

## CITIZENSHIP AND RELIGION: INCLUSIONS AND EXCLUSIONS IN THE ANCIENT WORLD\*

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Legal historians believe that the Romans based the existence and use of rights on three broad general categories, which were utilized to include and exclude human beings. These divisions defined a person's legal condition and what the subjects could do, what they could own, what they could attempt to achieve, in what they could succeed, and to what they could be submitted<sup>1</sup>.

The legal terminology that is most frequently used to define these categories is *status*, which means condition or situation. Concerning the *ius Quiritium*, full legal subjects were only those men who benefitted from a position of privilege in terms of their *status personae*, which was tested by three different questions. First, the *status libertatis* investigated whether the person was free, a slave or a *libertus*. Second, the *status civitatis* queried whether he/she was a Roman citizen or a foreigner or "almost Roman". Finally, the *status familiae* addressed questions regarding whether a man is a *pater familias* or a man or woman is *sui iuris* or *alieni iuri subiectus*. All three categories involve a type of conflict that relates to the logical antithesis between the people who are "inside" or "outside" and the natural opposition between the people who are interested in making the fence strong and eternal and the people who, on the contrary, would like to trespass or destroy it<sup>2</sup>.

To analyse the genesis and historical development of these categories, as well as the nature of the conflict that they create, we should attempt to comprehend if and in which way they were effectively understood, accepted and barred in actual life by real people who lived for over a millennium in the vast ancient Roman Empire. The question arises whether these categories were created only for the use and benefit of a small ruling élite, i.e., the Italian aristocracy, or whether through centuries they also formed part of the culture of the large masses of *provinciales*, i.e., the multiform peoples of Mauritania, Gallia, Egypt, and Germania. These people's destiny was to enjoy the *pax Romana*, with its connected benefits and limits, after they had lived through a variety of military and political events in the *limes* – and it remains uncertain whether they were happy about this<sup>3</sup>.

The answer to the above question appears to be simple regarding the *status libertatis* and *status familiae*, although for opposite reasons.

It is well known that all ancient peoples without exception practiced various forms of personal enslavement, which divided all human beings on the basis of Gaius' *summa division*, between *liberi* and *servi* (*Inst.* 1.9-12). Although we know that the forms of coercion an owner could use on an enslaved subject differed widely in place and time, to be enslaved in ancient Israel was unquestionably a lesser evil than to be enslaved in ancient Greece or Rome. In the time of Crassus,

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<sup>1</sup> See F.M. d'Ippolito, F. Lucrezi, *Profilo storico-istituzionale di diritto romano*, III ed. Napoli 2012, 129ff.; Lucrezi, *Al di sopra e al di sotto delle leggi*, in *Sodalitas. Scritti Guarino*, Napoli 1984, 683ss.; Id., *Leges super principem. La "monarchia costituzionale di Vespasiano"*, Napoli 1982.

<sup>2</sup> d'Ippolito, Lucrezi, *op. cit.* 129ff.

<sup>3</sup> d'Ippolito, Lucrezi, *op. cit.* 129ff.

the slave's position was far worse than in the time of Hadrian or Marcus Aurelius<sup>4</sup>. In the ancient world, everyone understood what it meant to be a slave and would do everything possible to avoid this fate. There may have been some exceptions because Plautus wrote that some slaves begged their *dominus* not to free them and abandon them on the road without home, job and assistance.

It is widely believed that the institute of *patria potestas* belonged exclusively to the Roman tradition<sup>5</sup>. *Patria potestas* originated during very ancient times because the *pater familias*, the head of the family, was attributed the role of religious mediator between the world of the living and the world of the dead in the interest of the *familia*, which was considered, as Franco Casavola has said, an "isola sacra", a sacred island<sup>6</sup>. Gaius has proudly emphasized that no other ancient people but the Romans knew this or any similar institution or had ever any interest in following it (*Inst.* 1.55).

For many centuries, only a small part of the population of the Roman Empire built their lives, as individuals and as organized communities, on the strong supremacy of the *pater familias*. Not only was the *pater familias* the owner of the patrimonial property and the holder of subjective rights, he was also the only person who was authorized to exercise power over the individuals under his authority. *Pater familias* could include *fili familias* of fifty or sixty years old, and they may be fathers or grandfathers and consuls or senators; their most extensive powers included an arbitrary *ius vitae ac necis*<sup>7</sup>.

For several centuries, the *patria potestas* generated a hidden, fierce conflict between *patres* and *fili familias*, which reflected the dark "prohibited dream" of the sons to violently overthrow the supremacy of the despot in contrast to the "fear of the fathers". Connected to this conflict was the cruel *supplicium singulare* of the *poena cullei*. This punishment was set for the son who was convicted of murdering his own father, and he was condemned to die by drowning in a horrible animal tangle by being sewn in a sack with a dog, viper, cock and monkey, whose characteristics were all present in him<sup>8</sup>.

However, sons could often obtain significant advantages and benefits from their condition. In contrast, the high number of *emancipationes* demonstrates that many fathers frequently wanted to free themselves from this heavy burden. However, most of the inhabitants of the empire were not concerned with *patria potestas* and many of them likely did not know what it meant. No citizen of Syria, Iberia or Britannia would ever desire to become a *pater familias*.

The *status civitatis* is more complicated because it is not easy to define if, how, when, to what degree, and for which persons or peoples the achievement of the condition of *civis Romanus* could be a goal that involved real privileges.

Many sources depict an image of *civitas Romana* in a rhetorical and propagandistic manner as a condition of superiority, completion and perfection on the civil, cultural and legal levels. This status was progressively and incrementally extended – sometimes passing through the middle *status* of *Latinitas* – to increasingly larger groups of foreigners, *peregrini* and *barbari* to allow them to enjoy the Roman *felicitas* until the ecumenical donation of Antoninus Caracalla. The so-called *constitutio Antoniniana* of 212 A.D. generously extended citizenship to all inhabitants of the empire<sup>9</sup>. However, there are actually no truthful indications that the *peregrini* always strived to achieve the deeply desired goal of the *civitas Romana*. It is more realistic that the ancient sources give us an absolute and untrue picture through an abstract and timeless representation. Without exact frames of

<sup>4</sup> See Lucrezi, *L'uccisione dello schiavo in diritto ebraico e romano. Studi sulla 'Collatio'* I, Torino 2001, *L'uccisione del proprio schiavo nella 'Collatio'*, in *Iuris vincula. Studi Talamanca*, Napoli 2002, *L'asservimento abusivo in diritto ebraico e romano. Studi sulla 'Collatio'* V, Torino 2010.

<sup>5</sup> See d'Ippolito, Lucrezi, *op. cit.* 131ff.

<sup>6</sup> *Fondamenti del diritto antico*, in M.V. del Tufo, F. Lucrezi (Eds.), *Vita/morte. Le origini della civilizzazione antica*, Centro Studi sui Fondamenti del diritto antico, Un. "Suor Orsola Benincasa", Napoli 2015, next publication, and in *Iura & Legal Systems* 2 (2015).

<sup>7</sup> d'Ippolito, Lucrezi, *op. cit.* 132ff.

<sup>8</sup> See Lucrezi, *Senatsconsultum Macedonianum*, Napoli 1992.

<sup>9</sup> d'Ippolito, Lucrezi, *op. cit.* 83f.

time and space, some specific problems of legal capacity and private autonomy have been described and generalized. These problems relate to the acquisition of property and the formation of contracts, which originated and existed only in specific contexts and particular historical times.

As a political problem with wide-ranging implications, the *civitas* question would become prominent for the first time when the *libera res publica* was under threat. Thus, during the *bellum sociale* of 90-89 B.C., the *leges de civitate*, the *lex Iulia de civitate Latinis et sociis danda* of 90 B.C. and the *Plautia Papiria* of 89 B.C. were rapidly promulgated and extended the *civitas* to the *socii* who had not raised arms against Rome. Subsequently, a specific *quaestio extraordinaria de civitate* was established in 65 B.C., which was charged to judge the *crimen* of *usurpatio civitatis*. However, the real causes of the war appear not to have been the simple request by the Italian allies of Rome to be granted *civitas*, because it seems that on the contrary, many of the *socii* were openly opposed to this inclusion<sup>10</sup>. Moreover, it is a fact that the *quaestio de civitate* seldom sat; we know the famous defence by Cicero of the poet Archia, who was accused of *usurpatio civitatis* in violation of the *lex Plautia Papiria*, but we do not have many other sources concerning this field. Thus, when during the last century of the republic, the problems of ownership and the extension of citizenship were addressed by juridical and political regulation, these questions had already lost much of their importance<sup>11</sup>.

Not much later, the great battle between the West and the East would be decided – on the one side the republican, secular, pluralist and polytheistic tradition and on the other side the autocratic, absolute and mystic models of power; the government of Rome would become the government of the world. In the new, ambiguous system of the *principatus*, the prince was the preserver of the republic and at the same time, as Antoninus Pius said, also "*toù kòsmou kyrios*", the lord of the universe<sup>12</sup>. In addition, as Giorgio Luraschi explained<sup>13</sup>, in this new world, relevance was no longer situated in the inclusion in or exclusion from an abstract concept of *civitas Romana*. Relevance involved the level of civilization, autonomy, and institutional strength that was conquered and defended by the various nations and regions, and the thousands of *civitates*, *coloniae*, *pòleis*, *municipia* of the Roman world were the deciding factor.

Arnaldo Momigliano has written that the question of citizenship may well be considered the "royal road" in understanding the history of Rome<sup>14</sup>. However, primarily, municipal citizenship was the most important factor, and the history of the Roman Empire is overall the history of a multitude of local citizenships. This situation does not mean that the *civitas Romana*, as *status personae*, had no significance; it was very relevant, for example, in criminal prosecutions, because only Roman citizens could *provocare ad Caesarem* against the capital sentences of local tribunals. Saint Paul used this possibility, although without success<sup>15</sup>, but Jesus did not have this opportunity if he would have wanted to use it<sup>16</sup>. However, concerning the possession and exercise of civil rights and political and economic power, citizenship had little importance. Many inhabitants of the empire were not concerned at all regarding the kind gift of Antoninus Caracalla; many people were probably unaware of it, whereas many others viewed it as a 'promotion' from a citizen of their own nation to a subject of Rome.

A century later, another, more important, event would determine a definitive change in the history of the ancient world and, concomitantly, in the history of citizenship. After the victory of

<sup>10</sup> See Lucrezi, *Cicerone in difesa di Archia in un processo di 'usurpatio civitatis'*, in F. Amarelli, F. Lucrezi, *I processi contro Archia e contro Apuleio (Quaestiones 1)*, Napoli 1997, 17ff.

<sup>11</sup> See Lucrezi, *Cicerone in difesa di Archia* cit.

<sup>12</sup> d'Ippolito, Lucrezi, *op. cit.* 77ff., 207ff.

<sup>13</sup> "*Foedus ius Latii civitas*". *Aspetti costituzionali della romanizzazione della Transpadania*, Padova 1990.

<sup>14</sup> *Quinto contributo alla storia degli studi classici e del mondo antico*, Roma 1975.

<sup>15</sup> d'Ippolito, Lucrezi, *op. cit.* 327ff.

<sup>16</sup> d'Ippolito, Lucrezi, *op. cit.* 334ff.; F. Amarelli, F. Lucrezi (Eds.), *Il processo contro Gesù (Quaestiones 2)*, Napoli 1999, spanish ed. (Eds. A. and F. Fernández de Bujàn): *El proceso contra Jesús*, Madrid 2002.

Christianity, which was related to the definitive strengthening of the empire as a monarchic and absolute institution, the unique emperor, in the name of the unique God, would address a unique people: the people of God<sup>17</sup>. The words of Saint Paul, the apostle of the gentiles, that there would exist "no free man and no slave, no Roman and no Greek, but only brothers in Christ" (*Gal.* 3.28), did not admit any citizenship but that which belonged to the *civitas Dei* of Saint Augustin.

The *civitas Romana* becomes in this way the *civitas Christiana*, which was no longer regulated by rules of voluntary inclusion and exclusion but rather by forced and compulsory inclusion<sup>18</sup>. This forced inclusion involved a total and violent de-legitimation of all individuals who – for whatever reason and resolve – were in a position of antagonism, distance, and irregularity regarding this new universal category. New types of conflict were also generated, which would be much stronger and more enduring than the conflicts regarding the previous problems concerning citizenship. These conflicts raged for many centuries against these "different citizens." In this category, pagans were obstinate citizens of a past world who were destined to a quick dissolution. Heretics were dangerous holders of an evil "virus" of "false citizenship". Jews were the citizens *sui generis* of a glorious but lost world whose function had ended with the arrival of the Messiah. Jewish citizens were in eternity and without distinction completely guilty for not having recognized the son of God and for having put him to death<sup>19</sup>.

The Roman *civitas* was never based on an evaluation of the conscience. The sole defender of the ancient values of the Roman *civitas* and a proud and lonely voice against the new idea of absolute and compulsory citizenship was the pagan senator Symmachus, who declared at the end of the fourth century: "*suus cuique mos, suus ritus est*" (*Rel.* 3.10). However, very few heard and followed this philosophy. A new rule was adopted regarding the new "strangers". This rule was derived from the parable of the banquet that was found in the gospel of Luke, namely, "*compelle eos intrare*" (14.23), force people to enter my home. This rule was never applied regarding the old *peregrini*.

## Abstract

The essay tries to explain what was the meaning and the function of the three broad categories (the so called *status: familia, civitas, libertas*), which were built in the Roman antiquity and were utilized to include and exclude human beings, defining the person's legal condition and what the subjects could do, what they could own, what they could attempt to achieve, in what they could succeed, and to what they could be submitted.

<sup>17</sup> See d'Ippolito, Lucrezi, *op. cit.* 89ff., 341ff.

<sup>18</sup> See Lucrezi *Haruspicy in the Constantinian Legislation*, in Gambaro, Rabello (Eds.), *Towards a New European 'Ius Commune'*, The Hebrew University of Jerusalem, 1999, 9ss., italian edition: *Costantino e gli aruspici*, in *AAN.* 97 (1986 but 1987) 171ss., also, with changes and other title, in Lucrezi, *Messianismo regalità impero. Idee religiose e idea imperiale nel mondo romano*, Firenze 1996.

<sup>18</sup> See Lucrezi, *Roma e gli ebrei nel Tardo Antico*, in *SDHI.* 80 (2014) 726ss.; Id., *Teologia, politica e diritto nelle relazioni diplomatiche fra Santa Sede e Stato di Israele*, in *Studi in onore di Antonino Metro*, Milano 2010, III. 563ss., also, with changes and other title, in Lucrezi, *Ebraismo e Novecento. Diritti cittadinanza identità*, Livorno 2009, 117ss.; Id., *I cristiani di fronte alla nascita dello stato di Israele*, in M. e N. Ben Horin, J. Des Rochettes, B. Di Porto, S. Levi Della Torre, F. Lucrezi, *La terra di Israele ci interpella* (XII Colloquio ebraico-cristiano di Camaldoli, novembre 1991), Camaldoli 1992, 170ss.; Lucrezi, Amarelli, *Poistfazione* in Amarelli, Lucrezi, *Il processo contro Gesù* cit.

<sup>19</sup> See Lucrezi, *Roma e gli ebrei nel Tardo Antico*, in *SDHI.* 80 (2014) 726ss.; Id., *Teologia, politica e diritto nelle relazioni diplomatiche fra Santa Sede e Stato di Israele*, in *Studi in onore di Antonino Metro*, Milano 2010, III. 563ss., also, with changes and other title, in Lucrezi, *Ebraismo e Novecento. Diritti cittadinanza identità*, Livorno 2009, 117ss.; Id., *I cristiani di fronte alla nascita dello stato di Israele*, in M. e N. Ben Horin, J. Des Rochettes, B. Di Porto, S. Levi Della Torre, F. Lucrezi, *La terra di Israele ci interpella* (XII Colloquio ebraico-cristiano di Camaldoli, novembre 1991), Camaldoli 1992, 170ss.; Lucrezi, Amarelli, *Poistfazione* in Amarelli, Lucrezi, *Il processo contro Gesù* cit.

