

ON SOME INTERNATIONAL REGULATIONS IN GAIUS'S *INSTITUTES*

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ABSTRACT

The subject matter of the article concerns international regulations mentioned by Gaius in his *Institutes*. The work under discussion, which is also a textbook for students of law, refers in several fragments to the institutions respected at the international level – the status of the Latins, *peregrini dediticii* and *sponsio*, contracted at the international arena. The references made by Gaius to the above institutions was aimed at comparing them to private-law solutions, which was intended to facilitate understanding of the norms relating to individuals that were comprised in his work.

Key words: Gaius, *Institutes*, *sponsio*, *peregrini dediticii*, the Latins, international regulations

1. INTRODUCTION

The work entitled *Institutionum commentarii quattuor*¹ by the jurist Gaius², living in the 2nd century AD, is one of the most important works

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¹ This work was most probably written around the year 160 AD. Olga E. Tellegen-Couperus, *A Short History of Roman Law*, London-New York: Routledge, 1993, 100.

² Gaius, who is known only by his first name, is a rather mysterious figure. Despite of numerous hypotheses, it was not possible to reconstruct his life and even basic information, such as who he was and where he came from, is impossible to retrieve. Anthony

providing the grounds for research on the Roman law of the classical period³. Throughout the centuries it was believed that this work was lost and its fragments could be recreated only on the basis of other sources, among others the compilation of Emperor Justinian⁴. The ruler expressed his appreciation of Gaius's achievements, emphasizing that the work of the jurist was the most important source⁵ on which the imperial *Institutes* were based, which is demonstrated for instance in the use of the same systematization⁶. Fragments of Gaius's *Institutes* are also to be found in the 5th-cen-

M. Honoré, Gaius. A Biography, Cambridge: Clarendon Press, 1962, 12–17; Tomasz Giaro, "Gaius", In: Der Neue Pauly. Enzyklopädie der Antike, vol. 4, ed. H. Cancik, H. Schneider, Stuttgart: Metzler, 1998, 737.

³ It is assumed that the classical period of Roman law lasted from the establishment of the principate by Octavian Augustus and ended with the end of the rule of the Severan dynasty. Max Kaser, Das römische Privatrecht, vol. 1, ed. 2, Munich: CH BECK, 1955, 159–168.

⁴ Gaius commented, among others, on the Law of the Twelve Tables, *leges Iulia et Pappia Poppea*, *senatus consultus Tertulianum* and *s.c. Orfitianum*, as well as on the edict of the municipal and provincial praetor. Their fragments were also found in the compilation of Justinian. Tony Honoré, *Justinian's Digest: Character and Compilation*, Oxford: Oxford University Press, 2010, 24. Although his contemporaries rarely referred to his opinions, he was appreciated in the era of post-classical law. The law on citation included in the Theodosian Code, issued in 426 AD by Valentinian III and Theodosius II, sanctioned a long-standing practice in accordance with which the opinions of Gaius, together with the writings of Papinianus, Paulus, Ulpian and Modestinus, had binding force so that their authority could be summoned before the court. C.Th. 1.4.3: *Impp. Theod. et Valentin ad senatum urbis Romae: Papiniani, Pauli, Gai, Ulpiani atque Modestini scripta universa firamus ita, ut Gaium quae Paulum, Ulpianum et ceteros comitetur auctoritas lectionesque ex omni eius corpore recitentur*.

⁵ Prooem. Inst. 6: *Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis compositas [...] et plenissimum nostrarum constitutionum robur eis accommodavimus*.

⁶ The systematization *personae-res-actiones* created by Gaius was recreated by Justinian. The systematics had a great impact on the later fate of the systematization of law. A similar division was used for the content of the French Civil Code of 1804 (Code civil des Français) and the Austrian Civil Code of 1811 (ABGB). Also, the Canon Law Code of 1917 was based on this scheme. Andrzej Sacher, „Personae-res-actiones”, In: *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia*, ed. Antoni Dębiński, Maciej Jońca, Warsaw: CH BECK, 2016, 285–286. See also: Max Kaser, Das römische Privatrecht, vol. 1, Munich: CH BECK, 1955, 167.

tury *Collection of Moses and Roman law* (*Mosaicarum et Romanarum legum collatio*), being a collection juxtaposing fragments of the Old Testament, the writings of the jurists from the classical period and the imperial constitutions⁷. Only in the year 1816, the German historian Barthold Georg Niebuhr announced that one of the manuscripts located in the collection of the Library of Verona is precisely Gaius's *Institutes*⁸, unknown until then as a complete text. The text and its author have been therefore the subject of analysis for “merely” two hundred years and numerous articles and studies have already been devoted to it⁹.

The discussed work is a textbook for studying law¹⁰. Written in a very communicative language, the work is divided into four commentaries. The first book, entitled *De personis*, concerns introductory knowledge – the division of law and its sources, the division of people into freemen, slaves, as well as the division into the freeborn and freed persons. Further, the text concentrates on the division of persons into the *sui iuris* and *alieni iuris*, and those remaining under care or guardianships. Book Two and Three entitled *De rebus* focus on property law – the division of property, its acquisition, types of ownership, as well as types of inheritance – and, finally, the law of obligations and its categories. The last book of the series, Book Four, is entitled *De actionibus* and includes an elaboration on the subject of complaints, together with a description of issues related to the conducting of legal trials.

⁷ Antoni Dębiński, *Zbiór prawa Mojżeszowego i rzymskiego*. Tekst łacińsko-polski, transl. and glossary, Lublin: Wydawnictwo KUL, 2011, 13.

⁸ Artur A. Schiller, *Roman Law: Mechanisms of Development*, Berlin: Walter de Gruyter, 1978, 43–46.

⁹ Among the output of Polish Romanists one should mention at least such works as Juliusz Wisłocki, “Spór o Gaiusa”, *Czasopismo Prawnicze i Ekonomiczne* 33(1945): 93–98; Jan Kodrębski, “Gaius i Pomponius jako nauczyciele prawa rzymskiego”, *Zeszyty Naukowe Uniwersytetu Łódzkiego* 108(1976): 15–28; Maria Zabłocka, “Czy w okresie renesansu znano Instytucje Gaiusa?”, *Studia Iuridica* 37(1999): 183–190; Witold Wołodkiewicz, “Gaius weroński odzyskiwany”, *Palestra* 58. 3–4 (2013): 242–247, together with the cited literature.

¹⁰ Renato Quadrato, *Le Institutiones nell'insegnamento di Gaio: omissioni e rinvii*, Naples: Jovene, 1979, 3. The very term “institutes” derives from the verb “to instruct”, “to train up”, “to teach”, “to educate” (*instituere*). Charlton T. Lewis, Charles Short, *A Latin Dictionary*, Oxford: The Clarendon Press, 1956, s.v. *instiuo*, 969.

Even though the structure and content of the *Institutes* concern Roman law, some of the fragments include references to other legal orders¹¹. The analysis below aims to establish whether they include international regulations.

2. IUS GENTIUM

In the first fragment of Book One Gaius remarks that “So the laws of the people of Rome are partly peculiar to itself, partly common to all nation”¹². The “*ius common to all men*” is a law which natural reason establishes among all men and is observed by all peoples alike. It is called the *ius gentium*, as being the *ius* which all nations employ¹³.

In Gaius’s understanding, repeated by Justinian, *ius gentium* was juxtaposed with *ius civile*¹⁴. Thus, it referred to the provisions of private law applied by all the people, whose roots the Romans located in the natural law (*ius naturale*)¹⁵. It should not be forgotten that under the term *ius gentium* one could also find the effects of the law-making activity of the praetors, especially those made by the magistrate for foreigners (*praetor peregrinus*)¹⁶. This activity was based on introducing legal solutions applied in other legal

¹¹ In his *Institutes* Gaius makes references to other legal systems, even though those are very laconic remarks. Still, he emphasizes that “although if we ascertain what the law is among aliens by searching the records of other states we might come to a different conclusion” (Gai 3.96: *nam apud peregrinos quid iuris sit, singularum civitatum iura requirentes aliud intellegere poterimus*). Transl. Francis de Zulueta.

¹² Gai 1.1: *...Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur*.

¹³ Gai. 1.1: *...quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi pro iure omnes gentes utuntur*.

¹⁴ Inst. 1.2.1.

¹⁵ Maciej Jońca, „*Ius gentium*”, In: *Leksykon tradycji rzymskiego prawa prywatnego*, ed. Antoni Dębiński, Maciej Jońca, 202–203. See also: Martin David, Hein L.W. Nelson, *Gai Institutionum Commentarii IV*. Kommentar, vol. 1, Leiden: Brill, 1954, 3–6.

¹⁶ Adolf Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia: The American Philosophical Society, 1953, s.v. *ius gentium*, 528–529. More on the subject of the *ius gentium* and its categorization: Max Kaser, *Ius gentium*, Koln: Böhlau, 1993, together with the reference material.

systems¹⁷ to the annual edicts, which facilitated the resolution of disputes in which one of the sides did not have Roman citizenship¹⁸. At the same time, the ancient Romans used this term to denote, among others, the laws applied by parties being in a state of war with one another, regulations regarding the parliamentary immunity or the norms regulating the rights and obligations of the contracting parties¹⁹. Such an opinion was expressed not only by the historians but also by some jurists²⁰.

¹⁷ At the beginning of the annual office, the newly-chosen praetor would issue an edict in which he announced the principles he was going to follow during his term of office. In issuing such edicts, the praetors often relied on the solutions worked out by their predecessors, as well as on the regulations and institutions known in other legal orders. Theodor Mommsen, *Römisches Staatsrecht*, vol. 2.1, Basel 1888, reprint Cambridge: Cambridge University Press, 2009, 196. On the subject of the role of the praetor in the shaping of international regulations in the period of the Republic, see also: Gordon E. Sherman, "The Nature and Sources of International Law", *The American Journal of International Law* 15.3(1921): 355; Saskia T. Roselaar, "The Concept of *Commercium* in The Roman Republic", *Phoenix* 66.3–4 (2012): 396–398. The praetors' law-making activity ended with the issuing of edictum perpetuum on Emperor Hadrian's orders. Franz Wieacker, *Römische Rechtsgeschichte*, vol 1, Munich: CH BECK, 1988, 465.

¹⁸ Eventually, when both parties did not have Roman citizenship but were resolving the dispute in Rome. D. 1.2.2.28. David Daube, "The Peregrine Praetor", *The Journal of Roman Studies* 41.1–2 (1951): 66–70.

¹⁹ For instance, Livy emphasized that the violation of the bodily integrity of a foreign legate is a violation under the *ius gentium*. See: Izabela Leraczyk, "The Consequences of Violating the Immunity of Carthaginian Envoys in the Light of Liv. 38.42.7 And Val. Max. 6.6.3", *Review of European and Comparative Law* 32(2018): 19–40. At the same time, the ancient authors with regard to the international legal institutions also used some other expressions. Livy himself, in the first words of Book One *Ab urbe condita* indicates that the defeated Trojans were treated in accordance with the law of war (*ius belli*), which he considered to be cruel. Liv. 1.1.1. Describing the sacking of Capsa after the capturing of the city, Sallust wrote that the Roman deed was a violation of the law of war (*ius belli*). Sall. *Iug.* 91.7–8. Further, in Cicero's writings, one can find the *ius belli atque pacis* or *ius bellicum*. Cic. *de off.* 3.29.

²⁰ A fragment of the thirty-seventh book of Pomponius's commentary to the writings of Quintus Mucius Scaevola was added to the Digests, in which it was pointed out that hitting an emissary of the enemy country is a deed contrary to the *ius gentium*. (D. 50.7.18.1). Pomponius lived in the times of Emperor Hadrian and Antonius Pius. He was the author of treatises on civil law, including commentaries on the works of his predecessors. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, s.v. Pomponius, Sextus, 635. Scaevola, on the other hand, lived in the times of the late Republic, in the 1st century BC. Adolf Berger,

Gaius did not explain what the *ius gentium* was for him and his contemporaries. A sentence taken out of the context might indeed indicate that the jurist could have had in mind not only the regulations applied between individuals but also the norms in force on the international arena, applied by such entities as states or peoples²¹. Therefore, in order to understand fully the discussed *passus*, we should reach to other fragments of the *Institutes* and analyze them in accordance with the layout of the content of the textbook.

Analyzing “the law which regards persons” (*ius, quod ad personas pertinet*) the jurist indicated that “Slaves are in the power of their proprietors a power recognized by *ius gentium*”²². He further explained that the rights of the owners with regard to slaves are similar to all people. For instance, slave owners had the power over life and death (*ius vitae necisque*), which meant that the owner could kill his slave but it did not incur civil liability²³. The law was modified under the rule of Emperor Antoninus, who, as quoted by Gaius, issued a constitution stating that “neither Roman citizens nor any other persons who are under the empire of the Roman people are permitted to indulge in excessive or causeless harshness towards their slaves”²⁴. The jurist presented a modification of the *ius gentium*, refer-

Encyclopedic Dictionary of Roman Law, s.v. Mucius, 588. A closer look at the chronology of the life of the above jurists makes it possible to claim that the concept of the *ius gentium*, as also covering international relations, was well-established since the times of the Republic until the Justinian era.

²¹ On the international arena, subjectivity was enjoyed by the entities described in the sources as *civitas*, which could be translated as “cities”, “states”, or “communes”, but also as “peoples” or “population”, with regard to whom the word *populus* was used. The above terms might include inter-city relations. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol. 2, London: MacMillan, 1911, 34.

²² Gai 1.52: *Quae quidem potestas iuris gentium est: Nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum acquiritur, id domino acquiritur.*

²³ Raymond Westbrook, “*Vitae Necisque Potestas*”, *Historia: Zeitschrift für Alte Geschichte* 48.2(1999): 204.

²⁴ Gai 1.53: *Sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio Romani populi sunt, licet supra modum et sine causa in servos suos saevire.* See: Martin David, Hein L.W. Nelson, *Gai Institutionum Commentarii IV. Text*, Leiden: Brill, 1954, 71–77.

ring simultaneously to one of the regulations applied on the international stage – the acknowledgment of the authority of the Roman people (*imperium populi Romani*). The acknowledgment of the superior role of Rome in international relations was guaranteed under the peace treaty regulations. The laws which in literature are referred to as the *maiestas-Klausel* appeared in international agreements in the period of the mature Republic when Rome with its conquests established its position of hegemony with regard to other nations²⁵.

The selected issues with regard to the acquisition of ownership were connected by Gaius with the natural law (*ius naturale*)²⁶ or the natural criterion (*naturalis ratio*)²⁷. Taking into account the fragment opening the first book of the *Institutes*, it should be assumed that Gaius understood the concepts of the *ius gentium* and *ius naturale* as certainly synonymous terms, if not entirely identical²⁸. According to the jurist, this group included the specific primary methods of acquiring property²⁹. However, from the perspective of international regulations, only one fragment is especially significant, the one discussing the ownership of the spoils of war: “Capture from an enemy is another title of property by natural law”³⁰. The property of the enemy (*res hostiles*) acquired as part of war activities be-

²⁵ More on the subject: Izabela Leraczyk, *Ius belli et pacis w republikańskim Rzymie*, Lublin: Wydawnictwo KUL, 2018, 175–178, together with the cited literature.

²⁶ Gai 2.65; 73.

²⁷ Gai 2.69; 79. Cf. D. 41.1.1 pr.

²⁸ Coleman Phillipson, *The International Law*, vol. I, 80. In Gaius's theory, the *ius naturale* is not considered as equal to the *ius gentium* and *ius civile*, but provides both the source and justification for the *ius gentium* and *ius civile*. Martin David, Hein L.W. Nelson, *Gai Institutionum Commentarii IV. Text*, 3; Benedict Forschner, *Law's Nature: Philosophy as a Legal Argument in Cicero's Writing*, In: *Cicero's Law. Rethinking Roman Law of the Late Republic*, ed. Paul du Plessis, Edinburgh: Edinburgh University Press, 2016, 62–63. Herbert Wagner, *Studien zur Allgemeinen Rechtslehre des Gaius. Ius gentium und ius naturale in ihrem Verhältnis zum ius civile*, Zutphen: Terra, 1978, 120. For Ulpian, the sources of private law included already the *ius civile*, *ius gentium* and *ius naturale*. D. 1.1.2.

²⁹ Gai 2.66–79.

³⁰ Gai 2.69: *Ea quoque, quae ex hostibus capiuntur, naturali ratione nostra fiunt*. Gaius presented it in an almost identical way in a fragment of Book Two of his work *Everyday Matters or Golden Words* included in the Digests. D. 41.1.5.7

came the property of the Romans³¹. Those goods which were acquired on the territory of the enemy were sold and the income would go to the state treasury. The spoils of war acquired during an assault on a town (*direptio*) were left at the disposal of the soldiers³².

Moving beyond the dichotomy *ius gentium* and *ius civile*, Gaius remarks that “if anything should be done to violate a treaty, an action is not brought under the stipulation, but the property is claimed by the law of war”³³. The jurist thus literally points out to the fact that the consequences resulting from the breach of the provisions of the peace treaty are drawn under the laws of war, without referring to any other legal orders. Unfortunately, the lack of any references to *ius belli* in the textbook makes it impossible to determine whether this law was for Gaius a part of *ius gentium*.

3. PEREGRINI DEDITICII AND THE LATINIS

While discussing the division into freemen and slaves, Gaius indicated that there are three classes of freedmen, namely, Roman citizens, Latins, and dediticii³⁴. The jurist referred to the freedmen as Junian Latins. The fragment in which he was describing this group did not survive until the present times, however, from the preserved text it transpires that he derived that name from the colonial Latins, who enjoyed the privilege of the *ius Latii*. The origins of the privilege go back to the archaic times. In the times when the Roman Kingdom was ruled by the Kings and during

³¹ With regard to the property acquired from the enemy Roman jurists used descriptive terms, such as *ex hostibus capiuntur* or *res hostiles*, whereas in the literary sources the term *praeda bellica* appeared, denoting the spoils of war. Ferdinando Bona, “Preda di guerra e occupazione privata di res hostium”, *Studia et Documenta Historiae et Iuris* 25 (1959), 355. See also: Rosanna Ortu, “Praeda bellica: La guerra tra economia e diritto nell’antica Roma”, *Diritto@ Storia* 4 (2005): 1-70.

³² Adam Ziolkowski, “Urbs direpta, or How the Romans Sacked Cities”, In: *War and Society in the Roman World*, ed. John W. Rich, Graham Shipley, London-New York: Routledge, 2002, 90.

³³ Gai 3.94: *quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur*.

³⁴ Gai 1.12

the period of the early Republic, Rome was connected with Latin communities by way of treaties, which gave rise to the Latin League. The latter made international agreements guaranteeing the participating parties entitlements such as the right to enter into marriage (*ius conubii*), the right to conduct noble activities – in the light of Roman law (*ius commercii*), the right to free movement (*ius migrandi*), which allowed the adoption of the citizenship of a different commune by simple starting to live in it³⁵. The existence of the League came to an end in the year 340 BC with the outbreak of the Latin war, caused by the misuse by Rome of its dominant position. After the conflict was ended, the Romans regulated their relations with the Latin towns on the grounds of bilateral treaties, differentiating the privileges which they bestowed on their towns (*ius Latii*). Such a state of affairs lasted until the year 90 BC when after another rebellion the Romans decided to grant the Latins Roman citizenship under the *lex Iulia de civitate Latinis danda*³⁶. In the times of Gaius, on the other hand, there existed the colonial Latins, that is the inhabitants of the colonies established by the Romans. The *coloniae* were established for political, economic or military reasons and their creation was accompanied by the granting of certain entitlements. Those were entities strictly depended on Rome and on the authorities of specific provinces and therefore they were exempt from international regulations³⁷.

While describing the legal status of particular groups, Gaius indicated that under the *lex Aelia Sentia*³⁸, “slaves...[who have afterward been]

³⁵ Gary Forsythe, *A Critical History of Early Rome: From Prehistory to the First Punic War*, Berkeley: University of California Press, 2006, 184.

³⁶ John Enoch Powell, “The Fate of the Foedus Cassianum”, *The Classical Review* 48.1(1934): 14.

³⁷ Adrian N. Sherwin-White, *The Roman Citizenship*, Oxford: Clarendon Press, 1973, 117–118. With regard to the times close to Gaius, it is worth mentioning the problems with the supervision of municipal spendings in Apamea (*Colonia Iulia Concordia Apamea*), which Pliny the Younger, the governor of Bithynia and Pontus, described in his letter to Emperor Trajan. *Plin. Ep.* 10.47. Antoni Dębiński, Maciej Jońca, Izabela Leraczyk, Agata Łuka, *Pliniusz Młodszy. Korespondencja z cesarzem Trajanem. Komentarz*, Lublin: Wydawnictwo KUL, 2017, 150–154.

³⁸ *Lex Aelia Sentia* was established in year 4 AD and its aim was to limit the emancipation of slaves. The law established age restrictions both for the owners and slaves. It also modified the very procedure of granting freedom to slaves. Adam Wiliński, “Zur Frage

manumitted by the same, or by another proprietor” shall become free, and belong to the same class as that of enemies who have surrendered at discretion³⁹. Such status was given to freedmen, who when still as slaves were punished by their owners by being tied up or by burning out a stigma on them. Slaves who during torture admitted to having committed an offense (*nox*a) were treated in a similar way. Similarly, the same fate awaited those who were sent to fight in combat or with wild animals, who were placed in a school for gladiators or prison and were later freed⁴⁰. In the further part of his argumentation, Gaius points out that “Those enemies are called *dediticii* who, having formerly taken up arms and fought against the Roman people afterward have been conquered and have surrendered at discretion”⁴¹.

Surrender (*editio*) was known by the Romans already in the times of the Kings and the early Republic⁴². It was understood as a voluntary submission to the power of Rome or as surrender as a result of the end of military activity and losing the war⁴³. Livy in his account says that this act consisted of asking questions and receiving answers in an alternating way and their content had been unaffected for centuries⁴⁴. The procedure was aimed to establish several issues. The first one was to verify whether the legates from the other side had a sufficient mandate from their people

von Latinern ex lege Aelia Sentia”, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, 80(1963): 378–392. It was a second act, next to *Lex Fufia Caninia* of the year 2 AD, regulating those issues. Maria Zabłocka, „Polityka dynastii julijsko-klaudyjskiej wobec wyzwoleń i wyzwolenców”, Prawo kanoniczne 27.1–2(1984): 223–239.

³⁹ Gai 1.13: *Lege itaque Aelia Sentia cavetur, ut, qui servi... et postea vel ab eodem domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii*.

⁴⁰ The act of freeing could have been done by both the owner who had imposed punishments or any other next proprietor. Gai 1.13.

⁴¹ Gai 1.14: *Vocantur autem peregrini dediticii hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt*. Transl. S.P. Scott.

⁴² Liv. 1.37.

⁴³ On the subject of the concept, types and legal character of surrender, See: Izabela Leraczyk, *Ius belli et pacis w republikańskim Rzymie*, Lublin: Wydawnictwo KUL, 2018, 187–223, together with the cited literature.

⁴⁴ Liv. 1.38.1–2.

to conduct surrender⁴⁵. Further, they were asked whether the surrendering peoples were sovereign. Next, the main part of the submission took place, that is, a question was asked whether the legates submit themselves, their peoples and all the property belonging to them to the authority of Rome⁴⁶. In the times of the Kings, the act of surrender was received by a ruler, and since the times of the Republic this role belonged to the chief commanders of the army, which is mostly consuls, in possession of the *imperium*⁴⁷.

The consequence of *deditio* was primarily the loss of sovereignty. The peoples who submitted to Rome lost their sovereignty on the international scene, becoming an entity entirely dependent on Rome. Free people, who so far had enjoyed privileges to which they were entitled by virtue of having specific citizenship, became *dediticii*. What is significant, their *status libertatis* did not change and they remained free people. However, it should be remembered that the Romans followed the rule of the subjectivity of the law, which meant that with regard to the people belonging to a specific *civitas*, they applied the laws of their people. Following their surrender, *peregrini dediticii* forfeited their right to rely on their civil rights. Therefore, the only order they were then subject to was the *ius gentium*⁴⁸.

With regard to the situation of the freedmen equalled in status with *peregrini dediticii*, Gaius refers to them descriptively as “belonging to

⁴⁵ The verification whether the legates held the appropriate mandate took place in an oral form. However, Livy pointed out that after the capturing of Heraclea, the Aetolian emissaries arrived to the Roman consul and produced written authority stating that they were authorized to carry out the surrender. Liv. 36.28.2–3.

⁴⁶ Both Livy and Polybius indicate that in the formula of surrender there are questions concerning very specific issues: borders, temples, and tombs, as the things belonging to the triad *res sacrae-sanctae-religiosae*, private and public property, as well as questions about freemen and slaves. Liv. 1.38.1–2; Pol. 36.2.2–4. Henryk Insadowski, *Opera selecta*, Lublin: Wydawnictwo KUL, 2014, 32–33.

⁴⁷ As opposed to the solemn conclusion of the peace treaty (*foedus*) or the formal declaration of the just war (*bellum iustum*), the college of fetiales did not participate in the act of surrender. Alan Watson, *International Law in Archaic Rome*, Baltimore: John Hopkins University Press, 1993, 49–50.

⁴⁸ According to Max Kaser, *Das römisches Privatrecht*, vol. 1, Munich: CH BECK, 1955, 179–181, *dediticii* could resort to the protections guaranteed to them by *pretor peregrinus*.

the category of the conquered" (*deditiorum numero sunt*)⁴⁹, adding that "the lowest degree of freedom is possessed by those who belong to the class of *dediticii* nor is any way afforded them of obtaining Roman citizenship either by a law, by a Decree of the Senate, or by an Imperial Constitution"⁵⁰. He also indicates that on the grounds of *lex Aelia Sentia* the freedmen could lose their freedom, staying or living in Rome or within 100 miles from the town⁵¹. Those regulations were implemented in a statutory procedure; thus, it is assumed that the freedom of foreigners who subjected themselves to surrender was not threatened in the same way. Gaius himself emphasizes that

In conclusion, it should be noted that, as it is provided by the *Lex Aelia, Sentia* that slaves who have been manumitted for the purpose of defrauding a patron, or creditors, do not become free; for the Senate, at the suggestion of the Divine Hadrian, decreed that this rule should also apply to foreigners, while the other provisions of the same law do not apply to them⁵².

Apart from the threat of losing freedom, the status of freedmen falling into the category of the subjugated differed in one more aspect from the status of the foreigners who were the *dediticii*. On the international stage, the lack of legal personality was most often a temporary state⁵³. The Romans endeavored to establish a form of government and for this reason, they conducted restitution, consisting in the return to the state of previous freedom and property of the whole community⁵⁴. Further, a peace treaty was concluded, regulating mutual relations⁵⁵.

⁴⁹ Gai 1.12; 15; 25, 26.

⁵⁰ Gai 1.26: *Pessima itaque libertas eorum est, qui deditiorum numero sunt; nec ulla lege aut senatus consulto aut constitutione principali aditus illis ad civitatem Romanam datur*. Transl. S.P. Scott.

⁵¹ Gai 1.27. Cf. Gai 1.160.

⁵² Gai 1.47: *In summa sciendum est, quod lege Aelia Sentia cautum sit, ut creditorum fraudandorum causa manumissi liberi non fiant, hoc etiam ad peregrinos pertinere, cetera vero iura eius legis ad peregrinos non pertinere*. Transl. S.P. Scott.

⁵³ Andrew Lintott, *Imperium Romanum. Politics and Administration*, London-New York: Routledge, 1993, 18.

⁵⁴ Dieter Nörr, *Aspekte des römischen Völkerrechts: Die Bronzetafel von Alcantara*, Munich: Bayerische Akademie der Wissenschaften, 1989, 51–64.

⁵⁵ Werner Dahlheim, *Deditio und societas. Untersuchungen zur Entwicklung der römischen Aussenpolitik in der Blütezeit der Republik*, Munich: Dissertation, 1965, 55.

4. THE PROMISE OF PEACE

The fragment of the *Institutes*, which undoubtedly refers to the international law is a *passus* from Book Three, located in the section on stipulations⁵⁶:

Therefore, it is said that there is one instance in which an alien may be bound by this phrase, that is to say, when our Emperor interrogates the ruler of a foreign people with reference to concluding peace, as follows: “Do you solemnly agree that peace shall exist?” or where the Emperor himself is interrogated in the same manner. This, however, is said to be too subtle a refinement, for if anything should be done to violate a treaty, an action is not brought under the stipulation, but the property is claimed by the law of war⁵⁷.

Gaius indicates that peace (*pax*) is a factual state, guaranteed by the contracting of an agreement (*pactum*)⁵⁸ by the parties. It is confirmed by Ulpian: an agreement (*pactum*) is named so from the word “to make an agreement” (*pactio*), which is also a root word for “peace” (*pax*)⁵⁹. The provisions of such an agreement could pertain to all areas of life, including economic, political or religious issues, but the most important part were the common guarantees of refraining from conducting war activities.

⁵⁶ On the grounds of Roman private law, stipulation (*stipulatio*) was an oral contract coming into being by voicing a question by the creditor (*stipulator*) and by the answering of the debtor (*promissor*) with the use of strictly specified formulas. It was based on an oath taken in precisely specified words – the creditor asked the question in such a form so that it could be answered with one word only: the verb “promise” (*spondeo*). Kazimierz Kolańczyk, *Prawo rzymskie*, Warsaw: Lexis Nexis, 1999, 373-375; Max Kaser, *Das römische Privatrecht*, vol. 1, 168.

⁵⁷ Gai 3.94: *Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FVTVRAM SPONDES? vel ipse eodem modo interrogetur. quod nimium subtiliter dictum est, quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur*. Transl. S.P. Scott.

⁵⁸ On the grounds of private law, the term *pactum* was applied with regard to informal agreements (*nuda pacta*), which either did not include in its content the provisions provided for by the law, or they were not concluded in the form determined by the law. Max Kaser, Rolf Knütel, *Römisches Privatrecht*, Munich: CH BECK, 2003, 240–241.

⁵⁹ D.2.14.1.1: *Pactum autem a pactione dicitur (inde etiam pacis nomen appellatum est)*. The term *pactum* could mean also negotiations. D. 49.15.12 pr.

In the republican times, *sponsio* was, next to truce (*indutiae*)⁶⁰, a temporary treaty aimed to suspend the actual military activity. It was a personal commitment of a military commander who promised that the authorities of his state would honour the negotiated agreement. In the case of the lack of approval from relevant authorities, the responsibility with regard to the second party was borne by the general who had made the promise⁶¹. In literary sources there are few examples of concluding such agreements. The most famous examples include Livy's account of the events of 321 BC concerning the so-called Caudinian peace⁶² and the agreement of 137 BC described by Livy and Appian concluded by consul Gaius Hostilius Mancinus who promised a peace treaty to the Numantines⁶³. Nevertheless, in the subject literature it is indicated that the examples presented in the writings of the historians could have been the conclusions of peace agreements and the lack of the possibility of annulling such agreements would result in the application of a legal instrument facilitating the Roman withdrawal from the commitments made without any liability to the other party of the agreement⁶⁴.

The international agreement mentioned by Gaius would be concluded on behalf of Rome by the *imperator*, which in the translation by Francis de Zulueta appears as the "Emperor". In the times of the Kings and of the Republic this concept was used with regard to higher magistrates and military commanders in possession of the *imperium militiae*⁶⁵. Since the times of Octavian Augustus, the term *imperator* was used in the official imperial

⁶⁰ Truce was understood as a "rest from war" (Gell. 1. 25.1–2: *belli feriae*). The juridical sources include an explanation from Paulus: truce is a short and temporary agreement of the two parties about stopping mutual violence. (D. 49.15.19.1: *Indutiae sunt, cum in breve et in praesens tempus convenit, ne invicem se laceasant*). Theodor Mommsen, *Römisches Staatsrecht*, vol. 3, 1165.

⁶¹ C. Phillipson, *International Law*, vol. 2, London: MacMillan, 1911, 283.

⁶² Liv. 9.3–9.

⁶³ App. *Ib.* 83; Liv. *Per.* 55–56.

⁶⁴ Michael H. Crawford, "Foedus and Sponsio", *Papers of the British School at Rome* 41(1973): 1–7.

⁶⁵ Robert Develin, "Lex curiata and the Competence of Magistrates", *Mnemosyne* 30.1(1977): 49–65.

titular⁶⁶. This is the meaning that appears in German or English translations⁶⁷. Thus, if we assume that it was the Emperor who acted on behalf of Rome, the *sponsio* had to be of a perpetual character⁶⁸.

Next to the similarities to the private-law stipulation contract, the form of concluding *sponsio* is compared to the above-mentioned republican procedure of accepting submission (*deditio*). Even though known from the archaic times, surrender began to be applied by the Romans on a broader scale around the 2nd century BC, that is in the times when they established their dominant position in the Mediterranean region. Due to that, they could impose their policies and strike agreements in which the other party would accept the superior position of Rome and its authority. It is visible in the very form of accepting surrender or the form of *sponsio* mentioned by Gaius. It was the “acquiring” party that asked the questions and the other party could merely voice confirmation or contradiction, using the specifically determined verbs (in the first person singular or plural). Therefore, the ceremony itself excluded the equivalence of the two sides⁶⁹.

⁶⁶ Cf.: Plin. *Ep.* 10.1. Antoni Dębiński, Maciej Jońca, Izabela Leraczyk, Agata Łuka, Pliniusz Młodszy. Korespondencja z cesarzem Trajanem. Komentarz, Lublin: Wydawnictwo KUL, 2017, 22–23.

⁶⁷ Nadine Grotkamp, *Völkerrecht im Prinzipat Höglichkeit und Verbreitung*, Frankfurt am Main: Nomos, 2009, 49; Gai *Institutiones* or *Institutes of Roman law*, transl. Edward Poste, Introduction: Abel H.J. Greenidge, Oxford: Clarendon Press, 1904, 330.

⁶⁸ Nadine Grotkamp, *Völkerrecht im Prinzipat Möglichkeit und Verbreitung*, Frankfurt am Main: Nomos, 2009, 49. At the same time, it is worth taking into consideration Ulpian's opinion from his *Commentary* to the edict, in which he states that “the concluding of a peace agreement is a public agreement <which occurs> whenever the leaders who conducted war activities come to an agreement on the specific issues”. D. 2.14.5: *Publica conventio est, quae fit per pacem, quotiens inter se duces belli quaedam paciscuntur*. Ulpian mentions generals (*dux*), which might suggest that the chief commanders of the army were entitled to strike agreements with the enemy. However, in such a case their decisions would have to be approved of by the emperor and until the approval such an agreement would not be binding.

⁶⁹ It looked entirely different in the case of the sacral-legal ceremony of concluding a peace treaty (*foedus*), where both sides swore to abide by the agreements provided for in the treaty. Obviously, it did not entail that the treaty guaranteed equal rights to both parties of the agreement. On the subject of the procedure of contracting a treaty, See: Robert J. Penella, “War, Peace, and the *ius fetiale* in Livy 1”, *The Classical Philology* 82(1987): 233–237; Giovanni Turelli, *Audi Iuppiter. Il Collegio dei Feziali nell’esperienza giuridica romana*, Milan: Giuffrè, 2011, 55–81.

And even though the jurist emphasized that the emperor could also be “asked” about peace, it does not mean that during one ceremony both sides would make such mutual assertions. The use of the conjunction *vel* suggests that the jurist had in mind a different act.

At the end of his account, Gaius points out to the penalties which might be incurred should the provisions of the agreement be violated. He emphasized that there was no possibility of pursuing claims by way of legal procedure as was the case in private law agreements. The banality of this statement might be surprising, but it should be remembered that the *Institutes* was intended as a textbook for studying law and matters which, otherwise might seem fairly obvious, did not have to be so straightforward for the adepts of the legal science. The jurist indicates that the pursuit of one’s rights is possible only on the grounds of the war laws (*sed iure belli res vindicatur*). In such understanding, the concept of *ius belli* refers to the international custom well-established in the antique world and the concept of the just war (*bellum iustum*) observed by the Romans⁷⁰.

The breaking of the provisions of the peace agreement was treated as sufficient condition for the declaration of war (*iusta causa belli*)⁷¹. However, in order to pursue one’s claims by way of military action, the injured party had to first seek reparation for the sustained damage. Should that course of action fail, the affected side was allowed to initiate military action⁷². Thus, war was one of the methods of seeking solution to international disputes, but the declaration of war was subject to specific conditions.

5. CONCLUSION

In Gaius’s *Institutes* one can find traces of international regulations, even though they are not exactly where we might want to see them in

⁷⁰ Herbert Hausmaninger, “*Bellum iustum* und *iusta causa belli* im älteren römischen Recht”, Österreichische Zeitschrift für öffentliches Recht 11(1961): 337; Jörg Rüpke, *Domi militiae. Die religiöse Konstruktion des Krieges in Rom*, Stuttgart: Franz Steiner Verlag, 1990, 121.

⁷¹ Coleman Phillipson, *International Law*, vol. 2, 182.

⁷² Alan Watson, *International Law*, Baltimore: John Hopkins University Press, 1993, 10–11.

the first place. The *ius gentium* is for the jurist, at least for his textbook, the law regulating the relations between various entities, but not between the subjects recognized on the international stage. He mentions them mostly in the fragments in which he wanted to emphasize the origins of specific institutions applied by the Romans, especially their antique nature and the fact that they were shared by various peoples. As if on a side note, he points out to the custom of accepting the superiority of Rome on the international arena, as well as to the problem concerning the property belonging to the enemy.

References to the Latins and foreigners having the status of the *dediticii* point to the reminiscences of archaic institutions, raised to describe the legal situation of the freedmen. The very *peregrinini dediticii* are referred to only in the fragment in which Gaius explains that those were the peoples who “once” (*quondam*) remained in a state of war with Rome.

The institution of international law is the *sponsio*, even though on the basis of the available sources it is not possible to determine its legal status. The difficulties result primarily from the fact that in the times of the principate, after the conquests of Octavian Augustus, his successors significantly limited their military ambitions and abandoned the policy of conquests⁷³. This period, lasting also during Gaius’s lifetime, is referred to as the *Pax Romana*⁷⁴ and a significant decrease in the number of ongoing wars necessarily resulted in a diminished need for resorting to the international institutions and customs.

Gaius created a textbook for studying the law sciences, containing knowledge on the subject of then contemporary regulations in private law. It is from this perspective that the content of the *Institutes* is reconstructed and analyzed. The above conclusions prove, therefore, that this text provides ample material for research on antique, international custom.

⁷³ Adam Ziółkowski, *Historia powszechna. Starożytność*, Warsaw: PWN, 2009, 800.

⁷⁴ The *Pax Romana* refers to the period of relative peace within the *Imperium Romanum* and the decrease in the number of external conflicts. This phenomenon is broadly accounted for in historical literature, See: Adrian Goldsworthy, *Pax Romana: War, Peace and Conquest in the Roman World*, New Haven: Yale University Press, 2016, together with the cited literature.

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