

Wiesław Mossakowski (Toruń)

CONCEPT OF ASYLUM (ASYLUM, CONFUGIUM) IN THE ANCIENT ROME

The latin term *asylum*¹ probably comes from the Greek word Ἀσυλία or Ἀσυλον² which denotes a safe place and then, after a process of the evolution of this term, a sacred place, place of shelter³. The source material concerning asylum in Rome allows for the terminological and semantic categorisation:

- 1) *asylum*⁴,
- 2) *confugium ad statuas*⁵,
- 3) *confugium ad ecclesias*⁶,
- 4) *latebra*⁷.

Ad. 1. In ancient Rome the term asylum had a specific legal meaning. However, in the light of the present knowledge of sources, asylum was not defined by the Roman legislation and it was not described by jurisprudence. In spite of this, the Roman sources allow for reconstruction of term asylum. Throughout fourteen centuries of development, the Roman asylum has undergone the evolution processes, therefore, there is a need to introduce chronological frames. What is important, the institution of asylum was of a general (common) character, known to other civilisations⁸. As late as the late Empire, the specific forms of asylum (*confugium*⁹) developed.

¹ E. HERMAN, s.v. Asile dans l' église orientale (le droit de'), (in:) Dictionnaire de droit canonique contenant tout les termes du droit canonique avec un Sommaire de l' Histoire et des Institutions et l' état actuel de la discipline, t. 1, Paris 1935, col. 1048; Oxford Latin Dictionary, s.v. *asylum*, fasc. 1, Oxford 1968, p. 194.

² Dictionnaire Encyclopédique Quillet, s.v. asile, vol. 1, Paris 1968, p. 423.

³ Q. WRIGHT, [in:] The Encyclopedia Americana, vol. 2, s.v. Asylum, New York-Chicago-Washington 1958, p. 484; Brockhaus Enzyklopädie, Vol. 2, s.v. Asylrecht, Mannheim 1987, p. 229-232.

⁴ P. STENGEL, [in:] *Thesaurus Linguae Latinae*, Vol. 2, s.v. *Asylum*, Lipsiae 1900-1906, col. 990-991.

⁵ S. WRÓBLEWSKI, *Zarys rzymskiego prawa prywatnego*, [Outline of Roman Private Law], Kraków 1918, p. 244 – had used the term: „*ad fana deorum vel ad statuas principum*” to the asylum of slaves.

⁶ H. HEUMANN-SECKEL, *Handlexikon zu den Quellen des römischen Rechts*, s.v. *Asylum*, Graz 1958, p. 42.

⁷ Term used by: C.Th. 9, 45, 1; C.I. 1, 25, 1.

⁸ Catholic Biblical Encyclopedia, s.v. *asylum*, New York 1956, p. 125; Encyclopedia Judaica. Das Judentum in Gegenwart, Vol. 3 s.v. Asylrecht, Berlin 1929, p. 614-617; R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri. 332 B.C. – 640 A.D.*, Warszawa 1955, p. 84 and 477; S.P. SINHA, *Asylum and International Law*, Hague 1971, p. 275.

⁹ *Vocabularium Codicis Iustiniani, Pars prior (pars Latina)*, s.v. *confuga*, Praga 1923, p. 684.

Asylum results from archaic religion and magic concepts connected with a specific place and these concepts are not easily cognizable. The territorial factor is a constructive and a universal component - universal for every category of asylum. The territorial element came from the unshaken conviction concerning sacredness (*sacrum*¹⁰) of a specific place¹¹ (hierofany of a place). We can probably find the genesis of *sacrum* of a place in primeval concepts concerning sacredness of unusual physiographic objects: mountains, groves, rivers etc., present in magic and religious expiation practices. Thus the temple expiation of those who committed not so serious crimes was possible. Asylum made it possible to legally protect foreigners.

Then, amends for crimes committed were brought to temple and the concept of indemnity punishment for this crime was deliberated there. The attribute of sacredness served the very place of cult - the temple¹² (hieron, *templum*) as a specific place, sacred and unusual one which exceeded the cognizable reality.

The conviction concerning the sacredness of a temple was a universal cultural phenomenon without religious differentiation (even the basic differentiation: monotheism¹³ vs polytheism), and strict cultural differentiation (ceremonial, national or relating to customs) and property and social differentiation. Then, the commonly recognised sacredness of a place generated the imperative: „*pax in templo*¹⁴” – inviolability of this kind of the place. The term „inviolability”, I guess, denoted prohibition to use any violence towards a man, even justified violence, provided for by a procedure; prohibition to invade, disturb, attack as well as prohibition to wilfully take a property. The sacredness understood in this way gave a basis for asylum in two forms:

1) protection of property amassed in temples. The habit to lodge precious items in temples by third persons turned out to be very essential one. In this way the temple treasury¹⁵ was created (*aerarium*¹⁶) which, as a matter of fact, functioned as a deposit¹⁷. In Rome not only precious items but also archives were collected;

¹⁰ SERVIUS, *Ad Aen.*, 3, 75: *auri sacra fames*. See also: WESENER, s.v. *Sacer*, RE 1 A, 2 1920, col. 1626.

¹¹ F. De COULANGES, *La cité antique*, Paris 1905, p. 21-31.

¹² *Lexikon der Antike*, s.v. *Tempel*, Leipzig 1971, p. 543.

¹³ Jewish asile in the ancient times: *Encyclopedia Judaica. Das Judentum in Geschichte und Gegenwart*, vol. 3, s.v. *Asylrecht*, Berlin 1929, p. 614 - 617.

¹⁴ See: the Greek term: *eirene* and Jewish: *shalom* (*Vetus Test.*, *Lev.* 26, 6; *Is.* 52, 7).

¹⁵ For example: LIVIUS, *Ab urbe condita libri*, 29, 8-9.

¹⁶ A. BERGER, *Encyclopedic Dictionary of Roman Law*, s.v. *Aerarium populi Romani*, Philadelphia 1953, p. 355.

¹⁷ Liv. *Ab Urbe condita*, 29, 37, 12. See also: L. HOMO, *Les institutions politiques romaines*, Paris 1970, p. 171; Th. MOMMSEN, *Abriss des römischen Staatsrechts*, Leipzig 1907, p. 274.

2) protection of persons who were within the temple's boundaries. Although it is possible to distinguish a few zones of the temple due to differences in character of a place, its so called sacredness of a place (altar¹⁸, treasury, temple and its yard¹⁹), basically it is not possible to reconstruct any controversial matter concerning different approach to these place as far as sacredness of the place is concerned.

Therefore, it does not involve any risk to accept that peace „*pax*²⁰“ in temple meant the requirement to preserve tranquillity, to preserve a status quo in a temple treated as – perceived sacrally – an enclave within the reach of which no common laws and customs were valid but where the specific relations resulting from religious and magic concepts ruled.

It was unacceptable not only to kill, injure, beat up, but also drag away from the temple any person who happened to be there. Violation of these laws was of sacral character which was persecuted by a magic sanction. However, it is probable that a punishment of exclusion from the society²¹ was applied towards a person who violated the temple's peace. Thus the term „*asylum*“ used in the ancient Rome acquires the following juridical meanings:

- 1) subjective meaning – a legal institution which means that some category of persons is legally protected. The tenor of this protection could consist in abandoning of a court persecution (mainly penal persecution), it could also be a release from extrajudicial repressions. Abandoning of persecution mainly meant discontinuing of a legal procedure in progress or abandoning of punishment.
- 2) place of asylum²² that is a place which entitled to *ius asyli* in an individual case as well as the place where the person claiming asylum stayed until his right to consume his right to asylum was recognised. In other words, until the person claiming asylum got the legal result; his immunity from punishment at least in the meaning of the initial state of the case.
- 3) strict subjective meaning – *ius asyli* – the right of the person claiming *asylum* to a special legal protection which results from the fact that he stayed in the place of *asylum* with the aim to use the asylum protection. Such a right to use *ius asyli*, however, was not automatic; one should stay in the place of asylum with the intention to use it and to fulfil the positive conditions.

The word *asylum* in legal texts from the late Empire appears in the passages of Justinian Digesta²³ which include Ulpianus Commentary to edict by *aedile curulis* concerning slaves who were refused by their owners the right to be bought out from slavery and who, in this situation, found shelter in asylum:

¹⁸ S. Ambrosius, *Ep.* 20, (*Ad Marcellinam*), 20.

¹⁹ C.Th. 9, 45, 4 pr.

²⁰ A. BERGER, *op. cit.*, s.v. *Pax*, p. 623, but A. BURDESE, *Manuale di diritto pubblico romano*, Torino 1982, p. 226 says that *pax deorum* was a basis for the criminal charge.

²¹ The asile in contemporary time is a subject of the sociology: *Wörterbuch der Soziologie* herausgegeben von W. BERNSDORF, s.v. *Asyl*, Stuttgart 1969, p. 60-61.

²² In Roman meaning: *inter duos lucos* – A Classical Dictionary of Greek and Roman Antiquities, Biography, and Mythology, s.v. *Asylum* (Ἀσυλον), Cambridge 1916, p. 127; K. WELLESLEY, *Livy I*, 8, 5, *Latomus*, 33 (1974), p. 913.

²³ See also: V. Arangio-Ruiz, *Historia del derecho romano*, Madrid 1994, p. 456.

D. 21,1,17,12 ULPIANUS, *libro primo ad aedilium curulium*:

Apud Labeonem et Caelium quaeritur, si quis in asylum confugerint aut eo se conferat, quo solent venire qui se venales postulant fugitivus sit.

Ad 2 and 3. *Confugium*²⁴ was another term which denotes asylum in the ancient Rome (Principate) and which was created in the period of late Empire. In this time *confugium* appeared in two forms: "*ad statuas confugere*²⁵" (imperial asylum) and "*ad ecclesias confugere*²⁶" (church asylum).

Etymology of the word *confugium* does not raise any doubt and it means escape. It is not an escape away from something or from any danger but it means an escape to a specific place that is to the place of asylum (shelter). There are some doubts, however, whether the term *ecclesiae* denotes a place that is churches, Christian temples or Christian Church²⁷ (*Ecclesia*²⁸) understood as a community of people united by the faith they profess and who lived under canonically legal church authority. The term *confugium* was applied only to the above mentioned categories of asylum of IV and V centuries.

The introduction of the term *confugium* (that is since 386 AD²⁹ as *confugium ad statuas*, and since 392³⁰ as *confugium ad ecclesias*) replaced the old notion of "asylum". However, the word "asylum" appeared in the constitution of Emperor Honorius³¹ of 20 January 416 AD relating to service of imperial agents³². In this case the word asylum served as an example and common term – as a shelter for persons who used the service in the agents corps as an „asylum” where they can find a shelter. I think that the word asylum was used in this constitution was a formal lack of care but with no formal significance.

Ad. 4. Quite unusually, in the constitution of Emperor Theodosius of 392³³ which initiated the institution of church asylum (or rather its legislation) the term *latebra* could be found to denote

²⁴ Probably from the term: „*Ad misericordiam Ecclesiae confugere*: A. DUCLOUX, *Ad ecclesiam confugere*. Naissance du droit d' asile dans les églises (IV^e – milieu du V^e s.) Paris 1994, p. 25. See also: *Vocabularium iurisprudentiae Romanae*, Vol. 1, s.v. *Confugio*, Berlin 1903, p. 915.

²⁵ Term from title: *De his, qui ad statuas confugiunt* (C.Th. 9, 44 = C.I. 1, 25).

²⁶ Term from title: *De his, qui ad ecclesias confugiunt* (C.Th. 9, 45), and from: *De his, qui ad ecclesias confugiunt vel ibi exclamant* (C.I. 1, 12).

²⁷ MTh. 16, 18.

²⁸ Εκκλησία. Meyers Lexikon, vol. 3, Leipzig 1925, col. 1164.

²⁹ C.Th. 9, 44, 1 = C.I. 1, 25, 1.

³⁰ C.Th. 9, 45, 1.

³¹ C.Th. 6, 27, 18.

³² About the imperials agents: A. PIKULSKA -ROBASZKIEWICZ, *La sécurité publique à Rome sous les empereurs, Le droit romain et le monde contemporain. Melanges a la memoire de Henryk Kupiszewski*, Varsovie 1996, p. 233.

³³ C.Th. 9, 45, 1.

the place of asylum. The uniqueness of this term does not consist in its singular use only in this constitution as if it was a test, but in this that it appeared as a supplement to the term *ecclesia* within the frames of the institution „*ad ecclesias confugere*”. The context shows that word *latebra* was rather a word of evaluative character which referred to the place where asylum was obtained as a „shelter”, secure place, place of peace.

II. Legislation of *confugium ad ecclesias* by emperors confirmed the conviction that there was a need for such a kind of institution to function in the Christian Church³⁴. After the fall of the Western Rome the idea of asylum was partly taken over and preserved in the laws of some newly created states of medieval Europe. As a result of changes it became an administrative institution, what is more, the instrument of politics, very often of current, politics. However, gradually, there emerged a primeval sense of the church asylum idea - protection of man. The concept of human rights recognises asylum as an extraordinary form of protection and it draws - as I see it - from the Roman concept.

As it is clear from the above discussed information: the concepts of legal institution of asylum, of the place of asylum and of the rights to use asylum integrates into institutional and subjective entity. On the other hand, subjective differentiations resulting from differences in the legal systems and fields of law are absolutely separate. Although the function of particular categories of asylum is different, the institution of asylum shares many common features.

Thus to sum up the notion of asylum in ancient Rome of late Empire, we should distinguish terminological differentiations: 1) evolution which consists in replacing the term *asylum* by the term *confugium*, and then the efforts (in the post-Justinian period) to restore the original term *asylum*, 2) shaping of two categories of *confugium*: *ad statuas* and *ad ecclesias*.

The man was a subject of asylum. Usually the legal status (*caput*³⁵, *status*³⁶) of a person claiming asylum was not important. The object of asylum was to fulfil the right resulting from *ius asyli* by the subject of asylum in clearly defined place of asylum (in case of *confugium*: church, column³⁷), and the content of asylum was abandoning of court proceedings or public proceedings relating to court or extrajudicial prosecution.

³⁴ P. CIPROTTI, [in:] Enciclopedia del diritto, s.v. Asilo (diritto di) 2) Diritto intermedio, 1° Torino (1957-1958), p. 199-204. See: C.I.C. on 1917, can. 1179.

³⁵ Th. MOMMSEN, Römisches Staatsrecht, t. 3. 1, Leipzig 1887, p. 7.

³⁶ R. SOHM, Ein Lehrbuch der Institutionen. Geschichte und System des römischen Privatrecht, Leipzig 1899, p. 161.

³⁷ More informations about the mean and function of column: IHM, s.v. *Columna*, RE, 4 (1904), slip 603; W. MOSSAKOWSKI, Jurydyczno-sakralne funkcje kolumny w starożytnym Rzymie [The Juristic and Sacral Function of the Column in the Days of Ancient Rome], *Acta Universitatis Nicolai Copernici*, Historia XXXI, Toruń 1999, p. 144 ff.