LIABILITY OF INNKEEPERS IN ROMAN LAW

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Private enterprise in antiquity can be discussed in many ways, but whichever way we choose, the importance and grandeur of Rome cannot be neglected. The greatest and the most powerful state in ancient world, which spread on three continents, with one hundred million people living in it,[1] developed outstanding legal system, monetary economy and market which had never existed anywhere before.

Rome was the center of commerce and trades, but we are particularly interested in the private enterprise of sea merchants, innkeepers, and livery stable owners in the Roman Empire. This kind of private enterprise is related to quasidelicts and we will pay some attention to the profession of *caupones*.

This trade was not very respectable. Their work came under minute scrutiny. Unlike bakers who were appreciated because their work was considered honorable and useful, innkeepers were reproached for many things. This attitude is partly the result of the belief that they secretly provided the services of prostitutes, that they conspired with robbers and that their treatment of guests was dishonest and unpredictable. Since bad news travel fast, this attitude soon became such a commonplace one that their responsibility was under special regime.

The Romans were not the only ones with an unfavorable attitude towards these entrepreneurs. Let us take Babylon as an example, and look at the articles 108 and 109 of Code of Hamurabi which indicate later Roman attitude:

> *,,If a tavern – keeper (feminine) does not accept corn according to gross weight in payment of drink, but takes money, and the price of the drink is less than that of the corn, she shall be convicted and thrown into the water."*[2]

The above-mentioned article brings us to the conclusion that the Babylonian lawmaker included this criminal act in the code because of innkeepers' frequent dishonest dealings. The death penalty (throwing someone into water) for this criminal act is an example of the unfavorable position of these private entrepreneurs in Babylon.

The article 109 of Code of Hamurabi provides even more serious example of the innkeepers' liability:

> *,,If the conspirators meet in the house of a tavern – keeper, and these conspirators are not captured and delivered to the court, the tavern – keeper shall be put to death."*[3]

It seems that the lawmaker's intention was to put an end to the collaboration of innkeepers and robbers because they were very often accomplices. The above-mentioned article shows that this criminal act can be executed by performing no action, with premeditation or by negligence, which is irrelevant for the existence of guilt and for the execution of punishment.

Đorđe Milović says ,,that it remains unclear whether innkeeper's duty was to report conspirators who she met in her tavern, or her duty was to capture and deliver them to the court."[4]

With regard to the fact that a female person is not able to overcome several men, it seems that her duty was only to report conspirators, not to deliver them to the court. This led to avoidance of performing any action.

Roman law treats innkeepers in the same way. Hamman, the French author, says that innkeepers became stereotypes: the innkeeper was a miser, his wife was a witch, and his maid was a prostitute. *,,Innkeepers were reproached for diluting wine with water and for stealing hay from*

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1 Mamford, L., *Grad u istoriji (City in History)*, Beograd, 2000., p. 223.

2 Code of Hamurabi, article 108.

3 Code of Hamurabi, article 109.

4 Milović, Đ., *Krivično pravo Hamurabijevog zakonika (Criminal Law in Code of Hamurabi)*,, Zbornik Pravnog fakulteta u Zagrebu, 20/1, p. 259.

donkeys. There was no hygiene, no honesty or decency at his inn."[5]

The following Ulpianus' fragment from Digest is an example of prejudice of Roman law against innkeepers:

> *„Ait praetor: Naute caupones stabularii quod cuiusque salvium fore receperint nisi restituent, in eos iudicium dabo. Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodiae eorum committere. ne quisquam putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nune quidem abstineant huiusmondi fraudibus."*
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> *(„The praetor says: I will give an action against seamen, innkeepers and stablekeepers in respect of what they have received and undertaken to keep safe, unless they restore it. This edict is of the greatest benefit, because it is necessary generally to trust these persons and deliver property into their custody. Let no one think that the obligation placed on them is too strict: for it is in their own discretion whether to receive anyone: and unless this provision were laid down, there would be given the means for conspiring with thieves against those whom they receive, since even now they do not refrain from mischief of this kind")*[6]

This fragment confirms the unfavorable attitude of Roman law towards tavern keepers. The clause *„let no one think that the obligation placed on them is too* strict" brings us to the conclusion that the presumption of the innkeeper's culpability has been based on the belief that he is associated with dishonesty, conspiring and deceits. Innkeepers dishonesty seems to have been manifested so often and in so many ways that Roman law had to react. This fragment also informs us that innkeepers conspired with robbers and possibly shared the booty with them. Guests had to be protected because they depended on innkeeper's discretion. This attitude seems to be the beginning of the principle of the objective responsibility, which will be important in many ways in modern law:

> *„In eos, qui naves cauponas stabula exercebuunt, si quid a quoquo eorum quosve ibi habebunt furtum factum esse dicetur, indicium datur, sive furtum ope consilio exercitors factum sit, sive eorum cuius, qui in ea navi navigandi causa esset. Navigandi autem causa accipere debemus eos, qui adhibentur, ut navis naviget, hoc est nautas. Et est in duplum actio. Cum enim in caupona vel in navi res perit, ex edicto praetoris obligatur exercitor navis vel caupo ita, ut in potestate eius, cui res subrepta sit, utrum mallet cum exercitore honorario iure an cum fure iure civili experiri. Quod si receperit salvum fore caupo vel nauta, furti actionem non dominus rei subreptae, sed ipse habet, quia recipiendo periculum custodiae subit. Servi vero sui nomine exercitor noxae dedendo se liberat. cur ergo non exercitor condemnetur, qui servum tam malum in nave admisit et cur liberi quidem hominis nomine tenetur in solidum, servi vero non tenetur nisi forte idcirco, quod liberum quidem hominem adhibens statuere debuit de eo, qualis esset, in servo vero suo ignoscendum sit ei quasi in domestico malo, si noxae dedere paratus sit. si autem alienum adhibuit servum, quasi in libero tenebitur. Caupo praestat factum eorum, qui in ea caupona eius cauponae exercendae causa ibi sunt: item eorum, qui habitandi causa ibi sunt: viatorum autem factum non praestat. namque viatorem sibi eligere caupo vel stabularius non videtur nec repellere potest iter agentes: inhabitatores vero perpetuos ipse quodammodo elegit, qui non reciecit, quorum factum oportet eum praestare. in navi quoque vectorum factum non praestatur."*
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> *(„If a theft be said to have been committed by those who operate ships, inns, or livery stables or by anyone whom they have on their ship or premises, an action will be given, whether the theft be committed by the act and intent of the shipper or of those who were on the ship to sail her. This last we must take to include those aboard for the ship to run, that is, the crew. The action is for twofold. When something be lost at an inn or on a ship, the shipper or the innkeeper is bound by the praetor's edict so that it is in the power of the victim of the theft , as he chooses, to go against the actual thief. But if the innkeeper or the ship's master has quaranteed the safety of the goods, it is he and not the owner of the stolen thing who will have the civil action for theft because. bu his quarantee, he incurs the risk of safekeeping. But where the shipper is sued in respect of a slave, he can absolve himself by surrendering the slave noxaly. Now why is the shipper not condemned personally since he allows so evil a slave on his shi. And why, if he be fully liable for theft by a free member of the crew, is he not liable also for a slave? The reason must be that in engaging a freeman, it is for him*

5 Hamman, A. G., *Rim i prvi hrišćani – svakodnevni život (Rome and the first Christians – common life)*, Beograd, 1998., p. 29.

6 D. 4. 9. 1

to weight up the manner of man he is, but in the case of his own slave, such evaluation bu him may be waived, as for an offense ashore, if he be prepared to surrender the slave noxally. If, though, someone else's slave is involved, he will be liable as for a freeman. The inkleeper is answerable for the deeds of those whom he has in the inn to run the establishment as also of those who reside in the inn. he is not answerable for the acts of passing travelers. For an innkeeper or liveryman is not regarded as choosing his own traveler and cannot refuse those making a journey; but in a way, the innkeeper does selec his permanent residents, since he does not reject him, and so should be answerable for what they do. In the case of a ship, there is no liablility for the acts of passengers.")[7]

This fragment deals with the liability for the theft of *nautas, caupones et stabularios*. If a theft is committed on a ship, the shipper and his crew are liable for it. The action is *in duplum*. When something is lost at an inn or on a ship, the praetor's edict gives the power to the victim to bring the action against the shipper and innkeeper, regardless of his culpability; therefore, we may conclude that the liability of the shipper and innkeeper is even stricter. Ulpian confirms this saying that the victim of the theft can either go against the shipper or the innkeeper at praetorian law, or to bring the civil action against the actual thief.[8] This is yet another early example of objective responsibility, or, at least, presumed *mala fides*.

We find interesting the case in which the shipper or the innkeeper has guaranteed the safety of the goods on a ship or at an inn. Now, it is the shipper or innkeeper, not the owner of the stolen thing, who will bring the civil action against the actual thief. We find here the example of the shippers or innkeepers being noxaly liable because they can absolve themselves by surrendering the actual thief to the owner of the stolen thing.[9] However, according to Ulpian, this is possible only if a slave has committed the theft.[10] Why the shipper is not liable for the slave, if he is liable for the theft committed by a free member of the crew? Ulpian says that the reason must be the fact that it is the shipper's duty to evaluate the freeman's character when engaging him (in modern or pandectist law: *culpa in eligendo*). In the case of a slave, however, the character evaluation is not necessary because the slave should be delivered to the victim of *delictum*.[11]

The innkeeper is liable for the actions of his employees, and of those who reside in the inn. He is not liable for the acts of temporary residents. The idea of the *culpa in eligendo* is also implied here.

Eva Jakab wrote about the innkeeper's business and dealings in two articles, brought at Symposion – Society of Greek and Helenistic law. Her first article *Wo gärt der verkaufte Wein?*, analyses the model of typical wine delivery contract: those which guarantee the quality of wine and those which do not. One contract offers five-month guarantee for the quality of wine, from the moment of the delivery. If wine loses its original quality, it will be replaced with equal quantity of matching quality.[12] The innkeeper's liability for the quality of served wine is reduced to its appropriate level. He is not responsible for *vis maior*, but for exactly defined defects during fermentation only.

In her second article *Gaius kommentiert die Papyri?*, Eva Jakab proves how papiry could help better understanding of well-known Roman law sources.[13] The comparison of Gaius fragment from Digest with two Bizantine documents dealing with wine sale shows us a striking similarity:

„Si vina quae in dolis erunt venierint eaque antequam ab emptore tollerentur, sua natura corrupta fuerint si quidem de bonitate eorum adfirmavit venditor, tenebitur emptori: quod si nihil adfirmavit, emptoris erit periculum, quia sive non degustavit sive degustando male probavit, de se queri debet. plane si, cum intellegeret venditor non duraturam bonitatem eorum usque ad in eum diem quo tolli deberent, non admonuit emptorem, tenebitur ei, quanti eius interesset fuisse."

(„When wine in casks is sold and it goes off before removal by the purchaser, the vendor will be liable to the purchaser, assuming that he voushsafed its quality; if, though, the vendor said nothing, the purchaser bears the risk because, if he has not tasted the wine or, tasting, injudiciosly approves it, he has only himself to blame. Of course, if the vendor knew that the quality would not last until the date for removal and did not warn the purchaser, he will be liable to the purchaser for the latter's interest in being warned.")[14]

7 D. 37. 5. 1–6

8 D. 37. 5. 3

9 D. 37. 5. 5

10 Ibid.

11 Ibid.

12 Jakab, E., *Wo gärt der verkaufte Wein* , Symposion, 1997, *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Köln – Weimar – Wien 2001, p. 295–318.

13 Jakab, E., *Gaius kommentiert die Papyri*, Symposion, 1999, p. 313–324.

14 D. 18. 6. 16

This article deals with the liability of the purchaser and the vendor when selling wine. According to this article, when the wine in casks is sold and goes off before removal by the purchaser, the vendor will be responsible to the purchaser if he guarantees its quality. If the vendor does not guarantee the quality of wine and purchaser does not taste the wine, or if he tastes but injudiciously approves it. „He has only himself to blame", says Gaius.[15] In this case he byes the wine *telle-quelle*. If the vendor knows that the quality will not last until the date for removal and does not warn the purchaser of it, he will be liable.

Eva Jakab also mentions an interesting document about a sale of the future wine. It is a contract by which the purchaser pays in advance the price of sixty-six casks of wine which will be delivered after the future harvest. Of course, in this case the vendor cannot guarantee the quality of wine. This contract, which has elements of an aleatory contract, seems to be „a real speciality" of the Roman innkeepers who were making big profit without providing quality services.

Galenus (II century, B.C.), the Roman court physician, explains the reasons why the Roman innkeeper deserved the bad reputation he got. Galenus writes:

> *„We found out a that numerous innkeepers and butchers had been caught selling human flesh instead of pork and costumers did not notice the difference. Trustworthy people told me a following account. They had a delicious soup with fine meat at the inn. After they had almost finished the soup, they found a pulp of an index finger in it. They feared that they might be eaten by the innkeeper and his servants since they had such habits. They left immediately, threw up their lunch and moved on. Then, later on the innkeeper and his servants were caught murdering someone."*[16]

This somewhat shocking example proves that it was prudent to treat the innkeepers harshly and that severe punishments were justified.

Hamman also says that these innkeepers provided services of prostitutes. Written messages to costumers in front of the taverns advertised „good services, bath and comfort", actually offered young girls to the guests who stayed at the inn. A guest could buy bread and wine for one as, hay for a horse for two ases, and a girl for eight ases.[17] This author also says that the most famous innkeeper girl was Helen, emperor Constantin's mother, who was born in the city of *Naisus* (today Niš in Serbia). *„Helen converted to the Christianity. She influences both her son and the very course of history."*[18]

If we compare innkeepers with members of other trades, we can see that their harsh treatment by law was justified. Real life imposed on Hamurabi the necessity to include, in his casuistic written code, certain articles which allow the punishment of dishonest and disloyal innkeepers in his empire. These articles would not have been included in Code of Hamurabi if there had not been many innkeepers who were punished (sometimes by being thrown into the water) with a good reason.

Roman law adopted this unfavorable attitude towards Roman innkeepers. It can be seen that they were often liable for mal practice, for covering up, even for conspiring with robbers and for secretly providing services of prostitutes. That is why they are categorized as quasi-delicts. Why not as real delicts? It is of course related to the much-discussed problem of the nature of quasidelicts (with a contribution of the late professor Stojčević). His idea was that there is nothing in the nature of those very heterogenius cases which connect them, except the fact that they could not fit into the Roman notion of *delictum*. Here that element was: there is no evidence of the guilt on the side of nautas, caupones et stabularios. The principle of the presumption of culpability (except in cases of *vis maior*) without any degree of guilt probably is the ancestor of today's principle of the objective responsibility.

15 Ibid

16 Galenus C., *De propriis placitus*, Berlin, 1955., p. 67–69.

17 Hamman, p. 28–29.

18 Ibid.