THE PRINCIPLE OF RELATIVITY OF THE EFFECTS OF A CONTRACT IN ROMAN LAW

Elena ANGHEL[*]

Abstract

The matter of contracts had a particularly important place in Roman law, a place imposed by the boundless vitality of legal institutions regarding the obligations: they exceeded the boundaries of the era that created them and were applied, with certain adaptations, in the societies and ages that followed. Thus, many of the legal concepts on which the current legal system is based on have their origin in Roman law. But, especially in the matter of contracts, the Romans managed to give them such a precise wording that they remained, for the most part, unchanged in terms of the way the elements were formed and the effects produced. The explanation lies in the fact that Roman law was formed in close connection with the economic and social realities in Rome and evolved procedurally, being the faithful expression of a society based on private property and the exchange economy.

As such, Roman jurisconsults and praetors created principles that today represent the substrate of modern legislation in the field of private law. For these reasons, the study of Roman law constitutes the starting point in understanding the genesis and evolution of some important legal institutions, such as the principle of relativity of contract effects.

In the present study I propose to search for the origins of this principle which applied throughout the history of Roman law, being expressed by the adage: „res inter alios acta aliis neque nocere neque prodesse potest" (the contract concluded between some people neither injures nor benefits others). This rule, having a general character, found its application in three other principles: nullity of the stipulation for another, nullity of the promise for another and non-representation in contracts.

Keywords: *principle, relativity, effects, contract, obligation, roman law.*

1. Introduction

Nowadays, this principle is a given: the relativity of the contract effects is provided for by art. 1280 CC which shall read as follows: „*The contract shall produce effects only between the parties, unless the law provides otherwise*".

The principle was also enshrined in the previous Civil Code system, art. 973 CC 1864, which provided as follows: „Conventions shall have effect only between the contracting parties".

Essentially, the principle of the relativity of the effects of the contract means that the civil legal act/contract produces effects only in relation to the authors or the author of the act, and cannot benefit or harm other persons. In other words, the effects of the legal act are relative, being limited to the contracting parties. The legal link established between creditor and debtor is a personal one. The reason for this principle is to be found in the formalism specific to Roman law.

As we have stated, whenever we have researched the evolution of legal institutions and principles of law, if we want to capture the essence of the respective legal phenomenon, we must start from the study of Roman law because, by drawing on the legacy left by jurisconsults, we can trace the fate of legal institutions over a millenary evolution, in close connection with the other components of the social system and we can understand the context in which it was formed.

Specialized literature[1] has emphasized that the legal procedures created by the Romans give the legal phenomenon its own identity, they are „patterns into which certain types of human conduct fit" and, being abstract legal expressions, they can be applied in any type of society.

[*] Lecturer PhD, Faculty of Law, „Nicolae Titulescu" University, Bucharest (e-mail: elena_comsa@yahoo.com).

[1] E. Molcuț, J. Andrei, I. Ciutacu, *Actualitatea valorilor juridice romane* (The topicality of Roman legal values), in Public Law Magazine no. 2/2009, April-June, year XV(35), New Years, C.H. Beck Publishing House.

If a legislation is judged according to its possibility of being abstract, Roman law is the proof of a universally applicable synthesis, it is the connection between the past and the present, it is the legal system that has exercised a decisive influence on the subsequent development of the legal phenomenon[2].

2. Content

Roman law served as a source of inspiration particularly in the field of goods and obligations because these institutions, evolving in close connection with the economy of exchange, took such precise forms that they could be taken over and applied in feudal and modern legislation.

For the Romans, the legal principle of obligation appeared along with private property and social classes, initially as a means of subjugation of those without means of production. The proof is the etymology of the word „*obligatio*": means to bind, to chain. According to Justinian's definition, an obligation is a legal bond, with which we are bound by necessity of performing some act according to the laws of our State[3].

The sources of the obligation are the totality of the legal acts and deeds that give rise to it, with the specification that in the ancient Roman era, they consisted of contracts and delicts, contracts being rare since the production of the family members covered all their material needs.

Later, in the conception of Emperor Justinian, obligations arise from contracts, quasi-contracts, delicts and quasi-delicts[4].

In what concerns contractual obligations, it must be emphasized that for a long time, in Rome, the contract was merely a convention dressed up in a certain form. The word contract was originally used to mean reunion; since the sale in ancient times was made by two separate acts, a deed of purchase and a deed of sale, the word „contract" appeared later and was used to facilitate other legal transactions.

The term of *contractus* was first used in the sense of a binding legal act by Celsus in the 2nd century BC, then by Pomponius and Gaius[5].

In ancient times, a contract was an agreement which became binding by mans of the formalities and solemnities performed when it was concluded. Therefore, the essential element of the contract was not the agreement of the parties, but the formal elements required when it was drawn up. Moreover, the agreement of the parties was also formal because only in appearance were the parties on an equal footing. In fact, as stated above, the owner of the means of production imposed his will on the party without means of production.

If the agreement was not in the required form, or if the parties did not say the required solemn words, or if the necessary formalities were not observed (*i.e.*, ensuring the presence of witnesses or the presence of the weighing officer at the acts *per aes et libram*), then it was not binding. Solemn contracts, the oldest category of contracts in Roman law, included the following: contracts in religious form; contracts in verbal form; contracts in authentic form; contracts in written form (*litteris*).

Contracts in religious form were *sponsio religiosa and iusiurandum liberti*. *Sponsio religiosa* is the oldest Roman contract formed by question and answer and the taking of a religious oath. *Iusiurandum liberti* (the oath of the freedman) takes the form of two successive oaths by which the slave undertakes to perform certain services for his master.

Contracts in verbal form were *sponsio laica* and *stipulation*. *Sponsio laica* is a verbal contract concluded by question and answer, accessible only to Roman citizens, since the verb „*spondeo*" could only be pronounced by them. Unlike it, *stipulation* is a verbal contract, concluded by question and answer, but also accessible to pilgrims. The stipulation is a unilateral act and creates obligations only for the promisor[6].

The stipulation could be used to carry out various legal transactions (a loan, the securing of a debt, a novation, etc.), and as such, it is abstract in nature, since the way it is formed does not show the purpose for

---

[2] See E. Anghel, *Drept privat roman* (Roman Private Law), Universul Juridic Publishing House, Bucharest, 2021, p. 9.

[3] „*Obligatio est iuris vinculum quo necesitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura*" – see E. Molcuț, *Drept privat roman. Terminologie juridică romană* (Roman Private Law. Roman legal terminology), ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2011, p. 175.

[4] Criminal obligations arise from delicts, which are unlawful acts, causing damage, giving rise to an obligation on the offender to repair the damage or pay a fine. Quasi-contract obligations arise out of quasi-contracts and designate lawful acts which give rise to effects similar to those of a contract. Quasi-delict obligations arise, like torts, from unlawful acts, but the Romans, because of their conservative mentality, placed them in a separate category.

[5] V. Hanga, M. Jacotă, *Drept privat roman* (Roman Private Law), Didactică și Pedagogică Publishing House, Bucharest, 1964, p. 270.

[6] C. Ene-Dinu, *Istoria statului și a dreptului românesc*, 3rd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2024, p. 27.

which the debtor undertakes to perform the obligation. Since the form of the stipulation was used to dress up various conventions, it was widely employed in Roman law. As recorded in the Gaius manuscript discovered in Egypt, the stipulation was known as far back as the Law of the Twelfth Table.

In case of contracts in authentic form, *nexum* was concluded before the magistrate and took the form of a declaration whereby the creditor assured that the debtor's work was to be performed for him for a certain number of days, ratified by the magistrate by the word *addico*.

Litteris was the *so-called written contract*, concluded by certain entries made in the creditor's ledger with the debtor's consent. This contract arose in connection with the practice of Roman bankers to keep certain records of receipts and payments in order to prove debts or receivables arising from other contracts.

Subsequently, as the exchange economy developed, the old forms were abandoned and new contractual forms, both formal and non-formal, emerged; therefore, **real contracts** emerged, which were concluded by the mere material handing over of the thing, as well as **consensual contracts** emerged, which were concluded by the mere agreement of the parties (*solo consensu*).

If in ancient times, „a people with a primitive but realistic legal sense could not adopt any other solution given the formalism of legal acts”[7], in the imperial era, contracts were freed from excessive formalism and were concluded by the parties' agreement. Economic and social needs will bring to the surface other agreements with legal effects, which will join the old contracts; these are the **unnamed contracts** and **pacts**.

The development of goods production and trade has also brought about important changes in the legal mindset. The notion of obligation begins to change its physiognomy, being conceived not only in a material but also in a legal sense: it becomes a bond under which the debtor had to perform a service, and in case of non-performance, the creditor could pursue the debtor's assets, not the debtor's natural person.

As regards the capacity of persons to bind themselves contractually, the Romans distinguished between two persons *sui iuris* or, as the case may be, one person *sui iuris* together with another person *alieni iuris*[8].

In the first situation, where the contract was concluded between two persons *sui iuris*, having full legal capacity, the creditor's right to enforce his claim arose, together with the debtor's obligation to pay. Persons *sui iuris* could conclude any contract and, by virtue of the principle of the relative effects of a contract, the contract was effective only between the parties and not for third parties.

By parties we mean the persons who have entered into the contract, the heirs of those persons and the unsecured creditors (simple creditors) of the persons who have entered into the contracts.

Three other principles of particular application result from the general principle of the relativity of the effects of the contract:

- Principle of nullity of stipulation for the benefit of a third party;
- Principle of nullity of the promise on behalf of a third party;
- Principle of non-representation in contracts.

Principle of nullity of stipulation for the benefit of a third party, expressed by the saying „*nemo alteri stipular potest*”, means that no one can enter into a contract on behalf of a third party.

This principle was imposed in connection with the functions that the stipulation fulfilled in Roman law. Therefore, stipulation is a verbal solemn contract, concluded by question and answer and takes 2 forms: ordinary stipulation and stipulation for the benefit of a third party.

In case of ordinary stipulation, the creditor asks the debtor: „*Do you promise to give me 100*?”, and the debtor answers: „*I promise*”. This stipulation is valid in so far as it is to have effect between the parties.

In case of the stipulation for the benefit of a third party, the creditor asks the debtor: „Do *you promise to give Tertius 100?*”, and the debtor answers „*I promise*!” This stipulation is null and void both as against the creditor, who does not justify an interest in the contract, and as against *Tertius*, since he did not participate in the contract.

However, the Romans understood that stipulation for the benefit of a third party was of practical use: for example, if *Primus* had a claim of 200 against *Secundus* and a debt of 100 against *Tertius*, it might be that *Secundus'* payment to *Tertius* would discharge two debts: the debt of *Secundus* to *Primus* and the debt of *Primus*

[7] G. Dimitrescu, *Drept roman. Obligațiuni. Succesiuni* (Roman law. Obligations. Successions), vol. II, Independența Printing House, Bucharest, p. 267.

[8] Within the Roman family, the *pater familias* was *sui iuris*, having full legal capacity, and all other persons under his power were *alieni iuris*. See also, about procedural capacity in the present, E.E. Ștefan, *Noțiunea de persoană vătămată în dreptul administrativ*, Universul Juridic Publishing House, Bucharest, 2024, pp. 213-213.

to *Tertius*. This is why the Romans created a legal procedure whereby a stipulation for the benefit of a third party, although null and void, became enforceable. This mechanism is called *stipulatio poene* or stipulation of a penalty. According to this system, after the stipulation for the benefit of a third party was completed, the second stipulation, that of the penalty, was to come, on which occasion *Primus* asked *Secundus*: „*If you do not pay Tertius 100, do you promise to pay me 500*?", and *Secundus* answered „*I promise*!". This penalty stipulation is valid, so that if *Secundus* did not fulfill the invalid stipulation, he had to fulfill the valid one and pay the amount of 500, *i.e.*, 5 times more. It was therefore in *Secundus*' best interest to enforce the invalid stipulation and thus make it enforceable.

Principle of nullity of the promise on behalf of a third party found its expression in the saying „*nemo alienum factum promittere potest*".

In terms of the promise for the act of another, *Primus* promises *Secundus* that *Tertius* will give him the amount of 100. Such a promise is void as against *Primus*, since he has not promised his own act, and the subject-matter of the obligation must consist in a performance which the debtor makes to his creditor. The promise is also void in relation to *Tertius*, since he did not participate in the conclusion of the act.

The promise on behalf of a third party, as well as the stipulation for the benefit of a third party is of practical interest and that is why the jurisconsults have modified its form in such a way as to make the promise to another valid. According to the modified form, *Primus* promises *Secundus* that he will do so as to induce *Tertius* to give him the sum of 100. This promise is valid. If *Tertius* does not pay *Secundus* what *Primus* promised him, then *Secundus* will bring an action against *Primus* and will bring it successfully.

Principle of non-representation in contracts. In analyzing representation in Roman contracts, we consider the hypothesis in which a *pater familias*, in the capacity of principal, is bound by a contract concluded by another *pater familias*, in the capacity of proxy.

We emphasize that, for 5 centuries, the Romans did not allow representation in contracts, because this was contrary to the principle of the relativity of the effects of the contract. On the other hand, in very ancient times, when the economy was natural, contracts were concluded so rarely that there was no practical need for representation in contracts. Notwithstanding, by the end of the Republic, once with the development of trade and business, Roman citizens were frequently interested in concluding contracts at the same time in different places, and therefore representation in contracts became a legal necessity imposed by social practice. That is why a series of reforms were initiated, first allowing imperfect representation in contracts, and later, in some cases, even perfect representation.

The system of imperfect representation was introduced by the praetor for certain cases and then generalized through an innovation in case-law. Under this system, the third-party creditor could bring an *actio quasi institoria* against the proxy, even though the act had been concluded by the proxy. In case of imperfect representation, the principal undertakes, together with the proxy, so that the creditor has 2 debtors: the proxy and the principal. Therefore, if the creditor intends to take legal action against the proxy, he will bring a direct action against the proxy arising from the contract he concluded with the proxy. If he intends to take legal action against the principal, the creditor shall bring a useful action, which shall be drafted as follows: the *intentio* shall include the name of the proxy, because he concluded the contract, and the *condemnatio* shall include the name of the principal, because he takes part in the proceedings and is to bear the effects of the judgment.

In case of perfect representation, the proxy disappears, and the effects of the contract shall be produced directly on the principal in the sense that, although the contract was concluded by the proxy, the principal is the one who becomes creditor or debtor. Depending on the capacity of the proxy, the representation in contracts can be active (when the proxy has the capacity of creditor) and passive (when the proxy has the capacity of debtor).

The Romans admitted perfect representation only in certain cases.

Therefore, perfect active representation was admitted for the insolvent proxy case. According to general rules, the receivables arising from the contracts concluded by the proxy became part of his patrimony and were to be transferred to the principal by subsequent and separate instruments.

But if the proxy became insolvent, it would be pursued by its creditors, including the principal. Since he was in competition with the other creditors of the proxy, the principal could find himself in the position of not

being able to fully capitalize his receivable. In order to avoid such a situation, it has been agreed that, in case of an insolvent proxy, the receivable shall pass directly to the principal[9].

Perfect active and passive representation was also admitted for the consumer loan contract (*mutuum*). Therefore, if the principal empowered the proxy to lend a sum of money to a person, the receivable passed to the principal. If, on the contrary, the principal gave a proxy mandate to borrow a sum of money, the debt was actually pressing on the principal (perfect passive representation). Furthermore, perfect passive representation was admitted in relations between guardian and ward.

In the second hypothesis, we analyze the capacity of persons *aliens iuris* to be contractually bound.

In ancient times, persons *alieni iuris* (sons and slaves) could enter into legal acts by borrowing the capacity of the *pater familias*, provided that they benefited the *pater familias*' patrimonial situation. *Pater familias* or the master could become a creditor by means of sons or slaves, as a result of contracts made by persons under their power. This system was possible in ancient times, when legal acts were rarely concluded and contracts were unilateral. Once with the unprecedented economic development at the end of the Republic, legal transactions became common and contracts were bilateral. Faced with the new physiognomy of contracts, the old principles could no longer be applied because sons and slaves could not bind the *pater familias*.

Therefore, in the classical era, in the context of economic development, the praetor established certain reforms whereby the son of the family could bind himself in his own name, while at the same time binding the *pater familias*. This led to the development of the actions of concurred nature.

According to the praetor's reform, in certain situations, the son and the slave can bind themselves in their own name, the former in the land of the civil law, the latter in the land of the natural law, at the same time binding the *pater familias*, in the land of the praetorian law. Therefore, from the moment the son concludes the contract, the creditor has two debtors: the son, liable under civil law and the pater familias, liable under praetorian law.

The creditor may bring either a direct action against the son or a concurrent action against the pater familias. If the *pater familias* authorizes the son to enter into a contract of sale, the third party may bring a direct action against the son, whereby the obligations arising from such contract are usually sanctioned.

On the other hand, if the third party has an interest, it may bring concurrent action against the pater familias. These are the following: *actio quod iussu* (action on the basis of a special declaration, where the son or the slave has had the consent of the pater familias or dominus); *actio exercitoria*; *actio institoria; actio de peculio et de in rem verso* (action on *peculium* and enrichment); *actio tributoria* (distribution action). Therefore, these actions had a transposition formula: the *intentio* contained the name of the son, since he concluded the contract, and the *condemnatio* the name of the pater familias, since he is the one who stands in court.

3. Conclusions

By exploring the evolution of the institutions of Roman law, we will discover the extraordinary vitality of this system of law, which managed to create a wonderful connection between past and present, emerging from the age of antiquity and, thanks to the rigor, flair and sharp legal mind of the Roman praetor and jurisconsult, has been a source of inspiration for many legal systems.

As Professor Emil Molcuț emphasizes, modern lawyers borrowed from the arsenal of Roman law numerous legal constructions and categories, as well as a number of general categories and principles that they based all the regulation on[10]. The principle of relativity of the effects of the contract testifies to this respect.

References

- Anghel, E., *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021;
- Cătuneanu, I.C., *Curs elementar de drept roman*, Cartea Românească Publishing House, Cluj Bucharest, 1927;
- Dimitrescu, G., *Drept roman. Obligațiuni. Succesiuni*, vol. II, Independența Printing House, Bucharest;
- Ene-Dinu, C., *Istoria statului și a dreptului românesc*, 3rd ed., Universul Juridic Publishing House, Bucharest, 2024;
- Hanga, V., Bocșan, M.D., *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006;

[9] E. Molcuț, *Drept privat roman. Terminologie juridică romană, op. cit.*, 2011, p. 195.

[10] E. Molcuț, *Drept roman* (Roman Law), Edit Press Mihaela S.R.L. Publishing House, Bucharest, 2002, p. 10.

- Hanga, V., Jacotă, M., *Drept privat roman*, Didactică și Pedagogică Publishing House, Bucharest, 1964;
- Molcuț, E., Andrei, J., Ciutacu, I., *Actualitatea valorilor juridice romane*, in Public Law Magazine no. 2/2009, April-June, year XV(35), New Years, C.H. Beck Publishing House;
- Molcuț, E., *Drept privat roman. Terminologie juridică romană*, ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2011;
- Molcuț, E., *Drept roman*, Press Mihaela SRL Publishing House, Bucharest, 2002;
- Ștefan, E.E., *Noțiunea de persoană vătămată în dreptul administrative*, Universul Juridic Publishing House, București, 2024;
- Tomulescu, C.St., *Drept privat roman*, Typography of the University of Bucharest, 1973.