II, 1, 1–2; VIII, 34, 3; Pliny, *Paneg.* 44; 57; Tac. *Ann.* I, 1, 1; *Hist.* I, 16. For a detailed examination of the notion *res publica* see Rudolf Stark, *Res Publica*, Göttingen Diss. 1937.

⁴ This is the description used on formal occasions; see Varro, *De Ling. Lat.* (ed. Goetz–Schoell) VI, 86; Livy VIII, 9, 8.

4. THE OBJECT OF THIS STUDY

But the Roman constitution is not itself a constant. The Romans were well aware that their republican constitution was the result of long and gradual development.¹ And *libertas*, while identified with the republican constitution during the Republican period, continued to be a popular slogan and a constitutional principle under the Principate. The question therefore arises, whether the political content of Roman *libertas* changed according as the Roman constitution was transformed.

It is proposed in this study to describe the meaning of *libertas* as a political idea at Rome during the two hundred odd years between the Gracchi and Trajan, a period in which the Republican constitution gradually gave way and was finally superseded by the Principate which, in its own turn, considerably changed during the first century A.D.

In the period at which this study begins, Roman republicanism had already reached its highest stage of development. In the long course of that constitutional development certain general principles were laid down, and certain practices established. Those principles form the constitutional background of the political struggle which resulted in profound constitutional changes. In order to avoid the confusion that may arise from mistaking political programmes for constitutional principles, or vice versa, it is desirable in the first of the subsequent chapters to determine and isolate those general principles which from a theoretical point of view constitute Roman republicanism and Roman political liberty.

¹ See Cato the Elder's remark in Cic. *De Rep.* II, 1, 1-2. See also Polyb. VI, 11, 2 f.