Review

Andrea Colorio*

Die Rechtsetzung Mark Aurels zur Sklaverei [Akademie der Wissenschaften und der Literatur, Mainz: Abhandlungen der geistes- und sozialwissenschaftlichen Klasse]. By Thomas Finkenauer. Stuttgart: Franz Steiner Verlag, 2010. 108 pp. ISBN 978-3-515-09677-5 (paperback).

It is to fill the gap of a monographic study dedicated to the Emperor Marcus Aurelius' legislation on slavery that Thomas Finkenauer, Professor of Civil and Roman Law at the University of Tübingen, has written the book here under review, accepted by the German *Akademie der Wissenschaften und der Literatur* of Mainz in its *Abhandlungen* and published in Stuttgart by Franz Steiner Verlag.

After a short preface, where Finkenauer recalls the years of Marcus' reign[1] (AD 161–180) as the highest peak of Roman legal science, and explains his decision to write this book after an in-depth study of the laws concerning the *addictio bonorum libertatis causa*[2] and the *redemptio servi suis nummis*,[3] he starts his analysis firstly devoting space to a general evaluation of the influence of stoic philosophy on the person of Marcus Aurelius. It is, indeed, already in the first of the five chapters into which the book is divided ("Mark Aurel, das Recht und die stoische Philosophie," 7–12) that the author precisely defines the borders of the theme

---

* Andrea Colorio, a lawyer, is a PhD in Ancient Law and History from the Universities of Paris 1 Panthéon-Sorbonne, Milano-Bicocca and Szeged.

[1] Marcus Aurelius ruled jointly with his adoptive brother, Lucius Verus, from AD 161 to 169, and later with his son, Commodus, from 176 to 180.

[2] T. Finkenauer, "Freilassung durch Nachlaßübernahme — zur addictio bonorum libertatis causa," in T. Finkenauer, ed., *Sklaverei und Freilassung im römischen Recht. Symposium für Hans Josef Wieling zum 70. Geburtstag* (Berlin 2006), 19–57.

[3] T. Finkenauer, "Anmerkungen zur redemptio servi suis nummis," in H. Altmeppen, et al., eds., *Festschrift für Rolf Knütel zum 70. Geburtstag* (Heidelberg 2010), 345–57.

Roman Legal Tradition, 6 (2010), 22–28. ISSN 1943-6483. Published by the Ames Foundation and the University of Glasgow School of Law.

around which all discussion in the book is centered, that is, whether or not the philosophical stoic beliefs of Marcus Aurelius played a major part, as not few scholars have argued, in triggering his legislative activity on slaves. In this light, considering that in Marcus' famous *Meditations* there is no clear confirmation of such a hypothesis, the author states the intention of solving the question by analysing, from different points of view, the whole *corpus* of Marcus Aurelius' reforms concerning slavery. This is, in fact, an essential step in verifying, in practice, if the Emperor's intention was actually to introduce into the Roman legal system, of which he was an appraiser and a profound knower, those ideals of *humanitas* which, in some famous legislative fragments, he himself seems to recall (D.28.4.3 pr.; 40.5.37; 48.18.1.27).

To do so, the author opens the second chapter ("Freiheit von Sklaven," 13–66), which deserves special attention within this review, as it occupies exactly half of the total extent of the work, with an examination of Marcus' official pronouncements concerning freedom of slaves, and firstly concentrates on aspects connected to direct and indirect liberation by testament. In this regard, he argues that in both (proper) testamentary and fideicommissary liberation Marcus Aurelius' real scope was to strengthen the protection of the deepest intentions of the testator (*voluntas testatoris*), in order to preserve the testament's content (*favor testamenti*) at any cost: it is in this optic that a series of pronouncements, connected only apparently, in the view of the author, to an attitude of *favor libertatis* (e.g. D.48.10.7 and 2.15.3 pr.), should be interpreted. Among others, Finkenauer mentions a famous rescript (D.40.4.56) in which the Emperor ruled that, in the event of a contemporary direct and indirect concession of liberty to a slave by both testament and *fideicommissum*, the slave should be in the position of deciding which of the two different concessions to use: if he chose the second possibility, he would find himself under the direct *patronate* of the heir (24). This decision was of not scarce importance: as it is true, indeed, that freedmen had *honor*, *reverentia*, and *obsequium* obligations towards the heir, so it is not less true that the heir himself had substantial care duties towards freedmen; however, in the view of the author, these duties towards freedmen were not linked with a more humane attitude by Marcus Aurelius, but with an attempt to let the *voluntas testatoris* be respected in full.

Later Finkenauer comes to analyse another famous pronouncement, the so-called *constitutio ad Aufidium Victorinum*, concentrating his attention on the *ipso iure* freeing effect, intro-

duced by Marcus and his son Commodus for the case of non-fulfilment, in sales, of a condition *ut manumittatur*, i.e., that the slave be manumitted (D.18.7.10; 40.8.3; C.4.57.2). In the view of the author, the sources would indicate that, even in this particular case, it was all about an attempt by the Emperor to fully protect the seller's deepest intentions. The possibility left to the latter to change his mind at any time and consequently revoke his *voluntas* (43) would confirm this idea, as well as the fact that Marcus' *constitutio* cannot be interpreted as a legislative act with the innovatively humane aspects that certain scholars have pointed out in the past.

According to the author, analogous conclusions can be drawn also with reference to a number of other measures concerning freedom. On the one hand, for instance, even the juridical protection offered by a famous *epistula* of the *divi fratres* to Urbius Maximus (D.40.1.4.1) to a liberation from slavery obtained *suis nummis* (that is, by way of the use of the slave's own *peculium*) in fact reflected the Emperor's intention to strengthen the role of *voluntas*, as well as the interests of the masters; on the other hand, Marcus' commitment in favor of the obtainment of freedom by testament in cases such as the one cited in J.3.11 pr. should be considered, in turn, to be more close to an attempt to realize a balance between the interests of the parties involved, than to a proper humane attitude towards slaves.

This interpretation of Marcus' legislation, according to which his pronouncements do not show a predominant liberal inspiration, would be further confirmed, as argued by Finkenauer, by a disposition mentioned by Paulus (D.40.9.17 pr.), with which the Emperor prohibited that liberations of slaves be carried out *ex adclamatione populi* (61–62).

In the third chapter ("Behandlung von Sklaven," 67–76), the reader's attention is drawn to Marcus' laws concerning treatment of slaves. First and foremost, Finkenauer mentions a passage of the Digest (D.48.18.1.27), in which Ulpian reconstructs the case of a pardon granted to a slave called Primitivus, as well as his contextual forced sale to a third party, ordered by Marcus Aurelius to the proconsul Quintus Voconius Saxa, on the condition that *ne umquam in potestatem domini revertatur*, the violation of which would lead to the liberation of Primitivus. In order to escape from his master, Primitivus had falsely declared to have committed homicide, thus being sentenced; due to doubts regarding the facts as told by the slave, *prudenter et egregia ratione humanitatis* Quintus Voconius Saxa had allowed him to be tor-

tured in order to ascertain the truth, at which point it had been discovered that Primitivus was innocent. According to the analysis of Finkenauer, it would emerge that, even in this case, the apparently benevolent gesture of Marcus Aurelius towards the slave was not directly linked with *favor libertatis*, but with the censorian powers already absorbed at that time by the Emperor, and which were to be exercised to their full extent against those masters violating the *mores* with unreasonably cruel behavior towards their slaves.

In what follows, after having touched upon the problem of fugitive slaves, which Marcus Aurelius attended by aggravating the position of those who helped them hide (D.11.4.1.2), the author comes back to aspects concerning torture. In the view of Finkenauer, this was an instrument, the application of which towards slaves was not called into question by Marcus' legislation; in fact, to a general prohibition of utilizing torture on slaves being interrogated against (D.48.18.1.6) or in favor (D.48.18.1.3) of their masters, Marcus Aurelius developed measures in the contrary direction: for instance, basing on the principle that the slaves of a *civitas* technically did not belong *pro quota* to the single citizens of the same, but were property of a *universitas*, in a famous rescript the *divi fratres* allowed that torture might well be used against those slaves to be heard in favor or against a citizen (D.1.8.6.1). In this light, Finkenauer argues that even during Marcus' time torture continued to represent a valid tool of ascertaining the truth; a method in which the Emperor had a solid faith, as confirmed, in fact, by the attitude of profound approval towards the position of Q. V. Saxa highlighted above.

Slave punishment ("*Bestrafung von Sklaven*") is analysed in detail in the fourth chapter of the work (78–86). Firstly, the author concentrates his attention on an *oratio*, mentioned in a Constitution by Justinian (C.6.35.11 pr.), through which the Emperor somehow intervened in the (until then) valid legal framework introduced by the famous *Senatus Consultum Silanianum* of AD 10. Regardless of any concrete personal penal responsibility, this measure had introduced into the Roman system the principle that, when a master was murdered, all slaves with the master under the same roof at the moment of the homicide were to be subjected to torture and then put to death; besides this, it had also set forth the postponement of the opening of the master's testament to the conclusion of the investigations of the crime, determining, for those slaves not subjected to torture, the suspension, until such moment, of the effects of all of the

testamentary liberations granted by the murdered. Now, the author does not explicitly accept the extreme position of Max Kaser,[4] who sees in Marcus' pronouncement, as mentioned by Justinian, even a hardening of the severity of the *Senatus Consultum*; however, basing on the fact that Justinian's intention was, in turn, to fill in a gap within Marcus' corrective regulation, *ne princeps philosophiae plenus aliquid videatur imperfectum sanxisse*, and, more precisely, to avoid the heavy consequences linked with the delay in the freeing of the slaves, Finkenauer also distances himself from the idea that, *favore libertatis*, Marcus somehow desired to lighten the position of the slaves and of their children.

Then, after briefly lingering on the theme of *adulterium*, the author lightly touches upon the complex issue of arena fights, underlining, in particular, that Marcus' laws bring out his intention to restrict to the State the power to put slaves to death, thus excluding masters from the exercise of such power: as a confirmation of this idea, Finkenauer brings up the prohibition to sell slaves guilty of crimes for fights with wild beasts before a court judgment (D.18.1.42).

In the fifth chapter ("Mark Aurel — der rechtskonservative Kaiser," 87–91) the author shortly retraces some of Marcus' laws analysed in the work, arguing that, even in cases of measures in favor of slaves' freedom, their profound reason is always to be found in the *voluntas testatoris*, or in an attempt to guarantee, in the relations between slaves and masters, the interests of the *domini*, and certainly not in a *favor libertatis* attitude towards the *servi*. According to the author's view, even in the passages where *humanitas* is specifically recalled by the words themselves of the Emperor (e.g. D.28.4.3 pr.), Marcus would evoke a concept closer to *aequitas* than to the modern idea of humanity. In this light, the Emperor's position would be openly conservative, continuing the trends of his predecessors, and, instead of a more humane tendency, recognizable in Finkenauer's view only in exceptional pronouncements (as in the already cited case of D.48.18.1.27), it would indicate a clear intention by Marcus to show himself to be, on the one hand, the strenuous *defender of law*, and, on the other hand, the protector of a common sense of *pietas* and, more generally, of the traditional *mores* of Roman society (88–89).

---

[4] M. Kaser, *Das römische Privatrecht I: Das altrömische, das vorklassische und klassische Recht*, 2nd ed. (Munich 1971), 285.

The book closes with an index of abbreviations (93), a bibliography (94–101), as well with an index of ancient sources (102–108), all of which surely confirm the exactitude of the work realized by the author, who, paying great attention, by virtue of his evident scientific competence, to any detail, even formal, confidently approaches a theme so far not amply studied by modern scholars. In this light, the scope of this book can certainly be considered accomplished.

However, if one must find a defect, it is probably that Finkenauer resolves some questions not capable of easy solution in too brief a way, not going enough in depth into some important positions expressed by other scholars on specific points of discussion. Given, for instance, some opposite views to his idea, formerly held by Wieling[5] and Härtel[6] and only mentioned in one footnote (28), it is at least questionable that in D.40.5.31.1 there might be identified a clear attempt to safeguard the testator's *voluntas*, and not an attitude of *favor libertatis*. An analogous consideration may be made for D.48.10.7, where the use of such a significant term as *favorabiliter* should certainly have been deepened by the author (13–14), as well as for some other pronouncements concerning freedom from slavery, which, not being contextualized in full, are too hastily settled once and for all (62–66). For example, after having somehow apodictically ascertained that the extension to *collegia* and *sodalitates* of the possibility of freeing slaves (D.40.3.1), in analogy to the legal discipline already applicable to *municipia* and *coloniae*, represented a legal formalization of a praxis already vastly spread (66), the author does not clarify the relevance of such a measure — *prima facie* inspired to *favor libertatis* — for the main question under discussion in his work.

That being said, since Finkenauer still succeeds in offering some convincing interpretations and plausible conclusions, these remarks do not undermine at all the quality of a small, but very well-written book, which, even regardless of the full acceptance of the clear-cut position of the author, I personally retain to be very useful for those who will study the matter in the future, also as a starting point for the reconstruction of the multi-faceted *nuances*

---

[5] H. J. Wieling, *Testamentsauslegung im römischen Recht* (Munich 1972), 115.

[6] G. Härtel, "Der 'favor libertatis' im Imperium Romanum und sein gesellschaftlicher Zusammenhang nach den Digesten im 2.–3. Jahrhundert u. Z.," *Index*, 5 (1974/75), 294.

of a real protagonist of History, as Marcus Aurelius was, which certainly still need further study to be made fully clear.