THE STATIC AND DYNAMIC ASPECTS OF ROMAN LAW AS PORTRAYED IN THE SOURCES OF LAW

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Abstract

The dynamics of the private Roman law sources had been influenced by the conjoined action of three factors: the Romans' conservative mentality, their practicality and the incorporation of the concepts of equity and good faith into their legal system. By virtue of the Romans' conservative mentality, their private law functioned according to less than thirty laws. Towards the end of the Republic, against the background of the economic revolution that gave variety to social relations and enhanced their complexity, many of the provisions of the old laws, including those laid down under the Law of the Twelve Tables, became inapplicable. Faced with these challenges and animated by their practicality, the Romans realized that appropriate measures had to be taken so as to strike a balance between the provisions of the law and the new demands of the ever-changing Roman social life. To this end, they started from the conviction that trade economy could not be strengthened and further develop without an effective legal ordinance. In order to counterbalance the discrepancy between the laws and the development of the social environment, the Romans resorted to procedural means and extensive research upon which they elaborated in accordance with the principles of equity and good faith. Consequently, towards the end of the Republic, the Praetor's Edict and the jurisprudence functioned as a legal filter with a view to striking a balance between the provisions of the old laws and the new social atmosphere. Throughout this stage in the evolution of private Roman law sources, the law embodied the static aspect, whereas the Praetor's Edict represented its dynamic counterpart. Therefore, by means of interweaving tradition with innovation, the Romans managed to modernize the private law under the impression that the old laws were still in effect.

Keywords: *sources of law, procedural means, jurisprudence, subjective rights, codification*.

Introduction:

On today's legal scene, modern law distinguishes itself through the metaphysical nuances it possesses and the fact that it places high emphasis on the reformation of the fundamental sources of law and the codification process. However, systematic research should not be conducted on legislative technique only, but also on the actual causes of law. Against a background in which the law is regarded as the inventor of social relations that will eventually bring about virtual law, it is essential that we look back on a system in which social relations led to legal action, thus contributing to the development of the law. Given that the sources of Roman law have no equivalent anywhere else in the world, it is no wonder that scholars have shown great interest in these profoundly original works. The dynamics of the sources of private Roman law had been influenced by the conjoined action of three factors: the Romans' conservative mentality, their practicality and the incorporation of the concepts of equity and good faith into their legal system. By virtue of the Romans' conservative mentality, their private law functioned according to less than thirty laws. This scarcity can also be explained by the old Romans' reluctance to abrogate their laws on the grounds that they reflected not only the voice of the people, but also the will of the gods and any act of human interference with them was thus prohibited. On the other hand, towards the end of the Republic, against the background of the economic revolution that gave variety to social relations and enhanced their complexity, many of the provisions of the old laws, including those laid down under the Law of the Twelve Tables, became inapplicable. Faced with these challenges and animated by their practicality, the Romans realized that appropriate measures had to be taken so as to strike a balance between the provisions of the law and the new demands of the ever-changing Roman social life. To this end, they started from the conviction that trade economy could not be strengthened and further develop without an effective legal ordinance.

In order to counterbalance the discrepancy between the laws and the development of the social environment, the Romans resorted to procedural means and extensive research upon which they elaborated in accordance with the principles of equity and good faith. Consequently, towards the end of the Republic, the Praetor's Edict and the jurisprudence functioned as a legal filter with a view to striking a balance between the provisions of the old laws and the new social atmosphere. At this stage in the evolution of Roman law, whenever the Praetor deemed a plaintiff's claims legitimate, the latter was also presented with the appropriate procedural means to have his claims valued by judicial process1. Moreover, the Praetor also created new, flexible and effective legal institutions that served as the basis for a new legal

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[1] C.St. Tomulescu, International Review of Laws in Antiquity, Bruxelles, 19, 1972, p.435.

branch called the praetorian law which functioned as a counterpart to the civil law laid down under the old laws. Throughout this stage in the evolution of the private Roman law sources, the law embodied the static aspect, whereas the Praetor's Edict represented its dynamic counterpart. Therefore, by means of interweaving tradition with innovation, the Romans managed to modernize private law under the impression that the old laws were still in effect.

By means of subtle interpretation of the legal texts, new legal proceedings destined to settle the disputes that arose during this time frame were introduced in the science of law. Consequently, a similar function had to be carried out by the jurisprudence. Acting under the impression that they reinterpret the old civil law, the jurisconsults heavily exploited the resources of the legal technique and created new legal institutions. It is through formulating legal principles and systematizing the research material on their basis that the jurisconsults managed to produce a dynamic work that could offer practical solutions to even the most complicated legal disputes. Here is how the synthesis of the Romans' conservative mentality, their practicality and the requirements of natural law led to the emergence of a dynamic and effective legal system the sources of which successfully ensured both the stability of the legal institutions and their adaptability to the ever-changing social conditions.

In order to shed light on the manner in which the Praetor's Edict influenced the development of the civil law, we must elaborate on the features and the functions of certain legal praetorian institutions. We will now further discuss the praetorian property, inheritance and pacts.

As far as matters of property are concerned, the Praetor created a fictitious action that made civil property available to peregrines[2]. Given that the right of civil property could be originally exercised by the Roman citizens only and was sanctioned through actions for the recovery of personal property, the Praetor introduced into the formula of this action the fiction stating that peregrines are Roman citizens, thus making it applicable to them too. Praetorian property was also sanctioned through a fictitious action to which certain things mancipi acquired through tradition were subjected[3]. For a long time, the only manner in which things mancipi could be transferred was through mancipatio, but if a thing mancipi was transferred through tradition, the Praetor would make the acquirer entitled to use the Publician action that features the fictitious formula stating that the necessary time for usucaption had run and, in this way, the acquirer won the trial as usucapient. In the Praetor's view, the one who purchased the property of another should be deemed to be in good faith and entitled to legal protection. Put differently, the aforementioned solution draws on the concept of good faith. Another addition to property law includes the fact that the Praetor managed to alleviate the consequences of the pecuniary punishment through the introduction of the arbitrary clause into the formula of the action[4]. According to this clause, if it was proved that the plaintiff was the rightful owner of the object of the legal dispute, but the defendant refused to return it to him, the latter would be compelled to award the injured party a monetary compensation established by the plaintiff in compliance with the overall rule. As a result, there was every incentive for the defendant to return the object to the plaintiff and in so doing, the retaliation in kind came to be prescribed via an indirect route. Therefore, although the pecuniary punishment was not expressly abolished, it was not, in fact, used in property recovery litigations, meaning that, on this occasion, a procedural rule was amended through a procedural mechanism[5].

The Praetor brought about changes in matters of inheritance too and first among these was the fact that according to praetorian law, legal actions entailed the protection of the rights of succession of blood relatives[6]. Although civil kinship was the only ground of succession laid down under the Law of the Twelve Tables, the Praetor also called to the inheritance the blood relatives who did not qualify as civil relatives, a practice that became known as praetorian inheritance. The Praetor's reforms later provided the basis for the Imperial reforms and by the time of Justinian, blood kinship became the only ground of succession[7]. Once again the Praetor did not expressly abrogated the regulations of the civil law, but through the protection of the rights of succession of the blood relatives, he laid the foundation of a new successional system that eventually prevailed, being legislated by the modern law.

The Praetor's reforms exerted a tremendous influence over the successional system which functioned as a catalyst of the protection of the rights of succession of the blood relatives, insofar as, according to the Law of the Twelve Tables, the agnatio was the only ground of succession. Through these reforms, the Praetor revolutionized the old successional system that deemed the cognatio irrelevant and paved the way for the Imperial reforms by means of which the consanguinity became the ground of succession. Therefore, the Praetor not only created a new successional system, but he also indirectly contributed to the shaping of specific aspects of the modern successional matters.

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[2] Gaius, 4.36.
[3] J. Gaudemet, Private Roman Law, Paris, 2000, p.162.
[4] R. Robaye, *Roman Law*, I, Bruxelles, 2001, p.162;
[5] Inst.,4.6.31.
[6] P.C. Timbal, Roman Law and the Old French Law, Dalloz, 1975, p.120.
[7] Nov. 118; P.F.Girard, op.cit., p.879.

In reply to the complaints of the blood relatives, the Praetor altered the old successional system via a procedural route that implied the grant of new formulae based on the possession of successional goods known as bonorum possessio. By this means, four new categories of praetorian heirs appeared, namely the bonorum possessio unde liberi, the bonorum possessio unde legitimi, the bonorum possessio unde cognati and the bonorum possessio unde vir et uxor. This new successional order entailed other changes: firstly, the emancipated son and his descendants were no longer excluded from the inheritance, thus joining the sui heredes. Secondly, if an agnate repudiated the inheritance, it would no longer become vacant, for it would be passed on to the next category of heirs, namely the cognates. By introducing this new category of heirs into the successional hierarchy, the Praetor revolutionized the old regulation in which they did not appear, thus creating a successional vocation for the mother and the children born in a marriage without manus. Of course, this was possible only if the relatives belonging to the first two categories were absent. Otherwise, the existence of a single agnate made it impossible for the cognates to be in the line of succession to the inheritance. Through the introduction of the fourth category of heirs, the bonorum possessio unde vir et uxor, those8 married without manus were granted the right to inherit each other, on the condition that there were no heirs belonging to the first three categories. Although the agnates continued to take precedence over all other heirs, the Praetor, who was not a legislator, took the first step towards the protection of the rights of succession of the blood relatives that, in turn, lead to the implementation of the Imperial reforms by means of which the cognatio became the ground of succession.

The praetorian pacts emerged in response to the finding that the formalist approach to contract matters was nothing but a hindrance in the way of the commerce that was so vital to the Roman society. Therefore, by introducing the praetorian pacts, namely the recepta, the hypotheca and the constitutum debiti, the Praetor not only elevated the simple act of intention and manifestation of volition of the parties to the rank of legal contract, but he also created new adaptation patterns for the law to the dynamics of the society.

The activity performed by the Judicial Magistrates, led by the Praetor, was mainly defined by the extension of the scope of regulation via procedures9. In so doing, the civil law which had been portrayed in the legal texts as contradictory, rigid and formalist was influenced to the degree that it evolved towards an abstract, unified approach10. The emergence of the praetorian law came, among others, as a consequence of the fact that it was inconceivable to the Romans that a subjective right could exist without an appropriate corresponding action. While nowadays the existence of an action originates from the existence of the law itself, in the Roman world, the subjective right arose from the existence of the legal action and therefore it was impossible for a subjective right to exist without a corresponding legal action11. The specificity of this relationship between right and action put the judicial bodies at the forefront of the overall development of the private law by ensuring both its stability and flexibility.

The concepts, principles and institutions of the praetorian law were later subjected to scientific research and organized into collections known as ad edictum. Salvius Iulianus' Edictum Perpetuum12 marked the culmination of the systematization process on the basis of scientific criteria undertaken by the praetorian law. While the Law of the Twelve Tables is a collection of primitive legal customs enshrined in the practice of the courts, Edictum Perpetuum is not only the outcome of the systematization process that passed the evolved judicial practice through the scientific research filter, but also a regulatory model that prevailed through its subtlety, accuracy, harmony and above all, the general and abstract nature of its provisions. Unlike modern society which often takes the risk of legislating away nothingness, the Romans closely followed the thread of the judicial practice. The explains the fact that the concepts and principles of the classical Roman law were recognized as such only if they were enshrined in the practice of the courts. It is concluded that, at the peak of the Roman legal system, judicial practice played a crucial role not only in the application of the law, but also in its creation.

For its part, by means of interpretation, the jurisprudence created new legal institutions that not only departed from the requirements of the old civil law, but also denied it. One can mention in this respect the adoption, the emancipation and the adjoining pacts.

The adoption emerged via interpretation in response to the social demands in a context where, in accordance with the Law of the Twelve Tables, it was a nearly impossible undertaking. By interpreting the provisions referring to the sale of sons, the jurisconsults created this artificial form of acquisition of parental power by which a person who was under the power of the head of his family came under the power of another13.

It is through the interpretation of the provisions of the Law of the Twelve Tables referring to the sale of sons, too, that the Praetor created the emancipation in reply to the fact that the rapid development of trade

[8] S.G. Longinescu, *Aspects of Roman Law*, II, Bucharest, 1929, p.976.
[9] E.Volterra, Jura, 7, 1956, p.141.
[10] Cicero, De inv.2.22.67.
[11] E.Molcut, "On the role of the courts in the shaping and application of the law", Review of Public Law, nr.4/2004, p.9.
[12] O.Lenel, Das edictum perpetuum, ed.I, 1883; ed. a II-a, 1907; e. a III-a, 1927, republished under the imprint of Aalen, 1956.
[13] GAIUS, 1.98; XII. T., 4.2.

economy became wholly incompatible with the son's incapacity to perform legal acts in his own name14.

Last but not least, one can mention in this respect the emergence of the adjoining pacts that, in the form of conventions concluded in addition to the main obligation, sought to make certain content-related amendments15.

At the same time, the jurisconsults drew up new legal principles. However, these principles were recognized as such only if they were able to offer optimal solutions to all types of legal disputes in a given area. Therefore, it is not through metaphysical judgements that the principles of the Roman law came into being, but rather through the fact that they confirmed in practice. The close link between the content of the jurisprudence and the requirements of practice is suggestively highlighted by the historical path taken by those fragments of the classical works that were compiled under Justinian's Digest and Institutes.

While the adoption of the Law of the Twelve Tables and the codification of the Praetor's Edict marked the culmination of several natural development processes which consisted in introducing certain legal norms and procedures, Justinian's Digest and Institutes hold a different historical meaning. They are not supposed to symbolize the end of a cycle in the legal evolution, but Justinian's desperate attempt to resuscitate the Roman slave society. Justinian, aware that the Roman slave system was collapsing, appointed a number of highly regarded jurists to systematize and reinstate the most valuable fragments of the works of the classical jurisconsults, hoping that if they came back into force, the slave system would be saved16. In reality, all his efforts turned out to be in vain as the slave society eventually collapsed, being replaced by feudalism.

Under these circumstances, Justinian's codification proved to be inoperative and a few decades later, it was gradually replaced by other sources of law that matched the new social realities. Emperor Justinian's failed attempt to return to the classical Roman law can be explained by the fact that the classical legal procedures were neither passed through the filter of the judicial practice, nor adapted to the demands of the feudal social relations which were on the rise at that time. Upon noticing that the provisions laid down under the Digest and the Institutes did not meet the new social requirements, the judges found themselves powerless to apply them.

Indeed, the classical legal values that appeared as a result of the unprecedented development of the trade economy could not be mechanically applied to a context in which natural economy prevailed. It was much later, specifically after the capitalist economic revolution, that the legal texts of the Digest and the Institutes were properly welcomed and successfully applied.

The sources of private Roman law do not owe their originality and effectiveness to metaphysical judgements, the thirst for codification and legislative techniques, but rather to their ability to keep pace with the growing demands of the legal practice. The instruments employed by the legal thinking and practice, namely the principles, institutions, classifications and concepts, reflected the social, economic and political changes experienced by the Roman world. The jurisprudence, the praetorian law and the law of the gentes took shape in response to the formalist and rigid civil law and in accordance with the principles of equity and good faith. The balance between the dynamic and static aspects of the sources of private Roman law was struck when the Praetor's responsibilities and the jurisprudence merged and created a convergent, like-minded force that employed different methods in order to counterbalance the discrepancy between these two features as follows: the jurisconsults extended the scope of regulation via interpretation whereas the Praetors sanctioned new subjective rights via procedures[**].

References

- C.St. Tomulescu, International Review of Laws in Antiquity, Bruxelles, 19, 1972.
- J. Gaudemet, Private Roman Law, Paris, 2000.
- R. Robaye, Roman Law, I, Bruxelles, 2001;
- P.C. Timbal, Roman Law and the Old French Law, Dalloz, 1975.
- S.G. Longinescu, Aspects of Roman Law, II, Bucharest, 1929.
- E.Volterra, Jura, 7, 1956.
- Cicero, De inv.2.22.67.
- E.Molcut, "On the role of the courts in the shaping and application of the law", Review of Public Law, nr.4/2004.
- O.Lenel, Das edictum perpetuum, ed.I, 1883; ed. a II-a, 1907; e. a III-a, 1927, republished under the imprint of Aalen, 1956.
- V. Viard, Pacts Joined to Contracts in the Private Roman Law, Paris, 1928.
- C.Ferrini, Works of Contardo Ferrini, Milano,II.

[14] GAIUS, 1. 132.

[15] V.Viard, Pacts Joined to Contracts in the Private Roman Law, Paris, 1928.

[16] C.Ferrini, Works of Contardo Ferrini, Milano,II, p.307.

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