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## **Álvaro d'Ors and the Roman law conception of freedom – a legal and philosophical perspective**

### **Introduction**

The concept of freedom has long been a central subject of inquiry in both philosophy and law, profoundly shaping socio-legal frameworks throughout history. Within this enduring discourse, the present article aims to explore in depth the original conception of freedom developed by the renowned Spanish Roman law scholar Álvaro d'Ors. Specifically, it advances two main hypotheses: first, that different conceptions of freedom are intrinsically linked to conceptions of human rights; and second, that a Roman law perspective on freedom remains relevant today, offering a critical alternative for addressing the challenges faced by modern democracies and the erosion of substantive civil liberties.

To this end, the article adopts a dual methodology, combining historical-legal analysis with conceptual-philosophical inquiry. The historical-legal dimension entails a careful examination and systematization of Álvaro d'Ors's writings on freedom, which constitute the primary sources for this study, particularly his understanding of freedom in Roman law concepts such as *libertas* and *patria potestas*, as well as to his interpretation of key legal distinctions, notably those between *liberi* and *servi*, and *auctoritas* and *potestas*. D'Ors's writings are contextualized in light of the classical sources he himself employed and are complemented by contemporary authors who engage with classical and modern conceptions of freedom. The conceptual-philosophical approach, in turn, critically engages with d'Ors' reflections on the dimensions of freedom, and their relationship with responsibility. This includes a close analysis of his definitions, the logical connections he establishes, and a comparison with classical and modern philosophical accounts

of freedom, while situating his thought within the broader academic discourse on Roman law and political philosophy.

### Roman *libertas*

Álvaro d'Ors, develops his analyses based on the Roman idea of *libertas* as a legal construct originating in the relationship between father and son. In fact, he says, in Roman law, the *liberi* are precisely the children, thus distinguished within the domestic sphere from slaves, who were subject to a master. In this sense, the “free” individual is one who has no master (which leads to a rather negative conception of freedom: conceived as the absence of bonds, of a “master”)<sup>1</sup>.

Consequently, freedom implies, from a legal perspective, a strict limitation – one cannot be partially free and partially unfree, as the distinction between these two statuses is absolute. For this reason, *libertas* served as a fundamental principle of legal order that allowed for a clear distinction between the legal framework governing free individuals or communities and that which applied to singular or collective subjects under the dominion of an owner – whether enslaved persons or peoples subjected to the rule of an absolute monarch or the dominance of another people. The Roman concept of *libertas* is “clear, limited, and juridically practical”<sup>2</sup>.

In Cicero words, Rome is the “paradise of freedom”<sup>3</sup>: while *omnes nationes servitutem ferre possunt, nostra civitas non potest* (“All nations can endure slavery, our community cannot”)<sup>4</sup>. So clear was this conviction that the title of *dominus*, or even *regnum*, was always avoided, even during the Principate, calling him *Augustus* and not king: the ruler presents himself as the father of the Roman People, so that his subjects are called and feel free<sup>5</sup>.

Despite seeming hypocritical, Roman law fundamentally distinguished between free workers and slaves, even in similar dire circumstances. This legal distinction, which might appear incomprehensible to modern minds,

<sup>1</sup> On the other hand, the relationship between freedom and Roman legitimacy becomes clear: the slave, the non-free individual, is the one whose paternity has no importance and, consequently, whose filiation is irrelevant. The lack of legitimacy is linked, in Roman law, to the lack of freedom. See: V. Arena, *Libertas and the practice of politics in the Late Roman Republic*, Cambridge 2013, p. 14.

<sup>2</sup> F. Schulz, *Principios del derecho romano*, 2nd edición, Madrid 2000, p. 164. All translations from Spanish in this article were made by the author.

<sup>3</sup> M.T. Cicero, *De lege agraria*, ed. V. Marek, Leipzig 1983, II, 29. See: C. Balmaceda (ed.), *Libertas and res publica in the Roman Republic ideas of freedom and Roman politics*, Leiden–Boston 2020, pp. 25–27.

<sup>4</sup> M.T. Cicero, *Second philippic oration*, ed., transl. and notes W.K. Lacey, Warminster 1986, X, 20.

<sup>5</sup> Á. d'Ors, *Ensayos de teoría política*, Pamplona 1979, p. 202.

meant that Romans genuinely considered communities like *civitates liberae* (free cities) to be free, despite their limited autonomy and political dependence, as exemplified by Schulz. He states that "These communities are exempt from the power of governors, possess their own territory, and even enjoy financial autonomy. Differences of opinion between each *civitas* and Rome are resolved through discussion in the senate. For the Romans, this is 'freedom', despite the lack of international sovereignty and despite the contributions in troops, money, and goods that these communities are obliged to provide"<sup>6</sup>.

While Roman private law guaranteed citizens considerable freedom, it was not absolute. Beyond public law, ethical principles such as *pietas*, *fides*, and *humanitas* also significantly shaped conduct<sup>7</sup>, reflecting a desire for personal autonomy, a sentiment echoed by Burckhardt: "the man of our race demands, barely emerged from barbarism, a quiet house and an inviolable enclosure of thoughts and feelings"<sup>8</sup>. In Roman law, freedom was intrinsically linked to one's familial position, which was fundamental to inheritance, the protection of family property, and the largely family-based economy. Legal personality and capacity were thus determined by status within the family rather than individual subjectivity. The Roman family (*domus*) encompassed all individuals under the authority of the *pater familias*, including both free persons (*liberi*) and slaves (*servi*), all subject to his *patria potestas*. As a result, individuals under this paternal authority did not possess full private law rights, regardless of their standing in public life. The descendants of the *paterfamilias* become *sui iuris* (of their own right) and acquire inheritance upon his death.

Roman law provided institutions for granting freedom to slaves (*manumissio*) through methods such as *vindicta* (symbolic act) or *censu* (census registration), and freedom could also be granted through wills, with Christianity later introducing *manumissio in ecclesia*<sup>9</sup>. Freed slaves (*libertini*) held a moral obligation of reverence towards their patrons, who in turn were bound by *fides* to them. Furthermore, the institution of *emancipatio* allowed a father to extinguish his *patria potestas* over his children. This emphasis on freedom within the private sphere resonated with Roman civic sentiment, which reflected a conviction that private and state interests were linked, leading to voluntary contributions and citizen participation in public life. While the Roman state exhibited a degree of authoritarianism by prioritizing its own freedom, it also ensured the freedom of its citizens, demonstrating

<sup>6</sup> F. Schulz, op. cit., p. 167.

<sup>7</sup> These principles are reflected in legal institutions that originated in Rome, such as the abuse of rights, the *exceptio doli*, and others.

<sup>8</sup> Translation by the author. J. Burckhardt, *Gesammelte Werke. 1. Griechische Kulturgeschichte*, 4th ed., Basel 1980, p. 81.

<sup>9</sup> That is to say, personal freedom was attained through the means of political freedom.

the interconnectedness of freedom, authority, and power that characterized Roman culture. Indeed, the principles of freedom, authority, and power proper to Roman culture are united here.

## The dimensions of freedom in d'Ors's Thought

D'Ors defines freedom as the "essential presupposition of responsibility"<sup>10</sup> adding that freedom consists in the will to "opt" for one's own actions, even without the possibility of alternative choice. Focusing on the dimension of *freedom of choice*, he clarifies that freedom lies in the fundamental human possibility of choice itself<sup>11</sup>, not necessarily in having multiple options. This exercise of freedom can manifest as deciding whether to act or not, or even as the internal acceptance or rejection of one's circumstances<sup>12</sup>. In this way, he emphasises freedom of choice together a perspective of openness: "to decide is a way of stepping out of oneself"<sup>13</sup>, which, in order to fully become, requires taking possession of what is chosen, for a reason determined by the will itself, introducing a nuance of *fundamental freedom* in its allusion to inner freedom, insofar as free acceptance is a manifestation of self-possession.

Drawing on a Romanist framework, d'Ors defines freedom negatively as the state of not being under a master, which aligns with the concept of "freedom-from" – the ability to act without external constraint. While a necessary aspect, this "freedom-from" is distinct from the higher form of human freedom often referred to as "freedom-to" or positive freedom. D'Ors's Romanist perspective, which emphasizes this negative sense of freedom, is evident in his explanation of the Roman concept of *libertas*: "We say that to be free

<sup>10</sup> Á. d'Ors, *Claves conceptuales*, „Verbo" 1996, No. 345–346, p. 518.

<sup>11</sup> As Alvira rightly points out, „the freedom of choice must be understood in relation to fundamental freedom". Moreover, this highlights the importance of the fact that free will, paradoxically, is not enough to live freely: without decisions that commit to moral freedom, one easily falls into indifference. Choosing „is a phenomenon of freedom. (...) A sure sign of freedom (...); one could say that the freedom of choice is a »preliminary freedom«, but not a »fulfilled freedom«". See: R. Alvira, *¿Qué es la libertad?*, Madrid 1976, pp. 72–73.

<sup>12</sup> D'Ors gives the example of the attitude toward death: one may choose to either accept it – even preparing for this transcendental moment with special care – or to reject it and rebel, or to continue as if nothing were going to happen. This example clearly demonstrates that freedom goes beyond the act of choosing (which constitutes one of its dimensions, but not the most radical one), and that it is an ontologically constitutive element of the human person, as we always decide – each day, at every moment – sometimes through omission. It is also highlighted that decisions are all the more free – and, in turn, „creator of freedom" – when we choose the good, which is in accordance with truth. In this example, when one opts to accept the reality of death, one is growing in freedom because, based on reality, one can continue to choose behaviors that are more in line with the situation of one who is, and knows himself to be, a mortal being. Cf. Á. d'Ors, *Derecho y sentido común*, Madrid 1995, p. 33.

<sup>13</sup> R. Alvira, op. cit., p. 72.

means not to have a master (...). A master is the one who imposes his will as such a personal will"<sup>14</sup>. He claims that this negative sense means the absence of subjection to a power of unreason, asserting that "the power that is not justified by reason before those who reasonably demand its justification becomes domination and suppresses freedom"<sup>15</sup>. Acknowledging that "this radical negative sense of freedom, while very helpful in fully understanding the concept in all its possible dimensions, does not exhaust them"<sup>16</sup>, d'Ors goes on to elaborate on positive senses of freedom, with particular emphasis on *moral freedom*. He defines this as the alignment of personal conduct with what reason reveals to be good, achieved through "the adherence of our will to our own actions". In essence, according to d'Ors, man, "as a rational being, has freedom of conduct: (...) he can align his will with the reason inherent in his human nature"<sup>17</sup>. This comprehensive understanding of freedom, encompassing both the negative absence of constraint and the positive capacity for rational action, illuminates the broader principle where possession signifies freedom and being possessed denotes bondage, reflecting an active power to incorporate the external and thereby enrich one's being, a *fundamental freedom* that manifests as a vital, intrinsic human attribute.

This moral dimension of freedom is practical knowledge that requires, for its proper use, prior awareness of good and evil, along with self-awareness. *Moral freedom* can be identified with what Thomas Aquinas calls *libertas ab impellentibus*, which, although it seems to possess a certain neutrality, depends on the absence of dispositions that can lead the person to a wrong decision. Thus, Aquinas points out that "although it is capable of good and of evil, free decision is through itself ordered to the good. Thus, it is that which impedes it from the good that is an impediment and its corruption simply. For this reason, freedom from what impedes the good is called 'freedom' simply. This is freedom from sin"<sup>18</sup>. Ultimately, moral freedom points to the most authentic freedom, which is freedom from moral evil and from what leads to it<sup>19</sup>. It is clear, then, that man's moral freedom is always imperfect since it can be frustrated, and in fact this happens relatively frequently, being ontologically limited: "it is due to the deficiency of a created nature that it can turn to evil"<sup>20</sup>.

<sup>14</sup> Á. d'Ors, *Ensayos de teoría política*, Pamplona 1979, p. 202.

<sup>15</sup> *Ibidem*, p. 203.

<sup>16</sup> *Ibidem*.

<sup>17</sup> *Ibidem*.

<sup>18</sup> Thomas Aquinas, *In II Sent.*, d. 25, q. 1, a. 5, ad. 2.

<sup>19</sup> Along these lines, d'Ors explains that the true meaning of liberation lies in being freed from sin through Redemption. He further clarifies that the term *redimere*, in its broadest legal sense in Roman law, refers to the purchase of a slave for the purpose of granting them freedom. Cf. Á. d'Ors, *Ensayos...*, p. 222.

<sup>20</sup> Thomas Aquinas, *De Veritate*, q. 24, a. 8, ad. 1.

Furthermore, the positive dimension of *moral freedom* consists in the constant struggle to foster stable dispositions towards good, that is, growing in virtues. In this way, freely, man decides to surpass the dimension of *freedom of choice*, achieving a certain determination towards good. This, in turn, has been previously chosen as the end of one's own life, within the context of a determined life project, which signifies the committed use of *fundamental freedom* in its most radical aspect, which is what ultimately defines *who I am*.

D'Ors approaches the close relationship between freedom and morality primarily from the perspective of a jurist examining the preconditions for judgment: "If we can judge behaviors, and if morality exists because of this possibility, it's because humans, as rational beings, have freedom of conduct – that is, they can align their will with the reason inherent in their human nature"<sup>21</sup>. Otherwise, he continues, one could only consider the effects of actions as mere mechanical facts, devoid of their status as genuine human acts. Without freedom, moral judgment would be impossible, a conclusion that reason itself refutes. While this initial approach may appear somewhat superficial, d'Ors, in his definition of love, refers to the "will of union", the result of a volitional act that establishes a personal union, which can only pertain to persons. In this manner, by considering the matter from a different vantage point, he attains a more comprehensive understanding.

At this juncture, d'Ors emphasises the inherent personal freedom to determine one's actions in every circumstance. He draws a distinction, without employing these precise terms, between *voluntas ut ratio* (will as reason), whereby, having discerned the good, a person decides whether to act in accordance with it, and humanity's intrinsic teleological orientation towards the good (*voluntas ut natura*). Nevertheless, d'Ors observes that freedom, as a power deeply rooted in human nature, does not equate to an absence of constraints: "Even the most potent individual invariably finds their possibilities for action circumscribed by forces of varying degrees of irresistibility. They cannot accomplish all they wish, even when their will is reasonable"<sup>22</sup>. Freedom of choice, he elaborates, endures and transcends itself because "to opt is to will, i.e. it is to adapt our will to an act, even if this act is necessary, since even in the face of what is necessary and inevitable we can choose to want or not to want"<sup>23</sup>. Even in extreme situations where an action is imposed in a humanly irresistible way, the inner attitude of adherence or rejection towards what is materially carried out under irresistible external pressure remains undeniable.

Regarding the question of whether freedom is limited or unlimited, it is pertinent to note that seemingly contradictory statements can be found in

<sup>21</sup> Á. d'Ors, *Ensayos...*, p. 203.

<sup>22</sup> *Ibidem*, p. 204.

<sup>23</sup> *Ibidem*.

d'Ors writings. On the one hand, he asserts: "In its negative sense, freedom is indivisible: one cannot simultaneously have a master and a father (...). From this fundamental indivisibility of freedom arises its unlimitedness"<sup>24</sup>. On the other hand, as previously indicated, d'Ors also affirms *libertas*'s inherent limitations. It is crucial to understand that this apparent discrepancy does not represent a contradiction in the author's thought but instead arises from the distinct contexts of Roman law and philosophy within which he examines freedom. Thus, within philosophical inquiry, one can speak of an intensive unlimitedness of moral freedom to the extent that it possesses an inherent capacity for growth, aligning with the principle that all vital phenomena entail either development or decline<sup>25</sup>. In fact, in every free action, the agent is fundamentally deciding for themselves, thereby shaping their moral being and personal ethos. Indeed, every action invariably leaves an imprint on the agent, modifying their character in some manner, rendering them, for instance, benevolent, supportive, a thief, or a liar, contingent upon the object of the action in question. Consequently, freedom is inherently oriented towards growth, and each free act actualises the personal structure of self-possession and self-mastery. Metaphysically, however, freedom is finite due to its inherent form, and is therefore, in this sense, limited. This is readily apparent in the existence of non-free acts, the immediate implication of which is that "no one is the origin of his freedom": it is fundamentally a gift.

Ultimately, freedom embodies openness, while its antithesis – remaining confined within the self – constitutes a volitional negation of that very freedom. In this regard, parallelism emerges between classical thought, with its understanding of freedom as relative, and modern thought, characterised by an absolute conception of freedom. Thus, whereas for the classical thinker, freedom is understood and articulated concerning other elements, notably truth and goodness, the modern thinker posits an absolute freedom considered equivalent to a radicalised negative liberty – the complete absence of impediments to acting according to one's will.

This interpretation, beyond emphasising a purported absolute independence of humanity from any heteronomous order (its "emancipation"), entails a total affirmation of spontaneity. Consequently, a superficial modern

<sup>24</sup> To have a father is to be a child and thus enjoy freedom; conversely, to have a master is to be a slave and therefore without freedom. See: Á. d'Ors, *Ensayos...*, p. 204. The unlimitedness to which d'Ors refers here is based on the fact that „every limit is a partial reduction, and it is not possible to partially diminish a condition that is inherently necessarily total and indivisible”. Ultimately, to limit freedom would imply, within the Roman Law system, attempting to subject to servitude someone who was considered free. Hence, Roman law only admits the possibility of freedom or slavery, with no middle ground. This is evidently a conception of freedom based on exclusively external criteria.

<sup>25</sup> The absolute character of the person also implies that freedom, in its most transcendental and radical form, is unlimited, since its inherent growth cannot be ontologically constrained and expands with each exercise.

optimism arises from the perception that humanity is “liberated,” the sole architect and author of its own ends and the meaning of its existence. Paradoxically, this spontaneity, focused solely on external constraints – where the ostensibly “spontaneous” individual often lacks interiority – ultimately engenders various forms of internal constraints, effectively undermining freedom. These include attachments to transient trends or fleeting desires, existential dependence on external validation, addictions, lack of self-discipline, etc. Within modernity, happiness is no longer conceived as the corollary of a sustained pursuit of the ultimate human *telos*, but rather as the *telos* itself, a state to be attained and one whose content is often reduced to mere worldly gratification.

When freedom is devoid of inherent normative criteria concerning good and evil, the central challenge resides in the practical difficulty of establishing a social order. In such circumstances, it would seem that only a “pure” reason could prescribe appropriate action. Reality, however, demonstrates the inherent difficulty in achieving consensus and in the face of disagreements, establishing whose reason should prevail. Ultimately, it is the powerful who prevail because, once human nature is emptied of its inherent substance, the pursuit of justice diminishes, and the law becomes predicated on strategies or procedures aimed at safeguarding desired outcomes.

The ambiguities that arise when examining our author’s understanding of freedom highlight how his unsystematic use of certain concepts and shifts in context – characteristic of d’Ors’s free-flowing writing style – can lead to the erroneous conclusion that his thoughts have radical incoherences. While it is true that he was indeed highly systematic in his extensive studies across his chosen fields, particularly in Roman law, he did not apply the same systematic approach to his commentaries on philosophical, social, or political matters. Moreover, he frequently expressed a consistent aversion to engaging in philosophy: “For a jurist, common sense suffices. Common sense is the true philosophy of jurists”<sup>26</sup>. However, common sense cannot be taken for granted, and it is undoubtedly true that law requires a philosophical foundation to underpin it.

## Social freedom

For d’Ors, social freedom is the one that pertains to the citizen as a member of the community, a concept that extends to non-nationals as well. He defines it as “an effective determination of reasonable behaviours within the social group”<sup>27</sup>, ensuring that no irrational power dominates the actions

<sup>26</sup> Á. d’Ors, *Derecho y sentido...*, pp. 25–26.

<sup>27</sup> Idem, *Ensayos...*, p. 205.

of the community's members. Consequently, one can speak of communities as being either free or unfree, although this designation ultimately reflects the freedom enjoyed by their members.

It is generally accepted that every society requires norms, as a complete absence of determined social behaviours would inevitably precipitate chaos, engendering a significant curtailment of freedom, because of the constraints imposed by an absolute lack of security and predictability, thereby jeopardising the most fundamental liberties. Rational limits are therefore indispensable to prevent the actions of any one citizen from unjustly impeding those of others. It thus becomes necessary to elucidate why these essential limits do not suppress freedom. The crux of the matter, as d'Ors points out, lies in the judgment concerning the limits imposed on the government: whenever these are presented as demands of reason, rather than as dictates of mere will, they will be just and, consequently, will not restrict individual freedom.

In its essence, law constitutes a rational ordering directed towards rational beings, who generally grant it their voluntary acceptance<sup>28</sup>. And although every law incorporates a volitional element – in that the ultimate decision rests with the governing authority, and decision-making inherently involves volition – yet this element ought not to be the determining factor. Rather, its role is to provide the means of concretising the law that has been reasonably deemed necessary<sup>29</sup>. Thus, in such instances, the law does not abrogate freedom, even though it effectively precludes certain choices. The challenge arises when the volitional component assumes a primary position in the formulation of legislation. This can manifest quantitatively, through legislative inflation that transforms society into an intricate web of laws and regulations, thereby stifling the citizen and restricting their autonomy in decision-making; or qualitatively, when the impetus behind the decision is the will to impose a particular substantive content that moulds social spheres according to a specific ideology.

D'Ors perceive in the contemporary world, dominated by technocracy, the danger of an increasing curtailment of freedom of choice, to the extent that the very existence of freedom becomes questionable. "The problem can be posed in these terms: How can we ensure that social freedom is not felt to be lost when the accumulation of laws comes to so restrict our choices that our entire lives are channeled in a single direction?"<sup>30</sup>. Democracy attempted,

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<sup>28</sup> Ibidem, p. 206.

<sup>29</sup> D'Ors offers the straightforward example of a law mandating driving on the right side of the road: it is patently reasonable to establish a regulation that harmonizes traffic flow in the interest of road safety, yet the selection of the right or left side constitutes a voluntary decision, one that may also be influenced by technical or customary considerations. In this instance, the volitional element clearly does not represent a significant threat to freedom.

<sup>30</sup> Á. d'Ors, *Ensayos...*, p. 207.

albeit unsuccessfully, to resolve this issue under the guise of the general participation of citizens in the formation of law. That is to say, the premise that “everyone” decides would ostensibly lend reasonableness to a law by virtue of its being apparently “desired”.

Precisely herein lies a significant challenge of modern democracy: the paradox that it seeks to guarantee the citizen’s freedom through the Rousseauian strategy whereby, in Rousseau’s words, “when an opinion contrary to my own prevails, that proves nothing other than that I was mistaken and that my estimate of the general will was wrong. If my opinion had prevailed, I would have done something different from what I had intended and, in that case, I would not have been free”<sup>31</sup>. In these pronouncements, it seems that by participating in the assembly and voting, the citizen discovers the true nature of the general will and, logically, recognises *ex post facto* that their genuine desire was something different from their initial vote<sup>32</sup>. It is thus evident that the tension between personal freedom and civic freedom has not been resolved but rather set aside. D’Ors, offering a pragmatic qualification to Rousseau’s assertion, posits that a citizen dissenting from the majority might reason thus: “I cannot do what I want, but I want – at least – the law that prevents me from doing it”<sup>33</sup>. It becomes evident that modern democracy has not successfully resolved this significant challenge of ensuring respect for freedom within society when intrinsic criteria that demonstrate the rationality of laws are disregarded<sup>34</sup>. Moreover, when a citizen is acutely aware that their individual vote, amidst the vast multitude of ballots, is unlikely to determine the outcome, as their personal agreement or disagreement often carries little weight and their participation exerts minimal influence on decision-making, the final justification for claiming that freedom is safeguarded through participation in the formation of the ruler’s decisions is undermined.

Consequently, d’Ors asserts that the democratic solution, by relinquishing the requirement of rationality in law, can arbitrarily impose its will,

<sup>31</sup> J.J. Rousseau, transl. by I. Johnston, 2014 [1762], <https://web.viu.ca/johnstoi/rousseau/socialcontract.htm> (accessed: 29.03.2025).

<sup>32</sup> Even political philosophers of a proceduralist leaning today seriously question whether, when casting their votes, electors genuinely consider their personal preferences or rather behave akin to fervent supporters of a football club or an influential public figure. Furthermore, if contemporary democracy is indeed guided by such subjects, what are the implications for the operation of a government whose policies are dictated by the loudest voices? Similarly, when a Parliament unanimously approves certain policies, what recourse remains for the dilemma of a citizen who voted for their representatives based on their opposition to the very measures those representatives now endorse? Can genuine representativeness be said to exist in such circumstances? As a counterpoint to the Rawlsian “veil of ignorance”, there emerges the concept of a “veil of insignificance”, which would represent the perception of citizens stemming from the lack of substantive weight accorded to their opinions. Cf. G. Brennan, L. Lomansky, *Democracy & decision*, New York 1993.

<sup>33</sup> A. d’Ors, *Ensayos...*, p. 208.

<sup>34</sup> A. Segura Ferns, *La teoría del poder de Álvaro d’Ors*, “Verbo” 2004, No. 421–422, p. 43.

much like a tyrant. Ultimately, personal freedom is primarily affected by two factors: firstly, the volitional nature of law, which can accommodate any content, whether good or bad; and secondly, the deficiency in genuine and effective participation of citizens in the destiny of their political community. Confronted with optimistic viewpoints that, with seeming common sense, suggest that problem-solving is facilitated by a greater number of individuals involved, or with Maritainian perspectives that advocate for democracy grounded in natural law – a regime purportedly respecting human dignity and, consequently, freedom more than others<sup>35</sup> – d'Ors adopts a decidedly skeptical stance. Similarly, Alvira contends that “one must possess the courage to be clear, to set aside ambiguities and pharisaism: *real* democracy – not the idealized version – is nothing more than what it has always been, namely, the political regime of individualism”<sup>36</sup>. Therefore, it must be considered that individualism starts from an anthropological conception that denies natural sociability and, therefore, does not seek the common good but the particular good. Its manifestation in the field of freedom “leads (...) to the following thesis: no one has the right to impose their criteria on me; everyone can do what they please and think the same way. (...) Since there are no truths, or if there are, many do not know them, let each one organize as they please; in short, the ‘freedom of whim’ is requested”<sup>37</sup>.

In Orsian language, since freedom is not based on *auctoritas* – which, in turn, implies the truth of man and society – it ends up in a situation of mere *potestas* that is imposed by coercive force<sup>38</sup>. As Alvira points out, the tyrant of ancient Greece is today the democratic State whose power grows, day by day, due to the need to ensure what the citizen asks of it: well-being and economic prosperity.

## Civil freedoms

As has become increasingly apparent, social freedom is now primarily understood as the act of participation in political “elections”. To avoid such

<sup>35</sup> Cf. R. Alvira, op. cit., p. 131. Following the line of thought of Maritain, we find the position of Rocco Buttiglione, who points out that in a „good” democracy „in addition to rejecting relativism in the democratic process, a society must have confidence in those who try to see and to tell people the truth (...). For this reason, the [real] democracy (...) is the kind of democracy developed in the Anglo-Saxon tradition – the kind of democracy found in the Federalist Papers – rather than the continental democracy of the French revolution”. See: R. Buttiglione, *The moral mandate for freedom*, Grand Rapids 1997, pp. 4–5.

<sup>36</sup> R. Alvira, op. cit., p. 134.

<sup>37</sup> Ibidem, p. 135.

<sup>38</sup> D'Ors defined *auctoritas* as „socially recognized knowledge”, distinguishing it from *potestas*, which he described as „socially recognized power”. See: Á. d'Ors, *Claves conceptuales*, pp. 509, 521.

a reductive understanding of participation, d'Ors extends his analysis to encompass other forms, designated in contemporary discourse as "freedoms", though he argues that these are fundamentally rights<sup>39</sup>. Among these, d'Ors enumerates the right (or freedom, within democratic parlance) to free movement, inclusive of its various ancillary rights, the right to freely choose one's domicile, to engage in free trade, safeguards against unwarranted police detention, among other provisions.

These civil liberties are congruent with what are conventionally termed subjective rights, which d'Ors defines as "personal preferences that judges approve and defend"<sup>40</sup>, by virtue of the objective criteria established by law permitting their ascription to specific individuals. These are, consequently, "personal duties of the social order"<sup>41</sup>; therefore, they cannot be conceived solely as individual powers conferred by law, given their inherent implication of duties towards other persons. In this way, d'Ors underscores the underlying rationale that compels the law to validate subjective rights: the service to those legal goods whose protection "interests" society by fostering a robust social order. Nonetheless, it is pertinent to note that the nature of these positive freedoms is determined significantly by political criteria, technical or economic exigencies, and analogous considerations. In d'Ors's assessment, the rights currently garnering the broadest acceptance are the so-called freedoms of association and of the press, owing to their pivotal role in democratic deliberation.

## Freedom of association

According to d'Ors, freedom of association denotes "the positive recognition of entities that, in some manner, are destined to exert repercussions upon the governance of the community, thereby possessing public significance"<sup>42</sup>. This implies an encompassing of not simply entities bound by contractual arrangements, but rather those vested with a juridical personality that surpasses the individuals constituting them. In essence, the freedom of association is not reducible to a mere absence of opposition to the assembly of a group; instead, it constitutes the affirmative act that gives rise within society to novel groups of public efficacy.

In his analysis, d'Ors particularly focuses on the political parties, i.e. "political groups, united by a common ideology and interest, that are oriented towards the acquisition of social power or, at minimum, towards exerting

<sup>39</sup> Idem, *Ensayos...*, p. 208 et seq.

<sup>40</sup> Idem, *Claves conceptuales*, pp. 512–513.

<sup>41</sup> Idem, *Nueva introducción al estudio del derecho*, Madrid 1999, pp. 27–29.

<sup>42</sup> Idem, *Ensayos...*, p. 210.

a significant influence on public decisions”<sup>43</sup>. From his traditionalist perspective, he argues that parties should be contingent groupings that arise primarily in opposition to specific decisions and at moments, reflecting a diversity of perspectives and allowing for the expression of freedom of thought. However, d'Ors warns that the situation changes fundamentally when such associations evolve into strategic groups engaged in a continuous political struggle, mobilizing masses under strict party discipline with little regard for the conscientious objections their members may have on certain issues. In such cases, the party ceases to be a natural element of political coexistence<sup>44</sup>. Political parties today, while may ostensibly act in defense of social freedom – and indeed, a well-integrated opposition can contribute thereto – in the vast majority of cases, are groups that seek, at any cost, gain access to power. Frequently, when the interests of the party disregard its members, they become elements that undermine freedom rather than safeguarding it<sup>45</sup>. Ultimately, d'Ors posits that political parties ought to reflect a certain “distribution” of individuals into political spheres that are accidentally opposed for the specific election at hand. In this manner, the citizen would retain greater liberty, and, crucially, there would not be imposed upon civil society an “organization of the internal political hostility of the State (...) [which functions] as stable pressure groups subject to a discipline that does not readily tolerate discrepancies among its members”<sup>46</sup>.

In the function that d'Ors ascribes to political parties and political organisation *per se*, the concept of representation is notably absent. This is because, having attempted to elucidate political representation through the lens of the private contract of mandate, which entails a delegation of functions, he concludes that this framework is insufficient to “clarify today the political reality that, in every civil society, some are those who govern and others those who obey. What is truly at issue is not popular representation, but popular acceptance”<sup>47</sup>. Given the prevailing crisis of parliamentarianism, it is essential to inquire into the function of those who govern, and while

<sup>43</sup> Ibidem, p. 211.

<sup>44</sup> Ibidem, pp. 211–212.

<sup>45</sup> J. Lucero [pseudonym: Á. d'Ors], *Justicia distributiva en el ciudadano*, „Actualidad Española” 1956, No. 251.

<sup>46</sup> Á. d'Ors, *Nueva introducción al estudio del derecho*, Madrid 1999, pp. 168–169. The diminution of citizens' political freedom becomes even more evident in systems employing „closed lists”, which supplant the will of the elector with that of the party, thereby leading to partitocracy.

<sup>47</sup> Idem, *Ensayos...*, p. 238 ff. Within the text, he includes an imagined dialogue between the ruler and the ruled, cast in the following terms: „»Why do you command me, ruler?« – asks the democratically governed – and the ruler responds: »I command you because you have commanded me to do so«. It is thus evident that recourse to a supposed social contract or other analogous device is merely an attempt to rationalize this inherent contradiction wherein the mandatary commands the mandator.

d'Ors does not proffer a comprehensive response to the governmental facet of political representation, he nonetheless cautions against the tenuousness of its alignment with reality.

The problem, undoubtedly, presents itself with acuteness given the manifest absence of genuine deliberative processes in the making of public decisions. This constitutes yet another manifestation of the prevailing distrust in the efficacy of practical rationality, which is regarded as incapable of yielding valuable practical solutions for society. Consequently, parliament becomes commodified, and instead of serving as a forum for deliberation, it devolves into an arena of arithmetical voting where the sole aim is the imposition of wills over others. Ultimately, when rational dialogue directed towards the public shaping of political decisions is abandoned, its very specificity – that is, the representative function incumbent upon it – is jeopardised, transforming it into a sphere of partisan negotiation. In essence, partitocracy has transferred popular representation from the constitutive organs of the political regime to political parties, which act as direct instruments of government, thereby monopolizing the determination of what is presented as the popular will<sup>48</sup>.

### Freedom of the press

Within political society as conceived by d'Ors, the freedom of the press occupies a significant role. Indeed, if democracy operates based on political parties striving to perpetuate their hold on power, or at least to exert a decisive influence within society, these parties require, in addition to economic resources, the benefit of freedom of the press to enable the publication and dissemination of their ideas. In this regard, “the publication to which this freedom refers is, like the freedom of association, a means of intervening in the political sphere, belonging not to private individuals, but to society as a whole”<sup>49</sup>. Thus, both freedoms are directed towards the same end: shaping public opinion and thereby influencing governmental actions. Moreover, both seek to prepare for elections and to maintain in power the group to which they are affiliated; it is, therefore, a matter of orienting public opinion in a specific direction that ensures the control of power.

D'Ors cautions that, by its very nature, opinion, whether published or not, “is always (...) a piece of advice; however, when it evolves into the stance

<sup>48</sup> The ideas presented in this paragraph draw upon: A. Cruz Prados, *Ethos y polis*, Pamplona 1999, p. 429. Cruz exemplifies this situation by describing the current parliamentary procedure as a mere „staging”.

<sup>49</sup> Á. d'Ors, *Ensayos...*, p. 212.

of a pressure group, when it employs the means of propaganda to exert pressure on the consciences of others, that opinion tends to transform into and be utilized as an instrument of force"<sup>50</sup>. The binomial of *potestas* and *auctoritas* reappears, this time illustrating how *auctoritas* (itself a piece of advice) seeks to assume control of the *potestas*; nonetheless, given its usual embodiment in propaganda – itself a means of power – that authority degenerates into power. This is because the mass dissemination of an opinion within the community presupposes a decision by the *potestas* of the government, and furthermore, because the significant distinction between the inherent freedom to opine and the freedom to command the technical apparatus of mass propaganda, proper to *potestas*, is overlooked.

Moreover, for d'Ors, opinion, by its very nature, is personal and not social<sup>51</sup>, because no individual can impose upon another intellectual submission to a particular viewpoint. Social groups may possess a collective "will", but not a collective opinion; opinion remains inherently personal, belonging to the individuals who compose the group. When the objective is to achieve a common accord, personal opinion manifests in a diversity of proposals, while the acceptance of the outcome shows a singular will, even if it contravenes one's own opinion. Even in instances of unanimous majorities, what exists is an opinion held by all voters, but never a collective opinion: "I can will what the majority wills, but if I declare that I hold the same opinion as the majority regardless of what that opinion is, this is no longer an act of understanding, but of volition"<sup>52</sup>. When one defers to the intelligence of another, especially given the absence of certain and indisputable truths in the political realm, an instance of fanaticism clearly emerges.

Given this inherent characteristic of the opinion, any pretence of imposing dogmatically on anyone, as if they were technical imperatives grounded in scientific truth, is inherently unwarranted. Nevertheless, the prevailing attitude of "political correctness" has resulted in the *a priori* judgment of certain positions as either correct or incorrect, leading to the preferential validation or outright silencing of those who articulate them. Similarly, within a technologically advanced society, the issues under political consideration are often framed with such complexity that the average citizen cannot readily comprehend them without specialised preparation and an understanding of a myriad of factors often withheld from public knowledge. Consequently, while citizen participation in the formation of public opinion remains a laudable

<sup>50</sup> Idem, *Escritos varios sobre el derecho en crisis*, Madrid 1973, p. 104.

<sup>51</sup> Political power may represent the will of the community – the very foundation of democracy – but it can never represent its opinion, which remains personal to each citizen, being the product of intellectual reflection. Cf. idem, *Ensayos...*, p. 235.

<sup>52</sup> Ibidem, p. 237.

and necessary endeavour, it frequently does not translate into a decisive influence on governmental actions.

## Responsible freedom

As previously mentioned, the realisation of personal identity cannot be conceived without considering a final goal or meaning, which serves as a guiding principle in the successive choices an individual continuously makes. If the perspective of the end is eliminated, a “depersonalization” ensues, likening the human being to a “thing” – be it a machine or a mere procedure – to indicate some of the prevailing systems of objectification. Consequently, states d’Ors that “if we do not relinquish the distinction between human beings and things, it becomes inescapable to account for one’s own conduct – and herein lies responsibility”<sup>53</sup>. This characteristic of the person, continues our Romanist, asserts itself: “being humankind a rational and necessarily social being, and therefore ‘personal’, (...) must provide a rationale for their personal conduct to the other persons with whom they interact. It is precisely this relationship with their fellow beings that constitutes a human being as a ‘person’”<sup>54</sup>.

D’Ors asserts, perhaps stretching the language or venturing into over-interpretation – that with Kant, the term person is superseded by subject, a concept which – in its literal sense, distinct, of course, from the meaning intended by that philosopher – effectively marginalizes the capacity for free decision-making. The “subject”, by definition, is something “subjected”, that upon which decisions are made, yet inherently lacking the capacity for autonomous decision-making regarding its own conduct. Thus, we find ourselves today confronting a person whom modern subjectivization has divested of freedom, and who previously – with the Reformation doctrine – had relinquished responsibility for their actions. Consequently, according to d’Ors, “the origin of all human degradation in modernity lies in that theological error of ‘faith without works’, from which ultimately follows the negation of all freedom and responsibility”<sup>55</sup>.

D’Ors contends that the analysis of the relationship between freedom and responsibility – concepts he deems fundamentally juridical – necessitates an approach rooted in law, given that it involves a judgment concerning

<sup>53</sup> Á. d’Ors, *Responsabilidad y libertad*, „Verbo” 1994, No. 327–328, p. 803.

<sup>54</sup> D’Ors asserts that man „lives” and the person „exists”, based on the Latin etymological sense of these terms. Thus, he defines living as *esse in corpore*, whereas existing is understood as *ec-sistere* („to stand out or before others”), which indicates otherness, as one only exists in relation to something or someone.

<sup>55</sup> Á. d’Ors, *Responsabilidad y libertad*..., p. 804.

conduct, and indeed, all judgment is inherently juridical<sup>56</sup>. Consequently, he asserts that responsibility presents itself as the “answer of reason that a person must provide when questioned about their own acts and their conduct in general”<sup>57</sup>. This extends beyond the mere legal domain to encompass, more importantly, the fulfillment of one’s word. Therefore, d’Ors concludes that responsibility resides in the fidelity – the Latin *fides* – of the individual who answers in accordance with their given word: “that is why we say that a ‘responsible person’ is one who keeps their word. This response must be distinguished from ‘contestation’: one responds to a question, but one contests an affirmation, whether positive or negative; hence”, d’Ors continues, “the significant difference between a responsible person and a contestant”<sup>58</sup>. One might observe, however, that while freedom and responsibility constitute two distinct – yet intrinsically interwoven – dimensions of human nature, establishing any hierarchical order of priority, importance, or temporality between them proves unsustainable. Among other considerations, this is because accountability presupposes freedom, just as genuine freedom necessitates the presence of another to whom one is answerable. They are, therefore, mutually interdependent concepts. Thus, responsibility signifies “to answer”, yet only in response to another who “interpellates”, thereby, in a certain sense, entering into one’s being. The response invariably involves a movement beyond oneself and, consequently, remains inherently free.

In order to elucidate the relationship between freedom and responsibility d’Ors proceeds to examine various legal concepts. Following a detailed analysis of cause, presumption, and condition, he concludes that freedom serves as a presupposition for responsibility. Thus, he explains that “responsibility is the principal essential attribute of humankind, and freedom is merely a presupposition or requirement of responsibility, for one could not be held accountable for their actions if these were not voluntary”<sup>59</sup>. From the vantage point of responsibility, he asserts that “the latter cannot be the presupposition of freedom, as freedom itself would be inconceivable without responsibility”<sup>60</sup>. This constitutes a decidedly legalist argument, as

<sup>56</sup> In contrast to the author, it is worth considering that the concepts of freedom and responsibility are properly philosophical, given that law cannot be established without anthropological foundations. On the other hand, it is also pertinent to point out that not every judgment constitutes a juridical concept; judgment is also a feature of ethics and epistemology. Consequently, it is advisable to bear in mind that freedom and responsibility are not confined solely to the legal domain and that their reciprocal relations warrant examination within other spheres as well – for instance, the moral realm. This Orsian perspective, which accords absolute primacy to law, stands in opposition to an approach that ultimately emphasizes the unity of knowledge.

<sup>57</sup> Á. d’Ors, *Responsabilidad y libertad...*, p. 804.

<sup>58</sup> *Ibidem*.

<sup>59</sup> Cf. Á. d’Ors, *Responsabilidad y libertad...*, pp. 811–812.

<sup>60</sup> *Ibidem*, p. 812.

the reasoning rests upon legal concepts that do not fully comport with their philosophical content. Ultimately, freedom is here being defined by only one of its consequences: that which arises from the necessity of accepting the ramifications of one's own actions. In this vein, d'Ors affirms that "responsibility leads man to relinquish a portion of his freedom", positing that since humankind is "by nature, a responsible being, its freedom is a function of its responsibility". It might be countered that, preceding a volitional choice, its consequences do not constitute a limitation upon freedom because they have already been, at least implicitly, "chosen" when the primary decision was made. Ultimately, if one moves beyond the "purely legal" argumentation employed by d'Ors, it becomes evident that freedom and responsibility are two facets of the same human reality, lacking any inherent ontological hierarchy.

## Conclusion

In conclusion, it can be asserted that d'Ors, on the one hand, confronts the conception of freedom as the cornerstone of modernity, positioning it – in a certain respect – as subordinate while presenting responsibility as a more fundamental reality in contrast to that modern interpretation. On the other hand, he demonstrates the inadequacy of the modern conception of freedom, which he argues reduces it to mere acts of choice by a mere "subject" – one to whom "something occurs" – a subject who does not transcend the self to give himself over (the most profound sense of freedom), but rather whose freedom consists solely in that which "befalls" them.

Notwithstanding certain shortcomings from a philosophical perspective, d'Ors, by establishing freedom as a fundamental presupposition of responsibility, evinces a more profound and nuanced comprehension of its essence. Furthermore, his perspective transcends the limitations of subjective freedom by proposing a responsible freedom that actively shapes the individual. This form of freedom empowers individuals to pursue self-improvement through deliberate choices and to uphold their commitments, thereby accepting comprehensive responsibility for their actions.

Finally, the Orsian understanding emphasizes that responsibility does not consist merely in the moral or legal imputability of a harmful act understood, in principle, as voluntary conduct, but rather implies a voluntary assumption of the obligation to make amends. Building upon this, he extends the concept of freedom beyond the individual realm to the social sphere, shifting the focus from freedom in isolation to freedom exercised with responsibility, asserting that "so that freedom does not ruin the civil order itself, without which it falls into anarchy, it must be a responsible freedom. In other words:

freedom is only conceivable for those who take responsibility for the consequences of their actions”<sup>61</sup>.

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## Summary

### Álvaro d'Ors and the Roman law conception of freedom – a legal and philosophical perspective

**Keywords:** Roman law, *libertas*, moral freedom, freedom and responsibility, modern freedom.

The purpose of the article is to critically explore and analyse the original concept of freedom formulated by the renowned Spanish scholar of Roman

<sup>61</sup> J. Lucero [pseudonym: Á. d'Ors], *La instauración de la responsabilidad*, „Actualidad Española” 1956, No. 231, p. 9.

law, Álvaro d'Ors (1915–2004), drawing from his numerous, yet not fully systematised or compiled, teachings. Drawing on the Roman legal notion of *libertas* and employing legal and philosophical frameworks, d'Ors advances from freedom of choice to moral freedom, ultimately culminating in its highest form of responsible freedom. Furthermore, by scrutinising d'Ors' argument that responsibility constitutes the essential presupposition of freedom, the article seeks to offer a compelling counterpoint to modern interpretations of freedom. Finally, while acknowledging shortcomings of d'Ors' treatment from the perspective of the philosophical foundations of law, the article aims to demonstrate the enduring relevance of Roman law to contemporary philosophical and legal debates concerning freedom, responsibility, and civil order.

## Streszczenie

### Rzymskoprawna koncepcja wolności u Álvaro d'Orsa – perspektywa prawna i filozoficzna

**Słowa kluczowe:** prawo rzymskie, *libertas*, wolność moralna, wolność i odpowiedzialność, nowoczesne pojęcie wolności.

Celem artykułu jest krytyczna analiza oryginalnej koncepcji wolności sformułowanej przez wybitnego hiszpańskiego romanistę Álvaro d'Orsa (1915–2004), opierająca się na jego licznych, choć nie w pełni usystematyzowanych i skompilowanych rozważaniach. Odwołując się do rzymskoprawnego pojęcia *libertas* oraz wykorzystując ramy prawne i filozoficzne, d'Ors rozwija swoją koncepcję od wolności wyboru, przez wolność moralną, aż po jej najwyższą formę – wolność odpowiedzialną. Ponadto poprzez analizę argumentacji d'Orsa, zgodnie z którą odpowiedzialność stanowi fundamentalną przesłankę wolności, artykuł zmierza do przedstawienia przekonującego kontrpunktu wobec współczesnych interpretacji wolności. Wreszcie, choć uwzględnia pewne niedostatki ujęcia d'Orsa z perspektywy filozoficznych podstaw prawa, w artykule dąży się do wykazania trwałej aktualności prawa rzymskiego w kontekście współczesnych debat filozoficznych i prawnych dotyczących wolności, odpowiedzialności oraz ładu obywatelskiego.