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**Slaves: persons or property?**  
**The Roman law on slavery and its reception**  
**in Western Europe and its overseas territories**

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**Abstract**

*In Roman law, slaves were regarded as objects that could be the property of somebody else. Since slaves were also human beings, an inherent ambivalence was inextricably connected to the Roman conception of slavery. The Romans did not have any moral objections to slavery, however, and did not feel the need to grant slaves at least some legal capacity. Slaves were just res and, therefore, unable to conclude a contract or enter a marriage.*

*The Roman law on slavery did not disappear from Western Europe with the Fall of the Western Roman Empire in the fifth century. Especially in Southern European countries, where slavery persisted until well into the sixteenth century, the Roman notion of slaves as ‘things’ was still adhered to by medieval lawyers. The ambivalence that was so strongly connected to this notion became, however, increasingly problematic under the influence of Christian theology. As a response to this, slaves were granted a certain status as a ‘legal person’, but only in spiritual affairs.*

*In the fifteenth century, Western European countries started to acquire overseas territories, where slavery became an important institution. The rules regulating slavery in most of these colonies were (again) directly influenced by the relevant Roman law provisions. In the overseas territories of Spain and France, the medieval approach to slavery was predominant, meaning that slaves were legally regarded as things, as in Roman law, but at the same time enjoyed some rights as persons, especially in spiritual matters. In the colonies of the Dutch Republic, the influence of Roman law was even stronger. Consequently, slaves remained legally just res.*

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*Obviously, the ambivalence with regard to the status of slaves that was created by the Roman provisions on slavery could only be brought to a solution by prohibiting slavery as it was defined in Roman law.*

## **1. Introduction**

Most societies of the world have been familiar with slaves or the slave-trade at any point in their history.<sup>1)</sup> Japan is no exception to this and in the 16<sup>th</sup> century, Japan even did not escape becoming involved in the global slave trade as a result from its political disunity.<sup>2)</sup> Moreover, until well into the nineteenth century many states were still having legislation dealing with slavery, including Western European countries such as Spain, France and the Netherlands. But when it comes to a comparison of the various legal systems throughout the world dealing with slavery, it should be realised that for most of the Western European countries, legal rules with regard to slavery were strongly influenced by Roman law. The most salient detail of Roman law was that slaves were regarded as *res*, things, subjected to the rules of property. It should be noted that this definition of slaves as property created a fundamental ambivalence, since slaves were, of course, also human beings. It is the purpose of this essay to describe how this ambivalence was dealt with, both in the Roman Empire and in some Western European countries and their overseas territories. Since the reception of Roman law was particularly extensive in the Dutch Republic, special attention will be devoted to that country.

## **2. Roman law on slavery: the origin of a fundamental ambivalence**

Although the Roman Empire was greatly admired in Western countries for its cultural, architectural and legal achievements, and probably rightly so, one should not forget that it was also a society that rested heavily on slavery.<sup>3)</sup> Economically, the Roman Empire was predominantly agricultural where landholding was of the utmost importance. As a result, agricultural slavery predominated, but slaves were important for domestic services as well. In addition, slavery became an integral

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- 1) D.B. Davis, *The problem of slavery in Western culture* (Ithaca 1966). W.D. Phillips, jr. *Slavery from Roman times to the early Transatlantic trade* (Minneapolis 1985), who deals with slavery in Europe, Africa and the Islamic world. J.L. Watson (ed.), *Asian and African systems of slavery* (Oxford 1980).
  - 2) Cf. T. Nelson, 'Slavery in medieval Japan' in: *Monumenta Nipponica* 59/4 (2004), 463-492.
  - 3) J. Bodel, 'Slave Labour and Roman society' in: K. Bradley/P. Cartledge (eds.), *The Cambridge World History of Slavery I: The ancient Mediterranean World* (Cambridge 2011), 311-336.

part of the cultural ideology of the Roman slave-owning classes. It was, therefore, very fortuitous, that Rome was almost constantly at war, because this secured a continuous influx of slaves necessary to complement the natural reproduction of the existing slave population.<sup>4)</sup> Consequently, slaves constituted a substantial part of the assets of a rich Roman family and, as a result, the Roman law on slavery was highly developed. Since most European countries were greatly influenced by Roman law, they also had access to these readymade rules on slavery.

For reasons that need not detain us here, Roman law exerted most of its influence on the European legal systems through the *Corpus Iuris Civilis*, and more specifically through the *Digest*, promulgated in 533 AD by Emperor Justinian. One of the core legal provisions in the *Digest* on the position of slaves is D. 1,5,4 (Florentinus libro nono institutionum), a text taken from the *Institutes* written by the Roman lawyer Florentinus. Florentinus, whose full name remains unknown, worked at the earliest during the reign of Emperor Marcus Aurelius (121-180), but more likely somewhat later, and probably in the Eastern part of the Roman Empire.<sup>5)</sup> The full text of D. 1,5,4 reads as follows:

‘Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur.

1. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.
2. Servi ex eo appellati sunt quod imperatores captivos vendere ac per hoc servare nec occidere solent.
3. Mancipia vero dicta, quod ab hostibus manu capiantur.’

At the end of the twentieth century, this text has been translated by D.N. MacCormick, as part of a complete English-language edition of the *Digest*.<sup>6)</sup> It reads as follows:

‘Freedom is one’s natural power of doing what one pleases, save insofar as it

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4) W. Scheidel, ‘The Roman slave supply’ in: K. Bradley/P. Cartledge (eds.), *The Cambridge World History of Slavery I: The ancient Mediterranean World* (Cambridge 2011), 287-310.

5) W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (Graz/Vienna/Cologne 1967<sup>2</sup>), 217. K. Sallmann (ed.), *Die Literatur des Umbruchs von der römischen zur christlichen Literatur 117-284 n. Chr.* (Munich 1997), 206-207. See on the *Institutes* of Florentinus: F. Wieacker, *Textstufen klassischer Juristen* (Göttingen 1960), 199-202.

6) A. Watson (ed.), *The Digest of Justinian* vol.1 (Philadelphia 1998 (1<sup>st</sup> ed. 1985)), 15.

is rules out either by coercion or by law.

1. Slavery is an institution of the *ius gentium*, whereby someone is against nature made subject to the ownership of another.
2. Slaves (*servi*) are so-called, because generals have a custom of selling their prisoners and thereby *preserving* rather than killing them.
3. And indeed they are said to be *mancipia*, because they are *captives* in the hand (*manus*) of their enemies.’

For the purpose of this essay, the translation of the line sub (1) is of special interest, since there, the words ‘dominio alieno (...) subicitur’ determine the legal status of a slave. By using the term ‘ownership’ in his translation, MacCormick clearly tied in with the Roman view on the position of slaves as property.

In the early twentieth century, however, the same text of Florentinus has also been translated into English by Samuel Parsons Scott (1846-1929). Scott chose to translate these words by ‘subjected to the control of another’, which derived the text of any specific reference to property.<sup>7)</sup> For reasons of comparison, it is useful to note that the text of Florentinus can also be found in another part of the Justinian legislation, viz. his *Institutes*, as Inst. 1,3,1-3, in only slightly different wording.<sup>8)</sup> Inst. 1,3,2 is even practically the same as D. 1,5,4 sub (1), viz.: ‘Servitus autem est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur’. Scott translated this line of the *Institutes*, quite consistently, as ‘Slavery is a provision of the Law of Nations by means of which one person is subjected to the authority of another, contrary to nature’. Again, by translating ‘dominio alieno (...) subicitur’ as ‘subjected to the authority of another’ any reference to property is lacking.

Since the 1990s, a Dutch edition of the *Corpus Iuris Civilis* has been published as well, providing us with the Latin text and next to it a Dutch translation of both the *Institutes* of Justinian and the *Digest*. A comparison of the translation in this Dutch edition of D. 1,5,4 sub (1) with that of Inst. 1,3,2 shows a remarkable difference.<sup>9)</sup> In the relevant text of the *Institutes*, the approach of Scott is followed,

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7) S.C. Scott, *Civil Law* vol. II (Cincinnati 1932).

8) Cf. for the origin and a comparison of both texts: E.J.H. Schrage, *Libertas est facultas naturalis. Menselijke vrijheid in een tekst van de Romeinse jurist Florentinus* (Leiden 1975), 1-48. In this study, the focus is on the first line of the text of Florentinus.

9) J.E. Spruit/R. Feenstra/K.E.M. Bongenaar (eds.), *Corpus Iuris Civilis, Tekst en Vertaling I: Instituten* (Amsterdam 2008<sup>2</sup>), II: *Digesta I-X* (Zutphen 1994).

meaning that 'dominium' is translated with a Dutch word equivalent to 'control' or 'authority', viz. 'heerschappij'.<sup>10)</sup> However, in the relevant text of the *Digest*, 'dominium' is translated using the word 'eigendomsrecht', which means 'ownership' or 'proprietorship'. This is in accordance with the translation by MacCormick.

It will be argued in this essay that the discrepancy between the translation into English of D. 1,5,4 by MacCormick and the translation by Scott, as well as the difference between the translation into Dutch of D. 1,5,4 and of Inst. 1,3,2 should be seen as resulting from the ambivalence which is inseparably linked to the Roman law institution of slavery.<sup>11)</sup> On the one hand, a slave was regarded as an object that can be subjected to ownership, but on the other hand, it was difficult to deny that slaves had human features and emotions.<sup>12)</sup> It should be realised that at least in Roman times it was perfectly well possible that an emancipated slave was immediately admitted to Roman citizenship.<sup>13)</sup> At that moment he stopped being an object, and became a full citizen with complete legal capacity. Given this ambivalent position of a slave, it could be tempting to downgrade the property-side of a slave in the legal description of slavery, and instead suggest that slavery was just a special kind of labour relation between persons. This was especially the case where moral objections to slavery were an issue, as will be shown later.

The Romans themselves probably did not have much difficulty with the ambivalence with regard to the status of slaves. This may be connected to the fact that they had hardly any moral objections to the existence of slavery. The Romans regarded slavery as a common institution that was accepted by all nations, and was therefore regulated by the *ius gentium*. Being subjected to slavery was just an unfortunate twist of fate that could happen to anyone.<sup>14)</sup> It could even befall

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10) Spruit/Feenstra/Bongenaar (eds.), *Corpus Iuris Civilis, Tekst en Vertaling* I: *Instituten*, 16, and II: *Digesta* I-X, 113. All translations from Dutch into English are mine, unless otherwise stated.

11) Davis, *The problem of slavery*, 62-63.

12) A. Watson, *Slave law in the Americas* (Athens/London 1989), 32-33. L. Oppenheim, 'The law of slaves – A comparative study of the Roman and Louisiana systems' in: *Tulane Law Review* 14 (1939-1940), 384-406 (387 and 392).

13) W.W. Buckland, *The Roman law of slavery. The condition of the slave in private law from Augustus to Justinian* (Cambridge 1908), 5.

14) A. Watson, *Roman slave law* (Baltimore/London 1987), 3. See also J.K. Schafer, 'Roman roots of the Louisiana law of slavery: emancipation in American Louisiana, 1803-1857' in: *Louisiana Law Review* 56 (1995-1996), 409-422 (410).

highly educated Romans. Admittedly, in the text of Florentinus cited above it is stated that slavery was ‘contra naturam’, but it is unlikely that this is a reference to a *ius naturale*, or natural law, with any moral significance. It has been argued that it is just an acknowledgment of the fact that nature does not know slavery, because in the state of nature ‘freedom’ is the normal condition of creatures.<sup>15)</sup> Besides, this recognition implied already a timid step forward in comparison to the opinions of the Greek philosophers Plato (ca. 425 - ca. 348 BC) and Aristotle (384 - 322 BC), who both regarded slavery as ‘natural’.<sup>16)</sup> In any event, the Romans did not draw any practical consequences from the assessment that slavery was ‘against nature’, not even famous Roman stoic philosophers, such as Cicero (106 BC - 43 BC) and Seneca (4 BC - 65 AD).<sup>17)</sup> For them, the most important thing for an individual was to learn to control his emotions in order to be able to keep his equilibrium when faced with the inevitable adversities of life. So, lack of self-control was worse than slavery, or, as Seneca wrote to Lucilius, ‘no servitude is more disgraceful than that which is self-imposed’.<sup>18)</sup>

As a result of their view on slavery, the Romans regarded slaves as belonging unequivocally to the legal category of *res*, or ‘things’, albeit of a special kind, viz. humans. They were thus subjected to all regulations with regard to *res*.<sup>19)</sup> This meant that slaves lacked any competence to exert rights and they were, for example, unable to conclude a marriage. It is true that, sometimes, slaves were allowed a *peculium*, especially when they were in any way engaged in commerce. Although this *peculium* was usually spoken of as *de facto* the property of the slave, it nevertheless legally belonged to the owner of the slave.<sup>20)</sup> The slave thus

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15) Watson, *Slave law in the Americas*, 116-117. Cf. also Schrage, *Libertas*, 43-44.

16) Davis, *The problem of slavery*, 66-72.

17) Davis, *The problem of slavery*, 76-78. N. Morley, ‘Slavery under the Principate’ in: K. Bradley/P. Cartledge (eds.), *The Cambridge World History of Slavery I: The ancient Mediterranean World* (Cambridge 2011), 265-286 (275). See also: C. Verlinden, *L’esclavage dans L’Europe médiévale I: Péninsule Ibérique – France* (Bruges 1955), 30-31.

18) Seneca minor, *Epistolae ad Lucilium* VI, 47, 17: ‘nulla servitus turpior est quam voluntaria’. Cf. also Ibidem, VI, 47,1: “‘Servi sunt.’ Immo conservi, si cogitaveris tantundem in utrosque licere fortunae’, or “‘Slaves!’” No, they are our fellow-slaves, if one reflects that Fortune has equal rights over slaves and free men alike’. The translations are from R.M. Gummere, *Moral letters to Lucilius* 1 (Cambridge, Mass. 1917).

19) Cf. J.F. Gardner, ‘Slavery and Roman law’ in: K. Bradley/P. Cartledge (eds.), *The Cambridge World History of Slavery I: The ancient Mediterranean World* (Cambridge 2011), 414-437 (436).

20) Buckland, *The Roman law of slavery*, 187.

lacked any legal capacity of his own to dispose of this *peculium*. Consequently, the translation of ‘dominium’ into ‘property’ is suited better to the quite accurate terminology of the Roman lawyers than the translations into ‘control’ or ‘authority’. Buckland provides us with a clear illustration of this, where he points out that a slave who has been abandoned by his owner did not become a free person, but a *res nullius*, a thing that belonged to nobody. The slave could, then, be acquired by a new owner through *usucapio*, thus by being taken into possession.<sup>21)</sup>

### 3. The reception of Roman law on slavery in Western Europe and its overseas territories

#### 3.1 Reception in Western Europe

In the early Middle Ages, considerable changes occurred with regard to slavery in Europe, most of them connected to the demise of the (West) Roman Empire. After the fall of this Empire in the fifth century, cities imploded, money became scarce and mobility decreased.<sup>22)</sup> As a result of this, people were reduced to the status of ‘villains’ in large numbers. These ‘villains’ were inextricably linked to the land on which they lived. They were thus subjected to the authority of those who owned the land. These people were in principle not equated with slaves, however, although they were sometimes referred to as ‘serfs’, which is related to Latin word ‘servus’. For that reason, one should not too easily assume that in medieval times the term ‘servus’ had the same specific meaning as in the Roman era.<sup>23)</sup> It is generally accepted, therefore, that in this early-medieval period there still existed, alongside these ‘serfs’, slaves who were regarded as ‘property’ in more or less the Roman sense.<sup>24)</sup> For them, the word ‘sclavus’ could be used.

Despite this co-existence of ‘serfs’ and ‘slaves’, there is no evidence that in the early Middle Ages a rigid distinction was made on account of the term

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21) Buckland, *The Roman law of slavery*, 2.

22) E. Hamann, *Die Begründung des Sklavenstatus bei den Postglossatoren. Die Frage nach der Rezeption römischen Sklavenrechts* (Hamburg 2011), 21-22.

23) J. Hallebeek, ‘De slavernij gerechtvaardigd? Over menselijke vrijheid en natuurrecht bij Thomas van Aquino’ in: *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie* 8 (1979), 35-41 (37-38). H. Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter. Germanisches und römisches Recht in den Germanischen Rechtsaufzeichnungen I: Ostgoten, Westgoten, Franken, Langobarden* (Göttingen/Frankfurt/Zürich 1972), 58-61.

24) Hamann, *Die Begründung*, 24-26 and 65-70. Schrage, *Libertas*, 69-70. See for England: D. A.E. Pelteret, *Slavery in early mediaeval England* (Woodbridge 1995), 1-4 and 241-246.



‘dominium’ between the slave as a ‘thing’ and the slave as a ‘person’. This is also true for the period after about 1050, in which the text of Florentinus was reintroduced in the West as a result of the reception of the *Corpus Iuris Civilis*. The absence of such a discussion on the exact meaning of the term ‘dominium’ could be explained by the fact that, along with fall of the Empire itself, the formalism that was so characteristic of Roman legal thinking collapsed as well. In addition, Christianity could have played a role in mitigating the rigid Roman distinction. It is true that the famous Italian theologian and philosopher Thomas Aquinas (1225-1274) accepted, in line with the opinion of Roman lawyers, that slavery was contrary to natural law, but that it nevertheless also was a useful legal instrument derived from the *ius gentium*.<sup>25)</sup> However, Aquinas argued at the same time, unlike Roman lawyers, that in spiritual affairs slaves were not subjected, and that they, therefore, were able to enter a marriage.

Obviously, in this period, slavery along Roman lines was still in existence in Europe, at least in the southern parts. This is also evident from the *Siete Partidas*, the well-known Castilian legislation of the thirteenth century that was based on the *Corpus Iuris Civilis*. Indeed, several provisions of Roman law on the subject of slavery were included in the *Siete Partidas*, albeit in a way that corresponded to the views of Thomas Aquinas. This implied that in the *Siete Partidas*, too, slaves were regarded as things subjected to the rules of property, but that at the same time they were recognised as persons by granting them the right to marry.<sup>26)</sup>

At the end of the Middle Ages, Roman law also started to pervade gradually the legal systems of Northern Europe, although not everywhere to the same degree. England managed for the most part to stay aloof from the phenomenon of reception. In France, adherence to the own customary laws remained strong despite the substantial influence of Roman law. The situation was, however, different for the Holy Roman Empire, which at that time included the territories of the Dutch Republic that was about to be created in the course of the sixteenth century. There, Roman law became to be recognised as one of the most important sources of law. But even in these territories, at first, there seem to have been no place for the Roman legal provisions on slavery. After all, in the Dutch territories, as in the other parts of Northern Europe, slavery had already disappeared

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25) Hallebeek, ‘De slavernij gerechtvaardigd?’, 36-37.

26) See *Siete Partidas* part 4, title 5, which is devoted to the marriage of slaves. See also E.N. van Kleffens, *Hispanic law until the end of the Middle Ages* (Edinburgh 1968), 199-200, 337 and 341-342.

completely since the thirteenth century, so long before the reception of Roman law took place there.<sup>27)</sup> Exemplary is a remark by the lawyer Simon van Leeuwen (1626-1682), who wrote in 1656 with regard to the Province of Holland that 'slavery and serfs are completely unknown and in disuse here'.<sup>28)</sup> It is remarkable that in the Province of Holland, slavery seems also not to have been recognised as a legitimate legal instrument if the slave belonged to another jurisdiction. In any case, Van Leeuwen noted that if slaves from elsewhere arrived within the borders of the Province of Holland, they would be declared free persons because of their 'natural freedom', even if this was against the will of their masters.<sup>29)</sup>

### 3.2 Reception in the overseas territories

From the early sixteenth century onwards, the southern countries Spain and Portugal were already acquiring colonies, resulting in a worldwide colonial empire. Since slavery was at that time still in use in Spain and Portugal, it is hardly surprising that the existing laws on slavery, for example the relevant provisions of the *Siete Partidas*, were also made available for the overseas territories.<sup>30)</sup> Since in Northern Europe, countries were lagging behind almost a century in the process of colonisation, the development of the law on slavery was quite different. After all, when these Northern countries started to conquer colonies, more often than not during wars with Spain and Portugal, slavery was an institution they were no longer familiar with.<sup>31)</sup> The law in these countries was

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27) Hamann, *Die Begründung*, 26-27.

28) S. van Leeuwen, *Paratitla Juris Novissimi, dat is, Een kort begrip van het Rooms-Hollands-Recht* (Leiden 1656), 17: 'De slavernye ende de lijf-eygenen zijn by ons t'eenemaal onbekent ende in ongebruyck'. Cf. also S. à Groenewegen van der Made, *Tractatus de legibus abrogatis in Hollandia vicinisque regionibus* I, 12-13, and II, 3, 31 and 112 (Amsterdam 1669; edited and translated into Dutch by B. Beinart: Johannesburg 1974/1975).

29) Van Leeuwen, *Paratitla Juris Novissimi*, 17: 'naturlijcke vryheydt'.

30) Cf. W.D. Phillips, jr. *Slavery from Roman times to the early Transatlantic trade* (Minneapolis 1985), 107. The *Siete Partidas* were declared applicable for the overseas territories by the Spanish King Charles I (also known as Emperor Charles V) in 1530. Cf. J. H. Abendenon, 'Het oud Spaansch koloniaal stelsel zooals dit is nedergelegd in de "Leyes de Indias"' in: *Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië* 79 (1923), 73-197 (152-153).

31) Cf. for England: S.M. Wise, *Though the heavens may fall. The landmark trial that led to the end of human slavery* (Cambridge MA 2005). J. Nadelhaft, 'The Somersett case and slavery: myth, reality, and repercussions' in: *The Journal of Negro History* 51 (1966), 193-208. W.M. Wiecek, 'Somerset: Lord Mansfield and the legitimacy of slavery in the Anglo-American world' in: *University of Chicago Law Review* 42 (1974-1975), 86-146. Cf. for France: S.

sometimes even hostile to the phenomenon, as the Dutch example shows. In the course of the seventeenth century, however, lawyers of several countries in Northern Europe started to review their position on the phenomenon of slavery, because of its introduction in their overseas territories.

Given the reticence in England and France as regards the reception of Roman law, as described earlier, it is easy to understand that a direct application of the Roman provisions on slavery, such as the text of Florentinus cited above, was unlikely there. Instead, in these countries, it was decided to lay down the rules on slavery in special legislation.<sup>32)</sup> Although in neither of these countries, Roman law was accepted as a formal source of law, there is no doubt that it exerted some influence on these specially enacted rules.<sup>33)</sup>

For the English colonies, this resulted in a gradual deprivation of the rights of black persons, as can be illustrated by the example of Virginia.<sup>34)</sup> Between 1658 and 1666, measures were adopted making life servitude of slaves possible, followed by a decision in 1692, denying them the right to a jury in capital criminal cases. In 1705, the process of legalising slavery was completed by enacting that slaves were considered real property. From that moment on, they did not have any legal capacity, not even the right to own small property. As a matter of course, they were also barred from marriage.

For the French colonies, the special legislation was mostly enacted in the *Code Noir*, which was promulgated in March 1685.<sup>35)</sup> The influence of Roman law on this *Code Noir* is undeniable, as is demonstrated by Article 44, which reads: 'Déclarons les esclaves être meubles'. However, this provision was not as strictly maintained as by the Roman lawyers. In fact, in the same *Code Noir*, marriages

Peabody, "There are no slaves in France". *The political culture of race and slavery in the Ancien Régime* (New York/Oxford 1996).

32) Watson, *Slave law in the Americas*, 63-90.

33) Watson, *Slave law in the Americas*, 65. Schafer, 'Roman roots of the Louisiana law of slavery', 409-422. Cf. also T.N. Ingersoll, 'Slave Codes and judicial practice in New Orleans, 1718-1807' in: *Law and History Review* 13/1 (1995), 23-62. Oppenheim, 'The law of slaves – A comparative study of the Roman and Louisiana systems', 384-406.

34) C.E. Jewett/J.O. Allen, *Slavery in the South. A State-by-State History* (Westport, Conn./London 2004), 257-279. E.S. Morgan, *American slavery American freedom. The ordeal of colonial Virginia* (New York 1975), 154-155, 216-217 and 331-333. See also W.W. Hening, *Statutes at Large; Being a collection of all the laws of Virginia* (Richmond, Va. 1809-1823) volume 3, 102-103 and 333.

35) Watson, *Slave law in the Americas*, 86.

between slaves were recognised. The consequence of such a marriage was, for example, that husband, wife and children, if applicable, could not be sold separately.<sup>36)</sup> As in the Middle Ages and unlike in the Roman era, slaves were not just regarded as property, but, to a very limited extent, also as persons. It resembles the attitude of Thomas Aquinas with regard to the ambivalence as to the status of slaves, which is hardly surprising, since France was a predominantly Roman Catholic country.

In the Dutch Republic, too, the unconditional rejection of slavery was attenuated in the course of the seventeenth century, because of the fact that slavery became an increasingly important phenomenon in the overseas territories that were acquired by the Republic in this period. Since in this Republic the reception of Roman law had been extensive, it seems obvious to look there for a revival of D. 1,5,4. And indeed, the Roman law on slavery was introduced as such in the Dutch colonies. As early as 1636, the Estates General, which was the highest legislative body for the overseas territories of the Dutch Republic, promulgated a provision for the colonies stating that ‘all the laws and constitutions of the “ghemeyne Rechten” [the ‘common law’, that is the *Corpus Iuris Civilis*] with regard to slaves and unfree persons will be applicable’.<sup>37)</sup>

Moreover, Roman law was actually applied with regard to the status of slaves in the overseas territories of the Dutch Republic, as is illustrated by a decision of the Supreme Court of the Provinces of Holland and Zeeland of 3 July 1736. It is described by Cornelis van Bijkershoek (1673-1743), who had been a judge at that court, in his *Observationes Tumultuariæ*.<sup>38)</sup> To fully understand this case, it is necessary to note that introducing slavery in the overseas territories could result in some interesting legal problems if a slave, for whatever reason, ended up in the

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36) See Articles 10-13 and 47 of the *Code Noir*.

37) ‘Instructie, van de Ho. Mo. Heeren Staten Generael’ of 23 August 1636, Article 86: ‘Ende sullen in haer reguard plaetse hebben alle de Wetten ende constitutien by de ghemeyne Rechten, wegen de Slaven ende onvrye Luyden gestatueerd’. Printed in *Groot Plakkaat Boek II* (The Hague 1664), 1261. Cf. also the ‘Ordre van Regieringe soo in Policie als Iustitie’ of 13 October 1629, Article 61. Printed in *Groot Plakkaat Boek II* (The Hague 1664), 1245. E. van Zurck, *Codex Batavus* (Rotterdam 1757), 1066-1067.

38) C. van Bijkershoek, *Observationes Tumultuariæ* 4 (Haarlem 1962; E.M. Meijers/H.F.W.D. Fischer/M.S. van Oosten eds.), nr. 2966 (pp. 41-42). See on this source: M.S. van Oosten, *Systematisch Compendium der Observationes Tumultuariæ van Cornelis van Bijkershoek* (Haarlem 1962), 1. All translations from Latin into English are mine, unless stated otherwise.

European motherland. In this case, the plaintiff stated that he could reclaim his slave Pamphilus, who had fled from his custody in the Netherlands, and return him to the colony of Curaçao. In favour of Pamphilus, it was argued that he was a free person, ‘cum ratio libertatem suadeat, et servitus sit contra naturam’, that is ‘because the ratio called for to freedom and that slavery was contrary to nature’.<sup>39)</sup> This argument even seems to include reference to the text of Florentinus, albeit in quite a different meaning. In addition, it was held that ‘even animals that escaped the custody of their captors regained their freedom’, or, as the Latin reads, ‘ut ferae, quae capientis custodiam evaserunt, libertatem recipiunt’.<sup>40)</sup> Although the District Court of Amsterdam, the court of first instance, had denied the claim, the Supreme Court felt obliged to decide in favour of the plaintiff, ‘tandem quia haec et aliae coloniae necessario indigent servis, sine quibus res coloniarum expediri non possunt’, that is, ‘because without the institution of slavery, business in the colonies could not be continued’.<sup>41)</sup>

To substantiate this decision legally, the court established that the provisions of Roman law on slavery were as such applicable in the colonies, which meant that the plaintiff could, in principle, reclaim Pamphilus. This was in accordance with the legislative measure of the Estates General of 1636, just mentioned. The next problem the Supreme Court had to face resulted from the remark by Simon van Leeuwen, quoted above, that slaves who came to the Province of Holland ‘from elsewhere’ would be declared free persons because of their ‘natural freedom’. The Supreme Court solved this problem by arguing that Curaçao did not constitute another country, because it also fell under the authority of the Estates General. The Supreme Court concluded that, therefore, Pamphilus had not come ‘from elsewhere’ to the Republic.

As a result of this legal development, legal treatises of the late eighteenth and early nineteenth centuries could no longer claim that the Dutch Republic did not know slavery. In 1806, Joannes van der Linden (1756-1832), a lawyer from Amsterdam, still wrote in accordance with Simon van Leeuwen that ‘the distinction between *free persons* and *slaves*, which is so important in Roman law, is not applicable in our country: all people in this country are born free; slavery does not exist here’.<sup>42)</sup> Van der Linden also followed Van Leeuwen stating that

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39) Van Bijckershoek, *Observationes Tumultuariae* 4, nr. 2966 (p. 41).

40) Van Bijckershoek, *Observationes Tumultuariae* 4, nr. 2966 (p. 41).

41) Van Bijckershoek, *Observationes Tumultuariae* 4, nr. 2966 (p. 41).

42) J. van der Linden, *Regtsgeleerd practicaal en Koopmanshandboek* (Amsterdam 1806), 10: ‘Het onderscheid tusschen *vrijen* en *slaven*, het welk in de Romeinsche Rechtsgeleerdheid

‘slaves who came from the Dutch Indies to the Netherlands were set free immediately’. Van der Linden, however, had to include an exception in line with the decision of the Supreme Court: ‘provided they had not fled from their owners’.<sup>43)</sup> Even with this last exception, however, the description of the legal situation of slaves in the European part of the Republic was not completely accurate. The fact is that in 1776, the Estates General had adopted legislation stating that even slaves that had come to the European motherland with the consent of their masters retained the status of ‘slave’ for another six months.<sup>44)</sup>

Given the fact that the provisions of Roman law with regard to slavery were enforced as such in their entirety in the Dutch overseas territories, it is to be expected that the rigid Roman law approach as to the status of slaves was also adhered to.<sup>45)</sup> This would imply that slaves were regarded as just *res*, completely subjected to the ownership of their proprietors. And indeed, in the provisions of the regulation issued by the Estates General in 1776, mentioned earlier, the master of a slave was consistently referred to as the ‘owner’ and for slaves the term ‘goods’ was used.<sup>46)</sup> Sometimes D. 1,5,4 even surfaced, for example in a description by Daniel Denyssen (ca. 1773 - 1855) of the status of slaves in the Dutch colony of Cape of Good Hope, situated in present day South Africa.<sup>47)</sup>

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zulk een uitgebreid vak oplevert, komt in ons Land niet te pas: alle menschen worden in dit Land vrij geboren; de slavernij is hier te lande niet in gebruik’.

43) Van der Linden, *Regtsgeleerd practicaal en Koopmanshandboek*, 10: ‘ja zelfs alle slaven, die uit de Indiën in dit Land komen, worden dadelijk vrij; mits zij niet van hunne eigenaaren zijn weggelopen’. Cf. A.H. Huussen jr, ‘De staatsregeling van 1798 en het slavernijvraagstuk’ in: O. Moorman van Kappen/E.C. Koppens (eds.), *De Staatsregeling voor het Bataafsche Volk van 1798* (Nijmegen 2001), 213-232.

44) ‘Placaat van de Staaten Generaal, omtrent de Vryheid der Neger- en andere Slaaven, welke uit de Colonien van den Staat naar dese Landen overgebracht of overgesonden worden’. Printed in: *Groot Plakkaat Boek IX* (Amsterdam 1796), 526-528. See for the position of slaves coming from the Dutch colonies to the European motherland also: E. Maduro, ‘Nos a bai Hulanda. Antillianen in Nederland, 1634-1954’ in: G. Oostindie/E. Maduro, *In het land van de overheerser II: Antillianen en Surinamers in Nederland 1634/1667-1954* (Dordrecht 1986), 133-244 (153-164). R. Buve, ‘Surinaamse slaven en vrije negers in Amsterdam gedurende de achttiende eeuw’ in: *Bijdragen tot de Taal-, Land- en Volkenkunde* 119 (1963), 8-17 (12 and 15).

45) A.J.M. Kunst, *Recht, commercie en kolonialisme in West-Indië* (Zutphen 1981), 24 and 129-130.

46) ‘Placaat van de Staaten Generaal, omtrent de Vryheid der Neger- en andere Slaaven’, 527: ‘eigenaar’ and ‘goederen’.

47) Denyssen, ‘Letter from the Fiscal Denyssen to Sir John Cradock, 16 March 1813’ in: G.M. Theal, *Records of the Cape Colony from October 1812 to April 1814 Part 9* (1901), 143-161.

During one of the Napoleonic wars (1799-1815), Britain had seized the colony and needed an overview of the status of their newly acquired territory. In 1813, Denyssen, a (Dutch) government official who received his doctorate in 1799 from the University of Leiden in the Netherlands, produced a report on slavery for the new British rulers. In that report, Denyssen followed the Roman law provision closely and concluded that slaves were the property of their masters. With a reference to D. 1,5,4, Denyssen wrote: 'Slaves are the property of their owners and consequently they stand under the voluntary command of their masters, can be alienated at pleasure, and on the death of the owner devolve in property to the legal successor'.<sup>48)</sup>

It is undeniable that he was aware of the ambivalence that is so closely connected to the concept of slavery in Roman law. Denyssen, therefore, took also notice of the fact that the Romans had described slavery as 'a state contrary to nature'.<sup>49)</sup> However, unlike the Romans, Denyssen read a moral significance to the words 'contra naturam'. He not only remarked that slavery as such was 'contrary to the principles of the law of nature', but also stated that it was 'an evil in Society'.<sup>50)</sup> He even felt obliged to remark that 'the laws which allow slavery do not however allow that we are to discontinue considering slaves as our fellow creatures'.<sup>51)</sup>

In the end, however, these remarks did not result in any change with regard to the legal status of a slave as an object of 'property'. Denyssen noted that insofar as the power of masters over their slaves was not restricted by laws, they remained, as owners, 'free and independent'. Like in the Roman era, the slave was just a 'thing' and could therefore not be, at the same time, a person with any legal capacity. 'Slaves', Denyssen consequently wrote, 'have not any of those rights and privileges which distinguish the state of the free in civil society' and they could, therefore, not enter a marriage.<sup>52)</sup>

Interestingly, there is also another description of the status of slaves in the Cape Colony, until the abolition of slavery in that colony in 1834.<sup>53)</sup> It was written

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48) Denyssen, 'Letter', 147.

49) Denyssen, 'Letter', 146. Denyssen referred to Inst. 1.3.

50) Denyssen, 'Letter', 143. See also: G.J. Schutte, 'Zedelijke verplichting en gezonde staatkunde. Denken en doen rondom slavernij in Nederland en koloniën eind 18<sup>e</sup> eeuw' in: *Documentatieblad Werkgroep Achttiende Eeuw* 41-42 (1979), 101-111.

51) Denyssen, 'Letter', 147.

52) Denyssen, 'Letter', 150.

53) C.G. Botha, 'Slavery at the Cape' in: *South African Law Journal* 50/4 (1933), 4-12 (5).

in 1933 by Colin Graham Botha (1883-1973), who had studied law in Cape Town and subsequently had become the head of the National Archives there in 1912. Although his description was predominantly based on the report of Denysen, Botha tried to play down the rigid Roman law designation of slaves as just *res* in the Cape Colony. ‘Though slaves are generally described as the property of their “owners”’, he remarked with a reference to D. 1,5,4, ‘the law as administered at the Cape does not seem to have regarded them as entirely in the category of “things”’. It is not entirely clear why Botha chose to give such a different description, but it is not unlikely that moral aspects played a role. It should also be noted, however, that since the seizure of the Cape Colony by the British, there had been a strong influence of the *common law* and that lawyers brought up in that legal system were not very familiar with the rigid Roman law approach of property.

In the middle of the nineteenth century, the text of Florentinus also proved useful in the Dutch colonies in the West-Indies, viz. Surinam and the Dutch Antilles, in a debate over the status of slaves. The strict application of Roman law provisions resulting in categorically regarding slaves as just things increasingly lead to moral uneasiness. To respond to this, the Dutch government included an interesting provision, Article 117, in their *Regulations on the Policy of the Government in the Dutch West-Indies* (1828), declaring that ‘with respect to their daily treatment, the relation between slaves and their owners will be comparable to the relation between underage persons and their trustees or legal guardians’.<sup>54)</sup> In the same provision, it was also stated that ‘the unjustified principle that at law slaves can only be regarded as things and not as persons is permanently abolished’. It should be noted, however, that Article 117 *Regulations* did not put an end to the legal status of slaves as ‘things’. This became clear in 1838, in a discussion on the requirements for the acquisition of Dutch citizenship.<sup>55)</sup>

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54) The Regulations were printed in the *Surinaamsche Almanak voor het jaar 1829* (s.l. 1828), 104-153, as *Reglement op het Beleid der Regering in de Nederlandsche West-Indische bezittingen*. The Dutch version of the citations reads: ‘De slaven zullen, wat de dagelijksche behandeling betreft, in betrekking tot hunne eigenaars beschouwd worden te staan als *onmondigen* tot hunne *Curators* of *Voogden*’ followed by ‘wordende bij deze het onregtvaardig beginsel, dat zij [slaven] in regten alleen als zaken en niet als personen kunnen beschouwd worden, definitieflijk afgeschaft’. Cf. also for art. 117 *Reglement*: R.A. Römer, ‘Slavernij en slavenwetgeving in de kolonie Curaçao’ in: *Het oog van de meester. Opstellen aangeboden aan mr. C.E. Dip* (Curaçao 1989), 177-210 (189-190).

55) J.C. Voorduin, *Geschiedenis en beginselen der Nederlandsche wetboeken* II (Utrecht 1837), 28-29.



According to Article 5 of the Dutch Civil code of 1838, children born of parents domiciled in the Kingdom or its overseas territories would be granted Dutch citizenship. Some Members of Parliament suggested the removal of the reference to the overseas territories, fearing that otherwise children of slaves would be able to acquire the status of Dutch citizen. The Dutch Government responded that it was impossible for children of slaves to become Dutch citizens, because slaves could not have a domicile. After all, the Government argued, ‘they were the property of their masters. *Non sunt personae sed res*, (they are not persons, but things)’.<sup>56)</sup> Obviously, Article 117 *Regulations* just reminded the owners of the fact that slaves were human beings and should, therefore, not be maltreated. It did not grant slaves any legal capacity as persons and they remained, consequently, unable to enter a legally acknowledged marriage.<sup>57)</sup>

Nevertheless, two and a half decades later, the official Government Committee on Slavery felt obliged to write a devastating comment on this half-hearted attempt to deal with the ambivalent nature of slaves that resulted from the Roman law conception of slavery.<sup>58)</sup> According to the commission, Article 117 *Regulations* showed good intentions on the part of the legislator, but little knowledge of the law and could, therefore, not be applied in practice. In their view, the provision was based ‘on a wrong conception of the fundamental nature of slavery, which, instead, implies that the slave is a *marketable thing*’.<sup>59)</sup> It is remarkable that to underline their point they quoted D. 1,5,4 verbatim. ‘*Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur*’, the Romans were already rightly to note, the Government Committee stated. Again, as in the Cape of Good Hope, the efforts to attenuate for moral reasons the rigid conception of

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56) Voorduin, *Geschiedenis en beginselen*, 29: ‘Zij zijn de eigendom van hunnen meesters. *Non sunt personae sed res*, (zij zijn geene personen, maar zaken)’.

57) Cf. A. Lampe, ‘Christianity and slavery in the Dutch Caribbean’ in: A. Lampe (ed.), *Christianity in the Caribbean: essays on church history* (Kingston 2001), 126-153 (135-136). It should be noted that the Roman Catholic church approved of secretly marrying slave couples in the Dutch West-Indies, but these ‘marriages’ were illegal from the perspective of the civil authorities.

58) *Eerste rapport der Staatscommissie, benoemd bij Koninklijk Besluit van 29 november 1853, nr. 66, tot het voorstellen van maatregelen ten aanzien van de slaven in de Nederlandsche koloniën* (The Hague 1853), 10-11. *Tweede Rapport der Staatscommissie, benoemd bij Koninklijk Besluit van 29 november 1853, nr. 66, tot het voorstellen van maatregelen ten aanzien van de slaven in de Nederlandsche koloniën* (The Hague 1856), 34-35.

59) *Eerste rapport der Staatscommissie*, 10-11: ‘op een verkeerd begrip omtrent het wezen der slavernij, hetwelk juist daarin bestaat dat de slaaf is *eene verhandelbare zaak*’.

slaves as - legally - just *res* were frustrated by referring to the tradition of Roman law as embodied in the text of Florentinus.

#### **4. Concluding remarks: a final solution to the ambivalence**

In Roman law, slaves were regarded as objects that could be the property of somebody else. The Romans also recognised that slaves were human beings, so an inherent ambivalence was inextricably connected to their conception of slavery. Since they did not have any moral objections to slavery, however, they did not feel the need to grant legal capacity to them. Consequently, according to Roman law, slaves were just *res* and were, therefore, unable to conclude a contract, own property or enter a marriage.

In the early Middle Ages, the legal provisions on slavery were still under substantial influence of Roman law, with the exception of England. Consequently, the ambivalence that was inherent to it remained in place in most Western European countries as well. In Christian theology, however, as exemplified by the writings of Thomas Aquinas, this ambivalence became more problematic in the later Middle Ages. As a response to this, slaves were granted a certain status as a 'legal person', but only in spiritual affairs. An important consequence of this was that they were now able to marry. The ambivalence was, of course, not resolved by this measure, because medieval lawyers also kept to the Roman notion of slaves as 'things'.

In most of the overseas territories that were acquired from the fifteenth century onwards by the European countries, except again England, the Roman law on slavery exerted considerable influence. In Spain and France, the medieval approach to slavery as developed by Thomas Aquinas was predominant, meaning that slaves were legally regarded as things, as in Roman law, but at the same time enjoyed some rights as persons, especially in spiritual matters. They had, for example, the capacity to enter a marriage. In the colonies of the Dutch Republic the Roman law tradition was even stronger, as a result of a virtual complete reception. There, the provisions of Roman law on slavery were almost as strictly applied as in the Roman era. Although some attempts were made to attenuate this rigid approach to slavery, Roman law stood in the way of such efforts. Consequently, slaves remained legally just *res* and were thus unable to marry until well into the nineteenth century.

In the end, the ambivalence with regard to the status of slaves that was created by the Roman provisions on slavery could only be brought to a solution by prohibiting slavery as it was defined by Florentinus in D. 1,5,4. In the course of

the nineteenth century, this solution became an option indeed. The institution of slavery became increasingly criticised, and the Western European states decided to ban it. The United Kingdom took the lead by abolishing slavery in its Empire in 1833, followed by France in 1848 and the Netherlands in 1863.<sup>60)</sup> In the early twentieth century, another step was taken towards the worldwide prohibition of slavery, by the signing of the Convention against Slavery that was signed on 25<sup>th</sup> September 1926. The parties to this Treaty agreed, in Article 2, ‘to prevent and suppress the slave trade and to progressively bring about the complete elimination of slavery in all its forms’.<sup>61)</sup> Interestingly, for the purposes of this Convention, ‘slavery’ was defined as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.<sup>62)</sup> Finally, the Roman view on slavery, in which slaves were regarded as property, and the ambivalence that resulted from it were put to rest.

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60) Portugal abolished slavery in its Empire in 1869. In Cuba, a Spanish colony until 1898, slavery persisted until 1886. The Lincoln Proclamation of Emancipation, issued in 1863, heralded the abolition of slavery in the United States of America.

61) As of 2013, 99 countries have committed themselves to the Treaty.

62) See also Article 7 ‘Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’ of 7 September 1956: “‘Slavery’ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and “slave” means a person in such condition or status’.