

# DEFINITION BY THE OPPOSITE IN ROMAN LAW – CAPITIS DEMINUTIO ET STATUS LIBERTATIS, CIVITATIS ET FAMILIAE

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## Key words:

status libertatis, civitatis et familiae (status of liberty, membership of the city and of the family)

capitis deminutio maxima, media et minima

caput (legal capacity)

ingenui (lawful (free) man)

persona sui iuris (person of its right)

persona alieni iuris (person under the competence of someone else)

servitutes (slavery)

libertatis (liberty)

## Resumé:

Definition or argumentation by the opposite – a *contrario* – is a common method of the interpretation of legal documents. The basis of this method is a process of negation when for example one group is defined by listing the attributes of another group; these are opposite conditions or attributes. In the current law system, this method of interpretation or argumentation is used very often, for example it is everything except ... and so on. This method was used as well by the ancient roman experts of law. They often defined only some legal institutes and especially those which were controversial. Ulpianus explained *ius naturale* in this way: “*Ius naturale is what the nature granted to all beings. This right is not reserved only to a man, but to all the animals ... Ius gentium is the right which is applied by the nations*”. On the other hand, Ulpianus did not consider useful (necessary) to explain *ius civile*, because for him, it was evident<sup>1</sup>. From this Hattenhauer’s citation we can draw

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<sup>1</sup> Hattenhauer, H., *European legal history*, Praha 1998, C.H.Beck, p. 81

conclusions that ancient experts of law defined mainly the controversial and unclear provisions that required some explanation. The most frequent provisions were generally overlooked because it was not considered necessary to explain these institutes, that we can call today notoriety, in details.

That is why today wonderful passages are conserved from which we can learn everything about the situation of slaves and persons *alieni iuris*. At the same time we are directly referred by Roman lawyers to the understanding of the situation of *sui iuris* and free persons only if we understand the situation of slaves and *alieni iuris* persons.

*Capitis deminutio* is therefore the law status, it is a status that every Roman citizen can enter into following some specific real or legal facts, for example the real fact is war captivity and the legal fact is the adoption, *coemptio* which represent the end of membership of one family and belonging to the new family. There are other things related to this kind of “change”, for example the exercise of familial rituals, when the woman entering the new family by marriage (whereby leaving her previous family) accepts also religious rituals of the new family – so-called *sacra privata/familia* (for example the worship of family’s *Lares* and *Penates*).

*Capitis deminutio* of whichever level is very practical law provision that changes the legal status of a person in relation to the change of fact. It is necessary to realize that what made an ancient man into a man was a summary of his political rights and these rights could be exercised only in the society called the city of Rome. The political rights were ranked according to the membership to the particular class, but this status of individual was not absolute and definitive (this situation could change also for example during the census by the change of property relations). That is why this status could change whenever during the life and it could be as well restored to the original status (in terms of *caput*) – *ius postlimini*.

The statuses of the free Roman citizens themselves - *status civitatis*, *libertatis* and *familiae* - are defined by the opposite. It is clear that for Roman citizens and lawyers it was evident who was free and full-fledged citizen – therefore a Roman and that is why the systematic of Roman law defined their position by the easiest way possible. They described in detail who is not the Roman – therefore, who is not free – and on this basis, everybody who does not fulfil the provisions about slaves or persons *alieni iuris* is free and consequently, the person *sui iuris*.

In my opinion one of the greatest Roman law definitions included in Digests is the following: *Dig. 1.5.4 pr. Florus 9 inst. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur*<sup>2</sup> → *The liberty is a natural possibility to do as one pleases to everyone, but only in the case that nor power nor law hinders it.* Not only it is important that what is the liberty is defined, but also a contrario that “lack of freedom” is the situation when one does not do as he pleases, but as someone else does. Here I see a clear difference in somebody who is free and somebody who is not and has a different legal status (slave, discharged, but also a person *alieni iuris*). This is in addition very evident in the situation of property. Who is under somebody else’s power acquires all the property for his “master” - an owner of competence over him (of course except *peculium*). On the other hand the status of liberty and exercise of competence is also aggravated; chiefly by obligation to provide security for actions of persons that are in free man’s power – *potestas*.

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<sup>2</sup> Dig. 1.5.4pr. Florus – Latin text took from [www.thelatinlibrary.com](http://www.thelatinlibrary.com)